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CASES
ARGUED AND DETERMINED IN THE
COURT OF APPEALS
OF
NORTH CAROLINA
AT
RALEIGH

JOSEPH W. BARNETTE, EMPLOYEE, PLAINTIFF
v.
LOWE'S HOME CENTERS, INC., EMPLOYER, SELF-INSURED (SEDGWICK CLAIMS
MANAGEMENT SERVICES, INC., ADMINISTRATOR), DEFENDANT

No. COA15-938

Filed 19 April 2016

1. Workers' Compensation—findings of fact—sufficiency

The Industrial Commission did not err in a workers' compensation case by making its findings of fact 4, 6, and 7. Each of the challenged factual findings were supported by competent evidence in the record.

2. Workers' Compensation—injury by accident—fortuitous event—interruption of work routine—unusual task

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff employee failed to establish that he sustained an injury by accident. Plaintiff employee showed that his injury resulted from a fortuitous event, an interruption of his work routine, or an unusual task. The matter was remanded for further proceedings to determine the benefits that plaintiff was entitled as a result of his compensable injury.

Appeal by Plaintiff from opinion and award entered 15 April 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 January 2016.

Wallace and Graham, PA., by Whitney V. Wallace, for Plaintiff.

BARNETTE v. LOWE'S HOME CTRS., INC.

[247 N.C. App. 1 (2016)]

*Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch,
for Defendant.*

STEPHENS, Judge.

In this appeal by an injured employee from an opinion and award of the North Carolina Industrial Commission denying compensation, we apply our well established standard of review and hold that, while certain of the findings of fact challenged by the employee are supported by competent evidence, the Commission's legal conclusion that the employee failed to show that his injury "resulted from a fortuitous event, an interruption of his work routine, or an unusual task" and, thus, failed to establish that he sustained an injury by accident is *not* supported by the findings of fact. Accordingly, we reverse and remand.

Factual and Procedural Background

Plaintiff Joseph W. Barnette began working as a delivery driver for Defendant Lowe's Home Centers, Inc. ("Lowe's") in 2004. At the time he began his employment with Lowe's, Barnette had pre-existing back problems that had required medical treatment from about 2000 or 2001 forward. On 8 August 2012, Barnette was working with another Lowe's employee, Ron Alcorn, to deliver a refrigerator to a home on Bald Head Island. Like many homes on the island, this home had a so-called "reverse" floor plan with the kitchen on an upper floor. Barnette testified that the delivery was difficult, requiring him and Alcorn to carry a large refrigerator up a narrow twisting flight of stairs. At the top of the stairs, Barnette and Alcorn discovered that the refrigerator would not fit through the final turn of the stairwell and, thus, they had to take the refrigerator immediately back down the stairs. Barnette alleged that, near the bottom of the stairs, he lost all feeling in his right hand and forearm. Barnette shifted the weight of the refrigerator to his other hand and continued carrying the appliance down the stairs. The evidence was conflicting about whether Barnette mentioned his arm and hand symptoms to Alcorn at that moment. Feeling returned to Barnette's hand in about 20 to 30 minutes. Alcorn drove Barnette back to the local Lowe's. Barnette testified that he reported to the manager on duty that he had hurt his hand, but could not remember whether he mentioned "all the details"

On 15 January 2013, Barnette filed a Form 18 asserting that he had "injured his right arm/elbow/hand when performing [an] unusually difficult delivery of a refrigerator up and down a narrow set of stairs"

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on 8 August 2012. On 19 March 2013, Lowe's filed a Form 61 Denial of Workers' Compensation Claim and Amended Denials of Workers' Compensation Claim on 20 June and 7 November 2013. Barnette filed a Form 33 Request that Claim be Assigned for Hearing on 5 April 2013 and an amended Form 18 on 5 November 2013. On 7 January 2014, a hearing was held before the deputy commissioner, who filed an opinion and award on 4 August 2014 denying Barnette benefits for failure to show he sustained an injury by accident. Barnette appealed to the Full Commission ("the Commission"), and, on 15 April 2015, the Commission affirmed the deputy commissioner's opinion and award with modifications, still denying Barnette compensation. From the Commission's opinion and award, Barnette appeals.

Discussion

Barnette argues that the Commission erred in (1) making findings of fact 4, 6, and 7, and (2) finding and concluding that Barnette's injuries were not the result of an accident. We reverse and remand.

I. Standard of Review

On appeal, we review an opinion and award in a workers' compensation case to determine "whether there is any competent evidence in the record to support the Commission's findings and whether those findings support the Commission's conclusions of law." *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 608 (2001) (citation omitted). Thus, our "duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation and internal quotation marks omitted), *rehr'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). "[T]he Commission is the sole judge of the credibility of witnesses and may believe all or a part or none of any witness's testimony . . ." *Harrell v. J.P. Stevens & Co., Inc.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (citation omitted), *disc. review denied*, 300 N.C. 196, 269 S.E.2d 623 (1980). The Commission's findings of fact are conclusive on appeal if supported by competent evidence, even if there is evidence to support contrary findings. *Pittman v. Int'l Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709 (citation omitted), *affirmed per curiam*, 351 N.C. 42, 519 S.E.2d 524 (1999). "The Commission's findings of fact may be set aside on appeal only when there is a *complete* lack of competent evidence to support them." *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995) (citation omitted; emphasis added). Findings of fact unchallenged by the appellant are presumed to be supported by competent evidence on appeal. *Cooper v. BHT Enters.*, 195 N.C. App.

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363, 364-65, 672 S.E.2d 748, 751 (2009) (citation omitted). Where conclusions of law are not supported by the findings, we must reverse those portions of the opinion and award, remanding to the Commission for entry of conclusions of law that are supported. *See, e.g., Goodrich v. R.L. Dresser, Inc.*, 161 N.C. App. 394, 403, 588 S.E.2d 511, 517 (2003).

II. Findings of fact 4, 6, & 7

[1] Barnette first argues that no competent evidence supports the Commission's findings of fact 4, 6, and 7. We are not persuaded.

Specifically, Barnette challenges the following portions of these findings of fact as not supported by competent evidence:

4. [Barnette] could not recall whether he immediately reported his injury to Mr. Alcorn. . . .

. . . .

6. Mr. Alcorn recalled . . . no specific injury, pain, or symptoms reported by [Barnette] at that time. Mr. Alcorn testified that this was not the first time he witnessed [Barnette's] weakness, which he attributed to [Barnette's] age.

7. Defendant's Assistant Manager, Krystal Webb, . . . did not recall [Barnette] reporting how the numbness started

. . . .

On appeal, Barnette cites various portions of the testimony before the Commission that appear to contradict the findings of fact made by the Commission or which would support different findings of fact. However,

it is [not] the role of this Court to comb through the testimony and view it in the light most favorable to the [appellant], when the Supreme Court has clearly instructed us to do the opposite. Although by doing so, it is possible to find a few excerpts that might be speculative, this Court's role is not to engage in such a weighing of the evidence.

Alexander v. Wal-Mart Stores, Inc., 166 N.C. App. 563, 573, 603 S.E.2d 552, 558 (2004) (Hudson, J., dissenting), *reversed per curiam for the reasons stated in the dissenting opinion*, 359 N.C. 403, 610 S.E.2d 374 (2005). Having engaged in our proper review, we conclude that each of the factual findings challenged by Barnette is supported by competent evidence in the record.

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For example, in contending that no competent evidence supports the above-quoted portion of finding of fact 4, Barnette draws our attention to his testimony that he told Alcorn that he needed to see a doctor when his hand went numb as the two men carried the refrigerator to the bottom of the stairs. However, our review of the record reveals that, on direct examination, Barnette also testified that, when he suddenly lost all feeling in his right hand and forearm, “it scare[d] me a little bit. It scare[d] me a lot. And so I—I can’t recall whether I tell [Alcorn] something’s going on at that juncture or not.” Likewise, on cross-examination, Barnette reiterated that, “while I was lifting [the refrigerator] and as I sat it down, . . . I had to let go. I had nothing left. And I cannot remember whether I communicated that with [Alcorn] or not, at the time.” This testimony supports the Commission’s factual finding that Barnette “could not recall whether he immediately reported his injury to Mr. Alcorn. . . .”

Similarly, the part of finding of fact 6 stating that Alcorn “recalled . . . no specific injury, pain, or symptoms reported by [Barnette] at that time” is supported by Alcorn’s response when asked whether he immediately realized Barnette was having symptoms as a result of his alleged injury. Alcorn testified that he knew Barnette was “having trouble holding that weight and taking it down one step at a time. So, he had said he’s having difficulty doing it,” but did not describe any symptoms until he and Alcorn “got back on the barge [to return to the mainland from Bald Head Island].” In addition, when asked whether Barnette had ever exhibited any physical difficulty in performing his job, Alcorn replied, “Just a weakness at times. I mean, it’s—it’s a hard job. . . . He’s an old man. I’m sorry.” That evidence supports the finding that “Mr. Alcorn testified that this was not the first time he witnessed [Barnette’s] weakness, which he attributed to [Barnette’s] age.”

Finding of fact 7, that “Krystal Webb, . . . did not recall [Barnette] reporting how the numbness started[,]” is supported by Webb’s response to the question, “Did [Barnette] report to you how the pain started or the numbness started?”:

I don’t recall. It was on the job, per se, I assumed that it could have been a job related injury. But that was not discussed between us. It was just the fact that he needed to go to this appointment the next day. So, I—I don’t really recall it being on the job injury. That—that wasn’t discussed.

We thus overrule Barnette’s challenge to findings of fact 4, 6, and 7. We address his challenge to a portion of denominated finding of fact 25, along with the Commission’s closely related conclusion of law 4, in section III of this opinion.

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III. Denominated finding of fact 25 and conclusion of law 4

[2] Barnette argues that a portion of denominated finding of fact 25—that he “failed to show that his right arm condition resulted from a fortuitous event, an interruption of his work routine, or an unusual task. . . . [r]ather, [than while he was] performing his usual, strenuous job in his usual way”—and related conclusion of law 4—that, as a result, Barnette “failed to prove that his injury resulted from an ‘accident’”—are not supported by the Commission’s other findings of fact. We agree.

As an initial matter, we note that the part of denominated finding of fact 25 to which Barnette objects is actually a legal, rather than a factual, determination. “[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact.” *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations and internal quotation marks omitted). Whether Barnette’s “right arm condition resulted from a fortuitous event, an interruption of his work routine, or an unusual task” was a determination requiring “the application of legal principles”—to wit, the definition of “accident” as developed in our State’s worker’s compensation jurisprudence—and, thus, it is a conclusion of law. *See id.* Regardless of how they may be labeled, we treat findings of fact as findings of fact and conclusions of law as conclusions of law for purposes of our review. *See, e.g., N.C. State Bar v. Key*, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008) (“[C]lassification of an item within [an] order is not determinative, and, when necessary, the appellate court can reclassify an item before applying the appropriate standard of review.”). Accordingly, we must consider whether the challenged portion of denominated finding of fact 25 and conclusion of law 4 are supported by the Commission’s other findings of fact. *See Oliver*, 143 N.C. App. at 170, 544 S.E.2d at 608 (citation omitted).

Under the Worker’s Compensation Act (“the Act”), an employee

is entitled to compensation for an injury only if (1) it is caused by an accident, and (2) the accident arises out of and in the course of employment. . . .

[The Act] defines injury to mean only injury by accident arising out of and in the course of the employment. Our Supreme Court has defined the term accident as used in the . . . Act as an unlooked for and untoward event which is not expected or designed by the person who suffers the injury; the elements of an accident are the

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interruption of the routine of work and *the introduction thereby of unusual conditions likely to result in unexpected consequences.*

Shay v. Rowan Salisbury Sch., 205 N.C. App. 620, 624, 696 S.E.2d 763, 766 (citations, internal quotation marks, and some brackets omitted; emphasis added), *appeal dismissed*, 364 N.C. 435, 702 S.E.2d 216 (2010). “[U]nusualness and unexpectedness are [the] essence” of an accident under the Act. *Smith v. Cabarrus Creamery Co.*, 217 N.C. 468, 472, 8 S.E.2d 231, 233 (1940). “If an employee is injured while carrying on his *usual tasks in the usual way* the injury does not arise by accident. An accidental cause will be inferred, however, when an interruption of the work routine and the *introduction thereby of unusual conditions likely to result in unexpected consequences occurs.*” *Gunter v. Dayco Corp.*, 317 N.C. 670, 673, 346 S.E.2d 395, 397 (1986) (citations omitted; emphasis added).

This rule applies even where the usual tasks of an employee’s work are physically awkward, strenuous, or demanding. For example, in *Porter v. Shelby Knit, Inc.*, the injured employee was a knitter whose usual work “duties included doffing, a task which entailed pulling rods from rolls of cloth.” 46 N.C. App. 22, 23, 264 S.E.2d 360, 361 (1980) (internal quotation marks omitted). Because the evidence showed “that, on the occasion of [the] plaintiff’s injury[,] withdrawal of the rod was *unusually difficult* because the roll of cloth was extra tight, . . . [and, as a result,] the effort which [the] plaintiff exerted was *unusual*[.]” this Court affirmed the Commission’s conclusion that her injury was the result of an accident. *Id.* at 27, 264 S.E.2d at 363 (emphasis added). The Court reasoned that unusual conditions, to wit, the extra tightness of the roll requiring unusual effort and exertion, constituted an “interrupti[on of] what was [the] plaintiff’s normal work routine. . . .” *Id.*

Likewise, in *Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, the injured employee was a labor and delivery nurse whose patients frequently received epidural blocks that left them in need of the nurse’s help to raise their legs during childbirth. 135 N.C. App. 112, 113, 519 S.E.2d 61, 62 (1999), *disc. review denied*, 351 N.C. 351, 543 S.E.2d 124 (2000). This Court reversed the Commission’s conclusion that the nurse’s injury was not the result of an accident, noting that, when injured, she had been performing her usual strenuous duties of helping a patient who had received an epidural lift her legs, but that unusual conditions had interrupted her normal work routine. *Id.* at 116, 519 S.E.2d at 63-64. Specifically, “the undisputed evidence [was] that [the p]laintiff had never in her eleven years of work with [the employer] assisted a patient in

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child delivery where she was required, without any assistance from the patient, to lift the leg(s) of the patient, especially a patient weighing 263 pounds." *Id.* at 115-16, 519 S.E.2d at 63.

In a case involving an even more physically demanding normal work routine, this Court concluded that a compensable injury by accident occurred where a professional football player, "engaging in his *normal work duty* of blocking an offensive lineman, . . . was injured because he was forced by another player into *utilizing an unusual and awkward blocking or work technique that was not normally used* in [the player's] normal work routine." *Renfro v. Richardson Sports, Ltd. Partners*, 172 N.C. App. 176, 183, 616 S.E.2d 317, 324 (2005) (emphasis added), *disc. review denied*, 360 N.C. 535, 633 S.E.2d 821 (2006). In that case, the Commission's critical findings of fact were:

9. At practice on August 7, 2001, [the] plaintiff was playing defense at a linebacker position. During a particular play, [the] plaintiff became engaged by a block from an offensive lineman.

10. At the point when the offensive player engaged [the] plaintiff with the block, the impact caused [the] plaintiff's left hand and wrist to be moved down and around, forcing it into what [the] plaintiff described as an awkward position.

11. It was unexpected and unusual for the offensive player to block [the] plaintiff with an impact that caused his left hand and wrist into an awkward position. At the time of injury, [the] plaintiff was engaged in an activity within the scope of his employment contract and was taking reasonable measures to protect himself from injury, given the nature of the game. [The p]laintiff was required to do what he was doing at the time of injury and had no choice but to perform his job as best he could, notwithstanding the risk of injury.

Id. at 181-82, 616 S.E.2d at 323. This Court held that these findings of fact supported the Commission's conclusion that, "[a]lthough an injury sustained while playing football may not be an unusual occurrence, such injury [under the circumstances present here] is not a probable, intended consequence of the employment and constituted an unlooked for and untoward event that was not expected or designed by [the] plaintiff." *Id.* at 182, 616 S.E.2d at 324.

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Regarding the work activity Barnette was engaged in when he sustained his injury, the Commission found as fact:

1. At the time of hearing before the Deputy Commissioner, [Barnette] was 59 years old. He has a high school diploma. [Barnette] worked as a delivery driver for Defendant-Employer from November 2004, through August 2012. [Barnette] estimated his deliveries consisted of approximately 80% to 85% appliances and that he often delivered with co-worker, Ron Alcorn.

2. On August 8, 2012, [Barnette] testified that he and Mr. Alcorn delivered a side-by-side refrigerator to a home on Bald Head Island ("BHI") after making four or five other deliveries. After removing the doors of the refrigerator, [Barnette] and Mr. Alcorn lifted the refrigerator up a winding staircase leading to the second-story kitchen of the home. [Barnette] testified that *he and Mr. Alcorn were unable to make the final turn into the kitchen and decided to head back down the stairs, when his right hand went completely numb, roughly three-fourths of the way down the stairs.* [Barnette] testified that he immediately experienced numbness, but no pain, and that he used his left arm to help Mr. Alcorn finish the descent.

3. It was not uncommon for [Barnette] to deliver large appliances upstairs at homes like the one in question at BHI, which have "reverse" floor plans, with the kitchen on a second or third level. He described the homes on BHI as "tight" and with narrow staircases. Regarding the home in question, [Barnette] testified that *the staircase was not a standard staircase and was unusually tight.*

....

5. Ron Alcorn testified at the hearing before the Deputy Commissioner that he and [Barnette] worked together four to five times per week before [Barnette's] workplace injury and that about 75% of the time, an old refrigerator will have to be removed from the home to make room for the new one. Mr. Alcorn recalled the day of the incident, stating that *he and [Barnette] only made it two-thirds of the way up the staircase with the new refrigerator when they decided it was not going to fit and that they should*

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return downstairs. Mr. Alcorn testified that the staircase involved in this claim was narrow, that most of the staircases at the homes at BHI were "32-36" inches wide, but this staircase was "29-30" inches wide.

(Emphasis added). These findings of fact indicate that, like the professional football player in *Renfro*, Barnette's usual work routine and normal work duties were physically strenuous, and that those duties often included the delivery of large appliances, like refrigerators, to homes on BHI with reverse floor plans and narrow staircases and the removal of customers' old refrigerators back down the staircases. However, the above-quoted findings of fact also plainly establish "the introduction . . . of unusual conditions likely to result in unexpected consequences[,]" see *Gunter*, 317 N.C. at 673, 346 S.E.2d at 397 (citations omitted), during the delivery when Barnette sustained his injury.

Specifically, the uncontradicted evidence and findings of fact 2, 3, and 5 establish that, at the home where Barnette was injured, "the staircase was not a standard staircase and was *unusually* tight" such that, instead of carrying the new refrigerator up the stairs, setting it down, and then later carrying an old refrigerator down the stairs, Barnette and Alcorn "only made it two-thirds of the way up the staircase with the new refrigerator when they decided it was not going to fit and that they should return downstairs." Thus, the "unusual condition[]" of the narrow, non-standard staircase "result[ed] in [the] unexpected consequence[]" of Barnette having to hold and carry the refrigerator two-thirds of the way up the staircase and then back down again without a break or the opportunity to reposition his hold on the appliance to better accommodate the descent. See *id.* Simply put, Barnette, while "engaging in his normal work duty of [delivering a refrigerator to a second-floor kitchen by means of a staircase], . . . was injured because he was forced by [the unusual narrowness of the staircase] into utilizing an unusual and awkward . . . work technique that was not normally used in his normal work routine[,]" to wit, having to carry the new refrigerator back down the unusually narrow staircase without a break or pause. See *Renfro*, 172 N.C. App. at 183, 616 S.E.2d at 324.

Plainly then, the portion of denominated finding of fact 25 stating that Barnette "failed to show that his right arm condition resulted from a fortuitous event, an interruption of his work routine, or an unusual task. . . . [r]ather, [than while he was] performing his usual, strenuous job in its usual way" is not supported by the Commission's findings of fact 2, 3, and 5. Further, because those findings of fact establish that Barnette

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did not sustain his injury while “carrying on his *usual tasks in the usual way*[,]” but rather as a result of “an interruption of the work routine and the *introduction thereby of unusual conditions*[,]” an accidental cause must be inferred. *See Gunter*, 317 N.C. at 673, 346 S.E.2d at 397 (citations omitted). Accordingly, conclusion of law 4—that Barnette “failed to prove his injury resulted from an ‘accident’”—is not supported by the Commission’s findings of fact.

Conclusion

The Commission’s challenged findings of fact 4, 6, and 7 are supported by competent evidence, *see Oliver*, 143 N.C. App. at 170, 544 S.E.2d at 608, but are not pertinent to the issue of whether Barnette’s injury is compensable. Regarding compensability, unchallenged finding of fact 24 and conclusion of law 3 establish that Barnette’s injury was caused by the refrigerator-moving incident during his work, thus satisfying the requirement that the injury arise out of and in the course of employment. *See Shay*, 205 N.C. App. at 624, 696 S.E.2d at 766. However, the challenged part of denominated finding of fact 25 and conclusion of law 4—that Barnette’s injury was part of his normal work routine and not the result of an accident—are not supported by the Commission’s other findings of fact. *See Gunter*, 317 N.C. at 675, 346 S.E.2d at 398. Accordingly, the Commission’s opinion and award must be reversed and the matter remanded for further proceedings to determine the benefits to which Barnette is entitled as a result of his compensable injury by accident and the entry of an appropriate amended opinion and award.

REVERSED AND REMANDED.

Judges HUNTER, JR., and INMAN concur.

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[247 N.C. App. 12 (2016)]

MICHAEL M. BERENS, PLAINTIFF

v.

MELISSA C. BERENS, DEFENDANT

No. COA15-230

Filed 19 April 2016

1. Parties—aggrieved party—no motion to intervene

The trial court did not err by denying Adams' petition to appeal its decision as an aggrieved party. Although Adams filed various pleadings in response to plaintiff's subpoenas in the trial court and was represented by counsel during the hearing, she did not take any action to intervene or otherwise become a party in the underlying action. Rule 3 affords no avenue of appeal to either entities or persons who are nonparties to a civil action.

2. Appeal and Error—interlocutory orders and appeals—discovery—privilege—immunity—substantial right

Orders compelling discovery where a party asserts a privilege or immunity that directly relates to the matter to be disclosed pursuant to the interlocutory discovery order and the assertion of the privilege or immunity affects a substantial right and is thus immediately appealable.

3. Agency—participation in meeting with attorney and party to litigation—attorney-client privilege—work product

The trial court erred by concluding that the attorney-client privilege did not apply. A party to litigation who engages a friend as an agent to participate in meetings with an attorney does not waive the protections of attorney-client communications and attorney work product for information arising from the meeting with the attorney and any work product created with the assistance of or shared with the agent as a result of those meetings. The case was remanded to the trial court to determine whether the attorney-client privilege applied to the requested communications, using the five-factor *Murvin* test and considering petitioner Adams as defendant's agent.

Appeal by Defendant from order entered 18 November 2014 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 23 September 2015.

Horack Talley Pharr & Lowndes, P.A., by Christopher T. Hood and Gena G. Morris, for Plaintiff-Appellee.

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Wyrick Robbins Yates & Ponton LLP, by Michelle D. Connell, and Tom Bush Law Group, by Tom J. Bush, for Defendant-Appellant.

Thurman, Wilson, Boutwell & Galvin, P.A., by John D. Boutwell, for Brook Adams

INMAN, Judge.

This appeal presents the question of whether a party to litigation who engages her friend as an agent to participate in meetings with her attorney waives the protections of attorney-client communications and attorney work product for information arising from the meeting with her attorney and any work product created with the assistance of or shared with the agent as a result of those meetings. Based on our caselaw and the record here, the answer in this case is no.

Defendant-Appellant Melissa Berens (“Defendant”) appeals the interlocutory order denying her request for a protective order and her motion to quash Plaintiff-Appellee Michael Berens’s (“Plaintiff’s”) subpoena *duces tecum* to Brooke Adams Healy (“Ms. Adams”) compelling production of all documents relating to Ms. Adams’s communications with Defendant; her communications with the Tom Bush Law Group (“the law firm”), the firm representing Defendant in her divorce; and her communications with any third party regarding “one or more members of the Berens family” and the legal proceedings that are the subject of the underlying divorce case. On appeal, Defendant argues that Plaintiff’s subpoena to Ms. Adams seeks information protected by the attorney-client privilege and by the work product doctrine because Ms. Adams was Defendant’s agent. Consequently, according to Defendant, Ms. Adams’s presence during Defendant’s meetings with her attorney did not waive the privileges nor did her involvement in the preparation of materials for litigation defeat the privileges. Defendant also contends that the subpoena exceeds the scope of Rule 45 of the North Carolina Rules of Civil Procedure.

After careful review, we reverse the trial court’s order and remand for proceedings consistent with this opinion.

Factual and Procedural Background

Plaintiff and Defendant were married on 23 September 1989 and separated on 20 July 2012. Six children were born of the marriage. On 4 June 2014, the trial court entered a temporary parenting arrangement order in an effort to best address each child’s needs. In it, the court

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noted that there were several allegations that Plaintiff had engaged in physical confrontations with his children, including one incident in which Plaintiff grabbed one child and pushed him up against the wall. The court found that all the children have complained about “Plaintiff/Father acting weird or creepy,” citing several instances of Plaintiff’s inappropriate attempts at jokes or inappropriate behavior when he does not “get his way.” The court also stated that when “[Plaintiff] does not get his way, he acts inappropriately, gets up and has ‘mini explosions.’”

The trial court held that it was in the children’s best interest that Plaintiff have temporary supervised parenting only with the two youngest children and no contact with the four oldest children. The court endorsed the permanent child custody trial to begin on 1 December 2014.

Prior to the trial, on 9 September 2014, Plaintiff’s counsel issued a subpoena *duces tecum* to Ms. Adams. Ms. Adams, an attorney who is now on inactive status with the North Carolina State Bar, is a friend of Defendant’s and asserted in an affidavit that she had been “acting as a consultant/agent on behalf of [Defendant] and the Tom Bush Law Group, and acting in a supporting role for [Plaintiff].” Ms. Adams stated that her friendship with Defendant began prior to the current proceedings. As part of her role as a consultant and agent of Defendant, Ms. Adams stated that she had

attended meetings with [Defendant] and her attorneys and [has] had access to various documents and tangible things, including. . . emails and documents from and to [Defendant], her attorneys and/or other consultants/experts; correspondence and documents from and to [Defendant], her attorneys and/or other consultants/experts; notes of meetings between [Defendant] and her attorneys; drafts of Court pleadings; potential Court exhibits and documents; case law; statutes; settlements offers during mediation; and, [sic] strategy planning documents.

Attached to her affidavit was a copy of the “Confidentiality Agreements and Acknowledgement of Receipt of Privileged Information” (the “confidentiality agreement”) that Ms. Adams entered into with Defendant, identifying Ms. Adams as Defendant’s agent, emphasizing that the privileged information she received would be used “solely for the purpose[] of settling or litigating” the divorce proceedings, and affirming the expectation that Ms. Adams’s presence and involvement were “necessary for the protection of [Defendant’s] interest” and the expectation that all communications would be “protected by the attorney-client privilege.”

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The confidentiality agreement further provided:

Client's Agent will limit her communications concerning the Client's litigation and dispute with her husband to Client and Client's attorneys and they [sic] will have no communication with anyone, including, but not limited to Wife's experts, accountants, consultants or attorneys, or other advisors and consultants unless Client's attorneys are present.

Based on her assertion that she was Defendant's agent, Ms. Adams's counsel argued before the trial court that all documents and tangible things sought by Plaintiff's subpoena were protected by the attorney-client privilege and by work product immunity because Ms. Adams's presence in a "support role, to be a consultant, a representative" did not destroy the privilege or immunity. Plaintiff's counsel disagreed, arguing that Ms. Adams was engaged in the "unauthorized practice of law" and that the law firm had "assisted" her in that role.

The trial court denied Defendant's and Ms. Adams's motions on 16 November 2014, finding, in pertinent part, that:

19. Defendant/Mother's Motions and Ms. Adams'[s] Motions collectively assert that Ms. Adams has been functioning as a consultant and agent of Defendant/Mother and of the Tom Bush Law Group in this litigation. Ms. Adams states that she has attended meetings with Defendant/Mother and her attorneys, reviewed pleadings, emails, documents, case law, statutes etc.

...

21. Ms. Adams is not an employee of the Tom Bush Law Group, nor has she been retained by the Tom Bush Law Group in this litigation.

22. In truth, Ms. Adams is a good friend of Defendant/Mother and Ms. Adams is helping Defendant/Mother out in this litigation.

23. The Agreement executed by Ms. Adams and Defendant/Mother holds no weight in this litigation.

24. This Court cannot find that any attorney-client privilege or work product immunity exists with respect to the relationship between Ms. Adams and Defendant/Mother and the Tom Bush Law Group.

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25. There is no “good friend” exception to the attorney-client privilege or work product immunity warranting entry of an order quashing the Subpoena or protective order relieving Ms. Adams of her obligation to the comply with the Subpoena.

26. One could, argue that Ms. Adams is practicing law if she wishes to utilize either the attorney-client privilege or work product immunity. The Court will not focus on this argument or consider it since Ms. Adams is simply viewed as a good friend of Defendant/Mother.

The trial court concluded in pertinent part that:

2. The Agreement executed by Ms. Adams and Defendant/Mother holds no weight in this litigation.

...

4. No exception to the attorney-client privilege or work product immunity exists warranting entry of an order quashing the Subpoena or a protective order relieving Ms. Adams of her obligation to the comply with the Subpoena.¹

5. Defendant/Mother’s Motions and Ms. Adams’ Motions should be denied and Ms. Adams should fully comply with Plaintiff/Father’s Subpoena.

Defendant and Ms. Adams timely appealed.

Ms. Adams’s Appeal

[1] Ms. Adams argues that she constitutes an “aggrieved party” and has a statutory right to appeal the trial court’s order pursuant to N.C. Gen. Stat. § 1-271 (2013) and Rule 3 of the North Carolina Rules of Appellate Procedure. In an abundance of caution, however, Ms. Adams filed a petition for *writ of certiorari* seeking appellate review of the order.

Rule 3 provides that “[a]ny party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal. . . .” N.C. R. App. P. 3(a)(2014). Our Supreme Court has interpreted Rule 3 to mean that it “afford[s] no avenue of appeal to either entities or persons who are nonparties to a

1. The trial court’s conclusion that “[n]o exception to the attorney-client privilege or work product immunity exists” in this case appears to be a non-sequitur because the court ultimately held that neither the privilege nor the immunity applied.

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civil action.” *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). Although Ms. Adams filed various pleadings in response to Plaintiff’s subpoenas in the trial court and was represented by counsel during the hearing, it does not appear from the record that she took any action to intervene or otherwise become a party in the underlying action. *See id.* While Ms. Adams is correct that she will be affected by the trial court’s order compelling documents and other tangible things, she is not an “aggrieved party” entitled to appeal the order.

The *Bailey* court addressed a similar request by a nonparty and concluded that because the party had no right to appeal as a nonparty, “no such right could be lost by a failure to take timely action.” *Id.* at 157, 540 S.E.2d at 322. While Rule 21 provides that a *writ of certiorari* may be issued to permit review of a trial court’s order if, among other reasons, there is no right of appeal from an interlocutory order, N.C.R. App. P. 21(a)(1) (2014), *Bailey* compels a conclusion that this avenue of appeal is not available for those who did not fall within the parameters of Rule 3 allowing the party to appeal in the first place. Accordingly, we deny Ms. Adams’s petition.

Defendant-Appellant’s Appeal

[2] Orders compelling discovery generally are not immediately appealable. *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999). However, orders compelling discovery “where a party asserts a privilege or immunity that directly relates to the matter to be disclosed pursuant to the interlocutory discovery order and the assertion of the privilege or immunity is not frivolous or insubstantial, the challenged order affects a substantial right and is thus immediately appealable.” *Hammond v. Saini*, 229 N.C. App. 359, 362, 748 S.E.2d 585, 588 (2013) *aff’d*, 367 N.C. 607, 766 S.E.2d 590 (2014)(citation omitted).

Standard of Review

A trial court’s order compelling the production of documents that a party claims are protected by the attorney-client privilege or the work product doctrine is generally subject to review for an abuse of discretion. *Isom v. Bank of Am., N.A.*, 177 N.C. App. 406, 410, 628 S.E.2d 458, 461 (2006). “To demonstrate such abuse, the trial court’s ruling must be shown to be manifestly unsupported by reason or not the product of a ‘reasoned decision.’” *Id.* at 410, 628 S.E.2d at 461 (citation omitted) (internal quotation marks omitted). However, a trial court’s “discretionary ruling made under a misapprehension of the law . . . may constitute an abuse of discretion.” *Hines v. Wal-Mart Stores E., L.P.*, 191 N.C. App 390, 393, 663 S.E.2d 337, 339 (2008) (order for new trial reversed

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because “the order reveals that the trial court misapprehended the law and improperly shifted plaintiff’s burden of proof to defendant”). See also *State v. Tuck*, 191 N.C. App. 768, 773, 664 S.E.2d 27, 30 (2008) (trial court abused its discretion in evidentiary ruling because it misapprehended the applicable discovery statute and failed to consider criteria necessary to its analysis).

Analysis

[3] Plaintiff argues that Ms. Adams was not functioning in the capacity of an agent but was “merely Defendant-Appellant’s friend” and that the presence of a friend during attorney-client communications and giving her access to work product defeats the claim of privilege under our state’s established caselaw.

Defendant argues that Ms. Adams’s presence during and access to attorney-client communications and work product as a “friend, agent, and trusted confidant” did not destroy the attorney-client privilege or work product doctrine because Ms. Adams was acting as Defendant’s agent.² In support of this argument, Defendant cites the written confidentiality agreement providing that Ms. Adams was acting as her “agent and personal advisor to specifically assist her in this litigation” and that Ms. Adams’s presence and involvement in attorney-client communications “is necessary for the protection of [Defendant’s] interest.”

Defendant does not contend, and did not contend before the trial court, that she and Ms. Adams had an attorney-client relationship. Rather, she contends that because Ms. Adams was her agent for purposes of this litigation, the privileges and protections arising from her

2. Defendant also urges this Court to adopt an approach used in other jurisdictions which considers, on a case-by-case basis, the intention and understanding of the client as to whether the communications would remain confidential. Defendant specifically cites the analysis adopted by the Rhode Island Supreme Court in *Rosati v. Kuzman*, 660 A.2d 263, 266 (R.I. 1995) (holding that “the mere presence of a third party per se does not constitute a waiver thereof. Given the nature of the attorney-client privilege, the relevant inquiry focuses on whether the client reasonably understood the conference to be confidential notwithstanding the presence of third parties.” (emphasis removed) (citation removed) (internal quotation marks removed)), and by courts in Maryland. See *Newman v. State*, 384 Md. 285, 307, 863 A.2d 321, 334–35 (2004) (concluding that the attorney-client privilege was not defeated by the presence of a third party confidant because: (1) the record indicated the client’s “clear understanding that the communications made in the presence of [the third party] would remain confidential”; (2) the attorney “exerted his control over [the third party’s] presence”; and (3) in all times during the “extremely contentious” divorce and custody proceedings, the third party “acted as a source of support for [the client]” by attending court proceedings with the client, participating in investigations, and communicating directly with the attorney).

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attorney-client relationship with the law firm within the context of the confidentiality agreement remained intact despite the sharing of attorney communications and work product with Ms. Adams.

In concluding that “[t]he [confidentiality agreement] executed by Ms. Adams and Defendant/Mother holds no weight in this litigation,”³ the trial court misapprehended the law of agency. In failing to address the confidentiality agreement and other evidence of the agency relationship between Defendant and Ms. Adams, the trial court misapprehended the law regarding the extension of the attorney-client privilege and the attorney work product doctrine to communications with a client’s agent within the context of the litigation and confidentiality agreement.

I. Attorney-Client Privilege

“It is a well-established rule in this jurisdiction that when the relationship of attorney and client exists, all confidential communications made by the latter to his attorney on the faith of such relationship are privileged and may not be disclosed.” *State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981). Our Supreme Court has outlined a five-factor test, *i.e.*, the *Murvin* test, to determine whether the attorney-client privilege attaches to a particular communication:

A privilege exists if (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege. . . . Communications between attorney and client generally are not privileged when made in the presence of a third person who is not an agent of either party.

Id. at 531, 284 S.E.2d at 294 (citation omitted).

3. The trial court included this statement in both its findings of fact and conclusions of law. Because it involves the application of legal principles, it is a conclusion of law. *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675–76 (1997) (although trial court made identical findings of fact and conclusions of law that juvenile was neglected, that a government agency had made reasonable efforts to prevent her removal from her parent’s home, and that it was in the juvenile’s best interest to remain in county custody, “[t]hese determinations...are more properly designated conclusions of law and we treat them as such for purposes of this appeal”). Plaintiff did not dispute the authenticity of the confidentiality agreement or present any evidence to dispute Defendant’s or Ms. Adams’s stated understanding and intention in executing the confidentiality agreement.

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The burden is always on the party asserting the privilege to demonstrate each of its essential elements. This burden may not be met by mere conclusory or ipse dixit assertions, or by a blanket refusal to testify. Rather, sufficient evidence must be adduced, usually by means of an affidavit or affidavits, to establish the privilege with respect to each disputed item.

In re Miller, 357 N.C. 316, 336, 584 S.E.2d 772, 787 (2003) (citations omitted) (internal quotation marks omitted).

The parties do not dispute that an attorney-client relationship existed between the law firm and Defendant. Rather, they dispute whether Ms. Adams's presence during meetings of the law firm and Defendant destroyed the privileged nature of those meetings and related documents.

Defendant contends that all the communications Ms. Adams witnessed between the law firm and Defendant met all five factors of the *Murvin* test because Ms. Adams was an agent of Defendant. As explained below, we agree.

Defendant points to Ms. Adams's affidavit attesting her role as an agent and the confidentiality agreement she and Defendant signed memorializing their mutual understanding and expectation that Ms. Adams was acting as Defendant's agent and that Ms. Adams's access to Defendant's privileged information was protected by the attorney-client privilege.

Generally, communications between an attorney and client are not privileged if made in the presence of a third party because those communications are not confidential and because that person's presence constitutes a waiver. *Brown v. Am. Partners Fed. Credit Union*, 183 N.C. App. 529, 536, 645 S.E.2d 117, 122 (2007); *Harris v. Harris*, 50 N.C. App. 305, 316, 274 S.E.2d 489, 495 (1981). However, the privilege still applies if the third party is an agent "of either party." *Murvin*, 304 N.C. at 531, 284 S.E.2d at 294. As explained by our Supreme Court,

[i]n limiting the application of the privilege by holding that attorney-client communications which relate solely to a third party are not privileged, we note that this rationale would not apply in a situation where the person communicating with the attorney was acting as an agent of some third-party principal when the communication was made. In that instance, the information would remain privileged

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because the third-party principal would actually be the client who is communicating with the attorney through the agent. Because the communication would relate to the third-party principal's interests, it would therefore be within the scope of matter about which the attorney was professionally consulted and thus would be privileged.

Miller, 357 N.C. at 340–41, 584 S.E.2d at 789–90 (internal citation omitted).

If Ms. Adams was Defendant's agent when she witnessed the communications between Defendant and the law firm, the communications would remain privileged should they satisfy the other *Murvin* factors.

Agency is defined as "the relationship that arises from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Green v. Freeman*, 233 N.C. App. 109, 112, 756 S.E.2d 368, 372 (2014). "There are two essential ingredients in the principal-agent relationship: (1) Authority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent." *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 435, 617 S.E.2d 664, 669 (2005) (citation omitted) (internal quotation marks omitted).

The trial court dismissed without explanation Defendant's and Ms. Adams's claims that Ms. Adams was, at all times, acting as an agent of and consultant for Defendant. The trial court simply characterized Ms. Adams as "a good friend of Defendant/Mother" and concluded that the Agreement executed by Ms. Adams held "no weight in this litigation." In addition, based upon Finding of Fact 21, that "Ms. Adams is not an employee of the Tom Bush Law Group, nor has she been retained by the Tom Bush Law Group in this litigation," the trial court apparently considered that only a paid consultant or employee of the law firm could assist in the litigation without destroying the privilege. This misapprehension may have been why the trial court summarily disregarded Ms. Adams's affidavit and other evidence supporting Defendant's and Ms. Adams's contentions that, in addition to being Defendant's "good friend," Ms. Adams was also Defendant's agent and consultant in the contentious divorce and child custody proceedings, especially in light of the serious allegations noted in the temporary parenting order. Ms. Adams and Defendant memorialized their relationship in the confidentiality agreement, referring to Ms. Adams as "Client's Agent," *i.e.*, Defendant's agent, and noting that Ms. Adams's role was to "serve as [Defendant's] agent and personal advisor[] to assist [Defendant] in her

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dispute and/or litigation.” In addition, the information protected by this agreement is limited to direct communications between Defendant and the law firm and the law firm’s work product, which may be developed with Ms. Adams’s assistance under the confidentiality agreement. The trial court did not address whether or why this evidence did not manifest consent by Defendant and Ms. Adams regarding Ms. Adams’s role.

We hold that an agency relationship existed between Ms. Adams and Defendant for the purposes agreed upon between them. This holding is based not merely on Defendant’s allegations and assertions, *see generally In re Miller*, 357 N.C. at 336, 584 S.E.2d at 787, but on additional evidence derived from a source other than Defendant. The additional evidence includes the affidavit by Ms. Adams establishing that her role during the communications was as Defendant’s agent and consultant—the type of evidence specifically noted by the *In re Miller* court as probative of an agency relationship—as well as the written agreement memorializing the agency relationship between Ms. Adams and Defendant. The agreement provided express authority by Defendant for Ms. Adams to act as her agent and evidences Defendant’s control over Ms. Adams, both necessary showings to establish an agency relationship. *See Phelps-Dickson Builders*, 172 N.C. App. at 435, 617 S.E.2d at 669. The trial court failed to conduct the essential analysis as to whether the affidavit, confidentiality agreement, and other evidence established an agency relationship. We are aware of no caselaw, nor has Plaintiff cited any authority, that being a client’s “good friend” and being a client’s agent are mutually exclusive. Nor does our caselaw prohibit a non-practicing attorney from acting as an agent for purposes of assisting another person in communications with legal counsel. Our holding would be the same if Ms. Adams had been a friend trained as an accountant, a psychologist, or an appraiser who agreed to assist with the litigation without charge. Consequently, we must reverse the trial court’s order concluding that the attorney-client privilege does not apply in this case.⁴

II. Work Product Doctrine

In order to successfully assert protection based on the work product doctrine, the party asserting the protection . . . bears the burden of showing (1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or

4. Although Defendant’s appellate counsel urges this Court to adopt a new rule requiring the trial court to consider the client’s expectations regarding confidentiality, it is not necessary given the evidence establishing an agency relationship.

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for another party or its representatives which may include an attorney, consultant or *agent*.

Isom, 177 N.C. App. at 412–13, 628 S.E.2d at 463 (emphasis added) (citation omitted) (internal quotation marks and editing marks omitted). The doctrine is not without limits:

The work-product doctrine shields from discovery all materials prepared in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, or agent. This includes documents prepared after a party secures an attorney and documents prepared under circumstances in which a reasonable person might anticipate a possibility of litigation. Materials prepared in the ordinary course of business are not protected by the work-product doctrine. The test is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.

In re Ernst & Young, LLP, 191 N.C. App. 668, 678, 663 S.E.2d 921, 928 (2008) (citations omitted) (internal quotation marks omitted).

We are persuaded that, given the record evidence, many of the documents requested by Plaintiff may constitute privileged work product not subject to discovery. Accordingly, the trial court's order concluding that the work product protection necessarily does not apply to the documents is reversed.

III. Remand

Although we reverse the trial court's conclusion that neither the attorney-client privilege nor the work product doctrine has any application in this case, the ultimate determination of which documents are shielded from discovery requires further inquiry regarding the nature of each document requested. This determination must be made by the trial court from evidence including an *in camera* review of the documents.

Plaintiff's subpoenas requested all documents relating to all of Ms. Adams's communications with Defendant, all documents relating to her communications with the law firm, and all documents relating to her communications with any third party regarding the ongoing legal proceedings during a specified time period. While we have held that the record evidence established an agency relationship between Ms. Adams and Defendant, it is unclear whether all the requested materials fall

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within the scope of the attorney-client privilege by satisfying the five-factor *Murvin* test. For example, communications between Ms. Adams and third parties outside the law firm may not fall within the protection of the attorney-client privilege. Therefore, we must remand for the trial court to determine whether the attorney-client privilege applies to the requested communications, using the five-factor *Murvin* test and considering Ms. Adams as Defendant's agent. Unless the trial court can make this determination from other evidence such as a privilege log, it must conduct an *in camera* review of the documents. *See Raymond v. N.C. Police Benevolent Ass'n., Inc.*, 365 N.C. 94, 101, 721 S.E.2d 923, 928 (2011) (ordering the trial court to conduct an *in camera* review on remand to determine whether the communications were protected by the attorney-client privilege under *Murvin*).

We also are unable to determine based on the limited record whether the documents requested, or any of them, are subject to the work product doctrine. This determination is necessary only for documents which Defendant asserts are work product and which the trial court concludes are not protected by the attorney-client privilege. *See Isom*, 177 N.C. App. at 412–13, 628 S.E.2d at 463. We remand for the trial court to review the documents *in camera* and determine whether the work product protection applies, taking into account that Ms. Adams was acting as Defendant's agent. *See Ernst & Young, LLP*, 191 N.C. App. at 677–78, 663 S.E.2d at 928 (2008) (remanding for an *in camera* review to determine whether the documents requested were created in anticipation of litigation and satisfy the work product doctrine). A document created by Ms. Adams within the context of the confidentiality agreement for the law firm and for the purposes of the litigation would be protected, as would any documents created by the law firm which would normally be protected even if they were shared with Ms. Adams.

Given our reversal of the trial court's order, it is not necessary to address Defendant's alternative argument that Plaintiff's subpoena to Ms. Adams exceeded the scope of Rule 45 of the North Carolina Rules of Civil Procedure.

Conclusion

Based on the foregoing reasons, we reverse the trial court's order denying Defendant's motion to quash and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges CALABRIA and STROUD concur.

DANCY v. DANCY

[247 N.C. App. 25 (2016)]

KELLY RENEE DANCY, n/k/a KELLY RENEE LAUGHTER, PLAINTIFF

v.

ANTHONY SHANE DANCY, DEFENDANT

No. COA15-1049

Filed 19 April 2016

**Child Custody and Support—increased visitation with father—
best interests of child**

Where plaintiff-mother appealed the order of the trial court granting defendant-father increased visitation with their daughter, the trial court correctly used the best interest of the child analysis, and substantial evidence supported the trial court's findings, which supported its conclusion that the daughter's best interests and welfare were best served with a permanent custodial arrangement that included substantial visitation with her father.

Appeal by Plaintiff from order entered 2 July 2015 by Judge Hal G. Harrison in Madison County District Court. Heard in the Court of Appeals 11 February 2016.

Emily Sutton Dezio for Plaintiff-Appellant.

No brief filed by Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

Kelly Renee Dancy, now known as Kelly Renee Laughter ("Plaintiff"), appeals from a district court order granting Anthony Shane Dancy ("Defendant") increased visitation with their daughter. We affirm the trial court.

I. Factual and Procedural History

The parties were married in Marshall, North Carolina on 28 June 2003 and lived together as husband and wife until 30 May 2006, at which time they separated and Defendant moved to California. They had one daughter who was born on 2 September 2004.

On 30 May 2006, the parties executed a separation agreement that stated the following:

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11. Joint Custody.

The parties shall share the joint legal care, custody, and control of the minor child of the parties. The Wife shall have the physical custody of said minor child, subject to Husband's rights of reasonable visitation. The parties shall make every reasonable effort to foster feelings of affection between themselves and the child recognizing that frequent and continuing association and communication of both parties with a child is in the furtherance of the best interests and welfare of the child. . . .

13. Child Support Monetary Amount.

a. The Husband shall pay to Wife, as and for the support of the minor child of the parties, the sum of \$265.00 per month Obligations to make the payments as set forth in this section for the support of a child shall cease when the child dies, reaches the age of 18, enters in to marriage, becomes emancipated, or ceases to be in the physical custody of custodial parent. If, however, a child reaches the age of 18, is unmarried and resides with custodial parent [and] is a full-time high school student, said support obligation shall continue as to said child, until the child marries, no longer resides with custodial parent, no longer is a full-time high school student, completes the 12th grade [or] attains age 20, whichever shall first occur. . . .

c. Modification. The parties further acknowledge that the child support required by this Agreement is only subject to modification by a court of competent jurisdiction upon a showing of substantial change of circumstances.

In addition to settling child custody and support, the parties settled their property division in the agreement as well. The parties signed the agreement and filed it in Madison County, North Carolina on 9 May 2007.

Plaintiff and Defendant obtained an absolute divorce on 15 August 2007, and the district court incorporated their settlement agreement into the divorce judgment. On 12 July 2011, Plaintiff filed a "motion for immediate, temporary and modification of permanent custody" and received an *ex parte* order granting her immediate custody. At the return hearing

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on 18 July 2011, the parties entered into a consent order that increased Defendant's visitation time with the child and recited the following:

[T]his temporary agreement reached by and between the Parties is fair, just and reasonable and in the minor child's best interest and should be adopted by the Court. . . . Primary physical placement of the minor child shall remain with the Plaintiff in this matter, subject to visitation with the Defendant as is set out herein. . . . The parties agree to hold open the hearing on temporary custody set for July 20, 2011 in Yancey County, while they meet to attempt further settlement negotiations on all outstanding issues.

At the custody hearing on 8 September 2011, the trial court accepted the consent order and issued an order entitled, "Order: Temporary and Permanent Custody." The trial court filed the order 14 September 2011 and found the consent order provisions were in the best interests of the child and awarded primary physical custody to Plaintiff. Pursuant to the consent order, the trial court awarded Defendant greater visitation during his military leave from 20 July 2011 to 24 July 2011, and visitation on Sundays thereafter using cell phones, Skype, and other correspondence. The order contemplated future visitation as follows:

Provided the Defendant maintains regular Sunday contact with the minor child, then during the Summer of 2012, the Defendant shall exercise an uninterrupted period of visitation with the child, not to exceed two weeks, and which shall begin with two consecutive daytime visits from 10:00 a.m. until 6:00 p.m. Said two-week visitation shall be exercised within the state of North Carolina and the Defendant shall provide the Plaintiff with two months' advance notice of the visitation dates[.]

Three years later, on 24 September 2014, Defendant filed a verified motion for permanent custody. Defendant alleged the following:

6. That since the entry of [the 14 September 2011 order], the parties have continued Defendant's visitation with the minor child as provided in said Order, through [S]ummer 2012.

7. That since [S]ummer 2012, the parties have continued Defendant's visitation with the minor child on an ad hoc basis, to wit:

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- a. For [S]ummer 2013, Defendant was unable to travel to North Carolina and Plaintiff refused to allow the minor child to travel to California; and
 - b. For [S]ummer 2014, the minor child traveled to California with her older half-sibling, who is not a party to this action but is also a resident of the State of North Carolina, and was also accompanied by Defendant on both legs of the trip to and from California, for a period of approximately 15 days.
8. That Defendant's visits with the minor child have gone very well and that Defendant and the minor child desire to expand their visitations.
 9. That the custody order currently in effect does not provide for visitation between Defendant and the minor child beyond [S]ummer 2012.
 10. That the September 14, 2011 Custody Order is a temporary custody order in that said order did not determine all of the issues pertaining to child custody.

In his motion, Defendant sought to modify the child custody agreement to afford him "substantial visitation" with his daughter, to account for the geographic distance between the parties. The matter was set for the June 2015 calendar in Madison County District Court.

On 18 June 2015, the parties presented evidence and arguments to the trial court. The trial court entered a written order 2 July 2015 entitled, "Final and Permanent Child Custody Order." The order recited the following findings of fact and conclusions of law:

Findings of Fact

1. Defendant's Motion seeks to modify an existing temporary order and to establish a permanent child custodial arrangement. . . .
6. A temporary custody order was entered on September 14, 2011, which only provided a visitation arrangement through the summer of 2012. Thereafter the order did not set a custodial arrangement for the indefinite future.
7. By mutual agreement of the parties, Defendant did exercise a period of visitation with the minor child, in California, during summer 2014. That visit went very well,

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and the minor child was accompanied by her older half-sister [].

8. For the summer 2014 visit, Defendant flew to North Carolina to pick up the parties' minor child and to accompany her to California for the two-week visit, then flew back with the minor child to return her to North Carolina at the conclusion of the visit.

9. Both parties have a close, loving relationship with the minor child. . . .

11. Since the summer 2014 visit, and until the present visit for this Court hearing, Defendant's contact with the child has been limited to telephone calls and text messages.

12. Plaintiff is married and works as a house cleaner. Plaintiff and her current husband are very fit and suitable to share custody of the minor child.

13. Defendant is a retired U.S. Marine, is remarried, and self-employed as an electrical contractor. Defendant is very fit and suitable to share custody of the minor child.

14. It is in the best interests and welfare of the parties' minor child that she have a permanent custodial arrangement with the Defendant father.

15. It is in the best interests and welfare of the parties' minor child that the parties share joint legal care, custody, and control of the minor child.

Conclusions of Law

1. That this Court has jurisdiction over the persons of Plaintiff, Defendant, and the parties' minor child.

2. That it is in the best interests and welfare of the parties' minor child that she have a permanent custodial arrangement with the Defendant father.

3. That it is in the best interests and welfare of the parties' minor child that the parties share joint legal care, custody, and control of the minor child.

The trial court awarded primary physical custody to Plaintiff, ordered greater visitation to Defendant on holidays and school breaks, and specified the terms of visitation.

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Thereafter, Plaintiff timely filed her notice of appeal on 2 July 2015. She filed her Appellant brief and settled the record. Defendant has not participated in this appeal at all.

II. Standard of Review

“When reviewing a trial court’s decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court’s findings of fact to determine whether they are supported by substantial evidence.” *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). “In addition to evaluating whether a trial court’s findings of fact are supported by substantial evidence, this Court must determine if the trial court’s factual findings support its conclusions of law.” *Id.* at 475, 586 S.E.2d at 254.

“Whether a district court has utilized the proper custody modification standard is a question of law we review *de novo*.” *Peters v. Pennington*, 210 N.C. App. 1, 707 S.E.2d 724 (2011) (citations omitted). “Absent an abuse of discretion, the trial court’s decision in matters of child custody should not be upset on appeal.” *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006).

III. Analysis

Plaintiff contends the trial court committed error when it (1) found the 14 September 2011 order was a temporary order, and (2) failed to apply the correct burden of proof. We disagree.

Trial courts may issue child custody orders that are “temporary” or “permanent.” *Woodring v. Woodring*, 227 N.C. App. 638, 642, 745 S.E.2d 13, 17 (2013). “The term ‘permanent’ is somewhat of a misnomer, because ‘after an initial custody determination, the trial court retains jurisdiction of the issue of custody until the death of one of the parties or the emancipation of the youngest child.’” *Id.* (citations omitted).

A party seeking modification of a permanent child custody order bears the burden of showing “a substantial change in circumstances has occurred, which affects the child’s welfare.” *Karger v. Wood*, 174 N.C. App. 703, 705, 622 S.E.2d 197, 200 (2005) (citation omitted). Conversely, “if a child custody order is temporary in nature and the matter is again set for hearing, the trial court is to determine custody using the best interests of the child test without requiring either party to show a substantial change in circumstances.” *Senner v. Senner*, 161 N.C. App. 78, 80–81, 587 S.E.2d 675, 677 (2003) (quoting *LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 915 (2002)); *see also Woodring*, 227 N.C. App. at 643, 745 S.E.2d at 18.

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“A trial court’s designation of an order as ‘temporary’ or ‘permanent’ is neither dispositive nor binding on an appellate court.” *Woodring*, 227 N.C. App. at 643, 745 S.E.2d at 18 (citation omitted). A child custody order is temporary if (1) it is entered into without prejudice to either party; (2) it states a clear and specific reconvening time in the order and the time interval time between the two hearings was reasonably brief; or (3) the order does not determine all of the issues. *Id.* (citing *Peters*, 210 N.C. App. at 13–14, 707 S.E.2d at 734); *see also Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677. If a child custody order does not meet any of these criteria, it is permanent. *Peters*, 210 N.C. App. at 14, 707 S.E.2d at 734.

First, the 14 September 2011 custody order does not state it is entered into with prejudice towards either party. However, we need not resolve this issue using only this prong.

Second, the 14 September 2011 order does not state a specific reconvening time and date. This Court has held that a temporary order can be converted into a “final order” when “neither party sets the matter for a hearing within a reasonable time.” *Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677 (citing *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000) (holding that one year between hearings is too long in a case with no unresolved issues); *LaValley*, 151 N.C. App. at 293, n. 6, 564 S.E.2d at 915, n.6 (holding twenty-three months is an unreasonable time between hearings)). However, the passage of time alone will not convert a temporary order into a permanent order. *See Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677. In *Senner*, this Court held that a twenty-month passage of time was not unreasonable when the parties negotiated, albeit unsuccessfully, whether the child would move to Texas, and whether they would share joint custody on an alternating two-week basis. *Id.* In light of these ongoing negotiations, this Court held the plaintiff failed to show the defendant’s twenty-month delay in filing a motion to modify was unreasonable. *Id.* *Senner* is similar to the case *sub judice*, in that the 14 September 2011 order never allowed the child to visit Defendant in California, yet the parties agreed to let her travel to California in Summer 2014. Because the parties continued to agree beyond the trial court’s 14 September 2011 order, we hold the order was not converted into a permanent order.

Third, the 14 September 2011 order does not resolve all of the issues. The order does state in its preamble that the parties “hav[e] reached an agreement on all pending custody issues and tendered this Consent Order to the Court.” However, this Court has held that an order is temporary and does not resolve all issues when it fails to address a party’s right

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to “ongoing visitation.” See *Woodring*, 227 N.C. App. at 644, 745 S.E.2d at 18 (the temporary 2010 order at issue “provided father with only three specific instances of visitation in 2010” and “did not address father’s ongoing visitation[.]”); see also *Smith v. Barbour*, 195 N.C. App. 244, 671 S.E.2d 578 (2009). Here, the 14 September 2011 order only allowed Defendant to visit his daughter in person during his four-day military leave in July 2011, and again for two weeks during Summer 2012, provided that he maintain regular Sunday contact with his daughter and travel to North Carolina during Summer 2012. Under this arrangement, Defendant was only able to visit his daughter in person up to her eighth birthday, leaving his ongoing visitation rights to be effectuated via Skype and phone calls and texts. The 14 September 2011 order did not resolve all of the issues in this case. Accordingly, we hold the order is temporary and the trial court correctly proceeded to a best interests of the child analysis without burdening Defendant to show a substantial change in circumstances.

After *de novo* review of the record, we hold the trial court utilized the proper custody modification standard—the best interests of the child analysis. The trial court’s findings of fact supporting the custody modification are supported by substantial evidence presented by the parties. The findings of fact support the conclusion of law that the daughter’s best interests and welfare are best served with a permanent custodial arrangement that includes substantial visitation with her father, Defendant.

IV. Conclusion

For the foregoing reasons we affirm the trial court.

AFFIRMED.

Judges STEPHENS and INMAN concur.

DAUGHTRIDGE v. N.C. ZOOLOGICAL SOC'Y, INC.

[247 N.C. App. 33 (2016)]

ALBERT S. DAUGHTRIDGE, JR. AND MARY MARGRET
HOLLOMAN DAUGHTRIDGE, PLAINTIFFS

v.

THE NORTH CAROLINA ZOOLOGICAL SOCIETY, INC., DEFENDANT

No. COA15-1151

Filed 19 April 2016

1. Appeal and Error—parties—different cases

Plaintiffs could not seek review of an order in another, similar case where they were not parties in that case.

2. Jurisdiction—summary judgment—prior ruling by another judge

One judge could not quiet title in favor of defendant as a matter of law where another judge had previously denied defendant's motion for summary judgment on the same issue.

3. Appeal and Error—cross-appeal—notice untimely—appellant's brief required

A motion to dismiss defendant's cross-appeal was granted where the notice of cross appeal was untimely. Moreover, although defendant filed a petition for writ of certiorari, defendant did not file an appellant's brief and instead included its argument in its cross issues in its appellee brief, precluding full response by plaintiff. It is well established that a cross-appeal will not be considered when the cross-appellant fails to file an appellant's brief.

4. Appeal and Error—interlocutory orders and appeals—alternative basis for appeal

Defendant's purported cross-appeal and petition for writ of certiorari seeking review of an interlocutory order was denied where defendant made no attempt to show that the order affected a substantial right. Any arguments concerning an alternative basis for upholding a prior order did not relate to the order from which plaintiff appealed.

Appeal by plaintiffs and cross-appeal by defendant from order entered 11 December 2014 and judgment entered 29 June 2015 by Judges Alma L. Hinton and Marvin K. Blount, III, respectively, in Halifax County Superior Court. Heard in the Court of Appeals 10 March 2016.

DAUGHTRIDGE v. N.C. ZOOLOGICAL SOC'Y, INC.

[247 N.C. App. 33 (2016)]

Boxley, Bolton, Garber & Haywood, by Ronald H. Garber, for plaintiffs.

Charles S. Rountree, III, for defendant.

GEER, Judge.

Plaintiffs Albert S. Daughtridge, Jr. and Mary Margret Holloman Daughtridge appeal from a judgment quieting title in favor of defendant, the North Carolina Zoological Society, Inc. Plaintiffs contend the trial court erroneously overruled a previous order by a different superior court judge who had denied defendant's motion for summary judgment on the same issue. We agree with plaintiffs and find the procedural circumstances identical to those of *Iverson v. TM One, Inc.*, 92 N.C. App. 161, 374 S.E.2d 160 (1988). Accordingly, we vacate the judgment and remand to the trial court for trial on the issues presented in plaintiffs' complaint.

Facts

On 13 September 2010, defendant recorded a general warranty deed in the Halifax County Public Registry to a 25-acre tract of land which was granted in fee simple by John B. Shields. Included in the deed was a reference to a map of the 25-acre tract prepared by a surveyor on 10 August 2010. After discovering this deed in 2013, plaintiffs recorded 14 non-warranty deeds describing property by metes and bounds that also claimed title to land described by the survey referenced in defendant's deed. Plaintiffs then filed a declaratory judgment action and a notice of lis pendens in Halifax County Superior Court against defendant on 3 July 2013 for the purpose of quieting title to this disputed real property. Defendant filed an answer and its own counterclaim to quiet title on 17 September 2013.

The real property in dispute is located between the town of Scotland Neck and the Roanoke River, abutting the southern boundary of White's Mill Pond. All parties seem to agree that plaintiffs' property is bounded on the east and northeast by the Kehukee Swamp Run, a water course that runs south through White's Mill Pond and then in a southeasterly direction. The issue at the heart of this case is which party has proper record title to an approximately five-acre tract of land determined by a description of the course of the Kehukee Swamp Run in each parties' respective chains of title.

In conducting discovery, the parties produced substantial documentation regarding their respective chains of title dating as far back as 1799,

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as well as documentation regarding the exact location and course of the Kehukee Swamp Run. On 13 August 2014, defendant filed a motion for summary judgment, which came on for hearing on 3 November 2014 before Judge Alma L. Hinton. After reviewing detailed evidence regarding each parties' respective claims to chain of title to the disputed real property, Judge Hinton determined that summary judgment was not appropriate. Judge Hinton, therefore, entered an order on 11 December 2014 denying defendant's motion for summary judgment, and trial was calendared for 13 April 2015.

Subsequent to the denial of defendant's motion for summary judgment, plaintiffs deposed defendant's surveyor and defendant's closing attorney. Plaintiffs also filed with the court an affidavit from an expert witness expressing an opinion on the exact course of the Kehukee Swamp Run. On 15 April 2015, after conducting a pre-trial hearing spanning three days, Judge Marvin K. Blount, III took the case under advisement "to determine whether or not the case needs to be decided . . . by a jury or whether [there] are questions of law that will be decided by the judge." After hearing further arguments on 21 May 2015, Judge Blount directed defendant's counsel to prepare a judgment quieting title in favor of defendant as a matter of law. Judge Blount entered that judgment on 29 June 2015, and plaintiffs timely appealed the judgment to this Court.¹

I

[2] Plaintiffs argue that Judge Blount was precluded from quieting title in favor of defendant as a matter of law on 29 June 2015 because Judge Hinton had previously denied defendant's motion for summary judgment on the very same issue on 11 December 2014. We agree.

1. **[1]** There is also a dispute regarding whether defendant owns the property to the east of the Kehukee Swamp Run that is the subject of separate litigation between defendant and Virgil Leggett in Halifax County Superior Court, file no. 14 CVS 1027. Hearings in 14 CVS 1027 were calendared in Halifax County Superior Court for the same date as the hearings in this action between the parties to this appeal. The trial court ultimately entered partial summary judgment in favor of the North Carolina Zoological Society in 14 CVS 1027. Plaintiffs in this case and Mr. Leggett have filed a petition for writ of certiorari in this appeal in 13 CVS 624, seeking review of the summary judgment order entered in 14 CVS 1027. Because plaintiffs were not parties in 14 CVS 1027, they may not seek review of the order entered in that case. *See Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) ("A careful reading of Rule 3 [of the Rules of Appellate Procedure] reveals that its various subsections afford no avenue of appeal to either entities or persons who are nonparties to a civil action."). Moreover, Mr. Leggett may not seek review in this appeal of an order entered in an entirely different proceeding. We, therefore, have denied plaintiffs' and Mr. Leggett's petition for writ of certiorari.

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Plaintiffs cite generally to *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972), for the well-established rules that “no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another’s errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.” It is well established that “[o]ne superior court judge may only modify, overrule, or change the order of another superior court judge where the original order was (1) interlocutory, (2) discretionary, and (3) there has been a substantial change of circumstances since the entry of the prior order.” *First Fin. Ins. Co. v. Commercial Coverage, Inc.*, 154 N.C. App. 504, 507, 572 S.E.2d 259, 262 (2002).

“In the granting or denial of a motion for summary judgment, the court is ruling as a matter of law, and is not exercising its discretion.” *Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 633, 272 S.E.2d 374, 376 (1980). Because a denial of a motion for summary judgment is not discretionary, “[t]he aggrieved party may not seek relief by identical motion before another superior court judge.” *Id.* at 634, 272 S.E.2d at 376. Furthermore, “one trial judge ‘may not reconsider and grant a motion for summary judgment previously denied by another judge.’” *Iverson*, 92 N.C. App. at 164, 374 S.E.2d at 163 (quoting *Smithwick v. Crutchfield*, 87 N.C. App. 374, 377, 361 S.E.2d 111, 113 (1987)).

Defendant attempts to circumvent these established rules by labeling Judge Blount’s judgment a “directed verdict.” Defendant cites to *Clinton v. Wake Cnty. Bd. of Educ.*, 108 N.C. App. 616, 621, 424 S.E.2d 691, 694 (1993), for the proposition that “a pretrial order denying summary judgment has no effect on a later order granting or denying a directed verdict on the same issue or issues.” In *Clinton*, “[a]ll motions for summary judgment were denied . . . and the case proceeded to trial . . .” *Id.* at 620, 424 S.E.2d at 693. The plaintiff in *Clinton* presented his evidence at trial before a jury and then the trial court directed a verdict in favor of the defendant. *Id.*

Clinton has no relevance to the case before us. Here, Judge Blount did not grant a directed verdict during trial following the presentation of evidence. See *Buckner v. TigerSwan, Inc.*, ___ N.C. App. ___, ___, 781 S.E.2d 494, 498 (2015) (“‘[I]t is well settled that a motion for a directed verdict only is proper in a jury trial.’” (quoting *Dean v. Hill*, 171 N.C. App. 479, 482, 615 S.E.2d 699, 701 (2005))). Instead, he conducted a *pre-trial hearing* to determine whether there were genuine issues of fact appropriate for a jury trial or if the case could be decided as a matter

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of law. Whether labeled as such or not, Judge Blount purported to grant summary judgment to defendant.

The procedural circumstances in this case are identical to those in *Iverson*. In *Iverson*, after one superior court judge had denied defendant's motion for summary judgment, a subsequent superior court judge "conducted, at a pretrial conference, a hearing in the absence of the jury to determine whether a material issue of fact existed. This was the issue which had previously been presented to and decided by [the original judge presiding over defendant's summary judgment motion]." 92 N.C. App. at 164, 374 S.E.2d at 163. This Court held that the procedure used by the subsequent presiding judge, "while not labeled a hearing on summary judgment, was exactly that." *Id.* at 165, 374 S.E.2d at 163. Because the subsequent judgment overruled the original denial of summary judgment, this Court vacated the subsequent judgment and remanded the case back to the superior court for trial on the issues presented in the plaintiff's complaint. *Id.*

Because this case is materially indistinguishable from *Iverson*, we hold that Judge Blount's entry of judgment in defendant's favor prior to trial had the effect of overruling Judge Hinton's earlier denial of defendant's motion for summary judgment. We, therefore, must vacate Judge Blount's judgment and remand to the trial court for trial on the parties' actions to quiet title to the disputed real property. *Id.* See also *Cail v. Cerwin*, 185 N.C. App. 176, 184, 648 S.E.2d 510, 516 (2007) (holding that "only when the legal issues differ between the first motion for summary judgment and a subsequent motion may a trial court hear and rule on the subsequent motion").

II

[3] Defendant filed a notice of cross-appeal from Judge Hinton's order denying defendant's motion for summary judgment that was untimely under Rule 3(b)(3) of the Rules of Appellate Procedure. Because of the untimeliness of the notice, defendant has also filed a petition for writ of certiorari seeking review of that same order. Defendant, however, failed to file an appellant's brief and instead simply included its argument on its cross issues in its appellee brief.

Because defendant's notice of cross-appeal was untimely, we have granted plaintiffs' motion to dismiss defendant's cross-appeal. Further, by failing to file an appellant's brief in support of the cross-appeal that is the subject of the petition for writ of certiorari, defendant precluded plaintiffs from being able to fully respond with an appellees' brief. It is

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well established that this Court will not consider a cross-appeal when the cross-appellant has failed to file an appellant's brief. *See, e.g., Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 739, 407 S.E.2d 819, 826 (1991) ("Plaintiffs gave proper notice of appeal on these issues but did not file an appellant's brief within the time allowed under Rule 13 of the North Carolina Rules of Appellate Procedure. Rather, they attempted to argue the issues in their appellee's brief. The Court of Appeals, therefore, correctly held that plaintiffs had failed to preserve any of these questions for its review, and we affirm this decision."); *Countrywide Home Loans, Inc. v. Reed*, 220 N.C. App. 504, 508, 725 S.E.2d 667, 670 (2012) ("Because Plaintiff did not file a cross-appellant's brief in this case, we grant Defendants' motion to dismiss Plaintiff's cross-appeal[.]").

[4] Moreover, defendant's purported cross-appeal and petition for writ of certiorari seek review of an interlocutory order. In *Cail*, 185 N.C. App. at 185-86, 648 S.E.2d at 516-17, once this Court concluded that a superior court judge improperly granted summary judgment after a prior judge had denied a motion for summary judgment, the Court declined to address the defendant's arguments that the initial denial of summary judgment should be reversed. The Court noted that because the order denying summary judgment was an interlocutory order, it could only be reviewed upon a showing that it affected a substantial right. *Id.* at 185, 648 S.E.2d at 517. Because the defendant had failed to make the necessary showing, the Court dismissed the defendant's cross-appeal. *Id.* at 186, 648 S.E.2d at 517.

Likewise, in this case, defendant has made no attempt to show that Judge Hinton's order affects a substantial right. Because of defendant's failure to file an appellant's brief and because defendant has failed to show why an appeal of Judge Hinton's order is now necessary, we exercise our discretion to deny its petition for writ of certiorari.

It appears, however, that defendant may also be contending in its appellee brief that its arguments regarding Judge Hinton's order denying summary judgment constitute an alternative basis for upholding Judge Blount's order entering judgment in defendant's favor. Rule 28(c) of the Rules of Appellate Procedure allow an appellee, "[w]ithout taking an appeal," to "present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken."

Plaintiff has, however, appealed from Judge Blount's 29 June 2015 judgment, while defendant is challenging a separate order: Judge Hinton's

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11 December 2014 order. In *Belmont Land & Inv. Co. v. Standard Fire Ins. Co.*, 102 N.C. App. 745, 751, 403 S.E.2d 924, 927 (1991), this Court specifically held that when the plaintiff appealed from an order granting summary judgment on one of its claims, defendants could not seek review of an earlier order denying their motion for summary judgment on the grounds that the earlier order deprived them of an alternative basis in law for supporting the summary judgment challenged on appeal. The Court stated simply: “The error assigned by defendants does not relate to the order . . . from which appeal has been taken.” *Id.*

Because defendant’s arguments do not relate to the order that plaintiffs appealed, defendant cannot rely on Rules 10(c) and 28(c) as a basis for review of Judge Hinton’s order. Accordingly, we hold that defendant’s arguments are not properly before us, and we decline to address them. *See also Birmingham v. H&H Home Consultants & Designs, Inc.*, 189 N.C. App. 435, 444, 658 S.E.2d 513, 519 (2008) (declining to consider cross-assignment of error under the predecessor rule to Rule 10(c) because it did “not address the order entered by the trial court from which plaintiff appeals”).

VACATED AND REMANDED.

Judges TYSON and INMAN concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF
v.
ADAMS OUTDOOR ADVERTISING OF CHARLOTTE
LIMITED PARTNERSHIP, DEFENDANT

No. COA15-589

Filed 19 April 2016

1. Eminent Domain—subject matter jurisdiction—Section 108 hearing

The trial court’s erroneous application of the Outdoor Advertising Control Act in Article 11 did not affect subject matter jurisdiction to conduct a Section 108 hearing in a condemnation case.

2. Evidence—findings of fact—conclusions of law—sufficiency—billboard—outdoor advertising

The trial court erred in a condemnation case by finding and concluding that (1) defendant’s billboard was a permanent leasehold

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improvement and not personal property; (2) defendant's alleged loss of business and outdoor advertising income were compensable property interests in an Article 9 proceeding; (3) the Department of Transportation permit granted to defendant under the Outdoor Advertising Control Act was a compensable property interest; and (4) the option to renew contained in defendant's lease was a compensable real property interest.

3. Eminent Domain—calculation of compensation—bonus value method

The trial court erred by holding that the “bonus value” method of calculating compensation interest was improper and excluding evidence of the “bonus value” method from the trier of fact under Rules 401 and 403, and allowing consideration of income attributable to a billboard and outdoor advertising. The trial court's classification of the billboard as a permanent leasehold improvement was erroneous, which error resulted in improper measure of compensation.

Appeal by plaintiff from order entered 27 August 2014 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 December 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Dahr Joseph Tanoury and Assistant Attorney General Kenneth A. Sack, for the Department of Transportation.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus, for defendant-appellee.

BRYANT, Judge.

Where the trial court did not lack subject matter jurisdiction, we affirm. However, where the trial court's findings and conclusions regarding the compensable property interests taken are unsupported by the evidence and contrary to law, we reverse.

On 6 December 2011, the North Carolina Department of Transportation (“plaintiff-DOT”) filed a civil action in Mecklenburg County Superior Court and an acknowledgment of taking pursuant to a resolution of plaintiff-DOT authorizing the appropriation of defendant's property for the construction of a highway project. When the parties could not agree on the purchase price of the leasehold interest to

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be appropriated, the trial court held a Section 108¹ hearing and made findings of fact and conclusions of law. The trial court's findings of fact included those set forth below.

In 1981, a billboard ("the billboard") was originally constructed on a lot (the "CHS Lot") located at the corner of Independence Boulevard and Sharon Amity Road in Charlotte, North Carolina. It was legally erected pursuant to permits issued by the City of Charlotte and plaintiff-DOT. It was constructed pursuant to a lease agreement between Craig T. Brown, Jr., then-owner of the CHS Lot, and National Advertising Company ("National"), predecessor in interest to defendant Adams Outdoor Advertising of Charlotte Limited Partnership ("defendant"). The billboard had two back-to-back V-type sign face displays of approximately 14' x 48' each or 672 square feet of advertising space per face.

About ten years later, on 15 August 1991, a new lease agreement was entered into by National and C.H.S. Corporation, then-owner of the land. The new lease had an original term of six years and thereafter was to run on a year-to-year basis. In October 2001, defendant acquired the billboard from National and all property rights pertaining thereto. At that time, defendant inherited the 1991 lease which was operating on a year-to-year basis.

On 26 September 2006, defendant entered into a lease agreement (the "2006 lease") with C.H.S. Corporation to secure the CHS Lot for the purpose of operating, maintaining, repairing, modifying, and reconstructing the billboard. The original term of the 2006 lease commenced on 1 August 2007 and ran for a ten-year period with one automatic ten-year extension. Therefore, except for the discretion specifically reserved to defendant to cancel upon the happening of certain events,² the 2006

1. The purpose of a Section 108 hearing is to "eliminate from the jury trial any question as to what land [DOT] is condemning and any question as to its title." *N.C. State Hwy. Comm'n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967). During a Section 108 hearing, "the judge . . . shall . . . hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken." N.C. Gen. Stat. § 136-108 (2015).

2. The cancellation provision reads as follows:

CANCELLATION: If, in Lessee's sole opinion: a) the view of the advertising copy on any Structure becomes obstructed; b) the Property cannot be safely used for the erection, maintenance or operation of any Structure for any reason; c) the value of any Structure is substantially diminished, in the sole judgment of the Lessee, for any reason; d) the

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lease would not terminate until 1 August 2027. The 2006 lease was recorded in the Mecklenburg County Register of Deeds Office in Book 22206 at Pages 740–44 and permitted defendant to use the CHS Lot for outdoor advertising purposes only.

In the 2006 lease, defendant agreed to pay substantially more rent to the landlord C.H.S. Corporation than what was found in the 1991 lease due to the high value of the unique location of the CHS Lot and the need to secure defendant's investment for a long term. Additionally, the lease contained the following language regarding defendant's right to remove its billboards:

All Structures erected by or for the Lessee [defendant] or its predecessors-in-interest . . . shall at all times be and remain the property of [defendant] and the above-ground portions of the Structures may be removed by [defendant,] . . . notwithstanding that such Structures are intended by Lessor and [defendant] to be permanently affixed to the Property.

Prior to plaintiff-DOT's taking on 6 December 2011, defendant owned and operated the billboard and each year would pay the DOT to renew its State permit for the billboard.

Although the billboard was legally erected and maintained, it was not, as of 6 December 2011, in conformity with then existing height regulations adopted by plaintiff-DOT for outdoor advertising adjacent to interstates or federal aid primary highways. The sign was approximately sixty-five feet in height, and DOT regulations, adopted in 1990, set height limitations at fifty feet. However, because it was legally existing at the time it was erected, the billboard was grandfathered as a nonconforming sign that could be maintained under an exception to applicable state statute and DOT regulations. *See* Charlotte, N.C., Code § 13.112(1)(c).

Lessee is unable to obtain, maintain or continue to enforce any necessary permit for the erection, use or maintenance of any Structure as originally erected; or, e) *the use of any Structure, as originally erected, is prevented by law or by exercise of any governmental power*; then Lessee may, at its option, either: (i) reduce and abate rent in proportion to the impact or loss that such occurrence has upon the value of Lessee's Structure for so long as such occurrence continues; or, (ii) cancel this Lease and receive a refund of any prepaid rent, prorated as of the date of cancellation.

(emphasis added).

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Also, as of 6 December 2011, the CHS Lot was zoned B-2 by the City of Charlotte, and several years earlier, the City of Charlotte enacted zoning regulations banning new billboard locations within its jurisdiction, including along Independence Boulevard. The immediate neighborhood near the CHS Lot consisted of many commercial properties with a large concentration of retail shopping centers and automobile dealerships. Approximately 85,000 vehicles travel Independence Boulevard on a daily basis and it is one of the main thoroughfares linking the Charlotte downtown with areas to the east, including Union County, which is one of the fastest growing counties in the State.

However, because of the nonconforming nature of the billboard and the restrictive regulatory climate, relocation of the billboard in the City of Charlotte was not possible. Additionally, because plaintiff-DOT acquired the entire CHS Lot for highway widening purposes, neither the billboard, nor any substantial part thereof, could be moved anywhere else on the same site. As of 6 December 2011, the date of the taking, defendant had at least sixteen years remaining (until August 2027) on the lease to use the CHS Lot and maintain the billboard for outdoor advertising purposes.

The Complaint and Declaration of taking condemned defendant's right to use the CHS Lot for outdoor advertising and to operate and maintain on said land a sign for that purpose. Plaintiff-DOT had become the fee owner of the CHS Lot, having acquired title voluntarily from the former owner, C.H.S. Corporation, on 6 December 2011. On or about 13 December 2012, defendant filed an Answer praying for the appointment of commissioners to appraise any damage to the land as a result of the taking pursuant to Article 9, N.C. Gen. Stat. § 136-109.

Both parties filed motions for a "Section 108 hearing," pursuant to N.C. Gen. Stat. § 136-108, to hear all matters raised by the pleadings, except the issue of damages. On 23–25 June 2014, a Section 108 hearing was held pursuant to the motions before the Honorable Lisa C. Bell, Special Superior Court Judge presiding, in Mecklenburg County Superior Court. The trial court entered an order on 27 August 2014 finding, *inter alia*, that plaintiff-DOT took various property interests of defendant and that defendant was entitled to compensation pursuant to the Outdoor Advertising Control Act ("OACA"), for the value of defendant's outdoor advertising. On 24 September 2014, plaintiff-DOT gave Notice of Appeal from the order.

On appeal, plaintiff-DOT argues that (I) the trial court lacked subject matter jurisdiction and erred by applying Article 11, the OACA, to a condemnation proceeding; (II) the trial court's findings and conclusions are unsupported by the evidence and contrary to law; and (III) the trial court erred by adopting the wrong measure of compensation and damages.

I

[1] Plaintiff-DOT first argues that the trial court lacked subject matter jurisdiction and erred by applying the incorrect article to a condemnation proceeding. Specifically, plaintiff-DOT argues that the trial court erred by applying the Outdoor Advertising Control Act, codified within Article 11 of North Carolina General Statutes Chapter 136, rather than Article 9 (titled "Condemnation"), Chapter 136 of the North Carolina General Statutes. Instead, plaintiff-DOT argues the trial court should have applied Article 9 *exclusively* because plaintiff-DOT filed this action under Article 9 for the sole purpose of acquiring rights of way for the construction of highway improvements to E. Independence Boulevard and did not file the action under Article 11 to condemn a nonconforming billboard that violated the OACA. In other words, plaintiff-DOT contends that because the pleadings, consisting of plaintiff-DOT's complaint and defendant's answer, did not expressly raise the issue of N.C. Gen. Stat. § 136-131, the trial court lacked subject matter jurisdiction to decide the issue.³ We agree with plaintiff-DOT to the extent the trial court erred in applying Article 11; however, we disagree that the trial court lacked subject matter jurisdiction to conduct a Section 108 Hearing.

"Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003) (citations and quotation marks omitted). "A court has jurisdiction over the subject matter if it has the power to hear and determine cases of the general class to which the action in question belongs." *Dep't of Transp. v. Tilley*,

3. Plaintiff-DOT contends that its prayer for relief asking that just compensation be determined according to the provisions and procedures of Article 9 went unchallenged. However, the prayer for relief is not an "averment" for which a responsive pleading is required. *See* N.C. Gen. Stat. § 1A-1, Rule 8(d) (2015); *Bolton v. Crone*, 162 N.C. App. 171, 174, 589 S.E.2d 915, 916 (2004) ("Rule 8(d) applies to only material or relevant averments." (citation and quotation marks omitted)); BLACK'S LAW DICTIONARY (10th ed. 2014) (defining an "averment" as "[a] positive declaration or affirmation of fact; esp., an assertion or allegation in a pleading . . .").

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136 N.C. App. 370, 373, 524 S.E.2d 83, 86 (2000) (quoting *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 324, 244 S.E.2d 164, 165 (1978)). In *Tilley*, this Court, citing N.C. Gen. Stat. § 136-103(a) of Article 9, stated that “[o]ur legislature has expressly conferred jurisdiction over condemnation matters on our superior courts.” *Id.*

Article 9 procedures begin with the application of N.C. Gen. Stat. § 136-103 and the filing of a complaint and declaration of taking. N.C.G.S. § 136-103 (2015). Pursuant to N.C.G.S. § 136-103, both plaintiff-DOT’s complaint and declaration of taking are to provide “[a] statement of the authority under which and the public use for which said land is taken.” *Id.* § 136-103(c)(1). N.C. Gen. Stat. § 136-103 further dictates that the complaint and declaration describe the “entire tract or tracts affected” and the “estate or interest in said land.” *Id.* §§ 136-103(c)(2), (3). Once a complaint and declaration of taking is filed, “[a]ny person whose property has been taken by” DOT may file an answer to the complaint “only praying for a determination of just compensation.” N.C. Gen. Stat. § 136-106(a) (emphasis added).

A Section 108 hearing is conducted by the trial court which “shall . . . hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, *if controverted*, questions of necessary and proper parties, title to the land, interest taken, and area taken.” N.C. Gen. Stat. § 136-108 (2015) (emphasis added).

Here, in both plaintiff-DOT’s complaint and declaration of taking, plaintiff-DOT described “the authority vested in the plaintiff under the provisions of Chapter 136 of the General Statutes.” Plaintiff-DOT followed the mandate of N.C.G.S. § 136-103 by describing defendant’s lease “for the purpose of erecting and maintaining one Billboard Advertising Structure” permitted by plaintiff-DOT. In filing its answer, defendant followed N.C.G.S. § 136-103(a), admitting some allegations and denying others, including plaintiff-DOT’s allegation regarding the “tract or tracts affected” or the “interest in said land.” N.C.G.S. §§ 136-103(c)(2), (3).

“In reality, [plaintiff-DOT] [is] contesting the propriety of the *pleadings*, not the propriety of the court’s *jurisdiction*.” *Tilley*, 136 N.C. App. at 373, 524 S.E.2d 83, 86 (2000) (emphasis added). In *Tilley*, the defendants argued that because the plaintiff’s declaration of taking did not correctly list the entire tract affected, the trial court did not have subject matter jurisdiction over the property to be taken. *Id.* This Court rejected that argument, finding it to be “contrived and without merit.” *Id.*

Here, plaintiff-DOT employs a similar tactic by arguing that the trial court lacked subject matter jurisdiction because defendant’s answer

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discussed Article 11 and plaintiff-DOT did not file an action under that article. While we agree the trial court erred in applying Article 11, we disagree with plaintiff-DOT's contention that failing to apply Article 9 *exclusively* affected the jurisdiction of the court. All that is necessary to invoke the trial court's jurisdiction to conduct a Section 108 hearing is that the "interest in said land" be in dispute, *see* N.C.G.S. § 136-108; *City of Winston-Salem v. Slate*, 185 N.C. App. 33, 41, 647 S.E.2d 643, 649 (2007).

Here, defendant denied plaintiff-DOT's allegation regarding what precisely was defendant's "interest in said land"—the CHS Lot—upon which defendant had a leasehold interest and a billboard. Therefore, the trial court's erroneous application of Article 11 did not affect subject matter jurisdiction to conduct a Section 108 hearing. Accordingly, plaintiff-DOT's argument regarding jurisdiction is overruled.

II

[2] Plaintiff-DOT next argues that the trial court's findings of fact and conclusions of law regarding the compensable property interests taken are unsupported by the evidence and contrary to law. Specifically, plaintiff-DOT contends the trial court erred in finding and concluding that (1) defendant's billboard was a permanent leasehold improvement and not personal property; (2) defendant's alleged loss of business and outdoor advertising income are compensable property interests in an Article 9 proceeding; (3) the DOT permit granted to defendant under the OACA is a compensable property interest; and (4) the option to renew contained in defendant's lease is a compensable real property interest. We agree.

"The standard of review on appeal from a judgment entered after a non-jury trial⁴ is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Dep't of Transp. v. Webster*, 230 N.C. App. 468, 477, 751 S.E.2d 220, 226 (2013) (quoting *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002)). "[U]nchallenged findings of fact are presumed correct and are binding on appeal[,] but the trial court's conclusions of law are reviewed *de novo*. *Id.* (citations and quotation marks omitted).

4. We acknowledge that the case before us is an appeal from an interlocutory order and not an appeal of an order following a "non-jury trial." However, the standard of review for a trial judge's findings of fact and conclusions of law remain the same in our review of an interlocutory order. *See Webster*, 230 N.C. App. at 477, 751 S.E.2d at 226 (applying above stated standard of review in appeal of interlocutory order).

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By exercise of its eminent domain powers, plaintiff-DOT took defendant's property interests related to the CHS Lot. "The power of eminent domain, that is, the right to take private property for public use, is inherent in sovereignty." *Town of Morganton v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 533, 112 S.E.2d 111, 113 (1960). Just compensation limits eminent domain power and is guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article I, Section 19 of the North Carolina Constitution. U.S. Const. amend. XIV; N.C. Const. art. I, § 19; *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 274 N.C. 362, 372, 163 S.E.2d 363, 370 (1968).

In a compensation action, a property owner is entitled to " 'the full and perfect equivalent of the property taken.' . . . 'In awarding just compensation for the property taken,' the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken." *Lea Co. v. Dep't of Transp.*, 317 N.C. 254, 260, 345 S.E.2d 355, 358 (1986) (internal citations omitted). It is well-settled that "a leasehold is a property right, . . . [and] [a]ny diminution of that right by the sovereign in the exercise of its power of eminent domain entitles lessee to compensation." *Horton v. Redev. Comm'n of High Point*, 264 N.C. 1, 8–9, 140 S.E.2d 728, 734 (1965) (citations omitted). Furthermore, the power of eminent domain, being contrary to common law property rights, must be exercised strictly in accord with enabling statutes, and any ambiguities pertaining to such power are construed in favor of the property owner. *Proctor v. State Hwy. & Pub. Works Comm'n*, 230 N.C. 687, 692, 55 S.E.2d 479, 482–83 (1949).

(1) *Classification of Billboard*

Plaintiff-DOT's first assignment of error regards the proper classification of defendant's billboard. Plaintiff-DOT argues the trial court erred in Findings of Fact Nos. 21, 27, 32, 33, 40, 41, 45, and Conclusions of Law Nos. 8, 10–13, by holding that defendant's billboard was a permanent leasehold improvement and not personal property. We agree.

"[W]hether property attached to land is removable personal property or part of the realty is determined by examining external indicia of the lessee's 'reasonably apparent' intent when it annexed its property to the land." *Nat'l Adver. Co. v. N.C. Dep't of Transp.*, 124 N.C. App. 620, 626, 478 S.E.2d 248, 250–51 (1996) (citing *Little v. Nat'l Serv. Indus., Inc.*, 79 N.C. App. 688, 693, 340 S.E.2d 510, 513 (1986)). This classification is important because the law does not authorize a court to award compensation for personal property, such as a billboard sign. N.C. Gen. Stat. § 136-19(a) (2015) (stating NCDOT is authorized to condemn only land,

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materials, and timber for rights of way, not personal property); *Lyerly v. State Hwy. Comm'n*, 264 N.C. 649, 650, 142 S.E.2d 658, 658 (1965) (“No allowance can be made for personal property, as distinguished from fixtures, located on the condemned premises[.]” (citation omitted)). “Items of personal property which are attached to the leasehold for business purposes are trade fixtures . . . and they remain the personal property of the tenant.” *Taha v. Thompson*, 120 N.C. App. 697, 703, 463 S.E.2d 553, 557 (1995) (internal citations omitted) (citing *Stephens v. Carter*, 246 N.C. 318, 321, 98 S.E.2d 311, 313 (1957)).

In *National Advertising Co.*, this Court found that the billboard at issue was “removable personal property and not part of the realty.” 124 N.C. App. at 625, 478 S.E.2d at 250. In “examining the external indicia of the lessee’s ‘reasonably apparent’ intent,” this Court found the following in support of its conclusion that the billboard was personal property: (1) the landowners signed a disclaimer of any ownership in the sign; (2) the sign was listed as personal property for tax purposes; and (3) in response to plaintiff-DOT’s First Request for Admissions, the sign was noted to be a “trade” fixture, which by law is removable personal property. *Id.* at 626, 478 S.E.2d at 251.

In the instant case, “examining the external indicia of the lessee’s (defendant’s) reasonably apparent intent,” the external indicia show that the billboard and structure were personal property and the trial court’s ruling (Conclusion of Law No. 10) to the contrary is not supported by the facts.

First, defendant, not plaintiff-DOT, physically removed the billboard and structure from the CHS Lot by carefully dismantling them and reinstalling major components thereof at another billboard location along Independence Boulevard, as permitted by the lease agreement. The lease between defendant and C.H.S. Corporation specifically stated that

[a]ll Structures erected by or for the Lessee [defendant]. . . shall at all times be and remain the property of [defendant] and the above-ground portions of the Structures may be removed by the [defendant,] . . . notwithstanding that such structures are intended by Lessor and [defendant] to be permanently affixed to the Property.

(emphasis added). The clear intent of the parties as evidenced by the lease agreement was for the billboard to remain defendant’s property and be removed at the expiration of the lease, absent the imposition of a cancellation provision in the lease. *See supra* note 2.

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Second, for tax purposes, defendant's billboard structures are classified as "Business Personal Property" and the company pays property taxes to Mecklenburg County in accordance with that classification. Patricia Peterson, plaintiff-DOT's tax witness, testified that the North Carolina Department of Revenue treats a billboard as personal property even if the land is owned in fee by the billboard company. Significantly, defendant previously admitted in a different case that its billboards are personal property and subject to personal property tax assessments. *Adams Outdoor Adver., Ltd. v. City of Madison*, 294 Wis. 2d 441, 450, 458, 717 N.W.2d 803, 807–08, 811–12 (2006) (acknowledging personal property classification of billboard in tax assessment dispute).

Third, defendant's vice president for real estate admitted in a sworn affidavit and other documents that the billboard was personal property and agreed to accept relocation money for it. At the hearing, plaintiff-DOT's counsel argued that this evidence was not offered to dispute the validity of the relocation or eminent domain claim or reveal the settlement of a claim, as defendant argued, but rather it was offered and admitted to show defendant's inconsistent position regarding the classification of the billboard as personal property. *See Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors, Inc.*, 134 N.C. App. 468, 472, 518 S.E.2d 28, 31 (1999) (noting statement made by agent of party opponent regarding settlement of a claim in a different matter was admissible against party opponent under N.C.G.S. § 1A-1, Rule 801(d)).

Accordingly, the trial court erred in finding and concluding that the billboard and its structure were not movable personal property as this conclusion is not supported by evidence and is contrary to law.

(2) *Loss of Income*

Plaintiff-DOT next argues that defendant's alleged loss of business and outdoor advertising income are not compensable property interests in an Article 9 proceeding. Specifically, plaintiff-DOT contends that the trial court erred by stating plaintiff-DOT took defendant's "right to receive rental income" generated by the billboard sign and the jury should be allowed to consider that lost income. Furthermore, plaintiff-DOT argues that the lost advertising "rental income" attributable to the billboard is more accurately termed lost "business income." We agree.

In highway eminent domain proceedings, "[t]he longstanding rule in North Carolina is that evidence of lost business profits is inadmissible in condemnation actions" because the alleged losses are too speculative in nature, cannot be calculated with certainty, and are reliant on too many contingencies. *Dep't of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1,

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7, 637 S.E.2d 885, 891 (2006) (citing *Pemberton v. City of Greensboro*, 208 N.C. 466, 470–72, 181 S.E. 258, 260–61 (1935)). However, “[e]vidence of the *rental revenues* from land may be admitted and considered in determining the fair market value of the land at the time of the taking.” *Raleigh-Durham Airport Auth. v. King*, 75 N.C. App. 121, 123–24, 330 S.E.2d 618, 619–20 (1985) (emphasis added) (citations omitted); see *City of Charlotte v. Hurlahe*, 178 N.C. App. 144, 149–51, 631 S.E.2d 28, 31–32 (2006) (holding rental income from airport parking lot admissible to show market value where rent directly attributable to the land and comparable sales unavailable).

(3) *DOT Permit*

Plaintiff-DOT also argues that the DOT permit granted to defendant under the OACA is not a compensable property interest. Specifically, plaintiff-DOT argues that it was error for the trial court to hold that the value of the OACA permit should be considered by the finder of fact. We agree.

Once land has been deemed condemned and taken for the use of the DOT, “the right to just compensation therefor shall vest in the person owning said property *or any compensable interest therein* at the time of the filing of the complaint and the declaration of taking” N.C. Gen. Stat. § 136-104 (2015) (emphasis added). Generally, termination of a government-issued permit is not a compensable taking of a property interest. See *Haymore v. N.C. State Hwy. Comm’n*, 14 N.C. App. 691, 696, 189 S.E.2d 611, 615 (1972) (noting that the granting of a driveway permit application is a regulatory action that does not vest an irrevocable property right in the owner).

Plaintiff-DOT’s evidence, based on Roscoe Shiplett (“Shiplett”), a Charlotte appraiser’s forty-three years of experience, was that the permit’s worth should not be included in the value of the leasehold because it is not part of the real estate and “goes to the overall business enterprise.” Shiplett also testified that he has never seen another appraiser assign a specific value to a billboard permit when valuing a leasehold interest. We have found nothing in our jurisprudence that has held contrary to the statement made by Shiplett. Thus, the trial court erred in holding that the value of the OACA permit should be considered by the finder of fact in determining just compensation.

(4) *Option to Renew*

Plaintiff-DOT next argues that the option to renew contained in defendant’s lease is also not a compensable property interest. Specifically,

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plaintiff-DOT contends that the court's ruling that defendant's expectation of renewal "in perpetuity" of defendant's lease was a compensable property interest that should be considered by the finder of fact is not supported by the evidence and is contrary to law. Plaintiff-DOT argues that defendant is not entitled to compensation for any purported expectation of renewal of its leasehold interests beyond the terms of the lease. We agree.

While plaintiff-DOT's argument is supported primarily by North Carolina case law noting that "perpetual leases" are disfavored and "will not be enforced absent language in the lease agreement which expressly or by clear implication indicates that this was the intent of the parties," *Lattimore v. Fisher's Food Shoppe, Inc.*, 313 N.C. 467, 470, 329 S.E.2d 346, 348 (1985), the enforcement of a "perpetual lease" is not at issue here. Rather, the issue is whether the expectation of a lease renewal is a proper consideration in establishing just compensation. See *Almota Farmers Elevator & Warehouse Co. v. U.S.*, 409 U.S. 470, 473–74, 35 L. Ed. 2d 1, 8 (1973) (noting that the expectation of renewal is a proper consideration in establishing just compensation, especially when tenant fixtures (grain elevators) have a substantially long useful life). Further, it is well established that when determining just compensation, "the trial court should admit any relevant evidence that will assist the jury in calculating the fair market value of the property and the diminution in value caused by the condemnation." *M.M. Fowler*, 361 N.C. at 6, 637 S.E.2d at 890 (citing *Abernathy v. S. & W. Ry. Co.*, 150 N.C. 97, 108–09, 63 S.E. 180, 185 (1908)).

Here, at the time of the taking, defendant's lease for its billboard had been tied to the CHS Lot for approximately thirty years. When defendant acquired the billboard and all property rights pertaining thereto, defendant inherited an existing lease with CHS, which operated on a year-to-year basis. Around 26 September 2006, defendant negotiated and entered into a lease agreement with CHS to secure, long term, the site for the billboard. The original term of the lease commenced on 1 August 2007 and ran for a ten-year period with one automatic ten-year extension. Except for some limited circumstances reserved to defendant, neither CHS nor defendant could terminate the lease until 1 August 2027. After 1 August 2027, the lease would automatically renew for successive ten year periods unless either CHS or defendant gave ninety days' notice to terminate prior to the deadline. As of 6 December 2011—the date of the taking in this case—defendant had at least sixteen years to use the CHS Lot and maintain the billboard for outdoor advertising purposes.

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In its Finding of Fact No. 42, which plaintiff-DOT does not challenge, the trial court found the following:

42. A willing, knowledgeable buyer in the market for a billboard location and a willing seller of such property in setting a price would factor in the strength of the rights arising from a lease as improved with a sign structure and the status of compliance with State and local laws, in this case being the protections afforded to the sign owner from being legally permitted and the benefits accruing from the nonconforming nature of the property.

However, because there is no North Carolina case law specifically allowing the expectation of renewal of a lease to be considered in valuing property (here, a billboard), and because the instant case does not provide facts to support such an extension of the law, the trial court erred in finding and concluding that defendant's expectation of renewal "in perpetuity" of its leasehold interest was a compensable property interest.

As we reverse the trial court's findings and conclusions that various components of defendant's leasehold interest were compensable due to the trial court's ultimate conclusion that the billboard was a "permanent leasehold improvement," we note defendant's reliance and the trial court's acceptance of numerous cases from other states which have analyzed these components as being favorable to defendant's position. *See, e.g., The Lamar Corp. v. State Hwy. Comm'n*, 684 So.2d 601, 604 (Miss. 1996) (holding highway billboard located on property condemned for highway expansion was "structure," entitling owner to compensation in eminent domain proceedings, regardless of whether billboard was personal or real property); *State of Okla. ex rel. Dep't of Transp. v. Lamar Adver. of Okla., Inc.*, 335 P.3d 771, 775–76 (Okla. 2014) (holding that where billboards are part of a taking in a condemnation proceeding, such trade fixtures, like billboards, are "generally treated as real property"); *The Lamar Corp. v. City of Richmond*, 402 S.E.2d 31, 34 (Va. 1991) (holding government's condemnation of real estate includes billboards as a matter of law); *Dep't of Transp. v. Drury Displays, Inc.*, 764 N.E.2d 166, 172 (Ill. App. Ct. 2002) ("Billboard owners have a right to just compensation for any condemned sign.").

However, we also note that such authority is not controlling. And thus, we agree with plaintiff-DOT that the trial court erred in finding and concluding that the billboard is a "permanent leasehold improvement" and that lost profits, a DOT permit, and the option to renew are compensable property interests.

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III

[3] In plaintiff-DOT's final argument, it contends that the trial court erred by adopting the wrong measure of compensation and damages. Specifically, plaintiff-DOT argues that the trial court erred by holding that the "bonus value" method of calculating compensation interest was improper and excluding evidence of the "bonus value" method from the trier of fact pursuant to Rules 401 and 403 of the North Carolina Rules of Evidence, and allowing consideration of income attributable to the billboard and the outdoor advertising. We agree.

Section 108 of Chapter 136, titled "Determination of issues other than damages," states as follows: "[T]he judge . . . shall . . . hear and determine any and all issues raised by the pleadings other than the issue of *damages*, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken." N.C.G.S. § 136–108 (emphasis added).

"One of the purposes of G.S. 136-108 is to eliminate from the jury trial any question as to what land [plaintiff-DOT] is condemning and any question as to title." *City of Wilson v. Batten Family, L.L.C.*, 226 N.C. App. 434, 438, 740 S.E.2d 487, 490 (2015) (quoting *N.C. Stat. Hwy. Comm'n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967)). Accordingly, "[a]n order entered pursuant to N.C. Gen. Stat. § 136-108 is an interlocutory order because '[t]he trial court d[oes] not completely resolve the entire case,' but instead 'determine[s] all relevant issues other than damages *in anticipation of a jury trial on the issue of just compensation.*'" *Dep't of Transp. v. BB & R, LLC*, ___ N.C. App. ___, ___, 775 S.E.2d 8, 11 (2015) (emphasis added) (quoting *Dep't of Transp. v. Rowe*, 351 N.C. 172, 174, 521 S.E.2d 707, 708–09 (1999)).

The property interest determined at the Section 108 hearing was the "leasehold interest in the land on which the billboard stood." Defendant's position was that the billboard was a permanent improvement, not personal property, and therefore part of the property interest condemned by DOT and subject to just compensation. However, we have determined that the trial court's classification of the billboard as a permanent leasehold improvement was erroneous, which error resulted in improper measure of compensation. Therefore, because the trial court's ruling on what measure of damages would be included or excluded at a jury trial on damages was based on an erroneous premise, we must also reverse the trial court's order addressing the measure of damages.

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In accordance with the forgoing, the trial court's judgment is
REVERSED.

Judges GEER and McCULLOUGH concur.

EPIC GAMES, INC., PLAINTIFF
v.
TIMOTHY F. MURPHY-JOHNSON, DEFENDANT

No. COA15-454

Filed 19 April 2016

1. Appeal and Error—interlocutory orders

An order permanently staying five claims but permitting a claim for breach of contract was interlocutory but was allowed to proceed where a substantial right existed which could be lost absent immediate appellate review.

2. Arbitration and Mediation—state or federal law—no determination by court—determined by arbitrator

An arbitration case was not reversed where the trial court made no determination as to whether state or federal arbitration law governed. Under either law, the plain language of the arbitration clause, properly interpreted, delegates the threshold issue of substantive arbitrability to the arbitrator—not to the trial court.

3. Arbitration and Mediation—substantive arbitrability—delegated to arbitrator

The trial court erred by enjoining certain disputes from proceeding to arbitration where, according to the plain language of the arbitration clause, the threshold issue of substantive arbitrability was delegated to an arbitrator. Both the plain language of the arbitration clause and its incorporation of the AAA rules demonstrate that the parties agreed the arbitrator should decide issues of substantive arbitrability.

Appeal by defendant from order entered 18 July 2014 by Judge G. Bryan Collins, Jr. in Wake County Superior Court. Heard in the Court of Appeals 6 October 2015.

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Hunton & Williams, LLP, by R. Dennis Fairbanks, Douglas W. Kenyon, Ryan G. Rich, and Michael R. Shebelskie, for plaintiff-appellee.

David E. Shives, PLLC, by David E. Shives, and McGowan, Hood & Felder, LLC, by Chad A. McGowan, William A. McKinnon, and Jordan C. Calloway, for defendant-appellant.

CALABRIA, Judge.

Timothy F. Murphy-Johnson (“Johnson”) appeals from an order granting Epic Games, Inc.’s (“Epic Games”) application for judicial relief to enjoin arbitration in part. We reverse.

I. Background

Defendant, Johnson, is a computer programmer. While attending college in the United Kingdom, he founded a software company, Artificial Studios, and created Reality Engine, a successful computer software program that served as a platform for game developers to construct video games. In March 2005, Timothy Sweeney, the founder and largest shareholder of Epic Games, along with Michael Capps, the company’s president, negotiated with then-twenty-one-year-old Johnson to purchase Reality Engine and recruited him to move from London to North Carolina to work for Epic Games. On 10 May 2005, Johnson executed seven contracts that purported to sell Artificial Studios and Reality Engine and its related intellectual property to Epic Games, in exchange for employment with Epic Games, company stock options, and cash.

The seven contracts can be divided into two groups. First, Epic Games bought Reality Engine from Artificial Studios and then licensed it back to Artificial Studios. Those agreements were labeled “Reality Engine Acquisition Agreement” and “Reality Engine Limited License Agreement.” Second, Epic Games hired Johnson and executed five related contracts. Those agreements were labeled “Stock Option Agreement,” “Residual Rights Acquisition Agreement,” “Non-Competition Agreement,” “Confidentiality Obligations and Intellectual Property Rights Agreement,” and “Employment Agreement.”

The Employment Agreement contained the following arbitration clause:

Any disputes between Employee and Epic in any way concerning his employment, this Agreement or this

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Agreement's enforcement, including the applicability of this Paragraph, shall be submitted at the initiative of either party to mandatory arbitration before a single arbitrator and conducted pursuant to the rules of the American Arbitration Association [(“AAA”)] applicable to the arbitration of employment disputes then in effect, or its successor, provided however, that this Paragraph does not apply to the Confidentiality Obligations and Intellectual Property Rights Agreement referred to in Paragraph 7, and attached as Exhibit A. The decision of the arbitrator may be entered as judgment in any court of the State of North Carolina.

The Employment Agreement also contained a choice-of-law provision: “This Agreement shall be governed by the law of the State of North Carolina[.]”

According to the Stock Option Agreement, Johnson's stock options and bonuses were to vest over a four-year period. For this reason, according to Johnson, he requested that Epic Games draft a strict for-cause termination provision in the Employment Agreement. Johnson wrote Capps:

My lawyer's been explaining to me that “for cause” termination is not something I should count on as ensuring I will be employed, as so long as the determination of cause rests on Epic you can terminate me and the burden of proof would be on me, which means I'd have to litigate at a cost that would be prohibitive. Therefore while he thinks that's “fair” for purely employment terms, he said it's not very sensible to tie the \$75K and stock options related to the deal to employment in this way if I feel this is part of the value for selling my company.

My first question is therefore whether you're prepared to narrow “for cause” to what we initially agreed, namely that I'd have to commit some crime or other malicious act or act of total incompetence, and the burden of proof in “for cause” termination rests on Epic, not me. . . .

Epic Games' Vice President of Business Development, Jay Wilbur, responded:

Our goal is to have you join the Epic family. What you read in the employment agreement is that [sic] same for

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all Epic employees. I'm willing to consider changes but I need a little something back for it.

I'll give you the narrower "for cause" if you give me the Reality Engine marks, domains, websites, etc. as part of that assignment.

Johnson agreed. The narrowed "for cause" provision read:

b. Termination For Cause. Employer may terminate Employee's employment at any time, with or without notice, for any one or more of the following reasons: (i) willful and continual failure to substantially perform his duties with Employer (other than a failure resulting from the Employee's disability) and such failure continues after written notice to Employee providing a reasonable description of the basis for the determination that Employee has failed to perform his duties, (ii) indictment for a criminal offense other than misdemeanors not required to be disclosed under the federal securities laws, (iii) breach of this Agreement in any material respect and such breach is not susceptible to remedy or cure and has already materially damaged the [sic] Epic, or is susceptible to remedy or cure and no such damage has occurred, is not cured or remedied reasonably promptly after written notice to Employee providing a reasonable description of the breach, (iv) Employee's breach of fiduciary duty to Employer, material unauthorized use or disclosure of Employer's confidential or proprietary information or competition with Employer; (iv) [sic] Employee's intentional conduct or omission which reasonably has or is likely to have the effect of materially harming Employer's business; (v) conduct that the Employer has reasonably determined to be dishonest, fraudulent, unlawful or grossly negligent, and such conduct is not cured or remedied reasonably promptly after written notice to Employee providing a reasonable description of the conduct at issue, any one of which shall be deemed "Cause" for dismissal. The determination of whether an event, act or omission constitutes "Cause" hereunder shall rest in the reasonable exercise of the Employer's discretion. . . .

On 20 March 2006, approximately two months before his first round of stock options and bonuses were scheduled to vest, Epic Games fired

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Johnson. When Johnson was “terminated with cause” by Epic Games, he had been employed for less than one year, from 10 May 2005 until 20 March 2006. The termination letter stated, in pertinent part:

We regret to inform you that your employment with Epic Games is terminated with cause effective March 20, 2006 as a result of your repeated performance problems, conduct issues and attendance concerns, which you have failed to remedy despite verbal and written warnings. Epic has determined that these issues at the very least amount to a material failure to devote your entire professional time, attention, skill and energies to Epic’s business and the responsibilities assigned to you by Epic, a willful and continual failure to substantially perform your duties, gross negligence, and intentional conduct that is potentially materially damaging to Epic’s business. Any one of these supports a “for cause” termination.

On 7 March 2014, Johnson filed a demand for arbitration with the AAA alleging breach of contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty. Specifically, Johnson alleged that Epic Games breached the Employment Agreement by wrongfully terminating him; breached the covenant of good faith and fair dealing under the Employment Agreement and the related agreements by depriving him of the benefit of the sale of Artificial Studios and Reality Engine; and breached fiduciary duties owed to him under the Employment Agreement, Stock Option Agreement, and related agreements. Johnson sought the following pertinent forms of relief:

1. [A] declaration that Epic Games, Inc. willfully breached [the] Employment Agreement;
2. . . . [D]amages for [Epic Games’] breach of at least \$11,300,000, representing the value of stock, bonus, and other payments due [Johnson] under the Employment Agreement, or, in the alternative, that [Johnson] be awarded 1,966 shares of undiluted stock in Epic Games, Inc. and \$4,300,000 in other payments due;
3. . . . [A]ny copyright or other intellectual property assignment from [Johnson] or Artificial Studios to Epic be declared null and void;
4. . . . [L]ost profits of Artificial Studios;

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5. . . . [P]unitive damages for conduct that reflects fraud, deceit, or malicious behavior[.]

On 24 March 2014, Epic Games filed a motion, as an application for judicial relief, to enjoin arbitration in part in Wake County Superior Court, alleging that Epic Games never consented to arbitrate certain claims asserted by Johnson. Epic Games also alleged that Johnson did not object for eight years to the termination of his employment. Johnson denied this allegation in his answer and counterclaim.

On 18 April 2014, Johnson removed the case to the United States District Court for the Eastern District of North Carolina. On 2 May 2014, after hearing Epic Games' application to enjoin arbitration in part, the Honorable G. Bryan Collins, Jr. of Wake County Superior Court entered an order in favor of Epic Games. (This order was later stricken due to lack of jurisdiction.) On 9 July 2014, the federal court remanded the case to Wake County Superior Court.

On 18 July 2014, the trial court held a *de novo* hearing on Epic Games' application for judicial relief and to enjoin arbitration in part. Subsequently, the trial court granted Epic Games' application for judicial relief and entered a written order enjoining arbitration of the following claims:

4.1 The third cause of action for breach of fiduciary duty alleged in his arbitration demand.

4.2 The claim for stock or its monetary value under the parties' former Stock Option Agreement.

4.3 The request for a declaration that any copyright or other intellectual property assignment [Johnson] gave to Epic be declared null and void.

4.4 The request for a declaration that any copyright or other intellectual property assignment Artificial Studios, Inc. gave to Epic be declared null and void.

4.5 The claim for lost profits of Artificial Studios.

According to the trial court's order, Johnson could "proceed to arbitrate the issue whether Epic [Games] breached the Employment Agreement by discharging him[.]" However, the court permanently enjoined Johnson from arbitrating the matters identified in paragraphs 4.1 to 4.5. Johnson appeals.

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II. Jurisdiction

[1] The order on appeal permanently stays arbitration of five claims but permits Johnson’s claim of breach of contract to proceed. Although this order is interlocutory,

[a]ppellate review of an interlocutory order is permitted under N.C.G.S. § 7A–27(d)(1) when the order affects a substantial right, and review is permitted under N.C.G.S. § 1–277(a) of any order involving a matter of law or legal inference which affects a substantial right. It is well established that the right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable.

In re W.W. Jarvis & Sons, 194 N.C. App. 799, 802, 671 S.E.2d 534, 536 (2009) (citations, quotation marks, brackets, and ellipses omitted). Because the order enjoins certain claims from proceeding to arbitration, a substantial right exists which may be lost absent immediate appellate review. *Id.* Therefore, this Court has jurisdiction.

III. Analysis**A. Governing Law**

[2] As an initial matter, it is unclear whether the arbitration clause is governed by North Carolina’s Revised Uniform Arbitration Act (“RUAA”), the Federal Arbitration Act (“FAA”), or some other law. Determining whether the FAA applies “is critical because the FAA pre-empts conflicting state law[.]” *Sillins v. Ness*, 164 N.C. App. 755, 757–58, 596 S.E.2d 874, 876 (2004). In this case, although the trial court’s order referenced provisions of the RUAA as conferring upon it the authority to permanently enjoin certain claims asserted by Johnson, the court below made no determination as to whether state or federal arbitration law governs. “[T]he trial court should have addressed the issue of choice of law before addressing any other legal issue.” *Bailey v. Ford Motor Co.*, ___ N.C. App. ___, ___, 780 S.E.2d 920, 924 (2015) (citation omitted), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (2016). This is because

“ ‘[w]hether a contract evidence[s] a transaction involving commerce within the meaning of the [FAA] is a question of fact’ for the trial court[.]” *King v. Bryant*, 225 N.C. App. 340, 344, 737 S.E.2d 802, 806 (2013) (citation omitted), and this Court “cannot make that determination in the first instance on appeal[.]” *Cornelius v. Lipscomb*, 224 N.C. App. 14, 18, 734 S.E.2d 870, 872 (2012).

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T.M.C.S., Inc. v. Marco Contractors, Inc., __ N.C. App. __, __, 780 S.E.2d 588, 592 (2015).

Our appellate courts have remanded cases for the trial court to make the initial determination of whether the FAA governs an arbitration agreement, when that determination was critical to the disposition of the case. *See Eddings v. S. Orthopedic & Musculoskeletal Assocs., P.A.*, 147 N.C. App. 375, 385, 555 S.E.2d 649, 656 (2001) (Greene, J., dissenting) (reasoning that remand was required for trial court to determine initially whether FAA or RUAA governed arbitration clause, because the majority determined initially that FAA applied and resolution of governing law was dispositive to the case), *rev'd per curiam for reasons stated in the dissent*, 356 N.C. 285, 286, 569 S.E.2d at 645, 645 (2002); *see also Sillins v. Ness*, 164 N.C. App. 755, 759, 596 S.E.2d 874, 877 (2004) (reversing and remanding order denying motion to compel arbitration “[b]ecause the question whether the FAA or the UAA governs this arbitration agreement determines whether the trial court properly denied the motion to compel arbitration”).

In the instant case, however, whether federal or state arbitration law governs has no bearing on our disposition of the case. Both the FAA and the RUAA dictate that arbitration is strictly a matter of contract. *See Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (noting “[t]he thrust of the federal law is that arbitration is strictly a matter of contract[.]”) (citation, quotation marks, and brackets omitted); *see also Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 478, 583 S.E.2d 325, 330 (2003) (“[W]hether a dispute is subject to arbitration is a matter of contract law.”), *aff'd per curiam*, 358 N.C. 146, 593 S.E.2d 583 (2004). Under either law, the plain language of the arbitration clause, properly interpreted, delegates the threshold issue of substantive arbitrability to the arbitrator—not to the trial court. Therefore, we decline to reverse and remand the trial court’s ruling on the basis that it did not expressly find whether the FAA applies. *See Sloan Fin. Grp.*, 159 N.C. App. at 479, 583 S.E.2d at 330 (declining to reverse and remand trial court’s order in light of party’s argument that trial court failed to apply the FAA, when the analysis was virtually identical and the same conclusion would be reached under either federal or state law).

B. Standard of Review

“[W]hether a particular dispute is subject to arbitration is a conclusion of law, reviewable *de novo* by the appellate court.” *Carter v. TD Ameritrade Holding Corp.*, 218 N.C. App. 222, 226, 721 S.E.2d 256, 260 (2012) (citation omitted). Issues relating to the interpretation of terms in

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an arbitration clause are matters of law, which this Court reviews *de novo*. See, e.g., *Bailey*, __ N.C. App. at __, 780 S.E.2d at 924 (citation omitted).

C. Arbitrability

[3] Johnson contends that the trial court erred by enjoining certain disputes from proceeding to arbitration, because according to the plain language of the arbitration clause, the threshold issue of substantive arbitrability was delegated to an arbitrator. We agree.

“[O]nly those disputes which the parties agreed to submit to arbitration may be so resolved.” *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 23, 331 S.E.2d 726, 731 (1985). “To determine if a particular dispute is subject to arbitration, this Court must examine the language of the agreement, including the arbitration clause in particular, and determine if the dispute falls within its scope.” *Fontana v. S.E. Anesthesiology Consultants, P.A.*, 221 N.C. App. 582, 589, 729 S.E.2d 80, 86 (2012) (citation omitted). Because arbitration is a matter of contract, contract principles govern the interpretation of an arbitration clause. See, e.g., *Harbour Point Homeowners’ Ass’n, Inc. v. DJF Enters., Inc.*, 201 N.C. App. 720, 725, 688 S.E.2d 47, 51, *disc. review denied*, 364 N.C. 239, 698 S.E.2d 397 (2010).

“When the language of the arbitration clause is ‘clear and unambiguous,’ we may apply the plain meaning rule to interpret its scope.” *Fontana*, 221 N.C. App. at 588–89, 729 S.E.2d at 86. If the language is ambiguous, “[o]ur strong public policy requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration.” *Johnston Cty. v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992); see also *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984) (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, 74 L. Ed. 2d 765, 785 (1983)). Furthermore, “[p]ursuant to well settled contract law principles, the language of the arbitration clause should be strictly construed against the drafter of the clause.” *Harbour Point*, 201 N.C. App. at 725, 688 S.E.2d at 51.

In this case, Epic Games drafted the arbitration clause, which provided in pertinent part:

Any disputes between Employee and Epic in any way concerning his employment, this Agreement or this

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Agreement's enforcement, including the applicability of this Paragraph, shall be submitted at the initiative of either party to mandatory arbitration before a single arbitrator and conducted pursuant to the rules of the [AAA] applicable to the arbitration of employment disputes then in effect, or its successor, provided however that this Paragraph does not apply to the Confidentiality Obligations and Intellectual Property Rights Agreement referred to in Paragraph 7, and attached as Exhibit A.

The plain language of the arbitration clause is clear and unambiguous. It provides for mandatory arbitration of “[a]ny disputes between [Johnson] and Epic [Games] *in any way concerning* his employment, this Agreement or this Agreement’s enforcement[.]” These broad phrases indicate the drafter, Epic Games, intended for an extensive range of issues relating to Johnson’s employment or the Employment Agreement to fall within the arbitration clause’s scope. Moreover, this expansive clause expressly covers disputes “in any way concerning . . . the applicability of this Paragraph[.]” Indeed, the “dispute[.] between [Johnson] and Epic [Games]” on appeal is whether particular claims asserted fall within the scope of the arbitration clause, implicating a matter “concerning” the arbitration clause’s “applicability.” The language Epic Games employed in drafting the clause makes it clear that any disputes regarding whether the arbitration clause applied to a particular claim should be submitted to arbitration and decided by the arbitrator.

Furthermore, the arbitration clause incorporates the rules of the AAA. Under AAA Employment Rule 6(a), “[t]he arbitrator *shall* have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, *scope* or validity of the arbitration agreement.” (emphases added). Although our state appellate courts have never addressed or decided this issue when interpreting an arbitration clause subject to the RUA, this Court recently adopted the majority rule among the federal courts of appeal when interpreting an arbitration clause subject to the FAA. In *Bailey*, this Court held that under the FAA, an arbitration clause which incorporated an arbitral body’s rules, when those rules explicitly delegate the threshold issue of arbitrability to an arbitrator, constitutes “clear and unmistakable” evidence—a more exacting standard than currently exists when interpreting arbitration clauses subject to the RUA—that the parties agreed to arbitrate issues of substantive arbitrability. *Bailey*, __ N.C. App. at __, 780 S.E.2d at 927. Therefore, both the plain language of the arbitration clause and its incorporation of the AAA rules demonstrate that the parties agreed

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the arbitrator should decide issues of substantive arbitrability. Even if this broad clause, by itself, does not resolve the issue of whether the parties agreed to arbitrate arbitrability, the requirement for arbitration to be conducted pursuant to the AAA rules does.

As a secondary matter, we note that although the “Confidentiality Obligations and Intellectual Property Rights Agreement” was excluded from the arbitration clause’s scope, Epic Games concedes in its brief that this agreement merely “prescrib[es] Johnson’s confidentiality obligations and his assignment to Epic of intellectual property created *while employed*.” (emphasis added). Neither party asserts that Johnson’s claims fall within the scope of this agreement. Therefore, that agreement is of no consequence to our analysis or disposition of the case.

IV. Conclusion

Based on its plain language and incorporation of the AAA rules, the arbitration clause drafted by Epic Games, properly interpreted, contained a valid agreement to delegate issues of substantive arbitrability to the arbitrator. Therefore, the trial court was without authority to issue an injunction and determine the scope of arbitrable issues. The trial court’s order must be reversed.

REVERSED.

Judges BRYANT and ZACHARY concur.

 PETER JERARD FARRELL, PETITIONER

v.

 UNITED STATES ARMY BRIGADIER GENERAL, RETIRED, KELLY J. THOMAS, COMMISSIONER OF NC
 DIVISION OF MOTOR VEHICLES, IN HIS OFFICIAL CAPACITY, RESPONDENT

No. COA15-257

Filed 19 April 2016

1. Motor Vehicles—impaired driving—probable cause

The superior court erred in an impaired driving prosecution where it reversed the Department of Motor Vehicles’ conclusion that an officer had reasonable grounds to believe that petitioner was driving while impaired. The findings about petitioner at the scene of the stop were sufficient to establish probable cause.

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2. Evidence—State’s dismissal of criminal DWI charge—not an admission—license revocation

The State’s dismissal of an impaired driving charge and a hand-written entry by the prosecuting attorney that the dismissal was because all of the evidence would be suppressed was not a judicial admission that barred the Department of Motor Vehicles from pursuing a driver’s license revocation under the implied consent laws.

Judge DILLON concurring by separate opinion.

Judge HUNTER, JR. dissenting by separate opinion.

Appeal by respondent from order entered 31 December 2014 by Judge G. Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 10 September 2015.

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

The Farrell Law Group, P.C., by Richard W. Farrell, for petitioner-appellee.

DIETZ, Judge.

In 2013, a Raleigh police officer pulled over a car driven by Petitioner Peter Farrell. When the officer approached Farrell, he noticed that Farrell’s eyes were glassy and bloodshot and that his speech was slightly slurred. The officer returned to his patrol car to wait for backup. When he returned to question Farrell further, the officer noticed a strong odor of mouthwash that wasn’t there before, and a nearly empty bottle of mouthwash on the floorboard. The officer asked Farrell if he had just used mouthwash, and Farrell lied and said he had not. As the officer continued to question Farrell, he admitted that he had used mouthwash.

Farrell ultimately refused the officer’s request to take a breath test after being informed of his implied consent rights and the consequences of refusing to comply. Law enforcement then obtained a blood sample from Farrell, which revealed that Farrell’s blood alcohol level was .18.

Because Farrell refused to submit to a breath test upon request, the Division of Motor Vehicles revoked Farrell’s driving privileges as required by our State’s implied consent laws. Farrell challenged his license revocation and the DMV upheld it following a hearing. Farrell

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appealed the DMV's order to the Wake County Superior Court. There, the court reversed on the ground that the DMV's findings did not support its conclusion that the officer had reasonable grounds to believe Farrell was driving while impaired.

We reverse. As explained in more detail below, the DMV's findings readily support its conclusion. Those findings establish that the arresting officer observed Farrell with glassy, bloodshot eyes and slightly slurred speech; that, while the officer had returned to his patrol car, Farrell used enough mouthwash to create a strong odor detectable by the officer from outside the car; and that Farrell lied to the officer about using the mouthwash. From these facts, a reasonable officer could conclude that Farrell was impaired and had attempted to conceal the alcohol on his breath by using mouthwash and then lying about having done so. Thus, the DMV did not err in concluding that, based on its uncontested findings of fact, the arresting officer had reasonable grounds to believe Farrell was driving while impaired. Accordingly, we reverse the superior court's order.

Facts and Procedural History

Around 1:30 a.m. on 6 September 2013, Raleigh police received a call about a car driving dangerously at a shopping center. Officer David Maucher traveled to the scene and witnesses described the car as a silver four-door Audi sedan.

As Officer Maucher searched the area in his patrol car, he spotted a silver Audi matching the witnesses' descriptions. Officer Maucher ran a check on the plate and discovered that the car had an expired registration and was past its State-required inspection date. Based on this information, Officer Maucher pulled the car over.

Officer Maucher approached the car and found Farrell in the driver's seat, sitting on top of his seat belt, with glassy, bloodshot eyes and "slightly" slurred speech. Farrell admitted that he had consumed multiple beers earlier in the night.

Officer Maucher returned to his patrol car and requested backup. After other officers arrived, Officer Maucher returned to Farrell's car. As he approached the driver's side window, he smelled a strong odor of mouthwash that was not present the first time he approached the vehicle. Officer Maucher also noticed a nearly empty mouthwash bottle on the floorboard. Officer Maucher asked Farrell if he had just used mouthwash and Farrell said he had not. When Officer Maucher told Farrell that he did not believe him, Farrell relented and said he used "a little" mouthwash.

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Officer Maucher then asked Farrell to step out of the vehicle to perform field sobriety tests. Farrell refused to perform the sobriety tests, but indicated that he would take a breath test. Officer Maucher then placed Farrell under arrest for driving while impaired based on the officer's conclusion that Farrell was "under the influence of an impairing substance" and "appreciably impaired by alcohol."

At 2:29 a.m. in the Wake County Detention Center, Officer Maucher, a certified chemical analyst, informed Farrell of his implied consent rights, both orally and in writing in accordance with N.C. Gen. Stat. § 20-16.2(a), and explained to Farrell how to submit a sample of his breath for chemical analysis. After speaking with his brother by phone, Farrell told Officer Maucher that he would not take the breath test. Officer Maucher officially marked Farrell's refusal of chemical analysis at 3:04 a.m. Following this refusal, police obtained a blood sample from Farrell. That test revealed that Farrell had a blood alcohol concentration of .18.

The State charged Farrell with driving while impaired but later dismissed the criminal charges because the prosecutor believed that all evidence resulting from Farrell's stop and arrest would be suppressed under the exclusionary rule.

On 10 October 2013, Farrell received an official notice of license suspension from the DMV, effective 20 October 2013, based on his willful refusal to submit to chemical analysis under N.C. Gen. Stat. § 20-16.2. Upon receiving this notice, Farrell requested a hearing before the DMV.

On 19 February 2014, the DMV found adequate evidence to sustain the revocation of Farrell's driving privileges. Farrell appealed the administrative hearing results to the Wake County Superior Court. On 21 December 2014, the Superior Court reversed the DMV's decision on the basis that the findings of fact did not support the conclusion that Officer Maucher had reasonable grounds to believe Farrell was driving while impaired. The DMV timely appealed.

Analysis

[1] The DMV argues that the superior court erred in reversing its decision. We agree.

In an appeal from a DMV hearing to the superior court under N.C. Gen. Stat. § 20-16.2(e), the superior court acts as an "appellate court." *Johnson v. Robertson*, 227 N.C. App. 281, 286, 742 S.E.2d 603, 607 (2013). It is not a trier of fact. *Id.* By statute, the superior court's review "shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of

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law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license.” N.C. Gen. Stat. § 20-16.2(e).

Here, the superior court held there was “sufficient evidence in the record to support the Findings of Fact” but that “Conclusion of Law of [sic] #2 . . . is not supported by the Findings of Fact.” In Conclusion of Law #2, the DMV concluded that “Officer Maucher had reasonable grounds to believe that [Farrell] had committed an implied consent offense.” For the reasons explained below, we hold that Conclusion of Law #2 is supported by the DMV’s findings.

In a license revocation proceeding, “the term ‘reasonable grounds’ is treated the same as ‘probable cause.’” *Hartman v. Robertson*, 208 N.C. App. 692, 695, 703 S.E.2d 811, 814 (2010). “[P]robable cause exists if the facts and circumstances at that moment and within the arresting officer’s knowledge and of which the officer had reasonably trustworthy information are such that a prudent man would believe that the [suspect] had committed or was committing a crime.” *Id.*

Thus, in reviewing the DMV’s conclusion, we must ask whether the findings of fact establish that Officer Maucher had probable cause to believe Farrell was driving while impaired.¹ As explained below, the findings readily support that conclusion.

The DMV found that, when Officer Maucher approached the car, Farrell’s “eyes were glassy and bloodshot and his speech was slightly slurred.” The officer returned to his patrol car and when he approached Farrell a second time, he “smelt [sic] a significant strong odor of mouthwash coming from” Farrell. Officer Maucher did not smell this odor when he first approached Farrell’s car. Officer Maucher asked Farrell “if he had just washed his mouth out with the mouthwash.” Farrell lied and said he had not, then changed his story and admitted he had used “just a little bit” of mouthwash.

These findings are sufficient to establish probable cause. Farrell’s glassy, bloodshot eyes and slurred speech alone created a strong suspicion that Farrell might be impaired. Then, Farrell acted in an unusual and suspicious manner by using so much mouthwash while the officer had returned to his patrol car that, when the officer returned, there was “a significant strong odor of mouthwash” detectable from outside Farrell’s

1. Farrell does not contend that any particular findings by the DMV are unsupported by the record, nor does he challenge the superior court’s holding that there was “sufficient evidence in the record” to support all findings.

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car. Finally, and perhaps most significantly for the officer's determination of probable cause, Farrell lied to the officer and said he had not used any mouthwash and then, under further questioning, admitted that he had.

From this conduct, the officer had probable cause to believe that Farrell was impaired and sought to hide any odor of alcohol on his breath by using mouthwash and attempting to conceal that he had done so. *See United States v. Wilson*, 699 F.3d 235, 246 (2d Cir. 2012) (finding probable cause to search car for contraband where defendant "lied about having crossed the border at a non-designated border crossing point, and had then admitted to lying," and also admitted to having "scored a little" marijuana while in Canada); *People v. McCowen*, 159 A.D.2d 210, 213 (N.Y. App. Div. 1990) ("Defendant's untruthful answers to officers upon being questioned as to whether he had any gold chains on him provided the predicate for reasonable suspicion to ripen into probable cause."). Accordingly, the DMV properly concluded that Officer Maucher had reasonable grounds (i.e., probable cause) to believe Farrell was driving while impaired.

[2] Farrell next argues that the State's dismissal of his DWI charge is a "judicial admission" that bars the DMV from pursuing a driver's license revocation under the implied consent laws. The record before the DMV did not disclose *why* the State dismissed the DWI charge. On appeal, Farrell submitted a dismissal document from the criminal case in which a handwritten entry, apparently made by the prosecuting attorney, indicates that the State dismissed the DWI charge because all evidence would be "suppressed due to a pre-arrest request violation."

Ordinarily, we do not consider material not submitted to the trial court, and we cannot tell, from the record before us, whether Farrell raised this issue at the DMV hearing despite not producing the dismissal document. In any event, even assuming Farrell properly raised and preserved this issue below, it is meritless. First, as the concurrence observes, no court in this State has ever held that the decision of an assistant district attorney not to pursue criminal charges, made in the exercise of prosecutorial discretion, is binding on other state agencies that can pursue civil remedies for the same underlying conduct. Second, whatever evidence the prosecutor believed would be suppressed in the criminal case would not have been suppressed at the DMV hearing. It is well-settled that, unlike in a criminal proceeding, the exclusionary rule does not apply in a civil license revocation proceeding like this one. *See Combs v. Robertson*, __ N.C. App. __, 767 S.E.2d 925, 928, *appeal dismissed, review denied*, __ N.C. __, 776 S.E.2d 194 (2015); *Hartman*,

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208 N.C. App. at 695, 703 S.E.2d at 814; *Quick v. N.C. Div. of Motor Vehicles*, 125 N.C. App. 123, 127, 479 S.E.2d 226, 228 (1997).

The dissent contends that the U.S. Supreme Court’s recent decision in *Grady v. North Carolina*, 575 U.S. ___ (2015) (per curiam), which held that “the Fourth Amendment’s protection extends beyond the sphere of criminal investigations,” means that we should revisit our holding from *Combs*, *Hartman*, and *Quick*. This confuses the Fourth Amendment’s *protection* (against unreasonable searches) with a court-created *remedy* (the exclusionary rule). The Fourth Amendment itself “says nothing about suppressing evidence” and the U.S. Supreme Court has been clear that the exclusionary rule is a “judicially created remedy” and not a requirement of the Fourth Amendment. *See Davis v. United States*, 564 U.S. 229 (2011); *see also Stone v. Powell*, 428 U.S. 465, 494 at n.37 (1976) (holding that “the exclusionary rule is a judicially created remedy rather than a personal constitutional right”). Thus, although *Grady* held that the Fourth Amendment itself applies in the civil context, it does not follow that the exclusionary rule also must apply there. Indeed, *Grady* dealt solely with whether imposing satellite-based monitoring on sex offenders in a civil proceeding amounted to a search under the Fourth Amendment; the decision does not even mention the exclusionary rule.

We agree with our dissenting colleague that there are strong policy reasons for applying the exclusionary rule in civil license revocation cases. Indeed, the majority in this case also was in the majority in *Combs*, which pointed out that there was a significant split in our sister states on this issue, making it suitable for review by our Supreme Court. *Combs*, ___ N.C. App. at ___, 767 S.E.2d at 929, *appeal dismissed, review denied*, ___ N.C. ___, 776 S.E.2d 194 (2015). Our Supreme Court nevertheless dismissed the *Combs* appeal on the ground that it did not present a substantial constitutional question, and denied discretionary review, leaving our precedent from *Combs*, *Hartman*, and *Quick* intact. *Id.*

We remain bound by that precedent until an intervening decision of our Supreme Court or the U.S. Supreme Court overrules it and—for the reasons explained above—*Grady* does not. Accordingly, we are constrained to reject Farrell’s argument.

Conclusion

For the reasons discussed above, we reverse the superior court.

REVERSED.

Judge DILLON concurs by separate opinion.

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Judge HUNTER, JR. dissents by separate opinion.

DILLON, Judge, concurring.

I agree with the majority's conclusion that the Commissioner's findings are sufficient to establish that the officer had reasonable grounds (i.e. probable cause) to believe Mr. Farrell was driving while impaired.

I agree with the majority's conclusion that the State's dismissal of Mr. Farrell's DWI charge does not bar the DMV from suspending Mr. Farrell's license, notwithstanding the written notation on the DWI dismissal form which suggests that the prosecutor believed that the State's evidence would be "suppressed due to a pre-arrest request violation." The majority reasons that even if Mr. Farrell's Fourth Amendment rights were violated, the exclusionary rule would not apply since the rule is not part of the Fourth Amendment but rather is a judicial remedy that does not apply to a DMV hearing. The dissent argues that the exclusionary rule should apply, notwithstanding our case law to the contrary, in light of the recent United States Supreme Court holding in *Grady v. North Carolina*, 575 U.S. ____ (2015) (per curiam).

I write separately because I do not believe we need to reach the issue of whether the exclusionary rule still applies in a DMV hearing, in light of *Grady*. Specifically, I do not believe the DMV is estopped from making a reasonable grounds (probable cause) determination because of the decision (or reasoning) of an assistant district attorney not to pursue the DWI charge.

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

The Fourth Amendment protects the "right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause . . ." U.S. Const. amend. IV. Our State Constitution protects these same rights by prohibiting general warrants, which "are dangerous to liberty" N.C. Const. art. I, section 20. To protect these rights, both courts created the exclusionary rule, making "all evidence seized in violation of the Constitution . . . inadmissible in a State court as a matter of constitutional law." *State v. Cherry*, 298 N.C. 86, 92, 257 S.E.2d 551, 556-57 (1979).

Historically, the exclusionary rule has not been applied in civil proceedings. *Quick v. North Carolina Div. or Motor Vehicles*, 125 N.C. App. 123, 127, 479 S.E.2d 226, 228 n. 3 (1997) (citing *United States v. Janis*, 428 U.S. 433, 459-60 (1976)). Our Supreme Court "has long viewed

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drivers' license revocations as civil, not criminal, in nature." *State v. Oliver*, 343 N.C. 202, 207–08, 470 S.E.2d 16, 20 (1996) (citations omitted). Consequently, our Court has held that "evidence in a license revocation hearing . . . is not subject to the exclusionary rule." *Hartman v. Robertson*, 208 N.C. App. 692, 698, 703 S.E.2d 811, 816 (2010) (citing *Quick*, 125 N.C. App. at 127 n. 3, 479 S.E.2d at 228–29).

Prior to *Grady v. North Carolina*, 575 U.S. ___, 135 S. Ct. 1368 (2015), our Court noted this impasse, stating, "unless our Supreme Court holds otherwise the Fourth Amendment's exclusionary rule does not apply in civil proceedings such as driver's license revocation hearings . . ." *Combs v. Robertson*, ___ N.C. App. ___, ___, 767 S.E.2d 925 (Feb. 3, 2015) (No. COA14–709). Without the benefit of *Grady*, our Court has been obligated to affirm license revocation decisions that are based upon a record of unconstitutional evidence. See *Hartman*, 208 N.C. App. at 697, 703 S.E.2d at 815 ("Petitioner's second argument is that, because the traffic stop was illegal, the evidence gathered subsequent to the stop should have been suppressed. We disagree."); *Combs*, ___ N.C. App. at ___, 767 S.E.2d at 926–27 ("[P]olice violated Petitioner['s] Fourth Amendment rights by stopping her without reasonable suspicion. . . . Without the exclusionary rule, we must . . . affirm DMV's revocation of [Petitioner's] driver's license.")

This precedent was best critiqued by the United States Supreme Court in *Grady*, in the context of civil satellite based monitoring. At the State level, our Court "placed decisive weight on the fact that the State's monitoring program is civil in nature." *Grady*, 575 U.S. ___, 135 S. Ct. at 1371 (citation omitted). We affirmed the order imposing *Grady*'s satellite based monitoring, and our Supreme Court "summarily dismissed [his] appeal and denied his petition for discretionary review." *Id.* at ___, 135 S. Ct. at 1370 (citation omitted). On appeal, the United States Supreme Court granted *certiorari* and published a *per curiam* opinion. The Court reasoned, "the Fourth Amendment's protection extends beyond the sphere of criminal investigations." *Id.* at ___, 135 S. Ct. at 1371 (citing *Ontario v. Quon*, 560 U.S. 746, 755 (2010); *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967)). The *Grady* Court held the monitoring program "is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search." *Grady*, 575 U.S. at ___, 135 S. Ct. at 1371. The Court vacated and remanded the case, directing "North Carolina courts [to] examine whether the States' monitoring program is reasonable—when properly viewed as a [Fourth Amendment] search . . ." *Id.*

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Other states have resolved this issue in their highest courts, protecting Fourth Amendment rights by applying the exclusionary rule to license revocation proceedings. See *Olson v. Comm’r of Pub. Safety*, 371 N.W.2d 552, 556 (Minn. 1985); *Pooler v. Motor Vehicles Div.*, 306 Or. 47, 755 P.2d 701 (1988); *Vermont v. Lussier*, 171 Vt. 19, 757 A.2d 1017 (2000); *State v. Nickerson*, 170 Vt. 654, 756 A.2d 1240 (2000). With the hindsight of *Grady*, our Supreme Court is now ripe to consider whether the exclusionary rule should apply in civil license revocation proceedings, to allow the trial court to determine whether a police search was “reasonable” and if any evidence obtained should be suppressed.

I would hold the majority’s view of the standard of review is erroneously applied in this case and others arising from the revocation of driver’s licenses. As the majority states, “the Superior Court review” shall be limited to whether there is sufficient evidence in the record to support the Commissioner’s findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license. N.C. Gen. Stat. § 20.162(e) (2015).

Here, I concur that Appellant has not produced record evidence that the procurement of his breathalyzer was the result of an illegal search. Under the procedures used to revoke his license, he could not do so because a hearing officer is not a judicial officer with the jurisdictional mandate to enforce an illegal search. Assuming *arguendo* that the search was illegal, then in that event, I would hold in favor of remanding to the Superior Court to make findings on the constitutional issue on whether the Commissioner committed an error of law in revoking the license. Otherwise, unconstitutionally procured evidence could be used to support a governmental action to revoke a license. The use of the writ of *certiorari* to make findings of fact to reach legal issues not within the jurisdictional mandate of a body they are reviewing is not novel but a traditional use of the writ. See *Wilson Realty Co. v. City and County Planning Bd. for City of Winston-Salem and Forsyth County*, 243 N.C. 648, 655–56, 92 S.E.2d 82, 87 (1956) (“Certiorari, as an independent remedy, is designed to review and examine into proceedings of lower tribunals and to ascertain their validity and correct errors therein. The writ issues to review proceedings of inferior boards and tribunals which are judicial or quasi[-]judicial in nature.”) (citation omitted).

IN THE COURT OF APPEALS

GUILFORD CTY. EX REL. ST. PETER v. LYON

[247 N.C. App. 74 (2016)]

GUILFORD COUNTY BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT UNIT, EX REL
DEANA J. ST. PETER, PLAINTIFF

v.

SCOTT L. LYON, DEFENDANT

No. COA15-332

Filed 19 April 2016

1. Appeal and Error—interlocutory order—appeal from final order

Plaintiff's arguments were considered on appeal in a child support enforcement case where she appealed within 30 days of the final order (in November) and specifically appealed from the final order and an earlier, interlocutory order from June. While her arguments focused on the June order, she argued that the November order was based on the June order.

2. Child Custody and Support—motion to modify—changed circumstances converted sua sponte into fraud—insufficient notice

The trial court abused its discretion in a child support enforcement action by using a sua sponte motion to convert defendant's motion to modify child support due to changed circumstances into a Rule 60 motion for modification based on fraud. Plaintiff was entirely without notice that the issue of fraud would be addressed at the hearing.

3. Child Custody and Support—defendant's motion for modification

In a child support enforcement action reversed on other grounds, the trial court was ordered to base its ruling only on defendant's motion for modification.

Appeal by intervenor from orders entered 24 June 2014 by Judge Angela Bullard Fox and 6 November 2014 by Judge Wendy Enochs in District Court, Guilford County. Heard in the Court of Appeals 23 September 2015.

Wyatt Early Harris Wheeler, LLP, by Lee C. Hawley, for intervenor-appellant.

Walker & Bullard, P.A., by Daniel S. Bullard, for defendant-appellee.

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[247 N.C. App. 74 (2016)]

STROUD, Judge.

The trial court *sua sponte* raised and granted a motion under Rule 60 of the North Carolina Rules of Civil Procedure which vacated a prior permanent child support order and set temporary child support; the trial court subsequently entered a new order setting permanent child support. Intervenor Deana St. Peter appeals both orders. Because defendant's motion to modify child support gave intervenor no notice of any allegations of fraud or duress in entry of the prior permanent child support order and intervenor did not consent but instead specifically objected to consideration of these issues, the trial court erred by *sua sponte* amending the defendant's motion under North Carolina General Statute § 50-13.7(a) and vacating the December 2013 order under Rule 60(b). We therefore vacate the trial court's June 2014 order based upon the *sua sponte* Rule 60 motion, vacate the trial court's subsequent November 2014 child support order based upon the erroneous June 2014 order, and remand for further proceedings consistent with this opinion.

I. Background

In March of 2001 intervenor Deana St. Peter and defendant Scott Lyon were married; the couple had one child born in July of 2005, and in October of 2012 they were divorced.¹ On 15 January 2013, plaintiff Guilford County Child Support Enforcement Agency on behalf of Deana St. Peter, filed a complaint against defendant for failure "to pay support or adequate support" and requested that the trial court establish defendant's child support obligation. Defendant failed to answer, and in April of 2013, plaintiff requested and the assistant clerk of superior court entered an entry of default.

In August of 2013, the trial court entered a temporary child support order which also determined that defendant owed \$2,808.00 in arrears. A hearing to establish permanent child support was held on 9 October 2013; the order from this hearing was signed on 4 November 2013 and filed on 17 December 2013 ("December 2013 order"). The December 2013 order deviated from the child support guidelines and required defendant to pay \$325.00 per month, "of which \$268.25 is to apply toward the current child support obligation and of which \$56.75 is to apply toward the arrears" amount of \$2,555.47. In the findings of fact, the trial court noted:

1. These background facts were alleged in the complaint in this case.

3. The custody issue was settled by Court Order, effective 10/01/2013. The Plaintiff has the child residing with her 225 nights per year, and the Defendant has the child residing with him 140 nights per year.

....

6. The Defendant addresses the Court and requests a deviation from the North Carolina Child Support Guidelines. The Defendant tells the Court that he wishes to pay the sum of \$325.00 per month, of which \$268.25 should apply toward the current child support, and of which \$56.75 should apply toward the arrears. The Defendant added the daycare expense to the medical insurance premium that the Plaintiff pays and divided that number by two to get the \$325.00 that he wishes to pay.²

The December 2013 order was not appealed. On 16 January 2014, defendant filed a motion to modify the December 2013 child support order stating that “[a]t the time of current support order I agreed to pay more than the guidelines. I can no longer afford this amount and request that it be reduced to the guideline amount.”

In June of 2014, after a hearing regarding defendant’s motion to modify child support, the trial court found as fact:

3. The Plaintiff told Defendant prior to the October hearing that if Defendant did not ask the Court for a deviation and agree to this amount, that Plaintiff would not allow Defendant to see their son.
4. Fearing that Plaintiff would indeed keep their son from him, Defendant asked the Court during the October 9, 2013 hearing to deviate from the N.C. Child Support Guideline Amount of \$51.00 per month (substantially lower than the \$268.25 he was fraudulently coerced into paying). No findings were made regarding the ability of Defendant to pay or the needs of the child justifying deviation of the ordered amount. . . .

2. Based on the transcript of the hearing defendant explained to the trial court how he determined the amount and requested “a court order” be entered according to the parties’ prior “verbal agreement” to the deviation.

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[247 N.C. App. 74 (2016)]

5. Defendant's fear that he would be kept from his son was reasonable considering the past conduct of the Plaintiff toward the Defendant.

. . . .

10. Plaintiff has custody of the parties' child . . . for 225 nights per year. Defendant has custody of the parties' child for 140 nights per year.

The trial court further found “[t]he Court herein, *sua sponte*, after considering the substance of Defendant’s pleadings and testimony, allows amendment of Defendant’s pleadings to conform to the evidence per N.C. R. Civ. P. 15(b) and will consider such as a Motion for Relief and a Motion to set a temporary child support payment.” Ultimately, the trial court granted its own *sua sponte* motion for relief from judgment and temporarily modified child support to \$69.00 “toward the current child support” and \$56.75 “toward the arrears” with permanent child support to be set at a later date.

In September of 2014, Deana St. Peter filed a motion to intervene. In November of 2014, after a hearing on Ms. St. Peter’s motion to intervene and permanent child support, the trial court allowed the motion to intervene and ordered defendant to pay \$92.00 per month as permanent child support. Intervenor appeals both the June and November 2014 orders.

II. Basis for Appeal

[1] Defendant contends that

appellant’s appeal should be dismissed because she failed to appeal Judge Fox’s [June 2014] Rule 60 order within thirty days, thereafter failed to request a deviation from the child support guidelines prior to obtaining the permanent child support order filed November 6, 2014, and by making no reference to such permanent order in her statement of proposed issues in the record on appeal, or in the substantive argument in her brief.

(Original in all caps.) (Quotation marks omitted.) But the June 2014 order was clearly a temporary and thus interlocutory order. *See Banner v. Hatcher*, 124 N.C. App. 439, 441, 477 S.E.2d 249, 251 (1996) (“As we have recognized, an order providing for temporary child support is interlocutory and not an immediately appealable final order.”) Intervenor’s notice of appeal was filed within thirty days of the final November 2014 order setting permanent support and specifically appealed from both the June and November 2014 orders. Defendant further seems to argue that

because intervenor allegedly did not request deviation from the Child Support Guidelines at the hearing for the permanent order, she cannot make that argument here. Yet intervenor does not actually make this argument on appeal; intervenor's arguments are all focused on the errors in the June 2014 interlocutory order and do not ask this Court to address whether a deviation from the child support guidelines is appropriate. Finally, it is of no concern that intervenor did not make any substantive argument regarding the November 2014 order. Intervenor argues that the November 2014 order was entered in error because it was based upon the erroneous June 2014 interlocutory order and thus focuses her arguments on that prior order; this is entirely logical and permissible, and therefore we will consider plaintiff's arguments on appeal.

III. June 2014 Order

[2] Intervenor first contends that “the trial court abused its discretion in utilizing N.C. R. Civ. P. 15(b) to *sua sponte* amend defendant's motion to modify child support to be treated as a motion for relief under N.C. R. Civ. P. 60(b).” (Original in all caps.) Intervenor argues that she was prejudiced by the trial court's spontaneous motion as she had no notice that relief from judgment would be sought, particularly on the grounds of fraud. We agree.

North Carolina Rule of Civil Procedure 15(b) provides that

[w]hen issues not raised by the pleadings are tried by the express or implied *consent of the parties*, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. *If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.*

N. C. Gen. Stat. § 1A-1, Rule 15(b) (2013) (emphasis added).

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In *Jackson v. Jackson*, this Court vacated portions of a trial court's order which amended the pleadings pursuant to North Carolina Rule of Civil Procedure 15(b):

The Rules of Civil Procedure provide for and encourage liberal amendments to conform pleadings and evidence after entry of judgment under Rules 15(b), 59 and 60. *Discretion in allowing amendment of pleadings is vested in the trial judge and his ruling will not be disturbed on appeal absent a showing of prejudice to the opposing party. However, notwithstanding such discretion and despite the broad remedial purposes of these provisions, Rule 15(b) and Rule 59 do not permit judgment by ambush.*

Our Supreme Court has held that an amendment under Rule 15(b) is appropriate only where sufficient evidence has been presented at trial *without objection* to raise an issue not originally pleaded and where the parties understood, or reasonably should have understood, that the introduction of such evidence was directed to an issue not embraced by the pleadings. Under Rule 59, where a trial court opens an order, makes additional findings of fact and conclusions of law, and enters an amended order, the reasoning must be the same.

Here, the record indicates that the trial court held a hearing on 19 December 2006 to address plaintiff's third and fourth motions for order to show cause and order of contempt and defendant's motion to dismiss, motion for a more definite statement, and motion for sanctions and attorney's fees with respect to plaintiff's fourth motion for order to show cause and order of contempt. The record gives no indication either party understood or reasonably should have understood the evidence presented or the arguments made to be grounds for the modification of custody made by the trial court when it entered its Contempt Order. Furthermore, pursuant to subsequent motions to modify, the trial court entered an Amended Order amending its Contempt Order, but did not elect to take any new evidence.

Despite re-captioning the Contempt Order "Order Modifying Custody Order and for Contempt, and for

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the Appointment of a Parenting Coordinator” the trial court effectively denied both parties an opportunity to submit evidence or present arguments regarding custody modification.

192 N.C. App. 455, 462-64, 665 S.E.2d 545, 550-51 (2008) (citations, quotation marks, ellipses, and brackets omitted).

In this case, there were substantial differences between the motion defendant filed and noticed for hearing and the motion the trial court ruled upon *sua sponte*. See generally N.C. Gen. Stat. §§ 1A-1, Rule 60(b)(3); 50-13.7(a) (2013). North Carolina General Statute § 50-13.7 allows a child support order to be modified based upon “a showing of changed circumstances[;]” this type of motion calls for evidence “of changed circumstances by either party or anyone interested” which would justify modification of the child support obligation. N.C. Gen. Stat. § 50-13.7(a). North Carolina Rule of Civil Procedure Rule 60 provides that a party may be entirely relieved from a judgment upon a showing of “[f]raud . . . , misrepresentation, or other misconduct of an adverse party;” this type of motion would call for evidence of fraud or misconduct of a party which caused the order to be entered. N.C. Gen. Stat. § 1A-1, Rule 60(b)(3). Thus, North Carolina General Statute § 50-13.7 and North Carolina Rule of Civil Procedure Rule 60 require vastly different evidentiary showings and provide for different forms of relief. See generally N.C. Gen. Stat. §§ 1A-1, Rule 60; 50-13.7. The difference between the two statutes is much more than, as the trial court stated, “semantics” or “split[ting] hairs.” See generally N.C. Gen. Stat. §§ 1A-1, Rule 60; 50-13.7.

Under Rule 15(b), the defendant’s evidence regarding “fraud” or “coercion” was “objected to at the trial on the ground that it is not within the issues raised by the pleadings[;]” so the trial court could allow the pleadings to be amended and “shall do so freely” *if* (1) “the presentation of the merits of the action will be served thereby[,] and [(2)] the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.” N.C. Gen. Stat. § 1A-1, Rule 15(b). In addition, even if the trial court believes that the evidence will serve “the merits of the action[,]” the trial court may consider granting “a continuance to enable the objecting party to meet such evidence.” *Id.* Here, the trial court found that intervenor was not prejudiced because “the child support order is temporary and Plaintiff has the representation of a knowledgeable and prepared attorney. Further, Plaintiff is aware of her own actions to fraudulently coerce Defendant to pay more child support than he owes under the Guidelines and more than he can afford to pay.”

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First, “the child support order is temporary” is an ambiguous finding of fact. Presumably, the trial court was referring to the order which it was actually entering which vacated the December 2013 order and set temporary child support with another hearing to establish a permanent obligation. However, the fact remains that the existing permanent order was being set aside, without prior notice to intervenor of any motion to do so, to allow entry of a new temporary order followed by a new permanent child support order, without any showing of a change in circumstances. The trial court’s action was prejudicial to intervenor, particularly since the trial court did not allow a continuance which would at least permit intervenor the opportunity to prepare for a hearing on a Rule 60 motion.

Defendant filed a motion to modify child support based *only* upon a change in his financial circumstances, and thus, as intervenor’s attorney explained, intervenor came to the hearing prepared to present evidence regarding a lack of change in financial circumstances. Since the trial court *sua sponte* changed defendant’s motion to modify into a Rule 60 motion, plaintiff was entirely without notice that the issue of alleged fraud would be addressed at the hearing. Based upon defendant’s motion, plaintiff could expect that the trial court would be considering only the financial circumstances of the parties and the burden would be upon defendant to show how his circumstances had changed since entry of the prior order. See generally N.C. Gen. Stat. § 50-13.7. But despite intervenor’s attorney’s objections, including objections to the lack of prior notice of any allegations of fraud in entry of the prior order and the resulting prejudice, the trial court chose to set aside the entire prior child support judgment. The trial court’s *sua sponte* action placed intervenor in an entirely different procedural posture with substantively different issues to defend than were raised by the motion to modify child support.

We conclude that by *sua sponte* raising and granting a Rule 60 motion on defendant’s behalf, the trial court abused its discretion and created a “judgment by ambush.” *Jackson*, 192 N.C. App. at 462, 665 S.E.2d at 550. Therefore, we vacate and remand the trial court’s June 2014 order. Since the later order was based entirely upon the June 2014 order, we also vacate the November 2014 order setting permanent child support. Because we are vacating the June 2014 order and remanding for entry of a new order addressing defendant’s motion to modify child support, we need not address intervenor’s other issues on appeal, but we will address some issues that may arise on remand to provide guidance to the trial court.³

3. This opinion has no effect upon other subsequent orders issued by the trial court regarding other issues such as child custody and domestic violence.

[3] In the June 2014 order, the trial court failed to make any findings of fact regarding any change in circumstances from the time of the October 2013 hearing on the permanent child support order until the date of the March 2014 hearing on the motion to modify. On remand, the trial court should consider defendant's motion to modify as it was filed, based upon his allegations and the evidence of both parties regarding the alleged change in circumstances presented at the hearing on 5 March 2014, and should make findings of facts and conclusions of law based upon those allegations and that evidence. In addition, for guidance on remand, we note that the trial court's findings of fact could not in any event properly support a conclusion of law that plaintiff committed "fraud upon the defendant"⁴:

While fraud has no all-embracing definition and is better left undefined lest crafty men find a way of committing fraud which avoids the definition, the following essential elements of actionable fraud are well established: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injury party.

A subsisting or ascertainable facts, as distinguished from a matter of opinion or representation relating to future prospects, must be misrepresented.

Ragsdale v. Kennedy, 286 N.C. 130, 138-39, 209 S.E.2d 494, 500 (1974) (citations omitted).

The "representation" found by the trial court was plaintiff's alleged statements that she would not allow defendant to see their son in the future unless he agreed to the child support deviation from the guidelines. *Id.* Based upon the trial court's findings, this "representation" was not "false[.]" nor was it a representation of past or existing fact; rather, it was a representation of plaintiff's belief or intention regarding her future actions. *Id.* If she were to follow through on her statements and not allow defendant to see their son in violation of the custody order, her

4. The trial court made no actual conclusions of law about fraud or coercion beyond any which may be mixed with the findings of fact but simply granted "Defendant's amended pleadings of Motion for Relief and Motion to Set Temporary Current Child Support and Arrearage Payment[.]"

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action would be potentially punishable by contempt, but her statement of intent was not fraudulent.⁵ *See id.*

Since the trial court made no substantive conclusions of law, we cannot discern if the order was based in the alternative upon the trial court's determination that in the December 2013 order "[n]o findings were made regarding the ability of Defendant to pay or the needs of the child justifying deviation of the ordered amount[,]” and thus deviation from the child support guidelines was in error. The December 2013 order was not appealed by either party. Even assuming *arguendo* that the December 2013 order should have included additional findings of fact supporting deviation, one district court judge cannot overrule another. *See generally Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (“The well[-]established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another’s errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.”) On remand, the trial court must consider the December 2013 order as a valid and enforceable order and base its ruling *only* upon defendant’s motion for modification.⁶

IV. Conclusion

For the foregoing reasons, we vacate the June and November 2014 orders and remand for entry of an order consistent with this opinion addressing defendant’s motion for modification of child support based upon the hearing held on 5 March 2014.

VACATED and REMANDED.

Judges CALABRIA and INMAN concur.

5. Intervenor did not admit to the statements defendant claimed she had made, and we are basing this discussion only upon the trial court’s findings of fact.

6. Of course, both intervenor and defendant remain free to file any new or additional motions they wish, and we express no opinion on any potential future proceedings beyond the remand of the orders on appeal.

IN RE K.C.

[247 N.C. App. 84 (2016)]

IN THE MATTER OF K.C., A MINOR CHILD

No. COA15-960

Filed 19 April 2016

Termination of Parental Rights—neglect—abandonment—sufficiency of findings

The trial court erred by terminating respondent mother's parental rights on the grounds of neglect by abandonment. Respondent paid her court-ordered child support since petitioner gained sole custody of the minor child. Although respondent did not consistently attend all of her scheduled visitations, she still visited. The pertinent time period of lack of contact was not voluntary and therefore could not support a finding that respondent intended to abandon.

Appeal by respondent from judgment entered 22 May 2015 by Judge Donna Forga in Clay County District Court. Heard in the Court of Appeals 4 April 2016.

James L. Blomeley, Jr. for petitioner-appellee father.

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

DAVIS, Judge.

T.S. ("Respondent") appeals from the trial court's order terminating her parental rights to her minor child, "Karl."¹ After careful review, we reverse.

Factual Background

At the time Karl was born in 2007, Respondent was married to his biological father, G.C. ("Petitioner"). They subsequently divorced, and pursuant to a Virginia court order the parties had joint custody of Karl for alternating two-week periods. In February 2009, Karl was placed in the sole custody of Petitioner after Respondent failed to return Karl in accordance with the Virginia custody order. While Karl was in Petitioner's custody, Respondent paid Petitioner \$1 per month in court-ordered child

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

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support. In January 2010, after Petitioner and Karl had moved to North Carolina, the Clay County District Court modified the custody order by awarding Respondent visitation that was to be supervised until she successfully completed six consecutive monthly visits with Karl. It took Respondent a year and a half to complete six consecutive visits and fulfill this condition. Between March 2012 and October 2013, Respondent had nine visits with Karl.

On 14 March 2014, Petitioner filed a petition to terminate Respondent's parental rights to Karl on the ground of abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). On 10 April 2014, Respondent contacted Petitioner to seek a visit with Karl. Petitioner denied this request because Karl's therapist had determined that his visits with Respondent should be suspended indefinitely.² On 30 May 2014, Petitioner filed an amended petition that included the additional ground of neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1).

On 4 May 2015, the trial court conducted a hearing on the amended petition. The trial court entered an order on 22 May 2015 terminating Respondent's parental rights based on the ground of neglect under N.C. Gen. Stat. § 7B-1111(a)(1). Respondent filed a timely notice of appeal.

Analysis

On appeal, Respondent argues that the trial court erred by terminating her parental rights because its findings were insufficient to support its conclusion that she neglected Karl pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). We agree.

Our review on appeal is limited to a determination of whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether its findings of fact support its conclusions of law. *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 5, *disc. review denied*, 358 N.C. 543, 599 S.E.2d 42 (2004). Under N.C. Gen. Stat. § 7B-1111(a)(1), "[t]he trial court may terminate the parental rights to a child upon a finding that the parent has neglected the child." *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 427 (2003).

Included in the statutory definition of a "neglected juvenile" is a "juvenile . . . who has been abandoned . . ." N.C. Gen. Stat. § 7B-101(15) (2015). *See Humphrey*, 156 N.C. App. at 540-41, 577 S.E.2d at 427 (holding

2. A prior consent judgment entered into by the parties authorized Karl's therapist "to cease [Respondent's] visits for a period of time, or to modify them based upon the therapeutic needs of the child."

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parental rights may be terminated under N.C. Gen. Stat. § 7B-1111(a)(1) for neglect due to abandonment of the juvenile). “Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.” *In re S.R.G.*, 195 N.C. App. 79, 84, 671 S.E.2d 47, 51 (2009) (citation and quotation marks omitted). Abandonment has also been defined as

wilful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.

Humphrey, 156 N.C. App. at 540, 577 S.E.2d at 427 (citation omitted).

We have also held that “[w]illfulness is more than an intention to do a thing; there must also be purpose and deliberation.” *S.R.G.*, 195 N.C. App. at 84, 671 S.E.2d at 51 (citation and quotation marks omitted). “Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence.” *Id.* (citation and quotation marks omitted).

“A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding.” *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997). Thus, in order to terminate a parent’s rights on the ground of neglect by abandonment, the trial court must make findings reflecting the fact that the parent has acted in a way that “manifests a willful determination to forego all parental duties and relinquish all parental claims to the child” as of the time of the termination hearing. *S.R.G.*, 195 N.C. App. at 84, 671 S.E.2d at 51.

Here, the trial court made the following findings in support of its conclusion that Respondent had neglected Karl by abandonment:

e. While the case was under the jurisdiction of the Virginia courts, the initial determination of custody gave the parties joint custody of [Karl], with each party having [Karl] for one half of the time, alternating every two weeks. In February of 2009, [Petitioner] filed [a] motion in the cause after [Respondent] failed to return the child to him, and the Court placed the sole custody of the child with [Petitioner].

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f. Thereafter, jurisdiction was assumed by the State of North Carolina. In an order entered in January, 2010, the Court modified the Respondent's visitation so that it would be supervised until the Respondent successfully completed six consecutive monthly visits with the child. The Respondent was very inconsistent in her visits, and it was not until a year and a half later that she was able to complete six consecutive monthly visits.

g. The Respondent's last visit with the child was on October 13, 2013. During the period from March 2012 through October 2013, the Respondent had nine visits with the child. The last time that she requested a visit was on April 10, 2014, five days after being served with the Petition in this case. In response to that request, the Petitioner declined her request on the grounds that the child's therapist determined that visits should be suspended indefinitely pursuant to the consent order in Cherokee County file number 09 CVD 181. The Respondent has had no contact with the child in any fashion since October of 2013.

....

i. Since that time, the child has not asked for contact with the Respondent, although he would talk to her briefly if she called. Respondent has had only three phone conversations with the child since 2012, and none at all since October of 2013. In addition, the Respondent has not sent her son any cards or letters, nor has she sent him gifts at any time. In April 2014 when the Respondent called the Petitioner to ask for a visit she did not ask to speak to the child.

j. The Respondent pays \$1.00 each month in child support for the child. She receives disability payments from the federal government, but does not apparently receive any additional payments intended to benefit the child.

Respondent does not dispute these findings. Nevertheless, we conclude that the trial court's findings do not support its conclusion that Respondent neglected Karl by abandonment.

The trial court's findings demonstrate that Respondent had paid her court-ordered child support since Petitioner gained sole custody of Karl. Although Respondent did not consistently attend all of her scheduled

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visitations with Karl, she still visited with him nine times between March 2012 and October 2013, and she spoke with him on the phone three times after 2012. She also requested in April 2014 to visit with Karl, but this request was denied based on the decision of Karl's therapist. These actions are not consistent with abandonment as defined under North Carolina law.

Furthermore, the fact that Respondent did not visit Karl between 10 April 2014 and the 4 May 2015 hearing cannot be taken as evidence of abandonment. The trial court's findings indicate that Respondent was denied visitation during that period because "the Petitioner declined her request on the grounds that the child's therapist determined that visits should be suspended indefinitely . . ." Thus, this lack of contact was not voluntary and therefore cannot support a finding that Respondent intended to abandon Karl. *See In re T.C.B.*, 166 N.C. App. 482, 486-87, 602 S.E.2d 17, 20 (2004) (holding that trial court's conclusion of abandonment was not supported by its findings regarding lack of visits given that respondent's attorney instructed him not to have any contact with child and subsequent protection plan disallowed visitation).

In *Bost v. Van Nortwick*, 117 N.C. App. 1, 449 S.E.2d 911 (1994), *appeal dismissed*, 340 N.C. 109, 458 S.E.2d 183 (1995), this Court held that the trial court erred in determining that the respondent willfully abandoned his minor children when he visited them during Christmas, attended three of their soccer games, and told their mother he wanted to set up child support payments. *Id.* at 18-19, 449 S.E.2d at 921. This Court concluded that the respondent's actions did not "evinced a settled purpose to forego all parental duties and relinquish all parental claims to the children." *Id.* at 19, 449 S.E.2d at 921. Similarly, in the present case, in addition to paying child support, Respondent visited Karl nine times from March 2012 through October 2013 and asked for further visitation in April 2014 but was denied.

The facts here are distinguishable from cases where this Court has upheld terminations of parental rights on abandonment grounds. *See, e.g., In re C.J.H.*, ___ N.C. App. ___, ___, 772 S.E.2d 82, 92 (2015) (affirming finding of abandonment because even though respondent made "last-minute child support payments and requests for visitation," during the relevant period "respondent did not visit the juvenile, failed to pay child support in a timely and consistent manner, and failed to make a good faith effort to maintain or reestablish a relationship with the juvenile"); *In re Adoption of Searle*, 82 N.C. App. 273, 276, 346 S.E.2d 511, 514 (1986) (holding that evidence of one \$500 payment by respondent — without

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any other activity during the relevant time period — was sufficient to support jury’s determination that father willfully abandoned child).

In sum, the evidence does not support a conclusion that Respondent abandoned Karl. Therefore, the trial court erred in concluding that Respondent’s parental rights to Karl should be terminated based on the ground of neglect by abandonment under N.C. Gen. Stat. § 7B-1111(a)(1).

Conclusion

For the reasons stated above, the trial court’s 22 May 2015 order is reversed.

REVERSED.

Judges HUNTER, JR. and ZACHARY concur.

IN THE MATTER OF M.S.

No. COA15-1162

Filed 19 April 2016

1. Jurisdiction—standing—parent—stepfather—no record evidence became parent through adoption or otherwise qualified

A stepfather did not have standing to appeal in an abused and neglected juvenile case. N.C.G.S. § 7B-1002(4), which permits a “parent” to appeal from an order of adjudication and disposition, does not authorize an appeal by a stepparent in the absence of record evidence that the stepparent has become the child’s parent through adoption or is otherwise qualified under the statute.

2. Child Abuse, Dependency, and Neglect—abuse—neglect—indecent liberties—improper care—environment injurious to welfare

The trial court did not err by concluding that a minor child was an abused and neglected juvenile. Ample evidence supported the findings of fact which established that the stepfather committed indecent liberties upon the minor child and that she was an abused juvenile. The trial court’s findings also established that the child did not receive proper care from respondent mother and her stepfather, and that she resided in an environment injurious to her welfare.

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[247 N.C. App. 89 (2016)]

Appeal by respondent-mother and the minor's stepfather from adjudication and disposition order entered 1 May 2015 by Judge Addie H. Rawls in Harnett County District Court. Heard in the Court of Appeals 4 April 2016.

Duncan B. McCormick for petitioner-appellee Harnett County Department of Social Services.

Marie H. Mobley for guardian ad litem.

Richard Croutharmel for respondent-mother, appellant.

David A. Perez for respondent-stepfather, appellant.

ZACHARY, Judge.

Following the adjudication of the minor child, Mary,¹ as an abused and neglected juvenile, an appeal was taken to this Court by Mary's mother (respondent), and by J.C., who is married to Mary's mother and is referred to in court documents as her "stepfather." On appeal, respondent's counsel has filed a "no-merit" brief pursuant to N.C.R. App. P. Rule 3.1(d) (2014), and J.C. has offered arguments regarding the merits of the trial court's adjudication and disposition orders. We conclude that there is no basis for reversal of the trial court's order, and that the record fails to establish that J.C. has standing to appeal from the trial court's order. Accordingly, we affirm the trial court's order and dismiss J.C.'s appeal.

I. Background

On 22 July 2014, the Harnett County Department of Social Services ("DSS") filed a juvenile petition alleging that Mary was an abused and neglected juvenile and obtained nonsecure custody of Mary. The petition alleged that Mary was born in the Philippines in 2000, that her father was deceased, and that J.C., who was identified as Mary's "step-father," had sexually abused Mary over a period of years.

Two hearings were conducted on the petition in December 2014 and March 2015. Mary, who was fourteen at the time of the hearings, testified that J.C. had sexually molested her on numerous occasions when she was between nine and thirteen years old. Mary provided specific details

1. To protect the child's privacy, we refer to her by the pseudonym Mary in this opinion.

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of J.C.'s abuse, which had included inappropriate touching of Mary's private parts, J.C. touching Mary with his penis, and at least one attempt by J.C. to undress Mary. Mary had reported the incidents to respondent, who refused to believe her or to allow her to participate in professional services such as a child medical examination or therapy. Mary's older sister, who was nineteen years old at the time of the hearing, testified that J.C. had also molested her when she was eleven or twelve years old.

On 1 May 2015, the trial court entered an order containing more than sixty findings of fact describing Mary's home situation and J.C.'s sexual abuse of Mary. The trial court found that Mary did not receive proper care and supervision in the home of respondent and J.C. and that she resided in an environment injurious to her health. The court also found that respondent had not provided adequate protection and a safe environment for her daughter and that Mary resided in a home where another juvenile had been subjected to abuse or neglect by J.C. Based upon these findings of fact, the court adjudicated Mary to be an abused and neglected juvenile as defined by N.C. Gen. Stat. § 7B-101(1) and (15) (2014).

In its dispositional order, the trial court ordered that Mary's custody would remain with DSS and that there would be no visitation between Mary and either her mother or J.C. Respondent and J.C. each noted an appeal to this Court from the trial court's adjudication and dispositional orders.

II. Standard of Review

"The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2015).

When this Court reviews an order in a juvenile abuse, neglect or dependency proceeding, we determine whether the trial court made proper findings of fact and conclusions of law in its adjudication and disposition orders. In so doing, we consider whether clear and convincing evidence in the record supports the findings and whether the findings support the trial court's conclusions. If there is evidence to support the trial court's findings of fact, they are deemed conclusive even though there may be evidence to support contrary findings. We consider matters of statutory interpretation *de novo*.

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In re W.V., 204 N.C. App. 290, 293, 693 S.E.2d 383, 386 (2010) (citing *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007), *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000), *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984), and *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001)).

III. Appeal by J.C.

[1] We first address the issue of J.C.’s standing to appeal from the trial court’s orders. “Although [J.C.’s] brief does not address the issue of standing, we are compelled to address this issue.” *In re T.B.*, 200 N.C. App. 739, 742, 685 S.E.2d 529, 532 (2009). “Standing is jurisdictional in nature and [c]onsequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved.” *In re T.M.*, 182 N.C. App. 566, 570, 643 S.E.2d 471, 474 (quoting *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004)), *aff’d per curiam*, 361 N.C. 683, 651 S.E.2d 884 (2007). “As the party invoking jurisdiction, [J.C. has] the burden of proving the elements of standing.” *Neuse River Found., Inc., v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (citation omitted), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003).

N.C. Gen. Stat. § 7B-1001(a) (2014) provides in relevant part that an “appeal of a final order of the court in a juvenile matter shall be made directly to the Court of Appeals. . . . [T]he following juvenile matters may be appealed: . . . (3) Any initial order of disposition and the adjudication order upon which it is based.” Under N.C. Gen. Stat. § 7B-1002 (2014), appeal from an initial order of adjudication and disposition may be taken only by:

- (1) A juvenile acting through the juvenile’s guardian *ad litem* previously appointed under G.S. 7B-601.
- (2) A juvenile for whom no guardian *ad litem* has been appointed under G.S. 7B-601. . . .
- (3) A county department of social services.
- (4) A parent, a guardian appointed under G.S. 7B-600 or Chapter 35A of the General Statutes, or a custodian as defined in G.S. 7B-101 who is a nonprevailing party.
- (5) Any party that sought but failed to obtain termination of parental rights.

In the present case, J.C. clearly is not the juvenile, a court-appointed guardian *ad litem*, a county department of social services, or a party

IN RE M.S.

[247 N.C. App. 89 (2016)]

who sought unsuccessfully for termination of parental rights. Therefore, the only ground on which J.C. might assert a right to appeal from the trial court's order of adjudication and disposition would be pursuant to N.C. Gen. Stat. § 7B-1002(4), as Mary's "parent" or "custodian as defined in G.S. 7B-101." Upon review of the relevant statutes and the record, we conclude that the record fails to contain any evidence that J.C. is either Mary's parent or her legal custodian.

N.C. Gen. Stat. § 7B-101 (2014) defines the following terms as follows:

...

(3) Caretaker. – Any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent, foster parent, an adult member of the juvenile's household, [or] an adult relative entrusted with the juvenile's care[.] . . . (emphasis added).

...

(8) Custodian. – The person or agency that has been awarded legal custody of a juvenile by a court.

The record contains nothing to suggest that J.C. was awarded legal custody of Mary by a court and, as a result, he cannot assert a basis to appeal as her "custodian" pursuant to N.C. Gen. Stat. § 7B-101(8). Moreover, N.C. Gen. Stat. § 7B-101(3) expressly defines "caretaker" to include a stepparent, such as J.C. On the record before us, we conclude that J.C. had the status of "caretaker" of Mary.

In reaching this conclusion, we have necessarily made a distinction between "parent" and "stepparent," a distinction that we conclude is in accord with N.C. Gen. Stat. § 7B-101 and N.C. Gen. Stat. § 7B-1002. We note that N.C. Gen. Stat. § 7B-101(8) defines "caretaker" as a person "other than a parent, guardian, or custodian" who is responsible for the health and welfare of a juvenile, and specifies that this term includes "a stepparent." Thus, N.C. Gen. Stat. § 7B-101 distinguishes between a parent and a stepparent. In addition, in N.C. Gen. Stat. § Chapter 48, which governs adoption procedures, N.C. Gen. Stat. § 48-1-101(18) (2014) defines "stepparent" as "an individual who is the spouse of a parent of a child, but who is not a legal parent of the child." (emphasis added).

IN RE M.S.

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We conclude that J.C. is not a proper party for appeal pursuant to N.C. Gen. Stat. § 7B-1002 and that he is a ‘caretaker’ under N.C. Gen. Stat. § 7B-101(3). We hold that N.C. Gen. Stat. § 7B-1002(4), which permits a “parent” to appeal from an order of adjudication and disposition, does not authorize an appeal by a stepparent in the absence of record evidence that the stepparent has become the child’s parent through adoption or is otherwise qualified under the statute. “Due to insufficient information in the record to determine whether [J.C.] has standing to pursue this appeal, we dismiss the appeal.” *T.B.*, 200 N.C. App. at 740, 685 S.E.2d at 530.

IV. Appeal by Respondent

[2] Counsel for respondent has filed a “no merit” brief pursuant to N.C.R. App. P. 3.1(d) (2014). In compliance with the provisions of that rule, counsel states that after thoroughly and conscientiously reviewing the record on appeal and consulting with other experienced appellate attorneys he is unable to identify any issues with sufficient merit upon which to base an argument for relief on appeal. He asks this Court to review the record for possible meritorious issues that may have been overlooked by counsel. He also identifies possible arguments that he considered and explains why he rejected them. He attached to the brief the letter he mailed to respondent, advising her of his inability to find possible meritorious issues and of her right to file her own written arguments directly with this Court. Counsel also informed respondent of the procedures to follow if she elected to file her own arguments and provided her with the necessary documents for that purpose.

Respondent has not filed her own written arguments. After reviewing the record on appeal, we are unable to find anything to support an argument for meaningful relief on appeal. We find ample evidence to support the findings of fact, which establish that J.C. committed indecent liberties upon Mary, and, accordingly, that Mary is an abused juvenile. The trial court’s findings also establish that Mary did not receive proper care from respondent and J.C. and that she resided in an environment injurious to her welfare. The court’s findings of fact thus support its conclusion of law that Mary is an abused and neglected juvenile.

We affirm the adjudication and disposition order.

AFFIRMED IN PART, DISMISSED IN PART.

Judges HUNTER, JR., and DAVIS concur.

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[247 N.C. App. 95 (2016)]

ALEX D. McLENNAN, JR., DOROTHY N. McLENNAN, AND
RUFUS T. CARR, JR., PLAINTIFFS

v.

C. K. JOSEY, JR., DEBORAH G. JOSEY, JOSEY PROPERTIES, LLC,
THOMAS D. TEMPLE, IV, CRYSTAL TEMPLE, BETTY JO TEMPLE,
AND JOSEPH LANIER RIDDICK, III, DEFENDANTS

No. COA 15-533

Filed 19 April 2016

1. Real Estate—surveyor’s duty—senior documents—no justiciable issue

The counterclaim lacked a justiciable issue pursuant to N.C.G.S. § 6-21.5 in a boundary line dispute. Although defendants argued that they were fee simple owners of the property in good faith, defendants’ map of the property was based on their own survey. Surveyors have a duty to check the county records, and in this case a routine title search should have discovered senior documents.

2. Attorneys—fees—frivolous litigation

It was within the trial court’s discretion to award attorney fees for frivolous litigation where a counterclaim lacked a justiciable issue.

3. Attorneys—fees—appeal—award for additional case

Any attorney fees awarded under N.C.G.S. § 6-21.5 connected with an appeal were awarded erroneously. The portion of the award for another case was remanded because the record did not contain the final result in the case. The statute allowed an award of a reasonable attorney fee to the prevailing party.

4. Costs—litigation expenses—insufficient explanation—remanded

In a boundary dispute, an order awarding as costs an amount for “reasonable and necessary litigation expenses” without explanation of what the total included was remanded for additional findings.

5. Appeal and Error—frivolous appeal—sanctions denied—appeal well grounded in existing law

A motion for sanctions for a frivolous appeal was denied where the appeal was well grounded in existing law.

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[247 N.C. App. 95 (2016)]

Appeal by Defendants from order entered 15 December 2014 by Judge Alma L. Hinton in Halifax County Superior Court. Heard in the Court of Appeals 21 October 2015.

Charles S. Rountree, III, for Plaintiff-Appellees.

Etheridge, Hamlett & Murray, LLP, by Ernie K. Murray, for Defendant-Appellants.

HUNTER, JR., Robert N., Judge.

Defendants appeal an order awarding Plaintiffs attorneys fees, costs, and litigation expenses on the grounds that their claims presented justiciable issues contemplated by N.C. Gen. Stat. § 6-21.5. Defendants request we reverse the trial court. In addition, the Plaintiffs have requested that this Court award fees for filing a frivolous appeal. For the following reasons, we affirm in part, reverse in part, and remand the case to the trial court to take further action consistent with this opinion.

I. Factual and Procedural Background

Our Court previously reviewed the legal merits of this boundary line dispute in *McLennan v. Josey*, __ N.C. App. __, 758 S.E.2d 888 (2014). In the first appeal, after *de novo* review this Court affirmed the trial court's summary judgment holding Plaintiffs had established superior record title to the *res* in question and Defendants' parol evidence to the contrary was inadmissible. *Id.* at __, 758 S.E.2d at 891–892. Because Defendants' evidence did not meet their burden of proof to show their ownership was superior, we held no genuine issue of material fact existed as to the location of the boundary line between Plaintiffs' and Defendants' property. *Id.* at __, 758 S.E.2d at 892.

On 24 July 2013, during the pendency of the first appeal, Plaintiffs filed a Motion to Tax Costs, Including Reasonable Attorney's Fees and Expenses in trial court. In support of their motion, Plaintiffs attached a list of legal services rendered and associated legal fees dating back from 17 May 2010, totaling \$112,740.00. Plaintiffs also attached a list of disbursements, including court costs totaling \$3,458.38, and fees associated with expert witnesses totaling \$24,708.86. Additionally, Plaintiffs attached affidavits attesting to the reasonableness of the fees.

Following our decision in the first appeal, Plaintiffs filed a Supplement to their Motion to Tax Costs on 17 October 2014. In support of their motion, Plaintiffs attached invoices related to the appeal totaling

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[247 N.C. App. 95 (2016)]

\$55,660.00 in attorneys fees and \$1,130.18 for out of pocket expenses and court costs.

On 15 December 2014, the trial court entered an order taxing costs and reasonable attorneys fees to Defendants. The trial court concluded:

- A. Plaintiffs are entitled as a matter of law to recover the costs incurred in this action in the sum of \$3,716.25.
- B. The court has the authority to award reasonable attorneys fees and out of pocket expenses to Plaintiffs in this case pursuant to N.C. Gen. Stat. § 6-21.5 (2014).
- C. The court concludes as a matter of law that plaintiffs' reasonable attorneys fees and litigation expenses incurred as a result of the complete absence of a justiciable issue of either law or fact raised by Defendants in any pleading total \$215,828.12.

Defendants filed a written notice of appeal on 13 January 2015, contesting the order awarding costs and attorneys fees. On 14 August 2015, Plaintiffs filed a motion seeking sanctions against Defendants for pursuing a frivolous appeal. Defendants filed a reply brief 19 August 2015. The Clerk of the North Carolina Court of Appeals referred Plaintiffs' motion to this panel on 31 August 2015.

II. Jurisdiction

Jurisdiction lies in this Court from a final order of a superior court pursuant to N.C. Gen. Stat. § 7A-27.

III. Standard of Review

Our decision requires we apply differing standards of review to the questions arising from the lower court's award. We decide these issues consecutively.

First, we must determine whether or not the Plaintiffs presented a justiciable issue in their pleadings. Our case law has held that "[i]n reviewing an order granting a motion for attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.5, '[t]he presence or absence of justiciable issues in the pleadings is . . . a question of law that this Court reviews *de novo*.'" *Wayne St. Mobile Home Park, LLC v. N. Brunswick Sanitary Dist.*, 213 N.C. App. 554, 561, 713 S.E.2d 748, 753 (2011) (citing *Free Spirit Aviation v. Rutherford Airport*, 206 N.C. App. 192, 197, 696 S.E.2d 559, 563 (2010)).

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Second, “[t]he [trial court’s] decision to award or deny attorney’s fees under [s]ection 6-21.5 is a matter left to the sound discretion of the trial court.” *Persis Nova Constr., Inc. v. Edwards*, 195 N.C. App. 55, 67, 671 S.E.2d 23, 30 (2009). “An abuse of discretion occurs when a decision is ‘either manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.’” *Exgelhof ex rel. Red Hat, Inc. v. Szulik*, 193 N.C. App. 612, 668 S.E.2d 367 (2008) (citing *Country Club of Johnston Cty., Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 248, 563 S.E.2d 269, 280 (2002)).

Next, we examine the award of costs and expenses to the prevailing party. “Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law . . .” *Peters v. Pennington*, 210 N.C. App. 1, 25, 707 S.E.2d 724, 741 (2011). We therefore review the trial court’s interpretation *de novo*. However, the “reasonableness and necessity” of costs is reviewed for abuse of discretion. *Id.* at 26, 707 S.E.2d at 741.

IV. Analysis

A. Attorneys Fees

[1] In North Carolina, parties to litigation are generally responsible for their own attorneys fees unless a statute provides otherwise. *Hicks v. Albertson*, 284 N.C. 236, 238, 200 S.E.2d 40, 42 (1973). Statutes awarding attorneys fees to prevailing parties are “in derogation of the common law” and therefore must be strictly construed. *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 256, 400 S.E.2d 435, 437 (1991).

N.C. Gen. Stat. § 6-21.5 states, “. . . the court, upon motion of the prevailing party, may award a reasonable attorney’s fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading.” N.C. Gen. Stat. § 6-21.5 (2015). Fees related to an appeal to this Court or to the North Carolina Supreme Court are not recoverable under N.C. Gen. Stat. § 6-21.5. *See Hill v. Hill*, 173 N.C. App. 309, 318, 622 S.E.2d 503, 509 (2005). The purpose behind N.C. Gen. Stat. § 6-21.5 is to “discourage frivolous legal action.” *Short v. Bryant*, 97 N.C. App. 327, 329, 388 S.E.2d 205, 206 (1990).

A justiciable issue is one that is “real and present, as opposed to imagined or fanciful.” *Sunamerica*, 328 N.C. at 257, 400 S.E.2d at 437 (citations omitted). “In order to find a complete absence of a justiciable issue it must conclusively appear that such issues are absent even giving the pleadings the indulgent treatment they receive on motions

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for summary judgment or to dismiss.” *K & K Development Corp. v. Columbia Banking Fed. Savings & Loan*, 96 N.C. App. 474, 479, 386 S.E.2d 226, 229 (1989) (citations omitted). “Under this deferential review of the pleadings, a plaintiff must either: (1) ‘reasonably have been aware, at the time the complaint was filed, that the pleading contained no justiciable issue’; or (2) be found to have ‘persisted in litigating the case after the point where [he] should reasonably have become aware that pleading [he] filed no longer contained a justiciable issue.’” *Credigy Receivables, Inc. v. Whittington*, 202 N.C. App. 646, 655, 689 S.E.2d 889, 895 (2010) (citing *Brooks v. Giesey*, 334 N.C. 303, 309, 432 S.E.2d 339, 342 (1993)); see also *Sunamerica*, 328 N.C. 254 at 258, 400 S.E.2d at 438. A trial court must make one or both of these findings to support its award of section 6-21.5 attorneys fees. See *Sunamerica*, 328 N.C. 254 at 260, 400 S.E.2d at 439 (“[A trial court] shall make findings of fact and conclusions of law to support its award of attorneys’ fees.”).

The granting or denial of a motion for summary judgment is “not in itself a sufficient reason for the court to award attorney’s fees.” N.C. Gen. Stat. § 6-21.5 (2015). However, granting a Rule 12(b)(6) motion or entering summary judgment may be evidence that a pleading lacks a justiciable issue. *Sunamerica*, 328 N.C. 254 at 259, 400 S.E.2d at 439. Moreover, “action by the losing party which perpetuated litigation in the face of events substantially establishing that the pleadings no longer presented a justiciable controversy may also serve as evidence for purposes of 6-21.5.” *Id.* at 259, 400 S.E.2d at 439.

Defendants argue that they presented a justiciable issue in their counterclaim, contending they were the fee simple owners of the property at issue and that they did so in good faith. Additionally, Defendants point out the award of attorneys fees includes \$55,660.00 for “responding to Defendants’ appeal” as well as attorneys fees for another case between the parties, 11-CVS-973. Defendants contend the fees related to the appeal and case number 11-CVS-973 were erroneously awarded. We address each of Defendants’ arguments in turn.

To review whether attorneys fees are proper, we first determine whether the pleadings contained a justiciable issue. The trial court made the following findings related to whether the pleadings contained a justiciable issue:

2. Defendants knew at the time they recorded the map in 2009 that the deed descriptions in the deeds by which Defendants acquired their property excluded the more than two hundred acres belonging to Plaintiffs.

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3. Defendants' deeds stated that their titles were subject to a 1909 deed by Defendants' predecessors in title to Wilts Veneer Company that described by metes and bounds the location of the boundary between their property and Plaintiffs' adjoining property in a different location than that shown on the 2009 map Defendants recorded.

4. Before Plaintiffs filed the Complaint in this case in 2010 Defendants had a copy of the recorded 1918 boundary survey of Plaintiffs' property showing the more than two hundred acres was owned by Plaintiffs' predecessor in title.

5. The Complaint filed by Plaintiffs in the summer of 2010 includes references to recorded maps and deeds describing the boundary on the ground between their property and Defendants' property.

Thus, the trial court's order contains the necessary findings to support its award of attorneys fees. We note that the Defendants did not challenge these factual findings on appeal as unsupported by competent evidence. It is unlikely that such a challenge could be made, since the matters establishing a title are contained in the county register of deeds vaults. Questions of title are questions of law and where the law is settled in regard to titles, the law of this case is that the Defendants submitted no admissible evidence to meet their burden. This result was foreseeable from the title records and routine application of settled law. We agree with the trial court that the counterclaim contained no justiciable issue at the time it was filed.

Defendants relied on a map recorded in 2010 and subsequent deeds to determine the location of Gaynor's Gut, the boundary between Plaintiffs' and Defendants' land. As this Court reasoned in the previous appeal:

[D]efendants present no evidence by way of deeds in their chain of title to establish their superior claim to the disputed land. Moreover, defendants' recorded map in 2010 and subsequent deeds using the map's boundary description to convey the disputed land are junior to the 1909 and 1918 documents that describe the run of Gaynor's Gut. Thus, the descriptions found in the 1909 and 1918 documents control.

McLennan v. Josey, __ N.C. App. __, __, 758 S.E.2d 888, 892 (2014). Moreover, as the trial court pointed out in finding number 3, Defendants' deeds made reference to the 1909 deed, alerting Defendants to the

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existence of the deed prior to filing their counterclaim. Plaintiffs' Complaint also referenced the 1909 deed as well as a 1918 map, informing Defendants of their existence prior to filing their counterclaim.

Defendants' 2010 map is based on a survey obtained by Defendants. Surveyors have a duty to always check the county records in which the land is located. Walter G. Robillard & Lane J. Bouman, *Clark on Surveying and Boundaries* 119 (7th Ed. 1997). Thus, in a routine title search, the senior documents should have been discovered by a surveyor or attorney prior to the drafting of the 2010 survey. As a rule of surveying "no following surveyor may establish new corners or lines or correct erroneous surveys of the earlier surveyors," the run of Gaynor's Gut in the senior deeds and maps controls. *Id.* at 23 (emphasis removed from original). Therefore, after our *de novo* review of the pleadings, we hold the pleadings lacked a justiciable issue.

[2] Since the trial court properly held the pleadings lacked a justiciable issue pursuant to N.C. Gen. Stat. § 6-21.5, it is within the trial court's discretion whether to award attorneys fees. *See Persis Nova Constr.*, 195 N.C. App. at 67, 671 S.E.2d at 30. Although the order does not explicitly state why the court exercised its discretion we hold that it was in furtherance of the policy of the statute to discourage frivolous litigation. As the prevailing party, Plaintiffs are entitled to attorneys fees at the discretion of the trial court. The court had authority pursuant to N.C. Gen. Stat. § 6-21.5 to award Plaintiffs attorneys fees, and made the required findings to support such an award. Therefore, we hold the trial court did not abuse its discretion in awarding attorneys fees under N.C. Gen. Stat. § 6-21.5 to Plaintiffs.

[3] Finally, we review the trial court's award of attorneys fees to determine whether they were authorized under the statute. Within the award of attorneys fees, the trial court awarded \$55,898.18 for "responding to Defendants' appeal." Defendants argue attorneys fees may not be awarded under N.C. Gen. Stat. § 6-21.5 for appeals to this Court. *See Hill*, 173 N.C. App. at 318, 622 S.E.2d at 509. We agree. Because attorneys fees related to an appeal are not recoverable under N.C. Gen. Stat. § 6-21.5, we hold any fees connected with the appeal were awarded in error.

Defendants also claim a portion of the awarded attorneys fees are related to another case between the parties, case number 11-CVS-973. Defendants specifically point to entries on the attorneys fees invoices for drafting a complaint in August 2011. Plaintiffs filed the Complaint in the case appealed to this Court on 27 August 2010, approximately one year earlier than the invoice entry in question.

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In its order taxing costs and reasonable attorneys fees, the trial court specifically allowed attorneys fees for both cases by finding:

22. The legal services in preparing pleadings in 2011 to add additional claims for relief by amendment to the pleadings in this case or by the filing of a companion law suit, being strategic in nature and designed to litigate all issues raised by Defendants' actions at the same time, were related to the prosecution of this civil action and the attorney's fees and litigation expenses incurred are properly recoverable in this action.

However, the motion to consolidate the cases was denied. Further, no final judgment or order from case 11-CVS-973 was appealed to this Court.

N.C. Gen. Stat. § 6-21.5 allows a court to award "a reasonable attorney's fee to the prevailing party." N.C. Gen. Stat. § 6-21.5 (2015) (emphasis added). The record on appeal does not contain the final result of the other case nor is that case before this Court. Should Plaintiffs be successful in the other case and should that case also lack a justiciable issue, then Plaintiffs may pursue attorneys fees separately for that case. Unfortunately, based on the record, we cannot distinguish between fees charged for the case on appeal and fees charged for 11-CVS-973. Therefore, we remand this issue to the trial court to limit the fees applicable to this case.

B. Costs and Litigation Expenses

[4] Defendants contend N.C. Gen. Stat. § 6-21.5 only allows an award of attorneys fees, not costs. However, costs are allowed as of course in actions "for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial." N.C. Gen. Stat. § 6-18 (2015). Even so, Defendants contend that "numerous items the trial court ordered to be paid have been held not to be recoverable."

N.C. Gen. Stat. § 7A-305(d) provides a "complete and exclusive . . . limit on the trial court's discretion to tax costs." The statute allows for the "reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings." N.C. Gen. Stat. § 7A-305(d)(11) (2015). In light of the North Carolina Supreme Court's recent decision in *Lassiter ex rel Baize v. North Carolina Baptist Hospitals, Inc.*, expert witness fees are taxable as costs even though the expert was not compelled by subpoena.

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Lassiter ex rel Baize v. North Carolina Baptist Hospitals, Inc., 368 N.C. 367, 378–379, 778 S.E.2d 68, 75–76 (2015).

The trial court order includes “\$26,283.49 in reasonable and necessary litigation expenses” without explanation of what the total includes. Defendants contend this contains expert fees in the amount of \$24,708.86, including preparation time for trial. Plaintiffs acknowledge the use of experts in the case, but do not specify whether expert fees were included in the costs or litigation expenses awarded by the trial court order. Thus, we remand this issue to the trial court to make additional findings of fact regarding costs and litigation expenses consistent with this opinion and the Supreme Court opinion.

C. Motion for Sanctions

[5] Plaintiffs contend Defendants are currently pursuing a frivolous appeal before this Court. As such, Plaintiffs seek sanctions against Defendants under N.C. R. App. P. 34 to reimburse Plaintiffs for attorneys fees and costs incurred during this appeal. Pursuant to Rule 34, this Court may impose sanctions against an appellant where “the appeal was not well grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.” *ACC Const., Inc. v. SunTrust Mortg., Inc.* __ N.C. App. __, __, 769 S.E.2d 200, 213–214 (2015).

Here, the appeal was well grounded in existing law. In fact, Defendants succeeded in arguing a portion of the attorney’s fees were granted in error. Moreover, Defendants pointed to potential problems in the award of costs and litigation expenses. Thus, we deny Plaintiffs’ motion for sanctions.

V. Conclusion

For the foregoing reasons, we affirm in part, reverse in part, and remand the award of attorneys fees pursuant to N.C. Gen. Stat. § 6-21.5. We also remand the award of costs for further findings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges GEER and DILLION concur.

SE. CAISSONS, LLC v. CHOATE CONSTR. CO.

[247 N.C. App. 104 (2016)]

SOUTHEAST CAISSONS, LLC, PLAINTIFF

v.

CHOATE CONSTRUCTION COMPANY, CHOATE CONSTRUCTION GROUP, LLC,
FALCON ENGINEERING, INC., BBH DESIGN, P.A., AND KIMLEY-HORN AND
ASSOCIATES, INC., DEFENDANTS

No. COA15-1284

Filed 19 April 2016

**Contracts—construction—no execution of proposed contract—
no meeting of minds—venue selection clause**

Where a subcontractor performed work for a contractor even though the written subcontract was never signed by either party, the Court of Appeals affirmed the trial court's order denying the contractor's motion for change of venue. The trial court correctly determined that there was no meeting of the minds on the proposed subcontract and that the parties did not intend to be bound by its terms, including its venue selection clause. The Court of Appeals rejected the contractor's argument that the trial court's order was fatally overbroad.

Appeal by defendants from order entered 11 August 2015 by Judge William Z. Wood in Forsyth County Superior Court. Heard in the Court of Appeals 31 March 2016.

Randolph M. James P.C., by Randolph M. James, for plaintiff-appellee.

Johnston, Allison & Hord, P.A., by Robert L. Burchette, Michael J. Hoefling, and David V. Brennan, for Choate Construction Company and Choate Construction Group, LLC, defendants-appellants.

TYSON, Judge.

Defendants Choate Construction Company and Choate Construction Group, LLC (collectively, "Choate") appeal from order denying Choate's motion to dismiss, or alternatively, for change of venue pursuant to Rule 12(b)(3). We affirm.

I. Factual Background

On 28 July 2011, the trustees of Wake Technical Community College entered into a prime contract with Choate for the construction of

SE. CAISSONS, LLC v. CHOATE CONSTR. CO.

[247 N.C. App. 104 (2016)]

the Northern Wake Campus Parking Deck, located in Raleigh, Wake County, North Carolina. The parking deck construction (hereinafter, “the project”) was a public project, and subject to a comprehensive set of statutes and regulations regarding the procurement of services and materials and the performance of the project. The project was overseen by the North Carolina Department of Administration and the State Construction Office.

Choate solicited bids for drilled shafts and concrete piers for the project. Southeast Caissons, LLC (“SEC”) submitted two bid proposals to Choate. Brian Kinlaw (“Mr. Kinlaw”) served as Choate’s project manager for the construction of the parking deck. After SEC submitted its second bid proposal, Mr. Kinlaw corresponded via a series of emails with Keisha West (“Ms. West”), a managing member of SEC, regarding the terms of the proposed subcontract with SEC for the drilling of shafts and the installation of concrete caissons and piers to support the weight and structure of the project.

On 6 October 2011, Mr. Kinlaw emailed Ms. West an electronic copy of Choate’s proposed subcontract and informed her she would also receive two hard copies by mail. The subcontract offered a lump sum payment of \$438,000.00 to SEC for its work on the project, subject to contingencies, and incorporated the terms of the prime contract between Choate and Wake Technical Community College. The subcontract also contained a clause in Article X, Section 3(b) entitled “Additional Dispute Resolution Provisions.” This clause stated: “Venue for any arbitration, settlement meetings or any subsequent litigation whatsoever shall be in the city of Contractor’s office as shown on page 1 of the Subcontract.” Choate’s office was shown on page 1 of the subcontract as being located in Raleigh, Wake County, North Carolina.

Mr. Kinlaw subsequently requested that Ms. West sign and return the proposed subcontract. He explained that Choate required a signed subcontract before it would allow SEC to begin work on the project. Ms. West informed Mr. Kinlaw that SEC “had some small changes to the subcontract but generally found the subcontract agreeable.” Ms. West emailed the changes to Mr. Kinlaw and he discussed the changes with his superiors.

On 24 October 2011, Choate and SEC held a “pre-drill” meeting on-site, where the parties reached an oral agreement on where “rock payment would begin in a drilled shaft.” On 26 October, Ms. West emailed Mr. Kinlaw SEC’s “Proposed Addendum” to the subcontract. The “Proposed Addendum” stated “[SEC] hereby accepts the terms of the attached

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Subcontract, *subject to and conditioned upon* [Choate's] acceptance of the terms set forth in this Addendum[.]” (emphasis supplied).

On 27 October, Mr. Kinlaw and Ms. West engaged in a two-hour-long telephone call, during which they discussed the subcontract and the “Proposed Addendum.” Following this telephone call, Mr. Kinlaw and Ms. West continued to exchange emails and telephone calls, in which they sought to reach an agreement on and finalize the terms contained in the subcontract and “Proposed Addendum.” The correspondences included an email from Mr. Kinlaw on 2 November, in which he indicated the parties “got closer” to reaching a final agreement on the additional issues and he “hope[d] to have this resolved with [Ms. West] ASAP.” Ms. West replied with an email on 7 November which read: “I just wanted to touch base with you to check the status of the Subcontract Agreement. I would like to get this contract nailed out [sic] today prior to drilling, if possible.” SEC began drilling the first shaft that same day, while the amended subcontract and “Proposed Addendum” remained unsigned by both SEC and Choate.

Despite SEC beginning to drill on-site on 7 November 2011 without a signed written subcontract, Choate and SEC, through Mr. Kinlaw and Ms. West, continued to discuss the terms of the subcontract. On 15 November, Mr. Kinlaw sent an email to Ms. West, which read: “I tried calling yesterday and today . . . to speak further about the Subcontract. . . . Sending this just in case it’s not reaching you.” Mr. Kinlaw sent another email to Ms. West on 18 November seeking to discuss “further definition and clarification” of certain terms in the proposed subcontract.

The parties continued discussing the terms of the proposed subcontract into December 2011. In an email dated 19 December 2011, Mr. Kinlaw wrote to Ms. West:

Further to my email below from 12/1/11 following the collaborative effort by both of our offices to reach concurrence on Contract terms, no further response has been received from Southeast Caissons — namely, a signed and executed copy of the Subcontract. In making another attempt, attached you will find a revision to the Subcontract that includes all modifications agreed-upon as clarified and documented previously.

In her supplemental affidavit, Ms. West stated she “could not sign the proposed subcontract because we were not in agreement.”

Mr. Kinlaw sent a follow-up email to Ms. West on 30 December, in which he stated he wanted to “discuss several urgent paperwork

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issues[.]” Mr. Kinlaw also reminded Ms. West he had re-sent the proposed subcontract document for her to execute and return to Choate.

Mr. Kinlaw emailed to SEC another modified proposed subcontract on 12 January 2012. He stated in the email: “I am re-sending the subcontract to you that includes all modifications agreed-upon as clarified and documented previously and has been cleaned up to remove the handwritten notes on Exhibits B and C. Please execute and return this document immediately.” Ms. West averred in her supplemental affidavit that Mr. Kinlaw considered this a “finalized subcontract,” but it contained “modifications which were not acceptable to [SEC].” Ms. West did not respond to Mr. Kinlaw’s correspondence, and SEC continued to perform work on the construction project. SEC drilled the last shaft on the project on 27 January 2012. The proposed “finalized subcontract,” as modified and sent by Mr. Kinlaw on 12 January 2012, remained unexecuted by both parties.

On 23 February 2012, Ms. West mailed Mr. Kinlaw a letter to notify him SEC’s work had been completed and to request payment from Choate. Acknowledging she had not signed the proffered subcontract as yet, Ms. West stated: “We understand Choate has maintained that a contract must be signed prior to any payment to [SEC], but it is undeniable that no matter what our disagreement might be on the amount due to [SEC] there is some amount due.” In his response letter to Ms. West, Mr. Kinlaw informed her Choate would be unable to pay SEC until someone from SEC submitted a payment application to Choate.

SEC filed a complaint on 23 February 2015 against Choate, Falcon Engineering, Inc. (“Falcon”), BBH Design, P.A. (“BBH”), and Kimley-Horn and Associates, Inc. (“Kimley-Horn”) in Forsyth County. Defendants Falcon, BBH, and Kimley-Horn are not parties to this appeal, and the allegations asserted in SEC’s complaint pertaining to these defendants are not addressed. SEC’s complaint against Choate alleged claims for: (1) breach of contract; (2) *quantum meruit*; (3) fraud in the inducement; (4) unfair and deceptive trade practices; and (5) punitive damages.

Choate responded and filed an answer, motion to dismiss, counterclaims, and crossclaims. Choate asserted four separate bases for the trial court to grant its motion to dismiss: (1) motion to dismiss for breach of a condition precedent to maintain a claim/or waiver of the right to maintain a claim and for failure to state a claim for relief, *i.e.* compliance with the condition precedent; (2) motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6); (3) motion to dismiss or alternatively for change of venue; and (4) motion to dismiss for failure to establish that “rock” was encountered beyond bearing elevation.

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Choate's motion for change of venue was based upon the language contained in Article X, Section 3(b) of the unsigned subcontract, which provided: "Venue for any arbitration, settlement meetings or any subsequent litigation whatsoever shall be in the city of Contractor's office as shown on page 1 of the Subcontract."

SEC voluntarily dismissed without prejudice its claims against defendants BBH and Kimley-Horn on 30 July 2015. Choate's motion to dismiss or alternatively for change of venue was heard in Forsyth County Superior Court on 27 July 2015. Both Mr. Kinlaw and Ms. West submitted affidavits, which were filed in anticipation of this hearing.

The trial court entered a written order denying Choate's motion for change of venue on 11 August 2015. The trial court's order stated, in part:

IT APPEARS to the Court from Brian Kinlaw's affidavit filed by movants and the Affidavit of Keisha West and Supplemental Affidavit of Keisha West filed by plaintiff Southeast Caissons, LLC (SEC), a managing member of SEC, that the Subcontract attached to defendants [sic] Choate's Answer as Exhibit A was never executed by SEC or Choate . . . and is therefore not binding on the plaintiff, and in particular the venue selection clause of Article X of the unexecuted Subcontract; and,

IT FURTHER appears to the Court . . . that [SEC] is a Forsyth County, Kernersville, North Carolina Corporation and venue is proper in Forsyth County . . . as the plaintiff maintains its principal office in Forsyth County and maintains a place of business in Forsyth County[.]

Choate gave timely notice of appeal to this Court.

II. Issues

Defendant Choate argues the trial court erred by: (1) entering an order, which was fatally overbroad; and (2) denying Choate's motion for change of venue pursuant to Rule 12(b)(3).

III. Standard of Review

"[Q]uestion[s] of venue . . . [rest] within the sound discretion of the trial judge, and [are] not subject to review except for manifest abuse of such discretion." *Farmers Coop. Exch., Inc. v. Trull*, 255 N.C. 202, 204, 120 S.E.2d 438, 439 (1961) (citations omitted). Under an abuse of discretion standard, this Court reviews the trial court "to determine whether

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a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.” *Printing Servs. of Greensboro, Inc. v. Am. Capital Grp., Inc.*, 180 N.C. App. 70, 74, 637 S.E.2d 230, 232 (2006) (citation omitted), *aff’d per curiam*, 361 N.C. 347, 643 S.E.2d 586 (2007).

IV. Analysis

A. Jurisdiction

Defendant Choate’s appeal is interlocutory. An order or judgment is interlocutory if it does not settle all the pending issues and “directs some further proceeding preliminary to the final decree.” *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80 (citation omitted), *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985). The trial court’s order denying Choate’s motion for change of venue is interlocutory, because it does not dispose of all issues of the case and is not a final disposition for any party.

An interlocutory order is generally not immediately appealable. An exception to this rule exists if the appellant shows the order affects a substantial right, which will be lost if the case is not reviewed prior to the issuance of a final judgment. N.C. Gen. Stat. §§ 1-277(a) (2015), 7A-27(b)(1) (2015); *Guilford Cnty. ex rel. Gardner v. Davis*, 123 N.C. App. 527, 529, 473 S.E.2d 640, 641 (1996).

This Court has held “where the issue pertains to applying a forum selection clause, our case law establishes that [a party] may nevertheless immediately appeal the order because to hold otherwise would deprive him of a substantial right.” *Hickox v. R&G Grp. Int’l, Inc.*, 161 N.C. App. 510, 511, 588 S.E.2d 566, 567 (2003) (citation omitted); *see also Parson v. Oasis Legal Fin., LLC*, 214 N.C. App. 125, 128, 715 S.E.2d 240, 242 (2011) (citation omitted); *Mark Grp. Int’l, Inc. v. Still*, 151 N.C. App. 565, 566 n.1, 566 S.E.2d 160, 161 n.1 (2002); *L.C. Williams Oil Co. v. NAFCO Capital Corp.*, 130 N.C. App. 286, 288, 502 S.E.2d 415, 417 (1998) (citation omitted). The trial court’s denial of Choate’s motion for change of venue affects a substantial right, and we proceed to the merits of Choate’s claims.

B. Order Denying Choate’s Motion for Change of Venue

Choate argues the trial court erred by entering an order denying Choate’s motion for change of venue because: (1) the trial court’s order was fatally overbroad; and (2) the order was based upon a misapprehension of law.

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1. Venue Selection Clauses

“Generally in North Carolina, when a jurisdiction is specified in a provision of contract, the provision generally will not be enforced as a mandatory selection clause without some further language that indicates the parties’ intent to make jurisdiction exclusive.” *Cable Tel Servs., Inc. v. Overland Contracting, Inc.*, 154 N.C. App. 639, 644, 574 S.E.2d 31, 34-35 (2002) (citation and internal quotation marks omitted) (noting mandatory venue selection clauses have contained words such as “exclusive,” “sole,” or “only” to indicate that the contracting parties intended to make jurisdiction exclusive).

Here, the venue selection clause stated: “Venue for any arbitration, settlement meetings or any subsequent litigation whatsoever shall be in the city of Contractor’s office as shown on page 1 of the Subcontract.” The clause at bar does not contain any words to indicate a mandatory venue selection clause. The clause is clearly non-mandatory. *Id.* The trial court correctly determined venue was proper in Forsyth County, where SEC “maintains its principal office[.]”

2. Choate and SEC Subcontract

The well-settled elements of a valid contract are offer, acceptance, consideration, and mutuality of assent to the contract’s essential terms. *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980) (“The essence of any contract is the mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds.”). “Generally, a party seeking to enforce a contract has the burden of proving the essential elements of a valid contract[.]” *Orthodontic Ctrs. of Am., Inc. v. Hanachi*, 151 N.C. App. 133, 135, 564 S.E.2d 573, 575 (2002) (citation omitted).

The parties agreed at oral argument this contract is not subject to the statute of frauds. Although only those contracts subject to the statute of frauds are required to be in writing and signed by the party to be charged, *see* N.C. Gen. Stat. § 22-2 (2015), this Court held the *absence* of a signed, written instrument is evidence of the parties’ intentions not to be bound by the proposed contract. *Zinn v. Walker*, 87 N.C. App. 325, 332, 261 S.E.2d 314, 318 (1987) (citations omitted), *disc. review denied*, 321 N.C. 747, 366 S.E.2d 871 (1988).

“If mutual assent is purportedly manifested in a written instrument but a question arises as to whether there was a genuine meeting of the minds, the court must first examine the written instrument to ascertain the parties’ true intentions.” JOHN N. HUTSON, JR. & SCOTT A. MISKIMON,

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NORTH CAROLINA CONTRACT LAW § 2-4, at 61, § 2-7-1, at 68 (2001) (“Failing to memorialize an oral contract does not invalidate the agreement but instead merely affects the mode of proving the terms of the contract.”).

Choate argues the trial court was only authorized to make a limited determination on whether the venue selection clause was enforceable when ruling on its motion for change of venue. Choate contends the trial court’s order exceeded the scope of this authority, and is fatally overbroad, because the order is “not limited to whether the parties agreed to select a venue for adjudication of [p]roject-related disputes.” Choate also asserts the trial court abused its discretion by basing its order on a “misapprehension of law.” We disagree.

The trial court’s order denied Choate’s motion for change of venue based, in part, on the finding that “the Subcontract . . . was never executed by SEC or Choate . . . and is therefore not binding on the plaintiff, and in particular the venue selection clause of Article X of the unexecuted Subcontract[.]” Choate argues this “blanket proclamation” effectually “removes the matter of contract formation from the finder of fact, [and] at a minimum it will result in prejudice to [Choate] at trial on the underlying actions.” We do not interpret the trial court’s language to be as sweeping or draconian as Choate suggests. As explained below, the trial court’s order does not resolve the underlying issues alleged in SEC’s complaint, nor does it define the terms of the agreement between Choate and SEC.

“The heart of a contract is the intention of the parties, which is ascertained by the subject matter of the contract, the language used, the purpose sought, and the situation of the parties at the time.” *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 11, 161 S.E.2d 453, 462 (1968) (citations omitted). “It is a general rule of contract law that the intent of the parties, where not clear from the contract, may be inferred from their actions.” *Branch Banking & Trust Co. v. Kenyon Inv. Corp.*, 76 N.C. App. 1, 9, 332 S.E.2d 186, 192 (1985), *appeal withdrawn*, 316 N.C. 192, 341 S.E.2d 587 (1986). *See Zinn*, 87 N.C. App. at 332, 261 S.E.2d at 318 (citations omitted) (“[T]he parties’ intentions[,] which are controlling in contract construction, may be construed from the terms of the writings and the parties’ conduct.” (citations omitted)).

“One of the most fundamental principles of contract interpretation is that ambiguities are to be construed against the party who prepared the writing.” *Chavis v. S. Life Ins. Co.*, 318 N.C. 259, 262, 347 S.E.2d 425, 427 (1986) (citations omitted). Here, Choate prepared the proposed subcontract using its own form. Any ambiguities in the proposed subcontract are to be construed against Choate. *Id.*

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Our Supreme Court has long held “[f]or an agreement to constitute a valid contract, the parties’ minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement.” *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (citations and internal quotation marks omitted), *reh’g denied*, 354 N.C. 75, 553 S.E.2d 75 (2001). *See also Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 912 (1998); *Normile v. Miller*, 313 N.C. 98, 108, 326 S.E.2d 11, 18 (1985); *Croom v. Goldsboro Lumber Co.*, 182 N.C. 217, 220, 108 S.E. 735, 737 (1921).

“[I]n order that there may be a valid and enforceable contract between parties, there must be a meeting of the minds of the contracting parties upon all essential terms and conditions of the contract.” *Quantum Corporate Funding, Ltd. v. B.H. Bryan Bldg. Co., Inc.*, 175 N.C. App. 483, 490, 623 S.E.2d 793, 798-99 (2006) (citations and quotation marks omitted) (holding defendant company did not agree to jurisdiction in New York when it submitted a counteroffer of the amount owed to plaintiff because there was no acceptance of counteroffer).

Here, the trial court’s order merely, and correctly, reflects a quintessential tenet of contract law in North Carolina and elsewhere — contract interpretation is governed by mutual assent and the intent of the parties. *Buettel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 631, 518 S.E.2d 205, 209, *disc. review denied*, 351 N.C. 186, 541 S.E.2d 709 (1999). The trial court properly concluded the parties did not reach mutual assent on, and did not intend to be bound by, the terms of Choate’s proposed subcontract, including the venue selection clause, based on their conduct, including: (1) Mr. Kinlaw continued to modify the terms of the proposed subcontract through January 2012, while SEC’s work was underway; (2) Choate, via its representatives, articulated numerous times it required a *signed* subcontract from SEC, yet allowed SEC to begin and complete the work without the proposed agreement being signed; (3) in December 2011, Ms. West refused to sign the proposed subcontract because SEC and Choate had not yet reached a mutual agreement on the final terms of the subcontract; (4) Mr. Kinlaw sent to Ms. West a purported “finalized subcontract,” but this document contained additional modifications; (5) at a 1 February 2012 meeting, after the work had been completed and Choate had received the benefits of SEC’s work, Mr. Kinlaw informed Ms. West that Choate could not pay any money to SEC “until a contract was agreed to and executed[;]” (6) Ms. West averred in her affidavit “the written subcontract document was never agreed to by the parties [and] there was no meeting of the minds between the parties as to the written subcontract;” and, (7) the proposed subcontract was never signed

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by either party, despite numerous ongoing correspondences over many months between Ms. West and Mr. Kinlaw regarding the importance of reaching a final agreement on the terms of the subcontract in order for SEC and Choate to sign the subcontract as a written memorialization of the parties' agreement.

Although the purpose of a signature is to show assent, assent may be shown where the party who failed to sign the writing accepted its terms and acted upon those terms. . . . However, if under the circumstances the parties are merely negotiating while trying to agree on certain terms and the parties are looking to a writing to embody their agreement, no contract is formed until the writing is executed and . . . the offeree's acceptance is properly communicated to the offeror.

HUTSON, JR. & MISKIMON, *supra*, § 2-7-1, at 68-69.

Other jurisdictions have similarly held evidence of the parties' intent to enter into a "final definitive agreement" may be utilized to determine the extent of the parties' agreement. *See Empro Mfg. Co., Inc. v. Ball-Co Mfg., Inc.*, 870 F.2d 423, 425 (7th Cir. 1989) (holding "as a matter of law parties who make their pact 'subject to' a later definitive agreement have manifested an objective intent not to be bound"); *Knight v. Sharif*, 875 F.2d 516, 525 (5th Cir. 1989) (holding "[t]he parties' use of the term 'final definitive agreement' also leads to the distinct conclusion that what came before . . . was neither final nor definitive"); *Conley v. Whittlesey*, 888 P.2d 804, 811 (Idaho Ct. App. 1995) (holding "agreement in principle" language did not irrevocably commit parties to settlement where parties agreed to memorialize intentions and mutual assent in a formal written contract).

The trial court's order denying Choate's motion for change of venue does not preclude either SEC or Choate from subsequently showing the parties had a contract implied in fact to the jury at trial on the underlying actions. *Snyder*, 300 N.C. at 217, 266 S.E.2d at 602 ("An implied contract is valid and enforceable as if it were express or written. . . . Whether mutual assent is established and whether a contract was intended between parties are questions for the trier of fact." (citations omitted)). "A valid contract may be implied in light of the conduct of the parties and under circumstances that make it reasonable to presume the parties intended to contract with each other." HUTSON, JR. & MISKIMON, *supra*, § 2-5, at 61-63 (noting "[w]hether a party's conduct is a manifestation of assent is ordinarily a question of fact to be resolved by the trier of fact[]" and "[o]nly rarely do courts rule as a matter of law that the parties' course of conduct created an implied contract[]").

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The trial court's order simply concludes Choate's proffered written subcontract was never executed by either party and its terms contained therein are not binding on the parties. Both parties' conduct demonstrates their intent *not* to be bound by the proposed written subcontract. As such, the venue selection clause is unenforceable against SEC. *Walker v. Goodson Farms, Inc.*, 90 N.C. App. 478, 488, 369 S.E.2d 122, 126 (citations omitted) (noting "the parties' intentions control, and their intentions may be discerned from both their writings and actions[]"), *disc. review denied*, 323 N.C. 370, 373 S.E.2d 556 (1988).

The trial court considered the evidence, including the extensive written correspondences between the parties, the unexecuted subcontract, the affidavits of Mr. Kinlaw and Ms. West, and the conduct of the parties in order to determine whether the parties had manifested a mutual assent and intent to be bound by the terms of the unsigned subcontract. The trial court ultimately, and correctly, determined there was no *aggregatio mentium*, or "meeting of the minds," on the proposed agreement, and the parties did not intend to be bound by the terms of the unexecuted subcontract, and its venue selection clause. Choate has failed to carry its burden to show the trial court abused its discretion by denying its motion for change of venue. Choate's argument is overruled. The trial court's order denying Choate's motion for change of venue is affirmed.

V. Conclusion

The trial court's order denying Choate's motion for change of venue is not fatally overbroad. The trial court reviewed the extensive evidence and arguments presented by Choate and SEC to decipher the intent of the parties. The trial court concluded the parties did not intend to be bound by Choate's unsigned proposed subcontract. Even if the clause were applicable, the venue selection clause contained within the unsigned subcontract prepared by Choate is not a mandatory venue selection clause to make Wake County the sole proper venue. The trial court did not abuse its discretion by denying Choate's motion for change of venue.

This interlocutory appeal of a discretionary ruling by the trial court on a non-mandatory venue provision contained within an unexecuted subcontract prepared by Choate is reviewed under an abuse of discretion standard on appeal. The trial court's order is affirmed. This case is remanded for further proceedings on the merits.

AFFIRMED.

Chief Judge McGEE and Judge INMAN concur.

SERAPH GARRISON, LLC v. GARRISON

[247 N.C. App. 115 (2016)]

SERAPH GARRISON, LLC, DERIVATIVELY ON BEHALF OF
GARRISON ENTERPRISES, INC., PLAINTIFF

v.

CAMERON GARRISON, DEFENDANT

v.

GARRISON ENTERPRISES, INC., NOMINAL DEFENDANT

No. COA14-1166

Filed 19 April 2016

1. Corporations—President and CEO—failure to pay taxes or make 401(k) contributions—breach of fiduciary duties

Where the President and CEO (defendant) of a corporation (GEI) had stopped paying state and federal payroll taxes and stopped making 401(k) contributions for several years, the trial court erred in a derivative action brought on behalf of GEI by concluding that these actions by defendant did not constitute a breach of his fiduciary duties. Defendant deliberately neglected two of his primary corporate responsibilities in violation of state and federal laws—a failure to act with due care and good faith—and he knowingly engaged in conduct that injured GEI—a breach of the duty of loyalty.

2. Corporations—President and CEO—misrepresentation of contract to board of directors—affirmative duty to disclose material facts—no requirement to prove reliance element of actual fraud

In a lawsuit filed derivatively on behalf of the corporation (GEI) for which defendant was the President and CEO, where defendant misrepresented the terms of a licensing contract he negotiated with another company (Ecolab) to GEI's board of directors, the trial court erred in its conclusion that plaintiff had failed to establish the board's reasonable reliance on defendant's misrepresentations and therefore could not be awarded damages on its fraud claim. As a corporate officer reporting to the board, defendant had an affirmative fiduciary duty to disclose all material facts related to the Ecolab contract negotiations. Because defendant breached this duty, plaintiff was not required to prove the reliance element of actual fraud.

3. Corporations—President and CEO—repaying self for loan rather than paying back taxes—constructive trust or unjust enrichment

Where the President and CEO (defendant) of a corporation had stopped paying state and federal payroll taxes and stopped making

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401(k) contributions for several years—yet he continued to pay himself and also repaid himself for a loan using funds from an initial payment on a contract with another company—the trial court erred by refusing to grant plaintiff’s claim under either a constructive trust or unjust enrichment theory based on the loan repayment. Defendant breached his fiduciary duty by directing the repayment to himself rather than making mandatory payments to the federal and state governments. As to whether plaintiff was entitled to recover defendant’s salary and benefits, the issue was remanded to the trial court for consideration of whether plaintiff was entitled to recover any compensatory damages.

4. Corporations—President and CEO—fraud and breach of fiduciary duty—punitive damages claim

In a lawsuit filed derivatively on behalf of the corporation (GEI) for which defendant was the President and CEO, where the trial court erroneously concluded that GEI was not injured by defendant’s fraud and breach of fiduciary duty in misrepresenting a contract he negotiated with another company and therefore was not entitled to compensatory damages, the Court of Appeals ordered the court to consider the issue of punitive damages on remand.

5. Corporations—expert testimony—business valuation

In a lawsuit filed derivatively on behalf of the corporation (GEI) for which defendant was the President and CEO, the trial court erred by rejecting an expert witness’s calculation of GEI’s loss of value caused by defendant’s actions. The trial court’s finding that the expert “simply chose a convenient number to base his loss of value calculation on” was unsupported by the evidence. The expert chose one of three third-party offers to purchase GEI (\$6,000,000) because it was the lowest offer during the relevant time period and also occurred on the date closest to defendant’s actions that gave rise to the lawsuit.

Appeal by plaintiff from judgment entered 26 June 2014 by Judge Calvin E. Murphy in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 March 2015.

Hamilton Stephens Steele & Martin, PLLC, by Mark R. Kutny and Erik M. Rosenwood, and Bryan Cave LLP, by Nicole J. Wade (admitted pro hac vice), for plaintiff-appellant.

No brief filed for defendant-appellee.

SERAPH GARRISON, LLC v. GARRISON

[247 N.C. App. 115 (2016)]

CALABRIA, Judge.

Seraph Garrison, LLC (“plaintiff”) appeals from an order and judgment denying its claims, which were brought derivatively and on behalf of Garrison Enterprises, Inc. (“GEI” or “the corporation”), against Cameron Garrison (“defendant”). For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings.

I. Background

GEI, a North Carolina corporation, was founded by defendant in July 2000. The corporation primarily worked with government entities to supply health inspection software for the input of data for various types of restaurants and government agencies; it also sold software and data related to restaurant inspections, and other types of inspections, to private companies. Defendant was President and CEO of GEI from its founding until the corporation’s board of directors (the “Board”) terminated his employment in December 2010. During this time period, defendant’s father, mother, sister, and three brothers were employed at GEI. In his role as President and CEO, defendant was tasked with ensuring that all required tax payments on behalf of GEO were made to the United States Department of Revenue and the North Carolina Department of Revenue. Defendant was also responsible for making contributions to GEI’s 401(k) Plan.

On 20 December 2010, plaintiff, a Georgia limited liability company and shareholder of GEI, sent a demand letter to GEI’s Board requesting an investigation regarding, *inter alia*, defendant’s “potential breaches of fiduciary duty.” Three days later, the Board terminated defendant’s employment with GEI but it refused to take further action against him. Responding to the Board’s refusal, plaintiff instituted a derivative action on behalf of GEI to recover losses that purportedly resulted from defendant’s conduct during his tenure as President and CEO. In its verified complaint, which was filed in Mecklenburg County on 22 July 2011, plaintiff alleged that defendant breached his fiduciary duties to GEI, committed actual fraud against the corporation, and engaged in unfair and deceptive trade practices.

Specifically, plaintiff alleged that for “various periods beginning in 2008 and ending in 2010,” defendant stopped remitting payroll taxes to the federal and North Carolina state governments. Plaintiff further alleged that defendant failed to make required contributions to GEI’s 401(k) Plan from February 2008 until his termination in December 2010. Finally, plaintiff alleged that defendant deceived the Board by misrepresenting

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the terms of a licensing contract he negotiated with Ecolab, a company that sells cleaning supplies to the hospitality, food service, and health care industries. Based on these allegations, plaintiff sought to recover damages based on unjust enrichment and the imposition of resulting and constructive trusts. Plaintiff also sought punitive damages.

Subsequently, the case was designated as a complex business case and assigned to Judge Calvin E. Murphy, Special Superior Court Judge for Complex Business Cases. On 23 November 2011, defendant filed an answer and counterclaims. When the matter came on for trial in June 2014, defendant failed to appear. As a result, Judge Murphy conducted a bench trial, where plaintiff presented testimony from Rahul Saxena (“Saxena”), who became GEI’s interim President and CEO upon defendant’s termination, and Paul Saltzman (“Saltzman”), who the trial court designated an expert in business valuation, income tax, and accounting. After trial, the court entered an order and judgment that granted plaintiff’s claim for breach of fiduciary duty based on defendant’s misrepresentations regarding the Ecolab contract. However, all of plaintiff’s remaining claims were denied, and no damages were awarded on any claims.¹ Plaintiff appeals.

II. Analysis

A. Standard of Review

“The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment.” *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002) (quotations omitted). “Where such competent evidence exists, this Court is bound by the trial court’s findings of fact even if there is also other evidence in the record that would sustain findings to the contrary.” *Willen v. Hewson*, 174 N.C. App. 714, 718, 622 S.E.2d 187, 190 (2005) (citation omitted). The trial court’s conclusions of law, however, are subject to *de novo* review. *Id.* (citation omitted).

B. Plaintiff’s Claims For Unfair And Deceptive Trade Practices

As an initial matter we note that the trial court denied plaintiff’s unfair and deceptive trade practices claim based on its conclusion that N.C. Gen. Stat. § 75-1.1 did not apply to this case. We agree with this conclusion. *See White v. Thompson*, 864 N.C. 47, 53, 691 S.E.2d 676, 860

1. The trial court also granted plaintiff’s motion for a directed verdict on defendant’s counterclaims, since he neither prosecuted nor presented evidence upon them.

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(2010) (finding section 75-1.1 inapplicable to the internal conduct of a single business). Furthermore, since defendant does not challenge the court's conclusion on appeal, he has abandoned the issue. 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."). Thus, we affirm the trial court's denial of plaintiff's unfair and deceptive trade practices claim.

C. Plaintiff's Claims For Breach of Fiduciary Duty and Fraud

Before addressing plaintiff's fiduciary duty and fraud claims, we begin by noting some principles that should animate any judicial evaluation of corporate conduct. First, under North Carolina law, corporate officers with discretionary authority must discharge their duties:

- (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.

N.C. Gen. Stat. § 55-8-42(a) (2015). Corporate directors are charged with the same standard of conduct. *Id.* § 55-8-30(a)(1)-(3). Although the word "fiduciary" is not used in these provisions, the Official Comment to section 55-8-30 explains "there is no intent to change North Carolina law in this area. The decision not to bring forward the language . . . in former [N.C. Gen. Stat.] § 55-35[—which provided that officers and directors stand in a fiduciary relation 'to the corporation and to its shareholder'—] is not intended to modify in any way the duty of directors recognized under the former law." Consequently, the earlier cases that examine and delineate the duties of directors and officers continue to be effective.

Under these cases, corporate directors and officers act in a fiduciary capacity in the sense that they owe the corporation the duties of loyalty and due care. *Belk v. Belk's Dep't Store, Inc.*, 250 N.C. 99, 103, 108 S.E.2d 131, 135 (1959) (recognizing a director's "duty to honestly exercise[]" his powers "for the benefit of the corporation and all of its shareholders"); *Loy v. Lorm Corp.*, 52 N.C. App. 428, 436, 278 S.E.2d 897, 903 (1981) ("Directors owe a duty of fidelity and due care in the management of a corporation and must exercise their authority solely for the benefit of the corporation and all its shareholders."); *Pierce Concrete, Inc. v. Cannon Realty & Const. Co.*, 77 N.C. App. 411, 413-14, 335 S.E.2d

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30, 31 (1985) (declaring that the fiduciary duty corporate officers owe to North Carolina corporations “is a high one”).

Subdivision 55-8-42(a)(2) outlines the standard by which an officer’s duty of care is measured. Its specific language—in a “like a position” and “under similar circumstances”—acknowledges officers’ that responsibilities will vary from corporation to corporation. The same holds true for the corporate decision-making processes that are employed. Even so, subdivision 55-8-42(a)(2) also imposes an affirmative duty on officers: it requires them to assume an active and direct role in the matters that are under their authority. *Anthony v. Jeffress*, 172 N.C. 378, 379, 90 S.E. 414, 415 (1916) (considering it “immaterial whether the [directors] were cognizant of the . . . company[’s insolvency] or not [when they declared a dividend]. The law charges them with actual knowledge of its financial condition, and holds them responsible for damages sustained by stockholders and creditors by reason of their negligence, fraud, or deceit.”); *F-F Milling Co. v. Sutton*, 9 N.C. App. 181, 184, 175 S.E.2d 746, 748 (1970) (stating that corporate directors in North Carolina may be held personally liable for, *inter alia*, gross neglect of their duties and mismanagement).

Subdivision 55-8-42(a)(3) codifies the requirement that an officer always discharge the responsibilities of the office “with undivided loyalty” to the corporation. *Meiselman v. Meiselman*, 309 N.C. 279, 307, 307 S.E.2d 551, 568 (1983). The corporate law duty of loyalty also imposes an affirmative obligation: a fiduciary must strive to advance the best interests of the corporation. *In re The Walt Disney Co. Derivative Litig.*, 2004 WL 2050138, at *5 n.49 (Del. Ch. Sept. 10, 2004) (stating that the duty of loyalty “has been consistently defined as ‘broad and encompassing,’ demanding of a director ‘the most scrupulous observance.’ To that end, a director may not allow his self-interest to jeopardize his unyielding obligations to the corporation and its shareholders”) (citation omitted).

Second, while subsection 55-8-42(a) requires an officer to act in good faith, this concept cannot be separated from the duties of loyalty and due care. In other words, the obligation to act in good faith does not create a discrete, independent fiduciary duty. Rather, good faith is better understood as an essential component of the duty of loyalty. *See Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006)² (“The failure to act in good faith may result in liability because the requirement to act in good faith ‘is a subsidiary element[,]’[i.e., a

2. Although Delaware law is not binding on this Court, we find its well-developed body of corporate case law instructive and persuasive.

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condition,] ‘of the fundamental duty of loyalty.’ ”). A leading authority on North Carolina business law has also recognized this obligation as a component of the duty of due care: “The requirement of good faith is listed separately in [subsections 55-8-30(a) and 55-8-42(a),] . . . but it normally operates . . . as a component of the other two traditional duties, requiring conscientious effort in discharging the duty of care and constituting the very core of the duty of loyalty.” Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 14.02, 14-7 (7th ed. 2015); see also *Jeffress*, 172 N.C. at 380, 90 S.E. at 415 (“Good faith alone will not excuse [directors] when there is lack of the proper care, attention, and circumspection in the affairs of the corporation[.]”) (emphasis added). Thus, the requirement of good faith is subsumed under an officer’s duties to the corporation; it is a primary and comprehensive obligation that compels an officer to discharge his responsibilities openly, honestly, conscientiously, and with the utmost devotion to the corporation. See *Black’s Law Dictionary* 762 (9th ed. 2009) (defining “good faith” in pertinent part as “[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, . . . [and] (4) absence of intent to defraud or to seek unconscionable advantage”).

Third, context matters: the analysis of an officer’s fiduciary conduct must be judged in light of the background in which it occurs and the circumstances under which he serves the corporation. *Robinson* at § 16.07 (noting that officers’ “greater familiarity with the affairs of the corporation . . . may subject them to higher scrutiny and expectations” than some directors, and that an officer’s good faith and adherence to his duty of loyalty are “defined in terms of the particular individual’s position, so that one with a higher level of authority would naturally have greater responsibilities”); *TW Servs., Inc. v. SWT Acquisition Corp.*, Nos. 10427, 10298, 1989 Del. Ch. LEXIS 19, *28 n.14, 1989 WL 20290 (Del. Ch. Mar. 2, 1989). “[N]o matter what our model [of corporate law], it must be flexible enough to recognize that the contours of a duty of loyalty will be affected by the specific factual context in which it is claimed to arise. . . .”). The same holds true for any examination of “good faith,” an inquiry that presents a mixed question of law and fact:

Whether a party has acted in good faith is a question of fact for the trier of fact, but the standard by which the party’s conduct is to be measured is one of law. In making the determination as to whether a party’s actions constitute a lack of good faith, the circumstances and context in which the party acted must be considered.

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Farmdale Co., LLC v. Gibellini, 176 N.C. App. 60, 67-68, 628 S.E.2d 15, 19 (2006) (citation omitted).

Fourth, the standard of conduct outlined in section 55-8-42 is subject to review under the business judgment rule. While the application of the business judgment rule in North Carolina has been rather sparse, it is clear that our courts do apply the rule.³ See, e.g., *Ehrenhaus v. Baker*, 216 N.C. App. 59, 91, 717 S.E.2d 9, 30 (2011); *State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 602, 513 S.E.2d 812, 821-22 (1999); *Swenson v. Thibaut*, 39 N.C. App. 77, 107, 250 S.E.2d 279, 298 (1978); *N. Carolina Corp. Comm'n v. Harnett Cty. Trust Co.*, 192 N.C. 246, 134 S.E. 656, 657 (1926). This Court has formulated the rule as follows:

[The business judgment rule] operates primarily as a rule of evidence or judicial review and creates, first, an initial evidentiary presumption that in making a decision the directors acted with due care (i.e., on an informed basis) and in good faith in the honest belief that their action was in the best interest of the corporation, and second, absent rebuttal of the initial presumption, a powerful substantive presumption that a decision by a loyal and informed board will not be overturned by a court unless it cannot be attributed to any rational business purpose.

ILA Corp., 132 N.C. App. at 602, 513 S.E.2d at 821-22. As a general matter, *post hoc* judicial review of corporate action should not serve as a platform for second-guessing the business decisions of officers and directors. *HAJMM Co. v. House of Raeford Farms*, 94 N.C. App. 1, 10, 379 S.E.2d 868, 873 (“We are also mindful that the business judgment rule protects corporate directors from being judicially second-guessed when they exercise reasonable care and business judgment.”), *review on additional issues allowed*, 325 N.C. 271, 382 S.E.2d 439 (1989), and *modified, aff'd. in part, rev'd in part on other grounds*, 328 N.C. 578, 403 S.E.2d 483 (1991). Nevertheless, to receive the benefit of the business judgment rule, an officer or director must discharge his duties in compliance with the requirements of subdivision 55-8-42(a). See *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 124 (Del. Ch. 2009) (holding that absent proof of bad faith, conflict of interest, or

3. “The business judgment rule is generally stated, by [our Supreme Court] and others, as being available to officer and directors.” *Robinson* at § 16.07 (citing *Alford v. Shaw*, 318 N.C. 289, 299, 349 S.E.2d 41, 47 (1986), *on reh'g*, 320 N.C. 465, 358 S.E.2d 323 (1987) (stating in dicta that the “rule has provided the yardstick against which the duties and decisions of corporate officers and directors are measured”)).

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disloyalty, officers' and directors' business decisions will not be second-guessed if they are "the product of a rational process," and the officers and directors "availed themselves of all material and reasonably available information" and honestly believed they were acting in the corporation's best interests) (citation and footnote omitted).

With these principles in mind, we turn to plaintiff's claims for breach of fiduciary duty and fraud.

1. *Payroll Taxes and 401(k) Contributions: Breach of Fiduciary Duty*

[1] Plaintiff contends the trial court erred in concluding that defendant's failure to remit payroll taxes and make 401(k) contributions did not constitute a breach of his fiduciary duties. We agree.

From at least 2008 until the end of 2010, defendant caused GEI to stop paying state and federal payroll taxes. Defendant also stopped making contributions to GEI's 401(k) Plan during this time period. When defendant was terminated in December 2010, GEI owed the federal government approximately \$1.6 million in back taxes. The tax delinquency caused several problems for GEI: penalties were incurred, interest accrued, and corporate assets were frozen for a period of time. As a result of the 401(k) contribution delinquency, the North Carolina Department of Labor filed a complaint against GEI and defendant in his individual capacity. According to defendant's deposition, because cash flow was tight at GEI during the period in question, he chose to pay employees and keep the corporation running instead of paying taxes and making contributions.

Based on plaintiff's evidence, the trial court found that there was no proof that defendant's failure to pay payroll taxes and make 401(k) contributions fell below the standard of conduct required by subsection 55-8-42(a). The court also found that defendant neither hid the tax delinquency from the Board nor prevented the Board from intervening to reduce the tax liability. As a result, the court concluded that "given GEI's cash crunch," plaintiff did not present sufficient evidence that defendant's plan of management amounted to a breach of fiduciary duty. Because defendant failed to discharge his duties according to law, the trial court's conclusion was reached in error.

Defendant's failure to make the required payments violated both federal and state law. For example, federal law provides that amounts withheld for payroll taxes and 401(k) plan contributions are held in trust for the government and employees, respectively, and must be used by the employer solely for the purpose of making the required payments to

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the government or to the 401(k) plan. *See, e.g.*, 26 U.S.C. §§ 7501, 6672; 29 U.S.C. §§ 1103, 1132. The federal Internal Revenue Code (“the Code”) specifically requires employers to withhold payroll (i.e., social security and excise) taxes from their employees’ wages. An employer’s “[p]ayment of . . . [payroll] taxes is ‘not excused’ merely because ‘as a matter of sound business judgment, the money was paid to suppliers . . . in order to keep the corporation operating as a going concern—the government cannot be made an unwilling partner in a floundering business.’ ” *Erwin v. United States*, 591 F.3d 313, 319 (4th Cir. 2010) (internal brackets and citation omitted). To assure an employer’s compliance with its obligation to remit payroll taxes, the Code imposes personal liability on officers or agents of the employer who are responsible⁴ for the employer’s decisions regarding withholding and payment of the taxes and who willfully fail to do so. 26 U.S.C. §§ 6672(a), 6671(b).

Whether a “responsible person” willfully failed to collect, account for, or remit payroll taxes depends primarily on whether the person had “knowledge of nonpayment or reckless disregard of whether the payments were being made.” *Erwin*, 591 F.3d at 325. “[W]hen a responsible person learns that withholding taxes have gone unpaid in past quarters for which he was responsible, he has a duty to use all current and future unencumbered funds available to the corporation to pay back those taxes.” *Id.* at 326. To that end, the Fourth Circuit has held that a director acted willfully in failing to remit delinquent payroll taxes when she knew that such taxes for numerous quarters remained unpaid and continued to direct corporate payments to herself and other creditors. *Johnson v. United States*, 734 F.3d 352, 364-65 (4th Cir. 2013) (citing 26 U.S.C.A. § 6672).

In the instant case, defendant, a “responsible person,” knew that payroll taxes for quarters from 2008 to 2010 remained unpaid during his tenure as a GEI officer—he caused the delinquency himself. However, despite this knowledge, unencumbered corporate funds were used to pay defendant’s salary and car allowance. When the Board questioned defendant on the payroll tax issue, he claimed to be working with the IRS but stated that “it was on the bottom of the pile.” Defendant continued to skirt the issue when the Board followed up on it. Notably, Saxena testified that although corporate expenses were high, GEI’s revenue was

4. “The case law interpreting [section] 6672 generally refers to the person required to collect, account for, and remit payroll taxes to the United States as the ‘responsible person.’ ” *Plett v. United States*, 185 F.3d 216, 218-19 (4th Cir. 1999).

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sufficient to pay the payroll taxes and make 401(k) contributions. Saxena also testified that there was no legitimate reason for defendant's failure to make the required payments and contributions. All told, defendant's failure to remedy the payroll tax deficiencies was willful as a matter of law. *See id.* at 364-65 (“[D]uring the . . . delinquent tax periods, Mrs. Johnson received well in excess of \$500,000 in compensation and benefits from the corporation while the payroll taxes went unpaid.”).

This Court has held that failure to comply with the statutory procedures required for a corporate merger “constitutes a breach of a director’s fiduciary duty[.]” *Loy*, 52 N.C. App. at 435, 278 S.E.2d at 902-03. One principle emanating from *Loy* is that a director or officer’s failure to ensure the corporation is operated according to law amounts to a breach of fiduciary duty. Plaintiff’s evidence established defendant’s indifference to the payroll tax and 401(k) contribution deficiencies, which presented the corporation with a myriad of legal problems. It is irrelevant that defendant neither hid these liabilities from the Board nor prevented the Board from addressing them—his conduct violated subsection 55-8-42. By deliberately neglecting two of his primary corporate responsibilities, and violating federal and state law in the process, defendant failed to act with due care and in good faith to GEI. And since defendant had actual knowledge of the tax and contribution liabilities, he also breached his duty of loyalty by engaging in conduct that injured the corporation. Given the facts of this case, the business judgment rule cannot protect defendant’s failure to remedy problems he both created and ignored. Accordingly, the trial court erred in concluding that defendant did not breach his fiduciary duty to GEI by causing the corporation to become delinquent on its payroll taxes and 401(k) contributions.

2. Ecolab Contract: Fraud and Breach of Fiduciary Duty

[2] Plaintiff next argues that the trial court erred in concluding that damages could not be awarded on its fraud claim because plaintiff failed to establish the Board’s reasonable reliance on defendant’s misrepresentations regarding the Ecolab contract. We agree.

While an officer at GEI, defendant had the sole responsibility for all contract negotiations with third parties. In early 2009, defendant began negotiating a contract with Ecolab to provide data from government agencies that conduct health inspections on restaurants. According to defendant’s deposition, he pledged to keep the Board apprised of the negotiations and to submit the contract for Board review before it was executed. To that end, defendant submitted a draft that was reviewed and edited by GEI’s corporate counsel and approved by the Board.

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On 10 August 2009, defendant circulated to the Board a “final” version of the contract, which purportedly had been executed by GEI and Ecolab on 1 July 2009 (the “July Contract”). GEI undertook its relationship with Ecolab based on the Board’s understanding that the July Contract’s terms were in effect. However, defendant had actually executed a different version of the Ecolab contract on 1 August 2009 (the “August Contract”). Ecolab paid GEI \$1,000,000 as an up-front exclusivity payment (“initial payment”) for executing the August Contract. Defendant used a portion of those funds to repay himself for a loan he had previously made to GEI, and to pay his salary, car allowance, and the salaries of other employees. Sometime in late 2010, at a meeting between GEI and Ecolab representatives, Saxena learned of the August Contract’s existence. He also learned that the August Contract’s terms—which were particularly unfavorable to GEI—governed the parties’ relationship and that the July Contract had never been executed by Ecolab.

After having a third-party law firm conduct an investigation, the Board determined that Ecolab’s signature on the July Contract was a forgery and that the August Contract was valid. At this point in time, GEI could not repudiate the August Contract. Even more problematic were the material differences between the two contracts: the July Contract required Ecolab to pay up to \$2,550,000 in exclusivity fees, while the August Contract provided for only \$1,300,000 in such fees; the July Contract permitted GEI to maintain existing contracts with large restaurant chains, but the August Contract required GEI to terminate its preexisting contracts with third parties; the July Contract granted GEI and Ecolab equal rights of termination after ten years, but the August Contract could be terminated only by Ecolab after ten years; the August Contract prohibited GEI from pursuing new contracts unless Ecolab approved, but the July Contract allowed GEI to enter into such contracts under certain conditions. The August Contract also contained provisions that granted Ecolab exclusive rights to GEI’s intellectual property, including its software. In Saxena’s view, the August Contract effected a sale of GEI to Ecolab for \$1,300,000.

Based on this evidence, the trial court found that the August Contract “was financially detrimental to [GEI].” However, the trial court also found that none of the evidence established that defendant was required to seek the Board’s approval before entering into contracts on behalf of GEI. Based on this finding, the court concluded that while defendant breached his fiduciary duty by purposefully misleading the Board as to the July Contract, GEI was only damaged by the August Contract’s execution. In the court’s view, even though the August Contract’s terms

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might have embodied a “bad business deal,” defendant’s execution of that contract did not constitute a breach of fiduciary duty. The court reached a similar conclusion on plaintiff’s fraud claim:

[47] As previously noted, the Court is unconvinced that [d]efendant was obligated to seek Board approval before entering into the Ecolab contract. And, even if [d]efendant were [sic] required to seek Board approval, the approval given was for the July 2009 unexecuted contract and not for the August 2009 executed contract. The only step the Board took in reliance on [d]efendant’s misrepresentations was to approve the July 2009 contract, which was never executed. Defendant’s representations could not have caused the Board to approve the August 2009 contract because, as Saxena testified, the Board was not aware of its existence until months after it had been executed. Therefore, the Court does not conclude that the Board relied on [d]efendant’s misrepresentation to [GEL’s] detriment such that an award of damages would be proper under [p]laintiff’s fraud claim.

After denying plaintiff’s fraud claim and granting its breach of fiduciary claim (as to the Ecolab contract), the court refused to award any compensatory damages based on the following rationale: “It was not [d]efendant’s misrepresentation [regarding the July Contract] to the Board that caused damage to GEL. Rather, it was his signing of the August . . . Contract that created the problem for the company, but such was not a breach of his fiduciary duty.”

By focusing on defendant’s affirmative misrepresentation regarding the July Contract, the trial court diminished the legal significance of his concealed execution of the August Contract and engaged in flawed reasoning. Our Supreme Court has recognized that actual fraud “has no all-embracing definition[.]” *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974) (citations omitted). Even so, a *prima facie* case for fraud consists of the following elements: “(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the [deceived] party.” *Id.* Additionally, the deceived party must have reasonably relied on the allegedly false representations. *Forbis v. Neal*, 361 N.C. 519, 527, 649 S.E.2d 382, 387 (2007) (citation omitted).

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As noted above, the trial court analyzed only defendant's misrepresentation as to the July Contract; it did not address defendant's concealment of material facts (the August Contract's terms and execution). Consequently, the court found that plaintiff met all the essential elements of fraud but failed to prove reasonable reliance causing detriment.

Although reasonable reliance is generally required, the existence of a confidential or fiduciary relationship creates a duty to fully disclose material facts. *Vail v. Vail*, 233 N.C. 109, 116, 63 S.E.2d 202, 207 (1951). When the duty to disclose is breached, fraud has been committed and the deceived party need not prove reasonable reliance. *Id.* Indeed, in the context of fiduciary relationships, the law excuses a deceived party's failure to exercise reasonable diligence, as the duty to investigate is subordinate to the duty of full disclosure:

[T]he failure of the defrauded person to use diligence in discovering the fraud may be excused where there exists a relation of trust and confidence between the parties. This is so for the reason that a confidential or fiduciary relation imposes upon the one who is trusted the duty to exercise the utmost of good faith and to disclose all material facts affecting the relation.

Id. (internal quotation marks and citation omitted); see also *Everts v. Parkinson*, 147 N.C. App. 315, 325, 555 S.E.2d 667, 674 (2001) (holding that a plaintiff need not prove reasonable reliance upon proving breach of duty to disclose, as the elements are virtually identical to what is already required to establish the very duty to disclose).

In the instant case, defendant committed two species of fraud: he concealed the August Contract's terms from the Board, and he falsely represented that the July Contract was in effect. The trial court found that defendant misled the Board by "purposefully present[ing] the Board with [the July Contract] when he knew that another, detrimental version had already been executed." Given the fiduciary duties that subsection 55-8-42(a) imposed on defendant, plaintiff had to prove only that the law obligated defendant to disclose the information he concealed. Even a cursory review of the record reveals that defendant's calculated misrepresentation relating to the July Contract allowed him to conceal the negotiation, execution, and existence of the August Contract. It is equally clear that the Board detrimentally incorporated defendant's misrepresentations into its decision-making process: GEI commenced its relationship with Ecolab based on the July Contract, which the Board believed to be valid and binding; and if the August Contract's terms

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had been disclosed, it is reasonably certain that the Board would have attempted to repudiate the agreement.⁵ Yet the trial court reasoned that defendant's misrepresentations did not induce the Board to enter into the August Contract. This reasoning was flawed. Defendant's act (representing that the July Contract was executed) and omission (concealing the August Contract), which were not taken in good faith, were inextricably linked. It was illogical to conclude that reliance was required in this instance and that such reliance, if required, could only be established by proving the Board relied on information that defendant *deliberately concealed*. As a corporate officer reporting to the Board, defendant had an affirmative, fiduciary duty to disclose all material facts related to the Ecolab contract negotiations. Since he failed to do so, plaintiff was not required to prove the reliance element of actual fraud, *Vail*, 233 N.C. at 116, 63 S.E.2d at 207, and the trial court erred in imposing such a requirement. Accordingly, we reverse the trial court's conclusion that plaintiff failed to establish the elements of actual fraud in relation to the Ecolab contract.

Defendant not only breached his fiduciary duties through misrepresentations and concealment, he also breached them by using the initial payment from Ecolab for his personal benefit. Saltzman acknowledged that when defendant repaid himself for a loan he purportedly made to GEI, he "put himself first in the line of creditors." The record also demonstrates that, had funds from the initial payment flowed through the corporation correctly, other creditors—the federal government, employees, and GEI itself—would have been paid before defendant. Defendant repaid himself at a time when GEI was facing serious legal consequences from the federal and state governments. Those consequences stemmed directly from defendant's failure to remit payroll taxes and make required 401(k) contributions. As such, defendant engaged in a certain form of self-dealing: he used proceeds from a corporate contract to benefit himself and his interests at the expense of GEI. Because the requirement of good faith requires officers to avoid self-dealing, *see Freese v. Smith*, 110 N.C. App. 28, 38, 428 S.E.2d 841, 848 (1993) (noting that defendant-director "was under a statutory mandate to act in good faith and not to engage in any self[-]dealing"), defendant breached his

5. As noted below, we conclude that the reasonable reliance requirement of fraud was obviated in this case due to defendant's concealment of the August Contract. However, GEI also detrimentally relied on defendant's affirmative misrepresentation as to the July Contract, which fraudulently induced the Board to forego inquiries which it otherwise would have made. Thus, no matter what analysis is applied, the trial court reached an erroneous conclusion on plaintiff's fraud claim.

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duty of loyalty to GEI. *See ILA Corp.*, 132 N.C. App. at 597, 513 S.E.2d at 819 (holding that a director engaged in self-dealing and breached his fiduciary duty by directing proceeds from a purchase of corporate stock to repay a debt to another company that he controlled).

D. Unjust Enrichment, Resulting Trust, and Constructive Trust

[3] Plaintiff argues that the trial court erred by denying its claims for unjust enrichment, resulting trust,⁶ and constructive trust.

A constructive trust is an equitable remedy “ . . . imposed by courts . . . to prevent the unjust enrichment of the holder of title to, or of an interest in, property which [was] acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.” *United Carolina Bank v. Brogan*, 155 N.C. App. 633, 636, 574 S.E.2d 112, 115 (2002) (citations omitted). Failure to establish a fraud claim is not determinative of a constructive trust claim; “[i]t is sufficient that legal title has been obtained in violation, express or implied, of some duty owed to the one who is equitably entitled.” *Colwell Elec. Co. v. Kale-Barnwell Realty & Const. Co.*, 267 N.C. 714, 719, 148 S.E.2d 856, 860 (1966) (citation omitted); *see also Roper v. Edwards*, 323 N.C. 461, 465, 373 S.E.2d 423, 425 (1988) (stating that the existence of fraud need not be established if the facts of the case necessitate imposition of a constructive trust).

This Court has defined unjust enrichment as a

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

Adams v. Moore, 96 N.C. App. 359, 362, 385 S.E.2d 799, 801 (1989) (citation and brackets omitted). Since an unjust enrichment claim involves a restitution-type recovery, a plaintiff need not have actual damages:

6. Plaintiff makes no legal argument on its resulting trust claim, and we believe the claim was never actionable in the first place. *See Patterson v. Strickland*, 133 N.C. App. 510, 519, 515 S.E.2d 915, 920 (1999) (explaining that a resulting trust generally arises “when a person becomes invested with the title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for the benefit of another”) (citation and quotation marks omitted). Accordingly, we will not address this issue. *See N.C.R. App. P. 28(b)(6)*.

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The main purpose of the damages award is some rough kind of compensation for the plaintiff's loss. This is not the case with every kind of money award, only with the damages award. In this respect, restitution stands in direct contrast to the damages action. The restitution claim, on the other hand, is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep. A plaintiff may receive a windfall in some cases, but this is acceptable in order to avoid any unjust enrichment on the defendant's part. The principle of restitution is to deprive the defendant of benefits that in equity and good conscience he ought not to keep . . . even though plaintiff may have suffered no demonstrable losses.

Booher v. Frue, 86 N.C. App. 390, 393-94, 358 S.E.2d 127, 129 (1987) (alteration, quotation marks, and citations omitted).

Plaintiff's constructive trust and unjust enrichment claims were based on its allegations that defendant paid himself and received benefits—such as a car allowance—during the period that the payroll tax and 401(k) contribution delinquencies occurred. These claims were also based on the allegation that defendant used a portion of the initial payment (\$124,451) from the August Contract to repay himself for a loan he made to GEI. The trial court rejected both claims, finding that: (1) defendant did not breach his fiduciary duty by failing to remit payroll taxes or make 401(k) contributions; (2) “by entering into a bad business deal, [d]efendant [did not] forfeit[] his right to earn and be paid a salary and car allowance”; and (3) “even if [d]efendant did repay a loan he made to GEI in accordance with Saltzman's testimony, there is insufficient evidence that he was not entitled to such repayment.”

As to the \$124,451 loan repayment, the trial court erred by refusing to grant plaintiff's claim under either a constructive trust or unjust enrichment theory. We have already held that defendant breached his fiduciary duty in directing the repayment to himself. In the context of this case, it is irrelevant whether defendant was entitled to repayment—he claimed those funds at a time when his actions (and inactions) caused GEI to incur significant legal and financial liabilities. Specifically, he used discretionary funds from the initial payment to benefit himself instead of making mandatory payments to the federal and state governments.

As to whether plaintiff was entitled to recover all or a portion of defendant's salary and benefits that were taken from the initial payment,

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we remand the issue to the trial court for further consideration. The trial court took issue with Saltzman's analysis of losses GEI suffered related to plaintiff's unjust enrichment and constructive trust claims, finding that he "never presented evidence on" those claims. We agree with this finding subject to one exception: Saltzman did discuss the \$124,451 loan repayment. As a result, plaintiff cannot recover losses related to defendant's salary and benefits pursuant to its unjust enrichment and constructive trust claims. However, since we have reversed the court on the breach of fiduciary duty and fraud claims, it should consider whether plaintiff may recover any losses related to defendant's salary and benefits (taken from the initial payment) may be recovered as compensatory damages.

E. Damages Issues***1. Punitive Damages***

[4] Plaintiff next contends that because the trial court erred in denying compensatory damages, the court also erred in failing to consider an award of punitive damages. We agree.

N.C. Gen. Stat. § 1D-15 (2015) provides, in pertinent part, that:

(a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:

- (1) Fraud[;]
- (2) Malice[; or]
- (3) Willful or wanton conduct.

(b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.

"For the tort of fraud, the aggravating factor may be intrinsic to the tort." *Hudgins v. Wagoner*, 204 N.C. App. 480, 493, 694 S.E.2d 436, 446 (2010); *see also Stone v. Martin*, 85 N.C. App. 410, 418, 355 S.E.2d 255, 260 (1987) ("Since fraud is present in [this] case . . . , additional elements of aggravation are unnecessary.") (citation omitted).

Here, the trial court found that GEI was not "injured by [d]efendant's breach of fiduciary duty by misrepresenting" the Ecolab contract's terms. As this was "the only actionable portion of all [p]laintiff's claims," the trial court concluded that plaintiff was not entitled to compensatory

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damages from defendant. Consequently, the court refused to consider the issue of punitive damages.

Since the trial court erroneously concluded that plaintiff failed to prove actual fraud—a potential aggravating factor under section 1D-15—and since compensatory damages may be awarded for defendant’s fraud and breach of fiduciary duty claims, the court should consider the issue of punitive damages on remand.

2. The Trial Court’s Rejection of Saltzman’s Loss of Value Evaluation

[5] In its final argument, plaintiff contends that the trial court erroneously rejected Saltzman’s calculation of GEI’s loss of value that was caused by defendant’s actions. Once again, we agree.

At trial, Saltzman explained that his analysis focused on the fair market value of GEI in 2009, when defendant negotiated the Ecolab contract. In assessing GEI’s fair market value, Saltzman mainly considered three different third-party offers to purchase GEI: (1) \$10,500,000 on 24 November 2009; (2) \$7,000,000 on 17 August 2010; and (3) \$6,000,000 on 6 November 2009. He also discussed later, additional offers: a \$5,000,000 offer from Ecolab in November 2010, and a \$2,000,000 offer which was tendered in 2013. Saltzman concluded that the \$6,000,000 offer provided the best starting point for calculating GEI’s loss of value, explaining that he “took the lowest of the three [offers] that were in that time period” and that “[t]he [\$6,000,000] figure was the closest date to the” negotiation of the July and August Contracts. After basing his calculations on the \$6,000,000 offer, Saltzman concluded it was reasonably certain GEI had lost \$510,531 in value.

However, the trial court rejected Saltzman’s use of the \$6,000,000 figure:

Saltzman’s use of \$6,000,000 in his calculation of loss of value appears to be based on convenience and very little methodology. There were other figures he could have used to represent expression of interest in purchasing GEI that were close to the timing of the Ecolab contract, including one number lower than he selected. Saltzman affirmatively opted not to use an average value. It appears to the Court that Saltzman simply chose a convenient number to base his loss of value calculation on, which the Court finds unpersuasive.

Based on our review of the record, we conclude that these findings were unsupported by the evidence. To begin, the trial court’s insinuation

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that an average value would have been more appropriate makes little sense. An average of the three 2009 offers would have set Saltzman's starting point at approximately \$7,800,000; an average of all five offers would have yielded a \$6,100,000 starting point. In addition, the "lower" offer the court discussed—apparently a reference to the \$5,000,000 Ecolab offer—was contingent on certain revenue requirements and was, thus, not comparable to the \$6,000,000 offer. Finally, the court's finding that defendant "simply chose a convenient number" was unjustified. Saltzman explained his methodology and testified that he took the lowest offer that was close in time to the Ecolab contract's execution. Overall, Saltzman's assessment of GEI's loss of value was calculated with reasonable certainty. *See Iron Steamer, Ltd. v. Trinity Rest., Inc.*, 110 N.C. App. 843, 847, 431 S.E.2d 767, 770 (1993) (recognizing that damages for loss of corporate profits must be ascertained with "reasonable certainty") (citation omitted). Consequently, the trial court erred in rejecting his \$510,531 loss of value estimate.

III. Conclusion

Defendant breached his fiduciary duties to GEI by failing to remit payroll taxes and make 401(k) contributions that were required by federal and state law. He also breached his fiduciary duties by appropriating funds from the Ecolab contract initial payment for his personal benefit—the repayment of a loan he made to GEI—to the detriment of the corporation. By concealing the existence of the binding August Contract, defendant committed actual fraud against GEI. Since compensatory damages may be awarded on this claim, the trial court should consider the issue of punitive damages on remand. Furthermore, because we have reversed the trial court on virtually all of plaintiff's claims, the court should consider anew the issue of compensatory damages as they relate to the claims of breach of fiduciary duty and fraud. Plaintiff is entitled to recover the \$124,521 loan repayment pursuant to its constructive trust and unjust enrichment claims, and the trial court should reconsider whether the salary and benefits defendant received from his appropriation of the initial payment are subject to plaintiff's compensatory damages claim.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges McCULLOUGH and DIETZ concur.

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CRAIG STEVEN SMITH, PLAINTIFF

v.

VERA CRANFORD SMITH, DEFENDANT

No. COA15-185

Filed 19 April 2016

1. Appeal and Error—appealability—interlocutory order—temporary child support and custody order—subsequent permanent order

Although plaintiff argued that an interlocutory order concerning temporary child support and custody order was reviewable on appeal because the question was a matter of public interest, the matter did not, in fact, raise any issue of public interest. The temporary child support order and the interlocutory post-trial order were moot because of the subsequent entry of the permanent child support order.

2. Child Custody and Support—high income parent—private school tuition

In a case of first impression, the trial court did not err by concluding that a high income plaintiff should continue to pay his children's private school tuition where the children had been consistently enrolled in private school, the parties' continual desire was to educate their children in private schools, and the parties' income exceeded the level set by the Child Support Guidelines. A trial court can require a higher income parent to pay his children's private school tuition without a specific showing that his children needed the advantages offered by private schooling; a child's reasonable needs are not limited to absolutely necessary items if the parents can afford to pay more to maintain the accustomed standard of living of the child.

3. Child Custody and Support—private school tuition—father capable of paying

Whether the parties had previously used defendant's inheritance to pay their children's private school tuition was irrelevant to their present ability to pay in a child support action where the father was ordered to continue paying private school tuition for his children. The trial court's findings, binding on appeal, were specific enough to support the conclusion that plaintiff was capable of paying his children's tuition.

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4. Child Custody and Support—retroactive private school tuition—UTMA accounts

The trial court did not err in a child support action by ordering plaintiff to pay retroactive private school tuition to defendant where at least some of the money was paid by defendant from the children's Uniform Transfers to Minors Act (UTMA) accounts. The trial court ordered that defendant reimburse the UTMA accounts upon receipt of the child support award from plaintiff.

5. Statutes of Limitation and Repose—retroactive child support payments—payments after action filed

The three-year statute of limitations had no application to retroactive child support payments made after plaintiff filed her action in 2009.

6. Child Custody and Support—retroactive—findings

An order for retroactive child support was remanded for recalculation where there was an inconsistency in the trial court's findings.

7. Child Custody and Support—retroactive child support—partial payment—basis

The trial court erred in a child support action by ordering defendant to pay 25 percent of the children's school tuition without making findings explaining its basis for the 25 percent figure.

8. Child Custody and Support—retroactive support—inconsistent testimony—other supporting evidence

The trial court did not err when ordering retroactive child support where plaintiff argued that defendant's testimony had been inconsistent and skewed, but the inconsistency went to credibility, and evidence before the trial court otherwise established the subject of the evidence.

9. Child Custody and Support—retroactive child support—change of custodial arrangement—corresponding findings of fact

The trial court did not err in a child support case in its award of retroactive child support where plaintiff argued that a change in the custodial arrangement meant that some of defendant's evidence about expenditures did not reflect amounts spent after that time, but defendant testified repeatedly to the static nature of the shared and individual expenses of her children and that she had taken into

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account any increase or decrease that may have occurred. The trial court made corresponding findings of fact.

10. Child Custody and Support—inconsistent findings—remanded

A child support order was remanded where the trial court's intent, as suggested by one finding, was inconsistent with another finding that was reflected in the conclusion.

11. Child Custody and Support—amount previously paid

The trial court did not err in a child support action by failing to credit to plaintiff an amount previously paid where plaintiff testified that the payment represented the computation of defendant's share of the October distribution of marital assets minus expenses.

12. Child Custody and Support—prospective support award—findings—no mention of defendant's inheritance—remanded

A prospective child support award was remanded where the trial court's findings lacked any mention of defendant's inheritance. Without specific findings of fact addressing this inheritance, the Court of Appeals could not determine whether the trial court gave due regard to the factors enumerated in N.C.G.S. § 50-13.4(c).

13. Child Custody and Support—support—plaintiff's contribution—religious contribution—loan repayment—no conclusion as to reasonableness

The trial court did not err in a child support case where there was no specific conclusion as to the reasonableness of plaintiff's religious contributions or a loan repayment, but the trial court's ultimate conclusion as to plaintiff's reasonable expenses were supported by its findings of fact.

14. Witnesses—child psychologist—qualified as an expert—child custody and support action

The trial court did not err in a child custody and support action by concluding that a child psychologist was qualified to testify as an expert witness.

15. Child Custody and Support—shared parenting—child psychologist—testimony relevant

A child psychologist's testimony in a child custody and support case on shared parenting arrangements was relevant to the custodial arrangement in the case, and the trial court did not abuse its discretion in admitting the testimony.

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16. Child Custody and Support—deviation from temporary order—change of circumstances not required

The trial court was not required to find changed circumstances in a child custody and support action in order to deviate from an earlier temporary order.

17. Child Custody and Support—shared custody—evidence and findings

Challenged findings in a child support and custody case were supported by competent evidence, and the findings supported the conclusion that an equally shared custodial arrangement was in the best interest of the children.

18. Divorce—equitable distribution—inheritance

The trial court erred by making no mention of defendant's inheritance in the final equitable distribution order because the inheritance qualifies as property.

19. Appeal and Error—granting of motions—order not included

The Court of Appeals did not have jurisdiction to address the issues raised by defendant on appeal regarding the granting of plaintiff's motion to amend an equitable distribution order pursuant to N.C.G.S. § 1A-1, Rules 52 and 59. Defendant clearly included the amended judgment and order regarding equitable distribution in her notice of appeal but failed to include the order granting plaintiff's Rule 52 and 59 motions.

20. Divorce—equitable distribution—debt payments—status—stipulations

The trial court did not err in an equitable distribution order by not classifying two debt payments as divisible property. As to the debt incurred for expenses relating to the marital home, the parties' stipulations fully resolved any claims arising from divisible property interests in the marital home, and there was no divisible interest remaining after considering the value of the property and the debt. There was also no divisible property interest in dues or assessments plaintiff may have paid to a country club. Finally, the findings supported the trial court's conclusions of law.

21. Divorce—equitable distribution—accounting partnership—valuation

The trial court did not err in an equitable distribution and child support case in the valuation methodology used for valuing

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plaintiff's PricewaterhouseCoopers, LLC partnership interest. The trial court's methodology applied sound techniques and relied upon competent evidence to reasonably approximate the value of plaintiff's partnership interest.

Appeal by plaintiff and cross-appeal by defendant from orders and judgments entered 1 June 2010, 21 February 2011, 10 May 2011, 31 August 2011, 17 June 2013, 22 July 2013, 20 November 2013, 28 January 2014, and 9 July 2014 by Judge Donnie Hoover in Mecklenburg County District Court. Heard in the Court of Appeals 25 August 2015.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, G. Russell Kornegay, III, and John Paul Tsahakis, for plaintiff.

William L. Sitton, Jr., Attorney at Law, by William L. Sitton, Jr.; and Brendle Law Firm, PLLC, by Andrew S. Brendle, for defendant.

GEER, Judge.

Plaintiff Craig Steven Smith appeals from the trial court's equitable distribution judgment, three corresponding qualified domestic relations orders, and a permanent child support and custody order. Plaintiff primarily argues on appeal that the trial court erred by requiring him to pay his children's private school tuition without finding that his children have a reasonable need for private schooling that a public school education cannot provide. Because the parties' combined yearly income exceeds the level at which the presumptive North Carolina Child Support Guidelines ("the Guidelines") apply, we hold that the trial court was not required to make findings mandated by the Guidelines. Instead, we hold that the trial court's conclusion that private school is a reasonable need of the children is fully supported by the court's findings of fact that private school is part of the children's accustomed standard of living, that the parties are capable of paying the tuition, and that the parties have previously agreed that their children would be educated in private school. We therefore affirm the trial court's order that plaintiff pay his children's private school tuition. Because the parties have shown that the trial court failed to make adequate findings of fact with respect to certain aspects of the child support and equitable distribution orders, we reverse those orders and remand for further findings of fact. We find no error with respect to the custody order and affirm it.

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Facts

Plaintiff and defendant married on 1 August 1992. They met while employed as certified public accountants at the same company in New Orleans, Louisiana. They later moved to Houston, Texas where plaintiff took a job with PricewaterhouseCoopers (“PwC”). Three children were born to their marriage: Margaret (“Meg”) on 13 October 1996; Emilie on 16 January 1999; and Lara on 8 April 2002.

In August 2003, they moved from Houston to Charlotte, North Carolina so that plaintiff could pursue his career as an equity partner with PwC. Within a few years after the move to Charlotte, plaintiff’s income as an equity partner substantially increased from approximately \$150,000.00 in 2003 to over \$500,000.00 by 2007. During the same period, defendant’s salary decreased from around \$80,000.00 to approximately \$38,000.00, as she became the primary caregiver for the children and plaintiff became the primary supporting parent.

Ever since the children began school, plaintiff and defendant shared a mutual desire to educate their children in private schools. When the parties relocated to Charlotte, they enrolled their three children at Providence Day School (“PDS”), where they presently remain enrolled.

The parties separated on 1 June 2007, when defendant left the marital home a few months after plaintiff discovered that defendant was having an extramarital affair and was pregnant from that affair. From the date of separation until February 2009, the parties shared physical custody of the children, with each parent having the children for nearly an equal amount of time. However, beginning in February 2009 and continuing until the trial court entered a temporary custody order in February 2011, defendant unilaterally restricted plaintiff’s time with the children to every other weekend.

Also upon separation, plaintiff began objecting to the children’s continued enrollment at PDS. He agreed for them to finish the 2007-2008 school year at PDS, but expressed his desire to enroll them at a less expensive private school, even though he never made a significant effort to identify one. Plaintiff did not voluntarily contribute to the PDS tuition after the 2007-2008 school year. Defendant therefore paid the children’s tuition for the 2008-2009 and 2009-2010 school years with money from the children’s individual Uniform Transfers to Minors Act (“UTMA”) accounts in the amounts of \$53,810.00 and \$49,804.18, respectively, for each school year. She also utilized individual savings accounts to pay the 2009-2010 tuition.

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Plaintiff filed for absolute divorce on 8 May 2009, which the trial court granted on 17 September 2009. In his complaint for divorce, plaintiff also sought primary custody of the children and an unequal equitable distribution of the marital property in his favor. Defendant filed an answer and counterclaim on 19 June 2009, seeking continued primary custody, retroactive and prospective child support, and an unequal distribution of the marital property in her favor.

The trial court entered a final equitable distribution pretrial order on 1 June 2010. In this order, the parties stipulated to classifying three of plaintiff's PwC retirement accounts – a 401(k) plan, a “Keough” plan, and a “RBAP” plan – as marital property until the date of separation and any post-separation accruals in those accounts as plaintiff's separate property. Also, on 23 December 2010, the parties stipulated in writing that they would equally divide the net equity received from the sale of the marital residence.

On 21 February 2011, the trial court entered a temporary child support order, requiring plaintiff to pay \$5,000.00 in child support to defendant on the first of each month beginning 1 August 2010 and all of the children's private school tuition at PDS going forward. Also on 21 February 2011, the trial court entered a temporary custody order essentially maintaining the custody arrangement created by defendant in February 2009. This order provided that plaintiff would have the children for approximately six overnights a month and for four weeks of the children's summer vacation.

On 22 July 2013, the trial court entered its final equitable distribution order in which it ordered an unequal distribution in favor of defendant. The order was based on findings including, but not limited to, the extent of defendant's inheritance, the value of plaintiff's PwC partnership interest as of the date of separation, and the classification and valuation of plaintiff's PwC retirement accounts. With regard to defendant's inheritance, the trial court acknowledged her maternal inheritance of over \$916,000.00, which she contributed to the marriage. However, the trial court made no findings relating to defendant's substantial paternal inheritance, aside from three parcels of real property. In relation to plaintiff's PwC partnership valuation, although the court “question[ed] the accuracy and validity of both parties' methods of computing the value,” it ultimately concluded that “Defendant/Wife's methodology appears to be the most appropriate of the two.”

The trial court further found, despite prior stipulations to the contrary, that the post-separation accruals in plaintiff's three PwC retirement

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plans were divisible property. Plaintiff thereafter filed several post-trial motions on 1 August 2013, which the court granted pursuant to Rules 52 and 59 of the Rules of Civil Procedure. As a result, the trial court entered an amended equitable distribution order on 20 November 2013 reclassifying these post-separation accruals as plaintiff's separate property. Then, on 28 January 2014, the trial court entered three qualified domestic relations orders ("QDROs"), distributing defendant's shares of these retirement plans accordingly.

Upon entering a permanent custody order on 9 July 2014, the trial court reversed course from the temporary custody arrangement and granted the parties joint and equal physical custody on a week-on-week-off basis. In addition, the trial court awarded "permanent joint legal care, custody, and control of the minor children" to both the parties. Also on 9 July 2014, the trial court entered a permanent child support order, in which the trial court reduced plaintiff's monthly support contribution from \$5,000.00 to \$4,000.00 as a result of the changed custody arrangement. It further required plaintiff to pay \$95,520.65 in retroactive child support to defendant for the time period from the date of separation through 30 June 2009.

Because of the parties' substantial combined income, the trial court determined that the presumptive requirements of the child support Guidelines were not applicable. With regard to private school tuition, the trial court found that "[i]t continue[d] to be in the best interest of the minor children to be enrolled at [PDS]," and that plaintiff "is well-able and capable of providing substantial support on behalf of the minor children to maintain that standard of living that they have enjoyed prior to the parties' separation . . ." Based on its findings, the trial court ordered that plaintiff "be solely responsible for every tuition and expense payment due and payable to [PDS]," but required defendant to reimburse plaintiff for 25% of the tuition expenses going forward. Additionally, plaintiff was required to pay \$116,409.18 in reimbursements to defendant for tuition for the 2007-2008, 2008-2009, and 2009-2010 school years paid out of her account and the children's accounts.

Plaintiff timely appealed the permanent custody and support orders, as well as the final equitable distribution order and corresponding QDROs to this Court. Shortly thereafter, defendant timely filed a cross-appeal, challenging the custody, support, and equitable distribution orders, as well.

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Discussion

As a general matter, where the trial court sits without a jury, “the judge is required to ‘find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.’” *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 188-89 (1980) (quoting N.C.R. Civ. P. 52(a)). Thus, “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.” *Oakley v. Oakley*, 165 N.C. App. 859, 861, 599 S.E.2d 925, 927 (2004) (quoting *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). The findings of fact are supported by competent evidence “even when the record includes other evidence that might support contrary findings.” *Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002). “The trial court’s conclusions of law, however, are reviewed de novo.” *Casella v. Alden*, 200 N.C. App. 24, 28, 682 S.E.2d 455, 459 (2009).

I. Appeal from Temporary and Interlocutory Orders

[1] Before addressing the parties’ appeals from the final orders in these proceedings, we must address plaintiff’s appeals from the trial court’s 21 February 2011 temporary child support and custody order and the 31 August 2011 interlocutory order denying plaintiff’s post-trial motions. Plaintiff acknowledges the well-observed rule that a temporary interlocutory order made moot by virtue of a subsequent permanent order is not reviewable by this Court. *See, e.g., Metz v. Metz*, 212 N.C. App. 494, 498, 711 S.E.2d 737, 740 (2011) (refusing to challenge temporary support order mooted by subsequent permanent order). In an attempt to circumvent this rule, plaintiff cites to *In re A.N.B.*, 232 N.C. App. 406, 408, 754 S.E.2d 442, 445 (2014) (quoting *Thomas v. N.C. Dep’t of Human Res.*, 124 N.C. App. 698, 705, 478 S.E.2d 816, 821 (1996), *aff’d per curiam*, 346 N.C. 268, 485 S.E.2d 295 (1997)), arguing that this Court has a duty to address the issues he raises in these mooted orders because “the ‘question involved is a matter of public interest.’”

We do not agree that this matter raises any issue of public interest. Matters of public interest are, for example, matters such as “preventing unwarranted admission of juveniles into [psychiatric] treatment facilities[.]” *Id.* We do not believe that the court-ordered child custody and support arrangements are comparable matters of public interest. Accordingly, the temporary child support order and the interlocutory post-trial order are moot on account of the subsequent entry of the permanent child support order and are not reviewable by this Court.

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Plaintiff also seeks review of these orders pursuant to a writ of certiorari under Rule 21(a)(1) of the Rules of Appellate Procedure. However, “it is well-established that where an argument is moot, no appellate review should lie.” *In re J.R.W.*, ___ N.C. App. ___, ___, 765 S.E.2d 116, 119 (2014) (declining to suspend the Rules of Appellate Procedure under Rule 2 when arguments moot), *disc. review denied*, 367 N.C. 813, 767 S.E.2d 840 (2015). We, therefore, deny plaintiff’s request for certiorari.

II. Child Support

Plaintiff appeals, and defendant cross-appeals, from a number of rulings in the permanent child support order of 9 July 2014. Both parties challenge the trial court’s findings of fact and conclusions of law related to the payment of their children’s private school tuition, while plaintiff also challenges the findings of fact related to the retroactive and prospective child support awards. Each challenge is addressed in turn below.

A. Private School Tuition

[2] Plaintiff contends that the trial court erroneously ordered him to pay his children’s private school tuition at PDS without making findings of fact as to the children’s particular needs for private school pursuant to North Carolina’s applicable child support statute. That statute reads:

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) (2015) (emphasis added). The question whether a trial court can require a higher income parent, such as plaintiff, to pay his children’s private school tuition without a specific showing that his children need the advantages offered by private schooling is a matter of first impression for this Court. However, we do not agree with plaintiff’s contentions that a trial court must find such a specific need prior to ordering a higher income parent to pay this expense as a component of child support.

The trial court made numerous findings in the permanent child support order regarding the parties’ respective incomes. The trial court found that as of 2011, plaintiff “was earning at least \$522,000/year at PwC,” that his “gross income has increased each year since 2004[,]” and

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that “[t]here is no reason to assume that [his] gross monthly income will remain at or below \$43,000.00 per month for the current fiscal year.” The trial court also found that defendant’s income in the years from 2007 to 2011 fluctuated from approximately \$36,000.00 to \$51,000.00. Based on the parties’ combined income, the court determined that “[c]hild support in this matter is not subject to the N.C. Child Support Guidelines” and, therefore, that private school tuition was not a “deviation” from the Guidelines or an “extraordinary expense” as set forth in the Guidelines.

The trial court further found that “[p]rior to taking up residence in Charlotte, North Carolina . . . Meg and Emilie were enrolled at Providence Day School” and that the youngest child, Lara, “has remained a full-time student at PDS since August of 2007.” The court also found that plaintiff “testified that it was his preference that the Smith children continue attending private school[,]” but that he claimed “there are other private schools in the Charlotte region that charge significantly less tuition than PDS . . . [which] should be preferred[,]” even though he had not “present[ed] [any] evidence regarding accreditation, curricula or tuition and expenses for these specific alternative schools.”

Ultimately, the trial court concluded that the parties were capable of paying for their children’s private school tuition based on their respective gross incomes. Furthermore, the trial court concluded that the parties must continue to educate their children in private school “[i]n order to maintain the standard of living to which the minor children are accustomed” and to remain consistent “with the stated intent of both parties that the minor children attend private school versus public school[.]”

Normally, “[t]he court shall determine the amount of child support payments by applying the presumptive guidelines” N.C. Gen. Stat. § 50-13.4(c). However, when “the parents’ combined adjusted gross income is more than \$25,000 per month (\$300,000 per year), the supporting parent’s basic child support obligation cannot be determined by using the child support schedule.” N.C. Child Support Guidelines, 2016 Ann. R. N.C. at 50. “The schedule of basic child support may be of assistance to the court in determining a minimal level of child support.” *Id.* But, “[f]or cases with higher combined monthly adjusted gross income, child support should be determined on a case-by-case basis.” *Taylor v. Taylor*, 118 N.C. App. 356, 362, 455 S.E.2d 442, 447 (1995) (quoting Guidelines, 1991 Ann. R. N.C.), *rev’d on other grounds*, 343 N.C. 50, 468 S.E.2d 33 (1996).

Thus, where the parties’ income exceeds the level set by the Guidelines, the trial court’s support order, on a case-by-case basis,

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“ ‘must be based upon the interplay of the trial court’s conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount.’ ” *Id.* (quoting *Newman v. Newman*, 64 N.C. App. 125, 127, 306 S.E.2d 540, 542 (1983)). The determination of a child’s needs is “largely measured by the ‘accustomed standard of living of the child.’ ” *Cohen v. Cohen*, 100 N.C. App. 334, 339, 396 S.E.2d 344, 347 (1990).

Even though the expense of private school has never been specifically addressed in higher income cases, our appellate courts have long recognized that a child’s reasonable needs are not limited to absolutely necessary items if the parents can afford to pay more to maintain the accustomed standard of living of the child. *See, e.g., Williams v. Williams*, 261 N.C. 48, 57, 134 S.E.2d 227, 234 (1964) (“In addition to the actual needs of the child, a [parent] has a legal duty to give his [or her] children those advantages which are reasonable considering his [or her] financial condition and his [or her] position in society.”); *Loosvelt v. Brown*, ___ N.C. App. ___, ___, 760 S.E.2d 351, 362 (2014) (“In addition to the actual needs of the child, a father has a legal duty to give his children those advantages which are reasonable considering his financial condition and his position in society.”).

Despite this well-established law, plaintiff contends that in order for the trial court to award the expense of private school tuition, it must first find that a child’s special needs – for example, a child’s health issues or disabilities – require private school and that public school cannot adequately meet such needs. In making this argument, he cites *Biggs v. Greer*, 136 N.C. App. 294, 524 S.E.2d 577 (2000). This Court in *Biggs* held that *in order to deviate from the Guidelines* and allow for such “extraordinary expenses” as private school tuition, the trial court must make adequate findings relating to the reasonable needs of the child for such extraordinary expenses. *Id.* at 298, 524 S.E.2d at 581. *Biggs* is inapplicable, however, when, as here, the trial court was not bound by the Guidelines because the parents’ income exceeds the level governed by the Guidelines.

Plaintiff also relies on case law that predates the establishment of the presumptive Guidelines to support his argument. He claims that *Brandt v. Brandt*, 92 N.C. App. 438, 444, 374 S.E.2d 663, 666 (1988), *aff’d per curiam*, 325 N.C. 429, 383 S.E.2d 656 (1989), is applicable here because it holds that a party fails to show that “private school is a necessary or reasonable expense” when there is “no evidence . . . [that a child] could not excel in public school.” He also cites to *Evans v. Craddock*, 61

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N.C. App. 438, 443, 300 S.E.2d 908, 912 (1983), and *Falls v. Falls*, 52 N.C. App. 203, 215, 278 S.E.2d 546, 554-55 (1981) for the same proposition.

While we do not find these cases wholly inapplicable simply because they predate the presumptive Guidelines,¹ we also do not find them relevant to this appeal because they do not reflect the parents' accustomed standards or desires in high-income cases. They, therefore, shed little light on the needs of children in higher income families in which "need" is determined based on their "accustomed standard of living," as this Court's decisions in *Loosvelt* and *Williams* require.

In addition, in contrast to this case, in all three cases cited by plaintiff, the parents had not mutually agreed to enroll, and in fact had enrolled, their children in private school before the time of trial. See *Brandt*, 92 N.C. App. at 444, 374 S.E.2d at 666 (indicating one party was not consulted prior to child's enrollment in private school by other party); *Evans*, 61 N.C. App. at 443, 300 S.E.2d at 912 ("On remand, . . . [t]he trial judge should also determine if the defendant agreed to pay the tuition . . ."); *Falls*, 52 N.C. App. at 215, 278 S.E.2d at 555 (acknowledging children were not attending private school and parents' lack of intent to enroll them in private school). Thus, the mutual intent of both parents to educate their children in private school, together with their children's actual enrollment, is a consideration in determining the "accustomed standard of living" of the parties.

In this high-income case, the trial court properly addressed the reasonable needs of the children as measured by their accustomed standard of living, consistent with *Cohen*, 100 N.C. App. at 339, 396 S.E.2d at 347. The trial court's findings of fact regarding the children's consistent enrollment in private schools and the parties' continual desire to educate their children in private schools adequately support the court's conclusion that private schooling is a reasonable need of the children given their accustomed standard of living.

[3] Plaintiff, however, further argues that even though his children had always been enrolled in private school, the payment of the PDS tuition had resulted in "estate depletion." According to plaintiff, they were only able to afford the tuition by using defendant's maternal inheritance. In effect, he challenges the trial court's determination that he is capable of paying his children's tuition. We disagree.

1. "Before the guidelines, the law referred to the needs of the child as the basis of the award; therefore, pre-guidelines cases are instructional." Suzanne Reynolds, 2 *Lee's North Carolina Family Law* § 10.16, at 542 n.132 (5th. ed. 2015).

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In support of his argument, plaintiff points to his own testimony that upon moving to Charlotte, his children's tuition was paid for at least in part by defendant's separate money from her maternal inheritance. Specifically, plaintiff testified that the tuition "was funded out of salary and Vera's inheritance." He, therefore, claims that because defendant's inheritance is now depleted, he is incapable of affording the tuition payments.

The trial court, however, based its determination that plaintiff is able to pay the tuition expenses on its finding that beginning with the 2007-2008 school year, plaintiff's salary had increased to over \$500,000.00 a year and was no less than \$43,000.00 a month. The court found that plaintiff's own financial affidavit from 2011 claimed \$11,568.00 in monthly expenses for his three children, an amount that included tuition payments of nearly \$5,000.00 a month and \$5,000.00 in child support payments owed to defendant each month. The trial court also found that plaintiff's other reasonable monthly expenses included \$3,700.00 in personal expenses per month and another \$3,700.00 in shared family expenses per month. Finally, the trial court found that from the date of separation through 2011, plaintiff had been able to make contributions to his retirement accounts and charitable contributions in the approximate amount of \$10,000.00 per month. However, the court concluded that plaintiff's religious contributions of \$4,500.00 per month would not be included in his reasonable expenses.

Thus, even though plaintiff points to his own testimony that paying for his children's tuition created a standard of living commensurate with estate depletion, it is apparent that the trial court gave little weight to that testimony and found, to the contrary, that plaintiff contributed personally to his children's tuition prior to separation and that, given his income and reasonable expenses, he can afford to pay for the tuition. Despite plaintiff's contentions, however, the court's findings are supported by the evidence, including his own testimony. Indeed, despite contending in conclusory fashion that the findings regarding his income and expenses are unsupported by competent evidence, plaintiff fails to make any specific argument to support that contention.² We, therefore, consider those findings binding on appeal. In totaling plaintiff's reasonable monthly expenses, including tuition, and comparing them to the

2. Plaintiff specifically challenges the findings that his religious contributions are not reasonable expenses. We address those arguments *infra* as plaintiff's arguments in that regard relate to prospective child support and not to his ability to pay his children's tuition. Thus, he fails to argue effectively here how the trial court's calculations of his income and expenses preclude him from paying his children's tuition.

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monthly earnings found by the trial court, we hold that these findings are specific enough to support the conclusion that plaintiff is capable of paying his children's tuition. Whether the parties had previously used defendant's inheritance to pay their children's tuition is, therefore, irrelevant to their present ability to pay.

Accordingly, because the trial court's determinations regarding the reasonable needs of the children to attend private school – as established by their accustomed standard of living and past actions – and plaintiff's ability to pay for this tuition are adequately supported by competent findings of fact, we affirm the trial court's order requiring plaintiff to pay his children's private school tuition.

[4] Plaintiff next contends that the order that he pay retroactive private school tuition to defendant is improper because (1) defendant should not recover money she paid to PDS out of her children's UTMA accounts, (2) the award requires reimbursement of funds paid outside the pertinent time period for retroactive support, and (3) the permanent support award fails to account for payments he already made to defendant for tuition payments. We address these arguments in sequence.

The trial court found in the permanent child support order that the parties' three children each have a UTMA account at Merrill Lynch of which defendant is the custodian. The support order also found that defendant paid for her three daughters' 2008-2009 and 2009-2010 PDS tuition primarily out of their individual UTMA accounts, in a total amount of \$103,614.18. Concluding that plaintiff was responsible for all the tuition expenses for his children for the 2007-2008, 2008-2009, and 2009-2010 school years, the trial court decreed that plaintiff shall reimburse defendant for the \$53,810.00 payment made out of the UTMA accounts for the 2008-2009 school year; that plaintiff shall reimburse defendant for the \$49,804.18 payment made out of the UTMA accounts for the 2009-2010 school year; and that defendant thereafter shall reimburse each UTMA account on a *pro rata* basis within 90 days from the entry of the permanent support order.

In calculating retroactive child support awards, the trial court must determine "the amount actually expended by [the dependent spouse] which represent[s] the [supporting spouse's] share of support." *Hicks v. Hicks*, 34 N.C. App. 128, 130, 237 S.E.2d 307, 309 (1977). The dependent spouse "is not entitled to be compensated for support for the children provided by others[.]" *Id.* Notwithstanding this established rule of law, because the trial court ordered that defendant reimburse her children's UTMA accounts upon receipt of the child support award from plaintiff,

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we do not agree with plaintiff's first argument that the trial court erred by reimbursing defendant for amounts that she did not pay.

[5] Plaintiff next urges that defendant's claim for retroactive child support improperly included \$41,225.18 in tuition payments defendant made on 22 June, 2 November, and 7 December of 2009 because retroactive child support is only recoverable for the amount expended three years prior to the date of filing. He cites to *Napowsa v. Langston*, 95 N.C. App. 14, 21, 381 S.E.2d 882, 886 (1989), arguing that retroactive child support is recoverable by defendant "(1) to the extent she paid [plaintiff's] share of such expenditures, and (2) to the extent the expenditures occurred three years or less before . . . the date she filed her claim for child support." However, the limitation plaintiff is referencing only limits reimbursement to three years prior to the filing of the action. See N.C. Gen. Stat. § 1-52(2) (2015). Since defendant filed her claim for retroactive child support on 19 June 2009, the statute of limitation has no application to payments defendant made *after* that date. Indeed, *Napowsa* held that " 'each . . . expenditure by the mother creates in her a new right to reimbursement.' " 95 N.C. App. at 21, 381 S.E.2d at 886 (quoting *Tidwell v. Booker*, 290 N.C. 98, 116, 225 S.E.2d, 816, 827 (1976)).

[6] Lastly, plaintiff argues that Finding of Fact No. 194 in the permanent support order credits him with paying only \$5,810.00 in PDS tuition for the 2007-2008 school year. He claims this amount is \$3,000.00 too low, as the court determined in Finding of Fact No. 108 that "Plaintiff/Father was credited with one-half (1/2) of payment three (3) (made on November 1, 2007) or \$5,810.00 and \$3,000.00 of payment four (4) (made on February 1, 2008) from his separate funds." We agree with plaintiff that there is an inconsistency in the trial court's findings, and we, therefore, remand to the trial court for findings of fact resolving this inconsistency and recalculation of the amount owed by plaintiff to defendant in retroactive child support.

[7] Defendant's sole argument with respect to the private school tuition part of the permanent child support order is that the trial court erred in requiring her to reimburse plaintiff for 25% of the PDS tuition. Defendant contends that the trial court failed to make any findings of fact explaining its basis for the 25% figure, which departs from a pro-rata distribution of support requirements based on the parties' respective incomes. We agree.

"The ultimate objective in setting awards for child support is to secure support commensurate with the needs of the children and the ability of the [obligor] to meet the needs." *Robinson v. Robinson*, 210

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N.C. App. 319, 333, 707 S.E.2d 785, 795 (2011) (quoting *Cauble v. Cauble*, 133 N.C. App. 390, 394, 515 S.E.2d 708, 711 (1999)). This objective is fulfilled by making adequate findings regarding the “estates, earnings, conditions, accustomed standard of living . . . , the child care and home-maker contributions of each party, [or] other facts of the particular case.” N.C. Gen. Stat. § 50-13.4(c).

In this instance, Finding of Fact No. 121 in the permanent support order set out the parties’ respective annual incomes from 2007 to 2011. It is apparent from the trial court’s findings that plaintiff’s income perennially dwarfed defendant’s income, accounting for almost 90% of the parties’ combined income. The trial court made no other findings of fact that could support its order that defendant pay 25% of the tuition payment when her income accounts for only 10% of the combined income. While the record contains evidence upon which the trial court might justify its award, we agree with defendant that the trial court’s determination of the amount she was required to pay is not supported by adequate findings of fact. We, therefore, reverse the child support award, and remand to the trial court for further findings of fact to support its determination.

B. Retroactive Child Support

[8] Plaintiff also appeals several other aspects of the retroactive child support order apart from the private school tuition. He argues the order (1) lacks adequate factual findings, (2) is marred by internal inconsistencies, and (3) fails to account for payments already made to defendant.

“[A] party seeking retroactive child support must present sufficient evidence of past expenditures made on behalf of the child, and evidence that such expenditures were reasonably necessary.” *Loosvelt*, ___ N.C. App. at ___, 760 S.E.2d at 355 (quoting *Robinson*, 210 N.C. App. at 333, 707 S.E.2d at 795). Recoverable expenditures are those “‘actually expended on the child’s behalf during the relevant period.’” *Id.* (quoting *Robinson*, 210 N.C. App. at 333, 707 S.E.2d at 795). Affidavits are acceptable means by which a party can establish these expenditures. *Savani v. Savani*, 102 N.C. App. 496, 502, 403 S.E.2d 900, 904 (1991). Any “[e]videntiary issues concerning credibility, contradictions, and discrepancies are for the trial court . . . to resolve and, therefore, the trial court’s findings of fact are conclusive . . . if there is competent evidence to support them despite the existence of evidence that might support a contrary finding.” *Smallwood v. Smallwood*, 227 N.C. App. 319, 322, 742 S.E.2d 814, 817 (2013).

Here, the permanent child support award directed plaintiff to pay defendant \$95,520.65, “representing the difference between the monthly

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cash support ordered . . . for the period beginning June 1, 2007 through June, 2009 and the total amount actually paid” during that time period. Plaintiff first argues that the findings of fact regarding this retroactive child support payment are not supported by competent evidence because defendant testified inconsistently as to the numbers sworn to in her financial affidavit and because such numbers were skewed for the relevant time period as a result of the changed custody arrangement. We disagree.

Defendant initially testified in June 2010 that her expense affidavit relevant to retroactive child support for the period of June 2007 to June 2009 was based only on her year-end expenses for 2009, suggesting those expenses were not reflective of actual expenditures during that period. However, defendant adequately explained during the permanent support hearing on 21 December 2011 that the expenses set out in her June 2009 financial affidavit were “the same” as the previous two years’ expenses because she “used those two years of expenses to verify . . . the numbers [she] was placing on [her] affidavit.” She provided an updated affidavit of financial standing on 8 September 2011 corroborating this testimony. Because this inconsistency cited by plaintiff raises only credibility issues to be resolved by the trial court, and evidence before the court otherwise established her expenditures for the relevant time period, we find that the trial court’s findings in this regard were based on competent evidence.

[9] Plaintiff also argues that because the custodial arrangement changed significantly in February 2009, giving defendant increased time with the children, her affidavit based on expenditures made in 2009 does not properly reflect expenditures made from June 2007 until January 2009. However, at the 21 December 2011 hearing, defendant testified repeatedly to the static nature of the shared and individual expenses of her children from the date of separation through 2010 and that she had taken into account any increase or decrease that may have occurred in the two years prior to the filing of her affidavit in June 2009. The trial court made corresponding findings of fact, ultimately concluding that the children’s monthly individual and shared expenses totaled \$6,285.00. Accordingly, we affirm the trial court’s ruling awarding retroactive child support for this period.

[10] As a final matter, plaintiff points out a clerical error in the support order. Finding of Fact No. 183 states that plaintiff “is well able and capable of paying \$4,000.00 per month” in retroactive support for the June 2007 to June 2009 time period. However, Finding of Fact No. 193 suggests that the trial court intended this monthly payment to be \$5,000.00

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for this time period. This intent, which is inconsistent with Finding of Fact No. 183, is reflected in Conclusion of Law No. 14 in the support order, which states that the \$4,000.00 per month permanent support payment effective 1 March 2012 “represents a 20% reduction in the amount of child support” plaintiff was paying prior to that date. Accordingly, we remand to the trial court for correction of the clerical error.

[11] Plaintiff’s last argument with respect to the retroactive support directive is that the trial court failed to take into account the \$43,085.00 payment he made to defendant on 5 October 2007, and therefore its conclusions were not supported by appropriate findings of fact. However, plaintiff testified that the \$43,085.00 payment “represented what we computed as her share of the October distribution [of marital assets] minus the expenses we had discussed.” Accordingly, we hold the court did not err by failing to credit this amount to plaintiff as a child support payment.

C. Prospective Child Support

[12] Plaintiff contends that the trial court erred in calculating his prospective child support requirement by failing to make sufficient findings of fact regarding (1) defendant’s paternal inheritance and (2) defendant’s reasonable monthly expenditures. The trial court’s award to defendant of prospective child support in the amount of \$4,000.00 per month effective 1 March 2012, a reduction from the temporary child support order, was based on plaintiff’s “increased custodial time” with the children, defendant’s ability to work additional hours, plaintiff’s “substantial earned income” and defendant’s earned income, the “needs and expenses of the minor children and their accustomed standard of living,” and, lastly, “the passive income that Defendant/Mother can realize from her non-retirement assets and accounts[.]”

“[T]he trial court is *required* to make findings of fact with respect to the factors listed in [N.C. Gen. Stat. § 50-13.4(c)],” including findings on “the parents’ incomes, *estates*, and present reasonable expenses in order to determine their relative ability to pay.” *Sloan v. Sloan*, 87 N.C. App. 392, 394, 360 S.E.2d 816, 818, 819 (1987) (emphasis added). “[T]o determine the relative abilities of the parties to provide support, the court ‘must hear evidence and make findings of fact on the parents’ income[s], estates (e.g., savings; real estate holdings, including fair market value and equity; stocks; and bonds) and present reasonable expenses.’ ” *Taylor*, 118 N.C. App. at 362-63, 455 S.E.2d at 447 (quoting *Little v. Little*, 74 N.C. App. 12, 20, 327 S.E.2d 283, 290 (1985)). “At the very least, a trial court must determine what major assets comprise the parties’ estates and their approximate value.” *Sloan*, 87 N.C. App. at 395, 360 S.E.2d at

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819; *see also Sloop v. Friberg*, 70 N.C. App. 690, 695-96, 320 S.E.2d 921, 925 (1984) (holding that finding of fact regarding party's total estate is "required").

Throughout the child support and equitable distribution proceedings, both parties put on evidence of the sizeable inheritance defendant had received from her father after his passing following the date of separation. Defendant testified to being the sole heir of her father's estate, which comprised a 401(k) plan worth in excess of \$800,000.00, an IRA worth approximately \$60,000.00, a Certificate of Deposit worth approximately \$100,000.00, a bank account with Bank Corp. South worth approximately \$208,000.00, various other bank accounts worth anywhere from \$7,000.00 to \$13,000.00, three vehicles, and two parcels of real estate with a tax value in excess of \$103,000.00. Although defendant claimed that some of this money is inaccessible or "subject to tax" if she were to withdraw it immediately, she also admitted that she received an initial distribution of \$30,000.00 from her father's 401(k), and would continue receiving yearly distributions from this account, as well as "approximately \$700.00 a month" from her mother's pension, which passed to her through her father's estate. Despite this evidence, the trial court's findings of fact regarding permanent child support erroneously lack any mention of these assets other than a vague allusion to her "non-retirement assets and accounts" as a partial impetus for reducing the monthly award from \$5,000.00 to \$4,000.00 in the permanent support order.

Defendant argues that notwithstanding these omissions, the trial court considered these components of her estate in calculating the child support award and that, as a result, plaintiff has failed to show prejudicial error. Defendant also claims that the pre-Guidelines cases plaintiff cites requiring findings on defendant's estate are irrelevant here because post-Guidelines cases suggest that specific findings of one's estate are only required when a party requests a deviation from the Guidelines. We disagree with both contentions.

First, the post-Guidelines cases that defendant cites are not high-income cases, but rather are cases controlled by the Guidelines and, therefore, irrelevant to the issues in this case. Second, defendant's paternal inheritance is both voluminous and convoluted in nature. There are a number of issues regarding her inherited estate – including monthly distributions and tax implications – that impact defendant's ability to immediately utilize this estate to pay her children's monthly expenses. Without specific findings of fact addressing this inheritance, we cannot determine whether the trial court gave due regard to the factors

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enumerated in N.C. Gen. Stat. § 50-13.4(c). Consequently, we reverse the prospective child support award and remand for findings of fact relating to defendant's paternal inheritance.

[13] Plaintiff next argues that the trial court's determinations regarding the reasonableness of his expenses, particularly his monthly religious contributions and 401(k) loan repayment expenses, were not supported by any finding of fact. We disagree. The trial court detailed in its findings of fact plaintiff's total individual monthly expenditures as of the June 2010 hearings and his personal expenses as of the date of the permanent child support order. In each finding, the trial court determined that plaintiff's monthly religious contributions totaled more than half of his monthly expenditures, and if excluded, would result in plaintiff having personal expenses of only \$3,700.00 each month. The trial court also made a finding that of plaintiff's \$22,839.33 of itemized monthly deductions, "\$955.00 is a loan payment that Plaintiff/Father pays to himself as a result of borrowing against one of his retirement accounts" and that such an amount "should not be itemized as a deduction."

When determining the reasonable needs and expenses of the parties in domestic actions, "absent contrary indications in the record, there is no requirement that a specific conclusion as to the reasonableness of such expenses be made[.]" *Byrd v. Byrd*, 62 N.C. App. 438, 441, 303 S.E.2d 205, 208 (1983). Where there are no contrary indications in the record, "a lack of a specific conclusion as to reasonableness will not necessarily be held for error[.]" *Coble*, 300 N.C. at 714, 268 S.E.2d at 190. Although there was no specific conclusion as to the reasonableness of plaintiff's religious contributions or his \$955.00 loan repayment, the trial court's ultimate conclusions as to plaintiff's reasonable expenses were supported by its findings of fact, which were in turn supported by competent evidence. We, therefore, affirm those aspects of the trial court's permanent support order.

III. Custody

A. Admissibility of Dr. Neilsen's Expert Testimony

[14] Defendant first contends that the trial court erred in admitting Dr. Linda Neilsen's expert testimony and corresponding exhibits in the areas of "adolescent psychology, father-daughter relationships and shared parenting, and scientific research on father-daughter relationships and shared parenting." We note that "trial courts are afforded 'wide latitude of discretion when making a determination about the admissibility of expert testimony'" and such a decision "will not be reversed on appeal absent a showing of abuse of discretion." *Howerton v. Arai Helmet, Ltd.*,

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358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (quoting *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984)).

Our Supreme Court has established “a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert’s proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert’s testimony relevant?” *Id.* (internal citations omitted). Here, defendant challenges both Dr. Neilsen’s competency as an expert and the relevancy of her testimony.

We first address defendant’s challenge to Dr. Neilsen’s competency to testify to matters of clinical psychology and, specifically, facts relating to the parties’ relationships with their children. Dr. Neilsen testified that she was as a professor of adolescent psychology at Wake Forest University and had 15 years of experience researching shared parenting and father-daughter relationships. The trial court, upon qualifying Dr. Neilsen as an expert, made clear that she was not qualified “to talk about any specifics of this case or these children.” Accordingly, Dr. Neilsen testified to, among other things, “research regarding young adults who have grown up in shared parenting families and sole parenting families” When referring to “these” children, her testimony focused on the children within this research, and not the parties’ children specifically.

“Under the North Carolina Rules of Evidence, a witness may qualify as an expert by reason of ‘knowledge, skill, experience, training, or education,’ where such qualification serves as the basis for the expert’s proffered opinion.” *Id.* at 461, 597 S.E.2d at 688 (quoting N.C.R. Evid. 702(a)). Given Dr. Neilsen’s extensive experience and education in research related to shared parenting relationships, and the trial court’s limitation of her testimony to those areas, we hold that the trial court did not err in concluding that Dr. Neilsen was qualified to testify as an expert witness.

[15] We next address defendant’s arguments that Dr. Neilsen’s testimony was irrelevant. Relevant evidence is defined as evidence having “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C.R. Evid. 401. “ [I]n judging relevancy, it should be noted that expert testimony is properly admissible when such testimony can assist the [trier of fact] to draw certain inferences from facts because the expert is better qualified than the [trier of fact] to draw such inferences.’ ” *Howerton*, 358 N.C. at 462, 597 S.E.2d at 688-89 (quoting *State v. Goode*, 341 N.C. 513, 529, 461 S.E.2d

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631, 641 (1995)). Furthermore, a trial court has inherent authority to limit the admissibility of expert testimony under Rule 403 of the Rules of Evidence. *Howerton*, 358 N.C. at 462, 597 S.E.2d at 689. Rule 403 provides that relevant evidence may nonetheless 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.”

We find Dr. Neilsen’s testimony regarding research on shared parenting arrangements was relevant to the custodial arrangement in this case because it assisted the trial court in deciding what was in the best interests of the children. As the trial court found in Finding of Fact No. 90, based on Dr. Neilsen’s testimony, “six (6) monthly overnights is grossly inadequate for a parent to participate in shared residential parenting and to maintain an engaged, authoritative relationship with the minor children”

Defendant has not shown that the trial court erred in deciding that the probative nature of the testimony was not outweighed by a danger of unfair prejudice, confusion of the issues, or misleading the trier of fact. Other than the fact that the trial court assigned significant weight to Dr. Neilsen’s testimony in altering the final custody determination, defendant fails to point to any way in which the testimony unfairly prejudiced defendant or confused or misled the trial court. Although a party “may disagree with the trial court’s credibility and weight determinations, those determinations are solely within the province of the trial court.” *Brackney v. Brackney*, 199 N.C. App. 375, 391, 682 S.E.2d 401, 411 (2009).

Accordingly, we find that the trial court did not abuse its discretion in admitting Dr. Neilsen’s testimony or the corresponding authenticated exhibits. Furthermore, to the extent defendant argues that the findings in the custody order based on Dr. Neilsen’s testimony are unsupported by competent evidence, we disagree and affirm the trial court.

B. Award of Equal Physical Custody

[16] Defendant next argues that the trial court’s findings of fact that underlie the order’s provision for an equal custody arrangement are unsupported by competent evidence because they arbitrarily ignore or alter the findings of fact in the temporary custody order. Defendant essentially contends that without a showing of changed circumstances prior to the permanent custody order, the trial court was not permitted to deviate from the findings in the temporary order. We disagree.

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“If a child custody order is temporary in nature and the matter is again set for hearing, the trial court is to determine [permanent] custody using the best interests of the child test without requiring either party to show a substantial change of circumstances.” *LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 915 (2002). Therefore, “ [t]he rule established by section 50-13.7(a) and developed within our case law requires a showing of changed circumstances only where an order for permanent custody already exists.’ ” *Lamond v. Mahoney*, 159 N.C. App. 400, 404, 583 S.E.2d 656, 659 (2003) (quoting *Regan v. Smith*, 131 N.C. App. 851, 853, 509 S.E.2d 452, 454-55 (1998)).

Subsequent to the trial court’s entry of the Order for Temporary Custody and Temporary Child Support on 21 February 2011, hearings were held on the issues of custody and child support in September of 2011. Because the 21 February 2011 order was temporary, the trial court was not required to find changed circumstances in order to deviate from that earlier order in entering the 9 July 2014 permanent child support and custody order.

[17] Next, defendant challenges the trial court’s Findings of Fact Nos. 62, 70, 77, 80, and 85 in the permanent custody order. Finding of Fact No. 62 states that when the parties first daughter was born, “Plaintiff/ Father took a couple of days off from work at her birth and the month of December to help care for [her]” and that at this time defendant “reduced her work schedule by approximately half.” Finding of Fact No. 70 states that both parties “had a loving relationship with the minor children during the marriage and were actively involved in the minor children’s daily care and activities . . .,” while Finding of Fact No. 77 states that “Plaintiff/ Father has not been precluded by his work and travel schedule from maintaining an active and involved relationship with the minor children since the date of separation.” In addition, Findings of Fact Nos. 80 and 85 state, respectively, that “Defendant/Mother is actively involved in the minor children’s daily care and activities” and that the equal custody arrangement “during the summer of 2011 worked very well for the minor children as well as the parties”

Defendant argues that Finding of Fact No. 62 arbitrarily deletes the portion of the corresponding finding from the temporary order that states: “With the exception of December 1996, Mother has been the primary custodian of Meg since her birth.” Because the trial court was not bound to repeat the findings of fact from the temporary order, but rather could determine what findings it found most pertinent or which evidence was entitled to greater weight, defendant has presented no legitimate basis for questioning Finding of Fact No. 62.

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We also find that the record contains ample evidence to support Findings of Fact Nos. 70, 77, and 80, despite the fact that there may also be evidence to the contrary which supported the temporary order. Competent evidence suggests that plaintiff has played a major part in his children's upbringing both before and after the date of separation. During the marriage, the evidence indicated that plaintiff made efforts to make it home for dinner, bathe his children, and put them to bed. Furthermore, the trial court heard evidence that plaintiff spent significant amounts of time both before and after the date of separation participating in his daughters' extracurricular activities. Because these findings were based on competent evidence, even though there was evidence to the contrary, we reject defendant's challenges to Findings of Fact Nos. 70, 77, and 80.

As a final matter, we note that defendant has no basis for contesting Finding of Fact No. 85 as unsupported by the evidence because it is based directly on her testimony that she believed "splitting the summer custody has worked out very well." We therefore, hold that these findings of fact are supported by competent evidence and that they furthermore support the conclusion of the trial court that an equally shared custodial arrangement is in the best interests of the children.

C. Award of Joint Legal Custody

Plaintiff essentially repeats his assault on the trial court's order requiring him to pay his children's private school tuition by arguing that such an order erroneously contradicts the trial court's grant of "permanent joint legal and physical care, custody, and control of the minor children[.]" Specifically, plaintiff points to the fact that the permanent child custody order granting the parties joint legal custody requires that "Plaintiff/Father and Defendant/Mother shall make joint decisions on all major issues affecting the health, education, and general welfare of the minor children, including but not limited to educational issues" However, the order also concludes that "[i]t continues to be in the best interest of the minor children to be enrolled at Providence Day School."

This Court has held that legal custody "refer[s] generally to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare." *Diehl v. Diehl*, 177 N.C. App. 642, 646, 630 S.E.2d 25, 27 (2006). Although our General Assembly has not defined "joint legal custody," this omission "implies a legislative intent to allow a trial court 'substantial latitude in fashioning a joint [legal] custody arrangement,'" *Id.* at 647, 630 S.E.2d 28 (quoting *Patterson v. Taylor*, 140 N.C. App. 91, 96, 535 S.E.2d 374, 378 (2000)),

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so long as the court “focus[es] on the best interests and welfare of the child[.]” *Patterson*, 140 N.C. App. at 96, 535 S.E.2d at 378.

Plaintiff relies on *Diehl* in arguing that the trial court erred in “simultaneously award[ing] both parties joint legal custody, but stripp[ing] [plaintiff] of all decision-making authority” regarding where the children were enrolled in school. 177 N.C. App. at 646, 630 S.E.2d at 28. However, in *Diehl*, this Court reversed the trial court’s order because, although it gave both parties joint legal custody, it granted primary decision-making authority on all issues to one parent. *Id.* Nothing in *Diehl* limits the authority of the trial court to decide what is in the best interests of the children if there is a conflict between the parents. The trial court here did not violate *Diehl* by awarding joint custody, while simultaneously giving one parent primary decision-making authority over the children’s schooling. Instead, the trial court awarded joint legal custody, but exercised its authority, given the disagreement between the parents, to determine that it was in the best interests of the children to remain enrolled at PDS. This determination was adequately supported by findings of fact that the children had been enrolled exclusively at PDS, that they had excelled at PDS, and that both parents preferred private school over public school. Because plaintiff does not challenge these findings of fact, they are binding on appeal and amply support the trial court’s conclusion that it is in the best interests of the children to continue attending PDS.

IV. Equitable Distribution

A. Defendant’s Paternal Inheritance as a Distributional Factor

[18] Plaintiff asserts that the trial court committed reversible error by failing to make findings of fact and corresponding conclusions of law relating to defendant’s paternal inheritance of nearly \$1.25 million as a distributional factor. We agree.

In an equitable distribution action, N.C. Gen. Stat. § 50-20(c)(1) (2015) provides that one of the factors the court “shall” consider in making an equitable division of property is “[t]he income, property, and liabilities of each party at the time the division of *property* is to become effective.” (Emphasis added.) “[W]hen evidence of a particular distributional factor is introduced, the court must consider the factor and make an appropriate finding of fact with regard to it.” *Fox v. Fox*, 114 N.C. App. 125, 135, 441 S.E.2d 613, 619 (1994).

Here, the trial court erroneously made no mention of defendant’s paternal inheritance in the final equitable distribution order. Defendant

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attempts to justify the trial court's failure to specifically address this inheritance by citing a conclusion in the order that states: "The Court notes that a number of factors which relate to the distributional factors to be considered by the Court . . . are found in other sections of the findings of fact herein. . . . [This] does not mean that the Court did not consider them as distributional factors." However, this general conclusion is simply not adequate to compensate for the total lack of findings to address defendant's paternal inheritance. See *Rosario v. Rosario*, 139 N.C. App. 258, 262, 533 S.E.2d 274, 276 (2000) ("[A] finding stating that the trial court has merely given 'due regard' to the section 50-20 factors is insufficient as a matter of law.").

Defendant also argues that because the inheritance is not a specifically enumerated factor in N.C. Gen. Stat. § 50-20, the court is not required to make such specific findings. Contrary to defendant's arguments, we find that defendant's inheritance qualifies as "property." Accordingly, we reverse the order and remand for findings of fact regarding defendant's paternal inheritance.

B. Amendment of the Equitable Distribution Order

[19] Defendant also challenges the order granting plaintiff's motion to amend the 22 July 2013 equitable distribution order pursuant to Rules 52 and 59 of the Rules of Civil Procedure. In response, plaintiff claims that defendant failed to give proper notice of appeal of this order pursuant to Rule 3(d) of the Rules of Appellate Procedure because defendant's notice of cross-appeal only designated the amended equitable distribution order entered on 20 November 2013 and failed to designate the simultaneously-entered order granting plaintiff's Rule 52 and 59 post-trial motions.

Rule 3(d) requires that a notice of appeal "designate the judgment or order from which appeal is taken" If the court does not have proper notice, it will not have jurisdiction over the matter. *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990). However, there are exceptions to this rule that allow us to liberally construe a notice of appeal. The first is that " 'a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake.' " *Id.* at 156-57, 392 S.E.2d at 424 (quoting *Smith v. Indep. Life Ins. Co.*, 43 N.C. App. 269, 274, 258 S.E.2d 864, 867 (1979)). "Second, if a party technically fails to comply with procedural requirements in filing papers with the court, the court may determine

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that the party complied with the rule if the party accomplishes the ‘functional equivalent’ of the requirement.” *Id.* at 157, 392 S.E.2d at 424 (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 101 L. Ed. 2d 285, 291, 108 S. Ct. 2405, 2409 (1988)).

Neither of these exceptions is applicable here. The second exception is clearly inapplicable because defendant actually complied with all the procedural requirements of filing her notice of appeal. The first exception is also inapplicable as suggested in *Von Ramm* and *Chee v. Estes*, 117 N.C. App. 450, 451 S.E.2d 349 (1994), two cases with circumstances analogous to those here. In *Chee*, the trial court found that because the plaintiff had noticed an appeal “from the judgment entered in accordance with the verdict . . . it cannot be fairly inferred from the notice that plaintiffs intended as well to appeal the denial of their motion for new trial.” *Id.* at 452, 451 S.E.2d at 351. The converse occurred in *Von Ramm*, where the appellant noticed appeal from the judgment denying a Rule 59 motion, but this Court found it could not fairly infer from the notice of appeal the appellant’s intent to appeal the order underlying the appellant’s Rule 59 motion. 99 N.C. App. at 157, 392 S.E.2d at 425.

Similarly, here, defendant clearly included the Amended Judgment and Order regarding equitable distribution in her notice of appeal, but failed to include the order entered granting plaintiff’s Rule 52 and 59 motions. Consistent with *Von Ramm* and *Chee*, we hold that we cannot fairly infer defendant’s intent to appeal the order granting plaintiff’s Rule 52 and 59 motions and, therefore, we do not have jurisdiction to address the issues raised by defendant on appeal regarding the grant of plaintiff’s motion. As defendant has not requested we review these issues pursuant to a petition for writ of certiorari, we also decline to review these issues under Rule 21 of the Rules of Appellate Procedure.

C. Plaintiff’s Post-Separation Payments Towards the Marital Debt

[20] Plaintiff contends the trial court improperly classified two debt payments in the final Equitable Distribution Order. First, plaintiff claims the trial court failed to designate as divisible property in its findings of fact plaintiff’s post-separation debt payments in the amount of \$101,441.00 towards the marital mortgage, property taxes, homeowners’ insurance, repairs, and neighborhood residence fees. Second, plaintiff claims the trial court also erred in failing to account for \$11,764.00 in country club dues as divisible property.

The final equitable distribution order found that the parties stipulated that upon the sale of the marital home, each would receive half of its net equity, defined as “the gross sales price less mortgage payoffs,

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realtor commissions, tax prorations, revenue stamps, homeowners' association dues, mutually agreed upon repairs, and other closing costs directly attributable to the sellers" The trial court later concluded that "[b]y entering into the referenced Stipulations, the parties have fully and finally resolved any and all claims arising out of each party's marital and, separate and/or divisible property interests in and into the marital residence."

The trial court further found that while plaintiff was responsible for all mortgage fees and other expenses relating to the marital home from the date of separation until the date the marital residence was sold, plaintiff lived in the house, but did not pay defendant her share of the rental value, which was no less than \$3,500.00 per month. This value, the trial court concluded, exceeded the expenditures that plaintiff incurred on a monthly basis, therefore leaving "no divisible property interest [in the marital home] to be valued, classified, and/or awarded in this Judgment."

In regard to the parties' country club membership, the trial court found that "[t]he Ballantyne Country Club's membership was in Plaintiff/Husband's name[.]" that "the initiation fee was paid from a portion of Defendant/Wife's inheritance[.]" and that after the date of separation, defendant "had no right to utilize the facilities . . . unless she was a guest of Plaintiff/Husband." The trial court also made a finding that the membership was sold and transferred along with the marital residence, which was "divided equally between the parties" pursuant to the parties' stipulations. In conclusion, the trial court found there was "no divisible property interest . . . to take into account with regard to any monthly dues or assessments that Plaintiff/Husband may have incurred and paid to Ballantyne Country Club."

It is well settled that "divisible property includes '[i]ncreases and decreases in marital debt and financing charges and interest related to marital debt.'" *Warren v. Warren*, 175 N.C. App. 509, 517, 623 S.E.2d 800, 805 (2006) (quoting N.C. Gen. Stat. § 50-20(b)(4)(d) (2003)). Furthermore, "mortgage payments and payment of property taxes, have been treated by this Court as payments made towards a marital debt." *Smith v. Smith*, 111 N.C. App. 460, 510, 433 S.E.2d 196, 226 (1993), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).

It is also true that "[i]n equitable distribution actions, our courts favor *written stipulations* which are duly executed and acknowledged by the parties." *Fox*, 114 N.C. App. at 132, 441 S.E.2d at 617. Stipulations are treated as "judicial admissions which, unless limited as to time or application, continue in full force *for the duration of the controversy*." *Id.* at 131, 441 S.E.2d at 617.

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Plaintiff makes general assertions that the trial court's findings of fact regarding the classification of these marital debts are unsupported by competent evidence, but fails to point to any specific evidence that suggests they are erroneous. As such, they are binding on appeal. We further hold that these findings adequately support the trial court's corresponding conclusions of law that plaintiff has no divisible property interest in the payments made towards the marital residence or the country club membership. This is evident because after the date of separation and until these interests were sold, defendant was effectively barred from realizing any benefit from these marital interests. Furthermore, the stipulations referenced by the trial court indicate that the net equity in the marital residence, including the country club membership, was split evenly between the parties, thereby resolving all claims arising out of the interests in the marital residence. Accordingly, we affirm this portion of the final equitable distribution order.

D. Valuation of Plaintiff's Partnership Interest

[21] Plaintiff lastly argues that the trial court failed to make appropriate findings of fact regarding the valuation methodology used for valuing plaintiff's PwC partnership interest. Here, the trial court examined at length both parties' valuation methods, and the proffered evidence supporting them. Although it ultimately questioned "the accuracy and validity of both parties' methods of computing the value of Plaintiff/Husbands' partnership interest in PricewaterhouseCoopers, LLP," the trial court adopted defendant's methodology after concluding that it "appears to be the most appropriate of the two." The court arrived at a date of separation value of \$94,118.00 by taking the net capital account balance ("CAB") as of the date of separation and subtracting the outstanding loan balance owed to PwC as of the date of separation. The parties do not dispute this outstanding loan balance of \$93,190.00. The trial court found from defendant's evidence that the CAB is impacted by three different numbers: "(1) Capital contributions during the Time Period in question, (2) increases in capital (shares of earned income[]) during the Time Period, and (3) decreases to capital (mainly withdrawals in distributions made to the partner[]) during the Time Period[.]" Applying these factors, the trial court arrived at a date of separation net CAB of \$187,308.00. Subtracting the undisputed outstanding loan balance from this amount, the trial court concluded plaintiff's partnership valuation totaled \$94,118.00.

"If there is 'no single best approach to valuing' an asset, '[t]he task of [this Court] on appeal is to determine whether the approach used by the trial court reasonably approximated' the value of the asset at the

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date of separation.” *Fountain v. Fountain*, 148 N.C. App. 329, 338, 559 S.E.2d 25, 32 (2002) (quoting *Poore v. Poore*, 75 N.C. App. 414, 419, 331 S.E.2d 266, 270 (1985)). If it appears that “ ‘the trial court reasonably approximated the net value of the [asset] . . . based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed.’ ” *Id.* (quoting *Poore*, 75 N.C. App. at 422, 331 S.E.2d at 272). Although plaintiff urges that the trial court should have adopted his methodology rather than defendant’s, the trial court’s adopted approach appears to apply sound techniques and relies upon competent evidence to “reasonably approximate[.]” the value of plaintiff’s PwC partnership interest. Plaintiff has, therefore, failed to demonstrate that the trial court erred in valuing his partnership interest.

Conclusion

We affirm the trial court’s custody order. We further affirm the trial court’s child support order requiring plaintiff to pay his children’s private school tuition at PDS in full upon due according to a payment plan allowed by PDS on a prospective basis until changed circumstances or further review. However, because we find that the trial court’s orders regarding child support and equitable distribution were not fully supported by appropriate findings of fact, we reverse these orders and remand for further findings of fact as to the following: (1) defendant’s paternal inheritance, both as to the child support and equitable distribution orders, (2) defendant’s ability to reimburse plaintiff for 25% of their children’s PDS tuition, (3) the clerical error in Finding of Fact No. 183 of the child support order, erroneously requiring plaintiff pay \$4,000.00 per month to defendant in child support for the period from 1 June 2007 through June 2009, and (4) the inconsistency between Findings of Fact Nos. 108 and 194 in the child support order regarding plaintiff’s payment of private school tuition for the 2007-2008 school year. We leave the decision regarding whether to hear additional evidence to the sound discretion of the trial judge.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges BRYANT and TYSON concur.

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CRAIG STEVEN SMITH, PLAINTIFF

v.

VERA CRANFORD SMITH, DEFENDANT

No. COA15-331

Filed 19 April 2016

1. Child Custody and Support—child support order—enforceable during pendency of appeal

Where plaintiff-father requested emergency relief from a permanent child support order that required him to pay his children's private school tuition, the Court of Appeals rejected plaintiff's argument that the trial court was without jurisdiction to hold him in contempt for violating that order during the pendency of his appeal. Pursuant to N.C.G.S. § 50-13.4(f)(9), the order of child support requiring periodic payments toward his children's school tuition was enforceable during the pendency of the appeal.

2. Child Custody and Support—child support order—cross-appeal by mother—enforceable

Where plaintiff-father requested emergency relief from a permanent child support order that required him to pay his children's private school tuition, the Court of Appeals rejected plaintiff's argument that defendant-mother's cross-appeal of that order precluded her from enforcing it. Defendant cross-appealed the order only with respect to the requirement that she reimburse plaintiff for 25 percent of the tuition after plaintiff paid it in full and on time. The Court of Appeals could conceive of no justification for precluding defendant from enforcing plaintiff's court-ordered obligation to pay his children's school tuition on time.

3. Child Custody and Support—contempt order—bond to stay enforcement

Where the trial court denied plaintiff-father's motion to stay the execution of a permanent child support order requiring him to pay his children's private school tuition and held him in contempt for failing to pay the tuition pursuant to the order, the Court of Appeals rejected plaintiff's argument that the trial court erred in failing to set a bond to stay enforcement of the private school tuition directive pursuant to Rule 62(d) of the Rules of Civil Procedure and N.C.G.S. § 1-289. By acknowledging that child support was excepted from this process because the children affected had nothing to do with

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the disputes between the two parties, the trial court appropriately exercised its discretion in refusing to set a bond pending appeal of the order requiring plaintiff to pay child support.

4. Child Custody and Support—contempt order—findings and conclusions supported—purge condition

Where the trial court denied plaintiff-father's motion to stay the execution of a permanent child support order requiring him to pay his children's private school tuition and held him in contempt for failing to pay the tuition pursuant to the order, the Court of Appeals affirmed the contempt order. The trial court's conclusions of law were adequately supported by competent findings of fact, which were supported by competent evidence, and there was no merit to plaintiff's argument that the purge condition was erroneous.

Judge TYSON dissenting.

Appeal by plaintiff from orders entered 15 October 2014 by Judge Donnie Hoover in Mecklenburg County District Court. Heard in the Court of Appeals 22 September 2015.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, G. Russell Kornegay, III, and John Paul Tsahakis, for plaintiff-appellant.

William L. Sitton, Jr., Attorney at Law, by William L. Sitton, Jr.; and Brendle Law Firm, PLLC, by Andrew S. Brendle, for defendant-appellee.

GEER, Judge.

This is the second appeal before this Court arising out of the parties' claims for equitable distribution, child custody, and child support. In the first action, both parties appealed the permanent child custody and support order and the equitable distribution order. In the instant case, plaintiff Craig Steven Smith appeals (1) the order denying his motion to stay the execution and enforcement of the permanent child support order and (2) the order holding him in contempt for failing to pay his children's private school tuition pursuant to the permanent child support order. He primarily argues that statutory law requires the automatic stay of the permanent child support order upon the parties' appeals of that order and that, as a result, the trial court did not have jurisdiction to hold him in contempt for violating the order. He also asserts that defendant Vera

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Cranford Smith is precluded from enforcing the child support order from which she had also appealed. We hold that N.C. Gen. Stat. § 50-13.4(f)(9) (2015) allowed the trial court to enforce the child support order that was pending appeal.

Plaintiff also contends that because his income has declined since the entry of the permanent child support order, he did not willfully violate the permanent child support order and should not be held in contempt. We hold that the trial court's conclusion that plaintiff was willfully in contempt of the child support order was supported by factual findings, which in turn were supported by competent evidence. Accordingly, we affirm the orders of the trial court below.

Facts

In the first appeal before this Court, plaintiff challenged the rulings in the 9 July 2014 permanent child support and custody order that required him to pay his children's private school tuition at Providence Day School ("PDS"). Defendant cross-appealed from the same child support order because it required her to reimburse plaintiff for 25% of the tuition payments. On 19 August 2014, a few days after defendant filed her notice of cross-appeal, she also filed and served on plaintiff a motion for emergency relief and motion for contempt in the trial court below. The basis for those post-appeal motions was plaintiff's refusal to pay the required tuition with the result that their children were in danger of forfeiting their enrollment at PDS as a result of the outstanding amount due to the school.

As allowed under the child support order, plaintiff chose to pay for the 2014-2015 PDS tuition on a 10-month installment plan, which required payment of \$6,141.00 on the 20th day of each month beginning 20 July 2014. On 8 August 2014, plaintiff's counsel informed defendant's counsel that he was unable to make the July and August 2014 payments as a result of his increasing debt and decreased income. On 11 August 2014, defendant's counsel responded by requesting certain documentation concerning plaintiff's financial circumstances. The deadline for securing continued enrollment of the minor children at PDS was, however, 18 August 2014, forcing defendant to file a motion seeking emergency relief.

On the same day that defendant filed her motions for emergency relief and contempt, Judge Donnie Hoover entered an Order to Appear and Show Cause and Notice of Hearing, requiring plaintiff to appear at a contempt hearing two days later on 21 August 2014. On 20 August 2014, plaintiff filed and served a Motion to Stay Execution and Enforcement

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of Judgment During Appeal to stay enforcement of the PDS tuition payment directive while the first appeal before this Court was pending. At the hearing on 21 August 2014, plaintiff introduced an updated financial affidavit showing his average net monthly income had reduced to \$16,533.01, and that he was now running a monthly deficit of \$1,266.72.

After hearing all motions on 21 August 2014, Judge Hoover first denied plaintiff's motion to stay and found that the trial court "has the authority to enforce the Child Support Order . . . notwithstanding the appeal[.]" Judge Hoover also found plaintiff in civil contempt, ordering him imprisoned in the Mecklenburg County jail for 30 days or until he pays the tuition owed according to the support order. The trial court subsequently issued a written order on 15 October 2014, specifically requiring plaintiff to pay "the entire balance currently owed to PDS for the 2014-2015 school year." Plaintiff timely appealed to this Court.

I

In challenging the trial court's denial of his motion to stay, plaintiff makes several different arguments. First, he argues that his original appeal from the 9 July 2014 child support order automatically stayed enforcement of the directive to pay his children's private school tuition at PDS pursuant to N.C. Gen. Stat. § 1-294 (2015), effectively taking defendant's motion for contempt out of the jurisdiction of the trial court. Second, relying solely on federal precedent, he attempts to persuade this Court that defendant's cross-appeal of the child support order also requires an automatic stay of the tuition payment directive. Finally, plaintiff argues that the trial court erred by failing to set a bond under N.C. Gen. Stat. § 1-289 (2015) to stay enforcement of the PDS tuition directive.

Normally, we review the denial of a motion to stay under an abuse of discretion standard. *Park E. Sales, LLC v. Clark-Langlely, Inc.*, 186 N.C. App. 198, 202, 651 S.E.2d 235, 238 (2007). Here, however, our standard of review is de novo because where a party "presents a question of 'statutory interpretation, full review is appropriate, and the conclusions of law are reviewable de novo.'" *Romulus v. Romulus*, 216 N.C. App. 28, 32, 715 S.E.2d 889, 892 (2011) (quoting *Mark IV Beverage, Inc. v. Molson Breweries USA, Inc.*, 129 N.C. App. 476, 480, 500 S.E.2d 439, 442 (1998)). Also, where the trial court's subject matter jurisdiction to hear an issue is questioned, "[t]he standard of review . . . is de novo.'" *Id.* (quoting *Keith v. Wallerich*, 201 N.C. App. 550, 554, 687 S.E.2d 299, 302 (2009)).

[1] We first address plaintiff's argument that the trial court was without jurisdiction to hold him in contempt for violating the permanent support order because it was automatically stayed pending appeal. As a general

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rule, under N.C. Gen. Stat. § 1-294, “[w]hen an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein” However, N.C. Gen. Stat. § 50-13.4(f)(9) establishes an express exception to that rule when the trial court has ordered child support payments. N.C. Gen. Stat. § 50-13.4(f)(9) provides in pertinent part: “Notwithstanding the provisions of G.S. 1-294, an order for the payment of child support which has been appealed to the appellate division *is enforceable in the trial court by proceedings for civil contempt* during the pendency of the appeal.” (Emphasis added.) This exception was applied in *Guerrier v. Guerrier*, 155 N.C. App. 154, 159, 574 S.E.2d 69, 72 (2002), which held that “orders for the payment of child support are enforceable pending appeal”

Plaintiff attempts to deflect this exception by arguing that it is only applicable to child support orders requiring “periodic payments” equating to “a specific, unequivocal directive . . . to pay child support on a certain schedule and/or by certain dates.” *Brown v. Brown*, 171 N.C. App. 358, 361, 362, 615 S.E.2d 39, 40-41 (2005). Plaintiff claims that because the trial court’s order that he pay tuition allowed him “to choose between the options available” at PDS, this is not a “specific, unequivocal directive,” *id.*, contemplated by the exception in N.C. Gen. Stat. § 50-13.4(f)(9) and *Brown*. However, *Brown* does not control here because it only applies in cases “[w]here an *order reducing child support arrears to a money judgment* does not include a provision for periodic payments or other deadline for payment[.]” 171 N.C. App. at 362, 615 S.E.2d at 41 (emphasis added). Because neither party has moved to reduce the tuition payment directive to a money judgment, plaintiff’s reliance on *Brown* is misplaced. Furthermore, because we agree with the trial court that the PDS tuition payment directive “is still a periodic payment, whether [plaintiff] chooses to pay it once a year, once a semester or over ten months[.]” we find N.C. Gen. Stat. § 50-13.4(f)(9) controlling in this matter. Accordingly, the child support order was not automatically stayed and the trial court had proper jurisdiction to enforce it.

[2] Plaintiff next argues that defendant’s cross-appeal of the child support order should necessarily preclude her from enforcing the very rulings that she is challenging. In support of this proposition, plaintiff cites a number of federal cases. *See generally* *Bronson v. La Crosse & Milwaukee R.R. Co.*, 68 U.S. 405, 410, 17 L. Ed. 616 (1863); *Trustmark Ins. Co v. Gallucci*, 193 F.3d 558, 559 (1st Cir. 1999); *Enserch Corp. v. Shand Morahan & Co.*, 918 F.2d 462, 464 (5th Cir. 1990); *TN Valley Auth. v. Atlas Mach. & Iron Works, Inc.*, 803 F.2d 794, 797 (4th Cir. 1986). We are, of course, not bound by these decisions, but we also do not

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find them persuasive authority since the cases do not address appeals from child support orders. Moreover, defendant cross-appealed the final child support order only with respect to the requirement that she *reimburse* plaintiff for 25% of the tuition after he paid it in full and on time to PDS. We can conceive of no justification for precluding defendant from enforcing plaintiff's court-ordered obligation to pay the PDS tuition in full upon becoming due.

[3] Plaintiff also argues that the trial court erred in failing to set a bond to stay enforcement of the private school tuition directive pursuant to Rule 62(d) of the Rules of Civil Procedure and N.C. Gen. Stat. § 1-289. Because N.C. Gen. Stat. § 1-289(a1) states that “the court shall specify the amount of the undertaking required to stay execution of the judgment pending appeal[,]” we review the trial court’s decision to deny the setting of a bond for an abuse of discretion. *See Markham v. Nationwide Mut. Fire Ins. Co.*, 125 N.C. App. 443, 456, 481 S.E.2d 349, 358 (1997) (holding decision to set surety amount “‘adjudged by the court’” reviewed for abuse of discretion (quoting N.C. Gen. Stat. § 1-285(a) (1995)). Here, we find that the trial court, by acknowledging that “child support is excepted from this process” because the children affected “have nothing to do with the disputes that have gone on between these two parties[,]” appropriately exercised its discretion in refusing to set a bond pending appeal of the order requiring plaintiff to pay child support. We, therefore, affirm the trial court’s order denying plaintiff’s motion to stay execution and enforcement of the child support order.

The dissent holds that the trial court erred in failing to set a bond pursuant to N.C. Gen. Stat. § 1-289. The dissent and plaintiff misread N.C. Gen. Stat. § 1-289 and Rule 62(d). Plaintiff filed a motion under the statute and rule “to stay enforcement of the PDS tuition payment directive” Both the statute and rule, however, address obtaining a stay of “execution” on a judgment and do not specifically address the ability to hold a party in contempt during an appeal. That issue is specifically addressed by N.C. Gen. Stat. § 50-13.4(f)(9).

While the dissent cites *Quick v. Quick*, 305 N.C. 446, 462, 290 S.E.2d 653, 663 (1982), as holding that a child support order can be a money judgment for purposes of N.C. Gen. Stat. § 1-289, both the dissent and plaintiff have overlooked the fact that our courts have restricted execution and, therefore, the applicability of N.C. Gen. Stat. § 1-289 to past due installments. *See Clark v. Bichsel*, ___ N.C. App. ___, ___, 767 S.E.2d 145, 148 (2015) (“We have previously held that, as a general rule, once a

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judgment fixes the amount due, execution, not contempt, is the appropriate proceeding.”); *Potts v. Tutterow*, 114 N.C. App. 360, 364, 442 S.E.2d 90, 92 (1994), (emphasizing that “this Court [has] held that execution is only available for past due installments of alimony”), *aff’d per curiam*, 340 N.C. 97, 455 S.E.2d 156 (1995).

Moreover, *Quick* predates the 1983 amendment that enacted the provision in N.C. Gen. Stat. § 50-13.4(f)(9) that allows a court to hold a party in contempt for failure to pay child support pending appeal. *See* 3 Suzanne Reynolds, *Lee’s North Carolina Family Law* § 13.127[a] (5th ed. 2002). The proper remedy for plaintiff was to seek a stay from this Court. *See* N.C. Gen. Stat. § 50-13.4(f)(9) (“Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for child support until the appeal is decided, if justice requires.”).

II

[4] Plaintiff also argues that the order holding him in civil contempt should be reversed because (1) he did not have adequate notice of the contempt hearing, (2) the trial court did not make adequate findings of a willful violation of the directive to pay PDS tuition, and (3) the purge condition in the contempt order erroneously modified the underlying tuition payment directive. “ ‘When reviewing a trial court’s contempt order, the appellate court is limited to determining whether there is competent evidence to support the trial court’s findings and whether the findings support the conclusions [of law].’ ” *Wellons v. White*, 229 N.C. App. 164, 173, 748 S.E.2d 709, 716 (2013) (quoting *Shumaker v. Shumaker*, 137 N.C. App. 72, 77, 527 S.E.2d 55, 58 (2000)). “ ‘The trial court’s conclusions of law drawn from the findings of fact [in civil contempt proceedings] are reviewable *de novo*.’ ” *Id.*, 748 S.E.2d at 716-17 (quoting *Tucker v. Tucker*, 197 N.C. App. 592, 594, 679 S.E.2d 141, 143 (2009)).

As an initial matter, plaintiff argues that the trial court committed reversible error by failing to provide him with the full five-day notice period required for a show cause order entered pursuant to N.C. Gen. Stat. § 5A-23(a) (2015). The Order to Appear and Show Cause and Notice of Hearing required plaintiff to appear before the trial court only two days after its issuance on 19 August 2014. Upon objection, Judge Hoover noted that he had issued the child support order the previous month, and that because plaintiff had ample time to construct a defense to the enforcement of that order, there was sufficient notice to plaintiff and good cause to hear the contempt proceedings on short notice. Because “the purpose of notice is to enable the one charged to prepare

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his defense,” *M.G. Newell Co. v. Wyrick*, 91 N.C. App. 98, 101, 370 S.E.2d 431, 434 (1988), we agree with the trial court, and find that it had good cause to shorten the notice period.

With regard to the substance of the civil contempt order, the trial court ultimately concluded that (1) plaintiff “has failed to comply with the [permanent support order]” by refusing to pay his children’s private school tuition, (2) that plaintiff “has the present ability to comply with the [permanent support order,]” and (3) that his “noncompliance . . . was willful.” These conclusions are supported by several findings of fact setting out plaintiff’s testimony at the contempt hearing regarding his income and expenses. Preceding these findings is Finding of Fact No. 17, which reads: “The court finds that despite the Father’s contentions, ample evidence was presented that Father is well able and capable of paying the permanent child support obligations set forth in the July 9, 2014 Order” A sampling of this “ample evidence” is as follows: plaintiff indicated a monthly income of \$47,000.00 on a July 2013 loan application for his purchase of a residence worth approximately \$840,000.00; he owns over \$140,000.00 worth of stocks, bonds, and securities; he owns five rental properties separately or jointly with his present wife and realizes uncharacteristically low profits from them; his retirement accounts are worth in excess of \$900,000.00; the court found his monthly expenses as represented on his financial affidavit were unreasonable; and plaintiff failed to account for the fact that his stepchildren’s father covers some of their expenses. In conclusion, the trial court found that as a result of plaintiff’s willful violation of the permanent support order, he would be imprisoned for 30 days or until he “pay[ed] the remaining balance of any tuition owed to Providence Day School on behalf of the Minor Children for the entire 2014-2015 school year[.]”

The relevant contempt statute holds in pertinent part that “[f]ailure to comply with an order of a court is a continuing civil contempt as long as . . . [t]he noncompliance by the person . . . is willful; and . . . [t]he person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.” N.C. Gen. Stat. § 5A-21(a) (2015). As with all proceedings in which the court sits without a jury, the trial court’s ultimate findings “are conclusive on appeal if supported by competent evidence, even though there may be evidence to support contrary findings.” *Bridges v. Bridges*, 85 N.C. App. 524, 526, 355 S.E.2d 230, 231 (1987). However, “findings are inadequate [if] they are ‘mere recitations of the evidence and do not reflect the processes of logical reasoning.’ ” *Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 3 (2003) (quoting *Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000)).

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Plaintiff first challenges the findings that utilize his testimony by categorically dismissing them as insufficient recitations of evidentiary fact. He argues that because they “merely recapitulate [his] testimony,” they “do not meet the standard set by [Rule 52(a)(1) of the Rules of Civil Procedure].” *Id.* We disagree. The detailed findings and the corresponding conclusions noted above do more than merely recite plaintiff’s testimony. They also “reflect the processes of logical reasoning.” *Id.* (quoting *Williamson*, 140 N.C. App. at 364, 536 S.E.2d at 339). This is most evident in the preamble to Finding of Fact No. 17, which asserts that plaintiff’s contentions that he is unable to pay his children’s private school tuition are sufficiently refuted by the “ample evidence” to the contrary. We, therefore, hold that the trial court’s findings of fact describing plaintiff’s own testimony were not in error.

Plaintiff also claims that these enumerated findings do not support a conclusion that he is presently able to pay his children’s tuition and that his refusal to do so is willful. In his appellate brief, plaintiff attempts to refute each finding with contrary evidence or a different interpretation of each finding. Despite this effort, we determine that the findings of fact, drawn in part from plaintiff’s own testimony or admissions, are supported by evidence and sufficiently establish plaintiff’s substantial monthly income, his accumulated wealth in the form of real property, retirement, and stocks and bonds, and the unreasonable aspects of his most recent affidavit in which he claims he is unable to afford the PDS tuition. These findings support the conclusion that plaintiff has sufficient income and assets to comply with the permanent child support order by paying the PDS tuition in monthly installments as he elected to do or by “tak[ing] reasonable measures that would enable [him] to comply with the order” as provided in N.C. Gen. Stat. § 5A-21(a)(3). Accordingly, we affirm the trial court’s ruling that plaintiff was in willful violation of the permanent support order.

Plaintiff’s final argument is that the purge condition requiring him to pay the remaining balance of the PDS tuition owed for the 2014-2015 school year erroneously modified the permanent support order in place, which allowed plaintiff to “choose between the [payment] options available” at PDS. Plaintiff cites to *Bogan v. Bogan*, 134 N.C. App. 176, 179, 516 S.E.2d 641, 643 (1999), in support of this argument, which holds that “a trial court is without authority to *sua sponte* modify an existing support order.” However, we find that a simple reading of the contempt order shows that “Plaintiff/Father must pay the *remaining balance* of any tuition owed to Providence Day School” (Emphasis added.)

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Thus, as plaintiff “elected to pay PDS tuition by monthly installments,” the trial court did not *sua sponte* modify the permanent child support order because the contempt order did not require plaintiff to pay the tuition for the school year in its entirety, but only the remaining balance for the entire 2014-2015 school year given his monthly installment plan. Accordingly, because we find the purge condition was not erroneous, and because the trial court’s conclusions of law were adequately supported by competent findings of fact, which were in turn supported by competent evidence, we affirm the trial court’s contempt order.

AFFIRMED.

Judge BRYANT concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

The majority’s opinion erroneously affirms the trial court’s civil contempt order, which concluded plaintiff willfully failed to pay his children’s private school tuition as required by the support order, while that order was pending before this Court on cross-appeals from both parties. Presuming, without agreeing, defendant possessed the right to seek enforcement through contempt, while also contesting the same order on appeal, the trial court erred and prejudiced plaintiff by failing to rule upon his motion to stay the execution and enforcement of the appealed order and to set bond conditions pursuant to N.C. Gen. Stat. § 1-289.

Plaintiff retained a statutory right to seek and secure the trial court’s determination of a bond or security to stay execution of the child support order. The trial court failed to make the statutorily required bond determination to allow plaintiff to stay execution of the party’s jointly appealed order, which would have allowed plaintiff to avoid being held in civil contempt. The trial court’s order should be reversed. I respectfully dissent.

I. Standard of Review

This Court reviews whether a trial court has properly followed, interpreted, or applied a statutory mandate *de novo*. *McKinney v. McKinney*, 228 N.C. App. 300, 301, 745 S.E.2d 356, 358 (2013) (citation omitted), *disc. review denied and dismissed as moot*, 367 N.C. 288, 753 S.E.2d 679 (2014).

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II. Analysis

N.C. Gen. Stat. § 1-289, as applicable, provides:

(a) If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment *unless* a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment[.]

N.C. Gen. Stat. § 1-289(a) (2009) (emphasis supplied).

Our Supreme Court held an order for the payment of child support is “a judgment directing the payment of money” within the meaning of N.C. Gen. Stat. § 1-289. *Quick v. Quick*, 305 N.C. 446, 462, 290 S.E.2d 653, 663 (1982) (citations omitted) (noting a child support order is a money judgment and an appeal does not stay execution for the collection of judgment unless a stay or supersedeas is ordered). Our Supreme Court’s holding in *Quick* remains controlling law. Nothing shows the 1983 amendment to N.C. Gen. Stat. § 50-13.4(f)(9) altered or limited *Quick*’s holding, as posited in the majority’s opinion. *See Romulus v. Romulus*, 216 N.C. App. 28, 35, 715 S.E.2d 889, 893-94 (2011) (noting our Supreme Court has recognized judgments directing the payment of alimony or child support are “judgments directing the payment of money” under N. C. Gen. Stat. § 1-289).

Here, plaintiff timely filed a motion to stay execution and enforcement of judgment during appeal on 20 August 2014, after an order to show cause was issued by the trial court with only two (2) days prior notice to plaintiff, in violation of N.C. Gen. Stat. § 5A-23(a1) (2015).

In support of his motion, plaintiff averred “North Carolina law permits [plaintiff] to seek a stay of execution and enforcement of the child support provisions of the Support/Custody Order pending disposition of the parties’ respective cross-appeals[,]” citing N.C. Gen. Stat. § 1-289 (2009). Plaintiff correctly asserted “N.C. [Gen. Stat.] § 1-289 authorizes such a stay where [plaintiff] executes a written undertaking by one or more sureties in an appropriate amount and after consideration of the relevant factors set forth in and contemplated by [N.C. Gen. Stat.] § 1-289.”

The majority’s opinion purports to limit plaintiff’s options to obtain a stay of execution on the judgment solely to filing a motion for supersedeas with this Court. While N.C. Gen. Stat. § 50-13.4(f)(9) authorizes this

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Court to “stay any order for civil contempt entered for child support,” *see* N.C. Gen. Stat. § 50-13.4(f)(9) (2015), this option is not the *only* permissible avenue through which a party may obtain a stay of “a judgment directing the payment of money.” *Quick*, 305 N.C. at 462, 290 S.E.2d at 663 (citations omitted).

Nothing in the plain language of N.C. Gen. Stat. § 50-13.4(f)(9) or the pertinent case law restricts or diminishes plaintiff’s right to seek a stay of execution under N.C. Gen. Stat. § 1-289. Plaintiff’s motion was filed in accordance with the explicit statutory language of N.C. Gen. Stat. § 1-289, and does not conflict with other statutory alternatives.

The trial court failed to rule upon plaintiff’s motion for determination of a bond as statutorily required and summarily denied plaintiff’s motion to stay execution and enforcement of judgment on 15 October 2014. In the order denying plaintiff’s motion, the trial court stated “N.C. Gen. Stat. § 50-13.4(f)(9) and the ruling in *Guerrier v. Guerrier*, 155 N.C. App. 154, 574 S.E.2d 69 (2002) are controlling.” The trial court wholly ignored and did not rule upon plaintiff’s rights under N.C. Gen. Stat. § 1-289 to set a bond and to allow him to post security to stay execution and enforcement of the jointly appealed child support order. The trial court’s failure to do so permitted defendant to “have her cake and eat it to,” by forcing plaintiff’s compliance, under pain of contempt, with a contested matter on appeal, while allowing defendant to continue challenging those portions of the same order on appeal which were unfavorable to her.

The plain language of N.C. Gen. Stat. § 1-289 authorized plaintiff to seek a stay of execution and required the trial court to determine conditions and set a bond. The trial court, as fact finder, and the forum where defendant’s contempt motion was pending, was a proper forum to determine and set conditions of the bond to stay the order. The trial court failed to consider and rule upon plaintiff’s motion in accordance with the statutory mandate. The trial court’s order denying plaintiff’s motion to stay execution and enforcement of judgment during appeal was erroneously entered based upon a disregard or misapprehension of law. *Blitz v. Agean, Inc.*, 197 N.C. App. 296, 312, 677 S.E.2d 1, 11 (2009) (“Where a ruling is based upon a misapprehension of the applicable law, the cause will be remanded in order that the matter may be considered in its true legal light.” (citations and quotation marks omitted)).

The trial court erroneously refused to consider plaintiff’s motion to determine the bond or security and stay execution of the appealed judgment. As a result, the trial court permitted defendant to proceed on

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her motion for contempt and show cause order against plaintiff upon only two (2) days prior notice. Had the trial court properly considered plaintiff's motion to stay execution of the judgment and set a bond as set forth in N.C. Gen. Stat. § 1-289, defendant's motion to hold plaintiff in civil contempt would have inevitably failed. *See Smith v. Miller*, 155 N.C. 242, 71 S.E. 355 (1911) (holding there will be a stay of execution as to the parties appealing, upon compliance with this section); *Bryan v. Hubbs*, 69 N.C. 423 (1873) (holding posting of security operates as stay of execution of judgment).

If the trial court had properly ruled upon plaintiff's motion to set a bond and stay execution of the judgment, defendant's motion to hold plaintiff in civil contempt would have failed. Defendant could not demonstrate plaintiff's "willful noncompliance" or "stubborn resistance" if a bond had been determined, posted, and the money judgment stayed. N.C. Gen. Stat. § 5A-21(a) (2015).

The trial court entirely ignored an apt and permissible basis to allow plaintiff to stay execution of the judgment under § 1-289. Plaintiff was prejudiced by subsequently being found in civil contempt for his willful noncompliance with the very order he sought to have stayed and pending on cross-appeals by both parties. *See Meehan v. Lawrence*, 166 N.C. App. 369, 378, 602 S.E.2d 21, 27 (2004) ("In explaining the 'willfulness' requirement necessary to find a party in civil contempt, our Supreme Court has noted this term imports knowledge and a stubborn resistance." (citations and internal quotation marks omitted)).

The trial court erred by holding plaintiff in willful civil contempt for the non-payment of the private school tuition expenses set out in the appealed child support order. I vote to reverse the contempt order appealed from, and remand to the trial court for ruling and entry of an order consistent with the statutory mandate set forth in N.C. Gen. Stat. § 1-289.

III. Conclusion

Plaintiff was statutorily allowed to seek a stay of execution of the judgment and for the trial court to determine and set bond conditions, pursuant to N.C. Gen. Stat. § 1-289. The trial court's order failed to rule upon plaintiff's motion, and set a bond and security conditions to stay execution of the judgment. The trial court's contempt order was entered based upon a disregard for and misapprehension of the law.

Plaintiff was entitled to a ruling on his motion under N.C. Gen. Stat. § 1-289 and for the trial court to determine bond conditions to stay

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execution of the judgment, from which defendant had also appealed. Doing so would have precluded the trial court from having to rule on defendant's two-day noticed motion for contempt, in violation of N.C. Gen. Stat. § 5A-23(a1). I respectfully dissent.

STATE OF NORTH CAROLINA

v.

JUAN FITZGERALD ALLEN

No. COA15-708

Filed 19 April 2016

Appeal and Error—misdemeanor citation—jurisdiction—failure to object in district court

Where defendant was tried and convicted on a misdemeanor open container citation in district court and failed to object to that court's exercise of jurisdiction, he was no longer in a position to assert his statutory right to object to trial on citation. The Court of Appeals held that his appellate challenge to the trial court's jurisdiction was without merit.

Appeal by defendant from judgments entered 23 January 2015 by Judge R. Stuart Albright in Surry County Superior Court. Heard in the Court of Appeals 17 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General Tamika L. Henderson, for the State.

Appellate Defender Staples Hughes, by James R. Grant, for defendant-appellant.

BRYANT, Judge.

Where defendant was tried without objection and convicted on a misdemeanor citation in district court, appealed the conviction for a trial *de novo* in superior court and was convicted by jury on the same misdemeanor citation, again without objection to the citation, defendant's challenge to the jurisdiction of the trial court is without merit.

On 27 July 2013, defendant Juan Fitzgerald Allen was issued North Carolina Uniform Citations charging him with willfully operating a motor

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vehicle on a street or highway/public vehicular area (1) while subject to an impairing substance, (2) while his drivers' license was revoked, (3) while displaying an expired registration plate knowing the same to be expired, (4) without having a current electronic inspection, such vehicle requiring such an inspection, and (5) for transporting an open container of fortified wine or spirituous liquor. Defendant submitted to a chemical analysis of his breath approximately one hour after his arrest and registered a 0.23 blood alcohol level. The record indicates that a bench trial was held in Surry County District Court followed by a trial *de novo* commenced on 21 January 2015, during the criminal session in Surry County Superior Court, the Honorable Stuart Albright, Judge presiding.

During a pre-trial conference in superior court, the State made an unchallenged oral motion before the trial court to join for trial the charges of transporting fortified wine or spirituous liquor without being in an unopened original container, driving while impaired, and driving while license revoked. The State took a voluntary dismissal on charges of driving with an expired registration and no vehicle inspection. The matter proceeded to trial before a jury.

Following the presentation of all evidence and the trial court's instruction to the jury, the jury returned guilty verdicts against defendant for impaired driving, driving a motor vehicle on a highway while his driver's license was revoked, and transporting within the passenger area of a motor vehicle spirituous liquor in other than the manufacturer's unopened original container. The jury further found as an aggravating factor that "[a]t the time of the offense, . . . defendant's license was revoked because of impaired driving." Based on the jury's finding of the aggravating factor, the trial court arrested judgment on the offense of driving a motor vehicle on a highway while his driver's license was revoked. In accordance with the remaining jury verdicts, the trial court entered judgment against defendant for the offense of impaired driving and sentenced him to an active term of two years. Judgment was entered against defendant for transporting an open container of spirituous liquor, for which he was sentenced to an active term of twenty days, to be served concurrent with his DWI sentence. Defendant entered written notice of appeal.

On appeal, defendant argues the trial court lacked jurisdiction to try him for transporting an open container of spirituous liquor, a misdemeanor, when the charging citation failed to allege an essential element of that offense. Specifically, defendant contends that the charging

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citation was fatally defective as it failed to allege that the open container was transported in the passenger area of defendant's vehicle. We disagree.

"There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity." *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17–18 (1966) (citations and quotation marks omitted). "[A] citation . . . serves as the pleading of the State for a misdemeanor prosecuted in the district court, unless the prosecutor files a statement of charges, or there is objection to trial on a citation." N.C. Gen. Stat. § 15A-922(a) (2015). "A citation is a directive, issued by a law enforcement officer or other person authorized by statute, that a person appear in court and answer a misdemeanor or infraction charge or charges." *Id.* § 15A-302(a) (2015). "The citation must: (1) [i]dentify the crime charged, including the date, and where material, identify the property and other persons involved[.]" *Id.* § 15A-302(c).

Initially, we note that a defendant may object to a trial on a citation; "[a] defendant charged in a citation with a criminal offense may by appropriate motion require that the offense be charged in a new pleading." *Id.* § 15A-922(c). However, this Court has held that a defendant may not challenge the derivative jurisdiction of the superior court to try a misdemeanor offense on a citation, where that challenge was not raised before the district court. *See State v. Phillips*, 149 N.C. App. 310, 318, 560 S.E.2d 852, 857 (2002) ("[A] defendant's objection to trial by citation must be asserted in the court of original jurisdiction, in this case, the district court. *See State v. Monroe*, 57 N.C. App. 597, 599, 292 S.E.2d 21, 22 (1982) Thus, . . . '[o]nce jurisdiction had been established and [the] defendant had been tried in district court, . . . he was no longer in a position to assert his statutory right to object to trial on citation when he appealed to superior court.' *Id.*").

Defendant appeals from the conviction by jury of a misdemeanor allowed by his *de novo* appeal to superior court. "[T]he superior court has jurisdiction to try a misdemeanor . . . [w]hen a misdemeanor conviction is appealed to the superior court for trial *de novo* . . ." N.C. Gen. Stat. § 7A-271(a)(5) (2015). The record does not indicate that defendant—tried and convicted in district court before his appeal to superior court for a trial *de novo*—challenged the charges in the citation during proceedings in the district court, or the superior court. Now before this Court, defendant raises this challenge to the jurisdiction of the trial courts for the first time. We acknowledge defendant is allowed

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to challenge jurisdiction for the first time on appeal. *See* N.C. R. App. P. 10(a)(1) (2015) (“[W]hether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.”). However, the ability to raise a jurisdictional challenge at any time does not ensure that the jurisdictional challenge has merit.

Defendant argues that “[a] citation, like a warrant or an indictment, may serve as a pleading in a criminal case and must therefore allege lucidly and accurately all the essential elements of the [crime] . . . charged.” However, defendant fails to direct our attention to any opinion from this Court or other authority equating the requirements for a valid citation with those of a valid indictment, and we find none. *Compare id.* § 15A-302(c) (“The citation must: (1) Identify the crime charged, including the date, and where material, identify the property and other persons involved[.]”), *with id.* § 15A-644(a)(3) (“An indictment must contain: . . . (3) Criminal charges pleaded as provided in Article 49 of [Chapter 15A], Pleadings and Joinder[.]”); *see also State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) (“An indictment, as referred to in [N.C. Const. art. I, § 22] . . . , is a written accusation of a crime drawn up by the public prosecuting attorney and submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill. To be sufficient under our Constitution, an indictment must allege lucidly and accurately all the essential elements of the offense endeavored to be charged.” (citation and quotation marks omitted)); *State v. Jones*, 157 N.C. App. 472, 477, 579 S.E.2d 408, 411 (2003) (“[A] citation is not an indictment[.]”).

On 27 July 2013, defendant was issued a Uniform Citation by a law enforcement officer with the Mt. Airy Police Department: “Defendant did unlawfully and willfully operate a (motor) vehicle on a (street or highway) (public vehicular area) transport open container of fortified wine/spirituous liquor unopened original container G.S. 18B-401(a).” Section 401 of General Statutes Chapter 18B (“Regulation of Alcoholic Beverages”) states that “[i]t shall be unlawful for a person to transport fortified wine or spirituous liquor in the passenger area of a motor vehicle in other than the manufacturer’s unopened original container. . . . Violation of this subsection shall constitute a Class 3 misdemeanor.” N.C. Gen. Stat. § 18B-401(a) (2015).

Defendant argues that the citation failed to state that he transported the fortified wine or spirituous liquor “in the passenger area” of his motor vehicle and as such, is fatally defective to confer jurisdiction. Defendant contends that the citation failed to include an essential element of the crime charged and that a citation, which may be issued by

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a law enforcement officer, *see* N.C.G.S. § 15A-302(b) (“An officer may issue a citation to any person who he has probable cause to believe has committed a misdemeanor or infraction.”), is to be held to the same standard as an indictment issued by a grand jury, *see* N.C. Gen. Stat. § 15A-641(a) (2015) (“Any indictment is a written accusation by a grand jury, filed with a superior court, charging a person with the commission of one or more criminal offenses.”). Defendant’s contention does not comport with the statutory law of North Carolina, where the standard for issuance of an indictment is not precisely the same as a citation.

Nevertheless, in pertinent part, General Statutes, section 15A-302 states that a citation must “[i]dentify the crime charged.” N.C.G.S. § 15A-302(c). As noted above, the citation issued to defendant on 27 July 2013 sufficiently identified the crime charged—transporting an open container of fortified wine or spirituous liquor while operating a motor vehicle—and put defendant on notice of the charge. Defendant was tried on the citation at issue without objection in the district court, and by a jury in the superior court on a trial *de novo*. Thus, once jurisdiction was established and defendant was tried in the district court, “he was no longer in a position to assert his statutory right to object to trial on citation” *Monroe*, 57 N.C. App. at 599, 292 S.E.2d at 22. Therefore, defendant’s challenge to the trial court’s jurisdiction is without merit.

NO ERROR.

Judges GEER and McCULLOUGH concur.

STATE v. GODWIN

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STATE OF NORTH CAROLINA

v.

WILLIAM EDWARD GODWIN, III, DEFENDANT

No. COA15-766

Filed 19 April 2016

1. Witnesses—expert—qualification required—testimony about HGN test

The trial court erred in an impaired driving prosecution by admitting testimony from an officer about the results of a Horizontal Gaze Nystagmus (HGN) test. N.C.G.S. § 8C-1, Rule 702(a1) requires that a witness be qualified as an expert by knowledge, skill, experience, training, or education before testifying as to the results of an HGN test.

2. Evidence—HGN test—unqualified witness—prejudice

In an impaired driving prosecution, the erroneous admission of testimony about HGN test results from an officer who was not qualified as an expert was prejudicial where there was a reasonable possibility of a different result without the testimony.

3. Criminal Law—request for instruction denied—Intoximeter—no error

The trial court did not err in an impaired driving prosecution by not giving a requested instruction concerning the results of the Intoximeter. Defendant's argument had been previously rejected.

Appeal by defendant from judgment entered 15 November 2013 by Judge Gary M. Gavenus in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 January 2016.

Attorney General Roy Cooper, by Assistant Attorney General Teresa L. Townsend, for the State.

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

ELMORE, Judge.

William Edward Godwin, III (defendant), appeals his conviction for driving while impaired following a jury trial in superior court. The

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question for decision is whether Rule 702(a1) of the North Carolina Rules of Evidence requires a witness to be qualified as an expert before he may testify to the issue of impairment related to HGN test results. We hold that it does.

I. Background

The State's evidence at trial tended to show the following: On 18 January 2011, at approximately 10:14 p.m., Daniel Kennerly, an officer with the Charlotte Mecklenburg Police Department, observed defendant driving fourteen miles per hour over the posted speed limit and executed a traffic stop. When he approached the vehicle, Officer Kennerly noticed that defendant's eyes were red and glassy, and he detected a strong odor of alcohol coming from defendant's breath. Officer Kennerly asked defendant where he was coming from and how much alcohol, if any, he had consumed that evening. In response, defendant stated that he had just left a restaurant where he had consumed three beers. Officer Kennerly then asked defendant to step out of his vehicle and began an investigation for impaired driving.

As part of his investigation, Officer Kennerly administered three field sobriety tests: the Horizontal Gaze Nystagmus (HGN) test, the walk-and-turn, and the one-leg stand. He observed four out of six possible indicators of impairment during the HGN test, six out of eight possible indicators during the walk-and-turn, and two out of four possible indicators during the one-leg stand. At that time, Officer Kennerly placed defendant under arrest for driving while impaired and transported him to the Mecklenburg County Sheriff's Office's Intoximeter site to perform a EC/IR II breath test. The results of the Intoximeter showed that defendant's blood-alcohol concentration was .08.

On 20 December 2011, defendant was convicted in Mecklenburg County District Court of driving while impaired. He appealed to superior court, and the matter came to trial at the 12 November 2013 Criminal Session of the Superior Court for Mecklenburg County. At trial, defendant objected to Officer Kennerly's HGN testimony, arguing that the officer had to be qualified as an expert under Rule 702 of the North Carolina Rules of Evidence before such testimony could be admitted. Over defendant's objections, the trial court allowed Officer Kennerly to testify, based on his training and experience, as to his administration of the HGN test, the indicators of impairment, and his opinion regarding defendant's impairment based on the indicators which he observed. At the conclusion of the trial, the jury found defendant guilty of driving while impaired. Defendant gave notice of appeal in open court.

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II. Discussion

[1] Defendant first argues that the trial court erred in admitting Officer Kennerly's testimony regarding the HGN test results. Specifically, defendant maintains that Rule 702(a1) requires a party offering testimony about the results of an HGN test to do so through a properly qualified witness who has been accepted as an expert by the trial court. Defendant contends, therefore, that in overruling his objection and allowing Officer Kennerly to offer such testimony as a lay witness, the trial court acted under a misapprehension of the law.

"Issues of statutory construction are questions of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citing *Moody v. Sears Roebuck & Co.*, 191 N.C. App. 256, 264, 664 S.E.2d 569, 575 (2008)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

The North Carolina Supreme Court first addressed the admissibility of HGN evidence in *State v. Helms*, 348 N.C. 578, 580, 504 S.E.2d 293, 294 (1998). On discretionary review, the Court agreed with our conclusion that "the HGN test does not measure behavior a lay person would commonly associate with intoxication, but rather represents *specialized knowledge that must be presented to the jury by a qualified expert.*" *Id.* at 581, 504 S.E.2d at 295 (emphasis added); see also *State v. Helms*, 127 N.C. App. 375, 379, 490 S.E.2d 565, 568 (1997) ("[The HGN test] is based upon a scientific principle that the extent and manner in which one's eye quivers can be a reliable measure of the amount of alcohol one has consumed." (citation omitted)), *rev'd on other grounds*, 348 N.C. 578, 504 S.E.2d 293. This meant that under the prior version of Rule 702, the State had to show, *inter alia*, that the methodology underlying the test was "sufficiently reliable," *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852 (1990) (citations omitted), and that it "can be properly applied to the facts in issue," *State v. Goode*, 341 N.C. 513, 527, 461 S.E.2d 631, 639 (1995) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993)). Where no evidence was admitted, and no inquiry conducted, as to the reliability of HGN testing, the Court held that it was error to admit an officer's testimony regarding the results of the HGN test administered on the defendant. *Helms*, 348 N.C. at 582, 504 S.E.2d at 295.

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After *Helms* was decided, the North Carolina General Assembly passed House Bill 1048, which added subsection (a1) to Rule 702. 2006 Sess. Laws ch. 253, § 6. Rule 702(a1) provides, in pertinent part, as follows:

(a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

(1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

N.C. Gen. Stat. § 8C-1, Rule 702(a1) (2015). The first sentence of this subsection contemplates that testimonial evidence concerning HGN test results be offered by an expert witness. Although the prior version of Rule 702(a) was still in effect when subsection (a1) was added, the bases on which a witness may be qualified as an expert are the same under the current version. Rule 702(a), as amended, provides as follows:

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, *a witness qualified as an expert by knowledge, skill, experience, training, or education*, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

(1) The testimony is based upon sufficient facts or data.

(2) The testimony is the product of reliable principles and methods.

(3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2015) (emphasis added); *cf.* N.C. Gen. Stat. § 8C-1, Rule 702(a) (2009) (“[A] witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.”).

In accordance with *Helms*, therefore, Rule 702(a1) requires that before a witness can testify as to the results of an HGN test, he must be “qualified as an expert by knowledge, skill, experience, training, or

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education.” See *Helms*, 348 N.C. at 580–81, 504 S.E.2d at 294–95. If the witness is so qualified and “proper foundation” is established, the witness may “give *expert testimony*” as to the HGN test results, subject to the additional limitations in subsection (a1). N.C. Gen. Stat. § 8C-1, Rule 702(a1) (emphasis added). Namely, the expert witness may testify “solely on the issue of impairment and *not* on the issue of specific alcohol concentration,” and the HGN test must have been “administered by a person who has successfully completed training in HGN.” *Id.* (emphasis added).

In the case *sub judice*, although Officer Kennerly completed a training course in DWI detection and standardized field sobriety tests, there was never a formal offer by the State to tender him as an expert witness. In fact, after conducting its own *voir dire*, the trial court rejected defendant’s contention that Officer Kennerly must be qualified as an expert before testifying as to the results of the HGN test:

THE COURT: I will allow this officer to testify that he administered the HGN test, the walk-and-turn test, and the one-legged test. He will be allowed to testify as to the indicators of impairment he observed of this defendant in giving these tests. Anything else?

MR. POWERS: I’d ask the Court to note my exception. Is the Court disqualifying him as an expert on the HGN?

THE COURT: I’m not—he doesn’t have to be qualified as an expert. I’m not going to make that requirement.

Thereafter, over defendant’s objection, Officer Kennerly testified that he “observed four out of six” possible clues during the HGN test, which “indicates a probability that the person could be impaired as a result of the consumption of alcohol.” Furthermore, based on his interactions with defendant and defendant’s performance on all of the field sobriety tests, including the HGN test, Officer Kennerly opined that defendant’s “mental and physical faculties were appreciably impaired as a result of the consumption of some impairing substance, that substance in this case being alcohol.” Our application of Rule 702(a1) to the facts of this case leads us to conclude that the trial court erred in allowing a witness who had not been qualified as an expert under Rule 702(a) to testify as to the issue of impairment based on the HGN test results.

The State, relying on our decision in *State v. Smart*, 195 N.C. App. 752, 674 S.E.2d 684 (2009), *disc. review denied*, 363 N.C. 810, 692 S.E.2d 874 (2010), nevertheless argues for an interpretation of Rule 702(a1) that

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would not require an arresting officer who administered the HGN test to be qualified as an expert before testifying as to the HGN test results and the issue of impairment related thereto. Unlike this case, however, the arresting officer in *Smart* was qualified as an expert under Rule 702 before she testified as to her administration of the test. *Id.* at 755–56, 674 S.E.2d at 685–86. And although the defendant’s argument, as it was initially phrased, attacked the officer’s qualifications as an expert witness, the defendant’s actual challenge went toward the testimony itself: “[The defendant] in fact specifies that his argument pertains to whether the officer’s ‘method of proof’—that is, the nystagmus testing—is sufficiently reliable as a basis for expert testimony.” *Id.* at 755, 674 S.E.2d at 685; *see also Goode*, 341 N.C. at 529, 461 S.E.2d at 640 (“Once the trial court has determined that the method of proof is sufficiently reliable as an area for expert testimony, the next level of inquiry is whether the witness . . . is qualified as an expert to apply this method to the specific facts of the case.” (citing N.C. Gen. Stat. § 8C-1, Rule 702 (1992))). Addressing this argument, we explained that, at least under the prior version of Rule 702(a), before admitting expert opinion testimony the trial court had to make “a preliminary assessment of whether the reasoning or methodology underlying the testimony is sufficiently valid.” *Id.* at 756, 674 S.E.2d at 686 (quoting *Goode*, 341 N.C. at 527, 461 S.E.2d at 639); *see also* N.C. Gen. Stat. § 8C-1, Rule 104(a) (2015) (“Preliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).”). At that time, we interpreted subsection (a1) “as obviating the need for the State to prove that the HGN testing method is sufficiently reliable.” *Id.* Our holding in *Smart* went no further, and it has no application here. While some may even question whether *Smart* survives the amendment to Rule 702(a), that issue is not the one presently before us.

[2] Having concluded that the trial court erred in admitting Officer Kennerly’s testimony, we must now determine whether the error was prejudicial so as to warrant a new trial. “In order to establish prejudicial error in the erroneous admission of the HGN evidence, defendant must show only that had the error in question not been committed, a reasonable possibility exists that a different result would have been reached at trial.” *Helms*, 348 N.C. at 583, 504 S.E.2d at 296 (citing N.C. Gen. Stat. § 15A-1443(a) (1997)).

The remaining evidence presented at trial shows the following: (1) Officer Kennerly stopped defendant for speeding; (2) when Officer Kennerly initiated the stop, defendant activated his turn signal, pulled onto the next side street, and came to a stop at roadside in a safe

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location; (3) defendant was not weaving, and he made no sharp or sudden turns to avoid the traffic stop; (4) two experts testified that they would have expected to see some indicators of impairment which defendant did not exhibit while operating the vehicle; (5) defendant had no problem retrieving his license or registration; (6) defendant did not tilt his head away from Officer Kennerly or otherwise try to avoid contact with him; (7) Officer Kennerly noticed that defendant's eyes were red and glassy, and he smelled a "strong odor of an alcoholic beverage coming from his breath"; (8) one expert testified that "the odor of alcohol is simply an indicator of presence of alcohol" and that there is "no basis for an opinion that correlates the strength of an odor to . . . blood alcohol concentration in the body"; (9) defendant told Officer Kennerly that he had just left a restaurant where he had consumed three beers that evening; (10) when asked to step out of the vehicle, defendant removed his seatbelt without difficulty, he did not use the doorframe or the vehicle for support while exiting, and he did not stagger or sway once he was out of the vehicle; (11) Officer Kennerly observed six out of eight possible clues during the walk-and-turn test, and two out of four possible clues on the one-leg stand test; (12) defendant repeatedly told Officer Kennerly that he had to use the restroom, and two experts agreed that defendant's need to urinate could have adversely affected his performance on the tests; (13) one of the experts, who reviewed the video from Officer Kennerly's dash camera, testified that Officer Kennerly should not have counted three of the six clues he observed during the walk-and-turn test; that the steep grade of the road where defendant performed the one-leg stand could have adversely affected defendant's performance on the test; and that the presence of traffic on the narrow road where the tests were administered, along with the cold weather that evening, could also have affected defendant's performance on the tests; (14) Helen Godwin, defendant's mother, testified that when she saw defendant at the police station, his eyes were not red or glassy, he did not smell of alcohol, his speech was normal, and she did not believe he was impaired; (15) after being placed under arrest and transported to the Intoximeter site, defendant registered a .08 on the Intoximeter. Based on the foregoing, particularly the conflicting evidence regarding defendant's performance on the other field sobriety tests, we conclude a reasonable possibility exists that, had the HGN test results not been admitted, a different result would have been reached at trial.

A. Jury Instructions

[3] Defendant also contends that trial court erred in denying his request for the following jury instruction concerning the results of the Intoximeter:

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A chemical analysis of defendant's breath obtained from an EC/IR-II, which shows an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath, is deemed sufficient to prove defendant's alcohol concentration. However, such chemical analysis does not compel you to so find beyond a reasonable doubt. You are still at liberty to consider the credibility and/or to give such chemical analysis when considering whether the defendant's guilt has been proven beyond a reasonable doubt.

According to defendant, the requested instruction was necessary to inform the jury that the Intoximeter results were sufficient to support a finding of impaired driving but did not compel such a finding beyond a reasonable doubt. By charging the jury using Pattern Jury Instruction 270.20A, defendant claims the trial court impressed upon the jury that it could not consider evidence which showed that defendant was not impaired.

"When a defendant requests a special jury instruction, 'the trial court is not required to give [the] requested instruction in the exact language of the request. However, when the request is correct in law and supported by the evidence in the case, the court must give the instruction in substance.'" *State v. Beck*, 233 N.C. App. 168, 171, 756 S.E.2d 80, 82 (alteration in original) (quoting *State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976)), *writ of supersedeas denied, disc. review denied*, 367 N.C. 508, 759 S.E.2d 94 (2014). To establish error, therefore, the defendant "must show that the requested instructions were not given in substance and that substantial evidence supported the omitted instructions." *State v. Garvick*, 98 N.C. App. 556, 568, 392 S.E.2d 115, 122 (citing *State v. White*, 77 N.C. App. 45, 52, 334 S.E.2d 786, 792, *cert. denied*, 315 N.C. 189, 337 S.E.2d 864 (1985)), *aff'd per curiam*, 327 N.C. 627, 398 S.E.2d 330 (1990). "The defendant also bears the burden of showing that the jury was misled or misinformed by the instructions given." *Beck*, 233 N.C. App. at 171, 756 S.E.2d at 82 (citing *State v. Blizzard*, 169 N.C. App. 285, 297, 610 S.E.2d 245, 253 (2005)).

As defendant acknowledges in his brief, we have previously rejected his argument concerning Pattern Jury Instruction 270.20A. In *Beck*, we concluded that

the trial court's use of the pattern jury instruction [270.20A] informed the jury that in order to return a verdict of guilty, it must be convinced beyond a reasonable doubt that Defendant's alcohol concentration was .08 or

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more. This instruction informed the jury, in substance, that it was not compelled to return a guilty verdict based simply on the chemical analysis results showing a .10 alcohol concentration.

Beck, 233 N.C. App. at 171–72, 756 S.E.2d at 83. The trial court also “informed the jury that it possessed the authority to determine the weight of any evidence offered to show that Defendant was—or was not—impaired.” *Id.* at 172, 756 S.E.2d at 83 (citations omitted). Despite defendant’s attempt to distinguish *Beck* from the case *sub judice*, we are unable to do so. Accordingly, we reject defendant’s second argument. See *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”).

III. Conclusion

Although the trial court’s jury instructions were proper, we conclude that the trial court erred in admitting Officer Kennerly’s testimony regarding the HGN test results and the issue of defendant’s impairment related thereto, without requiring him to be qualified as an expert under Rule 702(a). Based on the remaining evidence presented at trial, we further conclude a reasonable possibility exists that, had the error not occurred, the jury would have reached a different result. Defendant is entitled to a new trial.

NEW TRIAL.

Judges STROUD and DIETZ concur.

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STATE OF NORTH CAROLINA

v.

DARRYL ANTHONY HOWARD

No. COA14-1021

Filed 19 April 2016

1. Jurisdiction—subject matter jurisdiction—motion for relief—post-conviction DNA statutes

The trial court did not have subject matter jurisdiction to rule on defendant's claim for relief under post-conviction DNA statutes in a double murder and arson case. Consequently, that portion of the trial court's order granting such relief was void.

2. Civil Procedure—motion for appropriate relief—failure to conduct evidentiary hearing

The trial court erred by failing to conduct an evidentiary hearing before granting defendant's motion for appropriate relief (MAR) in a double murder and arson case given the nature of defendant's post-conviction claims and the unusual collection of evidence offered in support of them. The case was remanded for an evidentiary hearing.

Appeal by the State from order entered 27 May 2014 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 8 April 2015.

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

Womble Carlyle Sandridge & Rice, LLP, by James P. Cooney III, and Innocence Project, by Barry Scheck and Seema Saifee (both admitted pro hac vice), for defendant.

CALABRIA, Judge.

The State appeals from the trial court's order granting defendant's motion for appropriate relief ("MAR") on the basis of newly discovered evidence pursuant to N.C. Gen. Stat. § 15A-1415(b)(3), "favorable" post-conviction DNA results pursuant to N.C. Gen. Stat. § 15A-270(c), and violations of the U.S. Constitution. For the reasons that follow, we vacate the trial court's order and remand for an evidentiary hearing.

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I. Background

The factual genesis of this case was the 27 November 1991 murders of Doris Washington (“Doris”) and her thirteen-year-old daughter, Nishonda Washington (“Nishonda”). Approximately one year after the murders, Darryl Anthony Howard (“defendant”) was arrested and indicted on two counts of first degree murder and one count of first degree arson. At defendant’s trial in March 1995, both first degree murder charges were reduced to second degree murder. The jury found defendant guilty of both murders and the associated arson. Defendant received an eighty-year sentence, which he appealed. This Court concluded that his trial was free from error. *See State v. Howard*, 122 N.C. App. 754, 476 S.E.2d 147 (1996), No. COA95-1156, WL 34899110, at *1, *disc. review denied*, 347 N.C. 272, 493 S.E.2d 755 (1997). The evidence presented by the State at defendant’s 1995 trial established the following facts.

Shortly after 1:00 a.m. on 27 November 1991, the Durham Fire Department responded to a call regarding an apartment fire in Few Gardens, a Durham public housing community. Shortly after Durham Firefighter Robert Wesley McLaughlin, Jr. ascended to the smoke-filled apartment’s second floor, he discovered the nude bodies of Doris and Nishonda lying face down on a bed in the front bedroom. The fire had been intentionally set in a closet located in the rear upstairs bedroom.

Eric Campin (“Campin”), a crime scene technician with the Durham Police Department (“DPD”), arrived at the crime scene around 7:00 a.m. During his investigation, Campin observed a console TV sitting on the apartment’s lower level floor. The TV had been pulled away from the wall, and cable or VCR wires lay on the floor beside it. After Campin observed a dust pattern on top of the TV, which in his experience was an indication of theft, he surmised that a VCR or similar appliance was missing.

Doris and Nishonda’s autopsies were performed at approximately 10:30 a.m. on 27 November 1991. Dr. Robert L. Thompson, a forensic pathologist, testified regarding the results, which revealed that Nishonda died from ligature strangulation. While certain evidence suggested that Doris was also strangled, it was determined that she had died from a “blunt force injury to [her] abdomen which caused extensive internal bleeding.” Both Nishonda and Doris died before the apartment caught fire.

Sexual assault kits (“rape kits”) were collected from Doris and Nishonda, a routine occurrence when a victim “has obviously [been sexually assaulted] or [there is] a possibility of having been sexually

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assaulted.” Dr. Thompson discovered “a moderate number of well[-]preserved” sperm heads in Nishonda’s anal cavity, and subsequent testing of Nishonda’s rape kit also detected sperm on her vaginal smears. DNA analysis excluded defendant as a source of the sperm found in Nishonda’s vagina and anus. Doris’ vagina was torn (one-half inch laceration) and contained a small amount of blood-tinged fluid, but no sperm was detected in any of her body cavities or in her rape kit. Dr. Thompson determined that Doris’ vagina was torn around the time of her death and that “something had to be placed inside [it] . . . some pressure put on it to cause that tear.” He also determined that Doris had ingested cocaine “fairly recent[ly]” prior to her death.

Roneka Jackson (“Jackson”), a Few Gardens resident who knew Doris, Nishonda, and defendant, testified that Doris used and sometimes sold cocaine. According to Jackson, during the afternoon of 26 November 1991, defendant went to Doris’ apartment in search of his girlfriend, but Doris would not let him inside. An argument ensued, and before defendant left, he said to Doris, “I am going to kill you and your daughter.” Around 10:00 p.m. that evening, Jackson saw defendant and his brother, Bruce, walking out of Doris’ back door carrying a television. After setting the television in his car, defendant placed a three or four minute phone call from a public telephone and then drove away with his brother. Jackson then noticed smoke coming from a back window of Doris’ apartment; fire trucks arrived approximately fifteen minutes later.

Rhonda Davis (“Davis”) was at Doris’ apartment getting high on cocaine from approximately 10:30 a.m. to 10:30 p.m. on 26 November 1991. To the best of Davis’ knowledge, Doris did not sell cocaine but she did allow a group of dealers from Miami and another from New York¹ to sell drugs from her apartment. After Nishonda went to bed around 10:30 p.m., Davis and Doris left the apartment for a short while and split up. Hoping to buy some cocaine, Davis returned to Doris’ apartment around midnight and knocked on the back door. After approximately five minutes, defendant appeared at the window and told Davis that he and Doris were “busy.” Davis then “heard some dishes rattling in the sink or something.” After walking around to the front door, Davis “heard somebody going up the steps.” Davis then left.

Few Gardens resident Terry Suggs (“Suggs”) saw smoke coming from Doris’ apartment sometime after midnight on 27 November 1991.

1. Testimony at trial indicated that a gang of teen-age drug dealers known as the “New York Boys” operated in Few Gardens. Defendant proceeded at trial under the theory that the New York Boys were responsible for these crimes.

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A few minutes before seeing the smoke, Suggs saw defendant and a female walking through the gap between Doris' apartment building and the adjacent building.

Around midnight on 27 November 1991, Kevin Best ("Best") and Dwight Moss ("Moss") were standing across from Doris' apartment. According to Best, defendant and another male—who Moss claimed was defendant's brother, Kenny—exited the back door of Doris' apartment carrying a television and a VCR. "[N]o more than [ten] minutes" later, Best saw smoke coming from Doris' apartment window.

Moss had heard that Doris sold drugs for a person he referred to as "the New York Boy." According to Moss, defendant "hung around" with the New York Boys and was "kind of with them." During his testimony, Moss stated that he saw defendant and Doris arguing about money and drugs during the afternoon of 26 November 1991. Defendant told Doris that she had "messed up the money" and "messed up the drugs," yelled "I'll kill you," and then walked away. Around 11:10 p.m., Moss saw defendant and another male² "coming around from the backside of" Doris' apartment. The men were carrying what looked like a television and a VCR.

Angela Oliver ("Oliver"), who knew defendant but did not know Doris, testified for the State and was designated a hostile witness by the trial court. Oliver testified that she was interviewed by Detective Darryl Dowdy of the DPD ("Detective Dowdy"). On 10 October 1992, nearly a year after the murders, Detective Dowdy—the lead investigator on the case—received a tip that Oliver wanted to talk and he interviewed her the same day. During her trial testimony, Oliver stated that she told the truth to Detective Dowdy in the interview, that the interview was tape recorded, and that a transcript of the tape was prepared. The interview transcript was admitted into evidence and Oliver's tape-recorded statement was played in court.

During the interview, Oliver stated that she and defendant went to Doris' apartment between 5:00 and 6:00 p.m. "to get [defendant's] money or drugs," but Doris did not have either one. Defendant told Doris that if she did not have his money or his drugs when he returned, he would "kill her mother—ing ass." Sometime later, between 10:00 p.m. and 1:00 a.m., defendant, his brother, Harvey, and Oliver returned to Doris' apartment. Doris still did not have the money or drugs, so defendant "started jumping on her" and pushing her against the wall. Defendant then asked

2. Best testified that Moss identified the male as defendant's brother, Kenny, but at trial, Moss claimed not to recall who the person was.

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Oliver to go outside because he did not want her to “be around what he [was] fixing to do.” Before Oliver exited the apartment, she saw defendant taking Doris upstairs. According to Oliver, “the next thing I kn[e]w, there was a lot of noise. [Doris] was hollering and screaming[,]” saying something about Nishonda being in the apartment. Eventually, the upstairs lights went on and “it got quiet.” At that time, defendant’s brother entered the apartment. After defendant set a fire in the apartment, he told his brother that “he had to burn them up. He didn’t want to leave no evidence.” Before they left, defendant’s brother removed something from the apartment wrapped in a sheet and sold it on the street.

When defendant and his brother, Harvey, were taken into custody in November 1992³, Durham Fire Marshall Milton Smith (“Smith”)—who had investigated the fire and murder scene at Doris’ apartment—arrived at the Durham Magistrate’s Office to complete the booking process. While Smith was collecting information from Harvey, defendant told Smith that his brother, Kenny, not Harvey, was with him at Few Gardens when the fire occurred. Smith then asked defendant, “So, it was your brother Kenneth when you did this thing,” to which defendant responded, “Yes, it was me and Kenny.” Defendant then leaned over to Smith and added, “You are a smart mother—er, ain’t you?”

Gwyndelyn Taylor (“Taylor”), who testified that she knew both defendant and Doris, saw defendant at a Durham nightclub sometime between 27 November and 31 December 1991. While there, Taylor overheard someone ask defendant if he killed Doris, to which defendant responded, “[Y]eah, I killed the bit-. The next one to get in [my] way [I’ll] mess them up too.”

3. To provide context, we briefly outline the events that led to defendant being charged in this case. Defendant was arrested in Few Gardens around 7:30 a.m. on 27 November 1991 for trespassing and driving with a revoked license. While defendant was in custody, he told DPD Officer R.M. Davis that “Doris was his close friend,” and emphasized that she had killed Nishonda before killing herself. Defendant was released later that morning; however, he was interviewed by Durham Police again during the afternoon of the 27th. While speaking with investigators, defendant stated that Doris sold drugs for the “Miami Boys” and claimed that he saw several individuals exiting the back of Doris’ apartment after the fire had been set. Defendant was eventually released without charge. In June 1992, defendant was admitted to the hospital after being shot five times; allegedly, New York Boys gang members “King” and “O” were responsible for the shooting. Detective Dowdy interviewed defendant regarding O’s involvement in two murders unrelated to defendant’s shooting. During the interview, defendant stated that the New York Boys had murdered Doris and Nishonda. On 12 November 1992, after multiple witnesses implicated defendant in Doris and Nishonda’s murders during interviews with investigators, defendant and his brother were arrested. Defendant was charged with two counts of first degree murder and one count of first degree arson. Harvey was charged only with arson, but that charge was dropped shortly after defendant’s conviction.

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Defendant and Natasha Mayo (“Mayo”)—defendant’s girlfriend and the mother of his son—testified in defendant’s defense. According to Mayo, defendant went to Doris’ apartment two days before her death, and he was looking for Mayo. Defendant was angry to find Mayo there because Doris had encouraged Mayo and other women to have sex with men in exchange for drugs. Mayo further testified that on 26 November, she was with defendant while he was selling drugs out of the Few Gardens apartment of Sharon Bass (“Bass”). Around midnight, Bass and defendant went to get cocaine from “the New York Boy[’s]” apartment, which was located in Doris’ apartment building. At that time, defendant and Mayo noticed smoke coming from Doris’ apartment so they ran back to Bass’ apartment because defendant feared he would be cited for trespassing in Few Gardens. Mayo maintained that she and defendant remained at Bass’ apartment for the rest of the night, smoking cocaine.

According to defendant, Doris never sold drugs for him but she did sell drugs for the New York Boys. Defendant acknowledged retrieving Mayo from Doris’ apartment two days before the murders because, “Doris ha[d] a habit of using other women to get her own drugs.” He also stated that Doris did not owe him any money or drugs at the time of her death. Defendant denied killing Doris and Nishonda and denied setting their apartment on fire.

Approximately five months after defendant’s trial, in August 1995, Jackson was murdered in Brooklyn, New York, by two members of the New York Boys gang. “Because they could not find a gun,” the two men “broke [Jackson’s] neck, doused her with gasoline, and lit her on fire.” *United States v. Celestine*, 43 F. App’x 586, 589-90 (4th Cir. 2002).

In May 1997, defendant filed a *pro se* MAR in Durham County Superior Court, which was denied. Shortly thereafter, in October 1997, the North Carolina Supreme Court denied defendant’s petitions for writ of certiorari and for discretionary review. *State v. Howard*, 347 N.C. 272, 493 S.E.2d 755 (1997).

In May 2004, Moss executed a sworn affidavit recanting a prior statement that he had given to Detective Dowdy, which was read into evidence at defendant’s trial. Moss alleged that he was coerced by Detective Dowdy and other DPD officers to provide a false and inaccurate statement against defendant. Moss also claimed that he could not possibly have been in all the places described in his statement.⁴

4. We note that the copy of Moss’ affidavit contained in the record is essentially illegible. However, we do not question the State’s or defendant’s representations regarding the affidavit’s content.

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In 2009, defendant's *pro bono* counsel moved the Durham County trial court to have post-conviction DNA testing performed on Doris and Nishonda's rape kits pursuant to N.C. Gen. Stat. § 15A-269. The court granted defendant's motion. Using advanced technology, a private lab conducted testing on Doris' vaginal swabs and discovered a previously undetected male DNA profile. Defendant was excluded as the source. However, a search of "CODIS," the FBI's national DNA database, generated a "hit" on the profile of Jermeck Jones ("Jones"), who had lived in the Few Gardens area as a teenager and dated Nishonda in the weeks preceding her murder, and who was later incarcerated in Tennessee for various offenses.⁵ Consequently, in late 2012, defendant's counsel sent private investigator Jerry Waller ("Waller") to interview Jones. During the interview, Jones stated that he had sex with Nishonda at a friend's house on the night before her murder, but maintained that he had neither met nor had sex with Doris and that he had never been to Doris and Nishonda's apartment. Waller reduced the content of his interview with Jones to a sworn affidavit in September 2013.⁶

After moving for post-conviction DNA testing in 2009, defendant's counsel received—pursuant to an open-file discovery request—the State's entire investigative file from the 1995 murder trial. Included in the State's files was a police informant's routing slip ("the memo"), which contained information from an anonymous informant regarding Doris and Nishonda's murders. The memo, dated 1 December 1991, contained the following information:

Reference Double Homicide/Arson Phew [sic] Gardens. Informant advised me that subjects were probably murdered because mother owed \$8,000.00 to drug dealers from either Philadelphia or New York.

Informant stated that many residents in Phew [sic] Gardens were offered two-thousand dollars a week for use of their apartment but apparently not many accepted.

Informant further stated that perpetrators were believed to have left 4 bags of drugs at the apt. and apparently found some contents missing when they came for them.

5. The lab also tested sperm found in Nishonda's vaginal and rectal smears, which revealed a partial male profile. Defendant was excluded as the source and the profile did not match that of Jones. In addition, the partial profile from the unknown male was ineligible for a CODIS search.

6. The affidavit contained only Waller's account of his interview with Jones.

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The perps. then told the victim/tenant she owed them eight-thousand dollars. When perps. came for the money they first raped her before strangling her. The 13 yr. old daughter may have unknowingly walked in on the seen [sic] so then killed her.

Also written in the memo's margin was a note to Detective Dowdy from then-Durham Police Captain E.E. Sarvis ("Captain Sarvis): "Dowdy There may be something to this. I don't remember any public info on the rape. EES[.]" In conjunction with the police memo, defendant submitted the affidavit of his trial counsel, H. Wood Vann ("Vann"), who averred that he had no "independent recollection of ever receiving or seeing" this document, "through discovery or otherwise," before trial. Vann also averred that the memo was "highly exculpatory" and that it would have "eviscerate[d] the State's theory at trial."

On 19 March 2014, defendant filed a second MAR in Durham County Superior Court. Defendant based his motion for a new trial primarily upon the grounds of newly discovered evidence: Jackson's murder, Moss' recantation, the post-conviction DNA results and Waller's affidavit containing Jones' statements regarding the results, and the memo. Pursuant to our Criminal Procedure Act,

a defendant at any time after verdict may by [an MAR], raise the ground that evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, including recanted testimony, and which has a direct and material bearing upon . . . the defendant's guilt or innocence.

N.C. Gen. Stat. § 15A-1415(c). "This section of the statute codifies substantially the rule previously developed by case law for the granting of a new trial for newly discovered evidence." *State v. Powell*, 321 N.C. 364, 371, 364 S.E.2d 332, 336 (1988) (citing *State v. Beaver*, 291 N.C. 137, 229 S.E.2d 179 (1976)). To prevail upon an MAR based on the ground of newly discovered evidence, a defendant is required to establish that:

- (1) the witness or witnesses will give newly discovered evidence;
- (2) the newly discovered evidence is probably true;
- (3) the evidence is material, competent and relevant;
- (4) due diligence was used and proper means were employed to procure the testimony at trial;
- (5) the newly discovered evidence is not merely cumulative or corroborative;
- (6) the new evidence does not merely tend to contradict,

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impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial.

State v. Rhodes, 366 N.C. 532, 535, 743 S.E.2d 37, 39 (2013) (citing *Beaver*, 291 N.C. at 143, 229 S.E.2d at 183).

Defendant also alleged violations of his due process rights based on the State's failure to disclose material exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963) and the State's presentation of false evidence under *Napue v. Illinois*, 360 U.S. 264, 3 L. Ed. 2d 1217 (1959). Finally, defendant claimed that the post-conviction DNA results were "favorable" to him pursuant to N.C. Gen. Stat. § 15A-270(c).

The State filed a 1 May 2014 response, and moved that defendant's MAR be denied. Defendant replied to the State's response on 16 May 2014. On 27 May 2014, without conducting an evidentiary hearing, the trial court entered an order which granted defendant's MAR, vacated his convictions, and granted him a new trial. The State appeals.

II. Analysis

A. Appellate Jurisdiction

[1] As an initial matter, we must address defendant's motion to dismiss on the grounds that the State has no right to appeal from certain portions of the trial court's order. In this case, the trial court granted defendant's MAR on three different legal grounds: (1) newly discovered evidence, (2) constitutional violations, and (3) "favorable" post-conviction DNA test results. The State cites *State v. Peterson*, 228 N.C. App. 339, 744 S.E.2d 153, *review denied and review dismissed*, 367 N.C. 284, 752 S.E.2d 479 (2013), for the proposition that N.C. Gen. Stat. § 15A-1445(a)(2) "provides a means for the State to appeal an order granting [an MAR] in its entirety even where, as here, the trial court grants the motion based upon both newly discovered evidence and other grounds." In response, defendant argues that, under *State v. Norman*, 202 N.C. App. 329, 688 S.E.2d 512 (2010), the State has no right to appeal an MAR granted, in part, pursuant to N.C. Gen. Stat. § 15A-270(c).⁷ According to defendant,

7. Defendant also argues that the State has no right to appeal an MAR granting relief on the ground of constitutional violations. We conclude that, under *Peterson*, this argument is without merit. Our Supreme Court's decision in *State v. Stubbs* also defeats this argument. 368 N.C. 40, 770 S.E.2d 74, 75 (2015) (holding that this Court had subject matter jurisdiction to review the State's appeal from a trial court's order granting the defendant's MAR, which was based on a violation of his rights under the Eight Amendment to the U.S. Constitution).

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even if this Court determines that the trial court erred in granting him a new trial based on newly discovered evidence, the State's appeal under section 15A-1445(a)(2) is futile because it cannot appeal the other bases upon which the trial court granted defendant's MAR. As a precautionary measure, the State filed an alternative petition for writ of certiorari contemporaneously with its response to defendant's motion to dismiss. The alternative petition requested this Court to review the trial court's MAR order "pursuant to Rule 21 and/or Rule 2 of the North Carolina Rules of Appellate Procedure[.]"

Our Supreme Court has recognized that the State's right to appeal "in a criminal case is statutory, and statutes authorizing an appeal by the State in criminal cases are strictly construed." *State v. Elkerson*, 304 N.C. 658, 669, 285 S.E.2d 784, 791 (1982) (citations omitted). Appellate jurisdiction in criminal appeals by the State is governed, in general, by section 15A-1445.

In *Peterson*, the trial court granted the defendant's MAR for a new trial based on newly discovered evidence and constitutional violations. *Id.* at 342-43, 744 S.E.2d at 156-57. This Court concluded that the State's appeal was properly before it:

Pursuant to N.C. Gen. Stat. § 15A-1445[(a)(2)], the State may appeal an order granting a motion for a new trial "on the ground of newly discovered or newly available evidence but only on questions of law." Accordingly, because the trial court granted [the] defendant's MAR based, in part, on newly discovered evidence, the State had the right to appeal the MAR order. We note that the State, in case we found that the MAR order was based solely on *Brady* violations, filed a petition for *writ of certiorari*. Since *certiorari* is not necessary to confer jurisdiction on this Court, we dismiss the State's petition.

Id. at 343, 744 S.E.2d at 157.

According to defendant, however, our decision in *State v. Norman* precludes the State from appealing the portion of the MAR order that was granted pursuant to N.C. Gen. Stat. § 15A-270(c). To understand *Norman's* holding, a short explanation of our post-conviction DNA testing statutes is necessary.

When certain criteria are met, criminal defendants in North Carolina may move for post-conviction DNA testing of biological evidence. N.C. Gen. Stat. § 15A-269 (2013). If a trial court denies a "defendant's motion

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for DNA testing[,]” the defendant may appeal that order. *Id.* § 15A-270.1. When the trial court grants a defendant’s motion for DNA testing, it must conduct a hearing on the results. *Id.* § 15A-270(a) (“upon receiving the results of the DNA testing conducted under G.S. 15A-269, the court shall conduct a hearing to evaluate the results and to determine if the results are unfavorable or favorable to the defendant.”). If the test results “are unfavorable to the defendant, the court shall dismiss the motion” *Id.* § 15A-270(b). However, if the DNA testing reveals evidence which is “favorable” to the defendant, “the court shall enter any order that serves the interests of justice, including [one] that . . . (1) [v]acates and sets aside the judgment[,] (2) [d]ischarges the defendant[,] (3) [r]esentences the defendant[, or] (4) [g]rants a new trial.” *Id.* § 15A-270(c).

In *Norman*, the trial court granted the defendant’s motion for DNA testing and conducted a hearing on the results, which the court determined were unfavorable to the defendant. 202 N.C. App. at 330, 688 S.E.2d at 513-14. As a result, the defendant’s motion was dismissed pursuant to subsection 15A-270(b). *Id.* at 331, 688 S.E.2d at 514. On appeal, this Court concluded that although section 15A-270.1 provided a right to appeal from the denial of a motion for DNA testing, the defendant had no right to appeal “from an order denying relief following a hearing to evaluate the test results.” *Id.* at 332, 688 S.E.2d at 515. The *Norman* Court presumed that “[i]f the legislature intended to provide a right to appeal from the trial court’s ruling on the results of DNA testing, . . . it would have stated as such.” *Id.*

Here, defendant contends that “the State has no more right to appeal from a determination that the DNA results were ‘favorable’ and ordering a new trial, than [the defendant in *Norman*] did from a determination that the results were ‘unfavorable.’ ” Defendant insists that even if the trial court erred in granting him a new trial based on newly discovered evidence, he will receive a new trial anyway because the State has no independent statutory right to appeal the portion of the court’s MAR order granting defendant relief on the basis of favorable post-conviction DNA tests results pursuant to subsection 15A-270(c). In other words, defendant argues that the State’s appeal under subdivision 15A-1445(a)(2) is futile. We disagree. In fact, defendant had no statutory right to bring his claim for relief under our post-conviction DNA testing statutes in his MAR.

As noted above, defendant filed his MAR pursuant to subsection 15A-270(c) (post-conviction DNA results), subsection 15A-1415(c) (newly discovered evidence) and subdivision 15A-1415(b)(3)

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(constitutional violations based upon the newly discovered evidence). The trial court granted him a new trial based on all of those grounds. “According to [subsection] 15A-1415(b), a convicted criminal defendant is entitled to seek relief from his or her convictions by means of [an MAR] filed more than ten days after the entry of judgment on certain specifically enumerated grounds.” *State v. Harwood*, 228 N.C. App. 478, 484, 746 S.E.2d 445, 449 (2013). In *Harwood*, this Court recognized that because subsection 15A-1415(b)

clearly provides that the eight specific grounds listed in that statutory subsection are ‘the only grounds which the defendant may assert by a[n MAR] made more than [ten] days after the entry of judgment,’ a trial court has no authority to grant a request for relief from a criminal conviction based upon a request made more than ten days after the entry of judgment unless the defendant’s request falls within one of the eight categories specified in [subsection] 15A-1415(b).”

Id. at 484, 746 S.E.2d at 450 (quoting N.C. Gen. Stat. § 15A-1415(b)). “For that reason, a trial court lacks jurisdiction over the subject matter of a claim for post[-]conviction relief which does not fall within one of the categories specified in [subsection] 15A-1415(b).” *Id.* (citations omitted). Our review of subsection 15A-1415(b) reveals that defendant’s constitutional claims were cognizable under subdivision 15A-1415(b)(3). Defendant was also permitted to file an MAR and seek relief on newly discovered evidence grounds pursuant to subsection 15A-1415(c). However, defendant’s claim requesting the trial court to grant relief pursuant to subsection 15A-270(c) could not be brought in his MAR, which was filed well past ten days after the entry of judgment upon his convictions. Indeed, no provision of subsection 15A-1415(b) authorized the trial court to enter an order vacating defendant’s original judgment and order a new trial on the basis of “favorable” post-conviction DNA test results. In other words, the trial court did not have subject matter jurisdiction to rule on defendant’s claim for relief under our post-conviction DNA statutes. Consequently, that portion of the trial court’s order granting such relief is void. *State v. Daniels*, 224 N.C. App. 608, 617, 741 S.E.2d 354, 361 (2012).

This conclusion is in harmony with the fact that our Legislature has provided a specific procedural vehicle for asserting, and obtaining relief on, claims for relief based on post-conviction DNA testing. *See* N.C. Gen. Stat. §§ 15A-269, -270. That statutory scheme has already been

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discussed in detail above. Defendant should have requested relief pursuant to subsection 15A-270(c) in an independent proceeding, separate and apart from his MAR.⁸ Accordingly, since *all* of the relief granted to defendant was inextricably linked to, and based on, what the court found to be newly discovered evidence, the State properly relied on subdivision 15A-1445(a)(2) as its ground for appellate review. *Peterson*, 228 N.C. App. at 343, 744 S.E.2d at 157 (holding that this Court had jurisdiction to review a trial court's ruling on an MAR that was based, in part, on newly discovered evidence).⁹ Defendant's motion to dismiss is therefore denied and the State's (alternative) petition for writ of certiorari is dismissed, as it is unnecessary to confer jurisdiction on this Court.

B. Evidentiary Hearing

[2] We now proceed to the State's contention that the trial court erred by failing to conduct an evidentiary hearing before granting defendant's MAR. According to the State, "[i]f defendant has properly supported the allegations of each claim in the MAR with relevant, admissible, factual, proffered evidence, and each claim has merit such that defendant would prevail on that claim if the evidence in the supporting affidavits is deemed credible by the trial court after hearing the evidence from defendant's witnesses, then defendant has at most met the threshold showing required to obtain an evidentiary hearing." For the reasons that

8. Although we do not reach the merits of this appeal, if we did, nothing would preclude us from reviewing the same post-conviction DNA test results as newly discovered evidence: the DNA test results would be evaluated pursuant to subsection 15A-1415(c), which states the requirements that must be met before evidence may be characterized as "newly discovered"; at the same time, we would not apply subsection 15A-270(a)'s "favorable" or "unfavorable" analysis to the test results.

9. We note that our Supreme Court has recently held that this Court "has jurisdiction to hear an appeal by the State of an MAR when the defendant has won relief from the trial court." *Stubbs*, 368 N.C. at __, 770 S.E.2d at 76. The Court also recognized that N.C. Gen. Stat. § 15A-1422(c)(3) expressly provides that a trial court's MAR ruling is subject to review by writ of certiorari. *Id.* Accordingly, after *Stubbs*, Rule 21 was amended and now reads in pertinent part: "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review . . . pursuant to [subdivision] 15A-1422(c)(3) of an order of the trial court *ruling* on a motion for appropriate relief." N.C.R. App. P. 21(a)(1) (emphasis added). Prior to the Supreme Court's decision in *Stubbs*, Rule 21 stated in pertinent part "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court . . . for review pursuant to [subdivision] 15A-1422(c)(3) of an order of the trial court *denying* a motion for appropriate relief." N.C.R. App. P. 21(a)(1) (2013) (emphasis added). Given that this case is solely focused on newly discovered evidence, appellate jurisdiction must be analyzed under subdivision 15A-1445(a)(2) rather than subdivision 15A-1422(c)(3).

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follow, we conclude that the trial court improperly ruled on defendant's motion without conducting an evidentiary hearing.¹⁰

We begin by briefly explaining the general nature of MARs and the characteristics of the order issued in the instant case. An MAR, which is created by statute, constitutes "a motion in the original cause[,] . . . not a new proceeding." N.C. Gen. Stat. § 15A-1411(b) (2013). It "is a post-verdict motion (or a post-sentencing motion where there is no verdict) made to correct errors occurring prior to, during, and after a criminal trial." *State v. Handy*, 326 N.C. 532, 535, 391 S.E.2d 159, 160-61 (1990). Generally, all post-trial motions related to a defendant's trial must be brought under an MAR. N.C. Gen. Stat. § 15A-1411(c).

Our Legislature has specifically characterized the MAR as a procedural vehicle for defendants to challenge their convictions and sentences. *Id.* § 15A-1412. To that end, North Carolina's MAR statutes provide a mechanism to assert multiple, different claims for post-conviction relief in one procedural device. See official comment to *id.* § 15A-1411. When a defendant asserts multiple claims in an MAR, the trial court is ultimately charged with evaluating each individual claim on the merits and under the applicable substantive law. As a result, the trial court also sits as the trier of fact during MAR proceedings.

"Whether the trial court was required to afford defendant an evidentiary hearing is primarily a question of law subject to *de novo* review." *State v. Marino*, 229 N.C. App. 130, 140, 747 S.E.2d 633, 640 (2013) (italics added). The procedure governing MARs is set out in N.C. Gen. Stat. § 15A-1420, and subsection (c) contains directives regarding the trial court's duty to hold an evidentiary hearing:

10. Although neither party cites this Court's decision in *State v. Stukes*, 153 N.C. App. 770, 571 S.E.2d 241 (2002), we find it necessary to briefly discuss it. In *Stukes*, the trial court granted the defendant's MAR and allowed him a new trial on all charges. *Id.* at 773, 571 S.E.2d at 243. At the trial level, the State "affirmatively argued against the need for an evidentiary hearing" on the defendant's MAR. *Id.* at 774, 571 S.E.2d at 244. On appeal, however, the State asserted that the trial court's decision not to hold such a hearing was error. *Id.* After concluding that the State had not preserved the issue for review, and noting that "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct[.]" this Court rejected the State's argument. *Id.* (quoting *State v. Bruno*, 108 N.C. App. 401, 412, 424 S.E.2d 440, 447 (1993) (citation omitted)).

We find that *Stukes* has no application to the instant case, where the State simply argued—within the confines of the MAR statutes and applicable case law—that defendant's motion should be summarily denied and an evidentiary hearing was not required if the court could determine, based on the pleadings, that the motion was without merit.

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(c) Hearings, Showing of Prejudice; Findings.

(1) *Any party* is entitled to a hearing on questions of law or fact arising from the motion . . . unless the court determines that the motion is without merit. The court *must determine*, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact

(3) The court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law

(4) If the court cannot rule upon the motion without the hearing of evidence, it *must conduct* a hearing for the taking of evidence, and must make findings of fact. . . .

N.C. Gen. Stat. § 15A-1420(c) (2015) (emphasis added). “In an evidentiary hearing for appropriate relief where the judge sits without a jury the moving party has the burden of proving by the preponderance of the evidence every fact to support his motion.” *State v. Adcock*, 310 N.C. 1, 37, 310 S.E.2d 587, 608 (1984) (citing N.C. Gen. Stat. § 15A-1420(c)(5)). As explained in *State v. McHone*, “[u]nder subsection [15A-1420](c)(4), read in *pari materia* with subsections (c)(1) . . . and (c)(3), an evidentiary hearing is *required unless* the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor, or the motion presents only questions of law[.]” 348 N.C. 254, 258, 499 S.E.2d 761, 763 (1998) (emphasis added).¹¹

An evidentiary hearing is not automatically required before a trial court grants a defendant’s MAR, but such a hearing is the general procedure rather than the exception. Indeed, *McHone* dictates that an evidentiary hearing is mandatory unless summary denial of an MAR is proper, or the motion presents a pure question of law.

In the instant case, although the State denied “each and every allegation of fact made by . . . defendant except those facts supported by the record and those specifically admitted[.]” the trial court granted defendant’s MAR based upon extensive findings of what it characterized as “undisputed facts.” In its lengthy MAR order, the court routinely faulted

11. In addition, “[a]n evidentiary hearing is not required when the motion is made in the trial court pursuant to G.S. 15A-1414, but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact.” N.C. Gen. Stat. § 15A-1420(c)(2). This provision does not apply here, as defendant’s MAR was made pursuant to section 15A-1415.

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the State for failing to present evidence in rebuttal of defendant's allegations. Implicit in the trial court's ruling was its view that, after all MAR materials had been received from defendant and the State, only questions of law remained.

As a result, the trial court treated the MAR proceeding as a burden-shifting scheme. For example, when ruling on defendant's *Brady* claim, the trial court faulted, and even chastised, the State for failing to "tender any evidence by affidavit or otherwise that [the memo] was produced to [defendant] or his counsel."¹² Yet the defendant who seeks relief in an MAR "must show the existence of the asserted ground for relief." N.C. Gen. Stat. § 15A-1420(c)(6). By contrast, the opposing party—here, the State—is not required to "file affidavits or other documentary evidence" or rebut allegations contained in the motion. *Id.* § 15A-1420(b)(2). Defendant nevertheless embraced the trial court's approach at oral argument, asserting that the State neither disputed "many material facts" nor forecasted what an evidentiary hearing would produce. As the State suggests in its brief, the trial court's ruling looks more like a summary judgment, *see* N.C. Gen. Stat. § 1A-1, Rule 56(a), (b) (2013) (allowing for summary judgment by either party in a civil case), than one rendered within the confines of our MAR statutes. *See id.* § 15A-1412 ("The provision in this Article for the right to seek relief by [MAR] is procedural and is not determinative of the question of whether the moving party is entitled to the relief sought or to other appropriate relief."). The State was not required to forecast evidence; defendant was required to *present* evidence for the trial court's evaluation, which he did. The court's evaluation of the evidence, however, was inherently flawed. We agree with the State that as a general matter, unless an MAR presents only pure questions of law, the motion's principal purpose is to obtain an evidentiary hearing on a defendant's claims for relief.

12. The court made this finding despite record evidence that: (1) the memo was found "in a bound package of materials that were part of the screening package," presumably a reference to the materials that the State allowed defendant's trial counsel to "screen" before trial; (2) Vann's affidavit specified only that he had no "independent recollection" that the memo had ever been turned over; and (3) in a 2014 interview with the Washington Post, Vann stated that while he would have "seen" and "used" the memo had it been turned over, he could not "say 'with 100 percent certainty' that [the prosecutor] never gave him the [document]." To prevail under *Brady*, a defendant must prove that favorable and material evidence was "actually suppressed." *State v. Kilpatrick*, 343 N.C. 466, 471, 471 S.E.2d 624, 627 (1996). In this instance, a conflict in the evidence regarding the suppression issue arose from the record itself.

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Our conclusion is supported by recent language from our Supreme Court in a decision that addressed the trial court's role at hearings on motions to suppress evidence:

The trial judge who presides at a suppression hearing “sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth.” For this reason, our appellate courts treat findings of fact made by the trial court as “conclusive on appeal if they are supported by the evidence.” “The logic behind this approach is clear. In this setting, the trial judge is better able than we at the appellate level to gauge the comportment of the parties . . . and to discern the sincerity of their responses to difficult questions.” But a trial court is in no better position than an appellate court to make findings of fact if it reviews only the cold, written record. We therefore reject an interpretation of [the statutes governing suppression motions] that would diminish the trial court's institutional advantages in the fact-finding process.

State v. Bartlett, 368 N.C. 309, 776 S.E.2d 672, 674-75 (2015) (citations omitted). These principles share equal application in this case, where the trial court sat as the post-conviction trier of fact. Here, the trial court was obligated to ascertain the truth by testing the supporting and opposing information at an evidentiary hearing where the adversarial process could take place. Instead of doing so, the court wove its findings together based, in part, on conjecture and, as a whole, on the cold, written record.

Given the nature of defendant's asserted grounds for relief, the trial court was required to resolve conflicting questions of fact at an evidentiary hearing. Moss' affidavit illustrates this point. The trial court found that this recantation “by an important witness for the State” rendered Moss' trial testimony false and “undermined the credibility of the State's theory of the case.” Consequently, the court concluded that it was newly discovered evidence.

Pursuant to section 15A-1415(c), claims of newly discovered evidence may be based on recanted testimony. If a new trial is to be granted on such testimony, “1) the court [must be] reasonably well satisfied that the testimony given by a material witness is false, and 2) there [should be] a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial.” *State v. Britt*,

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320 N.C. 705, 715, 360 S.E.2d 660, 665 (1987), *superseded by statute on other grounds as stated in State v. Defoe*, 364 N.C. 29, 33-38, 691 S.E.2d 1, 4-7 (2010).

As to the first *Britt* requirement, the trial court's finding that Moss' repudiation of his pretrial statement rendered his trial testimony false is unsupported by the evidence. The testimony given by Jackson, Davis, Oliver, and Best, which was substantially similar to Moss', suggests that his testimony was true and that his recantation was not. Moss' affidavit does not explain why it was impossible for him to have been in all the places described in his statement. Furthermore, the circumstances under which Moss repudiated his statement—approximately 13 years after he gave it—are absent from the record: Did Moss recant on his own? Did defendant's post-conviction counsel or family members pressure Moss to do so? Did Moss wish to avoid giving further testimony at a new trial? Has Moss changed his tune on the recantation since executing the affidavit in 2004? This Court has previously found that such circumstances have a direct bearing on the veracity of a witness's testimony. *See State v. Doisey*, 138 N.C. App. 620, 628, 532 S.E.2d 240, 245-46 (2000) (affirming the trial court's denial of an MAR based on recanted testimony because the recanting witness testified, during the second hearing on the motion, that she repudiated her recantation and that "she signed the affidavit after being repeatedly questioned" by friends and family members of the defendant about the facts that led to his conviction).

Since the trial court had no opportunity to evaluate Moss' specific reasons for his recantation and his demeanor in giving that explanation, it could not properly determine whether the recantation was genuine and whether the statement and relevant trial testimony were false. Moss should have been questioned about whether his recantation was truthful, or merely a product of defendant's direction as to what to state. Accordingly, an evidentiary hearing was required in order to assess the truthfulness of Moss' affidavit. *See State v. Brigman*, 178 N.C. App. 78, 94-95, 632 S.E.2d 498, 509 (2006) ("Based on the record before us, we cannot determine the veracity of [the recanting witness's] testimony. Nor can we discern whether there is reasonable possibility that a different result would have been reached at trial had [the witness's] testimony at trial been different or non-existent. Accordingly, we must remand the [MAR] based upon her alleged recantation to the trial court for an evidentiary hearing.").

The record is replete with similar factual disputes, many of which the trial court purported to resolve in its findings of fact despite the lack of an evidentiary hearing. We will not address each one, since we are

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vacating the trial court's order and a new hearing will be held on remand followed by entry of a new order.

All told, the trial court was presented with a broad range of post-conviction claims based on a large and unusual constellation of conflicting evidence. Most of defendant's claims, and by extension, the trial court's findings, relied heavily on affidavits—and inferences drawn from them—for support. Resolution of those claims necessarily required the trial court to make credibility determinations, which could not be done unless the evidence and witnesses were actually *before* the court. Furthermore, the North Carolina Rules of Evidence apply to post-conviction proceedings. *See Adcock*, 310 N.C. at 37, 310 S.E.2d at 608 (“In hearings before a judge sitting without a jury ‘adherence to the rudimentary rules of evidence is desirable Such adherence invites confidence in the trial judge’s findings.’”) (citation omitted); *State v. Foster*, 222 N.C. App. 199, 202-03, 729 S.E.2d 116, 118-19 (2012) (“If we were to adopt the State’s position, then the Rules of Evidence would not apply to . . . [MARs] in criminal cases Obviously, that cannot be the law. . . . [Therefore,] the Rules of Evidence apply to post-conviction DNA testing motions or proceedings.”). Some of the trial court’s findings of fact in the MAR order were based upon evidence which the State argues was inadmissible as hearsay, hearsay within hearsay, and third-party guilt evidence. Suffice it to say that, on remand, the trial court should base its determinations upon only competent evidence. For the reasons stated above, we conclude that the trial court erred by reaching the merits of defendant’s MAR without conducting an evidentiary hearing.

III. Conclusion

Defendant has supported the allegations contained in his MAR with sufficient and potentially compelling evidence. However, under no circumstances did the information offered in support and opposition to the MAR present only undisputed facts and pure questions of law. Given the nature of defendant's post-conviction claims and the unusual collection of evidence offered in support of them, the trial court erred in failing to conduct an evidentiary hearing and make findings on the conflicting assertions before it granted the MAR and ordered a new trial.

Accordingly, we vacate the trial court's order granting defendant's MAR and remand for an evidentiary hearing.

VACATED AND REMANDED FOR AN EVIDENTIARY HEARING.

Judges STROUD and TYSON concur.

STATE v. ROMANO

[247 N.C. App. 212 (2016)]

STATE OF NORTH CAROLINA
v.
JOSEPH M. ROMANO, DEFENDANT

No. COA15-940

Filed 19 April 2016

Motor Vehicles—habitual impaired driving—driving while license revoked—suppression of blood evidence—warrantless search—reasonableness—no good faith exception

The trial court did not err in a habitual impaired driving and driving while license revoked after receiving a previous impaired driving revocation notice case by suppressing blood evidence an officer collected from a nurse who was treating defendant while he was unconscious. Under the totality of the circumstances, considering the alleged exigencies of the situation, the warrantless blood draw was not objectively reasonable. The officer never attempted to obtain a search warrant prior to the blood draw and could not objectively and reasonably rely on the good faith exception.

Appeal by the State from an order entered 23 March 2015 by Judge R. Gregory Horne in Buncombe County Superior Court. Heard in the Court of Appeals 11 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Constance E. Widenhouse, for Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

The State appeals following an order granting Joseph Mario Romano's (Defendant) pre-trial motion to suppress. The State contends the trial court erred in suppressing blood draw evidence Sergeant Ann Fowler ("Fowler"), of the Asheville Police Department, collected from a nurse who was treating Defendant. After appropriate appellate review, we affirm the trial court.

I. Factual and Procedural Background

On 17 February 2014, Defendant was charged with driving while impaired ("DWI") and driving while license revoked after receiving a

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previous impaired driving revocation notice. On 6 October 2014, a Buncombe County grand jury indicted Defendant for habitual impaired driving and driving while license revoked after receiving a previous impaired driving revocation notice.

On 26 January 2015, Defendant filed a pre-trial motion to suppress. The record evidence and hearing transcript tended to show the following.

On 17 February 2014, Asheville police received a call that a white male, age thirty to thirty-five, wearing a gray sweater backwards, stopped his SUV on Wood Avenue near Swannanoa River Road. The man got out of the SUV and stumbled towards the rear entrance of Frank's Roman Pizza while carrying a large bottle of liquor.

Officer Tammy Bryson ("Bryson"), of the Asheville Police Department, went to the Wood Avenue intersection and found an SUV parked behind another vehicle at a red light. She searched for the driver while Officer Rick Tullis ("Tullis") inspected the SUV. Bryson and Fowler found Defendant sitting behind Frank's Roman Pizza, about 400 feet from the SUV, drinking from a 1.75 liter bottle of Montego Bay Light Rum. He was wearing a gray sweater backwards and he was covered in vomit.

When Bryson approached, Defendant put the liquor bottle down and staggered in an attempt to stand up. Bryson told him to sit down. Defendant's speech was slurred, his eyes were bloodshot and glassy, and he smelled of alcohol. Then, Bryson handcuffed Defendant. Defendant became very agitated and cursed at the police. He looked towards the SUV and saw a tow truck nearby, and yelled, "What are you doing with my car [expletive]? That's my car."

Fowler asked Defendant to complete field sobriety tests but he was "belligerent" and "would not follow instructions." Fowler kept trying to stand Defendant upright but he kept falling down, and Fowler quit trying to conduct the sobriety tests because it was "unsafe." Fowler administered a roadside portable alco-sensor and it indicated Defendant was impaired by alcohol.

Tullis inspected the SUV and found the hood was still warm and there were no keys inside the SUV. He checked the vehicle's registration and discovered it belonged to Defendant. The keys to the SUV were found in Defendant's left pants pocket.

The police officers called an ambulance, and another officer, Officer Loiacono, rode in the ambulance with Defendant to the hospital. Bryson

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followed the ambulance to the hospital. Fowler stayed at the intersection until the SUV was towed, and then went to the hospital.

At the hospital, Defendant became “combative,” kicking and spitting while hospital staff tried to treat him. Fowler talked to Defendant and calmed him down for moments at a time, but he then became “irate . . . to the point that the hospital [staff] had to give him medication to calm him down.”

Fowler described the following: “[The nurse] knew we wanted to draw blood sooner or later. We had to wait until [Defendant] calmed down. Once he was sedated, he was out, and the hospital was drawing their blood [sic], [the nurse] had drawn enough [blood] to where we could use what she had drawn.” This happened, as Fowler described, “[p]retty much right off the bat. They knew he was a DWI [sic]. They knew that he was going to be physically arrested, and we would have somebody with him until he was released from the hospital.” Once Defendant was sedated, Fowler and Bryson stepped out of the hospital room.

Fowler testified she “always” tries to collect a chemical analysis of a suspect’s blood alcohol level when they are suspected of DWI. According to her, collection is dependent upon “the [suspect’s] willingness . . . who has the evidence inside their body, if [sic] they are willing to give that evidence to [police] or not.” Defense counsel asked her, “Did you think you would be able to get a blood sample [from Defendant?]” She answered, “If not, I would have gotten a search warrant.” Fowler did not attempt to get a search warrant for Defendant’s blood at any point, nor did she direct any of her subordinate officers to obtain a search warrant.

Rather, Fowler waited until the nurse drew a “large [vial] of blood.” The nurse told Fowler that the police could use the blood and Fowler said to her, “Let me make sure [Defendant] is unconscious.” Fowler confirmed Defendant was sedated and unconscious and “advised him of his rights.” She “attempted to wake [Defendant] up to get a verbal response from him, but he did not respond to [her].” Nevertheless, she took possession of the excess blood the nurse had drawn.

Defendant was never conscious to be advised of his rights, and consequently, he never refused the blood draw or signed an advice of rights form. None of the police officers obtained a search warrant from the magistrate’s office, which is “a couple of miles” from the hospital.

The parties were heard on Defendant’s motion to suppress on 2 February 2015. In addition to his motion to suppress the blood

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evidence, Defendant moved to suppress the discovery of his driver's license and SUV keys, which the trial court denied. In a 23 March 2015 order, the trial court granted Defendant's motion to suppress the blood evidence. The trial court made the following findings of fact, *inter alia*:

5. Upon arrival at the hospital, the Defendant remained belligerent and also became combative toward the medical staff and the officers present. He fought with the staff by flailing about, spitting and kicking. The medical staff had to tie his hands down and the officers attempted to physically restrain his legs. . . .

6. Sgt. Fowler discussed with the treating nurse that she would likely need a blood draw for law enforcement purposes;

7. At some point prior to any blood draw, the medical staff determined it was necessary to medicate the Defendant in order to calm him down. Prior to this point, the Defendant had not lost consciousness and was in no way cooperative with medical staff or law enforcement. Sgt. Fowler had not yet advised the Defendant of his chemical analysis rights nor had she requested that he submit[] to a blood draw;

8. After being medicated, the Defendant lost consciousness to some degree. The restraints were then removed and physical restraint by medical staff or law enforcement personnel was no longer necessary. Sgt. Fowler left the hospital room for some period of time and, in her absence, the treating nurse drew blood from the Defendant at 4:47 [p.m.]. This blood draw was for medical treatment purposes, but the nurse drew additional blood beyond what was needed for medical treatment purposes. When Sgt. Fowler returned to the hospital room, the nurse offered her the additional blood for law enforcement use. Sgt. Fowler initially declined receipt of the blood on the basis that she first wanted to see if the Defendant would consent to the blood draw or receipt of the evidence. To that end, Sgt. Fowler attempted to advise the Defendant of his chemical analysis rights at 4:50 [p.m.], less than fifty minutes after his transport to the hospital. Sgt. Fowler found the Defendant to be in an unconscious state at the time and she was unable to wake him up. Based upon his unconscious state, Sgt. Fowler then took custody of the

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excess blood for law enforcement testing purposes. Due to his medically induced state, the Defendant was rendered unable to meaningfully receive and consider his blood test rights, unable to give or withhold his informed consent, and/or unable to exercise his right to refuse the warrantless test;

9. Sgt. Fowler expressly relied upon . . . [N.C. Gen. Stat.] § 20-16.2(b) wherein a person who is unconscious or otherwise in a condition that makes the person incapable of refusal may be tested. As such, Sgt. Fowler did not obtain, or attempt to obtain, a search warrant prior to taking custody of the blood sample. Sgt. Fowler did not believe that any exigency existed, instead she relied on the statutory per se exception;

10. At all relevant times during the encounter, there were multiple law enforcement officers present and available to assist with the investigation both at the scene and later at the hospital. . . . There were a sufficient number of officers present such that an officer could have left to drive the relatively short distance (only a few miles) to the Buncombe County Magistrate's Office to obtain a search warrant. There were Magistrates on-duty and available at the time. Sgt. Fowler was familiar with the search warrant procedure and had previously obtained blood search warrants in other cases. The "blood draw" search warrant utilizes a fill-in-the-blank form and is not a time-consuming process. The Defendant was purposefully rendered into an unconscious or sedated state by the medical intervention. The Defendant never consented to any blood draw or to law enforcement taking possession of his blood. . . .

13. Pursuant to *Missouri v. McNeely*, [___ U.S. ___,] 133 S. Ct. 1552 (2013), "a warrantless search of the person is reasonable only if it falls within a recognized exception."

Based upon these findings of fact and the totality of the circumstances, the trial court concluded "no exigency existed justifying a warrantless search." Further, the trial court concluded that N.C. Gen. Stat. § 20-16.2(b), as applied in this case, violated *Missouri v. McNeely*. Accordingly, the trial court suppressed the blood draw evidence. The State timely appealed the trial court's order.

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On appeal, the State challenges finding of fact 10 “to the extent it suggests [Defendant] refused or withdrew consent . . . and to the extent it offers a legal conclusion on the issue of consent or implied consent.”

II. Standard of Review

Our review of a trial court’s denial of a motion to suppress is “strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). “The trial court’s conclusions of law . . . are fully reviewable on appeal.” *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). “[T]he trial court’s ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence.” *State v. McClendon*, 130 N.C. App. 368, 377, 502 S.E.2d 902, 908 (1998) (citation omitted).

III. Analysis

The Fourth Amendment protects the “right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause . . .” U.S. Const. amend. IV. Our State Constitution protects these same rights by prohibiting general warrants, which “are dangerous to liberty.” N.C. Const. art. I, section 20.

It is a “basic constitutional rule” that “searches conducted outside the judicial process, without prior approval by [a] judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.” *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971). These exceptions are jealously and carefully drawn. *Id.* at 455; see also *Jones v. U.S.*, 357 U.S. 493, 499 (1958). The party seeking the exception to the warrant requirement bears the burden of showing “the exigencies of the situation made that [warrantless] course imperative.” *Coolidge*, 403 U.S. at 455. The exigent circumstances doctrine “applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.” *Missouri v. McNeely*, ___ U.S. ___, ___, 133 S. Ct. 1552, 1558 (2013).

These principles apply to blood draw searches in DWI cases, which involve physical intrusion into a defendant’s veins. *Id.* ___ U.S. at ___, 133 S. Ct. at 1554. This “invasion of bodily integrity implicates an individual’s ‘most personal and deep-rooted expectations of privacy.’” *Id.*

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___ U.S. at ___, 133 S. Ct. at 1558 (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 616 (1989)). The United States Supreme Court has held “the natural metabolization of alcohol in the bloodstream” does not present a “*per se* exigency that justifies an exception to the Fourth Amendment’s warrant requirement for nonconsensual blood testing in all drunk-driving cases.” *McNeely*, ___ U.S. at ___, 133 S. Ct. at 1556. Rather, “exigency in this context must be determined case by case based on the totality of the circumstances.” *Id.*

Under North Carolina’s Uniform Driver’s License Act, all drivers who “drive[] a vehicle on a highway or public vehicular area” give “consent to a chemical analysis” if they are “charged with an implied-consent offense.” N.C. Gen. Stat. § 20-16.2(a) (2015). “Any law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person.” *Id.* Before the chemical analysis can be administered, the person charged must be taken before a chemical analyst or a law enforcement officer authorized to administer chemical analysis, both of whom must inform the person orally and in writing of the following:

- (1) You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your driver[']s license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.
- (2) [repealed]
- (3) The test results, or the fact of your refusal, will be admissible in evidence at trial.
- (4) Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of 21.
- (5) After you are released, you may seek your own test in addition to this test.
- (6) You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you

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are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

Id. (2015).

Fowler did not advise Defendant of these rights, and did not obtain his written or oral consent to the blood test. Rather, she waited until an excess of blood was drawn, beyond the amount needed for medical treatment, and procured it from the attending nurse. Fowler testified that she believed her actions were reasonable under N.C. Gen. Stat. § 20-16.2(b), which provides the following:

(b) Unconscious Person May Be Tested—If a law enforcement officer has reasonable grounds to believe that a person has committed an implied-consent offense, and the person is unconscious or otherwise in a condition that makes the person incapable of refusal, the law enforcement officer may direct the taking of a blood sample or may direct the administration of any other chemical analysis that may be effectively performed. In this instance the notification of rights set out in subsection (a) and the request required by subsection (c) are not necessary.

N.C. Gen. Stat. § 20-16.2(b) (2015).

It is true, as the State contends, that this Court has affirmed the use of N.C. Gen. Stat. § 20-16.2(b) to justify warrantless blood draws of unconscious DWI defendants. *See State v. Hollingsworth*, 77 N.C. App. 36, 334 S.E.2d 463 (1985); *see also State v. Garcia-Lorenzo*, 110 N.C. App. 319, 430 S.E.2d 290 (1993). However, these cases did not have the benefit of the United States Supreme Court's guidance in *McNeely*, which sharply prohibits *per se* warrant exceptions for blood draw searches.

Applying section 20-16.2(b) to the case *sub judice*, the record suggests, but does not affirmatively show, that Fowler had “reasonable grounds” to believe Defendant committed the implied consent offense of DWI. Reasonable grounds are the equivalent of probable cause in this context. *See Moore v. Hodges*, 116 N.C. App. 727, 729–30, 449 S.E.2d 218, 220 (1994) (citations omitted). It is undisputed that Defendant owned the SUV and possessed the keys. However, when Bryson and Fowler found him behind Frank's Roman Pizza, he was actively drinking rum. The record does not affirmatively show Defendant was intoxicated while he drove his SUV; rather, it raises a question as to whether he became very intoxicated while drinking rum during and/or after his 400-foot

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walkabout to Frank's Roman Pizza. More importantly, Fowler testified that she did not attempt to obtain a search warrant at any time, even though the magistrate's office was "a couple of miles" away from the hospital. Additionally, she did not direct the nurse or any other qualified person to draw Defendant's blood.

The State's *post hoc* actions do not overcome the presumption that the warrantless search is unreasonable, and it offends the Fourth Amendment, the State Constitution, and *McNeely*. As the party seeking the warrant exception, the State did not carry its burden in proving "the exigencies of the situation made that [warrantless] course imperative." *Coolidge*, 403 U.S. at 455. Under the totality of the circumstances, considering the alleged exigencies of the situation, the warrantless blood draw was not objectively reasonable. *See McNeely*, ___ U.S. at ___, 133 S. Ct. at 1558. Therefore, we hold the trial court's findings of fact are supported by competent evidence, and they support the trial court's conclusions of law.

Lastly, for the first time on appeal, the State contends the blood should be admitted under the independent source doctrine, or alternatively, through the good faith exception.

"The independent source doctrine permits the introduction of evidence initially discovered, or as a consequence of, an unlawful search, but later obtained independently from lawful activities untainted by the initial illegality." *State v. Robinson*, 148 N.C. App. 422, 429, 560 S.E.2d 154, 159 (2002) (citation omitted). The sequence of events in this case does not follow this framework. Moreover, Fowler's testimony shows the nurse knew the officers "wanted to draw blood sooner or later," that "[Defendant] was a DWI [sic]," and that Defendant was going to be arrested. Therefore, the nurse cannot be an independent lawful source.

The good faith exception allows police officers to objectively and reasonably rely on a magistrate's warrant that is later found to be invalid. *See U.S. v. Leon*, 468 U.S. 897 (1984). In the case *sub judice*, the officers never attempted to obtain a search warrant prior to the blood draw, and they cannot objectively and reasonably rely on the good faith exception.

IV. Conclusion

For the foregoing reasons we affirm the trial court.

Affirmed.

Judges STEPHENS and INMAN concur.

STATE v. TAYLOR

[247 N.C. App. 221 (2016)]

STATE OF NORTH CAROLINA

v.

RODNEY NIGEE PLEDGER TAYLOR, DEFENDANT

No. COA14-21-2

Filed 19 April 2016

1. Confessions and Incriminating Statements—custodial interrogation—right to counsel—ambiguous question—asked during phone call with third party

Where, during a police interview, defendant asked a detective, “Can I speak to an attorney?” while having a phone conversation with his grandmother, it was ambiguous whether defendant was conveying his own desire to receive assistance of counsel or he was merely relaying a question from his grandmother. Because defendant did not unambiguously communicate that he desired to speak with counsel, the detective was not required to cease questioning.

2. Confessions and Incriminating Statements—custodial interrogation—right to counsel—alleged error not prejudicial

Where the Court of Appeals held that the trial court did not err by denying defendant’s motion to suppress in his trial for first-degree murder, the State showed that, even assuming the trial court erred, the alleged constitutional error would have been harmless beyond a reasonable doubt. The overwhelming evidence, including eyewitness testimony from three people, supported the jury’s verdict that defendant killed the victim with premeditation and deliberation.

Appeal by defendant from judgment entered on or about 23 January 2013 by Judge Carl R. Fox in Superior Court, Wake County. Originally heard in the Court of Appeals on 4 June 2014, with opinion filed 5 August 2014. An order reversing in part the decision of the Court of Appeals and remanding for consideration of “defendant’s Fifth Amendment argument on the merits” was filed by the Supreme Court of North Carolina on 6 November 2015.

Attorney General Roy A. Cooper III, by Assistant Attorney General Kathleen N. Bolton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

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STROUD, Judge.

Rodney Nigee Pledger Taylor (“defendant”) appeals from a judgment entered on a jury verdict finding him guilty of first-degree murder. Among defendant’s arguments on appeal, defendant argued that the trial court erred in denying his motion to suppress because he invoked his Fifth Amendment right to counsel during a custodial interrogation. In our previous opinion, filed on 5 August 2014, we declined to address defendant’s Fifth Amendment argument on the merits and held that the trial court committed no error. *See State v. Taylor*, ___ N.C. App. ___, 763 S.E.2d 928 (2014) (unpublished). But on 6 November 2015, on discretionary review, the North Carolina Supreme Court reversed in part this Court’s decision and remanded the case to this Court for consideration of “defendant’s Fifth Amendment argument on the merits.” *State v. Taylor*, 368 N.C. 419, 777 S.E.2d 759 (2015). Accordingly, we address defendant’s Fifth Amendment argument on the merits. We find no error.

I. Background

We review our discussion of the factual and procedural background from our previous opinion:

Defendant was indicted for first degree murder on 12 June 2011. He pled not guilty and proceeded to jury trial. Before trial, defendant filed a motion to suppress statements he made to police. He argued that he had been unconstitutionally seized and that he was subjected to custodial interrogation without the benefit of *Miranda* warnings. The trial court denied defendant’s motion by order entered 17 January 2013.

At trial, the State’s evidence tended to show that on the evening of 23 June 2011, defendant (also known as “Sponge Bob”), Alex Walton (also known as “Biz” or “Mr. Business”), and Floyd Creecy (also known as “Bruno” or “Big Bs”) got together to hang out and smoke marijuana. All three men were involved in a local gang named “Bounty Hunters,” which was affiliated with the larger “Crips” gang.^[1] The three men went to a store on Poole Road in east Raleigh to buy some cigars to make “blunts.”

1. This Court added a footnote here that “Mr. Creecy denied being in a gang, but Mr. Walton testified that Mr. Creecy was [a] ‘mentor’ to the two younger men in the ‘Bounty Hunters.’ ” *Taylor*, ___ N.C. App. ___, 763 S.E.2d 928, slip op. at 2 n.1.

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They all rode together in the black Chrysler Pacifica owned by Mr. Creecy's wife.

After buying what they needed from the store, the three men got back into Mr. Creecy's car and drove back down Poole Road. Mr. Creecy was driving, defendant was in the passenger seat, and Mr. Walton was sitting in the back. As they were riding down Poole Road, defendant said, "There's Polo," and told Mr. Creecy to pull over. There were three individuals walking down the sidewalk—Darius Johnson (also known as "Polo"), Damal [O'Neal], and Kyonatai Cleveland. Mr. Creecy pulled into a church parking lot behind them. Defendant exited the car and approached the three; Mr. Walton then got out and followed defendant.

As defendant and Mr. Walton approached, Mr. Johnson took out what he had in his pockets, including his cell phone, and gave it to Ms. Cleveland. He also took out a wine opener that he had in his pocket, opened a small knife at the end of the opener, then closed the knife and put the opener back in his pocket. Defendant said to Mr. Johnson, "Why didn't you get back to us?" Mr. Johnson responded, "I don't know." Defendant then said, "Well, I gave you more than enough time." At that point, defendant said to Mr. Walton, "Watch out, Biz," pulled out a black revolver and began shooting at Mr. Johnson.

During this encounter, Ms. Cleveland called 911. However, she was unable to tell the operator what was happening because when they saw the gun, Mr. Johnson and his two friends tried to run. Mr. Johnson was hit by one bullet in his front left abdomen. The forensic evidence suggested that the bullet was fired from a close distance—perhaps less than two feet. After shooting Mr. Johnson, defendant and Mr. Walton ran back to the black Pacifica, which Mr. Creecy had pulled around to the next street. The gun was still in defendant's hand when he got back into Mr. Creecy's car.

At trial, Mr. [O'Neal], Ms. Cleveland, Mr. Walton, and Mr. Creecy all testified to the events of that night. The three men all positively identified defendant as the shooter. Mr. Walton and Mr. Creecy testified that defendant and

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Mr. Johnson had an argument approximately a week before the shooting. Mr. Johnson had been asking defendant about joining the Bounty Hunters. Defendant told Mr. Johnson to call him. When Mr. Johnson failed to call him, defendant said that he was going to “bang,” i.e. shoot, Mr. Johnson.

Defendant was asked to come to the police station to be interviewed by detectives. He initially denied knowing anything about the shooting, but later admitted that he was in the SUV. He said that the shooter was someone named “Chuck.” He later conceded that there was no one named Chuck but continued to deny that he was the shooter. Defendant claimed that after the shooting, he brought the gun back to his house. The detectives went to defendant’s grandmother’s house, where he was living. When they arrived, defendant’s grandmother informed them that she had found a gun in her grandson’s room, under his bed. She explained that she did not want the gun in her house, so she took it outside and hid it in her backyard. The police recovered the gun—a black .38 caliber revolver. Four spent shell casings were found in the revolver. Once the gun was recovered and the interview was complete, defendant was placed under arrest. Upon being transported to the jail, two deputies searched defendant’s pockets and found two .38 caliber bullets.

The jury found defendant guilty of first degree murder. The trial court accordingly sentenced defendant to life in prison without the possibility of parole. Defendant gave notice of appeal in open court.

Taylor, ___ N.C. App. ___, 763 S.E.2d 928, slip op. at 1-5 (footnote omitted).

II. Discussion

Defendant argues that the trial court erred in denying his motion to suppress because he invoked his Fifth Amendment right to counsel during a custodial interrogation.

A. Standard of Review

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

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findings of fact support the conclusions of law. However, when . . . the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed *de novo* and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Biber, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted).

B. Analysis

[1] In *Edwards v. Arizona*, the U.S. Supreme Court held that “it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.” *Edwards v. Arizona*, 451 U.S. 477, 485, 68 L. Ed. 2d 378, 387 (1981) (discussing *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966)). In *Edwards*, the police interrogated the petitioner on the evening of January 19 but ceased their questioning when the petitioner invoked his right to counsel. *Id.* at 486-87, 68 L. Ed. 2d at 387. The following day, the police returned and advised the petitioner of his *Miranda* rights but did not provide access to counsel. *Id.* at 487, 68 L. Ed. 2d at 387-88. The petitioner “stated that he would talk, but what prompted this action does not appear.” *Id.*, 68 L. Ed. 2d at 388. During this interrogation, the petitioner made a self-incriminating statement. *Id.*, 68 L. Ed. 2d at 388. The U.S. Supreme Court held that the petitioner’s “statement, made without having had access to counsel, did not amount to a valid waiver and hence was inadmissible.” *Id.*, 68 L. Ed. 2d at 388.

In *Davis v. United States*, the U.S. Supreme Court reiterated its holding in *Edwards* that “law enforcement officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation” and addressed the question of “how law enforcement officers should respond when a suspect makes a reference to counsel that is insufficiently clear to invoke the *Edwards* prohibition on further questioning.” *Davis v. United States*, 512 U.S. 452, 454, 129 L. Ed. 2d 362, 368 (1994).

The applicability of the rigid prophylactic rule of *Edwards* requires courts to determine whether the accused *actually invoked* his right to counsel. To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry.

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Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.

Rather, the suspect must unambiguously request counsel. As we have observed, a statement either is such an assertion of the right to counsel or it is not. Although a suspect need not speak with the discrimination of an Oxford don, . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect.

We decline petitioner's invitation to extend *Edwards* and require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney. . . . [I]f a suspect is indecisive in his request for counsel, the officers need not always cease questioning.

. . . .

Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. . . . But we decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.

Id. at 458-62, 129 L. Ed. 2d at 371-73 (citations and quotation marks omitted). "The test is an objective one that assesses whether a reasonable officer under the circumstances would have understood the statement to be a request for an attorney." *State v. Hyatt*, 355 N.C. 642, 655, 566 S.E.2d 61, 70 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003). In *Davis*, the U.S Supreme Court held that the petitioner's

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remark—“Maybe I should talk to a lawyer”—was not a request for counsel and thus the Naval Investigative Service agents were not required to cease questioning the petitioner. *Id.* at 462, 129 L. Ed. 2d at 373.

The U.S. Supreme Court had previously explained the difference between invocation and waiver and held that courts must not examine a defendant’s statements made *after* his invocation of the right to counsel in determining whether his invocation was ambiguous:

First, courts must determine whether the accused actually invoked his right to counsel. Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.

....

Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease. In these circumstances, an accused’s subsequent statements are relevant only to the question whether the accused waived the right he had invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together.

The importance of keeping the two inquiries distinct is manifest. *Edwards* set forth a “bright-line rule” that *all* questioning must cease after an accused requests counsel. In the absence of such a bright-line prohibition, the authorities through badgering or overreaching—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel’s assistance. With respect to the waiver inquiry, we accordingly have emphasized that a valid waiver cannot be established by showing that the accused responded to further police-initiated custodial interrogation. Using an accused’s subsequent responses to cast doubt on the adequacy of the initial request *itself* is even more intolerable. No authority, and no logic, permits the interrogator to proceed on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt

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on his initial statement that he wished to speak through an attorney or not at all.

....

[A]n accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. Such subsequent statements are relevant only to the distinct question of waiver.

Smith v. Illinois, 469 U.S. 91, 95-100, 83 L. Ed. 2d 488, 493-96 (1984) (*per curiam*) (citations, quotation marks, brackets, footnote, and ellipsis omitted).

In evaluating whether a defendant's request for counsel is unambiguous, the Seventh Circuit Court of Appeals has held that the questions—"Can I have a lawyer?"—and—"I mean, but can I call [a lawyer] now?"—and—"Can you call my attorney?"—were unambiguous requests for an attorney. *U.S. v. Lee*, 413 F.3d 622, 626 (7th Cir. 2005); *U.S. v. Wysinger*, 683 F.3d 784, 795-96 (7th Cir. 2012); *U.S. v. Hunter*, 708 F.3d 938, 943-44 (7th Cir. 2013). In *Hunter*, the Court explained that

[i]nstead of using a word like "should" or "might," which would suggest that the defendants were still undecided about whether they wanted a lawyer, all three defendants used the word "can." The defendants' choice of the word "can," by definition, means that they were inquiring into their present ability to be "able to" obtain a lawyer or to "have the opportunity or possibility to" obtain a lawyer. In sum, given the text of the previous statements that our circuit has found sufficient to invoke the right to counsel, the text of [the defendant's] request was sufficient to have put a reasonable officer on notice that [the defendant] was invoking his right to counsel.

Hunter, 708 F.3d at 943-44 (citation omitted). Similarly, in *Sessoms v. Grounds*, the Ninth Circuit Court of Appeals held that the question—"There wouldn't be any possible way that I could have a—a lawyer present while we do this?"—was an unambiguous request for an attorney. *Sessoms v. Grounds*, 776 F.3d 615, 626 (9th Cir. 2015), *cert. denied*, ___ U.S. ___, 193 L. Ed. 2d 207 (2015). In contrast, the Eighth Circuit Court of Appeals held that a state court was not unreasonable in determining that the question—"Could I call my lawyer?"—was not an unambiguous request for counsel. *Dormire v. Wilkinson*, 249 F.3d 801, 805 (8th Cir. 2001), *cert. denied*, 534 U.S. 962, 151 L. Ed. 2d 281 (2001).

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In *Hyatt*, our Supreme Court held that the defendant's statement "to the effect that his *father* wanted him to have a lawyer present during the interrogation was insufficient to constitute an invocation of [the] defendant's Fifth Amendment right to counsel[,] because the "statement did not unambiguously convey [the] *defendant's* desire to receive the assistance of counsel." *Hyatt*, 355 N.C. at 656-57, 566 S.E.2d at 71. The Court also noted that the detective "made no attempt to dissuade [the] defendant from exercising his Fifth Amendment right" but "clarified that [the] defendant, and not his father, must be the one to decide whether to seek the assistance of counsel." *Id.* at 657, 566 S.E.2d at 71.

Here, during the police interview, after defendant asked to speak to his grandmother, Detective Morse called defendant's grandmother from his phone and then handed his phone to defendant. While on the phone, defendant told his grandmother that he called her to "let [her] know that [he] was alright." From defendant's responses on the phone, it appears that his grandmother asked him if the police had informed him of his right to speak to an attorney. Defendant responded, "An attorney? No, not yet. They didn't give me a chance yet." Defendant then responds, "Alright," as if he is listening to his grandmother's advice. Defendant then looked up at Detective Morse and asked, "Can I speak to an attorney?" Detective Morse responded: "You can call one, absolutely." Defendant then relayed Detective Morse's answer to his grandmother: "Yeah, they said I could call one." Defendant then told his grandmother that the police had not yet made any charges against him, listened to his grandmother for several more seconds, and then hung up the phone.

Detective Morse then filled out a *Miranda* waiver form and advised defendant of his *Miranda* rights. Defendant refused to sign the form and explained that his grandmother told him not to sign anything. Detective Morse than responded: "Okay. Are you willing to talk to me today?" Defendant responded: "I will. But [my grandmother] said—um—that I need an attorney or a lawyer present." Detective Morse responded: "Okay. Well you're nineteen. You're an adult. Um—that's really your decision whether or not you want to talk to me and kind-of clear your name or—" Defendant then interrupted: "But I didn't do anything, so I'm willing to talk to you." Defendant then orally waived his *Miranda* rights.

Because defendant asked Detective Morse the question—"Can I speak to an attorney?"—during his telephone conversation with his grandmother after she raised the issue of his right to counsel, it is ambiguous whether defendant was conveying his own desire to receive the assistance of counsel or whether he was merely relaying a question from his grandmother to Detective Morse. In the case of the latter, defendant's

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question would not constitute an invocation, because a defendant's statement that a family member would like for him to have the assistance of counsel does not "unambiguously convey [the] *defendant's* desire to receive the assistance of counsel." See *Hyatt*, 355 N.C. at 656-57, 566 S.E.2d at 71. Under *Davis*, defendant's ambiguous remark did not require Detective Morse to cease questioning. *Davis*, 512 U.S. at 461-62, 129 L. Ed. 2d at 373 ("If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him."). Defendant's later statement—"But [my grandmother] said—um—that I need an attorney or a lawyer present."—is also not an invocation since it does not "unambiguously convey *defendant's* desire to receive the assistance of counsel." See *Hyatt*, 355 N.C. at 656-57, 566 S.E.2d at 71.

A few minutes later, after Detective Morse advised defendant of his *Miranda* rights, he properly clarified that the decision to invoke the right to counsel was defendant's decision, not his grandmother's. See *Davis*, 512 U.S. at 461, 129 L. Ed. 2d at 373 ("Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney."); *Hyatt*, 355 N.C. at 657, 566 S.E.2d at 71 (noting with approval that the detective "clarified that [the] defendant, and not his father, must be the one to decide whether to seek the assistance of counsel").

Defendant's reliance on *U.S. v. Lee* and *U.S. v. Hunter* is misplaced, because the defendants in those cases did not make their requests within the context of a simultaneous conversation with a third-party. *Lee*, 413 F.3d at 624; *Hunter*, 708 F.3d at 940. Had defendant asked the question—"Can I speak to an attorney?"—before or after his phone conversation, *Lee* and *Hunter* would become much more factually similar. But defendant asked this question *during* the phone conversation with his grandmother after she raised the issue of his right to counsel. The context of defendant's request creates ambiguity concerning whether he was conveying his own desire to receive the assistance of counsel or whether he was merely relaying a question from his grandmother to Detective Morse. We distinguish *Wysinger* and *Sessoms* for the same reason. See *Wysinger*, 683 F.3d at 795-96; *Sessoms*, 776 F.3d at 626. Following *Davis* and *Hyatt*, we hold that Detective Morse was not required to cease questioning, because defendant did not unambiguously convey that he desired to receive the assistance of counsel. See *Davis*, 512 U.S. at 461-62, 129 L. Ed. 2d at 373; *Hyatt*, 355 N.C. at 656-57, 566 S.E.2d at 71.

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Because defendant orally waived his *Miranda* rights before he made the statements at issue on appeal, we need not address the issue of whether defendant was in custody for purposes of *Miranda*. We therefore hold that the trial court did not err in denying defendant's motion to suppress.

C. Prejudice

[2] Even assuming *arguendo* that the trial court erred in denying defendant's motion to suppress, we hold that the State has shown that this alleged constitutional error would have been harmless beyond a reasonable doubt. See N.C. Gen. Stat. § 15A-1443(b) (2013). We preliminarily note that defendant admitted to killing Mr. Johnson ("the victim") 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); thus, the central issue at trial was whether defendant acted with premeditation and deliberation. We also note that during the police interview, defendant never confessed to shooting the victim; rather, he said Floyd Creecy shot the victim.

Defendant argues that his following statements and omission during the police interview prejudiced him: (1) defendant's admission that he left the car with a gun before approaching the victim; (2) defendant's admission that he put four bullets in the gun; (3) defendant's admission that he warned Biz Walton immediately before the shooting; and (4) defendant's failure to mention that the victim brandished a knife. Defendant argues that these statements and this omission tended to support the State's theory at trial that defendant shot the victim with premeditation and deliberation rather than defendant's theory at trial that he did not act with premeditation and deliberation and shot the victim only because the victim brandished a knife. Although defendant's statements and omission do tend to support a finding of premeditation and deliberation, any alleged error in their admission would be harmless beyond a reasonable doubt given the overwhelming evidence of defendant's premeditation and deliberation.

All three eyewitnesses, Mr. O'Neal, Ms. Cleveland, and Mr. Walton, testified that defendant confronted the victim, shot the victim, and fired multiple shots.² See *State v. Taylor*, 362 N.C. 514, 531, 669 S.E.2d 239, 256 (2008) (holding that a jury may infer premeditation and deliberation from a defendant's conduct, including "entering the site of the murder with a weapon, which indicates the defendant anticipated a

2. Mr. Creecy testified that he heard multiple gunshots but did not see the shooting.

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confrontation and was prepared to use deadly force to resolve it” and “firing multiple shots, because some amount of time, however brief, for thought and deliberation must elapse between each pull of the trigger”) (citation and quotation marks omitted), *cert. denied*, 558 U.S. 851, 175 L. Ed. 2d 84 (2009). All three witnesses also testified that the victim never threatened defendant with a knife. Biz Walton testified that defendant continued to shoot at the victim while the victim was running away. The State also proffered a recording of the 911 call in which defendant says, “Watch out, Biz,” followed by four gunshots. Dr. Jonathan Privette opined that the victim was shot from less than two feet away. Mr. Walton also testified that defendant had previously told him that he was going to “bang” the victim. In light of this overwhelming evidence of defendant’s premeditation and deliberation, we hold that the State has shown that any alleged constitutional error in denying defendant’s motion to suppress would have been harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b).

III. Conclusion

For the foregoing reasons, we hold that the trial court committed no error.

NO ERROR.

Judges STEPHENS and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
BURL RAVON TORRENCE, DEFENDANT

No. COA15-949

Filed 19 April 2016

**Motor Vehicles—driving while impaired—officer testimony—
expert testimony—impairment—alcohol concentration level**

The trial court erred in a driving while impaired case by admitting an officer’s testimony on the issue of impairment relating to the results of the HGN test without first determining if he was qualified to give expert testimony. The trial court also erred in admitting the officer’s testimony on the specific alcohol concentration level relating to the results of the HGN test. Defendant was entitled to a new trial.

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Appeal by defendant from Judgment entered 4 February 2015 by Judge Alan Z. Thornburg in Macon County Superior Court. Heard in the Court of Appeals 10 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Tamera S. Hill, for the State.

Richard J. Costanza for defendant.

ELMORE, Judge.

Burl Ravon Torrence (defendant) was found guilty of driving while impaired under N.C. Gen. Stat. § 20-138.1. On appeal, defendant argues that the trial court erred in admitting lay opinion testimony on the results of the Horizontal Gaze Nystagmus (HGN) test. After careful review, and consistent with our opinion in *State v. Godwin*, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 19, 2016) (No. COA15-766), we agree and conclude defendant is entitled to a new trial.

I. Background

The State's evidence tended to show the following: Deputy Jonathan Phillips with the Macon County Sheriff's Office was working as part of the traffic safety unit on the morning of 4 August 2013. He was on patrol around 1:00 a.m. on Route 64, or Highlands Road, when he observed a silver car, driven by defendant, in front of him. Phillips testified that defendant was driving around twenty miles per hour, and the speed limit was fifty miles per hour. He stated that he observed defendant "slow down to 20" and then "speed back up" approximately three times. Phillips "also observed him weaving within his lane, the white line to the yellow line, never breaking those lines but just weaving within the lane."

After following defendant for a few miles, Phillips initiated a stop when defendant began to exit off Route 64, then "all of a sudden made an abrupt lane change," and drove back onto Route 64. When defendant lowered the car window Phillips noticed a strong odor of alcohol, which prompted him to ask defendant to step out of the vehicle. Phillips stated that he detected a strong odor of alcohol coming from defendant's breath, defendant's eyes were red and glassy, defendant "had a little bit of trouble getting out of the vehicle[,] and defendant's speech was slow. As a result, Phillips offered defendant two portable breath tests and conducted several field sobriety tests, including the HGN test, the vertical gaze nystagmus test, the "one-leg stand test," the "walk-and-turn test," and the "finger-to-nose test."

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Afterward, Phillips placed defendant under arrest for driving while impaired and transported him to the Macon County Detention Center to test his breath for alcohol using the Intox EC/IR II device. Phillips administered the test three times but was unable to obtain a breath sample. Phillips indicated that defendant refused the test and presented defendant to a magistrate.

On 16 April 2014, defendant pleaded guilty to driving while impaired under N.C. Gen. Stat. § 20-138.1 in Macon County District Court. The Honorable Donna F. Forga suspended defendant's sentence of sixty days imprisonment and ordered twelve months unsupervised probation. Defendant appealed to Macon County Superior Court for a trial by jury where he was found guilty of driving while impaired on 4 February 2015. The Honorable Alan Z. Thornburg suspended defendant's sentence of sixty days imprisonment and ordered twelve months supervised probation. Defendant appeals.

II. Analysis

Defendant argues that the trial court erred in admitting Phillips's testimony on the issue of impairment relating to the results of the HGN test, and in accepting the State's argument that Phillips was simply reporting his observations, not giving expert testimony. Defendant claims that the trial court erred in failing to evaluate the admissibility of the testimony under Rule 702.

Where the appellant "contends the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*." *Cornett v. Watauga Surgical Grp.*, 194 N.C. App. 490, 493, 669 S.E.2d 805, 807 (2008) (citing *Smith v. Serro*, 185 N.C. App. 524, 527, 648 S.E.2d 566, 568 (2007); *FormyDuval v. Bunn*, 138 N.C. App. 381, 385, 530 S.E.2d 96, 99 (2000)).

A. Testimony on the HGN Test Results

Expert witness testimony is governed by Rule 702, which provides,

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

(1) The testimony is based upon sufficient facts or data.

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(2) The testimony is the product of reliable principles and methods.

(3) The witness has applied the principles and methods reliably to the facts of the case.

(a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

(1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

N.C. Gen. Stat. § 8C-1, Rule 702 (2015).

Accordingly, if an officer is going to testify on the issue of impairment relating to the results of an HGN test, the officer must be qualified as an expert witness under Rule 702(a) and establish proper foundation. *Id.*; see *State v. Godwin*, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 19, 2016) (No. COA15-766) (“Our application of Rule 702(a1) to the facts of this case leads us to conclude that the trial court erred in allowing a witness who had not been qualified as an expert under Rule 702(a) to testify as to the issue of impairment based on the HGN test results.”). Moreover, the officer may not testify to a specific alcohol concentration level relating to the results of an HGN test. N.C. Gen. Stat. § 8C-1, Rule 702(a1).

On appeal, the State argues that although Phillips was not tendered as an expert witness, he was qualified to give expert testimony on the HGN test because he “provided substantial evidence of his training, knowledge and skill[.]” At trial, however, the State specifically argued that Phillips was not being offered as an expert witness and that he was “just showing what he saw regarding the test and that’s it.”

Phillips testified to the meaning of nystagmus, resting nystagmus, lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation, and onset of nystagmus prior to forty-five degrees. Over objection Phillips stated that defendant did not present resting nystagmus, which indicated that defendant did not have a head injury. Phillips also testified, over objection, “if four or more clues exist that it’s a 77 percent chance that they are at a .10 or higher blood alcohol level.” He explained that a person may exhibit six clues during the HGN test and that defendant presented with all six clues, as follows:

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Q. Let's talk about the lack of smooth pursuit in the left eye. Did you see a lack of smooth pursuit in the left eye?

A. Yes.

Q. And how about the right eye?

A. Yes.

Q. And describe that you saw a lack of smooth pursuit in the defendant's left and right eye.

A. As the eye moves horizontally towards the side of his face, I saw that bouncing motion where his—the pupil would bounce instead of just like it was moving smooth. It would bounce as it heads to the side.

Q. Now the distinct and sustained nystagmus at maximum deviation. Again, what does maximum deviation mean?

A. Maximum deviation is where the pupil is at the corner of the eye without any white showing.

Q. So when you saw the defendant perform this standard field sobriety test, the distinct and sustained nystagmus at maximum deviation, describe his left and right eye?

A. When it was in the corner—

MS. LEPRE: Your Honor, I'm going to renew my objection simply because *State v. Helms* has said that the result of this test is scientifically founded and it does refer then to Rule 702 due to this. And so they are presenting scientific evidence even though he has training in it, there still needs to be a scientific foundation. I have *State v. Helms* here if Your Honor would like to see it.

THE COURT: Mr. Hess?

MR. HESS: Again, we're not asking him to state like the results of the test were. [sic] It's just a standard field sobriety test that he's received training in. So he can testify to what he observed.

THE COURT: Overruled.

....

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A. Both eyes it [sic] was in the corner and it was bouncing there.

Q. And then what was referred to as the onset of nystagmus prior to 45 degrees, what if anything did you notice in the left and right?

A. In both eyes I observed nystagmus prior to 45 degree [sic] angle.

As a lay witness, Phillips effectively informed the jury that, based on the results of the HGN test, there was more than a 77% chance that defendant's blood alcohol level was .10 or higher. Phillips's testimony violated Rule 702(a1) because he testified on the issue of impairment relating to the results of the HGN test without first being qualified under subsection (a), and because he testified on the issue of specific alcohol concentration level relating to the results of the HGN test. N.C. Gen. Stat. § 8C-1, Rule 702(a1). For the reasons discussed below, the error was prejudicial.

B. Prejudicial Error

Because defendant objected to Phillips's testimony at trial, we analyze whether the error was prejudicial under N.C. Gen. Stat. § 15A-1443(a). Defendant has the burden of showing that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2015).

In *State v. Helms*, 348 N.C. 578, 583, 504 S.E.2d 293, 296 (1998), our Supreme Court concluded that the admission of testimony regarding the results of an HGN test administered to the defendant constituted prejudicial error. In reversing this Court's holding that such error was harmless, the Supreme Court explained,

The evidence presented at trial was clearly sufficient to send the case to the jury and to support a jury finding of guilty of driving while impaired. However, that is not the question before us. The question is not one of sufficiency of the evidence to support the jury verdict. In order to establish prejudicial error in the erroneous admission of the HGN evidence, defendant must show only that had the error in question not been committed, a reasonable possibility exists that a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1997). We

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conclude that, in light of the heightened credence juries tend to give scientific evidence, there is a reasonable possibility that had evidence of the HGN test results not been erroneously admitted a different outcome would have been reached at trial.

Id.

Here, the State points to the following additional evidence to support its argument that any error was harmless: (1) Defendant was driving thirty miles per hour below the speed limit; (2) he was weaving within his lane of travel and made a suspiciously wide left-hand turn into a shopping center after an abrupt lane change; (3) a strong odor of alcohol emanated from his person; (4) he was unsteady on his feet; (5) his speech was slow; (6) his eyes were red and glassy; (7) he performed poorly on the “walk-and-turn test” and the “finger-to-nose test;” (8) the jury watched the video of defendant’s driving and sobriety testing; (9) the jury could use the evidence of defendant’s refusal with the Intoxilyzer test as evidence of impairment; and (10) the jury deliberated for only forty-two minutes.

Defendant, on the other hand, argues that the State’s other evidence did not overwhelmingly establish defendant’s guilt and does not prevent him from meeting his burden of showing prejudice under N.C. Gen. Stat. § 15A-1443(a). Defendant shows the following: (1) The jury heard conflicting evidence about defendant’s driving with some testimony showing he was lost; (2) he maintained travel in his own lane and never weaved between different lanes; (3) he promptly pulled over in response to the patrol car’s lights; (4) he informed Phillips that he had a medical condition—sciatica—which prevented him from performing some physical dexterity tests, such as the “walk-and-turn test” and the “one-leg stand test;” (5) he walked with a slight limp; and (6) the State failed to obtain a sample of his breath or blood for alcohol concentration testing.

Based on the foregoing and “in light of the heightened credence juries tend to give scientific evidence, there is a reasonable possibility that had evidence of the HGN test results not been erroneously admitted a different outcome would have been reached at trial.” *Helms*, 348 N.C. at 583, 504 S.E.2d at 296.

III. Conclusion

The trial court erred in admitting Phillips’s testimony on the issue of impairment relating to the results of the HGN test without first determining if he was qualified to give expert testimony. The trial court also erred

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in admitting Phillips's testimony on the specific alcohol concentration level relating to the results of the HGN test. Defendant is entitled to a new trial.

NEW TRIAL.

Judges STROUD and DIETZ concur.

STATE OF NORTH CAROLINA

v.

JAMES DAVID WILLIAMS

No. COA15-1052

Filed 19 April 2016

Domestic Violence—unlawfully entering property operated as domestic violence safe house or haven—protective order—sufficiency of evidence

The trial court did not err in an unlawfully entering property operated as a domestic violence safe house or haven by a person subject to a protective order case by denying defendant's motions to dismiss. A violation of the statute occurred as soon as defendant set foot onto the real property upon which the shelter was situated and did not require him to physically enter the building.

Appeal by defendant from judgment entered 8 April 2015 by Judge Joseph N. Crosswhite in Burke County Superior Court. Heard in the Court of Appeals 22 February 2016.

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

Franklin E. Wells, Jr. for defendant-appellant.

DAVIS, Judge.

James David Williams ("Defendant") appeals from his conviction for unlawfully entering property operated as a domestic violence safe house or haven by a person subject to a protective order in violation of N.C. Gen. Stat. § 50B-4.1(g1). On appeal, he contends that the trial court erred in denying his motions to dismiss because there was no evidence

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presented at trial that he actually entered the domestic violence shelter at issue. 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: Defendant and Dawn Triplett (“Triplett”) were involved in a romantic relationship and lived together in Glen Alpine, North Carolina from December 2013 to July 2014. In April 2014, their relationship began to deteriorate, and on 7 July 2014 a physical altercation occurred during which Defendant pointed a pellet gun at Triplett, pushed her onto a bed, and “threatened to bust [her] head.” Defendant then forced Triplett to go outside and get into the driver’s seat of his car at which point he “put a cinderblock up against the driver’s side so [she] couldn’t get out.” When Triplett attempted to exit the car through the passenger-side door, Defendant grabbed her by the throat and verbally berated her. A neighbor who witnessed the altercation called the Glen Alpine Police Department, and officers responded to the scene. Triplett related to the officers the events that had transpired, and Defendant was placed under arrest for assault on a female.

On 18 July 2014, Triplett moved into Options Domestic Violence Shelter (“Options”), a safe house for women who are victims of domestic violence and other violent crimes. That same day, Triplett filed a petition for a domestic violence protective order (“DVPO”) in Burke County District Court. On 1 August 2014, the Honorable Clifton Smith issued a DVPO preventing Defendant from having any contact with Triplett and further ordering Defendant to “stay away from [Triplett’s] residence or any place where [Triplett] receives temporary shelter.”

At approximately 6:45 a.m. on 8 August 2014, Defendant drove to the address at which Options was located and parked his car in the parking lot. He exited his vehicle and walked to the front door of the Options building. Defendant attempted to open the door by pulling on the door handle only to discover that it was locked. Defendant then returned to his vehicle and left the premises.

Defendant’s presence on the front porch and his attempt to open the door were captured by a surveillance camera that was being monitored at the time by Jessica Dolinger (“Dolinger”), an Options employee. After Defendant’s departure, Dolinger and other Options personnel discovered Defendant’s identity and contacted law enforcement officers. Defendant was arrested later that day.

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On 8 September 2014, Defendant was indicted on charges of (1) violating N.C. Gen. Stat. § 50B-4.1(g1); and (2) attaining the status of an habitual felon. A superseding indictment on the habitual felon charge was issued on 5 January 2015. A jury trial was held before the Honorable Joseph N. Crosswhite in Burke County Superior Court beginning on 6 April 2015. Both at the conclusion of the State's evidence and at the close of all the evidence, Defendant moved to dismiss the charge arising under N.C. Gen. Stat. § 50B-4.1(g1) based on insufficiency of the evidence. The trial court denied both motions.

The jury found Defendant guilty of violating N.C. Gen. Stat. § 50B-4.1(g1), and Defendant subsequently pled guilty to the habitual felon charge. The trial court consolidated Defendant's convictions and sentenced him to 78-106 months imprisonment. Defendant gave oral notice of appeal in open court.

Analysis

On appeal, Defendant argues that the trial court erred in denying his motions to dismiss based on his contention that in order for him to have been lawfully convicted of violating N.C. Gen. Stat. § 50B-4.1(g1) the State was required to prove that he actually entered the Options *building*. The State, conversely, contends that a violation of the statute occurred as soon as Defendant set foot onto the real property upon which the shelter was situated.

The trial court's denial of a motion to dismiss is reviewed *de novo* on appeal. 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. Pressley, __ N.C. App. __, __, 762 S.E.2d 374, 376 (internal citations and quotation marks omitted), *disc. review denied*, 367 N.C. 829, 763 S.E.2d 382 (2014).

N.C. Gen. Stat. § 50B-4.1(g1) is contained within the North Carolina Domestic Violence Act ("the Domestic Violence Act"). *See Comstock v. Comstock*, __ N.C. App. __, __, 780 S.E.2d 183, 185 (2015) ("The issuance and renewal of DVPOs, the means for enforcing them, and the penalties for their violation are governed by North Carolina's Domestic Violence Act, which is codified in Chapter 50B of the North Carolina

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General Statutes.”). N.C. Gen. Stat. § 50B-4.1(g1) states, in pertinent part, as follows:

Unless covered under some other provision of law providing greater punishment, any person who is subject to a valid protective order . . . who enters *property* operated as a safe house or haven for victims of domestic violence, where a person protected under the order is residing, shall be guilty of a Class H felony. A person violates this subsection regardless of whether the person protected under the order is present on the property.

N.C. Gen. Stat. § 50B-4.1(g1) (2015) (emphasis added).

The term “property” is not defined in N.C. Gen. Stat. § 50B-4.1. However, our Supreme Court has held that “[n]othing else appearing, the Legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning. In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute.” *State v. Abshire*, 363 N.C. 322, 329, 677 S.E.2d 444, 449 (2009) (citation and quotation marks omitted).

Webster’s New World College Dictionary defines property, in pertinent part, as “the right to possess, use, and dispose of something; ownership [*property* in land] . . . a thing or things owned; possessions collectively; esp., land or real estate owned[.]” *Webster’s New World College Dictionary* 1150 (4th ed. 2010). Therefore, by its plain meaning the term “property” is not limited to buildings or other structures affixed to land but also encompasses the land itself. Accordingly, upon Defendant’s entry onto the real property upon which the Options building is situated, he was in violation of N.C. Gen. Stat. § 50B-4.1(g1).¹

We further observe that the General Assembly’s use of the broad term “property” — as opposed to a more restrictive word such as “building” — in N.C. Gen. Stat. § 50B-4.1(g1) is consistent with the purposes underlying the Domestic Violence Act. As the Supreme Court has held, “[o]ur General Assembly enacted the Domestic Violence Act . . . to respond to the serious and invisible problem of domestic violence.” *State v. Elder*, 368 N.C. 70, 72, 773 S.E.2d 51, 53 (2015) (citation and quotation marks omitted). “In essence, [the Domestic Violence Act] requires the state to engage in prompt *remedial* action adverse to an individual’s property or

1. We note that N.C. Gen. Stat. § 50B-4.1(g1) does not contain a *mens rea* requirement. Therefore, Defendant’s act of entry onto the property in and of itself constituted a violation of the statute regardless of his motive for doing so.

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liberty interests in order to further the legitimate state interest in immediately and effectively protecting victims of domestic violence.” *Thomas v. Williams*, __ N.C. App. __, __, 773 S.E.2d 900, 903-04 (2015) (citation, quotation marks, and brackets omitted). By preventing persons subject to a DVPO from entering not only the domestic violence shelter where the victim resides but also the real property on which the shelter is situated, the General Assembly sought to maximize the protection afforded to victims of domestic violence from their abusers.²

Finally, we reject Defendant’s argument that the rule of lenity requires a different result. “When construing an ambiguous criminal statute, we must apply the rule of lenity, which requires us to strictly construe the statute in favor of the defendant. However, this rule does not require that words be given their narrowest or most strained possible meaning. A criminal statute is still construed utilizing common sense and legislative intent.” *In re N.T.*, 214 N.C. App. 136, 140, 715 S.E.2d 183, 185 (2011) (citation, quotation marks, and brackets omitted). *See Abshire*, 363 N.C. at 332, 677 S.E.2d at 451 (“The rule of lenity requires that we strictly construe ambiguous criminal statutes. However, construing the word ‘address’ in terms of indicating defendant’s residence is not a liberal reading in favor of the State; rather, it is the only plausible reading that comports with the legislative purpose in enacting the registration program.” (internal citation omitted)).

As discussed above, adoption of the plain and ordinary meaning of the statutory term “property” in the present context mandates the conclusion that it encompasses both the Options building itself and the land upon which the building sits. We cannot agree with Defendant that the rule of lenity requires us to adopt an unduly narrow definition of the term that would lead to a contrary result.

2. While not essential to our holding, we note that in a separate subsection of N.C. Gen. Stat. § 50B-4.1, the General Assembly utilized the phrase “residence or household.” *See* N.C. Gen. Stat. § 50B-4.1(b). Thus, by using the term “property” in subsection (g1) rather than repeating the phrase “residence or household,” the legislature demonstrated its awareness that the word “property” possessed a different meaning. *See generally Abshire*, 363 N.C. at 332, 677 S.E.2d at 451 (reading statute at issue *in pari materia* with related statutes in order to determine definition of undefined statutory term); *see also Comstock*, __ N.C. App. at __, 780 S.E.2d at 186 (explaining that “statutory provisions concerning the same subject matter must be construed together and harmonized to give effect to each. Where . . . the General Assembly includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion” (internal citations, quotation marks, and brackets omitted)).

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Defendant does not dispute that (1) he was subject to the DVPO previously obtained by Triplett; (2) Triplett resided at Options on 8 August 2014; and (3) he parked his car in the Options parking lot and then walked up to the front door of the shelter on that date. Having determined that his actions constituted an unlawful entry onto the property of Options within the meaning of N.C. Gen. Stat. § 50B-4.1(g1), we therefore conclude that the trial court properly denied Defendant's motions to dismiss.³

Conclusion

For the reasons stated above, we conclude that the trial court did not err in denying Defendant's motions to dismiss and that Defendant received a fair trial free from error.

NO ERROR.

Chief Judge McGEE and Judge GEER concur.

3. Defendant's appellate brief also contains an argument that the trial court committed plain error by failing to instruct the jury on the lesser-included offense of misdemeanor violation of a DVPO. However, because Defendant conceded at oral argument that no legal support existed for this argument, we need not address this issue. *See State v. Stroud*, 147 N.C. App. 549, 564, 557 S.E.2d 544, 553 (2001) ("[Defendant] conceded at oral argument the case law did not support her argument, and she abandoned this argument. Therefore, we dismiss this assignment of error."), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002).

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 APRIL 2016)

BARKER v. HATTERAS ISLAND COTTAGE REPAIR No. 15-1205	N.C. Industrial Commission (Y01087)	Affirmed
CORDREY v. FLINN No. 15-1084	Brunswick (14CVS2190)	Affirmed
EDWARDS v. REDDY ICE No. 15-308	N.C. Industrial Commission (13-702146)	Affirmed in part; vacated in part and remanded
ELDER v. ELDER No. 15-778	Mecklenburg (13CVD3235)	Affirmed
EUBANKS v. EUBANKS No. 15-859	Mecklenburg (10CVD25772)	Affirmed
FOSS v. MILLER No. 15-1106	Iredell (05CVD2831)	Affirmed
IN RE A.S.K. No. 15-1061	Caldwell (12J157) (12J158)	Affirmed
IN RE J.S. No. 15-1129	Cumberland (14JA321)	Affirmed
IN RE M.B. No. 15-990	Durham (12JA239)	Affirmed in part, vacated and remanded in part
IN RE CARRITHERS No. 15-867	Guilford (13JA100)	Vacated
LENNON v. N.C. DEP'T OF JUSTICE No. 15-660	Office of Admin. Hearings (14DOJ06377)	Affirmed
LESTER v. GALAMBOS No. 15-1115	Franklin (14CVS804)	Dismissed
LEWIS v. SACKIE No. 15-672	Mecklenburg (10CVD15731)	Dismissed
MAJERSKE v. MAJERSKE No. 15-839	Cumberland (08CVD6664)	Dismissed

NELSON v. ALLIANCE HOSPITALITY MGMT., LLC No. 15-738	Wake (11CVS3217)	Affirmed
PARKS BLDG. SUPPLY CO. v. BLACKWELL HOMES, INC. No. 15-727	Harnett (12CVS2059)	Affirmed
PAYNE v. PAYNE No. 15-457	Stokes (13CVD217)	Affirmed in part; vacated and remanded in part.
RICHARDS v. TIM BELL RACING, LLC No. 15-742	Iredell (14CVS959)	Reversed and Remanded
STATE v. AKBAS No. 15-943	Yadkin (14CRS50149) (14CRS50617) (14CRS50620-21) (15CRS27)	Affirmed
STATE v. BAKER No. 15-723	Forsyth (13CRS58335) (13CRS58338)	Affirmed in Part and Remanded in Part.
STATE v. BASS No. 15-1067	Wayne (12CRS55905)	No Error
STATE v. BLOUNT No. 15-555	Mecklenburg (13CRS214818)	No reversible error.
STATE v. BRADY No. 15-924	Randolph (12CRS29)	Affirmed in part; Dismissed in part; and Remanded
STATE v. BROWN No. 15-1192	New Hanover (14CRS7442-48)	No Error
STATE v. CLAY No. 15-987	Durham (11CRS58619) (12CRS3599) (12CRS50656) (12CRS50704)	No Error
STATE v. DOZIER No. 15-586	Wake (11CRS227765)	Reversed and vacated
STATE v. ELLIS No. 15-665	Wayne (12CRS53254-55)	No Error

STATE v. FOXWORTH No. 15-1092	Guilford (09CRS72211)	Affirmed
STATE v. GUIN No. 15-1007	Union (14CRS53066)	No Error
STATE v. GUSTAVINO No. 15-1193	Buncombe (11CRS58240)	Reversed
STATE v. HARRIS No. 15-770	Mecklenburg (12CRS248102)	Reversed and Remanded
STATE v. HENDERSON No. 15-979	Mecklenburg (13CRS223780)	No Error
STATE v. HUNICHEN No. 15-632	Johnston (12CRS57232-34) (13CRS147) (13CRS2639)	Affirmed
STATE v. JONES No. 15-572	Forsyth (14CRS55466)	Affirmed
STATE v. KEARSE No. 15-994	Onslow (12CRS52711) (12CRS52712)	No Error
STATE v. LANE No. 15-1164	Wake (11CRS220843) (14CRS1442)	No Error
STATE v. LASCO No. 15-1172	Edgecombe (13CRS54115)	No Error
STATE v. LASSITER No. 15-1075	Wayne (11CRS52802-04)	Reversed and Remanded
STATE v. MURCHISON No. 15-563	Columbus (11CRS52451) (11CRS52462)	No Error
STATE v. MURRELL No. 15-1097	Onslow (13CRS56479)	Judgment arrested and remanded
STATE v. NOLASCO No. 15-972	Guilford (12CRS79176)	No Error
STATE v. PERRY No. 15-967	Forsyth (13CRS58953-54) (13CRS58958) (14CRS108-09)	No Error

STATE v. SURRETT No. 15-973	Haywood (13CRS51644)	No Error
STATE v. WEEKS No. 15-1019	Cleveland (14CRS1281-1282) (14CRS51382)	No Error
STATE v. WILLIAMS No. 15-826	Richmond (12CRS50120) (13CRS519)	No Error
STATE v. WINKLER No. 14-442-2	Buncombe (13CRS51036)	No Error
WESLEY v. WINSTON-SALEM/ FORSYTH CNTY. BD. OF EDUC. No. 15-648	Forsyth (14CVS7395)	Reversed in part; and remanded

CAMPBELL v. GARDA USA, INC.

[247 N.C. App. 249 (2016)]

ALLAN ROBERT CAMPBELL, PLAINTIFF

v.

GARDA USA, INC. AND NEW HAMPSHIRE INSURANCE COMPANY, DEFENDANTS

No. COA15-756

Filed 3 May 2016

Workers' Compensation—attorney fees—grounds for award—partially improper

A workers' compensation award of attorney fees was vacated and remanded where there were grounds for imposing attorney fees for a discovery violation, but the Industrial Commission relied in part on two erroneous grounds.

Appeal by defendants from opinion and award entered 19 March 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 December 2015.

Charles G. Monnett, III & Associates, by Lauren O. Newton, for employee plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, LLP, by M. Duane Jones, Jeffrey A. Kadis, and Brooke A. Mullenex, for employer and carrier defendant-appellants.

DIETZ, Judge.

Plaintiff Allan Campbell suffered two workplace injuries while employed by Defendant Garda USA: one in December 2011 and one in July 2012. He reported both injuries to his employer immediately after they occurred. Campbell did not miss any work, but his injuries required medical treatment.

In August 2012, Campbell filed separate workers' compensation claims for his two workplace injuries. In November 2012, Garda agreed to pay medical benefits for the December 2011 injury, while reserving its right to later contest compensability. Garda denied the claim for the July 2012 injury.

During discovery, Garda falsely stated that it did not possess any written documents concerning the 2012 injury. In a later deposition, a Garda employee conceded that a written document existed and indicated that he had a copy on his computer, which he had with him at

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the deposition. Garda's lawyers then told the employee to stop talking and to power down his computer. Even after the deposition, Garda still refused to produce the document and, ultimately, a deputy industrial commissioner had to order its production. In its final opinion and award, the Industrial Commission imposed attorneys' fees on Garda under N.C. Gen. Stat. § 97-88.1 for "unfounded litigiousness."

On appeal, Garda contends that some of the grounds on which the Commission relied to award attorneys' fees are erroneous. As explained below, we agree with Garda that some of the Commission's reasoning, such as faulting Garda for asserting an unfounded notice defense that Garda never actually asserted, would not support attorneys' fees. But Garda's discovery violation readily provides a legal basis for attorneys' fees under N.C. Gen. Stat. § 97-88.1. Accordingly, we hold that attorneys' fees under § 97-88.1 are permitted in this case but, because some of the Commission's reasoning is erroneous, remand for the Industrial Commission to reassess its attorneys' fees award in light of the unfounded litigiousness described in this opinion.

Facts and Procedural History

On 1 December 2011, Allan Campbell sprained his left ankle while working for Garda USA, Inc. Campbell immediately informed his manager of the incident. He received medical treatment for the sprain, including physical therapy and various forms of pain medication. Campbell did not miss any work as a result of his injury.

On 19 July 2012, Campbell again injured himself when he slipped and fell while trying to lift a wooden pallet at work. After his fall, Campbell sent an email to his branch manager to notify him of the incident. The email had the subject line "keep this on file" and stated as follows:

I lifted a pallet and slipped on oil in the bay. Tweaked my lower back. I will take it easy today but at this time do not wish to seek medical. That's all I need right now is to file a claim with all of the stuff going on. We need to get oil dry today.

No one witnessed Campbell's fall, and he did not seek immediate medical treatment.

On 27 July 2012, Garda terminated Campbell's employment due to poor job performance. Later that day, at a scheduled appointment with his doctor concerning his high blood pressure, Campbell informed his doctor that he had severe back pain and explained that the pain originated with his fall earlier in the month.

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On 6 August 2012, Campbell filed a claim against Garda for his December ankle injury. Two days later, Campbell filed another claim, this time addressing his July back injury.

On 8 November 2012, Garda agreed to pay Campbell's medical expenses without prejudice to later denying the compensability of the claim using Form 63. Garda denied the compensability of Campbell's back injury using Form 61. The two claims were later consolidated for hearing before a deputy industrial commissioner.

During discovery, Campbell requested that Garda identify any statements obtained from Garda employees concerning Campbell's back injury and to turn over any documents concerning that injury. Garda initially responded to these requests with a blanket objection based on attorney-client privilege. After further discussion between counsel for the parties, Garda amended its discovery responses and stated that it was "not in possession of any written statement, photograph, writing or document related to the incident [on 19 July 2012]."

Six months later, Campbell deposed Bart Gibbons, a Garda risk management analyst, via telephone. During Gibbons's deposition testimony, he acknowledged that the company that manages Garda's workers' compensation claims had made an entry concerning Campbell's 19 July 2012 back injury in records accessible to Garda. That entry, called a "first report of injury," is part of a generated report described by Gibbons as "an internal document that comes from [a] third-party administer [sic]."

Gibbons had a copy of that document on his computer, which he had with him as he was testifying. When Campbell's counsel asked Gibbons to provide her with a copy of that document, counsel for Garda instructed Gibbons not to comply with that request and further instructed him to power down his computer and "not testify to anything that you are looking at on your computer." Gibbons obeyed, and Campbell's counsel expressed her intention to seek a ruling from the deputy industrial commissioner compelling Garda to produce the document. She then instructed the court reporter to hold Gibbons's deposition open pending a determination from the Industrial Commission.

After further motions practice, the deputy industrial commissioner ordered Garda to produce the document. The following day, Garda produced the document to Campbell. It contained an entry dated 27 July 2012 indicating that Campbell "slipped on an oil spill" and "sustained unknown injuries to back." As the Full Commission later found, this evidence, which was plainly responsive to Campbell's discovery request,

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“was not produced voluntarily and . . . [Garda] had to be compelled by the Commission to produce [it].”

On 23 May 2014, the deputy commissioner filed an opinion and award ordering Garda to pay certain medical expenses incurred, or to be incurred, from Campbell’s injuries, and ordering Garda to pay Campbell’s attorneys’ fees in the amount of \$13,212.50. On 5 June 2014, Garda appealed to the Full Commission. The Full Commission affirmed and Garda timely appealed its award of attorneys’ fees to this Court.

Analysis

The North Carolina Workers’ Compensation Act grants the Industrial Commission the authority to impose attorneys’ fees on either party if it determines that “any hearing has been brought, prosecuted, or defended without reasonable ground.” N.C. Gen. Stat. § 97–88.1. Our precedent requires us to review an award under § 97–88.1 using a two-part test. First, this Court reviews *de novo* the legal question of whether a claim was “brought, prosecuted, or defended without reasonable ground.” *Ensley v. FMC Corp.*, 222 N.C. App. 386, 390, 731 S.E.2d 855, 858 (2012). If our *de novo* review reveals that there were legal grounds to impose fees, we then review the Industrial Commission’s determination of “whether to make an award and the amount of the award” for abuse of discretion. *Id.*

We have no hesitation in concluding that Garda’s conduct satisfies the statutory criteria for imposing attorneys’ fees under the first prong of our two-part review. The record indicates that Garda falsely stated in discovery responses that it did not have any information concerning Campbell’s July 2012 back injury when, in fact, it had information, and had access to a document, relevant to issues of compensability. Moreover, after a Garda employee’s deposition revealed the existence of the responsive document (which Garda previously denied even existed), Garda did not immediately produce it. Ultimately, upon Campbell’s motion, a deputy industrial commissioner had to order its production. As a matter of law, this type of discovery violation satisfies the statutory criteria of N.C. Gen. Stat. § 97–88.1 and permits the Industrial Commission, in its discretion, to impose attorneys’ fees. *See Hauser v. Advanced Plastiform, Inc.*, 133 N.C. App. 378, 385–89, 514 S.E.2d 545, 550–53 (1999).

Garda does not dispute the underlying facts surrounding its discovery violation, but argues that the Industrial Commission also relied on two improper grounds in awarding attorneys’ fees: first, that Garda failed to contest the claim within 90 days in violation of N.C. Gen. Stat.

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§ 97–18(d) and, second, that Garda asserted an unfounded notice defense. Garda argues that both of these grounds are erroneous because N.C. Gen. Stat. § 97–18(d) does not apply to medical benefits-only claims and Garda never asserted a notice defense.

We agree with Garda that the Industrial Commission relied on these two grounds in awarding fees under § 97–88.1, as the Commission’s order indicates:

Although defendants accepted plaintiff’s foot injury as medical only via a Form 63, *they never “contest[ed] the compensability of the claim or its liability therefore [sic] within 90 days from the date [they] first ha[d] written or actual notice of the injury” in accordance with N.C. Gen. Stat. § 97–18(d).* As a result of the denial of medical treatment for Plaintiff’s foot, Plaintiff was denied medical treatment for his injury for over a year. Furthermore, *defendants denied plaintiff’s back injury on the basis that they had no notice of said injury* despite overwhelming evidence to the contrary that was not produced voluntarily and which they had to be compelled by the Commission to produce. The behavior of the defendant-employer in this claim has been unfoundedly litigious and defendant-employer is therefore subject to sanctions pursuant to N.C. Gen. Stat. § 97–88.1.

We also agree with Garda that neither of these two grounds would support an award of attorneys’ fees under § 97–88.1. First, Form 63—the document issued by the Industrial Commission for use in paying medical benefits without prejudice to later challenging compensability—indicates that N.C. Gen. Stat. § 97–18(d) and its corresponding 90-day response requirement do not apply to a medical benefits-only claim like Campbell’s. Thus, even if that statute and its 90-day provision apply here, Garda’s failure to comply with that statutory requirement, standing alone, was not unreasonable. We cannot fault Garda for relying on the instructions in a government-issued form.¹

Likewise, Garda did not assert a notice defense in this case. The Commission cannot award attorneys’ fees for asserting an unfounded defense that Garda never actually asserted.

1. Whether N.C. Gen. Stat. § 97–18(d) actually applies to a medical benefits-only claim is not an issue before this Court. The only issue we address is whether, for purposes of awarding attorneys’ fees under § 97–88.1, it was reasonable for Garda to rely on the instructions in Form 63.

IN RE S.Z.H.

[247 N.C. App. 254 (2016)]

In short, although there are grounds to impose attorneys' fees under § 97–88.1 in this case, the Commission at least partially relied on two erroneous grounds in its analysis. Ordinarily, when a lower court's decision is based in part on proper grounds but in part on an error of law, "it is appropriate to remand for reconsideration in light of the correct law." *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 206 N.C. App. 192, 204, 696 S.E.2d 559, 567 (2010); see also *Blitz v. Agean, Inc.*, 197 N.C. App. 296, 312, 677 S.E.2d 1, 11 (2009). Accordingly, we vacate and remand this matter for the Commission to reassess its attorneys' fees award in light of this opinion.

Conclusion

The portion of the Industrial Commission's opinion and award concerning attorneys' fees under § 97–88.1 is vacated and remanded for further proceedings consistent with this opinion.

VACATED AND REMANDED IN PART.

Judges STROUD and TYSON concur.

IN THE MATTER OF S.Z.H.

No. COA15-1270

Filed 3 May 2016

1. **Appeal and Error—notice of appeal—untimely—treated as petition for certiorari**

An appeal was treated as a petition for certiorari where the notice of appeal was untimely.

2. **Termination of Parental Rights—not maintaining communications with child—evidence—not sufficient**

A trial court's finding in a termination of parental rights case that respondent did not maintain communications with his child was not supported by clear, cogent, and convincing evidence. Moreover, the trial court conflated the separate stages of adjudication and disposition; it is imperative that the two inquiries be conducted separately, although they may be conducted in the same hearing.

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3. Termination of Parental Rights—abandonment of child—finding—not sufficient

The trial court erred in concluding that respondent had willfully abandoned his child under N.C.G.S. § 7B-1111(a)(7). The findings did not demonstrate that respondent had a “purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims” to the child. Abandonment was the sole ground for termination found by the trial court and the order was reversed.

4. Appeal and Error—issue not addressed—foreclosed elsewhere in opinion

An argument in a termination of parental rights case concerning the lack of appropriate findings was not addressed where it had already been determined that the trial court erred by concluding that there were grounds to terminate respondent’s rights.

5. Termination of Parental Rights—entry of order—not timely

It was noted in a termination of parental rights case that the trial court violated N.C.G.S. § 7B-1109(e) and N.C.G.S. § 7B-1110(a) by entering its termination order roughly six months after the adjudicatory and dispositional hearing.

Appeal by respondent-father from order entered on 23 July 2015 by Judge Jayrene R. Maness in District Court, Randolph County. Heard in the Court of Appeals on 12 April 2016.

Mark L. Hayes, for respondent-appellant.

No brief filed for petitioner-appellee.

STROUD, Judge.

Respondent-father appeals from an order terminating his parental rights to S.Z.H. (“Sally”).¹ Respondent argues that the trial court erred in (1) concluding that he had willfully abandoned Sally under N.C. Gen. Stat. § 7B-1111(a)(7) (2015); and (2) concluding that terminating his parental rights was in Sally’s best interests without making the requisite written findings of fact. We reverse the order because the evidence was insufficient to support the challenged findings of fact and because

1. We use this pseudonym to protect the juvenile’s identity.

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the remaining findings of fact cannot support a conclusion of law that respondent abandoned the minor child during the relevant time period.

I. Background

This case arises from a private termination of parental rights action filed by the child's mother against the child's legal and biological father. There were no allegations of neglect, abuse, or dependency under N.C. Gen. Stat. § 7B-1111 and no involvement by any Department of Social Services. On 1 February 2008, Sally was born to petitioner-mother and respondent-father, who were unmarried and living apart in North Carolina. For approximately one to two months, respondent helped care for Sally by watching her during the day while petitioner worked. After respondent's assistance became unreliable, petitioner made other child-care arrangements for Sally during the day. Later in 2008, after petitioner was involved in a car accident and lost access to reliable transportation, petitioner and Sally moved to Virginia to live with petitioner's uncle. In 2009, petitioner and Sally moved to Arizona to help care for petitioner's mother, who had been diagnosed with cancer.

In approximately March 2013, petitioner and Sally moved back to North Carolina, and petitioner arranged for respondent to visit with Sally for roughly two hours. In April 2013, respondent tried to send a \$50.00 money order to petitioner. Respondent called Sally during the next several months. In January 2014, respondent asked petitioner if he could attend Sally's birthday party in February 2014, but petitioner responded that Sally's birthday party was "probably not the best place for [respondent] to see [Sally] after not seeing her" since March 2013. Respondent and Sally have not communicated since January 2014. Sometime while petitioner and Sally were in North Carolina, petitioner married a man.²

On 12 May 2014, petitioner filed a petition for termination of respondent's parental rights alleging that "for more than three (3) years the Respondent has not initiated contact with the minor child[.]"³ In approximately June 2014, petitioner, her husband, and Sally moved to Arizona. On 26 January 2015, the trial court held a hearing on the adjudication and disposition stages. At the conclusion of the hearing, Sally's guardian *ad litem* recommended that the trial court not terminate respondent's

2. The record does not indicate the date of their marriage or the husband's name. He was identified in the transcript of testimony only as "Garry (indiscernible) Junior" or "Junior."

3. The trial court correctly concluded that North Carolina was Sally's home state at the time petitioner commenced this action. *See* N.C. Gen. Stat. § 50A-201(a)(1) (2013).

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parental rights because petitioner and respondent's dispute "essentially boils down to a communication problem." On 23 July 2015, the trial court entered an order concluding that respondent had willfully abandoned Sally under N.C. Gen. Stat. § 7B-1111(a)(7) and that it was in Sally's best interests to terminate respondent's parental rights. On 25 August 2015, respondent gave untimely notice of appeal.

II. Appellate Jurisdiction

[1] We first address whether we have jurisdiction over this appeal:

In civil actions, the notice of appeal must be filed "within thirty days after entry of the judgment if the party has been served with a copy of the judgment within the three day period" following entry of the judgment. N.C.R. App. P. 3(c)(1) (2013); N.C. Gen. Stat. § 1A-1, Rule 58 (2013). The three day period excludes weekends and court holidays. N.C. Gen. Stat. § 1A-1, Rule 6(a) (2013). . . . Failure to file a timely notice of appeal is a jurisdictional flaw which requires dismissal.

Magazian v. Creagh, ___ N.C. App. ___, ___, 759 S.E.2d 130, 131 (2014). "[I]n the absence of jurisdiction, the appellate courts lack authority to consider whether the circumstances of a purported appeal justify application of [North Carolina Rule of Appellate Procedure] 2." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). But "[North Carolina Rule of Appellate Procedure] 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner." *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997); *see also* 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[.]").

Here, the trial court filed and entered the termination order on Thursday, 23 July 2015. Petitioner served respondent a copy of the order on Tuesday, 28 July 2015. Thus, respondent was served a copy of the termination order within the three-day period, since we exclude the intervening Saturday and Sunday from the three-day period. *See Magazian*, ___ N.C. App. at ___, 759 S.E.2d at 131; N.C. Gen. Stat. § 1A-1, Rule 6(a), Rule 58 (2015). Accordingly, the last day on which respondent could have filed a timely notice of appeal was Monday, August 24, 2015. *See Magazian*, ___ N.C. App. at ___, 759 S.E.2d at 131; N.C.R. App. P. 3.1(a);

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N.C. Gen. Stat. §§ 1A-1, Rule 6(a), Rule 58, 7B-1001(b) (2015). Because respondent did not file a notice of appeal until Tuesday, August 25, 2015, respondent's notice of appeal was untimely. Accordingly, we treat respondent's appeal as a petition for writ of certiorari and issue a writ of certiorari to review the merits of respondent's appeal. *See Anderson*, 345 N.C. at 482, 480 S.E.2d at 663; N.C.R. App. P. 21(a)(1).

III. Termination Order

Respondent argues that the trial court erred in (1) concluding that he had abandoned Sally under N.C. Gen. Stat. § 7B-1111(a)(7); and (2) concluding that terminating his parental rights was in Sally's best interests without making the requisite written findings of fact.

A. Standard of Review

Termination of parental rights proceedings are conducted in two stages: adjudication and disposition. In the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C. Gen. Stat. § 7B-1111(a). This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law. If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary. However, the trial court's conclusions of law are fully reviewable *de novo* by the appellate court.

If the trial court determines that at least one ground for termination exists, it then proceeds to the disposition stage where it must determine whether terminating the rights of the parent is in the best interest of the child, in accordance with N.C. Gen. Stat. § 7B-1110(a). The trial court's determination of the child's best interests is reviewed only for an abuse of discretion. Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

In re A.B., ___ N.C. App. ___, ___, 768 S.E.2d 573, 575-76 (2015) (citations, quotation marks, and brackets omitted).

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B. Adjudication

i. Findings of Fact

[2] We preliminarily note that in the termination order, the trial court conflated the separate stages of adjudication and disposition, which is most clearly seen in its conclusion of law that “[i]t is in the best interests of the minor child that the parental rights of the respondent-father . . . be terminated and statutory grounds exist which justify this termination of the respondent’s parental rights.” A court’s decision to terminate parental rights based solely on the child’s best interests violates a parent’s constitutional right to custody of his child. *See Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001) (“The Due Process Clause ensures that the government cannot unconstitutionally infringe upon a parent’s paramount right to custody solely to obtain a better result for the child.”). It is imperative that courts conduct these two inquiries separately although they may be conducted in the same hearing. *See In re Parker*, 90 N.C. App. 423, 430, 368 S.E.2d 879, 884 (1988). We will thus focus our analysis on the trial court’s findings of fact as to the grounds for termination of parental rights without consideration of the many findings of fact regarding petitioner’s relocation to Arizona and the child’s circumstances there.

[3] Respondent argues that clear, cogent, and convincing evidence does not support the trial court’s Finding of Fact 15 and the underlined portion of Finding of Fact 18:⁴

15. Since the petitioner’s return to North Carolina in early 2013, the respondent has not sought any overnight visitation with the minor child nor has he actually exercised any overnight visitation. At all relevant times, the respondent had had the ability and means to maintain communication with the minor child and to arrange or schedule such visitation.

....

18. The Court finds as a matter of law that statutory grounds do exist to terminate the parental rights of the respondent in that the respondent, specifically for a period of

4. Finding of Fact 18 is actually a mixed finding of fact and conclusion of law. We will address the challenged factual portion here and the remaining factual and legal portions below.

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at least six (6) months preceding the commencement of the instant action and generally since April of 2013, has willfully abandoned the minor child. Since April of 2013, the respondent has failed to provide or attempt to provide any financial support for the welfare and benefit of the minor child; he has also failed to maintain communications to show his love, care or concern for the minor child.

(Emphasis added.) Because petitioner filed the petition on 12 May 2014, we examine the six-month period from 12 November 2013 to 12 May 2014. *See* N.C. Gen. Stat. § 7B-1111(a)(7).

Respondent argues that petitioner never testified that respondent did not request to communicate or visit Sally during this period; rather, respondent argues that the evidence shows the opposite, that respondent tried to call Sally “at least every day or every other day” and asked petitioner if he could attend Sally’s birthday party in February 2014.

Petitioner testified to the following events: The last time that respondent had visitation with Sally was in March 2013. Petitioner had never “active[ly] attempt[ed]” to deny respondent visitation and had not made any efforts to deny him communication with Sally. When petitioner and Sally moved back to North Carolina in April 2013, petitioner gave respondent a post office box as her mailing address but did not tell him her physical address. When petitioner changed her phone number in approximately June 2013, she provided her new number to respondent, and respondent called Sally on that number. Petitioner did not testify to how frequently respondent called Sally. When Sally returned to school in 2013, respondent called Sally and told her that he would pick her up to buy her a backpack and some shoes but did not “follow through” on these phone calls. The last time respondent called Sally was in January 2014. Respondent asked petitioner if he could attend Sally’s birthday party in February 2014, but petitioner responded that Sally’s birthday party was “probably not the best place for [respondent] to see [Sally] after not seeing her” since March 2013. Petitioner expressed her frustration that “[i]t’s not that [respondent] doesn’t want to put forth the effort, it’s just [sometimes there is] no [follow-through] and for seven years [petitioner has] been following through.”

Respondent testified to the following events: Since March 2013 when respondent last saw Sally, respondent called Sally “all the time” and tried to call Sally “at least every day or every other day[.]” Sally was available to talk “[u]nless she was at school or . . . asleep.” Petitioner told respondent that he could not visit Sally unless he sent financial support.

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Respondent called Sally until January 2014, about a week before Sally's 1 February 2014 birthday, when respondent and petitioner "[f]ell out." Petitioner either refused to answer respondent's calls and texts or would argue with respondent. Respondent continued trying to contact Sally but stopped after about a month of unsuccessful attempts.

In addition, at the conclusion of the hearing, Sally's guardian *ad litem* recommended that the trial court *not* terminate respondent's parental rights because petitioner and respondent's dispute "essentially boils down to a communication problem."⁵ He noted that "in the beginning" respondent "played a very active role in the child's life" but then that petitioner had "moved around several times, no fault of her own[.]" With petitioner and the child living in Arizona, he noted that "it's hard to say, now that [respondent] has [the] financial ability to see the child[.]" As both petitioner and respondent testified that respondent called Sally during roughly half of the relevant six-month period, from November 2013 to January 2014, and asked petitioner if he could attend Sally's birthday party in February 2014, we hold that clear, cogent, and convincing evidence does not support the trial court's finding that respondent "failed to maintain communications" with Sally during the relevant time. In addition, even during the last half of the six-month period, the evidence tended to show that respondent attempted to communicate with Sally but petitioner stopped allowing him to contact her. The guardian *ad litem* characterized the issue as a "communication problem" based at least in part upon petitioner's relocations and ultimate move to Arizona. Thus, there is no clear, cogent, and convincing evidence to support the challenged factual findings in Findings of Fact 15 and 18.

ii. Conclusion of Law

Respondent challenges the trial court's conclusion of law that he had willfully abandoned Sally under N.C. Gen. Stat. § 7B-1111(a)(7). This conclusion of law is found primarily in Finding of Fact 18, as noted above:

18. The Court finds as a matter of law that statutory grounds do exist to terminate the parental rights of the

5. The record on appeal lacks the trial court's order appointing Sally's guardian *ad litem* pursuant to N.C. Gen. Stat. § 7B-1108 (2013) and the guardian *ad litem*'s written report. The trial court mentioned in its order that the guardian *ad litem* had been "duly appointed" and that the guardian *ad litem* had provided a written report to the court, "in addition to his oral summary of his findings which were presented at the hearing." Since we do not have the written report, we have considered only the oral summary presented at the hearing.

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respondent in that the respondent, specifically for a period of at least six (6) months preceding the commencement of the instant action and generally since April of 2013, has willfully abandoned the minor child. . . .

The only related conclusion of law which is denominated as such is Conclusion of Law 4: “It is in the best interests of the minor child that the parental rights of the respondent-father . . . be terminated and statutory grounds exist which justify this termination of the respondent’s parental rights.”

N.C. Gen. Stat. § 7B-1111(a)(7) provides that the trial court may terminate parental rights upon concluding that the “parent has *willfully* abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]” N.C. Gen. Stat. § 7B-1111(a)(7) (emphasis added).

We preliminarily note that the petition here failed to allege any particular statutory basis upon which petitioner was seeking to terminate respondent’s parental rights. Indeed, the petition did not mention the relevant statute, N.C. Gen. Stat. § 7B-1111, and did not even use any variation of the word “abandon.” See *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002) (“While there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to what acts, omissions or conditions are at issue.”). In addition, at the termination hearing, none of the parties nor the trial court ever mentioned the ground of abandonment or even used the word “abandon” or other terms which would indicate a willful abandonment, such as “relinquish” or “surrender.” The first time the ground of abandonment is mentioned in the record is in the termination order itself. Nevertheless, we address whether the remaining findings of fact—other than Finding of Fact 15 and the challenged factual portion of Finding of Fact 18, as discussed above—support the conclusion of abandonment as the ground for termination since respondent did not raise the failure of the petition to give adequate notice of the grounds upon which termination was sought at trial or on appeal.

Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child[.] Willfulness is more than an intention to do a thing; there must also be purpose and deliberation. Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence.

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. . . .

A judicial determination that a parent willfully abandoned her child, particularly when we are considering a relatively short six month period, needs to show more than a failure of the parent to live up to her obligations as a parent in an appropriate fashion; *the findings must clearly show that the parent's actions are wholly inconsistent with a desire to maintain custody of the child.*

In re S.R.G., 195 N.C. App. 79, 84-87, 671 S.E.2d 47, 51-53 (2009) (emphasis added and citations and quotation marks omitted). In *S.R.G.*, this Court compared the following cases in its discussion of the ground of abandonment:

Compare [*In re Adoption of Searle*, 82 N.C. App. 273, 276-77, 346 S.E.2d 511, 514 (1986)] (finding that the respondent's single \$500.00 support payment during the relevant six-month period did not preclude a finding of willful abandonment) and *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982) ("except for an abandoned attempt to negotiate visitation and support, respondent 'made no other significant attempts to establish a relationship with the child or obtain rights of visitation with the child' ") *with Bost v. Van Nortwick*, 117 N.C. App. 1, 19, 449 S.E.2d 911, 921 (1994) (finding no willful abandonment where respondent, during relevant six-month period, visited children at Christmas, attended three soccer games and told mother he wanted to arrange support payments)[, *appeal dismissed*, 340 N.C. 109, 458 S.E.2d 183 (1995)].

S.R.G., 195 N.C. App. at 85-86, 671 S.E.2d at 52 (brackets omitted). The respondent in *S.R.G.* "visited [the child] eleven times during the relevant time period[.]" "brought appropriate toys and clothes for [the child] to those visits[.]" and "participate[d] in one of the trial proceedings during the relevant time period." *Id.* at 86, 671 S.E.2d at 52. This Court held that although the respondent's "conduct of continuing substance abuse and her failure to follow through with her case plan represent[ed] poor parenting," "her actions during the relevant six month period d[id] not demonstrate a purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to [the child] pursuant to N.C. Gen. Stat. § 7B-1111(a)(7)." *Id.* at 87-88, 671 S.E.2d at 53.

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As discussed above, some of the factual portions of Findings of Fact 15 and 18 were not supported by clear, cogent, and convincing evidence.⁶ The remaining findings of fact address identification of the parties and jurisdictional facts (FOF 1-4); reasons for petitioner's move to Arizona in 2014 (FOF 5-6); circumstances at the child's birth (FOF 7); petitioner's automobile accident, move to Virginia, and move to Arizona in 2009 (FOF 8-11); petitioner's return to North Carolina and respondent's visit with the child in March 2013 (FOF 12-13); respondent's attempt to send petitioner a money order in April 2013 (FOF 14); and the child's current family relationships and circumstances in Arizona (FOF 19-22). None of these address factual grounds which could support a conclusion of abandonment and some of them address events outside the relevant six-month period preceding the filing of the petition. The only other findings of fact which could potentially support a conclusion of abandonment are the following:

16. The Court specifically notes that there have been no cards or gifts from the respondent to the minor child since early 2013.

17. The Court further notes that prior to the petitioner's filing of the instant action, the respondent made no filings that were initiated by him in this jurisdiction, or any other jurisdiction, concerning the custody of the minor child.

18. . . . Since April of 2013, the respondent has failed to provide or attempt to provide any financial support for the welfare and benefit of the minor child[.] . . .

Even if these findings are correct, these findings alone are not sufficient to support a conclusion of willful abandonment. We hold that these findings do not demonstrate that respondent had a "purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims" to Sally. *See id.*, 671 S.E.2d at 53. Following *S.R.G.*, we hold that the trial court erred in concluding that respondent had willfully abandoned Sally under N.C. Gen. Stat. § 7B-1111(a)(7). *See id.*, 671 S.E.2d at 53. Because abandonment was the sole ground for termination found by the trial court, we hold that the trial court erred in terminating respondent's parental rights, and we reverse the order.

6. Finding of Fact 18 is a mixed finding of fact and conclusion of law; we will address one other factual portion of Finding of Fact 18 which was not addressed above.

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C. Disposition

[4] Respondent also argues that the trial court erred in concluding that terminating his parental rights was in Sally's best interests without making the written findings of fact as required by N.C. Gen. Stat. § 7B-1110(a) (2015). See *In re J.L.H.*, 224 N.C. App. 52, 59-60, 741 S.E.2d 333, 338 (2012) (holding that the trial court erred in failing to make written findings regarding relevant criteria under N.C. Gen. Stat. § 7B-1110(a)). A relevant factor is one that has "an impact on the trial court's decision[.]" *In re D.H.*, 232 N.C. App. 217, 221-222, 753 S.E.2d 732, 735 (2014). But because we have already determined that the trial court erred in concluding that there were grounds to adjudicate the termination of parental rights under N.C. Gen. Stat. § 7B-1111(a)(7), we need not address respondent's argument regarding the lack of findings as to disposition.

D. Delay in Entry of Order

[5] In addition, we note that the adjudicatory and dispositional hearing took place on 26 January 2015, but the trial court did not enter the termination order until 23 July 2015, roughly six months later. N.C. Gen. Stat. § 7B-1109(e) provides in pertinent part:

The adjudicatory order shall be reduced to writing, signed, and entered *no later than 30 days* following the completion of the termination of parental rights hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

N.C. Gen. Stat. § 7B-1109(e) (2015) (emphasis added). Regarding the dispositional stage, N.C. Gen. Stat. § 7B-1110(a) similarly provides in pertinent part:

Any order shall be reduced to writing, signed, and entered *no later than 30 days* following the completion of the termination of parental rights hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court

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scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

N.C. Gen. Stat. § 7B-1110(a) (emphasis added). Our Supreme Court explained that in the event that a trial court fails to comply with the procedure described above, a party may petition this Court for a writ of mandamus. *In re T.H.T.*, 362 N.C. 446, 456, 665 S.E.2d 54, 60-61 (2008). “[I]n almost all cases, delay is directly contrary to the best interests of children, which is the ‘polar star’ of the North Carolina Juvenile Code.” *Id.* at 450, 665 S.E.2d at 57. We note that the trial court violated N.C. Gen. Stat. § 7B-1109(e) and N.C. Gen. Stat. § 7B-1110(a) by entering its termination order roughly six months after the adjudicatory and dispositional hearing.

IV. Conclusion

For the foregoing reasons, we reverse the trial court’s order terminating respondent’s parental rights.

REVERSED.

Judges BRYANT and DIETZ concur.

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, PETITIONER

v.

CHAUNCEY JOHN LEDFORD, RESPONDENT

No. COA15-595

Filed 3 May 2016

1. Public Officers and Employees—discharge—political discrimination—prima facie showing—working for public agency in non-policymaking position

In an action by a discharged State employee who alleged political discrimination, the employee met the first element of the required prima facie case by showing that he had worked for a public agency in a non-policymaking position at the time of his termination. He had

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been the Alcohol Law Enforcement (ALE) Director (a policymaking position) before requesting a return to the field as an ALE Special Agent ahead of the governor's office changing to a new party. He was discharged as a Special Agent.

2. Public Officers and Employees—discharge—political discrimination—prima facie showing—party affiliation

A discharged State employee who alleged political discrimination met the second element of the required prima facie showing, affiliation with a certain political party, where the record disclosed substantial evidence of the employee's affiliation with the Democratic Party.

3. Public Officers and Employees—discharge—political discrimination—prima facie showing—discharge politically motivated

In an action by a discharged State employee who alleged political discrimination, the trial court did not err by admitting statements alleged to be hearsay on the issue of the third element of plaintiff's prima facie case, that the discharge was politically motivated. The statements were not offered to prove the truth of the matters asserted, but to show the mental states and motives of the speakers. Moreover, Administrative Law Judges have broad discretion to admit probative evidence, and admitting this testimony was not an abuse of discretion.

4. Evidence—discharge of State employee—political discrimination—relevance—prejudice

In an action by a discharged State employee who alleged political discrimination, testimony concerning statements made that the chief operating officer of the agency were relevant and not prejudicial. The challenged testimony was highly probative and its probative value was not substantially outweighed by the danger of unfair prejudice.

5. Public Officers and Employees—discharge—political discrimination—legitimate nondiscriminatory reason

An administrative law judge did not err by concluding that Ledford proved the legitimate nondiscriminatory reason the Department of Public Safety articulated for Ledford's termination was merely a pretext for political affiliation discrimination. The conclusion was strongly supported by the record.

6. Public Officers and Employees—discharge—political discrimination—public policy

The State's argument that it would be bad policy to uphold an administrative law judge's decision that a state employee was discharged for political reasons because it would entrench partisan political employees was declined.

Appeal by Petitioner from order entered 29 December 2014 by Judge C. Philip Ginn in Madison County Superior Court. Heard in the Court of Appeals 4 November 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for Petitioner.

Leake & Stokes, by Larry Leake, for Respondent.

STEPHENS, Judge.

Petitioner North Carolina Department of Public Safety ("DPS") appeals from the trial court's order affirming the Final Decision of the Office of Administrative Hearings ("OAH") by Senior Administrative Law Judge ("ALJ") Fred G. Morrison, Jr., in favor of Respondent Chauncey John Ledford on his claim for political affiliation discrimination. DPS argues that ALJ Morrison erred in concluding that Ledford satisfied his *prima facie* burden and proved by a preponderance of the evidence that the purportedly legitimate nondiscriminatory reasons DPS articulated for terminating him were merely pretextual. We affirm.

Factual Background

Ledford was born on 8 July 1965 and grew up in Madison County, where his father, a registered Democrat, served as a member of the Board of Commissioners for 20 years. In 1990, Ledford began a career in law enforcement as a Buncombe County Deputy Sheriff. In September 1993, Ledford joined the Alcohol Law Enforcement Division ("ALE") as a Special Agent in its field office in Asheville, where he served for just over five years and eventually attained the rank of Special Agent II, which was the highest available under the Division's then-extant system of classification. In the years since, ALE has adopted a three-tiered system of classifying its Special Agents based on their experience and competence into Contributing-, Journeyman-, and Advanced-levels, with recurring postings for vacancies to provide opportunities for lower level agents to compete for promotions between these ranks and pay increases within them.

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In November 1998, Ledford, a registered Democrat since the age of 18, was elected Sheriff of Madison County. Although he resigned from his employment with ALE at that time, Ledford subsequently rejoined ALE as a Special Agent Reserve in 2002 and continued to serve in that capacity throughout the next seven years of his tenure as Sheriff.

In October 2009, Ledford was appointed Director of ALE by Governor Beverly Perdue upon the recommendation of her appointed Secretary of Crime Control & Public Safety, Reuben Young. As Director of ALE, Ledford served in a policy-making exempt position until the expiration of Governor Perdue's term at the end of 2012. During Ledford's tenure as Director, ALE merged with several other State law enforcement agencies into the newly created DPS, of which Young was named Secretary. In January 2012, in his final performance evaluation as Director, Ledford was assessed at the Advanced competency level and his performance was rated as "Outstanding" by his superiors. Throughout his years in law enforcement, Ledford completed hundreds of hours of advanced law enforcement training through the FBI National Academy, the DEA Drug Unit Commanders Academy, and the State's Sheriffs Training Standards Division. He also became a certified general instructor for the State, with a specialized firearms instructor certification, and taught courses in ALE basic training programs and at the community college level.

In late 2012, Ledford decided that he wanted to return to the field as an ALE Special Agent after his term as Director concluded. During a training exercise in Wilmington in late October, Ledford approached Secretary Young about the possibility of obtaining a reassignment to ALE's district office in Asheville. Secretary Young advised Ledford that although he was unfamiliar with the necessary procedures for approving such a move, he was receptive to the idea, provided it could be done ethically and legally. The subject came up again several days later during a meeting in Raleigh among Secretary Young, Ledford, Chief Operating Officer of DPS Mikael Gross, Deputy Director of Operations for ALE Richard Allen Page,¹ and Director of Human Resources for DPS Alvin Ragland. After further discussion, Young directed Ledford to begin the process of requesting a reassignment and also asked Gross and Ragland to determine the legal and logistical requirements to facilitate the process.

1. ALE's Deputy Director of Operations, Richard Allen Page, had also previously worked in the Asheville office and made a similar reassignment request in late 2012 which followed a similar approval procedure to the process discussed *infra* for Ledford's request. Page was ultimately reassigned to serve as the Special Agent in Charge ("SAC") of ALE's Asheville office, where he served as Ledford's supervisor until April 2013.

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Pursuant to Young's request, Gross asked ALE Deputy Director for Law Enforcement Services Mark Senter whether there were any openings for a Special Agent in the Asheville office. Senter advised Gross that although there was a vacant position for a Contributing-level Special Agent in the Wilmington office, there were currently no open postings in Asheville. However, Senter also determined, based on a 2010 ALE needs-assessment and the recent retirement of an Asheville-based agent, that there was a clear business need for an additional Special Agent in the Asheville office, and that that need was greater than the need for an agent in Wilmington. Gross concluded that pursuant to section 18B-500(g) of our General Statutes, which provides authority for shifting ALE personnel from one district to another, see N.C. Gen. Stat. § 18B-500(g) (2015), Secretary Young could lawfully transfer the vacant Wilmington Special Agent position to the Asheville office and reclassify it from the Contributing-Level to the Advanced-Level to reflect Ledford's competency level. Senter consulted with DPS Deputy Director of Human Resources, Tammy Penny, who advised him that "the position would still have to be posted . . . to ensure we meet the statut[ory] requirement [imposed by N.C. Gen. Stat. § 126-7.1(a)] to make a position vacancy available via a minimum of a 5[-]day posting except for certain situations defined in policy" by the Office of State Personnel ("OSP") and in the State Personnel Manual. After consulting Section 2, Page 21 of the State Personnel Manual, which provides guidelines for the recruitment and posting of vacancies and lists examples for which posting requirements are inapplicable, Gross concluded that the vacant Special Agent position would not need to be posted publicly or as part of ALE's internal competitive applications process. In addition, based on their review of Section 4 of the State Human Resources Manual, which governs salaries for State employees who are demoted or reassigned, Gross and Senter determined that Ledford's salary would have to be reduced to the maximum available for an Advanced-level Special Agent.

Meanwhile, Ragland contacted the Interim Director of OSP, Ann Cobb, to inquire regarding the legality of Ledford's requested reassignment. Cobb informed Ragland that such a reassignment was legally permissible. Cobb later testified that although she advised Ragland that "the reassignment technically could be done, that an agency head can waive posting, can transfer a position and have a reassignment down of an employee," she also sounded a note of caution that such a reassignment "was something to be very careful with, that there needed to be a strong business case for doing it, and that it could be challenged by employees or applicants who were interested in those positions." Cobb testified further that she advised Ragland that because Ledford needed three

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more years of service before he qualified as a career State employee, he would not be entitled to the protection from termination afforded to such employees, which meant that a new administration could terminate him without just cause.

On 27 November 2012, Ledford formally requested reassignment from his position as Director to a position as a Special Agent in Asheville, effective 1 January 2013. In a memorandum to Secretary Young, Ledford stated that it was his understanding that “because my current salary exceeds the maximum pay grade for the Special Agent position, [OSP] requires a salary reduction to the maximum of my assigned position.” On 29 November 2012, Ledford signed a Personnel Action Clearance (“PAC”) Form requesting reassignment to an Advanced-level Special Agent position with a salary set at \$65,887.00, which was the maximum available for his requested position and represented a 41% reduction from his \$110,667.00 salary as ALE Director. Ledford later testified that the purpose of this PAC Form was to ensure that every individual who needed to review the propriety of the requested personnel action had the opportunity to do so as it moved through the approval process, and that his signature as “Division Director” was required to verify that his most recent employee performance evaluation was consistent with the action recommended. The form was subsequently approved and signed by Gross as Deputy Secretary for DPS, Ragland for Human Resources, Marvin Mervin for Fiscal, and Secretary Young. Young also cleared the request with Governor Perdue’s office, which advised him that as long as the move was legal, the Governor had no objections. On 19 December 2012, Young issued a memorandum approving Ledford’s reassignment request to a Special Agent position in ALE’s Asheville office. The position was formally transferred on 1 January 2013, and Ledford began his new employment as an Advanced Special Agent for the Asheville ALE office the next day.

In the months following his return to the field, Ledford led all agents in his new district in arrests made, and his supervisors did not receive any complaints about his performance. However, Gross, who served as DPS liaison for Republican Governor-elect Pat McCrory’s Justice and Public Safety transition team in December 2012, subsequently testified that when he was asked during a transition team meeting whether or not any exempt DPS employees were being moved to non-exempt positions, he replied that Ledford was one of three such DPS employees.²

2. The other two exempt DPS employees moved to non-exempt positions were Page and the former Director of Prisons. There is no indication in the record before us that either was investigated or disciplined as a result of their reassignments.

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Gross testified further that after news broke of Ledford's reassignment, he received a phone call from Henderson County Republican State Senator Tom Apodaca, who informed Gross that Ledford's reassignment "shouldn't have occurred and that they're going to fix that if they even have to just get rid of the position in the budget." Gross then reported Apodaca's statement to incoming-DPS Secretary Kieran J. Shanahan two days before Shanahan's scheduled swearing-in. Gross testified that during their time together on the transition team, he and Shanahan had "intimate conversations about personnel, personnel decisions, transition, [and] recommendations for employment" within DPS. When Gross conveyed Apodaca's statement to Shanahan, Shanahan agreed, stating, "Well, you know, [Ledford's reassignment] really shouldn't have happened."

On 6 February 2013, ALE Advanced-level Special Agent Kenneth Simma filed a grievance with the SAC of his district alleging that Ledford's reassignment, which Simma referred to as a "demotion," was "in direct violation of the existing [ALE] policy and contrary to all existing statute[s]." Specifically, Simma complained that Ledford's new position should have been posted so that other Advanced-level ALE Special Agents could have had an opportunity to compete for the higher pay that accompanied it. Simma also questioned Ledford's qualifications for an Advanced-level position, and alleged that Ledford's new salary created a division-wide salary inequity. Simma's grievance was denied by his district's SAC on 8 February 2013, and by ALE Acting Director Senter on 13 February 2013, both of whom concluded that the matters Simma raised in his grievance were non-grievable issues.

Simma subsequently testified that he had previously been subjected to disciplinary action by Ledford when Ledford was ALE Director; that he had received outside assistance in preparing his grievance; and that he shared his grievance with another ALE Advanced-level Special Agent, Patrick Preslar, who then filed a nearly identically worded grievance against Ledford on 15 February 2013. Preslar's grievance was denied as non-grievable by his district's SAC on 19 February 2013, and Senter reached the same conclusion on appeal on 25 February 2013. Both Simma and Preslar appealed the denial of their grievances directly to Secretary Shanahan, who likewise concluded that the issues they raised were non-grievable, and thus denied their appeals. Shanahan outlined his reasoning in a memo addressed to Simma dated 4 March 2013, in which he explained that Simma's allegation of a division-wide salary inequity did not constitute a dispute over performance pay and was not timely filed; that despite Simma's complaint that Ledford's new position

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should have been posted, the ALE's Grievance Policy "does not afford employees a right to file a grievance for failing to post a vacant position"; and that although ALE agents could grieve a "denial of promotion due to failure to post," they could only prevail "when such failure arguably resulted in the grievant being denied a promotion," a requirement that Simma could not satisfy since he was already an Advanced-level Special Agent. Shanahan stated similar bases for rejecting Preslar's appeal.

The grievances Simma and Preslar filed against Ledford were also reviewed by DPS Employee Relations specialist Margaret Murga. On 19 February 2013, Murga sent an email to DPS deputy general counsel Joseph Dugdale inquiring whether he had reviewed the grievances. Neither Murga nor Dugdale had any involvement in Ledford's reassignment, but on 25 February 2013, Dugdale replied via email to Murga that the issues raised by Simma and Preslar were non-grievable and that the "position did not have to be posted in this case because G.S. 126-5(e) specifically allows the [DPS] Secretary to demote an exempt employee from his or her position in the department." Dugdale stated further that 25 NCAC 01h. 0631(e)(8) provides an exemption from the general posting requirement for "[v]acancies to be filled by an eligible exempt employee who has been removed from an exempt position and is being placed back in a position subject to all provisions of the State Personnel Act." The next day, after Murga replied to ask Dugdale whether Ledford had been demoted or reassigned, Dugdale responded that Ledford "was transferred to a lower position, his salary was reduced and his responsibilities are less demanding; therefore it is a demotion." In response, Murga sent Dugdale an email with the notation "fyi" and a 26-page attachment that included documentation from Ledford's reassignment. On 27 February 2013, Dugdale replied to Murga that he had reviewed the documents she had sent him, believed they "tend[ed] to shed a somewhat different light on what happened in the 'reallocation' of Director Ledford," and posed a list of approximately 10 follow-up questions for Murga to investigate, including whether Ledford had been reassigned to a vacant position or had been transferred into a newly created position; whether the position was required to be posted; whether Ledford's transfer should have been approved by OSP and, if so, whether it had been and by whom; and whether it was normal practice for Gross to have signed off on Ledford's PAC Form as Deputy Director.

In the weeks that followed, Murga reviewed ALE and OSP policies regarding salary and posting requirements; found evidence of three or four instances in 2012 when openings for Advanced-level ALE Special Agent positions had been posted internally for competitive applications;

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confirmed that Ledford's new position had originally been classified as a Contributing-level opening in ALE's Wilmington office; and concluded that Ledford's position had never been posted, nor had an updated job description been provided, nor had OSP given approval to re-classify it from the Contributing- to the Advanced-level. However, Murga later testified that she was unaware that there had been a need for another Special Agent in the Asheville office since 2010, and she also acknowledged that she had been unable to fully answer several of Dugdale's questions—and had provided erroneous answers to others—because she did not speak to anyone involved in the decision-making process for Ledford's reassignment during her investigation into Ledford's reassignment.

At some point, Dugdale advised Commissioner of Law Enforcement Frank Perry that Murga had discovered that “there was more to [the] story” of Ledford's reassignment, and Perry urged Dugdale to continue to articulate, record, and discuss the findings from Murga's investigation. In early March, Murga and Dugdale met with several OSP representatives, who informed them that Ledford's new position should have been posted. Murga then relayed her findings to her supervisor, DPS Employee Relations manager Kim Davis-Gore. On 14 March 2013, Murga and Dugdale shared the results of their investigation with Perry during a brief meeting. That same day, Dugdale authored a memo to Perry in which he explained that Davis-Gore had consulted with HR and OSP regarding the alleged irregularities involved in Ledford's reassignment and “provided what they consider to be two (2) viable options” for addressing the situation. As Dugdale explained:

Option 1 is to simply ignore the irregularities and maintain the status quo. Option 2 is to undo the wrong by moving the position back to Wilmington and readjusting it back to the contributing competency level since there is no supporting documentation to justify why it was upgraded other than to accommodate Director Ledford's request for a reallocation. They believe, however, that because John Ledford is currently in the position, he should be afforded an opportunity to transfer with the position.

Despite Davis-Gore's recommendations, Dugdale opined in his memorandum to Perry that while he agreed that affording Ledford the opportunity to transfer to Wilmington “is an option,” he did not agree that it was required because Ledford “is not a career state employee and, therefore, is not afforded the protections of the State Personnel Act.” Nevertheless, as Dugdale also cautioned, “It should be pointed out that [Ledford] most likely will challenge [DPS] in either event arguing

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that the decision to move the position was based on his political affiliation” in violation of section 126-36 of our General Statutes, and thus DPS would “need to show that whatever action is taken, is based on an identifiable legitimate business need.”

On 10 April 2013, Ledford received a telephone call from ALE Acting Director Senter, who informed Ledford that he had been ordered to terminate Ledford’s employment and would be forwarding a memorandum authored by Perry (“the Perry Memo”) explaining the reasons for this decision. The Perry Memo, a version of which was hand-delivered to Ledford later that day,³ explained that DPS’s Employee Relations Section had “uncovered ethical and legal concerns” while reviewing the two grievances filed against Ledford’s reassignment. Specifically, the Perry Memo characterized the fact that Ledford had signed the PAC Form he used to request his reassignment on the line designated for the ALE Director’s signature as an “inappropriate deviation from normal practice [which] had the effect of sending a clear message that neither [HR] nor Fiscal had any real authority to deny your request.” The Perry Memo also took issue with Ledford’s salary, deeming it excessive, given that it made Ledford the highest-paid ALE Special Agent in the State, and in violation of State Personnel policy. Further, the Perry Memo stated that there had been no legitimate business need to transfer any Special Agent position from Wilmington to Asheville or to reclassify it from the Contributing-level to the Advanced-level, and that even if there had been a legitimate business need, the position should have been posted internally for competitive applications as required by State law and departmental policy. In light of the fact that Ledford did not qualify as a career State employee, the Perry Memo determined there was no lawful authority for Ledford’s reassignment from his exempt position as Director to a non-exempt position, and therefore concluded that Ledford’s “so-called ‘reassignment’ was nothing more than an attempt to circumvent the provisions of the State Personnel Act in that, at the time you submitted your request, you knew a new Department Head would be appointed effective January 1, 2013,” once Governor McCrory took office, “and that it was inevitable that you would be separated from state service.” Finally, as the Perry Memo summarized, Ledford

3. As detailed *infra*, the version of the Perry Memo that Ledford received was dated 9 April 2010 and had not been signed by Perry. However, it became clear during the subsequent OAH hearing that Perry had signed a different version of the memo dated 10 April 2013, which DPS considered the official copy. Ledford’s counsel cross-examined Perry extensively on the differences between these two versions, which were stylistic, rather than substantive.

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either knew, or should have known: 1. that your reassignment circumvented the existing statutory scheme pertaining to policy exempt employees; 2. that by reassigning yourself to a position to which you were not entitled, you violated the promotional rights of subordinate employees; 3. that, even if you were entitled to a reassignment to a Special Agent position, the salary requested and approved is excessive pursuant to state personnel policy; and 4. the approved salary amount exceeds the salary of every other Special Agent in the division, thereby creating an unwarranted salary inequity. As ALE Director, you knew or should have known that you did not have any reassignment rights, that it was inappropriate to reallocate and subsequently transfer a position for any purpose other than a legitimate business need, that the position you were “reassigned” to was required to be posted, and that your new salary was clearly excessive. Accordingly, your participation in the events described herein cannot be viewed as anything less than unacceptable personal conduct on your part.

The Perry Memo concluded by informing Ledford that he would be terminated effective immediately, that he had no right to appeal the decision, and that his position in Asheville would be moved back to Wilmington and reclassified at the Contributing-level due to the “total lack of any identifiable legitimate business need to justify” the original transfer. The Perry Memo was subsequently released to the media. On 17 April 2013, Secretary Shanahan sent an email to Governor McCrory’s Chief of Staff, Thomas Stith, detailing several scheduled public forums and providing a link to a news story on the *Asheville Citizen-Times* website covering Ledford’s termination. In his email, Shanahan advised, “Thought you and G should be aware of Ledford dismissal—done by the book. Assume it will be appealed.”

Procedural History

On 8 May 2013, Ledford filed a petition for a contested case hearing with the OAH, alleging that his dismissal was without just cause and resulted from discrimination based on his political affiliation in violation of N.C. Gen. Stat. § 126-34.1(a)(2)(b) (2011), *repealed by* 2013 N.C. Sess. Law 382, § 6.1.⁴ On 16 August 2013, DPS filed a motion to dismiss

4. Ledford’s petition was timely filed before our General Assembly’s repeal of section 126-34.1 became effective on 21 August 2013.

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Ledford's claim for dismissal without just cause, given the fact that Ledford was not a career State employee, as well as a motion for summary judgment regarding Ledford's political affiliation discrimination claim. By order entered 1 November 2013, ALJ Morrison granted DPS's motion to dismiss Ledford's claim for dismissal without just cause, but denied the motion for summary judgment.

A three-day hearing on Ledford's political affiliation discrimination claim began on 2 December 2013 with ALJ Morrison presiding. During the hearing, Ledford testified that he had requested to be reassigned as a Special Agent because he missed working in the field and wanted to continue serving the State. Ledford testified further that apart from making initial inquiries about the proper way to return to the field, he was minimally involved in the decision-making process surrounding his reassignment and that Gross and Ragland had researched the appropriate procedures and told him that everything checked out. Ledford denied the Perry Memo's accusation that he approved his own reassignment, testified that it was his regular duty as ALE Director to sign employee PAC Forms in order to verify that their most recent performance evaluations were consistent with the personnel actions recommended, and explained that he had signed his own PAC Form in order to ensure that every individual who needed to review the propriety of his requested reassignment had the opportunity to do so as it moved through the approval process. Ledford also testified that there had indeed been a legitimate business need to reallocate a Special Agent position to Asheville, and noted that irrespective of the Perry Memo's promise to move the vacancy back to Wilmington, the number of ALE Special Agents in the Asheville office had remained the same as before his dismissal. Regarding his salary, Ledford testified on cross-examination, "The extent of my involvement in the setting of my salary was somebody walked into [my office] and handed me a piece of paper that says, you're taking a 41 percent reduction in pay, and this is your salary. And that's it." In addition, Ledford testified that not all vacancies that had arisen during his tenure as ALE Director had been posted, and it was his understanding that OSP and the State Personnel Manual provided for exceptions from the general posting requirement. Regarding his dismissal, Ledford noted his surprise to learn that he was even being investigated, let alone terminated, in light of the ALE's then-extant disciplinary procedures, which required that all employees, including probationary employees, be advised of any allegations against them and afforded an opportunity to respond before being subjected to discipline.

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Ledford also presented testimony during his case-in-chief from Gross, who testified about the phone call he received from Senator Apodaca and incoming-Secretary Shanahan's reaction to it. When DPS objected to this testimony on the basis of hearsay, the following exchange occurred:

[DPS Counsel]: Objection, Your Honor. I don't believe Senator Apadaka [sic] is a witness here today. He hasn't been identified. We're into hearsay testimony now for sure.

THE COURT: Well, he can say that he got a call.

[DPS Counsel]: And that wasn't my objection, Your Honor. He's testifying to exactly what Senator Apadaka [sic] may or may not have told him, which is not just, I received a phone call from Senator Apadaka [sic]. I wouldn't have an objection to hearsay on that grounds because he's not getting into the truth of what's been asserted.

THE COURT: Well, I tell you, because he's an officer of the [c]ourt, an attorney and all, and the OAH rules provide that an ALJ can admit any evidence that has probative value and determine what weight to give it, I'm going to overrule the objection and let him testify because hearsay is if it's unreliable and all, so I overrule.

Gross also testified that he reviewed Section 2, Page 21 of the State Personnel Manual and concluded that the position to which Ledford was reassigned did not need to be posted because it fit the exception for a vacancy "to be filled by an eligible exempt employee who has been removed from an exempt position and is being placed back in a position subject to all provisions of the State Personnel Act." Regarding Ledford's salary, Gross testified that he and Senter determined that State policy required that it be set at the maximum available rate for an Advanced-level Special Agent based on their review of Section 4, Page 29 of the State Human Resources Manual, which provides that "[w]hen the employee's current salary is above the maximum of the range for the lower class, the salary shall be reduced at least to the maximum of the lower range." Gross acknowledged that Ledford's new salary might not have been popular among the ALE's ranks because, as he explained,

I've worked for ALE for a number of years and I've worked in State government for a lot of years. And when it comes to salary, everybody is unhappy. I don't believe that any one person in ALE who [has] ever watched somebody else

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get promoted has not said, "They don't deserve it," or, "I would have done a better job." I believe that no matter who would have been put in [Ledford's] position, no matter if anybody made \$1,000 more, somebody else would have said "There's an inequity," and they would have thought that it was grievable.

Nevertheless, Gross testified that Ledford's salary did not result in a grievable inequity because State policy required it and also because the next highest paid ALE Advanced-level Special Agent at the time of Ledford's termination had a salary of approximately \$61,000.00, and "in order for there to be a grievable inequity, there has to be more than \$10,000 between the person who is at top pay and the next person below him."

In addition to Gross's testimony, Ledford presented testimony from the other individuals who were directly involved in the decision-making process that led to his reassignment. Senter, Page, and Ragdale each testified that there had been a legitimate need for an additional Special Agent in Asheville; that they believed OSP regulations allowed for Ledford's reassignment without posting the position and required that his salary be set at the maximum rate available; and that they could not remember a single previous instance when an ALE employee had been terminated by telephone or any other method without first being advised of the allegations against him and afforded an opportunity to respond to those allegations. Indeed, Senter testified that although it was common for HR and DPS to review grievances from ALE employees, he was unaware of any prior examples of such reviews resulting in disciplinary investigations like the one conducted by Murga and Dugdale. Both Senter and Page continued to work for ALE after the McCrory Administration took office, but neither was approached by Murga, Dugdale, Perry, or anyone else during DPS's disciplinary investigation into Ledford's reassignment.

Former Secretary Young testified that although he was unaware of any previous instances of an ALE Director or other policymaking exempt employee being transferred downward, he was certain that Ledford had not reassigned himself. Young testified further that the ultimate decision to approve Ledford's request was his own to make; that he was satisfied that Gross, Senter, and Ragland had followed appropriate procedures in terms of transferring the position to Asheville and reclassifying its experience level; and that neither OSP nor HR nor the Governor's office had objected. Young also testified that Ledford's salary was legally permissible and, although he conceded on cross-examination that in his view, Section 4 of the State Human Resources Manual did not *require*

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Ledford's salary to be set at the maximum rate, he believed it was appropriate for an employee with Ledford's experience and qualifications. Indeed, Young testified that he believed it had been in ALE's best interests to retain Ledford as a Special Agent, given his longstanding dedication to the Division and the fact that Ledford "was probably one of the most hard-working and one of the most loyal employees I have ever worked with or had ever been around. Quite frankly, in that position, I wish I would have had twenty thousand more of [him]."

At the close of Ledford's evidence, DPS made a motion for directed verdict in its favor, which ALJ Morrison denied. Throughout its case-in-chief, DPS contended that irrespective of whether Ledford could make out a *prima facie* case for political affiliation discrimination, his claim should ultimately fail because his termination was based on the legitimate, nondiscriminatory reasons detailed in the Perry Memo. Murga and Dugdale testified about the investigation they undertook in response to the grievances filed by Simma and Preslar. In keeping with testimony by Cobb and Penny from OSP, both Murga and Dugdale testified that they did not believe OSP policy required Ledford's new salary to be set at the maximum rate; that they did not believe the exception to the posting requirement provided under Section 2, Page 21 of the State Personnel Manual that Gross had identified actually applied to Ledford's new position because in their view, Ledford did not qualify as an "eligible" employee, given that he had not yet attained career status; and that once Ledford assumed his new position, he was a non-exempt probationary employee who could be terminated for any reason so long as the reason was not illegal.

Murga testified further that she was unable to find any evidence that OSP had given approval to re-classify Ledford's new position to the Advanced-level; that she was unaware of any legitimate business need to transfer a position to Asheville; and that she believed the position should have posted internally for competitive applications as several other Advanced-level vacancies had been posted in 2012. However, Murga acknowledged on cross-examination that she never spoke to anyone who had been involved in the decision-making process for Ledford's reassignment.⁵ Dugdale testified that although he initially believed

5. For example, Murga reported to Dugdale that she did not know why Gross had signed off on Ledford's PAC Form instead of Chief Deputy Secretary Rudy Rudisell, who she believed should have signed the form instead. However, during the OAH hearing, Ledford and Gross both testified that Rudisill had been removed from the chain of command within ALE, leaving Gross to fill in and report directly to Secretary Young. When

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Ledford's reassignment was proper when Murga brought her concerns to his attention, he now believed that he should have been consulted directly during the decision-making process. Dugdale testified further that he viewed the fact that Ledford had signed off on his own PAC Form as "totally inappropriate" and considered Ledford's request for the maximum available salary a "total breach of trust." Dugdale also testified that although Murga's supervisor, Davis-Gore, had provided only "two viable options" for how DPS should deal with the situation—either do nothing or else allow Ledford the opportunity to transfer to Wilmington—the OSP representatives he and Murga had met with prior to informing Davis-Gore of their investigation's findings had indicated that they would be "comfortable" with Ledford's dismissal. Like Murga, Dugdale testified that during the investigation of Ledford's reassignment, he had not spoken to anyone involved in the decision to approve Ledford's request.

By the time of the hearing, Perry had been promoted by Governor McCrory to the position of DPS Secretary. Perry testified that he first learned of Ledford's reassignment in the "Under the Dome" section of the *News & Observer* (Raleigh), but did not look any deeper into the matter until Dugdale notified him of Murga's investigation, and that he never consulted with Secretary Shanahan or Governor McCrory or anyone other than Dugdale or Murga about Ledford's reassignment or the two grievances filed against him. When asked on direct examination why he chose to dismiss Ledford despite the fact it was not among the "two viable options" Davis-Gore had recommended, Perry emphasized the total lack of any State or federal precedent to allow for an action like Ledford's reassignment, which he believed, based on his discussions with Dugdale and Murga, amounted to "simply self-dealing to the level of a violation of law and policy." When asked why he did not consult with anyone who had been involved in the decision-making process for approving Ledford's reassignment, Perry stated that, "I felt to keep it clean, I need not consult others; and I made the decision based on the evidence I saw." When asked on cross-examination on what specific evidence he based his determination that Ledford's reassignment violated State law and OSP policy, Perry alluded to the fact that Ledford's new

Murga testified, she admitted she had not spoken to anyone involved in the decision-making process for Ledford's reassignment and was consequently unaware that Gross had assumed Rudisill's responsibilities. Murga agreed that in light of this news, it was appropriate for Gross to have signed off on Ledford's PAC Form and thus conceded that her answer to Dugdale's question had been erroneous.

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position was never posted and his reassignment had not been approved by OSP. However, Perry also conceded that he had no idea Cobb had been consulted as Interim Director of OSP in 2012 and had advised that the reassignment was, in fact, legal.

When asked for specific evidence to support his conclusion that Ledford had reassigned himself, Perry initially struggled to identify any basis to support his accusations of self-dealing before eventually testifying that Young's 19 December 2012 memo approving Ledford's reassignment "says that he had requested the assignment, 'he' being Ledford." Perry subsequently conceded that such a request would not itself be illegal, but insisted that "[i]t seems to me the reassignment in its totality was a matter of violation of State law and [OSP] policy" and later clarified that it was his understanding "that there was no precedent [for] this move, period." Throughout his testimony, Perry contended that the decision to dismiss Ledford was his alone; however, on cross-examination, Perry acknowledged that he was not the author of the Perry Memo and that he did not know who wrote it or why two different versions had been prepared. In addition, Perry acknowledged that after Ledford's dismissal, he signed a formal report to the Criminal Justice Enforcement and Training Standards Commission that stated that Ledford had not been subject to any investigation or inquiry concerning illegal or unprofessional conduct within 18 months of his dismissal.

On 31 December 2013, ALJ Morrison issued a Final Decision in this matter finding in Ledford's favor that his dismissal was the result of discrimination based on his political affiliation. In his Final Decision, ALJ Morrison made factual findings that Ledford was well-qualified to be an Advanced-level ALE Special Agent; that former Secretary Young had acted pursuant to his statutory authority in approving Ledford's reassignment request; that upon learning of Ledford's reassignment, incoming Republican officials in Governor McCrory's Administration had been disappointed Ledford was no longer in a policy-making exempt position where he would be subject to termination; that upon returning to the field in a non-exempt position, Ledford performed very well; that Perry had made his decision to terminate Ledford based largely on two already dismissed employee grievances despite the fact that Perry "knew nothing about [Ledford's] qualifications, never sought information from him, Secretary Young, his deputies, or his HR personnel" and "also ignored suggestions from employee relations and state personnel representatives to maintain the status quo or move the position and [Ledford] to Wilmington"; and that, contrary to ALE's internal disciplinary policy,

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Ledford was never given notice of the charges against him or an opportunity to respond.⁶

Based on these findings of fact, ALJ Morrison concluded that Ledford had met his *prima facie* burden “by establishing that he was a very prominent Democrat non-policymaking employee of [DPS] brought in during a Democrat[ic] administration who was hoping to continue his State employment under an incoming Republican administration.” Moreover, Ledford had also established that DPS

treated him differently than other ALE Special Agents in failing to follow its own ALE internal disciplinary policy by not providing him notice of his being investigated; not allowing him an opportunity to respond to the charges against him by two disgruntled employees who[] had been disciplined; not involving his immediate supervisors in an investigation and decision to terminate his employment. [Ledford] has also raised inferences by showing [DPS] focused upon holding him responsible for actions by his Democrat[ic] superiors in late 2012 and terminating him without regard to the very good job he was doing as a field agent in 2013; failing to provide a probationary employee with any counseling or suggestions concerning how he could improve his job performance; ignoring suggestions from personnel and legal professionals to let the matter rest or transfer the position with [Ledford] back to Wilmington. The Republican transition team had inquired about DPS plans to move any exempt employees into non-exempt

6. ALJ Morrison also noted in his factual findings that DPS “failed to produce discovery in a timely manner. Some was produced on the evening of the last business day before hearing and during the hearing. This was prejudicial to [Ledford] as it required his counsel to spend excessive amounts of time seeking production of the discovery and affected [Ledford’s] ability to conduct follow-up discovery and adequately prepare the case.” We note here that the last business day before the hearing was the day before Thanksgiving, and that after 6:00 that evening, DPS sent Ledford’s counsel an email with numerous attachments that included, *inter alia*, the memorandum Dugdale wrote to Perry informing him of the “two viable options” Davis-Gore provided for resolving the situation and other documents that had never previously been provided. We also note, however, that it appears from the OAH transcript these delays in discovery were not the fault of DPS’s counsel, who appears to have conducted himself admirably under the circumstances given that, as he explained to ALJ Morrison, he, too, was without access to these documents until he received them from DPS on the last business day before the OAH hearing, when he was the only person left in his office and had to successfully navigate technological setbacks in order to scan, download, and email them to Ledford’s counsel.

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positions prior to the administration change and were told of plans concerning [Ledford]. When informed about a Republican State Senator's negative remarks concerning the personnel transaction, Republican Secretary appointee Shanahan remarked "That should not have happened," indicating his state of mind coincided with the senator's and transition team's concerning [Ledford]. Finally, Secretary Shanahan thought it important to send an email at 9:47pm notifying the governor and his chief of staff that [Ledford] had been terminated, which suggests a political purpose was behind it. [Ledford] was a marked man politically.

After determining that Ledford had established his *prima facie* case, ALJ Morrison noted that the burden shifted to DPS to present evidence that Ledford's termination was based on a legitimate, nondiscriminatory reason and concluded that DPS had met this burden of production "by establishing that two disgruntled, formerly disciplined agents filed grievances complaining about how [Ledford] became a field agent and his salary, which led to an investigation resulting in his termination without following the ALE's internal disciplinary procedures." At that point, as ALJ Morrison explained, the burden shifted back to Ledford "to prove that [DPS's] reason for terminating [Ledford] as it did was merely a pretext, and not a legitimate, nondiscriminatory reason."

ALJ Morrison concluded that Ledford had met his ultimate burden of proving by a preponderance of the evidence that the purportedly legitimate reasons DPS had given to justify terminating Ledford were a pretext for political discrimination. In support of this conclusion, ALJ Morrison explained that in addition to relying on Ledford's *prima facie* evidence, "it did not seem credible that [DPS's] action was not politically motivated," given that Ledford

had been performing very well as a field agent. His background, training, and experience qualified him very well for the [A]dvanced-level position and approved salary. It is more likely than not that had he not been such a prominent, life-long Democrat from Madison County he would not have been terminated, for the State needs such well-qualified ALE Special Agents.

Terminating [Ledford] in disregard of ALE's internal disciplinary policy and past practices with other agents indicates that it is more likely than not that political affiliation

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was a factor. [DPS's] primary concern appeared to be to reverse the decision by Secretary Young to demote/transfer [Ledford], with no regard to how he was performing his duties as a field agent and without exploring fairly all alternatives to termination. Secretary Young had exercised due diligence prior to deciding to demote/transfer/reassign [Ledford] who was at the time a policymaking employee whose consent was unnecessary.

Based on these conclusions, ALJ Morrison ordered that Ledford be reinstated to his position as an Advanced-level Special Agent in the Asheville ALE office at his previous salary rate and paid all compensation he otherwise would have been entitled to receive since the date of his dismissal, plus attorney fees and costs.

On 30 January 2014, DPS filed a petition for judicial review in Madison County Superior Court pursuant to section 150B-43 of our General Statutes. After a hearing held on 1 December 2014, the court entered an order on 29 December 2014 affirming ALJ Morrison's Final Decision. On 30 January 2015, DPS filed notice of appeal to this Court.

Analysis

DPS argues that ALJ Morrison erred as a matter of law in concluding that Ledford's termination resulted from political affiliation discrimination. We disagree.

Standard of Review

Section 150B-51 of our State's Administrative Procedure Act ("APA") establishes the standard of review we apply when reviewing an ALJ's Final Decision and provides that while this Court may affirm or remand such a decision for further proceedings, we may only reverse or modify such a 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 [ALJ];
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;

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(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.

N.C. Gen. Stat. § 150B-51(b) (2015). Our Supreme Court has observed that the first four grounds enumerated under this section “may be characterized as law-based inquiries,” whereas the final two grounds “may be characterized as fact-based inquiries.” *N.C. Dep’t of Envtl. & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (citations and internal quotation marks omitted). Moreover, “[i]t is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as the sufficiency of the evidence to support [an ALJ’s] decision are reviewed under the whole record test.” *Id.* (citation, internal quotation marks, and certain brackets omitted).

Under the *de novo* standard of review, the Court “considers the matter anew and freely substitutes its own judgment. . . .” *Id.* at 660, 599 S.E.2d at 895 (citation, internal quotation marks, and brackets omitted). However, our Supreme Court has made clear that even under our *de novo* standard, a court reviewing a question of law in a contested case is without authority to make new findings of fact. *See id.* at 662, 599 S.E.2d at 896 (“In a contested case under the APA, as in a legal proceeding initiated in District or Superior Court, there is but one fact-finding hearing of record when witness demeanor may be directly observed. Thus, the ALJ who conducts a contested case hearing possesses those institutional advantages that make it appropriate for a reviewing court to defer to his or her findings of fact.”) (citations and internal quotations marks omitted). Under the whole record test, the reviewing court “may not substitute its judgment for the [ALJ’s] as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*.” *Id.* at 660, 599 S.E.2d at 895 (citation omitted). Instead, we must examine “all the record evidence—that which detracts from the [ALJ’s] findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the [ALJ’s] decision.” *Id.* Substantial evidence is “relevant evidence a reasonable mind might accept as adequate to support a conclusion.” *Id.* (citations omitted). We undertake this review with a high degree of deference because it is well established that

[i]n an administrative proceeding, it is the prerogative and duty of [the ALJ], once all the evidence has been presented

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and considered, 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. The credibility of witnesses and the probative value of particular testimony are for the [ALJ] to determine, and [the ALJ] may accept or reject in whole or part the testimony of any witness.

City of Rockingham v. N.C. Dep't of Envtl. & Natural Res., Div. of Water Quality, 224 N.C. App. 228, 239, 736 S.E.2d 764, 771 (2012).

Background Law

The sole issue before ALJ Morrison was whether Ledford was improperly terminated from his position as an ALE Advanced-level Special Agent due to illegal discrimination based on his political affiliation. On issues of employment discrimination, North Carolina courts look to federal law for guidance. *See N.C. Dep't of Corr. v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983). Our Supreme Court has adopted the same three-pronged burden-shifting approach that the United States Supreme Court uses for proving discrimination:

- (1) The claimant carries the initial burden of establishing a *prima facie* case of discrimination.
- (2) The burden shifts to the employer to articulate some legitimate nondiscriminatory reason for the [adverse action affecting the employee].
- (3) If a legitimate nondiscriminatory reason for [the adverse action] has been articulated, the claimant has the opportunity to show that the stated reason for [the adverse action] was, in fact, a pretext for discrimination.

Id. at 137, 301 S.E.2d at 82 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668 (1973)). As our Supreme Court observed in *Gibson*, “[t]he burden of establishing a *prima facie* case of discrimination is not onerous” and “may be established in various ways,” including a showing of dissimilar treatment of the claimant as compared to other employees. *Gibson*, 308 N.C. at 137, 301 S.E.2d at 82-83 (citations omitted). This is because

[t]he showing of a *prima facie* case is not equivalent to a finding of discrimination. Rather, it is proof of actions taken by the employer from which a court may infer discriminatory intent or design because experience has

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proven that in the absence of an explanation, it is more likely than not that the employer's actions were based upon discriminatory considerations.

Id. at 138, 301 S.E.2d at 83 (citations omitted).

If the employee succeeds in establishing a *prima facie* case for political affiliation discrimination, "the employer has the burden of *producing* evidence to rebut the presumption of discrimination raised by the *prima facie* case." *Id.* (citations omitted; emphasis in original). "To rebut the presumption of discrimination, the employer must clearly explain by admissible evidence, the nondiscriminatory reasons for the employee's rejection or discharge." *Id.* at 139, 301 S.E.2d at 84. If the employer succeeds on this second prong, the burden then shifts back to the employee, who is "given the opportunity to show that the employer's stated reasons are in fact a pretext for intentional discrimination." *Id.*

Burden-shifting Prong 1: Ledford's prima facie case

First element: non-policymaking position

[1] DPS argues first that ALJ Morrison's Final Decision must be reversed because Ledford failed to establish a *prima facie* case of political affiliation discrimination given that he obtained his position as an Advanced-level Special Agent through "purely political machinations, and not through any competitive selective process." We disagree.

This Court has explained that to meet the initial burden of establishing a *prima facie* case for political affiliation discrimination, an employee must show that:

(1) the employee work[ed] for a public agency in a non-policymaking position (i.e., a position that does not require a particular political affiliation), (2) the employee had an affiliation with a certain political party, and (3) the employee's political affiliation was the cause behind, or motivating factor for, the . . . adverse employment action.

Curtis v. N.C. Dep't of Transp., 140 N.C. App. 475, 479, 537 S.E.2d 498, 501-02 (2000).

The gravamen of DPS's argument on this point appears to be that Ledford cannot satisfy the first element required to meet his *prima facie* case. However, DPS cites no authority to support its implicit premise that the purportedly improper manner in which DPS alleges Ledford was reassigned to his position as an Advanced-level Special Agent in

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ALE's Asheville office somehow precludes him from qualifying as having "work[ed] for a public agency in a non-policymaking position (i.e., a position that does not require a particular political affiliation)[.]" *Id.* at 479, 537 S.E.2d at 501. While this argument is certainly relevant to the second and third prongs of the burden-shifting analysis our Supreme Court articulated in *Gibson*, we are wholly unpersuaded it has any bearing on this specific issue. Moreover, our General Statutes define an exempt policymaking position as a position

delegated with the authority to impose the final decision as to a settled course of action to be followed within a department, agency, or division, so that a loyalty to the Governor or other elected department head in their respective offices is reasonably necessary to implement the policies of their offices.

N.C. Gen. Stat. § 126-5(b)(3) (2015). Although Ledford's prior position as ALE Director certainly fits these criteria, the record is devoid of any evidence that "loyalty to the Governor" is a required attribute of the ALE Special Agent position from which Ledford was terminated, or that Ledford had any authority to "impose the final decision as to a settled course of action to be followed within [ALE]" while serving in that role. *See id.*; *see also Curtis*, 140 N.C. App. at 479, 537 S.E.2d at 502 (finding the petitioner satisfied the first element of his *prima facie* case by demonstrating his job in the Department of Motor Vehicles Enforcement Section "is not a policymaking position for which a particular political affiliation may be required"). Consequently, we find DPS's argument on this issue to be without merit, and we conclude that Ledford worked for a public agency in a non-policymaking position at the time of his termination.

*Third element: causation*⁷

[3] DPS argues next that Ledford failed to establish the third required element of his *prima facie* case because there is no competent evidence in the record to support any inference that Ledford's termination was politically motivated. Specifically, DPS complains that Gross's testimony about the phone call he received from Republican State Senator

7. **[2]** We note here that DPS does not challenge whether Ledford met the second required element of his *prima facie* case. Because the record includes substantial evidence of Ledford's affiliation with the Democratic party, *see Curtis*, 140 N.C. App. at 479, 537 S.E.2d at 502, we conclude that Ledford did satisfy this element.

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Apodaca, and about incoming-DPS Secretary Shanahan's reaction to that call, was the only evidence that could support an inference of political motivation, but that this testimony should have been excluded as inadmissible hearsay. We are not persuaded.

Hearsay is "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801 (2015). Our State's APA provides that in all contested cases, "[e]xcept as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed; but, when evidence is not reasonably available under the rules to show relevant facts, then the most reliable and substantial evidence shall be admitted." N.C. Gen. Stat. § 150B-29(a). Title 26, Chapter 3 of the North Carolina Administrative Code governs the procedures to be followed during OAH hearings and provides that an ALJ "may admit all evidence that has probative value." 26 N.C.A.C. 03 .0122 (1) (2015).

In the present case, as noted *supra*, during the OAH hearing, Gross testified over DPS's hearsay objection that Apodaca told him Ledford's reassignment "shouldn't have occurred and that they're going to fix that if they even have to just get rid of the position in the budget," and that Shanahan had agreed that the reassignment "really shouldn't have happened." When DPS objected that Gross's testimony was hearsay offered to prove the truth of the matter asserted, ALJ Morrison correctly noted that the OAH rules "provide that an ALJ can admit any evidence that has probative value and determine what weight to give it" before he admitted Gross's challenged testimony.

Given that Ledford was not offering the statements by Apodaca and Shanahan to prove the truth of the matters they asserted—that is, that his reassignment was wrong and should not have occurred—but instead to show their existing mental states and motives, we are unpersuaded by DPS's argument that Gross's challenged testimony should have been barred as hearsay. *See* N.C. Gen. Stat. § 8C-1, Rule 803(3). Further, even assuming *arguendo* these statements were hearsay, our General Assembly, through the Administrative Code, has entrusted ALJs with broad discretion to admit probative evidence during administrative hearings, and we do not view ALJ Morrison's decision to admit Gross's challenged testimony as an abuse thereof. Indeed, Gross's challenged testimony is highly probative of Ledford's *prima facie* case, insofar as it tends to show that even before Murga and Dugdale began their disciplinary investigation into Ledford's reassignment, a prominent Republican lawmaker from Ledford's part of the State voiced his displeasure that

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Ledford had been reassigned to a non-policymaking exempt position and planned to take action, if necessary through the budget process, to eliminate Ledford's new position. The challenged testimony also tends to show that Shanahan, the top political appointee assigned by the McCrory Administration to run DPS, was aware of the partisan backlash to Ledford's reassignment and agreed the reassignment should not have occurred.⁸

[4] DPS argues that even if Gross's challenged testimony should not have been barred as hearsay, it still should have been excluded as irrelevant and prejudicial. Under Rule 401 of the North Carolina Rules of 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. However, evidence that is not relevant is inadmissible, *see* N.C. Gen. Stat. § 8C-1, Rule 402, and even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403. Here, while conceding that "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision" can constitute direct evidence of discrimination, *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 284-85 (4th Cir. 2004), *abrogation on other grounds recognized by Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243 (4th Cir. 2015), DPS insists that Gross's challenged testimony was irrelevant because the statements by Apodaca and Shanahan in late 2012 were stray or isolated remarks unrelated to showing Perry's motivations for terminating Ledford in April 2013, and were also prejudicial because they represented the only evidence that could support ALJ Morrison's determinations that Ledford "was a marked man politically" and that his termination was politically motivated.

In support of this argument, DPS relies primarily on Perry's testimony during the OAH hearing that the decision to terminate Ledford was his alone, and that he did not consult with Apodaca, Shanahan, or anyone other than Murga and Dugdale in reaching that decision. However, the record in this case also includes evidence that Shanahan treated the matter of Ledford's reassignment as something of a priority, given that

8. The challenged testimony also is highly probative of another element necessary to Ledford's claim, discussed *infra*, that the purportedly nondiscriminatory reason articulated by DPS for his termination was pretextual.

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he inquired about reassignments early on in the transition process and subsequently considered Ledford's termination important enough to advise the Governor's Chief of Staff about in a late-night email. Moreover, as discussed in greater detail *infra*, our review of the record, including Perry's testimony under cross-examination, reveals that Ledford's counsel raised serious doubts about the process through which Perry reached his decision to terminate Ledford, as well as the credibility of the purportedly legitimate nondiscriminatory reasons Perry and other DPS witnesses articulated for Ledford's termination. To the extent the evidence in the record and testimony during the OAH hearing supports conflicting inferences, it is well established that it is the ALJ's prerogative and duty "to determine the weight and sufficiency of the evidence" and "the credibility of witnesses and the probative value" of their testimony. *City of Rockingham*, 224 N.C. App. at 239, 736 S.E.2d at 771.

Furthermore, although DPS's argument that the probative value of Gross's challenged testimony was far outweighed by its potentially prejudicial impact focuses intensely on the last three sentences of a lengthy paragraph in which ALJ Morrison determined that Ledford had satisfied his *prima facie* burden, we note here that the very same paragraph of the Final Decision identifies several additional bases beyond Gross's challenged testimony to support this legal conclusion. Indeed, as ALJ Morrison explained, the evidence in the record and the testimony introduced during the OAH hearing tended to show that DPS: (a) never sought input from any of the decision-makers behind Ledford's reassignment in 2012 during its investigation into and decision to terminate his employment; (b) failed to follow ALE's internal disciplinary policy and therefore DPS "treated [Ledford] differently than other ALE Special Agents" by failing to provide him with notice that he was being investigated or any opportunity to respond to the charges against him; (c) ignored "suggestions from personnel and legal professionals to let the matter rest or transfer the position with [Ledford] back to Wilmington;" and (d) "focused upon holding [Ledford] responsible for actions by his Democrat[ic] superiors in late 2012 and terminat[ed] him without regard [for] the very good job he was doing as a field agent in 2013."

As discussed *infra*, DPS argues that these additional bases were insufficient to rebut the legitimate nondiscriminatory reasons it articulated to justify Ledford's termination under the second prong of the burden-shifting analysis established by *Gibson*. However, the issue immediately before us is whether Ledford established a *prima facie* case for political affiliation discrimination. Our Supreme Court has made clear that this is not an onerous burden, given that it only requires

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“proof of actions taken by the employer from which a court may infer discriminatory intent or design because experience has proven that in the absence of an explanation, it is more likely than not that the employer’s actions were based upon discriminatory considerations.” *Gibson*, 308 N.C. at 138, 301 S.E.2d at 83. In summation, we conclude Gross’s challenged testimony was highly probative and that, in light of the additional bases articulated in ALJ Morrison’s Final Decision, its probative value was not substantially outweighed by the danger of unfair prejudice. Accordingly, we hold that ALJ Morrison did not err in admitting Gross’s challenged testimony or in concluding that Ledford established a *prima facie* case for political affiliation discrimination.

Burden-shifting Prong 3: Pretext

[5] DPS argues next that ALJ Morrison erred in concluding that Ledford proved the legitimate nondiscriminatory reason DPS articulated for Ledford’s termination was merely a pretext for political affiliation discrimination. We disagree.

Our case law makes clear that once the employee has satisfied the three elements of his *prima facie* case, the burden shifts to the employer to articulate some nondiscriminatory reason for taking adverse action against him. *Curtis*, 140 N.C. App. at 481, 537 S.E.2d at 503. The employer’s explanation “must be legally sufficient to support a judgment” in its favor. *Gibson*, 308 N.C. at 139, 301 S.E.2d at 84. In addressing the employer’s purported nondiscriminatory reason,

[t]he trier of fact is not at liberty to review the soundness or reasonableness of an employer’s business judgment when it considers whether alleged disparate treatment is a pretext for discrimination.

. . . .

While an employer’s judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination. The employer’s stated legitimate reason must be reasonably articulated and nondiscriminatory, but does not have to be a reason that the judge or jurors would act upon or approve. . . .

* * *

The reasonableness of the employer’s reasons may of course be probative of whether they are pretexts. The

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more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one. . . .

Id. at 140, 301 S.E.2d at 84 (citation omitted). Once the employer meets its burden of production, "the burden then shift[s] back to [the employee] to prove [the employer's] alleged reason was in fact pretextual." *Curtis*, 140 N.C. App. at 481, 537 S.E.2d at 503. To carry this burden, it is permissible for the employee to rely on evidence offered to establish his *prima facie* case. *Gibson*, 308 N.C. at 139, 301 S.E.2d at 84.

In the present case, DPS argued during the OAH hearing and in its brief to this Court that it terminated Ledford for the legitimate nondiscriminatory reasons articulated in the Perry Memo. Specifically, DPS contends that Ledford improperly exploited his power as a policymaking exempt political appointee to circumvent the State Personnel Act's requirements and reassign himself; that Ledford's new position was transferred without approval from OSP back to Ledford's hometown without any legitimate business need; that the position should have been posted internally for competitive applications and the fact that it was not violated the promotional rights of the ALE Special Agents Ledford once supervised; that Ledford's salary in his new position was excessive and created an unwarranted salary inequity within ALE; and that there was no legal precedent or lawful authority to allow for Ledford's reassignment. Nevertheless, ALJ Morrison concluded that Ledford had met his ultimate burden of proving by a preponderance of the evidence that the reasons DPS articulated for his termination were merely a pretext. DPS argues this conclusion was erroneous because the only direct evidence that Ledford's termination was politically motivated came from Gross's challenged testimony and further complains that even if properly admitted, the statements by Apodaca and Shanahan, standing alone, were insufficient to rebut the legitimate nondiscriminatory reasons DPS articulated for Ledford's termination. In support of this argument, DPS relies on this Court's decision in *Enoch v. Alamance Cty. Dep't of Soc. Servs.*, 164 N.C. App. 233, 595 S.E.2d 744 (2004).

In *Enoch*, the plaintiff was a female African American DSS employee who alleged that she had been denied a promotion on two occasions due to race- and gender-based discrimination. 164 N.C. App. at 235, 595 S.E.2d at 747. In 1999, the plaintiff applied for the position of DSS program manager but was passed over in favor of a white female who did not meet the minimum qualifications for the position. *Id.* at 235, 595 S.E.2d at 748. When the plaintiff alleged during a subsequent meeting with DSS's then-director, Mr. Inman, that race had played a role in his decision to hire

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the less-qualified white applicant, he replied: “You people always tend to want to believe that there’s some race involved, there was no—that there’s discrimination involved. There was no race involved in this decision.” *Id.* at 236, 595 S.E.2d at 748. Inman later sent a letter to the plaintiff explaining his decision in greater detail, then retired at the end of the year. *See id.* The plaintiff did not appeal this decision any further, and in December 2000, she was one of three applicants for a newly created program management position. *See id.* DSS’s new director, Ms. Osborne, reviewed their applications, determined that all three applicants met the minimum qualifications, and “considered a number of factors in making her selection,” including a structured interview, prior work evaluations, input from the management team and each applicant’s subordinates about their interactions, consultation with human resources, and the experience and educational backgrounds of each applicant. *Id.* In addition, Ms. Osborne considered a list of desired qualities including “that of a visionary who is progressive and flexible.” *Id.* at 244, 595 S.E.2d at 753. In 2001, when Osborne chose a white male applicant for the promotion, the plaintiff filed a petition for a contested case hearing with OAH. *Id.* at 241, 595 S.E.2d at 751. The ALJ assigned to the matter held a three-day hearing and ultimately determined based on 110 findings of fact and 86 conclusions of law that the decision not to promote the plaintiff was made without discrimination. *See id.*

On appeal to this Court, the plaintiff challenged the ALJ’s conclusion of law that DSS had successfully rebutted the presumption of discrimination by articulating a legitimate nondiscriminatory reason under the second prong of the *Gibson* burden-shifting analysis. *Id.* at 243, 595 S.E.2d at 752. We rejected that argument, explaining that Osborne had articulated several desired qualities for the position and that there was sufficient evidence introduced during the OAH hearing that the plaintiff possessed fewer of these attributes than the other applicants. *Id.* at 244, 595 S.E.2d at 753. The plaintiff also argued that the ALJ erred in concluding she had failed to show that DSS’s purported nondiscriminatory reason for not promoting her in 2000 was merely pretextual. *Id.* at 245, 595 S.E.2d at 753. Specifically, the plaintiff argued that the ALJ had failed to consider the racial animus evidenced in the above-quoted remark Inman made when explaining why he passed her over for a promotion in 1999. *Id.* at 245-46, 595 S.E.2d at 754. We rejected that argument as well, explaining that the plaintiff

offered no evidence linking the alleged prejudice of Mr. Inman to the decision of Ms. Osborne. Thus, . . . the ALJ was correct in concluding that the evidence surrounding

the 1999 passing over of [the plaintiff] lacked sufficient probative value for inferring pretext in Ms. Osborne's non-discriminatory reasons for hiring [the white male applicant in 2001]. Ms. Osborne was not employed by . . . DSS at the time of Mr. Inman's 1999 decision to promote [the white female applicant]; Mr. Inman was not employed by DSS at the time of Ms. Osborne's decision to promote [the white male applicant]. Furthermore, Ms. Osborne had supervised [the plaintiff] for the years of 1996-98. At no time did [the plaintiff] allege that Ms. Osborne was discriminatory in her evaluations, and these evaluations were used by Ms. Osborne in her 2001 hiring decision. Based upon the evidence before the ALJ, any inference of prejudice surrounding the 1999 promotion did not extend to Ms. Osborne's 2001 decision.

Id. at 246, 595 S.E.2d at 754. In the present case, DPS argues that just as Inman's purportedly discriminatory remark in 1999 was insufficient standing alone to rebut the legitimate nondiscriminatory reasons DSS articulated for its 2001 hiring decision in *Enoch*, Gross's challenged testimony about statements by Apodaca and Shanahan was insufficient to show that DPS's purportedly legitimate nondiscriminatory reasons for terminating Ledford four months later as articulated in the Perry Memo and during the OAH hearing were merely a pretext for political affiliation discrimination. However, this argument misconstrues our holding in *Enoch*. The *Enoch* decision was based not only on the fact that the statement by Inman upon which the plaintiff relied in her attempt to prove pretext was made two years before the challenged hiring decision by Osborne, but also, more significantly, because there was ample evidence in the record from the OAH hearing that demonstrated the multiple nondiscriminatory criteria on which Osborne based her decision to promote another applicant. *See id.* DPS's argument presupposes that here, as in *Enoch*, there was no other evidence apart from Gross's challenged testimony to support ALJ Morrison's conclusion that Ledford satisfied the third prong of the *Gibson* burden-shifting analysis. Our review of the record reveals that DPS's reliance on *Enoch* is misplaced.

During the three-day OAH hearing herein, ALJ Morrison heard extensive testimony from Ledford and other current and former DPS and ALE officials involved in the decision to reassign him regarding the process they followed, as well as testimony from those responsible for DPS's subsequent disciplinary investigation and from Gross himself about the rationale for terminating Ledford. We reiterate here that "it is

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the prerogative and duty of [the ALJ], once all the evidence has been presented and considered, 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.” *City of Rockingham*, 224 N.C. App. at 239, 736 S.E.2d at 771. “The credibility of witnesses and the probative value of particular testimony are for the [ALJ] to determine, and [the ALJ] may accept or reject in whole or part the testimony of any witness.” *Id.* ALJ Morrison’s Final Decision makes clear that after carefully weighing the credibility and the probative value of particular testimony, he concluded that the purportedly legitimate nondiscriminatory reasons DPS offered for Ledford’s termination were not credible and, instead, were just a pretext. Given how rapidly the Perry Memo’s rationales unraveled during the OAH hearing, we find ample support for ALJ Morrison’s conclusion.

At the OAH hearing and in its brief to this Court, DPS repeatedly emphasized the Perry Memo’s conclusion that Ledford reassigned himself. While this allegation certainly makes for an incriminating sound bite, we find it highly misleading, given that the evidence in the record tends to show that Ledford was minimally involved in the decision-making process after he raised his reassignment request with Secretary Young, who testified that he approved the request after consultation with other DPS and ALE officials including Gross, Senter, and Ragdale. The only specific evidence to the contrary that Perry could offer when he testified was that Ledford had made the request himself and also signed his PAC Form on the line designated for the Director of ALE. However, Ledford explained during his testimony that it was his regular duty to sign ALE employee PAC Forms in order to verify that their most recent performance evaluations were consistent with the actions recommended, and that he signed his own PAC Form to ensure that every individual who needed to review the propriety of his requested reassignment had the opportunity to do so. Although the Perry Memo alleges that by signing his own PAC Form, Ledford “sen[t] a clear message that neither [HR] nor Fiscal had any real authority to deny [his] request” and thus effectively exploited his position to intimidate others into complying with his wishes, DPS presented no evidence during the OAH hearing to support this allegation. Indeed, those involved in the process of approving Ledford’s reassignment testified to the contrary, while Murga, Dugdale, and Perry himself acknowledged that they made no efforts whatsoever to contact any of those individuals during their investigation—despite the fact that at least two of them, Page and Senter, continued to work for ALE and presumably could have shed at least some light on the internal process that led to Ledford’s reassignment. This lack of communication

may very well explain why nobody involved in DPS's investigation knew that there had indeed been a legitimate reason to move Ledford's new position to Asheville, or that Cobb had approved Ledford's reassignment on behalf of OSP in 2012, or that Gross had taken on an expanded role in the Division's chain of command.

DPS also contended that Ledford's salary in his new position was excessive and created a division-wide inequity. While there is some evidence that Gross was mistaken in his belief that Section 4, Page 29 of the State Human Resources Manual *required* Ledford's salary to be set at the maximum rate available, the plain language of this policy clearly establishes that Ledford's salary was in the legally permissible range. Moreover, Shanahan determined that the allegations of a division-wide salary inequity in the two grievances filed against Ledford were non-grievable issues, and DPS points to no evidence that Gross was mistaken when he testified that "in order for there to be a grievable inequity, there has to be more than \$10,000 between the person who is at top pay and the next person below him," which was not the case here.

In addition, DPS highlighted the Perry Memo's determination that there was no legitimate business reason to relocate Ledford's new position from Wilmington to Asheville or to reclassify it from Contributing-level to Advanced-level. However, testimony introduced during the OAH hearing from Gross, Senter, Page, and Ragdale regarding the 2010 assessment that found a need for an additional Special Agent in Asheville flatly contradicts this assertion, as does evidence that even after Ledford's termination, an additional Special Agent remained in Asheville despite the Perry Memo's statement that the position would be moved back to Wilmington.

DPS also insisted that Ledford's new position should have been posted internally for competitive applications, based on testimony from Murga, Dugdale, and others who did not believe the exception to the general posting requirement Gross had identified from Section 2, Page 21 of the State Personnel Manual applied to Ledford.⁹ But such a determination does not necessarily support DPS's claim that Ledford's

9. The relevant subsection here is labeled "Posting Requirements Not Applicable" and provides that: "Posting is not required when an agency determines that it will not openly recruit. The decision shall be based upon a *bona fide* business need and is the responsibility of the agency head. Examples include vacancies which are: committed to a budget reduction; used to avoid a reduction in force; used to effect a disciplinary transfer or demotion; to be filled by transfer of an employee to avoid the threat of bodily harm; to be filled immediately to prevent work stoppage in constant demand situations, or to protect public health, safety or security; designated exempt policymaking [G.S. 126-5(d)];

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reassignment violated the promotional rights of other ALE agents, especially in light of the fact Shanahan rejected both grievances filed against Ledford based in part on his determination that ALE “does not afford employees a right to file a grievance for failing to post a vacant position” and that the Special Agents who complained that Ledford’s reassignment without posting violated their promotional rights had not raised grievable issues because they could not show that the failure to post “arguably resulted in [each grievant’s] being denied a promotion.” Indeed, in light of Ledford’s decades of experience, thousands of hours of advanced training, and demonstrated loyalty to ALE, we find it hard to imagine how an applicant could be more qualified to serve as an Advanced-level Special Agent, and despite its repeated claims that there was no legal precedent or lawful authority to allow for Ledford’s reassignment, DPS has failed to identify any law or regulation that might expressly prohibit it. Moreover, although Section 2, Page 21 of the State Personnel Manual does not purport to provide an exclusive list of exceptions from the general posting requirement, even assuming *arguendo* the position should have been posted, Davis-Gore reviewed Murga’s investigation and concluded that DPS had “two viable options” for handling this situation—namely, doing nothing or affording Ledford the opportunity to transfer with the position to Wilmington. Terminating Ledford was not among the options.

DPS complains that ALJ Morrison erred in identifying Perry’s failure to follow Davis-Gore’s recommendations as an additional basis to support his conclusion that the legitimate nondiscriminatory reason for terminating Ledford was merely a pretext. In DPS’s view, this was wholly irrelevant and DPS raises similar objections to ALJ Morrison’s focus in his Final Decision on the fact that, contrary to ALE’s internal disciplinary procedure, Ledford was never provided any notice of the charges against him or any opportunity to respond, as well as the fact that neither Murga nor Dugdale nor Perry ever made any attempt to consult anyone involved in the decision-making process that resulted in

to be filled by chief deputies and chief administrative assistants to elected or appointed agency heads[,] and vacancies for positions to be filled by confidential assistants and confidential secretaries to elected or appointed agency heads, chief deputies, or chief administrative assistants; to be filled by an eligible exempt employee who has been removed from an exempt position and is being placed back in a position subject to all provisions of the State Personnel Act; to be filled by a legally binding settlement agreement; to be filled in accordance with a formal, pre-existing written agency workforce plan, including lateral appointments resulting from the successful completion of the requirements for the Model Co-op Education Program, the In-Roads Program or the Governor’s Public Management Fellowship Program; to be filled immediately because of a widespread outbreak of a serious communicable disease, and; to be filled as a result of a redeployment assignment.”

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Ledford's reassignment. DPS contends that the Final Decision's findings and conclusions on these points "merely serve[] to illustrate the ALJ's misunderstanding that as a non-career State employee, Ledford could be dismissed for any reason or no reason at all, just not an illegal reason." DPS is correct that once he returned to the field, Ledford was a probationary employee and had no right to the protections provided under the State Personnel Act. In our view, however, when combined with the aforementioned flaws in its stated rationale for terminating Ledford—many of which seem to have resulted from DPS's failure to consult anyone involved in the reassignment—these decisions not to afford Ledford the same procedural rights it customarily extended to all ALE employees, and not to follow the "two viable options" recommended by its top personnel officer, strongly suggest both that DPS was looking for any reason it could find to terminate Ledford and that the purportedly legitimate nondiscriminatory reasons it articulated during the OAH hearing were merely a pretext. As noted *supra*, "[t]he reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one." *Gibson*, 308 N.C. at 140, 301 S.E.2d at 84.

During an OAH hearing, it is the ALJ's duty to determine the weight and sufficiency of the evidence and the credibility of the witnesses, whose testimony the ALJ may accept or reject in whole or in part, as well as the inferences to be drawn from the facts. *City of Rockingham*, 224 N.C. App. at 239, 736 S.E.2d at 771. In the present case, we find strong support in the record for ALJ Morrison's conclusion that Ledford proved by a preponderance of the evidence that his termination was the result of political affiliation discrimination.

[6] In its final argument, DPS warns in dire tones against the public policy ramifications of allowing ALJ Morrison's Final Decision to stand. Specifically, DPS cautions this Court that our decision in this case might open the proverbial floodgates to allow future administrations of both parties to frustrate our State's democratic ideals by entrenching partisan appointees before relinquishing power. Legal scholars have long recognized the potentially deleterious effects of such practices in other arenas. *See, e.g.*, Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *Fordham L. Rev.* 489 (2006) (analyzing the impact on our federal judiciary). While acts of old school political patronage that turn the highest levels of State government into a revolving door through which well-connected acquaintances of those in power can gain

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prestige and lucrative remuneration at the taxpayers' collective expense are perhaps more publicized, on an abstract level the prospect of the old guard embedding itself bureaucratically on its way out the door in order to stall its successors' progress strikes us as potentially being every bit as corrosive to the goal of representative self-governance. Nevertheless, on a practical level, we find it difficult to discern how this rationale applies in the case of a veteran law enforcement officer who has dedicated his entire career to serving and protecting the people of this State, wishes to continue doing so in a role that has no clear impact on effectuating either party's policy priorities, and, unlike more common stereotypical well-heeled political appointees, has no proverbial golden parachute to guarantee a comfortable landing in the private sector. If our General Assembly is truly concerned with protecting North Carolinians against such harms as DPS forewarns, it can take appropriate legislative action, but this Court declines DPS's invitation to turn Ledford into a scapegoat for all that ails our body politic.

For these reasons, ALJ Morrison's Final Decision is

AFFIRMED.

Judges STROUD and INMAN concur.

MARY PONDER, PLAINTIFF
v.
MARK PONDER, DEFENDANT

No. COA15-1277

Filed 3 May 2016

Domestic Violence—protection order—renewal order—no findings of fact

Where the trial court entered a domestic violence protection order (DVPO) renewal order, which was void ab initio because the court made no findings of fact, and the defendant thereafter filed notice of appeal, the trial court had no jurisdiction to enter a subsequent Supplemental Order renewing the DVPO and order awarding attorney fees to plaintiff.

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Appeal by defendant from orders entered 12 February 2015, 23 June 2015 and 23 June 2015 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 13 April 2016.

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

Hamilton Stephens Steele + Martin, PLLC, by Amy S. Fiorenza, for defendant-appellant.

TYSON, Judge.

Mark W. Ponder (“Defendant”) appeals from three orders: one renewing a previously entered domestic violence protective order for an additional two years, a second “supplementing” the order renewing the protective order, and a third ordering him to pay attorney’s fees incurred by his former wife, Mary W. Ponder (“Plaintiff”). We reverse the renewal order as void *ab initio*, and vacate both the supplemental order and the order for attorney’s fees for lack of jurisdiction in the trial court.

I. Background

Plaintiff and Defendant married on 26 June 2010. On 13 November 2013, Defendant filed a complaint and motion for a domestic violence protective order against Plaintiff. Both parties acknowledge in their briefs that Plaintiff also filed a complaint and motion for a domestic violence protective order against Defendant on the same day, but the motion is not included in the record. Plaintiff apparently did seek such an order, as the trial court granted a domestic violence order of protection (“the DVPO”) to Plaintiff and against Defendant on 13 November 2013. The DVPO remained in effect for one year, until 13 November 2014, in compliance with N.C. Gen. Stat. § 50B-3(b).

Following the trial court’s entry of the DVPO, both Plaintiff and Defendant filed a plethora of motions on a range of issues over the ensuing two years. Only the motions relevant to the issues in this appeal will be discussed.

On 22 November 2013, Defendant filed a motion pursuant to Rules 52, 59, and 60 of the North Carolina Rules of Civil Procedure, seeking to set aside the original DVPO (“Defendant’s Motion”). On 17 February 2014, the court denied Defendant’s Motion. On 10 April 2014, Plaintiff filed a verified motion for attorney’s fees seeking to recover the fees expended in connection with responding to Defendant’s Motion.

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On 7 October 2014, before the DVPO had expired, Plaintiff filed a verified motion seeking to renew the DVPO against Defendant. A hearing on Plaintiff's motion to renew the original DVPO was set for 12 February 2015. At the hearing, Plaintiff and Defendant testified, and counsel for both parties presented arguments on the issue. At the conclusion of the hearing, the trial court found probable cause to renew the DVPO for a period of two years. The trial court failed to make any oral findings of fact or state any reasons to show good cause to renew the DVPO. The following colloquy occurred regarding renewal of the original DVPO:

THE COURT: All right. I think there's cause here in regards to the renewal of the domestic violence protective order. They want the AOC form, do you guys want findings of fact as far as to be included in the renewal order or I mean, that's more directed towards you [Defendant's counsel]?

[Defendant's Counsel] : Yes.

THE COURT: Okay. So they require it kind of both ways and you have to do the AOC form and then we can do a second order that has some findings of fact.

. . . .

THE COURT: . . . What I'm doing is this, is I'm going to do the AOC form today so you can walk away with this, this is going to be the one page (inaudible) it's going to say two years with the understanding that there will be a supplemental order that will have some *additional* findings of fact that I will contact you guys on that [Plaintiff's attorney] will prepare as far as the order[.]

(emphasis supplied).

On 12 February 2015, the trial court signed an order renewing Plaintiff's DVPO against Defendant ("the DVPO Renewal Order"). The DVPO Renewal Order erroneously noted the expiration date as 11 February 2015, and purported to extend the DVPO until 11 February 2017. While the trial court concluded in the DVPO Renewal Order that good cause existed to renew the DVPO, the trial court failed to make or list any findings of fact. The space on the AOC form in which the court was to make findings of fact is left blank. Defendant gave written notice of appeal from the DVPO Renewal Order on 13 March 2015.

On 19 June 2015, the trial court granted Plaintiff's motion for attorney's fees pursuant to N.C. Gen. Stat. § 50B-3 ("Attorney's Fees Order").

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The Attorney's Fees Order contained findings of fact and conclusions of law. The trial court found that Plaintiff incurred attorney's fees as a result of "the [original] DVPO, defending [Defendant's Motion] and [Plaintiff's] Motion to Renew [the original DVPO]." Defendant was ordered to pay a total of \$12,000.00 to Plaintiff.

On 19 June 2015, 127 days after the DVPO Renewal Order was entered and 98 days after Defendant filed notice of appeal from that order, the trial court purported to enter a "Supplemental Order Renewing Domestic Violence Protective Order and Denying Motion to Dismiss" ("Supplemental Order"). In the Supplemental Order, the trial court made findings of fact and conclusions of law purporting to support its decision to grant Plaintiff's motion "for renewal of the DVPO for a two (2) year period beginning from the hearing date (February 12, 2015)." Pursuant to the Supplemental Order, the DVPO, which on its face had expired on 13 November 2014, was to be extended erroneously from 12 February 2015 to 12 February 2017.

Defendant gave notice of appeal from the Attorney's Fees Order and the Supplemental Order on 30 June 2015. Defendant filed a motion to consolidate the appeals, and a consent order consolidating the appeals was entered on 11 September 2015.

II. Issues

Defendant argues the trial court erred by renewing the DVPO for an additional two-year period, in contravention of the plain statutory language of N.C. Gen. Stat. § 50B-3. In the alternative, Defendant argues the trial court's findings of fact in the Supplemental Order were not sufficiently supported by competent evidence. Defendant also argues the trial court erred by ordering him to pay Plaintiff's attorney's fees pursuant to N.C. Gen. Stat. § 50B-3(a)(10).

III. Appeal from DVPO Renewal Order; Effect on Supplemental Order

Defendant argues the trial court erred by renewing the DVPO for an additional two-year period from the 12 February 2015 hearing date. Because the trial court did not possess jurisdiction to enter the Supplemental Order, and because the DVPO Renewal Order is void *ab initio*, we do not reach the merits of Defendant's arguments on this issue.

A. Standard of Review

"Whether a trial court had jurisdiction to enter an order is a question of law that we review *de novo*." *Moody v. Sears Roebuck & Co.*, 191

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N.C. App. 256, 264, 664 S.E.2d 569, 575 (2008). An appellate court “has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*.” *Kor Xiong v. Marks*, 193 N.C. App. 644, 652, 668 S.E.2d 594, 599 (2008) (citation omitted).

B. Analysis

The power of a trial court to enter an order or take further action in a case following the filing of a notice of appeal by a party is enumerated in N.C. Gen. Stat. § 1-294, which states in relevant part:

When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

N.C. Gen. Stat. § 1-294 (2015).

According to well-established North Carolina law, “once an appeal is perfected, the lower court is divested of jurisdiction.” *Faulkenbury v. Teachers’ & State Emps.’ Ret. Sys.*, 108 N.C. App. 357, 364, 424 S.E.2d 420, 422, *disc. review denied in part*, 334 N.C. 162, 432 S.E.2d 358, *aff’d*, 335 N.C. 158, 436 S.E.2d 821 (1993) (citation omitted). “An appeal is not ‘perfected’ until it is docketed in the appellate court, but when it is docketed, the perfection relates back to the time of notice of appeal, so any proceedings in the trial court after the notice of appeal are void for lack of jurisdiction.” *Romulus v. Romulus*, 216 N.C. App. 28, 33, 715 S.E.2d 889, 892 (2011) (citation omitted).

Here, the trial court signed and entered the DVPO Renewal Order on 12 February 2015. The order was complete, and the trial judge intended for it to be operative, at that time. The trial judge remarked at the hearing that he would fill out the AOC form on the date of the hearing, and Plaintiff could “walk away” with that form. Defendant then filed an appeal from the DVPO Renewal Order on 13 March 2015, which divested the court of jurisdiction. *Faulkenbury*, 108 N.C. App. at 364, 424 S.E.2d at 422.

We are cognizant that the trial court contemplated, at the 12 February 2015 hearing, that a supplemental order containing findings of fact supporting its decision to renew the DVPO would be filed. However, the trial court made no oral findings of fact at the hearing, the DVPO Renewal Order itself contained no written findings of fact. The contemplated

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Supplemental Order, which *did* contain the findings of fact, was not entered until months after Defendant had perfected an appeal to this Court.

It is “fundamental that a court cannot create jurisdiction where none exists.” *Balawejder v. Balawejder*, 216 N.C. App. 301, 320, 721 S.E.2d 679, 690 (2011) (citing *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003)). While the trial court was technically not divested of jurisdiction until the appeal was perfected in this Court, which happened after the Supplemental Order was entered, under *Romulus*, the appeal, and thus the divestment of the trial court’s jurisdiction, relates back to the date of the notice of the appeal, in this case 13 March 2015. *Romulus*, 216 N.C. App. at 33, 715 S.E.2d at 892. The findings of fact and conclusions of law contained in the Supplemental Order are not ancillary to the appeal, and the trial court did not have jurisdiction to enter them following Defendant’s 13 March 2015 notice of appeal. The Supplemental Order, which was a “proceeding[] in the trial court after the notice of appeal” is “void for lack of jurisdiction.” *Id.*

IV. Validity of DVPO Renewal Order

Disregarding the Supplemental Order the trial court entered at a time when it was divested of jurisdiction to enter such an order, it is apparent that the purported 12 February 2015 DVPO Renewal Order, standing alone, is void *ab initio*.

A. Standard of Review

The standard of review of a trial court’s order renewing a domestic violence protective order is “‘strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.’” *Comstock v. Comstock*, ___ N.C. App. ___, ___, 771 S.E.2d 602, 608-09 (2015) (citing *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008)). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citations and internal quotation marks omitted).

B. Analysis

For a court to renew a protective order, a plaintiff seeking the renewal “must show good cause.” *Rudder v. Rudder*, 234 N.C. App. 173, 184, 759 S.E.2d 321, 329 (2014) (citation and internal quotation marks

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omitted). The plaintiff “need not show commission of an additional act of domestic violence after the entry of the original DVPO” in order to demonstrate “good cause” to renew a previously entered DVPO. N.C. Gen. Stat. § 50B-3(b); *see also Rudder*, 234 N.C. App. at 184, 759 S.E.2d at 329.

We note that the DVPO Renewal Order incorporated the original DVPO by reference, and the original DVPO did include findings of fact. While “prior acts may provide support for and be ‘incorporated by reference’ into orders renewing DVPOs,” *Forehand v. Forehand*, ___ N.C. App. ___, 767 S.E.2d 125, 128-29 (2014), the trial court must find as fact that the prior acts are “good cause” to renew the DVPO.

In *Forehand*, the trial court made eight findings of fact supporting its conclusion that “good cause” existed to renew the original DVPO. *Forehand*, ___ N.C. App. at ___, 767 S.E.2d at 128. This Court held the fact that the findings of fact to support renewal of the DVPO “rest[ed], in large part,” on acts “which [also] served as the basis for issuance of the original DVPO” in the first place was immaterial. *Id.*

The findings of fact in an original DVPO may nprovide the basis for “good cause” to renew the DVPO, but only if the trial court makes new findings of fact, at the time the renewal order is entered, to support its conclusion that the “good cause” to renew is based upon the findings in the original DVPO. Here, the trial court incorporated by reference the original DVPO, but did not find as fact that these, or any other, acts which supported the original DVPO demonstrated “good cause” to renew the DVPO.

Our review of the trial court’s order is limited to whether the trial judge’s findings of fact are supported by competent evidence, and whether the findings of fact in turn support the conclusion of law that there was “good cause” to renew the DVPO. N.C. Gen. Stat. § 50B-3(b); *Comstock*, ___ N.C. App. at ___, 771 S.E.2d at 608-09. Here, the trial court failed to enter *any* findings of fact in the DVPO Renewal Order, and, as such, no findings support the trial court’s conclusion of law that “good cause” existed to renew the DVPO. We reverse the DVPO Renewal Order. The findings of fact which purportedly do support a finding of “good cause” are contained in an order entered after the trial court was divested of jurisdiction. We vacate the Supplemental Order.

V. Attorney’s Fees

Defendant argues the trial court committed specific errors in awarding attorney’s fees to Plaintiff. We do not reach the merits of Defendant’s

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contentions, because the trial court was without jurisdiction to enter the Attorney's Fees Order.

A. Standard of Review

As noted, we review *de novo* whether a trial court had jurisdiction to enter an order. *Moody*, 191 N.C. App. at 264, 664 S.E.2d at 575. An appellate court "has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*." *Kor Xiong*, 93 N.C. App. at 652, 668 S.E.2d at 599.

B. Analysis

The facts of this case are remarkably similar to those presented in *Balawejder v. Balawejder*, 216 N.C. App. 301, 320, 721 S.E.2d 679, 690 (2011). In *Balawejder*, the trial court entered a child custody and child support order in favor of the defendant. *Id.* at 304, 721 S.E.2d at 681. The plaintiff filed a notice of appeal from the trial court's order. *Id.* After the notice of appeal had been filed, the trial court entered an order awarding attorney's fees to the defendant "for expenses incurred during trial and in preparing the final Custody and Child Support Order." *Id.*

On appeal, the plaintiff contended the trial court committed specific errors in awarding attorney's fees to the defendant. *Id.* at 319-20, 721 S.E.2d at 690-91. In vacating the trial court's order awarding attorney's fees, this Court did not reach those substantive issues, noting:

After [the] plaintiff filed notice of appeal . . . , the trial court was divested of jurisdiction to enter orders for attorney fees pending the completion of this appeal. . . . In *McClure [v. Cnty. of Jackson]*, 185 N.C. App. 462, 648 S.E.2d 546 (2007), this Court thoroughly considered the trial court's jurisdiction to enter an award of attorney fees after the notice of appeal and held that it is fundamental that a court cannot create jurisdiction where none exists. N.C. Gen. Stat. § 1-294 specifically divests the trial court of jurisdiction unless it is a matter "not affected by the judgment appealed from." When, as in the instant case, the award of attorney's fees was based upon the plaintiff being the "prevailing party" in the proceedings, the exception set forth in N.C. Gen. Stat. § 1-294 is not applicable.

Balawejder, 216 N.C. App. at 320, 721 S.E.2d at 690.

Here, the Attorney's Fees Order is affected by the judgment appealed from. The award of attorney's fees was based on three proceedings:

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(1) “the [original] DVPO;” (2) “defending [Defendant’s Motion];” and (3) [Plaintiff’s] Motion to Renew [the original DVPO].” The Attorney’s Fees Order was based, in part, on the motion to renew the DVPO, which resulted in the void *ab initio* DVPO Renewal Order. The trial court was without jurisdiction to enter the Attorney’s Fees Order, as it was a matter “affected by the judgment appealed from.” *Balawejder*, 216 N.C. App. at 320, 721 S.E.2d at 691. We vacate the Attorney’s Fees Order.

VI. Conclusion

Following Defendant’s notice of appeal from the DVPO Renewal Order, which was void *ab initio* due to the lack of any findings of fact, the trial court was without jurisdiction to enter the Supplemental Order and the Attorney’s Fees Order. The DVPO Renewal Order is reversed, and the Supplemental Order and the Attorney’s Fees Order are vacated.

REVERSED IN PART; VACATED IN PART.

Judges CALABRIA and HUNTER, JR. concur.

LESLIE R. SMITH, PLAINTIFF

v.

DANIEL Q. HERBIN AND OROZCO SANCHEZ, DEFENDANTS

No. COA15-1074

Filed 3 May 2016

1. Motor Vehicles—automobile accident—causation—neurological issues

Where plaintiff sued defendants for personal injuries resulting from an automobile accident, plaintiff’s lay testimony that she experienced tingling and itching sensations immediately after the crash was not sufficient evidence of causation to send the case to the jury. The causes of such neurological issues are not readily understandable to the average person; furthermore, plaintiff failed to produce any evidence of the mechanics of the crash.

2. Appeal and Error—directed verdict—failure to make argument before trial court

Where the trial court entered a directed verdict in favor of defendant, who admitted that he negligently caused the automobile

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collision that gave rise to the action, plaintiff waived her argument that she was entitled to nominal damages because she failed to object on this ground at trial.

Appeal by plaintiff from order entered 29 January 2015 by Judge Lindsay R. Davis, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 10 February 2016.

Steve Bowden & Associates, by Ed Yount, for plaintiff.

Davis and Hamrick, L.L.P., by Jason L. Walters, for defendant Daniel Herbin.

Kara V. Bordman, for defendant Orozco Sanchez.

DIETZ, Judge.

Defendants Daniel Herbin and Orozco Sanchez were involved in a chain-reaction rear-end collision with Leslie Smith's car at an intersection. After the crash, Smith felt a tingling in her left arm and itching in her back. Dr. Chason Hayes later treated her left shoulder with pain injections, arthroscopic surgery, and physical therapy. Smith sued Defendants, alleging that their negligence caused the collision and her resulting personal injuries and medical expenses.

At trial, Smith introduced the deposition testimony of Dr. Hayes to show that her injuries were caused by the crash. The trial court excluded Hayes's testimony on the ground that it was impermissibly speculative and thus inadmissible as expert testimony. As a result, the court granted a directed verdict in Defendants' favor because Smith had not met her burden on the element of proximate cause.

On appeal, Smith does not challenge the exclusion of Dr. Hayes's testimony. But she argues that her own testimony that the tingling and itchy sensations occurred immediately after the crash was sufficient evidence of causation to send the case to the jury. As explained below, we disagree. Lay testimony on causation is permissible only if an average person would know that those injuries were caused by that type of trauma—for example, lay testimony is permissible to show that cuts or bruises were caused by striking a car door or steering wheel with great force. By contrast, the causes of neurological issues like the

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tingling and itchiness in this case are not readily understandable to the average person.

More importantly, even if the causes of these neurological sensations properly could be the subject of lay testimony, Smith never described the mechanics of the crash in her testimony. She never explained what parts of her body were strained or stressed and never provided the jury with any other information from which it could conclude that the itching and tingling in her shoulder and back must have been caused by trauma during the crash. Accordingly, we affirm the trial court's judgment.

Facts and Procedural History

On the afternoon of 17 August 2012, Defendant Orozco Sanchez rear-ended Plaintiff Leslie Smith's car while Smith was stopped at an intersection. Seconds later, Defendant Daniel Herbin rear-ended Sanchez's car, causing it to collide with Smith's car again. When paramedics arrived at the scene, Smith told them that her left arm was tingling and her back was itchy.

Smith went to the emergency room that evening and complained that her left arm was tingling and her back was twitching. Emergency room attendants took x-rays and prescribed pain medications.

Two weeks later, Smith saw Dr. Chason Hayes to address the tingling sensation in her left arm. Dr. Hayes treated Smith's left shoulder with pain injections and physical therapy, and eventually ordered an MRI of her left shoulder. Based on the MRI results, Smith decided to undergo arthroscopic surgery on her left shoulder on 16 January 2013. After additional physical therapy, Smith last saw Dr. Hayes on 13 May 2013.

On 28 March 2014, Smith sued Defendants, alleging that they negligently caused her injuries and related medical expenses by rear-ending her car. In response to Smith's allegations, Defendant Herbin admitted that he negligently caused Sanchez's car to collide with Smith's, but denied causing Smith's injuries.

At trial, Smith produced a videotaped deposition of Dr. Hayes, in which Dr. Hayes testified that the two collisions caused Smith's back and left arm injuries. At the close of Smith's evidence, Defendants moved for a directed verdict. The trial court granted the motions, reasoning that Dr. Hayes's deposition testimony was impermissibly speculative and thus inadmissible as expert testimony on the issue of whether the two collisions proximately caused Smith's injuries. Smith timely appealed.

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Analysis**I. Proximate cause**

[1] On appeal, Smith does not challenge the trial court’s exclusion of Dr. Hayes’s testimony and, as a result, concedes that she has no expert testimony on the issue of causation at trial. But she contends that the directed verdict against her was improper because her own trial testimony concerning the tingling in her left arm and the itchy sensation in her back immediately after the collision was sufficient evidence for the jury to conclude that her personal injuries and medical expenses were caused by the two collisions. For the reasons explained below, we reject Smith’s argument.

We review the grant of a motion for directed verdict *de novo*. *Denson v. Richmond Cty.*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003). A trial court must deny a motion for directed verdict if, viewing the evidence in the light most favorable to the non-movant, there is “more than a scintilla of evidence supporting each element of the non-movant’s claim.” *Id.* at 412, 583 S.E.2d at 320.

Proximate cause is an essential element of a negligence claim. *Gillikin v. Burbage*, 263 N.C. 317, 324, 139 S.E.2d 753, 759 (1965). Where an injury is “so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to [its] cause.” *Id.* at 325, 139 S.E.2d at 760. But when “any layman of average intelligence and experience would know what caused the injuries complained of[,]” lay testimony on proximate cause is permissible. *Id.*

For example, expert testimony is not required to show causation when the plaintiff testified that bruises on her hip were caused when her hip hit the car door in an automobile accident. *Gillikin*, 263 N.C. at 324, 139 S.E.2d at 759. Likewise, expert testimony is not required to show causation for the death of a child when lay testimony established that the child was struck by a car and thrown violently onto the pavement. *Jordan v. Glickman*, 219 N.C. 388, 390, 14 S.E.2d 40, 42 (1941).

Smith argues that her personal injuries, which manifested after the accident as tingling in her left arm and the itchy sensation in her back, are the same as the injuries sustained in *Gillikin* and *Jordan* and could be proven by her own lay testimony that they occurred immediately after the two collisions. We disagree.

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First, sensations such as tingling and itchiness are not the same as a bruise. These sensations and their neurological causes are far more complex than bruising that results when a part of the human body is struck by something. Second, and more importantly, unlike the plaintiffs in *Gillikin* and *Jordan*, Smith never produced any evidence of the direct mechanism of her injuries. In the cases in which lay testimony is permitted, it is because the mechanics of the injury are readily apparent to the average person—for example, when a car door strikes a person’s hip resulting in the bruise. *Gillikin*, 263 N.C. at 325, 139 S.E.2d. at 760. Here, by contrast, Smith never described what happened to her body during the collision and, in particular, never described any stress or impact on her shoulder or back that might have permitted an average person to conclude that the accident caused her tingling or itchy sensations. Simply put, Smith’s testimony was not sufficient to establish causation for her injuries and the resulting medical expenses. Accordingly, the trial court did not err in granting a directed verdict in Defendants’ favor based on the failure to present any competent evidence of proximate causation.

II. Nominal damages

[2] Smith next argues that the trial court erred in entering the directed verdict because Herbin admitted that he negligently caused the collision and thus she was entitled to at least nominal damages. But Herbin admitted only that he negligently caused the accident; he did not admit that Smith suffered any injuries as a result of the accident or that his negligence caused those injuries. In any event, Smith failed to preserve this argument for appeal. When the trial court announced that it was entering a directed verdict in favor of Defendants, Smith did not object on the ground that she was entitled to nominal damages against Herbin based on his admission of liability. Had she done so, the trial court could have considered this argument with the jury still impaneled. Because Smith failed to object on this ground and obtain a ruling from the trial court when she had the opportunity, this argument is waived N.C. R. App. P. 10(a)(1).

Conclusion

We affirm the trial court’s judgment.

AFFIRMED.

Judges ELMORE and STROUD concur.

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STATE OF NORTH CAROLINA

v.

CONSTANCE RENEA BEDIENT, DEFENDANT

No. COA15-1011

Filed 3 May 2016

Search and Seizure—prolonged traffic stop—motion to suppress evidence—reasonable suspicion—nervous behavior—associated with known drug dealer

The trial court erred in a possession of a schedule II controlled substance case by denying defendant's motion to suppress evidence uncovered after she gave consent to search her car. The findings that defendant was engaging in nervous behavior and that she had associated with a known drug dealer were insufficient to support the conclusion that the officer had reasonable suspicion to prolong defendant's detention once the purpose of the stop had concluded.

Appeal by defendant from order entered 23 March 2015 by Judge Bradley B. Letts in Jackson County Superior Court. Heard in the Court of Appeals 22 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Benjamin J. Kull, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

GEER, Judge.

Defendant Constance Renea Bredient pled guilty to possession of a schedule II controlled substance. On appeal, defendant argues that the trial court erred in denying her motion to suppress evidence uncovered after she gave consent to search her car. She contends that the trial court erred in concluding that the investigating officer had reasonable suspicion to continue questioning her after addressing the initial purposes of the stop and in concluding that she voluntarily consented to additional questioning after the conclusion of the stop. Upon our comparison of the record to the trial court's findings of fact regarding the circumstances that gave rise to reasonable suspicion, we find only two circumstances are supported by the officer's testimony: defendant was engaging in nervous behavior and she had associated with a known drug dealer.

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We hold that these circumstances are insufficient to support the conclusion that the officer had reasonable suspicion to prolong defendant's detention once the purpose of the stop had concluded. Because defendant gave consent to a search during an unlawful detention, we reverse the denial of defendant's motion to suppress.

Facts

The State's evidence at the motion to suppress hearing tended to show the following facts. At around 11:30 p.m. on 28 February 2013, Sergeant Andy Parker of the Jackson County Sheriff's Office observed defendant driving a silver Mitsubishi Gallant on Highway 107 with her high beam lights on. She failed to dim her high beams as she passed Sergeant Parker going in the opposite direction. Sergeant Parker initiated a traffic stop, and defendant pulled to the side of the road. A dashboard video camera in Sergeant Parker's patrol car recorded the subsequent stop.

When Sergeant Parker approached the driver side door, defendant immediately acknowledged she was driving with her high beams on and was doing so in response to a prior stop that evening, which resulted in a written warning for a nonworking headlight. She produced this warning for Sergeant Parker. Sergeant Parker explained to defendant that he pulled her over because high beam lights are an indicator of a drunk driver. Defendant replied she was not drunk and that the prior officer instructed her to use her high beams in lieu of the nonworking headlight.

Sergeant Parker then asked the passenger of the car to identify herself. Defendant claimed it was her daughter, and the passenger identified herself as Tabitha. Sergeant Parker later determined that her full name was Tabitha Henry, a resident of South Carolina.

After reviewing the written warning defendant had received earlier, Sergeant Parker asked defendant for her license, which took her approximately 20 seconds to locate. According to Sergeant Parker, defendant seemed nervous because she was fidgety and was reaching all over the car and in odd places such as the sun visor.

While reviewing defendant's license, Sergeant Parker realized he recognized defendant and asked where he had seen her before. She responded that they had seen each other the night before at the home of Greg Coggins, where Sergeant Parker responded to a fire. Sergeant Parker testified that he knew Mr. Coggins as the "main man" for methamphetamine in Cashiers and believed that "anybody that hangs out with Greg Coggins is on drugs." Sergeant Parker also testified that

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defendant's husband, Todd Bredient, regularly called the Sheriff's Office complaining that defendant was taking up residence with Mr. Coggins.

Sergeant Parker returned to his patrol car to check on defendant's license and for any outstanding warrants on defendant or Ms. Henry. While seated in his patrol car, Sergeant Parker observed defendant moving around her car and reaching for her sun visor again. Meanwhile, the warrant checks for defendant and Ms. Henry turned up negative. Upon returning to defendant's car, Sergeant Parker requested that she join him at the rear of the car.

Sergeant Parker first cautioned defendant about driving with her high beams on and gave her a verbal warning since she had already received a written warning for her nonworking headlight. They discussed the problems with defendant's headlights for 15 to 20 seconds longer. Then, Sergeant Parker changed the subject, asking defendant when she planned to change the address on her license. Defendant claimed that she was not going to change her address. Sergeant Parker informed her that if she was not going to live at the address listed on her license, she would need to change it within 30 days or be guilty of a misdemeanor.

Only a few seconds later, Sergeant Parker changed the subject of his questioning again. He asked defendant if she had "ever been in trouble for anything." Defendant replied she had not. Sergeant Parker then asked defendant if she had anything in the car, to which she replied, "No, you can look." Sergeant Parker then handed defendant's license back to her and told defendant he was going to talk to Ms. Henry. As defendant attempted to reenter the vehicle, Sergeant Parker asked her to return to the rear of the car while he searched it. He then asked Ms. Henry to exit the car and stand by defendant.

As Sergeant Parker began searching the car he noticed an open beer bottle lodged in between the passenger seat and the center console. He confirmed that both defendant and Ms. Henry had been drinking the beer. As he continued to search the car, he discovered "crystal matter," pills, baggies, and "a folded dollar bill with some type of powdery residue in it" in a pocketbook that defendant admitted belonged to her. Sergeant Parker then placed defendant under arrest.

On 12 May 2014, defendant was indicted on one count of felony possession of a schedule II controlled substance and one count of possession of drug paraphernalia. Defendant filed a motion to suppress on 9 January 2015 that was heard on 16 March 2015 and denied in open court. The trial court later filed a written order on 23 March 2015 concluding

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that reasonable suspicion supported Sergeant Parker's continued questioning of defendant after he had verbally warned her about the use of her high beams and the invalid address on her license. The order further concluded that defendant voluntarily consented to additional questioning and the search of her car once the purpose of the stop was over.

Defendant reserved her right to appeal the denial of her motion to suppress. On 17 March 2015, the day after defendant's motion was denied, defendant pled guilty to possession of a schedule II controlled substance and received a suspended sentence of five to 15 months conditioned on the completion of 12 months of supervised probation. The State dismissed the indictment for possession of drug paraphernalia in exchange for the guilty plea. Defendant timely appealed to this Court.

Discussion

On appeal, defendant contends that the trial court erred in denying her motion to suppress, arguing that Sergeant Parker unlawfully prolonged the traffic stop without having reasonable articulable suspicion to do so and, further, that her consent was invalid because it was given during this unlawful detention. We review a trial court's denial of a motion to suppress by "determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

A. The "Mission" of the Traffic Stop

"[T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission' -- to address the traffic violation that warranted the stop, and attend to related safety concerns." *Rodriguez v. United States*, ___ U.S. ___, ___, 191 L. Ed. 2d 492, 498, 135 S. Ct. 1609, 1614 (2015) (internal citations omitted). "Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.'" *Id.* at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615 (quoting *Illinois v. Caballes*, 543 U.S. 405, 408, 160 L. Ed. 2d 842, 847, 125 S. Ct. 834, 837 (2005)). "Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615.

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Apart from these inquiries, an officer “may conduct certain unrelated checks during an otherwise lawful traffic stop. *But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.*” *Id.* at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615 (emphasis added). Thus, absent reasonable suspicion, “[a]uthority for the seizure . . . ends when tasks tied to the traffic infraction are – or reasonably should have been – completed.” *Id.* at ___, 191 L. Ed. 2d at 498, 135 S. Ct. at 1614.

Here, defendant does not dispute the finding that Sergeant Parker had a legitimate basis for performing a traffic stop for the purpose of addressing defendant’s failure to dim her high beam lights. Addressing this infraction, according to *Rodriguez*, was the original mission of the traffic stop. Defendant also does not contest that Sergeant Parker could then legitimately run a computerized license and warrant check of defendant – as the trial court found, the officer learned through these checks that defendant had a valid license and no pending warrants for her arrest. These two checks, considered by *Rodriguez* to be “‘ordinary inquiries incident to the stop,’” did not unlawfully prolong the stop. *Id.* at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615 (quoting *Caballes*, 543 U.S. at 408, 160 L. Ed. 2d at 847, 125 S. Ct. at 837).

The trial court’s unchallenged findings indicate that Sergeant Parker then returned to defendant’s car and asked defendant to exit the car and join him at the rear of the car. Although Sergeant Parker arguably prolonged the stop by requesting defendant to get out of her car, the trial court found that this was “warranted in this case for purposes of officer’s safety and to address the issues Sgt. Parker determined were related to the driver’s license.” Defendant does not challenge this finding, and we find it comports with *Rodriguez*, because Sergeant Parker was “attend[ing] to related safety concerns” and had legitimate questions regarding the address on defendant’s license. *Id.* at ___, 191 L. Ed. 2d at 498, 135 S. Ct. at 1614.

The trial court’s findings then indicate that once at the rear of the car, Sergeant Parker first “provided defendant a second warning from law enforcement on the use of high beams” At this point in time, the original purpose, or mission, of the traffic stop – addressing defendant’s failure to dim her high beam lights – had concluded because, as the trial court found, Sergeant Parker gave defendant a verbal warning, deciding not to issue defendant a traffic ticket. Sergeant Parker had also completed the related inquiries because he determined defendant’s license was valid, and she had no outstanding warrants for her arrest. *Id.* at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615.

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According to the trial court's findings, subsequent to this original verbal warning, Sergeant Parker asked defendant questions regarding the address on her license. These questions were reasonable because "there existed in the mind of Sgt. Parker a valid, articulable issue regarding whether her residence was with Todd Bredient or Greg Coggins" and "failure to change an address on a driver's license after a fixed number of days is a violation of N.C. Gen. Stat. §20-7.1."¹ Defendant also did not challenge this specific finding, and it is binding on appeal.

Therefore, even though the original mission of the traffic stop was completed upon Sergeant Parker's verbal warning to defendant regarding her failure to dim her high beams, the additional questioning regarding the address on her license, and thus defendant's prolonged detention, was supported by reasonable suspicion. This finding by the trial court comports with the standard in *Rodriguez* and is in accordance with prior North Carolina precedent as well. See *State v. Myles*, 188 N.C. App. 42, 45, 654 S.E.2d 752, 754 (" 'Once the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay.' " (quoting *State v. Falana*, 129 N.C. App. 813, 816, 501 S.E.2d 358, 360 (1998))), *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008).²

Because Sergeant Parker had reasonable suspicion to prolong the stop beyond the conclusion of the original mission of the traffic stop, Sergeant Parker developed a new mission for the stop: to determine whether defendant was in violation of N.C. Gen. Stat. § 20-7.1 (2015) for failure to change the address on her license. After eliciting a response from defendant regarding her address, Sergeant Parker "explained to her the concerns over the change in address on the driver's license" and "gave an additional verbal warning about maintaining the proper address on her driver's license." At that point, and pursuant to *Rodriguez*, Sergeant Parker had concluded the second mission of the stop because

1. As noted by the trial court's order, violation of this statute was a Class 2 misdemeanor until 1 December 2013. It is now punished as an infraction. N.C. Gen. Stat. § 20-35(a2)(3) (2015). This change was implemented pursuant to 2013 N.C. Sess. Law Ch. 385, § 4. Because the traffic stop was conducted on 28 February 2013, this change has no effect on the trial court's determinations.

2. Furthermore, assuming, without deciding, that Sergeant Parker did not have reasonable suspicion to further question defendant about her address, the question could be considered an "ordinary inquir[y] incident to [the traffic] stop" because Sergeant Parker was checking the accuracy of defendant's driver's license. *Rodriguez*, ___ U.S. at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615 (quoting *Caballes*, 543 U.S. at 408, 160 L. Ed. 2d at 847, 125 S. Ct. at 837).

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he had determined not to issue defendant a ticket in connection with defendant's license.

As this Court recognized in *State v. Cottrell*, ___ N.C. App. ___, ___, 760 S.E.2d 274, 280 (2014), once Sergeant Parker completed both missions, he needed reasonable suspicion to prolong defendant's detention beyond the conclusion of this second mission. In *Cottrell*, this Court held that after an officer addressed the two purposes for a traffic stop -- defendant's failure to activate his headlights and defendant's loud music -- with verbal warnings, the officer "was then required to have 'defendant's consent or grounds which provide a reasonable and articulable suspicion in order to justify further delay *before*' asking defendant additional questions." *Id.* at ___, 760 S.E.2d at 279-80 (quoting *Myles*, 188 N.C. App. at 45, 654 S.E.2d at 755). *See also State v. Jackson*, 199 N.C. App. 236, 242, 243, 681 S.E.2d 492, 496, 497 (2009) (finding further detention and questioning of defendant was unreasonable seizure because it occurred "[r]ight after the traffic stop was pretty much over," and "there was no evidence which could have provided [the officer] with reasonable and articulable suspicion to justify the extension of the detention").

Here, after Sergeant Parker verbally warned defendant about her failure to dim her high beams and failure to maintain the proper address on her license, the two purposes -- the two missions -- of the traffic stop were addressed. And, at that point, Sergeant Parker needed reasonable, articulable suspicion that criminal activity was afoot before he prolonged the detention by asking additional questions.

B. Reasonable Suspicion to Prolong the Stop

According to the trial court's findings of fact, "[a]t the conclusion of the interaction . . . Sgt. Parker asked the defendant 'Do you have anything in the vehicle?[,]' " to which defendant replied, " 'No. You can look.' " In support of its conclusion that "Sgt. Parker had reasonable suspicion to further question the defendant in that under the totality of the circumstances there existed specific articulable facts to indicate that criminal activity was afoot[,]" the trial court made the following findings:

48. . . . Sgt. Parker had reasonable articulable suspicion under the totality of the circumstances to further detain defendant. These factors consisted of observing defendant for eight minutes, finding her speech to be stuttering, defendant exhibiting fidgety actions which is consistent with use of methamphetamine, repeated fixation on the driver's side sun visor, failure

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to initially provide the last name of the passenger or explain the passenger was her daughter, continued operation of the same vehicle with the same lack of headlights on the same day after receiving a warning ticket for the same failure to dim headlights and having been at a residence known by law enforcement in Jackson County to be a location of drug use and drug transactions.

. . . .

55. Additionally, at the same time consent was given there did exist reasonable articulable suspicion based upon the totality of the circumstances presented to Sgt. Parker which supported further investigation and detention of defendant.
56. In addition to the specific and articulable factors that defendant was observed for eight minutes, the speech stuttered, defendant exhibiting fidgety actions which is consistent with use of methamphetamine, defendant repeatedly manipulated the driver's side sun visor, defendant failed to initially provide the last name of the passenger or explain the passenger was her daughter, defendant continued to drive the same vehicle with the same lack of headlights on the same day after receiving a warning ticket for the same failure to dim headlights issue and was at a residence known by law enforcement in Jackson County to be a location of drug use and drug transactions, after getting consent to search the vehicle defendant then attempted to return to the vehicle thereby impeding the search of Sgt. Parker.

Defendant contends that most of the circumstances identified in these findings of fact to justify further detention are not supported by competent evidence. Based on our review of the record, we agree.

Defendant first claims that the evidence does not support the finding that defendant failed to initially explain the passenger was her daughter. After reviewing Sergeant Parker's dashboard video camera footage, it is clear that defendant identifies the passenger as her daughter in immediate response to Sergeant Parker's inquiry. This finding is, therefore, not supported by the evidence.

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Defendant next challenges the description of her fidgeting as “consistent with use of methamphetamine.” At the suppression hearing, Sergeant Parker testified that defendant’s conduct indicated nervousness. There is no evidence suggesting that Sergeant Parker believed defendant’s “fidgety actions,” or other nervous behavior such as her “fixation on the driver’s side sun visor” or the “extreme rapidity in her movements” were consistent with the use of methamphetamine. Thus, this finding is also unsupported.

Next, defendant argues that the trial court erroneously described the warning she received before Sergeant Parker’s stop as a warning for “failure to dim high beams.” As a result, she also claims the finding that defendant received the same verbal warning for the “same failure to dim headlights” is unsupported by the evidence. The dashboard video in fact evidences that defendant explained to Sergeant Parker that her original warning was for a nonworking headlight and, further, that the prior investigating officer instructed her to use her high beam lights in lieu of her nonworking headlight. Accordingly, we hold this finding regarding the warnings is unsupported by competent evidence.

Finally, defendant challenges the finding that defendant was at a residence known for drug use and transactions. Sergeant Parker’s testimony indicates that he observed defendant the night before the traffic stop at the home of Greg Coggins, a man who is known in the town of Cashiers as “the main man” for methamphetamine. We hold that this testimony is sufficient to support the finding that Mr. Coggins’ home was a regular location for drug use and transactions.

Accordingly, as defendant argues, the only competent findings supporting the trial court’s determination that Sergeant Parker had reasonable suspicion to further question defendant are defendant’s nervous behavior during the traffic stop, evidenced by her stuttering, rapid movements, and fixation with her sun visor, and her association with a drug dealer, evidenced by her presence at Greg Coggins’ house the prior evening. Thus, we must determine whether these two factors establish reasonable articulable suspicion that criminal activity was afoot under the “totality of the circumstances.” *Myles*, 188 N.C. App. at 45, 654 S.E.2d at 754.

“To determine reasonable articulable suspicion, courts view the facts through the eyes of a reasonable, cautious officer, guided by his experience and training at the time he determined to detain defendant.” *Id.* at 47, 654 S.E.2d at 756 (quoting *State v. Bell*, 156 N.C. App. 350, 354, 576 S.E.2d 695, 698 (2003)). “In addition, [t]he requisite degree of

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suspicion must be high enough to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.' ” *Cottrell*, ___ N.C. App. at ___, 760 S.E.2d at 280 (quoting *State v. Fields*, 195 N.C. App. 740, 744, 673 S.E.2d 765, 767 (2009)). Thus, “in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.” *Terry v. Ohio*, 392 U.S. 1, 27, 20 L. Ed. 2d 889, 909, 88 S. Ct. 1868, 1883 (1968).

First, it is well settled that a defendant's nervous behavior during a traffic stop, although relevant in the context of all circumstances, is insufficient by itself to establish reasonable suspicion that criminal activity is afoot. *See, e.g., State v. Pearson*, 348 N.C. 272, 276, 498 S.E.2d 599, 601 (1998) (suggesting that “[t]he nervousness of the defendant [was] not significant” to the determination of reasonable suspicion because “[m]any people become nervous when stopped by a state trooper”); *State v. Blackstock*, 165 N.C. App. 50, 58, 598 S.E.2d 412, 417-18 (2004) (holding nervousness, by itself, is not sufficient to establish reasonable suspicion). Moreover, as this Court has recognized, the nervousness needs to be “extreme” in order to “be taken into account in determining whether reasonable suspicion exists[.]” *Myles*, 188 N.C. App. at 49, 654 S.E.2d at 757. While defendant's nervousness in this case may have been substantial, it cannot, by itself, establish reasonable suspicion to extend the traffic stop.

Although those findings of the trial court supported by the evidence show that defendant stuttered her words, moved around the car rapidly, and touched the sun visor repeatedly, this nervous behavior is a common response to a traffic stop. Furthermore, we note that the sun visor is not an uncommon location to keep a motorist's driver's license or registration. Thus, defendant's fixation on the sun visor could have been in response to an attempt to locate either one of these things and does not necessarily indicate suspicious movements.

Furthermore, a person's mere association with or proximity to a suspected criminal does not support a conclusion of particularized reasonable suspicion that the person is involved in criminal activity without more competent evidence. *See State v. Washington*, 193 N.C. App. 670, 678, 668 S.E.2d 622, 627 (2008) (holding conclusion “that the officer had a right to make a brief investigatory stop of defendant *because he was transporting* [a person wanted for various felony offenses] was erroneous as a matter of law”). This circumstance is analogous to the

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well settled principle that mere presence in a high-crime area, although relevant in the totality of the circumstances, is insufficient by itself to establish reasonable suspicion. See *Illinois v. Wardlow*, 528 U.S. 119, 124, 145 L. Ed. 2d 570, 576, 120 S. Ct. 673, 676 (2000) (“An individual’s presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.”); *Blackstock*, 165 N.C. App. at 58, 598 S.E.2d at 417-18 (holding that presence in high crime area alone does not amount to reasonable suspicion).

Here, defendant’s association with Greg Coggins – specifically the fact that Sergeant Parker saw defendant over at Coggins’ house, “a residence known . . . to be a location of drug use and drug transactions[,]” 24 hours prior to the stop – is also insufficient to establish reasonable suspicion. Although Sergeant Parker testified he believes “anybody that hangs out with Greg Coggins is on drugs[,]” Sergeant Parker did not testify to any particularized suspicion that defendant was on drugs the previous night when he encountered defendant at Coggins’ house. Nor did he testify that he believed defendant was on drugs at the time of the traffic stop. Thus, Sergeant Parker did not tie defendant’s association with Coggins to any basis particularized to defendant for reasonably suspecting that she was, at the time of the traffic stop, engaging in criminal activity.

Considering the totality of the circumstances found by the trial court (as supported by the evidence) – defendant’s nervous behavior and association with Greg Coggins – we find these two factors are together insufficient to amount to the reasonable suspicion necessary for Sergeant Parker to further detain defendant. The established case law in this State is consistent with that holding. For instance, in *Myles*, this Court found that the defendant’s extremely nervous behavior, specifically his fast heartbeat, and the fact that his rental car was one day overdue, did not amount to reasonable suspicion. 188 N.C. App. at 47, 50, 51, 654 S.E.2d at 756, 757, 758. Similarly, in *Cottrell*, the officer’s knowledge of the defendant’s past criminal drug convictions and the smell of a common cover scent for marijuana did not support a finding of reasonable suspicion under the totality of the circumstances. ___ N.C. App. at ___, 760 S.E.2d at 280-81.

The Fourth Circuit has also concluded that reasonable suspicion did not exist when the only indicators of criminal activity were the facts that defendant had an odd travel itinerary, that he rented a car from a state which is a source of illegal drugs, that defendant was stopped on an interstate known for drug trafficking, and that defendant was

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initially nervous. *United States v. Digiovanni*, 650 F.3d 498, 513 (4th Cir. 2011). Thus, because there was “no evidence of flight, suspicious or furtive movements, or suspicious odors, such as the smell of air fresheners, alcohol, or drugs” that would amount to suspicious behavior, the extended detention was impermissible. *Id.*

Indeed, when considering factors collectively that individually would not warrant a conclusion that reasonable articulable suspicion existed, the Fourth Circuit has directed that “the relevant facts articulated by the officers and found by the trial court, after an appropriate hearing, must in their totality serve to eliminate a substantial portion of innocent travelers.” *United States v. Williams*, 808 F.3d 238, 246 (4th Cir. 2015) (internal quotation marks omitted). See also *Digiovanni*, 650 F.3d at 511 (while acknowledging that “[t]he Supreme Court has recognized that factors consistent with innocent travel can, when taken together, give rise to reasonable suspicion[,]” holding that “[t]he articulated innocent factors collectively must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied” (internal quotation marks omitted)).

Here, as in *Williams* and *Digiovanni*, defendant’s nervousness when combined with the fact that she had associated with a drug dealer (who was not even present in the car) are not sufficient circumstances to eliminate a substantial portion of innocent travelers. These two circumstances simply give rise to a hunch rather than reasonable, particularized suspicion. Compare *State v. Fisher*, 219 N.C. App. 498, 504, 725 S.E.2d 40, 45 (2012) (finding reasonable suspicion given defendant’s nervousness, cover scent, inconsistent answers regarding travel plans, and “driving a car not registered to the defendant”); *State v. Euceda-Valle*, 182 N.C. App. 268, 274-75, 641 S.E.2d 858, 863 (2007) (holding reasonable suspicion present given defendant’s extreme nervousness, refusal to make eye contact, cover scent, and inconsistencies in defendant’s and passenger’s stories regarding their trip); *State v. Hernandez*, 170 N.C. App. 299, 309, 612 S.E.2d 420, 426, 426-27 (2005) (holding reasonable suspicion existed based on defendant’s nervous behavior, conflicting statements, and a cover scent).

Therefore, under the totality of the circumstances here, defendant’s association with Greg Coggins and nervous behavior do not amount to reasonable suspicion where there are no findings of evasive or inconsistent answers to the officer’s questions, as noted in *Fisher*, *Euceda-Valle*, and *Hernandez*, no findings of flight or suspicious or furtive movements as indicated in *Digiovanni*, or any other findings suggesting that criminal

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activity is afoot amounting to more than Sergeant Parker's "inchoate and unparticularized suspicion." *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909, 88 S. Ct. at 1883. Therefore, we hold that when Sergeant Parker further questioned defendant about the contents of her vehicle, he unlawfully prolonged the duration of the traffic stop.

C. Defendant's Consent

Since Sergeant Parker lacked reasonable suspicion to prolong the stop, defendant's consent to a search of her car was valid only if the extended encounter between Sergeant Parker and defendant became consensual. *See Myles*, 188 N.C. App. at 45, 654 S.E.2d at 755 (holding officer must have reasonable suspicion or defendant's consent to prolong the stop by asking additional questions). "Generally, an initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee's driver's license and registration." *Jackson*, 199 N.C. App. at 243, 681 S.E.2d at 497.

Thus, defendant challenges the trial court's conclusion that "[t]he defendant voluntarily consented and agreed to additional questioning . . . once the purpose of the traffic stop was over." In challenging this conclusion, defendant contends the findings of fact underlying that conclusion are unsupported by the evidence. The trial court first found: "Contemporaneously with Sergeant Parker advising her that she would not be charged or cited for any driving offense he returned her driver's license. These events occurred simultaneously . . ." The trial court then further found: "Contemporaneous with the return of the license, Sgt. Parker asked the defendant 'Do you have anything in the vehicle?'"

After reviewing the dashboard video, we agree with defendant that these events did not occur simultaneously or contemporaneously as the trial court's findings suggest. To the contrary, Sergeant Parker continued to possess defendant's driver's license up until the moment he received consent to search her car. He only returned defendant's driver's license upon commencing the search. Therefore, because defendant's license had not been returned at the time defendant gave her consent and because, at that time, the stop had been unlawfully extended, defendant's consent was not voluntary. The trial court's pertinent findings of fact are not supported by the evidence, which necessarily invalidates the conclusion that defendant voluntarily consented to the additional questions after the conclusion of the stop.

"Accordingly, the officer's continued detention of defendant violated defendant's Fourth Amendment right against unreasonable seizures and defendant's subsequent consent to a search of his car was

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involuntary as a matter of law.” *Cottrell*, ___ N.C. App. at ___, 760 S.E.2d at 285. *See also Myles*, 188 N.C. App. at 51, 654 S.E.2d at 758 (“Since [the officer’s] continued detention of defendant was unconstitutional, defendant’s consent to the search of his car was involuntary.”). The trial court, therefore, erred in denying defendant’s motion to suppress, and we reverse.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge DAVIS concur.

STATE OF NORTH CAROLINA
v.
JEFFREY CASTILLO

No. COA15-855

Filed 3 May 2016

1. Confessions and Incriminating Statements—traffic stop questions—no questions post arrest—Miranda not applicable

Miranda was not applicable in a drug seizure case arising from a traffic stop where defendant was questioned during the traffic stop, the questions related for the most part to the traffic stop, and he was not asked any questions after his arrest.

2. Search and Seizure—traffic stop—extended—reasonable suspicion

The trial court erred by suppressing evidence of cocaine and heroin that resulted from a traffic stop where the officer had reasonable suspicion to extend the stop based on defendant’s bizarre travel plans, his extreme nervousness, the use of masking odors, the smell of marijuana on his person, and the third-party registration of the vehicle.

3. Search and Seizure—traffic stop—consent to search—voluntary

Defendant’s consent to search his car following a traffic stop was voluntary and the trial court erred by suppressing evidence of cocaine and heroin. Although it appeared that the trial court believed that the officer lacked reasonable suspicion to extend the

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stop, and that the unlawful extension impinged on defendant's ability to consent, the trial court misunderstood the sequence of events.

Appeal by the State from order entered 22 April 2015 by Judge Richard Allen Baddour Jr. in Durham County Superior Court. Heard in the Court of Appeals 15 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Sutton & Lindsay PLLC, by Kerstin Walker Sutton and Stephen P. Lindsay, for the defendant-appellant.

McCULLOUGH, Judge.

The State appeals from an order allowing Jeffrey Castillo's ("defendant's") motion to suppress the search of his vehicle entered by the trial court on 22 April 2015. After careful review, we reverse.

I. Background

On 26 September 2014, Officer Roy Green, a 15-year veteran Durham Police Department officer assigned to the highway interdiction division of the special operations division was parked on an exit ramp monitoring the southbound lanes of I-85 near the Durham-Orange county border. Officer Green testified that he patrols the I-85 corridor looking for people who might be using that route to move contraband, money, or engage in human trafficking while also stopping and citing routine traffic violators. Officer Green further testified that he has had specialized interdiction training beginning in 2006. The interdiction training teaches him how to look for verbal and non-verbal indicators that the person stopped for a traffic violation might also be engaged in other criminal activity.

During his shift, Officer Green positioned his vehicle, a marked unit with no roof light system, on the exit ramp of Highway 70 which provided him with a clear view of the I-85 South traffic lanes. He noticed a green car traveling at what he estimated as a high rate of speed, so the officer began to follow the car to determine how fast the car was travelling. Officer Green had tested his speedometer and radar to ensure the accuracy of his speedometer at the beginning of the shift, which was important since there was too much traffic at the location he was monitoring for him to use his radar. After pacing defendant's vehicle for enough time and distance to calculate defendant's speed as 72 mph in a 60 mph zone, Officer Green activated his emergency lights and stopped

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defendant's vehicle. When defendant observed the officer's lights he abruptly pulled over to the shoulder of the road, startling Officer Green and requiring him to brake to avoid collision.

Officer Green approached defendant's vehicle from the passenger side and asked for his license and registration. Officer Green noticed defendant's hand was shaking uncontrollably as he handed the license to him. Officer Green also smelled a mild odor of air freshener emanating from the interior of the vehicle and observed that defendant was operating the vehicle with a single key, which indicated to Officer Green that defendant might not be the owner of the car. Officer Green explained that people who loan someone a car will often not give out all of their keys. This was corroborated later during the investigation as the officer validated that an individual from the Jackson Heights or Queens area of New York City was the owner of the vehicle. Upon noticing defendant's extreme nervousness, Officer Green asked defendant where he was going and where was he coming from. Instead of answering, defendant would respond with "huh," requiring Officer Green to re-ask the question. Officer Green testified that he believed this indicated defendant was stalling so that he could think of what to say. Officer Green testified he knew that defendant clearly heard the question as he had asked defendant to roll up the driver side window to screen the traffic noise from I-85 and make it quieter for their conversation. After the question was asked again, defendant informed Officer Green that he was coming from Queens, New York. Officer Green then asked defendant again about his destination and received another "huh" as his answer. Upon the second or third time defendant was asked about his destination, defendant claimed he did not know where he was going but had an address in the GPS of his phone. Defendant could not even provide the city where that address was located. Officer Green then asked if defendant had been to North Carolina before, to which defendant replied that this was his first trip.

Officer Green again asked where he was going and defendant could not, or would not, tell Officer Green his destination. At that point Officer Green concluded that defendant clearly did not want to tell him where he was going. Officer Green testified that he felt this was very strange for in 15 years of stopping people, they always knew where they were coming from and where they were going. Officer Green testified this was the first time someone ever told him that they did not know their destination, but had a destination address locked into the GPS on their phone. Officer Green testified that defendant informed him it was Big Tree Way, but he did not know the city in which this address was located; defendant

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only knew it was about an hour away. Given the facts that defendant had answered his questions with “huh” repeatedly and could not, or would not, disclose his destination, Officer Green began to believe that there was criminal activity involved. This belief arose before Officer Green asked defendant to exit his vehicle, submit to a pat down for weapons, and sit in his patrol vehicle.

The patrol vehicle was outfitted with both an in-car camera system to record the inside of the patrol vehicle and a forward-facing camera system to record what the driver would see in front of the patrol vehicle. The entire video of Officer Green’s interaction with defendant was entered into evidence and played for the trial court judge.

That video showed that while in the process of entering defendant’s information and that of the registered owner, Officer Green asked defendant about the odor of marijuana that he now detected. Defendant answered that he had smoked about three days ago and that some of his friends smoked, and that is what Officer Green might have smelled. Then later, while the officer is still processing the defendant’s name, registration, and routine information, defendant volunteered that he had been arrested for DUI in New York due to his driving while under the influence of marijuana, an experience defendant said he had learned from. While in the patrol vehicle, Officer Green also had defendant repeat his story about not knowing the city of his destination but that he had an address locked into the GPS of his phone and he was about an hour away. Officer Green then asked who defendant was going to see and defendant said “Eric.” But when asked Eric’s last name, defendant said he did not know. Defendant explained that he was going to see Eric, hang out for a few days, and go back to New York in the car he had borrowed from another friend. All of this occurred well before Officer Green learned from dispatch that there were no warrants for defendant.

Officer Green further testified that he had to change to the police channel in case the department was doing a safety check and then go back to dispatch to get information about warrants. Officer Green also ran the names of the owner of the vehicle and defendant through the El Paso Intelligence Center (“EPIC”) before printing out a warning ticket, although Officer Green had already informed defendant that he was going to receive a warning ticket long before the ticket was actually printed.

As Officer Green handed defendant the warning ticket, Officer Green asked defendant if he had any marijuana in the car, noting that he had smelled marijuana on defendant and defendant had admitted

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to the marijuana-based DUI. Defendant denied there was any marijuana in the car and said, “[y]ou can search, if you want to search.” The ensuing search discovered a quantity of heroin and cocaine in a trap door under the center console. As the officers are locating the drugs, defendant is heard muttering “they found it” on the video recording.

After his arrest, defendant was indicted on 3 November 2014 and a suppression hearing was held on 20 April 2015. The trial court entered an order allowing defendant’s suppression motion on 22 April 2015, from which the State now appeals. The trial court ruled that Officer Green unnecessarily extended the traffic stop without reasonable suspicion and that defendant had not given clear and unequivocal consent to search his vehicle.

II. Standard of Review

“The standard of review for a motion to suppress is whether the trial court’s findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law.” *State v. Wainwright*, __ N.C. App. __, __, 770 S.E.2d 99, 104 (2015) (internal quotation marks and citation omitted).

Whether a defendant has voluntarily consented to a search is determined after a review of the totality of the circumstances surrounding the obtaining of consent. *State v. Smith*, 346 N.C. 794,798, 488 S.E.2d 210, 213 (1997). Consent in the context of searches and seizures “means a statement to the officer, made voluntarily and in accordance with the requirements of [N.C. Gen. Stat. §] 15A-222, giving the officer permission to make a search.” N.C. Gen. Stat. § 15A-221(b) (2015).

III. Analysis

Here, the trial court properly found that Officer Roy Green, a 15-year veteran of the Durham Police Department serving in the interdiction unit of the special operations division, stopped a vehicle driven by defendant with reasonable suspicion that defendant was speeding in violation of N.C. Gen. Stat. § 20-141. The validity of the initial traffic stop is not at issue in this case. The problem with the trial court’s order stems from a misunderstanding of the United States Supreme Court’s recent decision in *Rodriguez v. United States*, __ U.S. __, 191 L. Ed. 2d 492 (2015), which held that even a *de minimis* extension of a valid traffic stop is a violation of the Fourth Amendment’s prohibition against unreasonable searches and seizures absent reasonable suspicion. Understanding exactly what *Rodriguez* permits and what *Rodriguez* prohibits is important. Thus, we re-visit the facts of *Rodriguez* and the legal standards applied in the Eighth Circuit at the time of the *Rodriguez* traffic stop.

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In *Rodriguez*, a canine police officer, who had his dog with him in his patrol vehicle, stopped a vehicle after observing it veer slowly onto the shoulder of the road and then “jerk” back onto the road. *Id.* at __, 191 L. Ed. 2d at 1612. The defendant in *Rodriguez* was driving the vehicle and there was a passenger in the front passenger seat. *Id.* Upon approaching the passenger side of the vehicle, the officer inquired why the defendant had driven onto the shoulder and the defendant replied that he had swerved to avoid a pothole. *Id.* at __, 191 L. Ed. 2d at 1613. Resolving the separate issue of whether the officer had reasonable suspicion to extend the traffic stop, an issue the majority did not reach and sent back for consideration by the Eighth Circuit, Justice Thomas added that “[the defendant’s] story could not be squared with [the officer’s] observation of the vehicle slowly driving off the road before being jerked back onto it.” *Id.* at __, 191 L. Ed. 2d at 1622 (Thomas, J., dissenting). The officer then took the defendant’s license, registration, and proof of insurance to his patrol vehicle and ran a records check on the defendant. *Id.* at __, 191 L. Ed. 2d at 1613. Upon completion of the records check on the defendant, the officer returned to the defendant’s vehicle, asked the passenger for his driver’s license, and questioned the passenger concerning their route and reason for traveling. *Id.* The passenger responded that they had gone to Omaha to look at a vehicle for sale and were returning to Norfolk. *Id.* The officer then returned to his patrol vehicle to run a records check on the passenger. *Id.* The officer also called for a second officer at that time. *Id.* Upon completion of the second records check, the officer wrote a warning ticket for the defendant for driving on the shoulder and returned to the defendant’s vehicle to issue the warning ticket. *Id.* After issuing and explaining the warning ticket and returning the defendant’s and the passenger’s documents, the officer then asked for permission to walk his dog around the defendant’s vehicle, a request the defendant refused. *Id.* At that time, the officer directed the defendant to turn off and exit the vehicle. *Id.* When a deputy sheriff arrived a few minutes later, the officer retrieved his dog from his patrol vehicle and led the dog around the defendant’s vehicle. *Id.* The dog alerted and drugs were discovered during a subsequent search of the defendant’s vehicle. *Id.*

The district court denied the defendant’s motion to suppress, noting that “in the Eighth Circuit, dog sniffs that occur within a short time following the completion of a traffic stop are not constitutionally prohibited if they constitute only *de minimis* intrusions.” *Id.* at __, 191 L. Ed. 2d at 1613-14 (internal quotation marks omitted). The Eighth Circuit affirmed that the delay in the traffic stop “constituted an acceptable *de minimis* intrusion on [the defendant’s] personal liberty” and declined

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to address whether the officer had reasonable suspicion to extend the stop. *Id.* at ___, 191 L. Ed. 2d at 1614 (internal quotation marks omitted). The U.S. Supreme Court granted *certiorari* and then vacated the judgment of the Eighth Circuit and remanded the case for the Eighth Circuit to consider whether there was reasonable suspicion to detain the defendant beyond the completion of the traffic stop. *Id.* at ___, 191 L. Ed. 2d at 1616-17. Upon remand the Eighth Circuit applied the “good-faith exception” and upheld the defendant’s conviction. *United States v. Rodriguez*, 799 F.3d 1222 (8th Cir. 2015).

It is important to examine exactly what guidance the Court provided in *Rodriguez*. There Justice Ginsburg explained:

A seizure for a traffic violation justifies a police investigation of that violation. A relatively brief encounter, a routine traffic stop is more analogous to a so-called “*Terry* stop” than to a formal arrest. Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure’s “mission” – to address the traffic violation that warranted the stop, and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose. Authority for the seizure thus ends when tasks tied to the traffic infraction are – or reasonably should have been – completed.

Our decisions in *Caballes* and *Johnson* heed these constraints. In both cases, we concluded that the Fourth Amendment tolerated certain unrelated investigations that did not lengthen the roadside detention. In *Caballes*, however, we cautioned that a traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a warning ticket. And we repeated that admonition in *Johnson*: The seizure remains lawful only so long as unrelated inquiries do not measurably extend the duration of the stop. An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop. But . . . he may not do so in a way that prolongs the stop, *absent the reasonable suspicion ordinarily demanded to justify detaining an individual*.

Id. at ___, 191 L. Ed. 2d at 1614-15 (internal quotation marks, citations, brackets, and ellipses omitted) (emphasis added).

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[1] At the outset it should be noted that while a person has been seized during a traffic stop, that seizure is permissible when based upon reasonable suspicion and statements made during the course of a traffic stop are not custodial statements requiring *Miranda* warnings. *Berkemer v. McCarty*, 468 U.S. 420, 437-42, 82 L. Ed. 2d 317, 332-36 (1984). While such has long been the law, defense counsel in the present case argued that Officer Green should have given defendant a *Miranda* warning before asking any questions. The trial court then issued Conclusion of Law 12, which provides, “[Officer] Green did not advise defendant of his rights pursuant to *Miranda*, and defendant did not waive them.” *Miranda*, however, is inapplicable under the circumstances of this case as defendant was not asked any questions post-arrest. All of the questions asked of defendant were during the traffic stop itself and, for the most part, related to the traffic stop, such as route information, vehicle ownership, purpose of the trip, odors emanating from defendant, or responses to questions from defendant, such as whether there were deer along the highway.

[2] In reviewing the guidance from *Rodriguez*, it is clear that a traffic stop may not be unnecessarily extended, “*absent the reasonable suspicion ordinarily demanded to justify detaining an individual.*” *Rodriguez*, __ U.S. at __, 191 L. Ed. 2d at 1615 (emphasis added). In determining whether a stop was unnecessarily extended, the purpose of the stop is paramount. Unrelated investigation is not necessarily prohibited, but extending the stop to conduct such an investigation is prohibited. The question then arises, “When does reasonable suspicion arise?” In *Rodriguez*, the majority opinion made no determination on the issue of reasonable suspicion and remanded the case to the Eighth Circuit to consider the issue. *Id.* at __, 191 L. Ed. 2d at 1616-17.

“[A] trial court’s conclusions of law regarding whether the officer had reasonable suspicion [or probable cause] to detain a defendant is reviewable *de novo*.” *State v. Hudgins*, 195 N.C. App. 430, 432, 672 S.E.2d 717, 718 (2009) (internal quotation marks and citations omitted). Thus, we review *de novo* the trial court’s conclusion in this case that Officer Green lacked reasonable suspicion prior to running the defendant’s name through other databases after learning there were no warrants for defendant.

Our Supreme Court has long recognized that “reasonable suspicion” is a relatively low threshold and should be viewed through the eyes of a reasonable officer, giving the officer credit for his training and

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experience. In *State v. Williams*, 366 N.C. 110, 726 S.E.2d 161 (2012), our Supreme Court explained:

An officer has reasonable suspicion if a reasonable, cautious officer, guided by his experience and training, would believe that criminal activity is afoot based on specific and articulable facts, as well as the rational inferences from those facts. A reviewing court must consider the totality of the circumstances – the whole picture. This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. While something more than a mere hunch is required, the reasonable suspicion standard demands less than probable cause and considerably less than preponderance of the evidence.

Id. at 116-17, 726 S.E.2d at 167 (internal quotation marks and citations omitted). Applying this reasonable suspicion standard to the circumstances in *Williams*, our Supreme Court determined the officers involved had reasonable suspicion to justify extending a stop until a canine unit arrived where the occupants of a car they stopped gave inconsistent and unlikely travel information, could not explain where they were going, gave inconsistent statements concerning their familial relationship, and the vehicle with illegally tinted windows was owned by a third person. *Id.* at 117, 726 S.E.2d at 167. The Court further explained that while the factors may not support a reasonable suspicion of criminal activity when viewed individually and in isolation, when “viewed as a whole by a trained law enforcement officer who is familiar with drug trafficking and illegal activity on interstate highways, the responses were sufficient to provoke a reasonable articulable suspicion that criminal activity was afoot[.]” *Id.*

Another case demonstrating that a series of innocent factors, when viewed collectively, may rise to the level of reasonable suspicion is *State v. Fisher*, 219 N.C. App. 498, 725 S.E.2d 40 (2012), *disc. rev. denied*, 366 N.C. 425, 759 S.E.2d 83 (2013). In *Fisher*, the State argued the following factors established reasonable suspicion that the defendant was transporting contraband:

- (1) there was an overwhelming odor of air freshener coming from the car;
- (2) defendant’s claim that he made a five hour round trip to go shopping but had not purchased anything;
- (3) defendant’s nervousness;
- (4) defendant had

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pending drug related charges and was known as a distributor of marijuana and cocaine in another county; (5) defendant was driving in a pack of cars; (6) defendant was driving a car registered to someone else; (7) defendant never asked why he had been stopped; (8) defendant was “eating on the go”; and (9) there was a handprint on the trunk indicating that something had recently been placed in the trunk.

Id. at 502-03, 725 S.E.2d at 44. This Court explained that

[t]he specific and articulable facts, and the rational inferences drawn from them, are to be viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. In determining whether the further detention was reasonable, the court must consider the totality of the circumstances. Reasonable suspicion only requires a minimal level of objective justification, something more than an unparticularized suspicion or hunch. We emphasize that because the reasonable suspicion standard is a commonsensical proposition, [c]ourts are not remiss in crediting the practical experience of officers who observe on a daily basis what transpires on the street.

Id. at 502, 725 S.E.2d at 43 (internal quotation marks and citations omitted). Then, upon review of the factors argued by the State, and despite noting that some of the factors could be construed as innocent behavior, this Court held the trial court erred in determining reasonable suspicion did not exist because multiple other factors present in the case were sufficient to establish reasonable suspicion. *Id.* at 504, 725 S.E.2d at 45. Specifically, the trial court noted “nervousness, the smell of air freshener, inconsistency with regard to travel plans, and driving a car not registered to the defendant.” *Id.* (internal citations omitted).

Federal reasonable suspicion cases are also instructive in the present case. Two of those cases are *United States v. Carpenter*, 462 F.3d 981 (8th Cir. 2006), and *United States v. Ludwig*, 641 F.3d 1243 (10th Cir. 2011).

In *Carpenter*, a defendant driving a vehicle with Texas plates exited the interstate highway in Phelps County, Missouri immediately after a sign warned of a drug check point ahead. 462 F.3d at 983. The defendant then drove for a distance before pulling to the shoulder of the road. *Id.* When an officer approached the defendant, the defendant claimed

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he was looking to refuel even though he had a quarter of a tank of gas and there were no service stations at the exit. *Id.* at 983-84. The defendant also claimed to be traveling from Austin, Texas, to New York, but the rental agreement for the vehicle showed the vehicle was rented in El Paso. *Id.* After another deputy arrived with a trained drug detection dog, the dog was walked around the defendant's vehicle and alerted. *Id.* at 984. The officer then searched the vehicle and found cocaine, leading to the defendant's arrest. *Id.* In reviewing whether there was reasonable suspicion, the Eighth Circuit explained as follows:

We consider the totality of circumstances in evaluating whether there was reasonable suspicion that criminal activity was afoot. Reasonable suspicion is a lower threshold than probable cause and it requires considerably less than proof of wrongdoing by a preponderance of the evidence. The behavior on which reasonable suspicion is grounded, therefore, need not establish that the suspect is probably guilty of a crime or eliminate innocent interpretations of the circumstances. Factors consistent with innocent travel, when taken together, can give rise to reasonable suspicion, even though some travelers exhibiting those factors will be innocent. To justify a seizure, however, the officer must have a minimal level of objective justification and something more than an inchoate and unparticularized suspicion or hunch. And the ultimate test is not what the seizing officer actually believed, but what a hypothetical officer in exactly the same circumstances reasonably could have believed.

Id. at 986 (internal citations and quotation marks omitted). The Court then held that the totality of the facts in the case provided reasonable suspicion to justify the detention of the defendant until the drug dog arrived. *Id.* at 987.

In *Ludwig*, a Wyoming state trooper initiated a stop of the defendant's car for speeding. 641 F.3d at 1246. The defendant pulled onto the shoulder of the highway but, strangely, continued driving for a considerable distance on the shoulder before stopping. *Id.* When the trooper approached the car, he smelled a strong odor of cologne and noticed the defendant was trembling so badly that he had difficulty producing his driver's license. *Id.* The trooper then had the defendant accompany him to his patrol car while he wrote the defendant a speeding ticket, during which time the trooper asked about the defendant's travel plans. *Id.* The

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defendant advised he was an “IT administrator” and had traveled from New Jersey to San Jose, California, to deal with a “server problem” and was now returning to New Jersey. *Id.* The defendant also stated that he chose to drive instead of flying, had stayed in California for only four days, and had spent the last night in his car. *Id.* The registration and proof of insurance for the defendant’s car were not in defendant’s name. *Id.* The trooper found the circumstances suspicious and after writing a ticket, detained the defendant for further investigation. *Id.* A drug dog then alerted to the defendant’s car and drugs were found during a search. *Id.* In reviewing the district court’s denial of the defendant’s motion to dismiss, the Tenth Circuit held that the combination of considerations which have been recognized in other cases to contribute to reasonable suspicion led it to hold the reasonable suspicion standard was satisfied. *Id.* at 1248-50 (citing *United States v. Villa-Chaparro*, 115 F.3d 797, 799, 802 (10th Cir. 1997) (failure to promptly stop); *United States v. Ortiz-Ortiz*, 57 F.3d 892, 895 (10th Cir. 1995) (masking odors); *United States v. Turner*, 928 F.2d 956, 959 (10th Cir. 1991) (third-party registration); *United States v. White*, 584 F.3d 935, 943, 951 (10th Cir. 2009) and *United States v. Sokolow*, 490 U.S. 1, 9, 104 L. Ed. 2d 1, __ (1989) (suspect travel schedule); *United States v. Williams*, 271 F.3d 1262, 1269 (10th Cir. 2001) (extreme nervousness)).

As stated earlier, the determination of reasonable suspicion is a conclusion of law which we review *de novo*. In analyzing the facts of the case at bar, we note that a number of factors deemed relevant in *Carpenter*, *Ludwig*, and other cases cited herein were present and were known to Officer Green before he had defendant join him in the patrol vehicle – an unusual story regarding his travel as he did not know his destination or was concealing it, *United States v. White*, *supra*; a masking odor, *United States v. Ortiz-Ortiz*, *supra*; third-party registration, *United States v. Turner*, *supra*; and nervousness, *United States v. Williams*, *supra*. These factors were known to Officer Green while he stood on the roadside before defendant joined him in the patrol vehicle. Then while running defendant’s name for warrants in the patrol vehicle, an action permitted in *Rodriguez*, the officer smelled marijuana on defendant’s person and learned from defendant that defendant had a DUI based on his own marijuana usage. The trial court’s conclusion that Officer Green lacked reasonable suspicion despite all of these factors discussed herein is incorrect. It bears repeating that reasonable suspicion is a common sense determination made by a reasonable officer, giving the officer credit for his training and experience and viewing the totality of the circumstances. While there might be someone who would borrow a car, drive eleven hours to “hang out” with a friend named Eric

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at an unknown location, spend a few days and return, it is a rather bizarre story. Reasonable suspicion does not depend on a proven lie, but is based on the totality of the circumstances. Based on defendant's bizarre travel plans, his extreme nervousness, the use of masking odors, the smell of marijuana on his person, and the third-party registration of the vehicle, it is reasonable that even an untrained person would doubt defendant's story, much less a fifteen-year veteran with interdiction training. Thus, we hold that Officer Green had reasonable suspicion to extend the stop and could run such ancillary records checks as he believed reasonable until his investigation was complete. The time it took for him to complete what is described in his testimony as a "pipeline" check and an EPIC check were both done relatively quickly and, when the warning ticket was issued, there had been no unreasonable extension of the stop.

The trial court issued conclusions of law that were phrased in the alternative and, thus, are somewhat confusing. For instance, Conclusion of Law 4 provides:

4. Even if the stop was reasonable in scope and duration up to the point of the issuance of the warning ticket, the extension of the stop after the issuance of the warning ticket was also unreasonable in both scope and duration, without reasonable suspicion to believe that criminal activity was afoot.

This conclusion of law is expressly overruled as we have held that the evidence clearly showed that Officer Green had reasonable suspicion from the time he and defendant sat down in the patrol car.

[3] Not only did Officer Green not unreasonably extend the stop, shortly after the warning ticket was written and as Officer Green handed the ticket to defendant, Officer Green, in light of smelling marijuana and defendant's admission to using marijuana, asked whether there was any marijuana in defendant's vehicle. Defendant denied there was anything in the car stating, "you can search if you want to search." The trial court found that Castillo stated that the officer could search, yet concluded consent was not freely given. It appears the trial court may have concluded that consent was not freely given because the trial court judge misunderstood the law and did not have the sequence of events in their correct order. The trial court's order contains the following findings of fact:

31. Approximately seventeen minutes into the stop, Green received word from Durham dispatch that there were no outstanding warrants for the driver.

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32. Approximately thirty-seven minutes into the stop, Green printed out a warning ticket for speeding.

33. At that point, Green told defendant to sit tight or otherwise indicated he wished him to remain in the vehicle. Green did not seek or gain consent for the extension of this stop. There was no point throughout the encounter in which Green indicated, verbally or otherwise, that defendant was not required to remain with the officer. At no point did Green let defendant know he was free to leave.

The trial judge then made Finding of Fact 34, which provides in pertinent part that “Green asked defendant if there was any marijuana in the car, but did not specifically seek permission to search the vehicle. The defendant responded negatively, and told the officer, ‘you can search if you want to search.’ ”

In making these findings, the trial judge had the sequence of events out of order. In fact, it was after defendant informed Officer Green that the officer could search if he wanted to that Officer Green told defendant to “sit tight[,]” as recounted in Finding of Fact 33. If the officer had in fact detained defendant without reasonable suspicion and ordered him to “sit tight[,]” perhaps one could conclude that consent was not freely and unequivocally given. While the issue of valid consent may be an issue of fact, that determination must be founded upon a correct factual basis. Ultimately these facts must support a conclusion of law that consent was or was not freely given. *See State v. Brown*, 306 N.C. 151, 169-71, 293 S.E.2d 569, 581-82 (1982). In the case at bar, the defendant clearly stated “you can search, if you want to search[,]” after which, not before, Officer Green tells defendant to “sit tight” and retrieves his gloves from the back seat of his patrol vehicle before beginning the search of defendant’s vehicle. Thus, the trial court’s Conclusion of Law 9, wherein the court concluded defendant’s consent was not clear and unequivocal, is premised on both incorrect facts and a misunderstanding of the law. As such, the court’s conclusion of law is clearly erroneous. *See State v. Smith*, 346 N.C. 794, 799-800, 488 S.E.2d 210, 213-14 (1997). In *Smith*, our Supreme Court held the trial court erred in concluding the defendant’s consent was not voluntary because it appeared that the trial judge believed that the “knock and talk” law enforcement technique was unconstitutional. *Id.* Furthermore, the Court reversed because the trial court did not make a specific finding that consent was voluntary. *Id.* In the present case, it appears the trial judge believed that Officer Green lacked reasonable suspicion to extend the stop and the unlawful extension impinged on defendant’s ability to consent. Additionally, it

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appears the trial court misunderstood the correct sequence of events. As a result, the trial court's factual findings do not support the conclusion of law that "defendant did not give lawful consent for the search." The trial court's conclusion is subject to reversal.

The case at bar is very similar to that of *U.S. v. Cardenas-Alatorre*, 485 F.3d 1111, 1118-20 (10th Cir. 2007), in which the Court held the district court's finding of voluntary consent was not clearly erroneous based on video of the encounter that showed no evidence of coercion and that the defendant continued to respond to officer's questions. 485 F.3d at 1118-20. Similarly, the entire encounter between Officer Green and defendant in this case was recorded on video. On the video, defendant can be clearly heard telling Officer Green he can search and talking to Officer Green and other officers during the search. There is no evidence to suggest defendant's consent was anything but voluntary and, therefore, we hold the trial court's conclusion that "defendant did not give lawful consent" is clearly erroneous.

IV. Conclusion

In conclusion, we hold Officer Green had reasonable suspicion to extend the traffic stop prior to entering his patrol vehicle with defendant. Thus, the traffic stop was not unlawfully extended. We also hold the trial court's conclusion that defendant's consent was not clear and unequivocal was based on a misapprehension of both the law and the factual sequence of events and, thus, was clearly erroneous. Consequently, we reverse the trial court's order suppressing the evidence in this case and remand the case to Durham County Superior Court for trial.

REVERSED.

Judges BRYANT and GEER concur.

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STATE OF NORTH CAROLINA

v.

CALEB HOPKIRK-RIDLEN HILL, DEFENDANT

No. COA15-675

Filed 3 May 2016

1. Evidence—identification of defendant in surveillance video—special knowledge—helpful to jury

In defendant's trial for crimes based on multiple break-ins at a shopping center, the trial court did not abuse its discretion by allowing the testimony of two law enforcement officers who identified defendant in a surveillance video from the shopping center. The officers had interacted with defendant numerous times previously, and they were familiar with the distinctive features of his face, posture, and gait. Further, defendant's appearance had changed between the time the crimes were committed and the trial. The officers' testimony was rationally based on their special knowledge of defendant and was helpful to the jury's determination of whether defendant was the person in the video.

2. Indictment and Information—fatal variance—owner of stolen property—lawful custody and possession

Where defendant argued on appeal that there was a fatal variance between the allegations in his indictment and the evidence at trial, but he failed to preserve the issue at trial, the Court of Appeals invoked Rule 2 of the Rules of Appellate Procedure to consider one of his arguments on the issue—that the indictment stated he stole an iPod and \$5.00 from Tutti Frutti, LLC, while the proof showed that the items belonged to the son of Tutti Frutti's owner. Reconciling two seemingly inconsistent decisions, the Court of Appeals held that there was a fatal variance between the indictment and the proof at trial because the State failed to establish that the alleged owner of the stolen property had lawful possession and custody of the property.

3. Constitutional Law—effective assistance of counsel—issues considered on appeal

Where defendant was convicted for multiple crimes related to break-ins at a shopping center and argued on appeal that his counsel's failure to raise fatal variances between the indictment and evidence at trial constituted ineffective assistance of counsel, the Court

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of Appeals' conclusion that his fatal variance claim concerning damage to property was meritless rendered that ineffective assistance claim meritless. As for his fatal variance claim related to the iPod and money, because the Court of Appeals agreed with his argument on the merits and vacated that count of larceny, there was no need to address counsel's performance on that issue.

4. Larceny—restitution—erroneously ordered

Where defendant argued, and the State conceded, that the trial court erred by ordering him to pay \$698.08 in restitution for items taken from a doctor's office where the jury acquitted him of the larceny charge concerning that office, the Court of Appeals vacated that award of restitution.

Appeal by defendant from judgments entered 3 December 2014 by Judge Edwin G. Wilson, Jr. in Orange County Superior Court. Heard in the Court of Appeals 3 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General Derek L. Hunter, for the State.

James W. Carter, for defendant-appellant.

DIETZ, Judge.

Defendant Caleb Hill appeals his convictions on multiple counts of breaking and entering, larceny, and injury to real property based on a series of break-ins at businesses in a shopping center in Chapel Hill.

Hill first argues that the trial court erred by failing to exclude the testimony of two law enforcement officers who identified him in surveillance video from the shopping center. As explained below, the officers were familiar with Hill and recognized distinct features of Hill's face, posture, and gait that would not have been evident to the jurors. Hill's appearance also had changed from the time of the crimes to the time of trial, and the officers' testimony assisted the jury in understanding Hill's appearance at the time of the crime and its similarity to the person in the surveillance videos. Accordingly, the trial court did not abuse its discretion in permitting this testimony.

Hill also argues that there were several fatal variances between the indictment and the evidence at trial. Hill failed to raise these issues at trial and they are waived on appeal. However, we conclude that one of

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these fatal variance arguments is meritorious and exercise our discretion under Rule 2 to suspend the appellate preservation rules and consider that argument, which concerns the theft of money and an iPod from a frozen yogurt shop. As explained in more detail below, the State alleged the property belonged to Tutti Frutti, LLC, but it actually belonged to Jason Wei, the son of the sole member of that limited liability company. Moreover, the State failed to show that Tutti Frutti, LLC was in lawful custody and possession of Mr. Wei's property at the time it was stolen. Accordingly, we vacate that conviction but reject Hill's other fatal variance claims.

Finally, Hill argues—and the State concedes—that the trial court's award of restitution is erroneous because it included restitution for a larceny for which Hill was acquitted. We vacate the portion of Hill's sentence concerning restitution and remand this case for further proceedings on that issue.

Facts and Procedural History

At or around 4:00 a.m. on 7 November 2013, a property manager for Bryan Properties, Inc. received a call that the alarm for the Lumina Theater, one of the properties her company manages at Southern Village in Chapel Hill, was going off and police had been dispatched. Upon arrival, she learned that four other businesses surrounding the theater had also been broken into, including Subway, Village Pediatrics, Tutti Frutti (a frozen yogurt shop), and Town Hall Grill. The suspect entered each business by shattering a glass window or door except for Town Hall Grill where there was no entry because the glass did not shatter. A second property manager pulled the surveillance videos from Lumina Theater, which showed a suspect inside. Surveillance video also showed a person breaking into both Subway and Village Pediatrics. Jason Wei, son of the owner of the Tutti Frutti store,¹ also turned over surveillance video and reported that his iPod had been taken but was not sure if any money had been stolen. A physician at Village Pediatrics also reported that her Hewlett-Packard laptop was missing from her office.

Officers and investigators of the Chapel Hill Police Department arrived, including Officer Shane Osborne. After reviewing the surveillance videos, he was sure that he recognized the suspect as Caleb Hill. The Subway video gave Osborne the best opportunity to get a good look

1. More accurately, Mr. Wei's father apparently is the sole member of Tutti Frutti, LLC, which owns the store. We refer to Jason Wei as the "owner's son" for consistency because that is how the parties' briefs describe him.

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at the face of the suspect, and Osborne was then “100 percent sure” it was Hill. Officer Osborne was familiar with Hill from prior interactions with him. He and his partner, Officer Ragan Bradley Kramer, arrested Hill in May 2013, and between then and 7 November 2013, had seen Hill approximately ten to fifteen times in the community. Officer Osborne last saw Hill approximately two weeks before the Southern Village break-ins.

When Officer Osborne viewed the video footage, he recognized Hill based on a number of factors. Osborne noticed Hill’s irregular, hunched-over posture and the way he dragged his feet when he walked. He also noticed Hill’s distinctive facial features, including the ridge line of his eyebrows, his nose, chin, and deep-sunken eyes. Finally, Osborne saw that the person in the video wore the same clothes, including unusually long and ill-fitting pants, worn by Hill in the previous encounters between the two. Confident in his identification, Officer Osborne showed the video to Officer Kramer, who also was familiar with Hill’s appearance. Officer Kramer agreed that the suspect in the video was Hill.

Police arrested Hill and questioned him at the police station. During the questioning, Officer Osborne noticed a small piece of tempered glass on the floor near Hill. Osborne suspected this glass may be related to the shattered glass doors at Southern Village. When Osborne asked about the glass, Hill became very defensive and refused to answer further questions.

At trial, the prosecution played the surveillance videos for the jury. Officer Kramer and Officer Osborne testified that they believed the suspect in the surveillance videos was Hill based on their familiarity with Hill’s distinctive features. Hill moved to exclude the officer identification, and the trial court denied the motion. Hill also moved to dismiss his charges at the close of the State’s case and the close of all evidence. The trial court denied those motions as well.

The jury returned a verdict of not guilty on one count of felony larceny but convicted Hill on the remaining counts, including four counts of breaking and entering, one count of attempted breaking and entering, two counts of felony larceny after a breaking and entering, and five counts of injury to real property. Hill timely appealed.

Analysis

Hill raises four issues on appeal: (1) whether the trial court erred in allowing Officers Osborne and Kramer to testify that they believed Hill was the person seen in the surveillance videos; (2) whether there were several fatal variances in the indictments; (3) whether he received

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ineffective assistance of counsel; and (4) whether the trial court erred in its restitution award. We address these issues in turn.

I. Officer Testimony Concerning the Surveillance Videos

[1] Hill first argues that the trial court erred in allowing Officers Osborne and Kramer to give their lay opinions that the person in the surveillance videos was Hill. Specifically, Hill alleges the officers were no better qualified than the jury to identify the suspect in the videos and, therefore, he was prejudiced by the admission of their testimony. We do not agree.

We review the trial court's decision to admit testimony for abuse of discretion. *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000). Admissible lay opinion testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." *Id.* This Court has identified the following factors as relevant to determining whether a witness's identification of the defendant from surveillance footage is admissible:

- (1) the witness's general level of familiarity with the defendant's appearance;
- (2) the witness's familiarity with the defendant's appearance at the time the surveillance photograph was taken or when the defendant was dressed in a manner similar to the individual depicted in the photograph;
- (3) whether the defendant had disguised his appearance at the time of the offense; and
- (4) whether the defendant had altered his appearance prior to trial.

State v. Collins, 216 N.C. App. 249, 255–56, 716 S.E.2d 255, 260 (2011).

Here, Officers Osborne and Kramer testified that they both had previous interactions with Hill, including having arrested him in 2013. Officer Osborne testified that he had seen Hill some ten to fifteen times between May and November 2013. Osborne also testified that he had seen Hill approximately two weeks before the Southern Village break-ins. Officer Kramer testified that he had seen Hill several times and that he occasionally spoke to him. During his testimony, Officer Osborne also narrated the surveillance video for the jury and pointed out the exact points in the video where he was able to get a good look at the suspect. He referenced the features of the person in the video—pronounced eyebrows, pointy nose, very set-in eyes, cleft chin—as well as the person's

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irregular posture and gait as factors which helped him determine that the suspect was Hill based on his familiarity with Hill. After viewing the video, Officer Osborne was “100 percent sure” Hill was the person in the video and later asked Officer Kramer to view it. Kramer agreed that he too was “100 percent sure” the suspect in the video was Hill. At trial, Officer Kramer also pointed to Hill’s distinct facial features as the reason he recognized Hill.

Moreover, Hill’s appearance changed between the time the crimes were committed and the trial. Hill had grown a beard and lost weight by the time of trial. Officer Osborne testified that Hill looked “very different. . . . [W]hen I dealt with him he did not look like he does today.” In light of the officers’ familiarity with the distinctive features of Hill’s face, posture, and gait, and Hill’s changed appearance, we hold that the officers’ testimony was rationally based on their special knowledge of Hill’s appearance and was helpful to the jury’s determination of whether Hill was the person seen in the video. Accordingly, the trial court did not abuse its discretion in admitting the officers’ testimony.

II. Fatal Variance Arguments

[2] Hill next argues that there was a fatal variance between the allegations in the indictment and the evidence at trial. Hill concedes that he failed to preserve this issue for appellate review but asks this Court to invoke Rule 2 of the Rules of Appellate Procedure to review the issue. As explained below, we exercise our discretion and invoke Rule 2 with respect to one of Hill’s arguments.

This Court repeatedly has held that a “[d]efendant must preserve the right to appeal a fatal variance.” *State v. Mason*, 222 N.C. App. 223, 226, 730 S.E.2d 795, 798 (2012); *State v. Pender*, __ N.C. App. __, 776 S.E.2d 352, 358 (2015). If the fatal variance was not raised in the trial court, this Court lacks the ability to review that issue. *Mason*, 222 N.C. App. at 226, 730 S.E.2d at 798. Rule 2 of the Rules of Appellate Procedure permits this Court to suspend the rules regarding preservation of issues for appeal. But this Court can invoke Rule 2 only in “exceptional circumstances . . . in which a fundamental purpose of the appellate rules is at stake.” *Pender*, __ N.C. App. at __, 776 S.E.2d at 358 (alteration in original).

Hill first argues that there was a fatal variance between the allegation that he stole an iPod and \$5.00 from Tutti Frutti, LLC and the proof at trial, which showed that the iPod and any stolen money belonged to Jason Wei, the son of the owner of the Tutti Frutti store. As explained below, we believe this argument has merit. We therefore exercise our

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discretion to hear this issue despite Hill's failure to preserve it below. See *State v. Gayton-Barbosa*, 197 N.C. App. 129, 134–35, 676 S.E.2d 586, 589–90 (2009).

This issue requires us to reconcile seemingly inconsistent decisions from this Court cited by the parties. In *State v. Johnson*, an indictment alleged that the defendant stole two letter openers owned by a church, but the proof at trial was that the letter openers belonged to a priest, not to the church. 77 N.C. App. 583, 585, 335 S.E.2d 770, 772 (1985). This Court held that the discrepancy amounted to a fatal variance between the indictment and the proof. *Id.*

By contrast, in *State v. Graham*, an indictment alleged that the defendant stole money and a radio owned by the Maury Post Office, but the proof at trial was that the money and radio belonged to the postmaster, not to the post office. 47 N.C. App. 303, 307, 267 S.E.2d 56, 59 (1980). This Court held that proof “that the post office is not the owner of such property is not a fatal defect in such a case as this where the property stolen was owned by the postmaster and he had left the property in the post office.” *Id.* The Court explained that “[t]he post office was in lawful custody and possession of the property at the time it was taken[.]” *Id.*

These cases involve virtually identical factual scenarios, with the only distinguishing factor being the apparent proof in *Graham* that the post office was in “lawful custody and possession” of the postmaster’s property. We are bound by all past precedent of this Court and, in an effort to harmonize these decisions, conclude that *Graham* applies only when there is proof at trial that the person named as the property’s owner in the indictment was in “lawful custody and possession” of the property, even if it actually was owned by someone else.

Other cases confirm our interpretation of the distinction between the *Johnson* and *Graham* holdings. For example, in *State v. Liddell*, the indictment alleged that the defendant stole some cigarettes, money, and hamburger patties belonging to Lees-McRae College. 39 N.C. App. 373, 374, 250 S.E.2d 77, 78 (1979). The proof at trial showed that the property belonged to vendors who supplied the college’s vending machines and cafeteria. *Id.* This Court affirmed the conviction, holding that the evidence showed Lees-McRae College “was in lawful possession of the property at the time of the offense” because it fit the “definition of a bailee.” *Id.* at 375, 250 S.E.2d at 79. Other cases from this Court have reached similar results. See *State v. Holley*, 35 N.C. App. 64, 67, 239 S.E.2d 853, 855 (1978); *State v. Vawter*, 33 N.C. App. 131, 136, 234 S.E.2d 438, 441 (1977). Accordingly, we hold that there is no fatal variance

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between an indictment and the proof at trial if the State establishes that the alleged owner of stolen property had lawful possession and custody of the property, even if it did not actually own the property.

Here, the State points to no evidence at trial proving that Tutti Frutti, LLC was in lawful custody and possession of Jason Wei's money and iPod. Indeed, there was no testimony at all concerning why Mr. Wei's money and iPod were at the store. Thus, we conclude that we are bound by *Johnson* and must vacate this count of larceny after breaking and entering because of a fatal variance between the indictment and the proof at trial.

Hill also argues that there was a fatal variance between the allegation that the broken windows and other real property at Southern Village belonged to Bryan Properties and the proof at trial, which established that Bryan Properties merely managed the property for some other owner. Unlike Mr. Wei's iPod, there was evidence at trial that Bryan Properties had "lawful custody and possession" of the damaged property. Moreover, our Supreme Court recently held that an indictment charging a defendant with damage to real property need only identify the real property itself, not its owner, to be valid. *State v. Spivey*, __ N.C. __, __ S.E.2d __ (2016). Thus, unlike the allegations involving Tutti Frutti, we do not believe any variance on the allegations concerning Bryan Properties would be fatal. We therefore decline to invoke Rule 2 because this argument does not present the sort of "exceptional circumstances . . . in which a fundamental purpose of the appellate rules is at stake." *Pender*, __ N.C. App. at __, 776 S.E.2d at 358.

III. Ineffective Assistance of Counsel

[3] Hill next contends that his counsel's failure to raise the fatal variance issues at trial deprived him of his Sixth Amendment right to the effective assistance of counsel. Our conclusion that Hill's fatal variance claim concerning damage to property at Southern Village is meritless necessarily means that counsel's failure to raise that issue was not deficient performance. *See Pender*, __ N.C. App. at __, 776 S.E.2d at 358. Likewise, our conclusion that Hill's fatal variance claim concerning the money and iPod is meritorious, and that we will therefore excuse counsel's failure to preserve the issue below by invoking Rule 2, obviates our need to address counsel's performance on this issue.

IV. Restitution

[4] Finally, Hill argues—and the State concedes—that the trial court erred by ordering Hill to pay \$698.08 in restitution for items taken from

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Village Pediatrics because the jury acquitted Hill of the larceny charge concerning Village Pediatrics. Both parties agree that the appropriate remedy is to vacate the portion of Hill's sentence imposing restitution and remand this case for further proceedings on the issue of restitution. We agree, vacate the award of restitution, and remand to the trial court for further proceedings.

Conclusion

We vacate the count of felony larceny after a breaking and entering concerning Tutti Frutti, LLC but affirm the remaining convictions. We vacate the restitution award. We remand for further proceedings consistent with this opinion.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges STROUD and TYSON concur.

STATE OF NORTH CAROLINA
v.
HARRY SHAROD JAMES

No. COA15-684

Filed 3 May 2016

1. Constitutional Law—*ex post facto* laws—first-degree murder—resentencing guidelines

Defendant's resentencing for first-degree murder pursuant to N.C.G.S. § 15A-1340.19A *et seq.* did not violate the constitutional prohibitions on *ex post facto* laws. Because N.C.G.S. § 15A-1340.19A *et seq.* does not impose a more severe punishment than that originally mandated in N.C.G.S. § 14-17, but instead provides sentencing guidelines that comply with the United States Supreme Court's decision in *Miller* and allows the trial court discretion to impose a lesser punishment based on applicable mitigating factors, defendant could not be disadvantaged.

2. Constitutional Law—cruel and unusual punishment—sentencing—juvenile offender

N.C.G.S. § 15A-1340.19A *et seq.* does not violate the constitutional guarantees against cruel and unusual punishment. It is not

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inappropriate or unconstitutional for the sentencing analysis in N.C.G.S. § 15A-1340.19A *et seq.* to begin with a sentence of life without parole and require the sentencing court to consider mitigating factors to determine whether the circumstances are such that a juvenile offender should be sentenced to life with parole instead of life without parole. Life without parole as the starting point in the analysis does not guarantee it will be the norm.

3. Constitutional Law—due process—sentencing guidelines—trial by jury

N.C.G.S. § 15A-1340.19A *et seq.* does not violate the right to due process of law. The discretion of the sentencing court is guided by *Miller* and the mitigating factors provided in N.C.G.S. § 15A-1340.19B(c). Although defendant contended that N.C.G.S. § 15A-1340.19A *et seq.* violated the right to trial by jury, no jury determination was required and thus defendant's argument was without merit.

4. Sentencing—mitigating factors—sufficiency of findings of fact

The trial court erred in a first-degree murder case by failing to make adequate findings of fact to support its decision to impose a sentence of life without parole. Nowhere in the order did the resentencing court indicate which evidence demonstrated the absence or presence of any mitigating factors.

5. Sentencing—life without parole—sufficiency of findings of fact—mitigating factors

The trial court abused its discretion in a first-degree murder case by resentencing defendant to life without parole under N.C.G.S. § 15A-1340.19A *et seq.* The trial court did not issue sufficient findings of fact on the absence or presence of mitigate factors. The case was reversed and remanded to the trial court for further sentencing proceedings.

Appeal by defendant from judgment entered 12 December 2014 by Judge Robert F. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 November 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defenders David W. Andrews and Barbara S. Blackman, for defendant-appellant.

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McCULLOUGH, Judge.

Harry Sharod James (“defendant”) appeals from judgment entered upon his resentencing for first-degree murder as ordered by our Supreme Court. For the following reasons, we affirm the constitutionality of N.C. Gen. Stat. § 15A-1340.19A *et seq.*, but reverse and remand this case for further resentencing proceedings.

I. Background

On 19 June 2006, a Mecklenburg County Grand Jury indicted defendant on one count of murder and one count of robbery with a dangerous weapon. The indictments were the result of events that occurred on 12 May 2006 when defendant was sixteen years old.

At the conclusion of defendant’s trial on 10 June 2010, a jury returned verdicts finding defendant guilty of first-degree murder both on the basis of malice, premeditation, and deliberation and under the first-degree felony murder rule and finding defendant guilty of robbery with a dangerous weapon. The trial court then entered separate judgments sentencing defendant to a term of life imprisonment without the possibility of parole for first-degree murder and sentencing defendant to a concurrent term of 64 to 86 months imprisonment for robbery with a dangerous weapon. Defendant’s sentence of life without parole for first-degree murder was mandated by the version of N.C. Gen. Stat. § 14-17 in effect at that time. *See* N.C. Gen. Stat. § 14-17 (2010).

Defendant appealed to this Court and, among other issues, argued a sentence of life without the possibility of parole for a juvenile was cruel and unusual punishment in violation of the juvenile’s rights under the Eight Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution. In asserting his argument, defendant identified two cases in which petitions for writ of certiorari were pending before the United States Supreme Court seeking review of the constitutionality of sentences of life without parole for juveniles.

On 18 October 2011, this Court filed an unpublished opinion in defendant’s case holding the constitutional issue was not preserved for appeal and finding no error below. *State v. James*, __ N.C. App. __, 716 S.E.2d 876, available at 2011 WL 4917045 (18 October 2011) (unpub.). In so holding, we explained that defendant failed to preserve the issue by objecting at trial and, although significant changes in the applicable law may warrant review in some instances where an issue is not otherwise preserved, there had been no change in the law as it relates to sentencing

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juveniles to life without parole because the petitions for writ of certiorari in the cases referenced by defendant were still pending before the United States Supreme Court and there was no guarantee the Court would grant certiorari in either case, much less hold that sentences of life without parole for juveniles are unconstitutional. *Id.* at *5. From this Court's unanimous decision, defendant petitioned our Supreme Court for discretionary review.

Before our Supreme Court acted regarding defendant's petition in this case, the United States Supreme Court granted certiorari in the two cases referenced in defendant's argument to this Court, heard arguments in those cases in tandem on 20 March 2012, and issued its decision in *Miller v. Alabama*, 567 U.S. ___, 183 L. Ed. 2d 407 (2012), on 25 June 2012. In *Miller*, the Court meticulously reviewed its decisions in *Roper v. Simmons*, 543 U.S. 551, 161 L. Ed. 2d 1 (2005) (holding imposition of the death penalty on juvenile offenders is prohibited by the Eighth Amendment), and *Graham v. Florida*, 560 U.S. 48, 176 L. Ed. 2d 825 (2010) (holding the imposition of a sentence of life without parole on a juvenile offender who did not commit homicide is prohibited by the Eighth Amendment), and then held "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 567 U.S. at ___, 183 L. Ed. 2d at 424. The Court summarized the rationale for its holding as follows:

Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him – and from which he cannot usually extricate himself – no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

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Id. at ___, 183 L. Ed. 2d at 423 (internal citations omitted). More concisely, “[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender’s age and the wealth of characteristics and circumstances attendant to it.” *Id.* at ___, 183 L. Ed. 2d at 422. “By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.” *Id.* at ___, 183 L. Ed. 2d at 424. Thus, “a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.” *Id.* at ___, 183 L. Ed. 2d at 430.

In response to *Miller*, our General Assembly approved “an act to amend the state sentencing laws to comply with the United States Supreme Court decision in *Miller v. Alabama*” (the “Act”) on 12 July 2012. *See* 2012 N.C. Sess. Laws 148 (eff. 12 July 2012). To meet the requirements of *Miller*, the first section of the Act established new sentencing guidelines for defendants convicted of first-degree murder who were under the age of eighteen at the time of their offense. *See* 2012 N.C. Sess. Laws 148, sec. 1. The new sentencing guidelines, originally designated to be codified in Article 93 of Chapter 15A of the North Carolina General Statutes as N.C. Gen. Stat. §§ 15A-1476 to -1479, are now codified in Part 2A of Chapter 81B of Chapter 15A of the North Carolina General Statutes as N.C. Gen. Stat. §§ 15A-1340.19A to -1340.19D. N.C. Gen. Stat. § 14-17 was later amended to indicate that juveniles were to be sentenced pursuant to the new sentencing guidelines. *See* 2013 N.C. Sess. Laws 410, sec. 3(a) (eff. 23 August 2013) (amending N.C. Gen. Stat. § 14-17 to provide that “any person who commits such murder shall be punished with death or imprisonment in the State’s prison for life without parole as the court shall determine pursuant to G.S. 15A-2000, *except that any such person who was under 18 years of age at the time of the murder shall be punished in accordance with Part 2A of Article 81B of Chapter 15A of the General Statutes.*”) (emphasis added).

Following the enactment of the Act, our Supreme Court, by special order on 23 August 2012, allowed defendant’s petition in this case as follows:

Defendant’s Petition for Discretionary Review as amended is allowed for the limited purpose of remanding to the Court of Appeals for further remand to the trial court for resentencing pursuant to [the new sentencing guidelines].

State v. James, 366 N.C. 214, 748 S.E.2d 527 (2012).

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Prior to defendant's case coming on for resentencing, defendant filed various motions with memorandums of law seeking to avoid resentencing pursuant to N.C. Gen. Stat. § 15A-1340.19A *et seq.* Those motions raised many of the same issues now before this Court on appeal.

On 5 December 2014, defendant's case came on for a resentencing hearing in Mecklenburg County Superior Court before the Honorable Robert F. Johnson. That sentencing hearing continued on 8 December 2014 and concluded on 12 December 2014. Upon considering defendant's motions, the trial court denied the motions and proceeded to resentence defendant to life imprisonment without parole for first-degree murder pursuant to N.C. Gen. Stat. § 15A-1340.19A *et seq.* The judgment indicated it was *nunc pro tunc* 10 June 2010. A resentencing order filed the same day was attached to the judgment. Defendant gave notice of appeal in open court.

II. Discussion

In *State v. Lovette*, 225 N.C. App. 456, 737 S.E.2d 432 (2013) ("*Lovette I*"), this Court summarized the pertinent portions of the new sentencing guidelines in N.C. Gen. Stat. § 15A-1340.19A *et seq.* as follows:

[N.C. Gen. Stat. §] 15A-1340.19B(a) provides that if the defendant was convicted of first-degree murder *solely* on the basis of the felony murder rule, his sentence shall be life imprisonment with parole. N.C. Gen. Stat. § 15A-1340.19B(a)(1) (2012). In all other cases, the trial court is directed to hold a hearing to consider any mitigating circumstances, *inter alia*, those related to the defendant's age at the time of the offense, immaturity, and ability to benefit from rehabilitation. N.C. Gen. Stat. §§ 15A-1340.19B, 15A-1340.19C. Following such a hearing, the trial court is directed to make findings on the presence and/or absence of any such mitigating factors, and is given the discretion to sentence the defendant to life imprisonment either with or without parole. N.C. Gen. Stat. §§ 15A-1340.19B(a)(2), 15A-1340.19C(a).

Id. at 470, 737 S.E.2d at 441 (footnote omitted). Defendant now asserts constitutional arguments against his resentencing pursuant to N.C. Gen. Stat. § 15A-1340.19A *et seq.* Defendant also argues the trial court failed to make proper findings of fact and abused its discretion in imposing a sentence of life without parole. We address the issues in the order they are raised on appeal.

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“The standard of review for alleged violations of constitutional rights is *de novo*.” *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010). “The standard of review for application of mitigating factors is an abuse of discretion.” *State v. Hull*, __ N.C. App. __, __, 762 S.E.2d 915, 920 (2014).

1. *Ex Post Facto*

[1] Defendant first argues that his resentencing pursuant to N.C. Gen. Stat. § 15A-1340.19A *et seq.* violates the constitutional prohibitions on *ex post facto* laws. See U.S. Const. art. I, § 10, cl. 1; N.C. Const. art. I, § 16. Defendant contends he should have been resentenced “consistent with sentencing alternatives available as of the date of the commission of the offense[,]” specifically, “within the range for the lesser-included offense of second-degree murder.” We are not persuaded.

Pertinent to this appeal, our Courts have “defined an *ex post facto* law as one which . . . allows imposition of a different or greater punishment than was permitted when the crime was committed” *State v. Vance*, 328 N.C. 613, 620, 403 S.E.2d 495, 500 (1991) (citing *Calder v. Bull*, 3 U.S. 386, 390, 1 L. Ed. 648, 650 (1798)). Our Courts have also recognized that “[t]here are two critical elements to an *ex post facto* law: that it is applied to events occurring before its creation and that it disadvantages the accused that it affects.” *State v. Barnes*, 345 N.C. 184, 234, 481 S.E.2d 44, 71 (1997).

There is no dispute concerning the first element in this case. N.C. Gen. Stat. § 15A-1340.19A *et seq.* was enacted on 12 July 2012, over six years after defendant committed the offense on 12 May 2006. Thus, the trial court’s application of N.C. Gen. Stat. § 15A-1340.19A *et seq.* in resentencing defendant was retroactive.

Regarding the second element, defendant claims he was disadvantaged by the retroactive application of N.C. Gen. Stat. § 15A-1340.19A *et seq.* Upon review, we hold there is no merit to defendant’s claim. As noted above, at the time defendant committed the offense, N.C. Gen. Stat. § 14-17 mandated that defendant be sentenced to life without parole. N.C. Gen. Stat. § 15A-1340.19A *et seq.*, enacted by the General Assembly in response to the United States Supreme Court’s holding in *Miller* that mandatory sentences of life without parole for juvenile offenders are unconstitutional, does not impose a different or greater punishment than was permitted when the crime was committed; nor does it disadvantage defendant in any way. N.C. Gen. Stat. § 15A-1340.19A *et seq.*

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merely provides sentencing guidelines that address the concerns raised in *Miller* by requiring a sentencing hearing in which the trial court must consider mitigating circumstances before imposing a sentence of life without parole, the harshest penalty for a juvenile. Thus, under N.C. Gen. Stat. § 15A-1340.19A *et seq.*, the harshest penalty remains life without parole, but the trial court has the option of imposing a lesser sentence of life imprisonment with parole. *See* N.C. Gen. Stat. § 15A-1340.19B(a)(2).

Nevertheless, defendant contends that he should have been resentenced to the most severe constitutional penalty at the time the offense was committed. Defendant claims “[t]he only constitutional sentence [he] could have received was a sentence within the range for the lesser-included offense of second-degree murder[,]” which would have resulted in a lesser sentence. In support of his argument, defendant relies on cases from other jurisdictions. *See State v. Roberts*, 340 So. 2d 263 (La. 1976); *Jackson v. Norris*, 426 S.W.3d 906 (Ark. 2013); *Commonwealth v. Brown*, 1 N.E.3d 259 (Mass. 2013). Yet, in the cases cited by defendant, there is no indication that the legislatures in those states enacted new sentencing guidelines that controlled after the mandatory sentences provided in their respective statutes were determined unconstitutional. In fact, the court in *Brown* indicated that the trial judge’s sentencing approach was due in part to the fact that “the Legislature had not prescribed the procedures for the individualized sentencing hearing contemplated by *Miller*[,]” 1 N.E.3d at 262. As a result, the courts in those cases severed the unconstitutional portions of the statutes in effect at the time of the offenses and sentenced the defendants pursuant to the remaining constitutional portions of the statutes.¹

In the present case, however, the General Assembly acted quickly in response to *Miller* and passed the Act, establishing new sentencing

1. In *Roberts*, the defendant’s death sentence was unconstitutional and the court remanded with instructions for the lower court to resentence the defendant to “imprisonment at hard labor for life without eligibility for parole, probation or suspension of sentence for a period of twenty years[,]” the most severe constitutional penalty for criminal homicide at the time. 340 So. 2d at 263-64. In *Jackson*, the juvenile defendant’s mandatory sentence of life without parole for capital murder was unconstitutional and the court remanded with instructions that the lower court “hold a sentencing hearing where [the defendant] may present *Miller* evidence for consideration[.]” and “[the defendant’s] sentence must fall within the statutory discretionary sentencing range for a Class Y felony[,] . . . a discretionary sentencing range of not less than ten years and not more than forty years, or life.” 426 S.W.3d at 911. In *Brown*, the juvenile defendant’s mandatory sentence of life without parole for first-degree murder was unconstitutional and the court remanded to the lower court for resentencing with instructions that the defendant be sentenced to a mandatory sentence of life with the possibility of parole. 1 N.E.3d at 268.

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guidelines in N.C. Gen. Stat. § 15A-1340.19A *et seq.* for juveniles convicted of first-degree murder. The General Assembly made clear that N.C. Gen. Stat. § 15A-1340.19A *et seq.* was to apply retroactively, providing in the third section of the Act that, in addition to sentencing hearings held on or after the effective date of the Act, the Act “applies to any resentencing hearings required by law for a defendant who was under the age of 18 years at the time of the offense, was sentenced to life imprisonment without parole prior to the effective date of this act, and for whom a resentencing hearing has been ordered.” 2012 N.C. Sess. Laws 148, sec. 3.

Because N.C. Gen. Stat. § 15A-1340.19A *et seq.* does not impose a more severe punishment than that originally mandated in N.C. Gen. Stat. § 14-17, but instead provides sentencing guidelines that comply with the United States Supreme Court’s decision in *Miller* and allows the trial court discretion to impose a lesser punishment based on applicable mitigating factors, defendant could not be disadvantaged by the application of N.C. Gen. Stat. § 15A-1340.19A *et seq.* Thus, there is no violation of the constitutional prohibitions on *ex post facto* laws.

2. Presumption

[2] Defendant next argues N.C. Gen. Stat. § 15A-1340.19A *et seq.* violates the constitutional guarantees against cruel and unusual punishment. *See* U.S. Const. Amend. 8; N.C. Const. art. I, § 27. Specifically, defendant contends N.C. Gen. Stat. § 15A-1340.19A *et seq.* presumptively favors a sentence of life without parole for juveniles convicted of first-degree murder and, therefore, the risk of disproportionate punishment under N.C. Gen. Stat. § 15A-1340.19A *et seq.* is as great as it was when N.C. Gen. Stat. § 14-17 mandated a sentence of life without parole for juveniles convicted of first-degree murder.

Defendant relies on the language in N.C. Gen. Stat. § 15A-1340.19A *et seq.* to support his argument that there is a presumption in favor of life without parole. Specifically, defendant points to N.C. Gen. Stat. § 15A-1340.19C(a), which provides, “[t]he court shall consider any *mitigating factors* in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole *instead of* life imprisonment without parole.” N.C. Gen. Stat. § 15A-1340.19C(a) (emphasis added). Defendant contends that the inclusion of only “mitigating factors” and the use of “instead of” demonstrates there is a presumption in favor of life without parole.

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We first note that the use of “instead of,” considered alone, does not show there is a presumption in favor of life without parole. Even the definitions of “instead of” quoted by defendant, *see Duer v. Hoover & Bracken Energies, Inc.* 753 P.2d 395, 398 (Okla. Ct. App. 1986) (“as a substitute for or alternative to”); The American Heritage Dictionary of the English Language, 909 (5th ed. 2011) (“[i]n place of something previously mentioned”), seem to indicate that “instead of” is merely used to distinguish between sentencing options. This is consistent with N.C. Gen. Stat. § 15A-1340.19B(a)(2), which states, “the court shall conduct a hearing to determine whether the defendant should be sentenced to life imprisonment without parole, as set forth in [N.C. Gen. Stat. §] 14-17, or a lesser sentence of life imprisonment with parole.” N.C. Gen. Stat. § 15A-1340.19B(a)(2) (emphasis added).

Yet, the reason for the General Assembly’s use of “instead of” in N.C. Gen. Stat. § 15A-1340.19C(a), as opposed to “or,” becomes clear when considered in light of the fact that the sentencing guidelines require the court to consider only mitigating factors. Because the statutes only provide for mitigation from life without parole to life with parole and not the other way around, it seems the General Assembly has designated life without parole as the default sentence, or the starting point for the court’s sentencing analysis. Thus, to the extent that starting the sentencing analysis with life without parole creates a presumption, we agree with defendant there is a presumption.

We decline, however, to hold that presumption is unconstitutional and we do not think N.C. Gen. Stat. § 15A-1340.19A *et seq.* “turns *Miller* on its head by making life without parole sentences the norm, rather than the exception[,]” as defendant asserts. In *Miller*, the Court made clear that it was not holding sentences of life without parole for juveniles unconstitutional. *See* 567 U.S. at ___, 183 L. Ed. 2d at 424 (“Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”) The Court’s holding in *Miller* simply requires “that sentencing courts consider a child’s ‘diminished culpability and heightened capacity for change’ before condemning him or her to die in prison.” *Montgomery v. Louisiana*, __ U.S. ___, ___, 193 L. Ed. 2d 599, 610-11 (2016) (quoting *Miller*, 567 U.S. at ___, 183 L. Ed. 2d at 424). A review of N.C. Gen. Stat. § 15A-1340.19A *et seq.* reveals the sentencing guidelines do just that. Instead of imposing a mandatory sentence of life without parole, the sentencing guidelines in N.C. Gen. Stat. § 15A-1340.19A *et seq.* require the sentencing court to hold a sentencing hearing during

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which the defendant may submit mitigating circumstances, including the defendant's "youth (and all that accompanies it)[,]" *Miller*, 576 U.S. at ___, 183 L. Ed. 2d at 424, which the trial court must consider in determining whether to sentence defendant to life without parole or life with parole. As noted in our discussion of defendant's first issue, these sentencing guidelines seem to comply precisely with the requirements of *Miller*.

Moreover, given that N.C. Gen. Stat. § 15A-1340.19A *et seq.* was enacted in response to *Miller* to allow the youth of a defendant and its attendant characteristics to be considered in determining whether a lesser sentence than life without parole is warranted, it seems commonsense that the sentencing guidelines would begin with life without parole, the sentence provided for adults in N.C. Gen. Stat. § 14-17 that the new guidelines were designed to deviate from. *See* N.C. Gen. Stat. § 15A-1340.19B(a)(2) (referring to "life imprisonment without parole, as set forth in [N.C. Gen. Stat. §] 14-17[)"). This commonsense approach is supported by repeated references to mitigation in *Miller* and the cases it relies on. For example, the Court in *Miller* refers to the "mitigating qualities of youth," 567 U.S. at ___, 183 L. Ed. 2d at 422, and explains that "*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." 567 U.S. at ___, 183 L. Ed. 2d at 430.

While the Court did indicate in *Miller* that it thought "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon[,]" the Court explained that its belief was based on "all [it had] said in *Roper*, *Graham*, and [*Miller*] about children's diminished culpability and heightened capacity for change[]" and "the great difficulty [it] noted in *Roper* and *Graham* of distinguishing at [an] early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" 576 U.S. at ___, 183 L. Ed. 2d at 424 (quoting *Roper*, 543 U.S. at 573, 161 L. Ed. 2d 1; *Graham*, 560 U.S. at 68, 176 L. Ed. 2d 825). Explaining that *Miller* announced a substantive rule of constitutional law, the Court has since stated that although *Miller* "did not bar a punishment for all juvenile offenders, as the Court did in *Roper* or *Graham*[,] *Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Montgomery*, __ U.S. at ___, 193 L. Ed. 2d at 620.

Upon review, nothing in N.C. Gen. Stat. § 15A-1340.19A *et seq.* conflicts with the Court's belief that sentences of life without parole for juvenile defendants will be uncommon or the substantive rule of law.

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N.C. Gen. Stat. § 15A-1340.19C(a) requires the sentencing court to take mitigating factors into consideration. With proper application of the sentencing guidelines in light of *Miller*, it may very well be the uncommon case that a juvenile is sentenced to life without parole under N.C. Gen. Stat. § 15A-1340.19A *et seq.*

For these reasons, we hold it is not inappropriate, much less unconstitutional, for the sentencing analysis in N.C. Gen. Stat. § 15A-1340.19A *et seq.* to begin with a sentence of life without parole and require the sentencing court to consider mitigating factors to determine whether the circumstances are such that a juvenile offender should be sentenced to life with parole instead of life without parole. Life without parole as the starting point in the analysis does not guarantee it will be the norm.

3. Due Process

[3] In his last constitutional challenge, defendant argues N.C. Gen. Stat. § 15A-1340.19A *et seq.* deprives him of the right to due process of law, *see* U.S. Const. Amend. 14; N.C. Const. art. I, § 19, because the law is unconstitutionally vague and will lead to arbitrary sentencing decisions for juvenile offenders.

In *State v. Green*, 348 N.C. 588, 502 S.E.2d 819 (1998), our Supreme Court explained that “[i]t is an essential element of due process of law that statutes contain sufficiently definite criteria to govern a court’s exercise of discretion.” 348 N.C. at 596, 502 S.E.2d at 823. In construing whether a statute contains sufficient criteria, the Court begins with the presumption that the statute is constitutional. *Id.* at 596, 502 S.E.2d at 824. The court then strictly construes the statute in a manner that allows the intent of the legislature to control. *Id.* Intent of the legislature may be determined by the circumstances surrounding enactment of the statute. *Id.*

Under a challenge for vagueness, the [United States] Supreme Court has held that a statute is unconstitutionally vague if it either: (1) fails to “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited”; or (2) fails to “provide explicit standards for those who apply [the law].”

Id. at 597, 502 S.E.2d at 824 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 227 (1972)). The North Carolina standard is nearly identical. *Id.* (citing *In re Burrus*, 275 N.C. 517, 531, 169 S.E.2d 879, 888 (1969) (“When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries

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sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met.”))

As in *Green*, defendant only challenges the second prong of the vagueness standard, the “guidance” component, in this case. Defendant does not challenge the vagueness standard’s first prong, the “notice” requirement.

Specifically, defendant contrasts the sentencing guidelines in N.C. Gen. Stat. § 15A-1340.19A *et seq.* with those for capital sentencing, N.C. Gen. Stat. § 15A-2000, and structured sentencing, N.C. Gen. Stat. § 15A-1340.16, in that the sentencing guidelines do not provide for the consideration of aggravating factors. Because the sentencing guidelines do not provide a process to weigh aggravating and mitigating factors, defendant contends the sentencing guidelines in N.C. Gen. Stat. § 15A-1340.19A *et seq.* “fail[] to provide any process by which a court can identify the few children who warrant life in prison without parole.” We disagree.

A review of sentencing guidelines is important. N.C. Gen. Stat. § 15A-1340.19B sets forth the procedure for sentencing a defendant who was a juvenile at the time they committed first-degree murder. As previously quoted, it first requires that if defendant is not convicted of first-degree murder solely on the basis of the felony murder rule, “the court shall conduct a hearing to determine whether the defendant should be sentenced to life imprisonment without parole, as set forth in [N.C. Gen. Stat. §] 14-17, or a lesser sentence of life imprisonment with parole.” N.C. Gen. Stat. § 15A-1340.19B(a)(2). Subsection (b) then provides for the consideration of evidence at the sentencing hearing. Subsection (b) does not require evidence presented during the guilt determination phase of the trial to be resubmitted, but provides that “[e]vidence, including evidence in rebuttal, may be presented as to any matter that the court deems relevant to sentencing, and any evidence which the court deems to have probative value may be received.” N.C. Gen. Stat. § 15A-1340.19B(b). That evidence includes evidence of mitigating factors. Specifically, subsection (c) provides that a defendant “may submit mitigating circumstances to the court[.]” N.C. Gen. Stat. § 15A-1340.19B(c). Those mitigating circumstances may include, but are not limited to, the following: “(1) Age at the time of the offense[;] (2) Immaturity[;] (3) Ability to appreciate the risks and consequences of the conduct[;] (4) Intellectual capacity[;] (5) Prior record[;] (6) Mental health[;] (7) Familial or peer pressure exerted upon the defendant[; and] (8) Likelihood that the defendant would benefit from rehabilitation in confinement.” *Id.* The list also includes, “(9) Any other mitigating factor

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or circumstance.” *Id.* Both the State and the defendant are “permitted to present argument for or against the sentence of life imprisonment with parole.” N.C. Gen. Stat. § 15A-1340.19B(d). In conjunction with N.C. Gen. Stat. § 15A-1340.19B, N.C. Gen. Stat. § 15A-1340.19C requires “[t]he court [to] consider any mitigating factors in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole.” N.C. Gen. Stat. § 15A-1340.19C(a).

Upon review of these sentencing guidelines, we reiterate what we have noted in our discussion of the first two issues on appeal – the guidelines comply precisely with the requirements in *Miller*. The sentencing guidelines require a sentencing hearing at which a defendant may present mitigating factors related to youth and its attendant characteristics which, in turn, the sentencing court must consider before imposing a sentence of life without parole. Although N.C. Gen. Stat. § 15A-1340.19C(a) simply directs the court to “consider” mitigating factors, when viewed in light of the circumstances surrounding enactment, that is through the lens of *Miller*, we hold N.C. Gen. Stat. § 15A-1340.19A *et seq.* is not unconstitutionally vague and will not lead to arbitrary sentencing decisions. The discretion of the sentencing court is guided by *Miller* and the mitigating factors provided in N.C. Gen. Stat. § 15A-1340.19B(c).

We also note that in addressing a comparison between the discretion afforded in N.C. Gen. Stat. § 15A-1340.19A *et seq.* and capital punishment sentencing similar to defendant’s comparison in this case, in *State v. Lovette*, __ N.C. App. __, 758 S.E.2d 399 (2014) (“*Lovette II*”), this Court stated that “our capital sentencing statutes have no application[.]” __ N.C. App. at __, 758 S.E.2d at 406. This Court further explained that “[a]lthough there is some common constitutional ground between adult capital sentencing and sentencing a juvenile to life imprisonment without parole, these similarities do not mean the United States Supreme Court has directed or even encouraged the states to treat cases such as this under an adult capital sentencing scheme.” *Id.*

Defendant also argues N.C. Gen. Stat. § 15A-1340.19A *et seq.* violates his right to trial by jury. In support of his arguments, defendant again compares N.C. Gen. Stat. § 15A-1340.19A *et seq.* to capital sentencing and structured sentencing, which require a jury to determine the existence of aggravating factors. *See State v. Everette*, 361 N.C. 646, 650, 652 S.E.2d 241, 244 (2007) (“[I]n most instances, aggravating factors increasing a defendant’s sentence must be submitted to a jury and

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proved beyond a reasonable doubt.”) (citing *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004)). However, as defendant asserts in his void for vagueness argument, N.C. Gen. Stat. § 15A-1340.19A *et seq.* does not require the finding of aggravating factors. The sentencing guidelines only require the sentencing court to consider the mitigating circumstances of defendant’s youth to determine whether a lesser punishment of life without parole is appropriate. Thus, no jury determination was required and defendant’s argument is without merit.

4. Findings of Fact

[4] In the first non-constitutional issue raised on appeal, defendant contends the trial court failed to make adequate findings of fact to support its decision to impose a sentence of life without parole. We agree.

N.C. Gen. Stat. § 15A-1340.19C provides that “[t]he order adjudging the sentence shall include findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate to include in the order.” N.C. Gen. Stat. § 15A-1340.19C(a). In *State v. Antone*, __ N.C. App. __, 770 S.E.2d 128 (2015), this Court noted that “‘use of the language “shall” is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error.’” __ N.C. App. at __, 770 S.E.2d at 130 (quoting *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001)). This Court then reversed the trial court’s decision in *Antone* to sentence the juvenile offender to life without parole, holding the trial court’s one-page sentencing order did not contain sufficient findings of fact to meet the mandate in N.C. Gen. Stat. § 15A-1340A.19C(a). *Id.* at __, 770 S.E.2d at 130. This Court explained as follows:

The trial court’s order makes cursory, but adequate findings as to the mitigating circumstances set forth in N.C. Gen. Stat. § 15A-1340.19B(c)(1), (4), (5), and (6). The order does not address factors (2), (3), (7), or (8). In the determination of whether the sentence of life imprisonment should be with or without parole, factor (8), the likelihood of whether a defendant would benefit from rehabilitation in confinement, is a significant factor.

We also note that portions of the findings of fact are more recitations of testimony, rather than evidentiary or ultimate findings of fact. The better practice is for the trial court to make evidentiary findings of fact that resolve any conflicts in the evidence, and then to make ultimate findings of fact that apply the evidentiary findings to the

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relevant mitigating factors as set forth in N.C. Gen. Stat. § 15A-1340.19B(c). If there is no evidence presented as to a particular mitigating factor, then the order should so state, and note that as a result, that factor was not considered.

Id. at __, 770 S.E.2d at 130-31 (internal citations omitted).

The present case is easily distinguishable from *Antone* in that the trial court's order spans ten pages and includes thirty-four findings of fact. Yet, despite acknowledging that the resentencing order "describes in great detail trial facts as to the offense and evidence elicited at the resentencing hearing[.]" defendant still contends the findings are insufficient. Defendant asserts that "[n]owhere in the order did the resentencing court indicate which evidence demonstrated 'the absence or presence of any mitigating factors.'" We agree.

As the defendant acknowledges, the trial court did issue many findings concerning both the circumstances of the offense and the circumstances of defendant. Many of those findings go to factors identified as mitigating factors in N.C. Gen. Stat. § 15A-1340.19B(c), such as age, upbringing, living environment, prior incidents, and intelligence. But, it is unclear from the order whether many of the findings are mitigating or not. For example, and as pointed out by defendant, the trial court found in finding number twenty-three, "[d]efendant was once a member of the 'Bloods' gang and wore a self-made tattoo of a 'B' on his arm." Yet that finding further provided, "[a]s of October, 2005 [defendant] was no longer affiliated with the gang. He had been referred to the Charlotte Mecklenburg Police Department 'Gang of One' program that worked with former gang members." This finding could be interpreted different ways – defendant was capable of rehabilitation or rehabilitative efforts had failed. Similarly, the trial court found in finding of fact number nine that "[a]t the time of the crime [defendant] was 16 years, 9 months old." While the finding makes clear that defendant was a juvenile, it is unclear whether defendant's age is mitigating or not. In finding of fact number twenty-six, the trial court found that "individuals around the age of 16 can typically engage in cognitive behavior which requires thinking through things and reasoning, but not necessarily self-control." In that same finding, however, the trial court also found, "[t]hings that may affect an individual's psycho-social development may be environment, basic needs, adult supervision, stressful and toxic environment, peer pressure, group behavior, violence, neglect, and physical and/or sexual abuse." The trial court's other findings show that defendant has experienced many of those things found by the trial court to affect development.

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Instead of identifying which findings it considered mitigating and which were not, after making its findings, the trial court summarized its considerations in finding of fact thirty-four as follows:

The Court, has considered the age of the Defendant at the time of the murder, his level of maturity or immaturity, his ability to appreciate the risks and consequences of his conduct, his intellectual capacity, his one prior record of juvenile misconduct (which this Court discounts and does not consider to be pivotal against the Defendant, but only helpful as to the light the juvenile investigation sheds upon Defendant's unstable home environment), his mental health, any family or peer pressure exerted upon defendant, the likelihood that he would benefit from rehabilitation in confinement, the evidence offered by Defendant's witnesses as to brain development in juveniles and adolescents, and all of the probative evidence offered by both parties as well as the record in this case. The Court has considered Defendant's statements to the police and his contention that it was his co-defendant . . . who planned and directed the commission of the crimes against [the victim], the Court does note that in some of the details and contentions the statement is self-serving and contradicted by physical evidence in the case. In the exercise of its informed discretion, the Court determines that based upon all the circumstances of the offense and the particular circumstances of the Defendant that the mitigating factors found above, taken either individually or collectively, are insufficient to warrant imposition of a sentence of less than life without parole.

This finding in no way demonstrates the "absence or presence of any mitigating factors." It simply lists the trial court's considerations and final determination. We hold this finding insufficient and require the trial court to identify which considerations are mitigating and which are not.

Additionally, other considerations listed by the trial court are not supported by findings. "[A] finding of 'irreparable corruption' is not required," *Lovette II*, __ N.C. App. at __, 758 S.E.2d at 408, but "the likelihood of whether a defendant would benefit from rehabilitation in confinement[] is a significant factor." *Antone*, __ N.C. App. at __, 770 S.E.2d at 130. In finding of fact thirty-four, the trial court indicated that it took into consideration "the likelihood that [defendant] would benefit from rehabilitation in confinement." Yet, there is no finding of fact concerning

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the likelihood of rehabilitation. In fact, in finding of fact number twenty-seven, the trial court found that the clinical psychologist “was unable to say with any certainty that . . . [defendant] would or would not reoffend.”

While the order was extensive in detailing the evidence, it did not “include findings on the absence or presence of any mitigating factors” as mandated in N.C. Gen. Stat. § 15A-1340.19C(a).

5. Abuse of Discretion

[5] In the last issue on appeal, defendant argues the trial court abused its discretion in resentencing him to life without parole under N.C. Gen. Stat. § 15A-1340.19A *et seq.* In support of his argument, defendant distinguishes the circumstances in his case from those considered in *Lovette II*, in which this Court determined the trial court did not err in sentencing a juvenile offender to life without parole. __ N.C. App. at __, 758 S.E.2d at 410.

As this Court stated in *Lovette II*, “[t]he findings of fact must support the trial court’s conclusion that defendant should be sentenced to life imprisonment without parole[.]” *Id.* at __, 758 S.E.2d at 408. “The trial judge may be reversed for abuse of discretion only upon a showing that his ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.” *State v. Westall*, 116 N.C. App. 534, 551, 449 S.E.2d 24, 34 (1994). Having just held the trial court did not issue adequate findings of fact, we must hold the trial court abused its discretion in sentencing defendant to life without parole. This holding, however, expresses no opinion on whether such sentence may be appropriate on remand; it is based solely on the trial court’s consideration of inadequate findings as to the presence or absence of mitigating factors to support its determination.

III. Conclusion

For the reasons discussed, we affirm the constitutionality of N.C. Gen. Stat. § 15A-1340.19A *et seq.* However, the trial court did not issue sufficient findings of fact on the absence or presence of mitigate factors as required by N.C. Gen. Stat. § 15A-1340.19C(a). As a result, it is difficult for this Court to review the trial court’s determination that life without parole was appropriate in this case and we must reverse and remand to the trial court for further sentencing proceedings.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges BRYANT and GEER concur.

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STATE OF NORTH CAROLINA

v.

CHRISTOPHER LEE SINGLETARY

No. COA15-1125

Filed 3 May 2016

1. Witnesses—State’s expert—compensation—cross-examination

In defendant’s trial for multiple sexual offenses committed against a child, the trial court erred by not allowing defendant to inquire into an expert witness’s compensation during cross-examination. The error, however, was not prejudicial, because testimony regarding the source of the witness’s compensation was heard by the jury, the payments were disclosed in defendant’s criminal file, and there was overwhelming evidence of defendant’s guilt.

2. Witnesses—interested—jury instructions

In defendant’s trial for multiple sexual offenses committed against a child, the trial court did not err by declining to give defendant’s requested pattern jury instruction on the testimony of an interested witness. The trial court’s jury instruction was sufficient to address defendant’s concern, leaving no doubt that it was the jury’s duty to determine whether the witness was interested or biased.

3. Sentencing—statutory sentencing provision—aggravated sentencing—no notice—finding by trial court—constitutionality

On appeal from defendant’s trial for multiple sexual offenses committed against a child, in which he received an aggravated sentence pursuant to N.C.G.S. § 14-27.4A(c), the Court of Appeals held that N.C.G.S. § 14-27.4A(c) (subsequently codified at N.C.G.S. § 14-27.28(c)) was facially unconstitutional. Pursuant to that sentencing provision, defendant was given no advance notice of the State’s intent to seek any aggravating factors, and the “egregious aggravation” factors were found solely by the trial court rather than by the jury beyond a reasonable doubt. Because the error was not harmless, the case was remanded for a new sentencing hearing.

Appeal by defendant from judgment entered 27 April 2015 by Judge Richard S. Gottlieb in Guilford County Superior Court. Heard in the Court of Appeals 31 March 2016.

Attorney General Roy Cooper, by Assistant Attorney General John F. Oates, Jr., for the State.

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Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for defendant-appellant.

TYSON, Judge.

Christopher Lee Singletary (“Defendant”) appeals from judgment entered after a jury found him guilty of sexual offense of a child by a substitute parent, indecent liberties with a child, and two counts of sexual offense with a child; adult offender. We find no prejudicial error in Defendant’s trial.

The trial court followed the sentencing procedures prescribed by N.C. Gen. Stat. § 14-27.4A(c), now codified at N.C. Gen. Stat. § 14-27.28(c), in sentencing Defendant. Those procedures do not require prior notice to Defendant of the State’s or the trial court’s intent to seek or impose aggravating factors, do not require aggravating factors to be submitted to a jury, and do not require the State to prove the aggravating factors beyond a reasonable doubt. Those procedures contravene well-settled commands of the Supreme Court of the United States, and for that reason are not constitutionally valid. Because application of N.C. Gen. Stat. § 14-27.4A(c) to Defendant’s case did not result in harmless error, we vacate the trial court’s judgment, and remand for a new sentencing hearing.

I. Background

J.K., a male child, lived with his mother, Ashley, in an apartment complex in Greensboro, North Carolina. Ashley met Defendant while she was working as a dancer at a nightclub. The two began dating, and Defendant moved in with Ashley and J.K. approximately two months later. Defendant lived with J.K. and Ashley from when J.K. was three years old until he was seven years old.

Shortly after this living arrangement began, Defendant and J.K. “immediately bonded” and J.K. began affectionately referring to Defendant as “Daddy Chris.” At trial, J.K. testified to multiple instances of sexual abuse committed by Defendant against him, beginning when J.K. was four years old.

J.K. testified Defendant had, on multiple occasions, hurt his “bottom.” J.K. explained Defendant had done so by putting his penis “inside [J.K.’s] . . . bottom.” J.K. also testified Defendant had forced him to perform fellatio on him on at least one, and possibly two, occasions. During and after these incidents, Defendant told J.K. that performing these acts would “make him [J.K.] stronger.”

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J.K. described two specific instances of anal sex perpetrated by Defendant, both of which occurred on 25 August 2013. The first instance occurred at a movie theatre. J.K. testified Defendant took him into the bathroom at the theatre and performed anal sex on him inside a bathroom stall. The second instance occurred later that night. While Ashley was taking a shower, Defendant ordered J.K. onto the couch, took down J.K.'s and his own pants, and again performed anal sex.

The following day, J.K. attended his first day of school in the first grade. That night, J.K. had difficulty having a bowel movement. Ashley asked J.K. whether he was constipated and if his stomach was bothering him. After initially being reluctant to provide an explanation to his mother, J.K. eventually stated "it's Chris," and revealed the sexual abuse Defendant had committed against him.

After J.K. reported the sexual abuse to Ashley, she dialed 911. Paramedics arrived, and took J.K. to Moses H. Cone Memorial Hospital, where he was examined by Lindsay Strickland ("Nurse Strickland"), a sexual assault nurse examiner. At trial, Nurse Strickland was accepted, without objection, as an expert in sexual assault nurse examination. During the course of Nurse Strickland's examination of J.K., he repeated his allegations of Defendant's sexual acts and abuse.

Nurse Strickland's physical examination revealed two tears in J.K.'s anus. Nurse Strickland took photographs of J.K.'s injuries and collected his underwear as evidence. Nurse Strickland testified the anal tears were caused by "some type of blunt force trauma," and that it is "not a normal finding to have those tears or injuries."

The underwear collected from J.K. by Nurse Strickland was examined by Lora Ghobrial ("Ghobrial"), a serologist in the forensic biology section of the North Carolina State Crime Laboratory. After being accepted, without objection, as an expert in serology, Ghobrial testified the underwear collected from J.K. was negative for semen, but her examination revealed a single sperm. The sperm was found in the rectal area on the inside of J.K.'s underwear.

J.K. was also examined by Dr. Stacey Wood Briggs ("Dr. Briggs"), a pediatric physician. Dr. Briggs testified that, given J.K.'s age and stage of development, it was "extremely, extremely unlikely to the point of absurdity that [J.K.] could produce sperm." Dr. Briggs testified that less than one percent of eleven year old boys – who would have been five years older than J.K. at the time the sperm was recovered – are able to produce sperm. Dr. Briggs opined the sperm found on the inside of J.K.'s underwear originated from a male other than J.K.

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1. Guilt-Innocence Phase

Defendant's trial began on 14 April 2015. In addition to the testimony of J.K, Ashley, Nurse Strickland, Ghobrial, and Dr. Briggs, the State proffered the testimony of Jessica Spence ("Spence"), a licensed professional counselor. Spence was accepted, without objection, as an expert in the field of counseling, and testified to her interactions with and treatment of J.K.

On cross-examination, the following colloquy occurred between Spence and Defendant's counsel regarding Spence's compensation:

[Defendant's counsel]: Is [J.K.] a private client or has he been assigned by some sort of court service or something?

[Spence]: He came to my office through his mother. . . . We use victim's compensation to pay for [J.K.'s] visits, if that's what you're asking.

. . . .

[Defendant's counsel]: So neither [J.K.] nor his mother are responsible for paying your fees?

[Spence]: Yes, that's correct.

[Defendant's counsel]: And what -- by just -- what is your fee?

[Prosecutor]: Objection, relevance.

THE COURT: Sustained. Counsel, approach.

A bench conference was held, after which questioning continued on other topics.

The record reveals \$2,200 was paid to Spence from a fund administered by the North Carolina Crime Victim's Compensation Commission, a state agency. *See* N.C. Gen. Stat. § 15B-3. Pursuant to state law, a record of these payments was filed with the trial court and included in Defendant's file. *See* N.C. Gen. Stat. § 15B-15 (2015). The jury was never made aware of the amount of these payments.

At the close of all evidence, a charge conference was held. At the conference, Defendant requested North Carolina Criminal Pattern Jury Instruction 104.20, testimony of an interested witness. Defendant argued that Spence "is clearly an interested witness." The court denied Defendant's request. The jury returned verdicts of guilty and convicted Defendant of all charges.

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2. Sentencing Phase

Following the jury verdicts, a sentencing hearing was held. The court determined Defendant was a prior record level II for sentencing purposes. The State explained to the court that the offense of “sexual offense with a child; adult offender” codified at N.C. Gen. Stat. § 14-27.4A is a “special offense that goes off of the grid, our normal sentencing grid” and provides that a defendant convicted of the offense shall in no case receive a sentence of less than 300 months pursuant to subsection (b). The State then asserted subsection (c) “gives the court an option of going from that 25 years [300 months] all the way up to life imprisonment without parole.”

The court appeared perplexed by its range of sentencing options under the statute:

THE COURT: Well, if the court is inclined to go above [a 300 month sentence], but is less than life or -- is there any number between what -- is there -- I'm just looking for guidance on how the court can calculate or if it's 300 minimum or life or --

The State again asserted the sentence must be a minimum of 300 months, and the court could, in its discretion, sentence Defendant to any sentence up to and including life in prison without parole, but “does have to make specific findings.”

Regarding sentencing, Defendant’s counsel “start[ed] by talking about what [he] [thought] the constitutional law require[d] the court to do in this case.” Defendant’s counsel discussed several cases from the Supreme Court of the United States, and argued “for [the court] to be allowed constitutionally to go above the 25 year [300 month] minimum, the state is required to allege aggravating factors in the indictment, present those aggravating factors to the jury, and have the jury determine whether or not those aggravating factors apply to the case.”

After hearing from the Defendant and the State, the trial court imposed two consecutive sentences of 420 to 504 months imprisonment, one for each conviction pursuant to N.C. Gen. Stat. § 14-27.4A. The court stated it believed it “ha[d] the authority under the statute to sentence above the minimum, and finds that as a matter of fact, in support of sentencing above the minimum, that this crime was of such a brutality and severity and scope and degree that it warrants a sentence above the minimum.” The court then made several oral findings of fact supporting its decision. The court also sentenced Defendant for the other crimes

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for which he was convicted, and ordered those sentences to run concurrently. Defendant gave notice of appeal in open court.

After imposing sentence, the court went “back on the record” later the same day. Defendant was not present. The trial judge stated he had “neglected to include the additional 60 months.” He further stated “because that’s a change in the maximum number based on the numbers in the statute,” the court declined to allow Defendant to be present, and instead “rel[ied] on defense counsel to explain that to [D]efendant.”

Ten days later, another sentencing hearing was held. Defendant was present at this hearing. Defendant’s counsel reiterated his objection to a sentence above the 300 month minimum, based on several United States and North Carolina Supreme Court opinions. Defendant’s counsel again argued the court could not sentence Defendant to more than 300 months. The State responded by arguing N.C. Gen. Stat. § 14-27.4A “gives the court the authority to find its own egregious factors.” The State admitted it was aware of the case law Defendant had presented and cited, but argued “we still have a statute here that the court has correctly followed” and “[t]his law is not going to be changed unless it is appealed.”

After hearing from the State and Defendant, the court sentenced Defendant for a third time, finding it had “jurisdiction to resentence the defendant because the sentence imposed in the presence of the defendant on the record was inconsistent with the law.” On the convictions under N.C. Gen. Stat. § 14-27.4A(c), the court sentenced Defendant to two consecutive terms of 420 months to 564 months imprisonment, “reflecting the court’s original intention.” Defendant again gave notice of appeal in open court.

II. Issues

Defendant argues the trial court erred by: (1) preventing Defendant from conducting cross-examination into the compensation paid to the State’s expert witness; and (2) denying Defendant’s request for a jury instruction on testimony of an interested witness. Defendant also challenges the constitutional validity of N.C. Gen. Stat. § 14-27.4A(c), and argues the statute allows the trial court to find “egregious aggravation” factors to increase punishment without submitting the issue to a jury, in violation of the Sixth Amendment to the Constitution of the United States. Even if the statute is upheld as constitutional, Defendant further argues the “egregious aggravation” factors found by the trial court in this case do not comport with the evidence at trial.

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III. Cross-Examination Regarding Expert Witness Compensation

[1] Defendant argues the trial court manifestly abused its discretion in preventing him from making any inquiry into the compensation paid to the State's expert witness.

A. Standard of Review

When a defendant "seeks to establish on appeal that the exercise of [the trial court's] discretion is reversible error, he must show harmful prejudice as well as clear abuse of discretion" *State v. Goode*, 300 N.C. 726, 730, 268 S.E.2d 82, 84 (1980). In order to demonstrate prejudicial error, the defendant must show " '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. Lanier*, 165 N.C. App. 337, 354, 598 S.E.2d 596, 607 (2004) (quoting N.C. Gen. Stat. § 15A-1443(a)).

B. Analysis

North Carolina "adheres to the 'wide-open' rule of cross-examination, so called because the scope of inquiry is not confined to those matters testified to on direct examination." *State v. Penley*, 277 N.C. 704, 708, 178 S.E.2d 490, 492 (1971) (citation omitted). Pursuant to the North Carolina Rules of Evidence, "[a] witness may be cross-examined on *any matter relevant to any issue in the case, including credibility.*" N.C. Gen. Stat. § 8C-1, Rule 611(b) (2015) (emphasis supplied).

Our Supreme Court "has consistently held that an expert witness' compensation is a permissible cross-examination subject to test partiality towards the party by whom the expert was called." *State v. Cummings*, 352 N.C. 600, 620, 536 S.E.2d 36, 51 (2000) (citations and internal quotation marks omitted); *State v. Brown*, 335 N.C. 477, 493, 439 S.E.2d 589, 598-99 (1994); *see also State v. Allen*, 322 N.C. 176, 195, 367 S.E.2d 626, 636 (1988); *State v. Creech*, 229 N.C. 662, 671, 51 S.E.2d 348, 355 (1949).

Given these clear and repeated pronouncements by our Supreme Court, and the record evidence indicating Spence's fee was paid with funds originating from a state agency, we hold the trial court erred in sustaining the State's objection to Defendant's questioning regarding Spence's fee. The source and amount of a fee paid to an expert witness is a permissible topic for cross-examination, as it allows the opposing party to probe the witnesses' partiality, if any, towards the party by whom the expert was called. *E.g.*, *Cummings*, 352 N.C. at 620, 536 S.E.2d at 51.

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Any partiality established by cross-examination goes directly to the witnesses' credibility and is properly for the jury to weigh and consider. *See, e.g., id.*

We express no opinion on whether Spence was, in fact, a witness interested in the outcome or partial to the State. Pursuant to *Creech* and its progeny, however, the general topic and question asked was proper for cross-examination to allow Defendant to test Spence's partiality, if any, towards the State or against Defendant. *E.g., Cummings*, 352 N.C. at 620, 536 S.E.2d at 51; *Creech*, 229 N.C. at 671, 51 S.E.2d at 355. An expert witness receiving compensation through a state-run victim's compensation fund does not *per se* make a witness interested in the outcome of the case nor demonstrate partiality to the State.

This holding of error does not end our analysis. We must determine if the trial court's error resulted in "harmful prejudice" to Defendant. *Goode*, 300 N.C. at 730, 268 S.E.2d at 84. We hold it did not.

Notwithstanding the trial court's error in not allowing Defendant an opportunity to inquire into any possible bias presented by Spence's fee arrangement, Defendant was able to elicit on cross-examination that the source of the Spence's fee was neither J.K. nor his mother, but rather a "victim's compensation" fund was the source "to pay for [J.K.'s] visits." The record before us also reflects that a record of the amount of these payments was filed with the trial court and included in Defendant's criminal file, pursuant to N.C. Gen. Stat. § 15B-15.

In addition, and under the "harmful prejudice" analysis, the State presented other overwhelming evidence of Defendant's guilt to which Defendant did not object. The State presented the testimony of, among others: (1) J.K., presenting his allegations of Defendant's acts; (2) J.K.'s mother, Ashley, corroborating key parts of J.K.'s account; (3) Nurse Strickland, regarding her examination of J.K. and her physical findings of two tears in J.K.'s anus; (4) Ghobrial, establishing that a single sperm was found in the rectal area of the inside of J.K.'s underwear; and (5) Dr. Briggs, who testified that the possibility the sperm came from J.K. was "extremely, extremely unlikely to the point of absurdity" due to his age.

In light of the unobjected testimony elicited by Defendant regarding the source of Spence's fee, the information contained in Defendant's file regarding the source of Spence's payment, and the other overwhelming evidence of Defendant's guilt, we hold Defendant has failed to carry his burden of proving "a reasonable possibility that, had the error in question not been committed, a different result would have been reached."

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Lanier, 165 N.C. App. at 354, 598 S.E.2d at 607 (citation omitted); see also *State v. Thaggard*, 168 N.C. App. 263, 278-79, 608 S.E.2d 774, 784-85 (2005) (finding no prejudicial error in erroneously admitted evidence when the State “presented a wealth of testimonial and physical evidence implicating defendant as the perpetrator of the crimes” for which he was convicted). Defendant’s argument is overruled.

IV. Jury Instruction on Interested Witness

[2] Defendant argues the trial court erred in denying his request for a jury instruction on the testimony of an interested witness. We disagree.

A. Standard of Review

“We review a trial court’s denial of a request for jury instructions *de novo*.” *State v. Ramseur*, 226 N.C. App. 363, 373, 739 S.E.2d 599, 606 (2013) (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.” *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citations and internal quotation marks omitted).

B. Analysis

“[A]n instruction to scrutinize the testimony of a witness on the ground of interest or bias is a subordinate feature of the case[.]” *State v. Dale*, 343 N.C. 71, 77-78, 468 S.E.2d 39, 43 (1996) (citation and quotation marks omitted). On appeal, “[t]he burden is on the party assigning error to show that the jury was misled or that the verdict was affected by an omitted instruction.” *State v. Peoples*, 167 N.C. App. 63, 69, 604 S.E.2d 321, 326 (2004) (citations and quotations omitted). The charge is 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.” *Id.* (citation and internal quotation marks omitted).

Defendant’s counsel requested the trial court give N.C.P.I.-Crim. 104.20, an instruction on interested witnesses. The pattern jury instruction states:

You may find that a witness is interested in the outcome of this trial. You may take the witness’s interest into account in deciding whether to believe the witness. If you believe the testimony of the witness in whole or in part, you should treat what you believe the same as any other believable evidence.

N.C.P.I.-Crim. 104.20 (2015). The trial court denied Defendant’s request.

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However, the trial court gave the following instruction:

You are the sole judge of the believability of witnesses. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, any part, or none of a witness' testimony. In deciding whether to believe a witness, you should use the same tests of truthfulness that you use in your everyday lives.

Among other things, those tests may include the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, the manner and appearance of the witness, *any interest, bias, prejudice or partiality the witness may have*, the apparent understanding and fairness of the witness, whether the testimony is reasonable and whether the testimony is consistent with other believable evidence in the case.

(emphasis supplied).

The trial court's jury charge was sufficient to address Defendant's concerns, as it left no doubt that it was the jury's duty to determine whether the witness was interested or biased. *See Peoples*, 167 N.C. App. at 69, 604 S.E.2d at 326. We hold Defendant has failed to meet his burden of showing "the jury was misled or that the verdict was affected by an omitted instruction." *Id.* Defendant's argument is without merit and overruled.

V. N.C. Gen. Stat. § 14-27.4A

[3] Defendant argues the trial court violated his Sixth Amendment right to a trial by jury when the court sentenced him to an "egregiously aggravated" sentence without prior notice of the State's intent to seek, or the court's intent to find and impose, aggravating factors without their submission to the jury to find their existence beyond a reasonable doubt. The State concedes the error and reasons that, due to this concession, this Court need not address the constitutional validity of N.C. Gen. Stat. § 14-27.4A(c).

As explained below, the State's concession does not weaken, and, in fact, strengthens, Defendant's contention that the constitutional question must be considered. After three attempts, each over the objection of Defendant's counsel who cited controlling authority, the trial court, with the State's encouragement, followed the exact procedure mandated by the statute in applying its provisions and sentencing Defendant.

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N.C. Gen. Stat § 14-27.4A does not expressly require, nor contemplate, aggravating factors to be submitted to the jury or proven beyond a reasonable doubt. Rather, the statute leaves the determination of “egregious aggravation” to “the court” under some undefined burden of proof. N.C. Gen. Stat. § 14-27.4A(c). Since the trial court followed the prescribed statutory procedure, we must examine whether the statute comports with federal constitutional requirements.

A. Standard of Review

It is “well settled in this State that the Courts have the power, and it is their duty in proper cases, to declare an act . . . unconstitutional – but it must be plainly and clearly the case.” *McIntyre v. Clarkson*, 254 N.C. 510, 515, 519 S.E.2d 888, 892 (1961). This Court has the power to review the facial validity of criminal statutes. *See* N.C. Gen. Stat. §§ 1-267.1(a1),(d) (2015) (noting that while a “facial challenge to the validity of an act of the General Assembly shall be transferred” and heard by a three judge panel in Wake County Superior Court, the procedure “applies only to civil proceedings[, and n]othing in this section shall be deemed to apply to criminal proceedings”). “When assessing a challenge to the constitutionality of legislation, this Court’s duty is to determine whether the General Assembly has complied with the constitution.” *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 283 (2015).

“When examining the constitutional propriety of legislation, we presume that the statutes are constitutional, and resolve all doubts in favor of their constitutionality.” *State v. Mello*, 200 N.C. App. 561, 564, 684 S.E.2d 477, 479 (2009) (citation and internal quotation marks omitted), *aff’d per curiam*, 364 N.C. 421, 700 S.E.2d 224 (2010). If a statute contains both constitutional and unconstitutional provisions, we sever the unconstitutional provisions and uphold the constitutional provisions to the extent possible. *Fulton Corp. v. Faulkner*, 345 N.C. 419, 422, 481 S.E.2d 8, 10 (1997) (citations omitted).

This Court reviews the asserted unconstitutionality of a statute *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).

B. Analysis1. Sentencing Pursuant to the Structured Sentencing Act

Criminal sentencing in North Carolina is conducted pursuant to Article 81B of Chapter 15A of the North Carolina General Statutes, known as the “Structured Sentencing Act.” The Structured Sentencing Act consists of

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a grid. . . with a vertical axis reflecting the seriousness of the crime and the horizontal axis reflecting the extent of the offender's prior criminal record. Each cell in the grid, corresponding to a particular "class" of felony or misdemeanor and a particular prior record "level," contains information about the available sentence dispositions. . . . The cell also contains information about the durations of the prison terms the judge could select, including a presumptive range, a higher aggravated range, and a lower mitigated range.

Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. Rev. 1935, 1951 (2006) (footnotes omitted).

Violation of N.C. Gen. Stat. § 14-27.4A is a Class B1 felony. N.C. Gen. Stat. § 14-27.4A (2014). Pursuant to the sentencing grid contained in the Structured Sentencing Act, the possible active minimum sentence ranges for a prior record level II offender, such as Defendant, convicted of a Class B1 felony are as follows: 166-221 months in the mitigated range; 221-276 months in the presumptive range; and 276-345 months in the aggravated range. *See* N.C. Gen. Stat. § 15A-1340.17(c) (2015). Under the Structured Sentencing Act, the highest presumptive minimum sentence set forth for a prior record level II offender convicted of a Class B1 felony is 276 months imprisonment. *See id.* This high-end presumptive minimum sentence corresponds to a maximum presumptive sentence of 392 months imprisonment. *See* N.C. Gen. Stat. § 15A-1340.17(f) (providing that the maximum sentence "for a Class B1 . . . felony that is subject to the registration requirements of G.S. Chapter 14, Article 27A," such as N.C. Gen. Stat. § 14-27.4A, *see* N.C. Gen. Stat. § 14-208.6(5) (2013), "shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus 60 additional months"); *see also State v. Ruffin*, 232 N.C. App. 652, 655-56, 754 S.E.2d 685, 687-88 (2014).

Under the Structured Sentencing Act, a sentencing judge may only depart from the presumptive range and sentence a defendant within the aggravated range, if the State has proven to a jury, beyond a reasonable doubt, that factors in aggravation exist. N.C. Gen. Stat. § 15A-1340.16(a)-(a1); *accord State v. Norris*, 360 N.C. 507, 512, 630 S.E.2d 915, 919 (2006). The State must also provide a defendant with at least 30 days prior written notice of its intent to seek and prove one or more aggravating factors, and must "list all of the aggravating factors the State seeks to establish." N.C. Gen. Stat. § 15A-1340.16(a6).

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N.C. Gen. Stat. § 14-27.4A, now codified in identical form at N.C. Gen. Stat. § 14-27.28, departs from this normal sentencing procedure in two ways, the latter of which Defendant challenges in this case. This opinion will cite to the former codification of the statute, in force at the time Defendant was sentenced.

2. Sentencing Pursuant to N.C. Gen. Stat § 14-27.4A

N.C. Gen. Stat. § 14-27.4A first departs from the Structured Sentencing Act by providing that a defendant convicted of “sexual offense with a child; adult offender” “shall be sentenced pursuant to [the Structured Sentencing Act], *except* that in no case shall the person receive an active punishment of less than 300 months[.]” N.C. Gen. Stat. § 14-27.4A(b) (emphasis supplied). Under this provision, the structured sentencing scheme involving mitigated, presumptive, and aggravated minimum sentencing ranges, along with the corresponding maximum sentences, remain in place, *except* to require a minimum sentence of 300 months. N.C. Gen. Stat. §§ 14-27.4A(b); 15A-1340.17(c), (e), (f).

As previously noted, without aggravating factors admitted or proven to a jury, a prior record level II offender convicted of a Class B1 offense is generally sentenced within the presumptive range to a minimum sentence between 221 and 276 months imprisonment. *See* N.C. Gen. Stat. § 15A-1340.17(c). The possible minimum sentences prescribed in the presumptive range, as well as the mitigated range and the lower end of the aggravated range, for a Class B1 felony are less than the minimum 300 month sentence commanded by N.C. Gen. Stat. § 14-27.4A(b). N.C. Gen. Stat. § 14-27.4(b) (providing a defendant convicted under the statute is sentenced consistent with the Structured Sentencing Act, but “in no case shall . . . receive” a sentence of less than 300 months).

Due to subsection (b)’s deviation from the Structured Sentencing Act, a prior record level II offender convicted under this statute and sentenced in the presumptive range would be sentenced to a minimum of 300 months imprisonment. *Id.* Defendant has not challenged subsection (b)’s departure from the normal minimum sentence set forth in the Structured Sentencing Act, and we must presume it to be constitutional in the case before us. *See, e.g., Lowery v. Bd. Of Graded Sch. Trs.*, 140 N.C. 33, 40, 52 S.E. 267, 269 (1905) (“In determining the constitutionality of an act of the Legislature courts always presume, in the first place, that the act is constitutional.”).

N.C. Gen. Stat. § 14-27.4A further departs from the Structured Sentencing Act, under subsection (c), in a second and more substantial

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manner. Defendant challenges the constitutionality of N.C. Gen. Stat. § 14-27.4A(c), which provides:

Notwithstanding the provisions of Article 81B of Chapter 15A of the General Statutes, [the Structured Sentencing Act,] the court may sentence the defendant to active punishment for a term of months greater than that authorized pursuant to G.S. 15A-1340.17, up to and including life imprisonment without parole, if the court finds that the nature of the offense and the harm inflicted are of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes, or considered in basic aggravation of these crimes, so as to require a sentence to active punishment in excess of that authorized pursuant to G.S. 15A-1340.17. If the court sentences the defendant pursuant to this subsection, it shall make findings of fact supporting its decision, to include matters it considered as egregious aggravation. Egregious aggravation can include further consideration of existing aggravating factors where the conduct of the defendant falls outside the heartland of cases even the aggravating factors were designed to cover. Egregious aggravation may also be considered based on the extraordinarily young age of the victim, or the depraved torture or mutilation of the victim, or extraordinary physical pain inflicted on the victim.

N.C. Gen. Stat. § 14-27.4A(c) (2013).

The State argues it conceded Defendant must be re-sentenced and, because of its concession, we need not address the constitutional validity of N.C. Gen. Stat. § 14-27.4A(c). This meretricious argument fails because, despite constitutional challenges by Defendant with citation to controlling legal authority and acknowledgement of such authority by the State, the trial court followed all procedures required by N.C. Gen. Stat. § 14-27.4A(c) in sentencing Defendant. The trial court determined, and stated in open court, that the crime “was of such a brutality and severity and scope and degree that it warrants a sentence above the minimum.” The trial court then entered eight findings of fact “[i]n support of sentencing pursuant to § 14-27.4A(c),” and entered a judgment sentencing Defendant to more than 300 months, as required by N.C. Gen. Stat. § 14-27.4A(b), but less than the death penalty, as permitted by N.C. Gen. Stat. § 14-27.4A(c).

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In a reversal from its position in the trial court, the State now concedes the trial court erred by failing to give prior notice of its intent to find “egregious aggravation” factors, failing to submit aggravating factors to the jury, and failing to have the factors proven beyond a reasonable doubt. The State’s concession, however, does not change the fact that the statute does not require a defendant to be provided advance notice of “egregious aggravation” factors, does not require aggravating factors to be submitted to the jury, and does not require the factors to be proven to a jury beyond a reasonable doubt before subsection (c) may be utilized to impose an “egregiously aggravated” sentence. *Id.*

If this Court were to accept the State’s logic, each time N.C. Gen. Stat. § 14-27.4A(c) is invoked and administered in the *exact* manner permitted by the statute to lengthen the term of a defendant’s sentence, this Court would be required to remand the case for a new sentencing hearing without inquiry into the statute’s constitutional validity. If the trial court, on remand, again utilized the power conferred upon it by subsection (c) to lengthen the defendant’s sentence, and again did so in the *exact* manner permitted by the statute, the State would have this Court again remand without inquiry into the statute’s constitutional validity. This process would continue, presumably, until the trial court employed some set of procedures not required nor contemplated under the challenged statute in order to satisfy constitutional requirements.

By its own terms, and as conceded by the State, N.C. Gen. Stat. § 14-27.4A(c) does not require prior notice to Defendant, submission of “egregious aggravation” factors to the jury, or proof beyond a reasonable doubt by the State. The trial court did not err by failing to submit aggravating factors to the jury, because N.C. Gen. Stat. § 14-27.4A(c) does not require, or permit, such a submission. The trial court, after three attempts, followed all procedures mandated by the statute to sentence Defendant in the manner it did. The State’s explicit concession of error as an attempt to avoid addressing the constitutional validity of N.C. Gen. Stat. § 14-27.4A(c) does not resolve the inherent and unavoidable defects contained in the statute and applied to Defendant in this case.

3. Constitutional Validity of N.C. Gen. Stat. § 14-27.4A(c)

Statutes which permit a defendant’s sentence to be lengthened based on the existence of aggravating factors have a long history of review at the Supreme Court of the United States, beginning with *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000).

In *Apprendi*, the Supreme Court considered a New Jersey statute, which allowed for an “extended term” of imprisonment for a defendant

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convicted of a firearm possession law, if the trial judge, by a preponderance of the evidence, found the defendant committed the crime for the purpose of intimidating an “individual or group of individuals because of” their membership in an enumerated protected class. 530 U.S. at 468-69, 147 L. Ed. 2d at 442. The Court struck down the statute, and held:

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse [this] statement of the rule[:]. . . . “It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.”

Id. at 490, 147 L. Ed. 2d at 455 (citation omitted). The Court held the New Jersey statute was unconstitutional because it allowed a judge, rather than a jury, to find the factors which lead to an “extended term” of imprisonment, and the judge was permitted to find and impose those factors by only a preponderance of the evidence. *Id.* at 491-92, 147 L. Ed. 2d at 456.

Four years later, the Supreme Court expanded upon its holding in *Apprendi* in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). In *Blakely*, the Court considered a Washington kidnapping statute, which allowed the trial court to impose a 120-month sentence, despite a usual 53-month maximum. 542 U.S. at 298, 159 L. Ed. 2d at 410. The statute permitted the lengthened prison term based upon a judicial determination that the defendant had acted with “deliberate cruelty.” *Id.* Under Washington’s statute, a judge imposing an “exceptional sentence” was required to make findings of fact and conclusions of law to support the sentence. *Id.* at 299, 159 L. Ed. 2d at 411.

The Court noted that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Id.* at 303, 159 L. Ed. 2d at 413 (emphasis original) (citation omitted). “In other words,” the Court continued, “the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” *Id.* at 303-04, 159 L. Ed. 2d at 413-14 (emphasis in original).

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The Court explained that if the sentencing judge imposed the “exceptional sentence” without finding additional facts, “he would have been reversed.” *Id.* at 304, 159 L. Ed. 2d at 414. “Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial.” *Id.* at 305-06, 159 L. Ed. 2d at 415. *Apprendi* “carries out this design by ensuring that the judge’s authority to sentence *derives wholly from the jury’s verdict*. Without that restriction, the jury would not exercise the control that the Framers intended.” *Id.* at 306, 159 L. Ed. 2d at 415 (emphasis supplied). The Court held the Washington statute violated the Sixth Amendment, as applicable to the states through the Fourteenth Amendment of the Constitution of the United States. *Id.*; *see also Parker v. Gladden*, 385 U.S. 363, 364, 17 L. Ed. 2d 420, 422 (1966). Against this backdrop of controlling constitutional requirements, we consider N.C. Gen. Stat. § 14-27.4A(c).

In this case: (1) Defendant was not given any advance notice of the State’s intention to seek any aggravating factors; (2) Defendant did not admit to any aggravating factors; (3) no aggravating factors were presented to the jury under any standard of proof; and (4) no aggravation or “egregious aggravation” factors were proven beyond a reasonable doubt. Under *Apprendi* and *Blakely*, the minimum sentence permitted for this offense is the 300-month minimum mandated by N.C. Gen. Stat. § 14-27.4A(b), and the maximum sentence permitted by law without finding additional facts was the 392-month statutory maximum sentence permitted by N.C. Gen. Stat. § 15A-1340.17(f). N.C. Gen. Stat. § 15A-1340.17(f); *see also Blakely*, 542 U.S. at 303, 159 L. Ed. 2d at 413. The constitutional validity of subsection (b) has not been challenged in this case.

N.C. Gen. Stat. § 14-27.4A(c) purports to provide the trial court with the unfettered ability to lengthen a defendant’s sentence up to and including life imprisonment without the possibility of parole, with no advance notice to the defendant and with no input from a jury. To wield this unbridled power, the statute only requires the trial court to: (1) find “that the nature of the offense and the harm inflicted are of such brutality, duration, severity, degree, or scope” beyond normally committed in such crimes; and (2) make findings of fact supporting its decision, “to include matters it considered as egregious aggravation.” N.C. Gen. Stat. § 14-27.4A(c).

The judge’s purported authority to sentence a defendant to a sentence above the statutory maximum does not “derive[] wholly from the jury’s verdict.” *Blakely*, 542 U.S. at 305-06, 159 L. Ed. 2d at 415. Instead,

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the judge's authority over a defendant's sentence derives from his or her perceptions of the circumstances and severity of the crime, and a subjective judicial consideration of factors he or she considers to be "egregious aggravation."

Following the enactment of N.C. Gen. Stat. § 14-27.4A by our General Assembly in 2008, legal commentators opined that subsection (c) was likely unconstitutional. See JESSICA SMITH, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME 236-37 (7th ed. 2012) ("[T]his procedure [permitted by N.C. Gen. Stat. § 14-27.4A(c)] appears to run afoul of the United States Supreme Court decision in *Blakely v. Washington*["]); John Rubin, 2008 Legislation Affecting Criminal Law and Procedure," UNC SCHOOL OF GOV'T ADMINISTRATION OF JUSTICE BULLETIN No. 2008/006, 3-4 (2008), available at <http://www.sogpubs.unc.edu/electronicversions/pdfs/aojb0806.pdf> (noting the procedure proscribed by N.C. Gen. Stat. § 14-27.4A(c) "is likely unconstitutional" and the definition of egregious aggravation was "designed for application by judges exercising discretion, not for juries normally charged with finding concrete facts.").

"Because circumstances in aggravation are found by the judge, not the jury," and because the statute does not require any aggravation or "egregious aggravation" factors be found beyond a reasonable doubt, N.C. Gen. Stat. § 14-27.4A(c) "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Cunningham v. California*, 549 U.S. 270, 288-89, 166 L. Ed. 2d 856, 873 (2007) (quoting *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d 435).

4. Use of Special Verdicts

Devoting but a single sentence of its brief to the defense of N.C. Gen. Stat. § 14-27.4A(c)'s constitutionality, the State argues the trial court may properly submit "egregious aggravation" factors to a jury through the use of a special verdict. Based upon the clear statutory text and the inherently judicial nature of the inquiry required by the statute, we reject the State's contention.

N.C. Gen. Stat. § 14-27.4A(c) explicitly gives only "the court," and not the jury, the ability to determine whether the nature of the offense and the harm inflicted require a sentence in excess of what is otherwise permitted by law. N.C. Gen. Stat. § 14-27.4A(c) ("*[T]he court* may sentence the defendant . . . *if the court* finds that the nature of the offense and the harm inflicted are of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes, or considered in

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basic aggravation of these crimes, so as to require a sentence to active punishment in excess of that authorized pursuant to G.S. 15A-1340.17. *If the court* sentences the defendant pursuant to this subsection, *it* shall make findings of fact supporting *its* decision, to include matters *it* considered as egregious aggravation.” (emphasis supplied)).

The primary purpose of statutory construction is to “give effect to the intent of the legislature.” *State v. Oliver*, 343 N.C. 202, 212, 470 S.E.2d 16, 22 (1996) (citation omitted). “When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.” *Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citations omitted); *see also State v. Wiggins*, 272 N.C. 147, 153, 158 S.E.2d 37, 42 (1967) (“It is elementary that in the construction of a statute words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise.” (citation omitted)). Courts are “without power to interpolate, or superimpose, provisions and limitations not contained therein.” *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (quoting 7 Strong, N.C. Index 2d, Statutes § 5 (1968)).

In order for this Court to read the statute to permit a jury to determine that “the nature of the offense and the harm inflicted” requires a lengthened sentence, or to determine “egregious aggravation” under the statute, we must on multiple occasions interpret the term “the court” in the statutory text as “the jury.” Such an extratextual interpretation would then require the jury: (1) to determine which circumstances are found in the “heartland of cases” of the crime of sexual offense with a child; adult offender; and (2) to determine whether the circumstances in the present case fall within, or outside, of that “heartland.” N.C. Gen. Stat. § 14-27.4A(c).

Not only would the State’s proposed textual substitution require the jury to undertake an inherently judicial function – such as compiling a list of prior cases, considering the facts and circumstances of those cases, and determining whether the facts and circumstances of the present case are more “egregious” than what is present in the “heartland” of child sexual abuse cases – it is also contrary to the clear statutory mandate that all such actions be conducted by “the court.” N.C. Gen. Stat. § 14-27.4A(c).

Applying the “clear and unambiguous” text of N.C. Gen. Stat. § 14-27.4A(c), the General Assembly intended the findings of fact and “egregious aggravation” factors to be found by “the court,” and not to be

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submitted to the jury through the use of a special verdict. We decline, as we must, to “interpolate, or superimpose” provisions onto the statute in order to save its constitutionality. *Camp*, 286 N.C. at 152, 209 S.E.2d at 756 (citation omitted). The State’s contention is overruled.

Courts reviewing the constitutional validity of a statute normally “neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants.” *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 478, 130 L. Ed. 2d 964, (1995). “A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707 (1987). Because both the statutory text and the inherently judicial nature of the tasks required of the trial court under N.C. Gen. Stat. § 14-27.4A(c) do not allow for submission of aggravation or “egregious aggravation” factors to the jury to be found beyond a reasonable doubt, and because such submission is a federal constitutional requirement, no set of circumstances exist under which N.C. Gen. Stat. § 14-27.4A(c) is valid. *Id.*

As written, N.C. Gen. Stat. § 14-27.4A(c) impermissibly provides the trial court with unfettered discretion to lengthen a defendant’s sentence, up to and including a sentence of life in prison without parole. The judge’s ability to sentence a defendant above the 392 month maximum set out in N.C. Gen. Stat. §§ 15A-1340.17(f) does not “derive[] wholly from the jury’s verdict,” but rather derives wholly from a solely judicial determination of whether “egregious aggravation” exists. This determination is made without prior notice to a defendant, and without submission to and a finding by a jury of proof beyond a reasonable doubt. *Blakely*, 542 U.S. at 305-06, 159 L. Ed. 2d at 415.

The procedures prescribed by N.C. Gen. Stat. § 14-27.4A(c) do not comport with the minimum constitutional requirements set forth in *Apprendi*, *Blakely*, *Cunningham*, and the Sixth Amendment to the Constitution of the United States, as made applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Parker*, 385 U.S. at 364, 17 L. Ed. 2d at 422.

5. Harmless Error Review

Following the Supreme Court of the United States’ decision in *Blakely*, our Supreme Court treated sentencing errors under *Blakely* as structural errors and reversible *per se*. See *State v. Allen*, 359 N.C. 425, 444, 615 S.E.2d 256, 269 (2005), *withdrawn*, 360 N.C. 569, 635 S.E.2d 899

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(2006). However, the Supreme Court of the United States subsequently decided *Washington v. Recuenco*, 548 U.S. 212, 165 L. Ed. 2d 466 (2006), which held that “[f]ailure to submit a sentencing factor to the jury . . . is not structural error.” *Id.* at 222, 165 L. Ed. 2d at 477.

In response to the decision in *Recuenco*, our Supreme Court held in *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), consistent with *Recuenco*, that failure to submit a sentencing factor to the jury is subject to harmless error review. *Id.* at 42, 638 S.E.2d at 453. In conducting harmless error review, “we must determine from the record whether the evidence against the defendant was so ‘overwhelming’ and ‘uncontroverted’ that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt.” *Id.* at 50, 638 S.E.2d at 458 (quoting *Neder v. United States*, 527 U.S. 1, 9, 144 L. Ed. 2d 35, 47 (1999)). A defendant “may not avoid a conclusion that evidence of an aggravating factor is ‘uncontroverted’ by merely raising an objection at trial . . . Instead, the defendant must ‘bring forth facts contesting the omitted element,’ and must have ‘raised evidence sufficient to support a contrary finding.’” *Id.* (quoting *Neder*, 527 U.S. at 19, 144 L. Ed. 2d at 53).

As discussed, Defendant was afforded no prior notice of the State’s intent to seek any aggravation factors, much less “egregious aggravation” factors, as required under the normal sentencing procedures set forth in the Structured Sentencing Act. N.C. Gen. Stat. §§ 15A-1340.16(a), (a1), (a6). Rather, consistent with N.C. Gen. Stat. § 14-27.4A(c), the trial court simply found the aggravating factors at sentencing.

Defendant had no prior notice or opportunity to “bring forth facts” to contest the facts found by the trial court to support its sentence under subsection (c). *Blackwell*, 361 N.C. at 50, 638 S.E.2d at 458 (citation omitted). Presuming those omissions alone were harmless, we must consider whether the evidence supporting the “egregious aggravation” factors found by the trial court were “so ‘overwhelming’ and ‘uncontroverted’ that any rational jury, as fact-finder, would have found the disputed aggravating factors beyond a reasonable doubt.” *Id.* (citation omitted).

N.C. Gen. Stat. § 14-27.4A(c) requires the trial court to determine whether aggravating factors exist, and also requires the trial court to determine whether the aggravating factors are “egregious aggravation” factors: that they are “of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes, or considered in basic aggravation of these crimes[.]” N.C. Gen. Stat. § 14-27.4A(c)

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(emphasis supplied). We do not minimize the severe harm and probable long-term impacts of Defendant's multiple criminal acts upon J.K.. These acts speak for themselves and the jury found Defendant guilty of committing these crimes.

On the record and evidence before us, though, we cannot say the evidence supporting the egregious aggravation factors was "so 'overwhelming' and 'uncontroverted'" such that any rational jury unanimously would have not only found the aggravating factors to exist, but would have also found the circumstances were "of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes." *Id.* The inherently judicial nature of the tasks the statute requires the court to undertake in sentencing a defendant pursuant to N.C. Gen. Stat. § 14-27.4A(c) renders any harmless error analysis particularly inapposite.

The State has also failed to show, and we cannot find, the circumstances presented in this case went so far outside the statutorily required "heartland of cases" such that any reasonable trier of fact would have, or could have, found them to be present beyond a reasonable doubt. As noted *supra*, such an exercise – identifying and scrutinizing past "sexual offense of a child; adult offender" cases, determining what "normally" occurs in those cases, comparing what "normally" occurs to what actually occurred in the present case, and deciding whether the circumstances of the present case fall within or outside of the "heartland of cases" – is an inherently judicial function.

The statute does not require, and Defendant did not receive, any prior notice of the "egregious aggravation" factors ultimately found by the judge at Defendant's sentencing hearing. The statute also did not require the State to prove "egregious aggravation" factors beyond a reasonable doubt to the jury. Due to these deficiencies in Defendant's sentence, we hold the *Apprendi* and *Blakely* errors created by the trial court's adherence to N.C. Gen. Stat. § 14-27.4A(c) were not harmless.

VI. Conclusion

The trial court erred in not allowing Defendant to further inquire into the amount of Spence's compensation during cross-examination. However, due to the testimony regarding the source of Spence's compensation that was heard by the jury, the disclosure of payments from the victim's compensation fund into Defendant's criminal file pursuant to N.C. Gen. Stat. § 15B-15, and other overwhelming evidence of Defendant's guilt, Defendant has failed to show "a reasonable possibility that, had the

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error in question not been committed, a different result would have been reached.” *Lanier*, 165 N.C. App. at 354, 598 S.E.2d at 607.

The trial court did not err in declining to give the requested pattern jury instruction on testimony of an interested witness. The trial court provided the requested instruction on interest or bias “in substance” through the use of an alternate instruction. Defendant has failed to show “the jury was misled” by the instruction given, “or that the verdict was affected by an omitted instruction.” *Peoples*, 167 N.C. App. at 69, 604 S.E.2d at 326.

Defendant’s counsel presented the trial court with the controlling case law prior to sentencing. On the court’s third attempt, Defendant was sentenced to between 56 and 344 months of additional incarceration beyond the consecutive 784-month sentence the law allowed for the two Class B1 felonies for which he was found guilty, on the basis of “egregious aggravation” factors found solely by a judge.

“The Framers would not have thought it too much to demand that, before depriving a man of [56 to 344 more months] of his liberty, the State should suffer the modest inconvenience of submitting its accusation to ‘the unanimous suffrage of twelve of his equals and neighbours,’ rather than a lone employee of the State.” *Blakely*, 542 U.S. at 313-14, 159 L. Ed. 2d at 420 (citation omitted).

N.C. Gen. Stat. § 14-27.4A(c), now codified at N.C. Gen. Stat. § 14-27.28(c), provides no prior notice to Defendant that “egregious aggravation” factors will be used to enhance his presumptive sentence, does not require the requisite levels of proof or a finding of “egregious aggravation” beyond a reasonable doubt, and does not provide any mechanism for submission of “egregious aggravation” factors to a jury. The statute explicitly and exclusively vests “the court” with both the ability and the duty to find “egregious aggravation” and to sentence a defendant to any term of imprisonment longer than 300 months, up to and including life in prison without the possibility of parole.

As Defendant has not challenged N.C. Gen. Stat. § 14-27.4A(b), we express no opinion on its constitutional validity. That subsection purports to allow the court to impose a minimum sentence of 300 months imprisonment, clearly within the aggravated range for minimum sentence under the generally applicable Structured Sentencing Act, without any of the notice or other protections normally provided thereunder.

As written, N.C. Gen. Stat. § 14-27.4A(c) violates a defendant’s rights under the Sixth Amendment, as interpreted by the Supreme Court of

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the United States in *Apprendi*, *Blakely*, and *Cunningham*. These cases unmistakably hold that aggravating factors, other than a defendant's prior record level or his admission, which "increase[] the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Cunningham*, 549 U.S. at 288-89, 166 L. Ed. 2d at 873; *Blakely*, 542 U.S. at 303, 159 L. Ed. 2d at 413; *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455.

We hold that Defendant has failed to demonstrate prejudicial error in his trial. As for sentencing, the trial court followed the sentencing procedures prescribed by N.C. Gen. Stat. § 14-27.4A(c), now codified at N.C. Gen. Stat. § 14-27.28(c), in sentencing Defendant. However, those procedures are in clear violation of *Apprendi*, *Blakely*, and *Cunningham*. The constitutional violations did not, beyond all reasonable doubt, result in harmless error to Defendant. The trial court's sentence and judgment are vacated, and this case is remanded for a new sentencing hearing.

NO PREJUDICIAL ERROR AT TRIAL; JUDGMENT VACATED;
REMANDED FOR NEW SENTENCING HEARING.

Chief Judge McGEE and Judge INMAN concur.

STATE OF NORTH CAROLINA

v.

JULIE WATKINS

No. COA15-1221

Filed 3 May 2016

Child Abuse, Dependency, and Neglect—misdemeanor child abuse—sufficiency of evidence

The State's evidence was adequate to submit misdemeanor child abuse charges to the jury, and the trial court properly denied defendant's motions to dismiss, where the child was under two years old and was left alone in a vehicle for over six minutes, with a window rolled more than halfway down in 18-degree weather with sleet, snow, and wind.

Appeal by defendant from judgment entered by Judge J. Thomas Davis in Madison County Superior Court. Heard in the Court of Appeals 9 March 2016.

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Roy Cooper, Attorney General, by Sharon Patrick-Wilson, Special Deputy Attorney General, for the State.

Allegra Collins Law, by Allegra Collins, for defendant-appellant.

DAVIS, Judge.

Julie Watkins (“Defendant”) appeals from her conviction for misdemeanor child abuse. On appeal, she contends that the trial court erred by denying her motions to dismiss. 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: At approximately 1:30 p.m. on 28 January 2014, Defendant drove with her 19-month-old son, “James,”¹ to the Madison County Sheriff’s Office to leave money for Grady Dockery (“Dockery”), an inmate in the jail. The temperature at the time was 18 degrees, and it was windy with accompanying sleet and snow flurries.

After parking her SUV, Defendant left James buckled into his car seat in the backseat of the vehicle and went into the Sheriff’s Office. While inside, Defendant got into an argument with employees in the front lobby. Detective John Clark (“Detective Clark”) was familiar with Defendant based on prior complaints that had been made about Defendant letting her toddler run loose in the lobby and into adjacent offices while she visited inmates in the jail. Detective Clark entered the lobby and told Defendant that by order of Chief Deputy Michael Garrison she was “not supposed to be on the property and that she needed to leave.”

Defendant and Detective Clark argued for “several seconds,” and then he escorted her to her vehicle in the parking lot. Defendant was inside the building for at least six-and-a-half minutes. Detective Clark testified that from where Defendant was positioned in the lobby she could not see her vehicle, which was parked approximately 46 feet away from the front door.

When Detective Clark was within 10 feet of Defendant’s vehicle, he noticed a small child sitting alone in the backseat. Defendant acknowledged that the child was hers. Detective Clark observed that the vehicle

1. A pseudonym is used throughout this opinion to protect the identity of the minor child.

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was not running and that the driver's side rear window was rolled more than halfway down. He testified that it was "very, very cold and windy and the snow was blowing." He stated that snow was blowing onto his head, making him "so cold I wanted to get back inside." He noticed that the child, who appeared to be sleeping, had a scarf around his neck. Before walking back into the building, Detective Clark told Defendant to turn on the vehicle and "get some heat on that child."

Defendant was charged with misdemeanor child abuse later that day. She was found guilty of that offense in Madison County District Court on 12 September 2014. She appealed the conviction to Madison County Superior Court for a trial *de novo*, and a jury trial was held on 7 May 2015 before the Honorable J. Thomas Davis. The only witness offered by the State was Detective Clark. At the close of the State's evidence, Defendant moved to dismiss the charge against her based on insufficiency of the evidence, and the trial court denied the motion.

Defendant elected to testify on her own behalf. She stated that throughout the events occurring on 28 January 2014 James was wearing a snowsuit along with mittens, boots, a toboggan, pants, and a sweater. Before going to the Sheriff's Office that afternoon, Defendant drove to a nearby grocery store. She met her father there, and he waited inside her vehicle with James (who was sleeping) while she went into the store for approximately fifteen minutes. The vehicle's engine remained on during this time period, and Defendant described the temperature inside the SUV as "hotter than blazes." Upon Defendant's return to the vehicle, her father left. At that point, she made a last-minute decision to stop at the Sheriff's Office to purchase a calling card for Dockery, who had previously lived with her.

James was still sleeping when they arrived at the Sheriff's Office, so Defendant decided to let him remain in the locked vehicle while she went inside. Based on past experience, she believed it would only take approximately "three or four minutes" to purchase the calling card. Defendant stated that her vehicle's windows were rolled up when she left James asleep in the SUV.

Defendant testified that from where she was standing in the Sheriff's Office she "could look directly into my car and see my kid." She also denied that Detective Clark escorted her out of the building, stating that she left on her own. According to Defendant, Detective Clark followed her outside and screamed at her for two or three minutes, stating at one point: "I'm sick and tired of you coming up here disrespecting my deputies and my staff." Defendant stated that Detective Clark also threatened

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to “arrest [her] or serve [her] a warrant” the next time she came to the Sheriff’s Office.

At the close of all the evidence, Defendant renewed her motion to dismiss, which was once again denied. The jury found Defendant guilty of misdemeanor child abuse. The trial court sentenced her to 75 days imprisonment, suspended the sentence, and placed her on 12 months supervised probation. Defendant gave oral notice of appeal in open court.

Analysis

The sole issue on appeal is whether the trial court erred in denying Defendant’s motions to dismiss. A trial court’s denial of a defendant’s motion to dismiss is reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). On appeal, this Court must determine “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[.]” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *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). Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State’s favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1,135, 132 L.Ed.2d 818 (1995). “Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal.” *Smith*, 300 N.C. at 78, 265 S.E.2d at 169. “The defendant’s evidence, unless favorable to the State, is not to be taken into consideration. However, if the defendant’s evidence is consistent with the State’s evidence, then the defendant’s evidence may be used to explain or clarify that offered by the State.” *State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 627 (2011) (internal citation and quotation marks omitted).

N.C. Gen. Stat. § 14-318.2(a) provides, in pertinent part, that

[a]ny parent of a child less than 16 years of age . . . who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse.

N.C. Gen. Stat. § 14-318.2(a) (2015).

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The State is required to prove only one of the three distinct acts set forth in N.C. Gen. Stat. § 14-318.2(a). *State v. Fredell*, 283 N.C. 242, 244, 195 S.E.2d 300, 302 (1973). That is, the State must introduce substantial evidence that the parent, by other than accidental means, either (1) inflicted physical injury upon the child; (2) allowed physical injury to be inflicted upon the child; or (3) created or allowed to be created a substantial risk of physical injury. *Id.*

The State does not contend that Defendant or anyone else actually inflicted physical injury upon James. Rather, the only question presented in this appeal is whether the State introduced substantial evidence that Defendant created a substantial risk of physical injury to James.

The phrase “substantial risk of physical injury” is not defined in N.C. Gen. Stat. § 14-318.2. Because of the paucity of cases applying this prong of the statute, Defendant attempts to draw an analogy to cases addressing whether a child was properly adjudicated to be a neglected juvenile under Chapter 7B of the North Carolina General Statutes. She points to several specific cases in which this Court has found parental conduct sufficient to support an adjudication of neglect, arguing that the acts at issue in those cases were more egregious than her conduct here. For example, in *In re D.C.*, 183 N.C. App. 344, 644 S.E.2d 640 (2007), we held that a mother who left her 16-month-old daughter alone in a motel room for at least 30 minutes at 4:00 a.m. exposed the child to an “unacceptable risk of harm . . .” *Id.* at 353, 644 S.E.2d at 645 (quotation marks omitted). In another case, this Court held that a parent put her child at substantial risk of harm by abusing alcohol and controlled substances in the child’s presence and driving while impaired with the child in the vehicle. *In re D.B.J.*, 197 N.C. App. 752, 755-56, 678 S.E.2d 778, 781 (2009).

However, while these cases as well as the other cases cited in Defendant’s brief illustrate *some* circumstances that can create a substantial risk of harm to a juvenile, they do not resolve the issue presently before us — that is, whether the State’s evidence here was sufficient to raise a jury question regarding a violation of N.C. Gen. Stat. § 14-318.2(a) by Defendant. Here, viewing the evidence, as we must, in the light most favorable to the State with every inference drawn in the State’s favor, James, who was under two years old, was left alone and helpless — outside of Defendant’s line of sight — for over six minutes inside a vehicle with one of its windows rolled more than halfway down in 18-degree weather with accompanying sleet, snow, and wind. Given the harsh weather conditions, James’ young age, and the danger of him being abducted (or of physical harm being inflicted upon him) due to the

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window being open more than halfway, we believe a reasonable juror could have found that Defendant “created a substantial risk of physical injury” to him by other than accidental means. *See* N.C. Gen. Stat. § 14-318.2(a).

Defendant acknowledges that her actions “may not have been advisable[] under the circumstances” but argues nevertheless that “this was not a case of child abuse.” However, the only question before us in an appeal from the denial of a motion to dismiss is whether a reasonable juror *could* have concluded that the defendant was guilty based on the evidence presented by the State. If so, even if the case is a close one, it must be resolved by the jury. *See State v. Franklin*, 327 N.C. 162, 170, 393 S.E.2d 781, 786-87 (1990) (“Although we concede that this is a close question . . . the State’s case was sufficient to take the case to the jury.”); *State v. McElrath*, 322 N.C. 1, 10, 366 S.E.2d 442, 447 (1988) (upholding trial court’s denial of motion to dismiss even though issue presented was “a very close question”).

Because we are satisfied that the State’s evidence was adequate to submit the case to the jury, the trial court properly denied Defendant’s motions to dismiss. Accordingly, Defendant’s argument is overruled.

Conclusion

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

NO ERROR.

Judges ELMORE and HUNTER, JR. concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 MAY 2016)

ALFORD v. GREEN No. 15-1101	Granville (13CVS1034)	Affirmed
B & B CRANE SERV, LLC v. DEVERE CONSTR. CO., INC. No. 15-781	Brunswick (14CVS1717)	Affirmed
BIGELOW v. TOWN OF CHAPEL HILL No. 15-897	Orange (11CVS1968)	Affirmed
CAMPBELL v. CITY OF STATESVILLE No. 15-329	Iredell (14CVS1387)	Affirmed
CUMBERLAND CTY. v. CHEEKS No. 15-1127	Cumberland (15CVD2216)	Reversed and Remanded
CURY v. MITCHELL No. 15-1008	Buncombe (08CVS4632)	Affirmed
DILLARD v. VESTER No. 15-1135	Haywood (12CVS1352)	Dismissed
GAY v. PEOPLES BANK No. 15-1103	Lincoln (13CVS383)	Affirmed
GONZALEZ v. TIDY MAIDS, INC. No. 15-1149	N.C. Industrial Commission (X06660)	Affirmed
HARRISON v. GEMMA POWER SYS., LLC No. 15-647	N.C. Industrial Commission (167921)	Affirmed
HENDERSON v. GOODYEAR TIRE & RUBBER CO. No. 15-985	N.C. Industrial Commission (13-737359)	Affirmed in part; reversed and remanded in part
IN RE C.A.G. No. 15-634	New Hanover (10JB46)	Reversed
IN RE C.M. No. 15-1223	Robeson (10JA94)	Reversed and Remanded

IN RE E.R.M.D. No. 15-1131	Rutherford (14JA113)	Affirmed
IN RE F.C.D. No. 15-1178	Sampson (14JA24)	Dismissed
IN RE J.W.M. No. 15-1287	Henderson (14JT51)	Affirmed
IN RE JOYCE No. 15-1318	N.C. Industrial Commission (U00463)	Affirmed in part; dismissed in part
IN RE K.D. No. 15-1365	Columbus (13JA24)	Affirmed
IN RE K.L. No. 15-1130	Robeson (12JT304)	Affirmed
IN RE N.J. No. 15-1241	Johnston (15JA25-26)	Affirmed in Part and Reversed in Part
IN RE X.D.G. No. 15-1288	Caldwell (13JA18) (13JA30)	Affirmed
LUECK v. LUECK No. 15-334	Sampson (12CVD1304)	Dismissed and remanded
McNEILL v. McNEILL No. 15-1041	N.C. Industrial Commission (PH-2513) (W61904)	Affirmed
MKTG. AD GRP, LLC v. LATITUDE 360 GLOBAL, INC. No. 15-911	Iredell (14CVS2554)	Affirmed in Part and Reversed in Part
ROBINSON v. SPIRES No. 15-963	Yancey (14CVS182)	Affirmed
ROCKY MOUNT WEH LP v. LANGSTON No. 15-988	Nash (13CVS714)	Reversed and Remanded
STATE v. BAKER No. 15-600	Forsyth (12CR58255-56)	Reversed, vacated and remanded
STATE v. BASKINS No. 15-1137	Guilford (14CRS88609)	Affirmed

STATE v. BRENNAN No. 15-885	Haywood (14CRS1090) (14CRS51228) (14CRS51230)	Affirmed
STATE v. BROWN No. 15-825	Durham (14CRS51266) (14CRS51267)	No Error
STATE v. CARTER No. 15-1234	Forsyth (13CRS51566)	Vacated and Remanded
STATE v. ENDARA No. 15-864	Mecklenburg (12CRS219167-68) (12CRS219171)	No Error
STATE v. FARABEE No. 15-696	Davidson (12CRS50719) (12CRS665)	NO ERROR in part; VACATED in part
STATE v. GRIFFIN No. 15-492	New Hanover (13CRS54388)	No Error
STATE v. HICKS No. 15-970	Wake (13CRS228746)	No Error
STATE v. HICKS No. 15-1098	Forsyth (13CRS51413)	No Error
STATE v. ISMAEL No. 15-842	Wake (14CRS213010) (14CRS214174)	Vacated and Remanded
STATE v. KETCHUM No. 15-771	Brunswick (14CRS2294-95) (14CRS3296) (14CRS50074) (14CRS50091)	Reversed and Remanded
STATE v. MARTIN No. 15-830	Forsyth (13CRS12383) (13CRS59051)	No Error
STATE v. MARTIN No. 15-986	Forsyth (14CRS51595)	No Error
STATE v. McCOWAN No. 15-948	Wake (13CRS230387)	No Plain Error In Part; No Error In Part

STATE v. McFADDEN No. 15-957	Mecklenburg (13CRS246309)	No Error
STATE v. MELLON No. 15-459	Lincoln (13CRS53174) (13CRS53175)	Vacated and remanded in part; no error in part
STATE v. RODGERS No. 15-1043	Orange (14CRS307)	No Error
STATE v. SHEIKH No. 15-688	Guilford (13CRS100094) (13CRS100098-99) (13CRS100100-102) (14CRS24118) (14CRS24121)	No Error
STATE v. SMITH No. 15-614	Wake (13CRS222682-83)	No Error
STATE v. SMITH No. 15-1220	Mecklenburg (13CRS220191) (13CRS220194) (13CRS220196)	Affirmed
STATE v. VANG No. 15-1069	Catawba (13CRS3475) (13CRS3477) (13CRS54204)	No Error
STATE v. WILKIE No. 15-762	Henderson (12CRS50036)	No Error
TSENG v. MARTIN No. 15-739	Guilford (13CVS7781)	Affirmed

BIGELOW v. SASSAFRAS GROVE BAPTIST CHURCH

[247 N.C. App. 401 (2016)]

REV. CARL E. BIGELOW, PLAINTIFF

v.

SASSAFRAS GROVE BAPTIST CHURCH, BOARD OF DEACONS OF SASSAFRAS GROVE BAPTIST CHURCH, WILLIE L. TURNER, JAMES HINTON, LOUIS HENDERSON, BOBBY R. JONES, ROY JOHNSON, SELMA S. HUNTER, CINDY HENDERSON, REV. DAVID HOLLOWAY, AND JOHN DOES, DEFENDANTS

No. COA15-557

Filed 10 May 2016

1. Employer and Employee—breach of contract—North Carolina Wage and Hour Act—at will doctrine

Plaintiff adequately stated claims for breach of contract and violation of the North Carolina Wage and Hour Act. The “at will” doctrine does not preclude an at will employee from suing for breach of contract with respect to benefits or compensation to which the parties contractually agreed. Further, plaintiffs sufficiently alleged that the contractually promised salary constituted wages and that defendant wrongfully failed to pay that salary.

2. Churches and Religion—breach of contract—North Carolina Wage and Hour Act—ministerial exception—ecclesiastical abstention doctrine

The trial court erred by granting defendants’ motion to dismiss for failure to state a claim upon which relief can be granted on claims by a former pastor for both breach of contract and violation of the North Carolina Wage and Hour Act. The “ministerial exception” and the “ecclesiastical abstention doctrine” does not bar courts from resolving contractual disputes not involving ecclesiastical issues and requiring only application of neutral principles of contract and statutory law.

Appeal by plaintiff from order entered 20 January 2015 by Judge W. Osmond Smith, III in Caswell County Superior Court. Heard in the Court of Appeals 4 November 2015.

Hicks McDonald Noecker LLP, by David W. McDonald, for plaintiff-appellant.

Law Offices of R. Lee Farmer, PLLC, by R. Lee Farmer, for defendants-appellees.

GEER, Judge.

BIGELOW v. SASSAFRAS GROVE BAPTIST CHURCH

[247 N.C. App. 401 (2016)]

Plaintiff, the Reverend Carl E. Bigelow, appeals from an order granting defendants' motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiff, a former pastor of defendant Sassafras Grove Baptist Church ("the "Church") who became disabled, has brought claims for both breach of contract and violation of the North Carolina Wage and Hour Act for failure to pay compensation and benefits plaintiff alleges is due to him pursuant to a written employment contract he entered into with defendants. While defendants have argued that two overlapping doctrines emanating from the First Amendment, the "ministerial exception" and the "ecclesiastical abstention doctrine," preclude the courts from deciding plaintiff's claims, we hold, consistent with other jurisdictions addressing this issue, that those doctrines do not bar courts from resolving contractual disputes not involving ecclesiastical issues and requiring only application of neutral principles of contract and statutory law. We, therefore, reverse the trial court's order.

Facts

On 25 October 2013, plaintiff filed a complaint against defendants -- the Church and its Board of Deacons, including Willie Turner, James Hinton, Louis Henderson, Bobby Jones, Roy Johnson, Selma Hunter, Cindy Henderson, and the Reverend David Holloway -- for breach of contract and violation of the North Carolina Wage and Hour Act. The complaint alleged the following facts.

Plaintiff began serving as a part-time pastor of "the Church," which is located in Yanceyville, North Carolina, in 1975. He held this part-time position until 14 February 2001, during which time he also worked for General Electric Co. ("GE") in Mebane, North Carolina. In order to be eligible for retirement at GE, plaintiff was required to continue working there through 13 February 2013. However, on 14 February 2001, plaintiff resigned his position with GE and entered into a contract with the Church entitled "Agreement of Full Time Pastorship." This contract consisted of several provisions that are pertinent to this appeal:

The Pastor shall serve the church for an indefinite period since there is no scriptural support of tenure. Where as, by [sic] Minister CARL BIGELOW is resigning from his current position of employment and would be eligible for retirement in the next (12) years, the [sic] accepts the liability of his employment and livelihood of his family for the enduring time until retirement.

If the Pastor should become disabled to carry on his work, he shall be paid his full salary until, the disability

BIGELOW v. SASSAFRAS GROVE BAPTIST CHURCH

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insurance begin to paid [sic] (which is provide [sic] by church) and relieves church of its responsibility to Pastor.

....

Where as, at any time the church shall become dissatisfied with the services of Pastor and ask for his resignation, the congregation at that time, shall take a vote and be governed by the majority of voting members eligible (members in good standing with church). At that time the church shall pay the Pastor the total package in advance or his services shall continue until such time the church shall meet this requirement.

After 10 years of serving as head pastor of the Church, plaintiff contracted kidney disease in September 2011, was hospitalized, and underwent surgery. As a result, he was no longer able to serve as the pastor of the Church. In addition, because the long-term disability insurance policy mentioned in the employment agreement lapsed prior to plaintiff's disability, plaintiff was without any disability coverage. At this point in time, it appears, based on the complaint, that the Church had ceased all payment of plaintiff's salary and benefits.

Plaintiff filed suit against the Church on 25 October 2013. On 23 December 2013, defendants filed a motion to dismiss contending that the trial court did not have jurisdiction to hear this dispute and that plaintiff had failed to state a claim upon which relief could be granted. Defendants subsequently also filed a motion for summary judgment supported by the affidavits of defendants Willie L. Turner and James Hinton on 30 December 2014.

The trial court heard defendant's motion to dismiss on 6 January 2015. Because plaintiff did not receive proper notice of defendant's motion for summary judgment and the accompanying affidavits, the trial court limited the hearing to the motion to dismiss and did not consider the affidavits.¹ On 20 January 2015, the trial court entered an order granting defendants' motion to dismiss. Plaintiff timely appealed to this Court.

1. Defendants' motion for summary judgment and the accompanying affidavits were included in the Record on Appeal. However, because defendants have made no argument on appeal that the trial court erred in refusing to consider these affidavits, we have not addressed them in this opinion.

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Discussion

“This Court reviews de novo a trial court’s ruling on a motion to dismiss.” *Transp. Servs. of N.C., Inc. v. Wake Cnty. Bd. of Educ.*, 198 N.C. App. 590, 593, 680 S.E.2d 223, 225 (2009). “[T]he question for the court is whether the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.” *Blinson v. State*, 186 N.C. App. 328, 335, 651 S.E.2d 268, 274 (2007). “The court must construe the complaint liberally and ‘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.’ ” *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (quoting *Block v. Cnty. of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000)), *aff’d*, 357 N.C. 567, 597 S.E.2d 673 (2003).

I

[1] We first address whether plaintiff adequately stated claims for breach of contract and violation of the North Carolina Wage and Hour Act. “The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract.” *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). Here, plaintiff alleged the existence of a written employment contract between himself and the Church, signed by several representatives of the Church on 14 February 2001.

Specifically, plaintiff alleged that he was guaranteed under the contract “salary continuation upon his disability” and “salary, housing, utilities, social security, and medical insurance . . . through February 13, 2013” in consideration for his forfeiture of his previous job’s benefits. He further alleged that defendants breached this contractual provision upon their refusal to pay his salary and other benefits when he became disabled. These allegations taken as true are sufficient to state a claim for breach of contract.

In arguing that plaintiff has failed to state a claim for relief, defendants rely on the principle that, in the absence of an employment contract providing for a specified term of employment, plaintiff is an employee at will and cannot sue for breach of contract. This argument is beside the point.

Certainly, it is well established “that absent some form of contractual agreement between an employer and employee establishing a *definite* period of employment, the employment is presumed to be an ‘at-will’

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employment,” but in that event, “the employee states no cause of action for breach of contract *by alleging that he has been discharged without just cause.*” *Harris v. Duke Power Co.*, 319 N.C. 627, 629, 356 S.E.2d 357, 359 (1987) (second emphasis added), *disapproved of on other grounds by Kurtzman v. Applied Analytical Indus., Inc.*, 347 N.C. 329, 493 S.E.2d 420 (1997). Thus, *Harris* mandates that an “at-will” employee cannot state a claim for breach of contract based on wrongful discharge.

The “at will” doctrine does not preclude an at-will employee from suing for breach of contract with respect to benefits or compensation to which the parties contractually agreed. Thus, in *Brooks v. Carolina Tel. & Tel. Co.*, 56 N.C. App. 801, 804-05, 290 S.E.2d 370, 372 (1982), when the defendant pointed to “at will” cases in arguing that the plaintiff was not entitled to sue for breach of contract with respect to a severance agreement, this Court held: “Those cases dealt with each employee’s right to continued employment and did not deal with the issue of benefits or compensation earned *during* employment.” Those cases are not apposite to the case now before us. *See also Way v. Ramsey*, 192 N.C. 549, 551-52, 135 S.E. 454, 455 (1926) (acknowledging that minister, who served at pleasure of his church organization, could sue for breach of contract with respect to nonpayment of his salary).

Because plaintiff in this case is not challenging the basis for his dismissal, but only seeks to recover money and benefits owed under the employment contract he alleges he entered into with defendants, the “at will” doctrine is inapplicable. Plaintiff has, therefore, properly alleged a claim for breach of his employment contract’s provisions for compensation and benefits.

Plaintiff also alleged a claim under the North Carolina Wage and Hour Act. Defendants do not address the sufficiency of those allegations. The Wage and Hour Act provides: “Every employer shall pay every employee all wages and tips accruing to the employee on the regular payday. Pay periods may be daily, weekly, bi-weekly, semi-monthly, or monthly.” N.C. Gen. Stat. § 95-25.6 (2015). Further, “[a]ny employer who violates the provisions of . . . G.S. 95-25.6 . . . shall be liable to the employee . . . in the amount of their unpaid . . . compensation, or their unpaid amounts due under G.S. 95-25.6 . . .” N.C. Gen. Stat. § 95-25.22(a) (2015). *See Meehan v. Am. Media Int’l, LLC*, 214 N.C. App. 245, 262, 712 S.E.2d 904, 914 (2011) (remanding to trial court for determination of salary due pursuant to a claim brought under the Wage and Hour Act).

Plaintiff’s allegations that the contractually promised “salary” constituted wages as defined in N.C. Gen. Stat. § 95-25.1 *et seq.* (2015), along

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with his allegation that defendant wrongfully failed to pay that salary, sufficiently alleges a claim under the North Carolina Wage and Hour Act. See *Hamilton v. Memorex Telex Corp.*, 118 N.C. App. 1, 10, 454 S.E.2d 278, 282 (1995) (“[O]nce the employee has earned the wages and benefits under this statutory scheme the employer may not rescind them[.]”).

II

[2] Defendants primarily based their motion to dismiss on their claim that plaintiff’s causes of action are barred by the “ministerial exception” or the “ecclesiastical abstention” doctrine.² In making their argument on appeal, however, defendants address almost exclusively the doctrine’s applicability to wrongful discharge claims. Although defendants appear to assume that plaintiff is challenging the termination of his employment, his complaint only asserts claims based on the non-payment of contractually agreed upon compensation and benefits. Neither doctrine, therefore, applies to plaintiff’s claims.

We first note that although both legal doctrines bar certain claims against religious institutions for reasons arising out of the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution, our appellate courts have not specifically addressed the ministerial exception and have only discussed the jurisdictional limits set in place by the ecclesiastical abstention doctrine. Because plaintiff argues both legal principles are inapplicable to his alleged claims, we address each in turn.

The ministerial exception is best articulated in the United States Supreme Court decision of *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, ___ U.S. ___, 181 L. Ed. 2d 650, 132 S. Ct. 694 (2012). We note that although North Carolina appellate courts have not previously addressed the ministerial exception, we are, of course, under the Supremacy Clause of the United States Constitution, bound by *Hosanna-Tabor’s* application and construction of the First Amendment. See *State v. Elliott*, 360 N.C. 400, 421, 628 S.E.2d 735, 749 (2006) (“The Supreme Court of the United States is the final authority on federal constitutional questions.”).

We first note that the parties mistakenly assume that the ministerial exception is a question of subject matter jurisdiction. *Hosanna-Tabor* clarifies, however, that “the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar. That

2. Defendants merge the two doctrines, but since they are analytically distinct, we treat them separately.

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is because the issue presented by the exception is ‘whether the allegations the plaintiff makes entitle him to relief,’ not whether the court has ‘power to hear [the] case.’” ___ U.S. at ___ n.4, 181 L. Ed. 2d at 667 n.4, 132 S. Ct. at 709 n.4 (quoting *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 254, 177 L. Ed. 2d 535, 546, 130 S. Ct. 2869, 2877 (2010)).

In explaining the ministerial exception, Chief Justice Roberts wrote for the Court: “Since the passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a ‘ministerial exception,’ grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers.” *Id.* at ___, 181 L. Ed. 2d at 663, 132 S. Ct. at 705. “By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.” *Id.* at ___, 181 L. Ed. 2d at 663, 132 S. Ct. at 706.

At the conclusion of Chief Justice Roberts’ opinion, he limited the opinion’s holding to the narrow circumstance of “employment discrimination suit[s] brought on behalf of a minister, challenging her church’s decision to fire her” and specifically “express[ed] no view on whether the exception bars . . . actions by employees alleging breach of contract” *Id.* at ___, 181 L. Ed. 2d at 668, 132 S. Ct. at 710.

Defendants, in relying on the ministerial exception set out in *Hosanna-Tabor*, vigorously argue only that “it is the decision of a church to hire or fire its pastor that is protected from judicial scrutiny[.]” Defendants cite no authority and provide no argument why the ministerial exception, as articulated in *Hosanna-Tabor*, should apply to claims based on nonpayment of compensation and benefits.

Although North Carolina courts have not expressly addressed the ministerial exception, other jurisdictions have and, in accordance with *Hosanna-Tabor*, have limited its application to the context of wrongful discharge suits not alleging a breach of contract. The Supreme Court of Kentucky has held that “[secular] courts do have jurisdiction to hear and resolve employment disputes, contract claims, tort claims, or similar. And that authority is not lost as a result of the ministerial exception.” *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 608 (Ky. 2014). Applying *Hosanna-Tabor*, the *Kirby* court held that the

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ministerial exception barred the plaintiff minister's claim that her discharge by a defendant Seminary was racially discriminatory. 426 S.W.3d at 614-15.

However, the court concluded that plaintiff's breach of contract claim based on the defendant Seminary's violation of its tenure policy was not barred by the ministerial exception:

When deciding whether a claim is barred by the ministerial exception, it is important to remain mindful of the ministerial exception's underlying purpose: to allow religious institutions, free from government interference, to exercise freely their right to select who will present their faith tenets. Although state contract law does involve the governmental enforcement of restrictions on a religious institution's right or ability to select its ministers, those restrictions are not *governmental* restrictions. Simply put, the restrictions do not arise out of government involvement but, rather, from the parties to the contract, namely, the religious institution and its employee.

Contractual transactions, and the resulting obligations, are assumed voluntarily. Underneath everything, churches are organizations. And, like any other organization, a church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court. Surely, a church can contract with its own pastors just as it can with outside parties. Enforcement of a promise, willingly made and supported by consideration, in no way constitutes a state-imposed limit upon a church's free exercise rights.

We are not presented with a situation where the government is inappropriately meddling in the selection of who will minister to the congregation. Limits on a religious institution's ability to choose – or the criteria for choosing – who will minister to its faithful are not being foisted on the religious institution. The government had no role in setting the limits on how the Seminary's tenured professors may be terminated. Instead, this is a situation in which a religious institution has voluntarily circumscribed its own conduct, arguably in the form of a contractual agreement, and now that agreement, if found to exist, may be enforced according to its own terms. That

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cannot breach church autonomy. Arguably, instead, this exemplifies religious autonomy because religious institutions are free to set forth policies that align with their respective mission.

Essentially, the Seminary willingly made a decision to offer tenure – a wholly secular concept – in exchange for professorial services. Providing substance to the offer of tenure, the Seminary explicitly stated in writing that it would only terminate a tenured professor on three grounds Of course, under the First Amendment, and the ministerial exception for that matter, the Seminary enjoys the right to excuse ministers as it sees fit. But here, the Seminary circumscribed its right to excuse faculty, ministers or not. The Seminary agreed to only express its First Amendment right under limited conditions.

Id. at 615-16 (internal quotation marks and footnotes omitted).

Based on this analysis, the court concluded: “Accordingly, the Seminary’s decision to fire a tenured professor, whether a minister or not, is completely free of any government involvement or restriction. In the absence of government interference, the ministerial exception cannot act as a bar to an otherwise legitimate suit.” *Id.* at 617.

Other jurisdictions have similarly concluded that the ministerial exception does not bar contractual claims. *See Second Episcopal Dist. African Methodist Episcopal Church v. Prioleau*, 49 A.3d 812, 817 (D.C. 2012) (declining to extend ministerial exception “to categorically bar any claim whatsoever by a ministerial employee[,]” particularly where employee seeks salary owed under contract); *Galetti v. Reeve*, 331 P.3d 997, 1001 (2014) (“As pled, it appears that Plaintiff can succeed on her breach of contract claim without any religious intrusion. The district court does not need to determine whether the Conference had cause to terminate Plaintiff’s employment, but only whether the Conference complied with its contractual obligation . . .”).

We find these decisions persuasive. Accordingly, because plaintiff’s complaint does not challenge the Church’s decision to terminate his employment, but instead seeks to enforce a contractual obligation regarding his compensation and benefits, we hold that the ministerial exception does not apply and is not a basis for dismissal of plaintiff’s claims.

We next address the ecclesiastical abstention doctrine, which North Carolina courts hold is a jurisdictional bar to courts adjudicating

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“ecclesiastical matters of a church.” *Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 327, 605 S.E.2d 161, 163 (2004) (“The courts of the State have no jurisdiction over and no concern with purely ecclesiastical questions and controversies” (quoting *Braswell v. Purser*, 282 N.C. 388, 393, 193 S.E.2d 90, 93 (1972))); *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 395, 397 (1998) (“The United States Supreme Court has interpreted [the Establishment Clause] to mean that the civil courts cannot decide disputes involving religious organizations where the religious organizations would be deprived of interpreting and determining their own laws and doctrine.”).

“Our Supreme Court has held that a trial court’s exercise of jurisdiction is improper only where ‘purely ecclesiastical questions and controversies’ are involved.” *Emory v. Jackson Chapel First Missionary Baptist Church*, 165 N.C. App. 489, 492, 598 S.E.2d 667, 670 (2004) (quoting *W. Conference of Original Free Will Baptists of N.C. v. Creech*, 256 N.C. 128, 140, 123 S.E.2d 619, 627 (1962)). An ecclesiastical matter is defined by our courts as “‘one which concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership’” *Tubiolo*, 167 N.C. App. at 327, 605 S.E.2d at 163-64 (quoting *E. Conference of Original Free Will Baptists of N.C. v. Piner*, 267 N.C. 74, 77, 147 S.E.2d 581, 583 (1966), *overruled in part on other grounds by Atkins v. Walker*, 284 N.C. 306, 200 S.E.2d 641 (1973)). Thus, “[t]he dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine.” *Smith*, 128 N.C. App. at 494, 495 S.E.2d at 398.

“While the Courts can under no circumstance referee ecclesiastical disputes,” *Tubiolo*, 167 N.C. App. at 329, 605 S.E.2d at 164, they “do have jurisdiction, as to civil, *contract* and property rights which are involved in, or arise from, a church controversy.” *Reid v. Johnston*, 241 N.C. 201, 204, 85 S.E.2d 114, 117 (1954) (emphasis added), *validity questioned on other grounds by Atkins*, 284 N.C. at 317, 200 S.E.2d at 649. *See also Way*, 192 N.C. at 551, 135 S.E. at 455 (“[T]he question of liability for the salary of a minister or pastor is governed by the principles which prevail in the law of contracts, and it is generally held that a valid contract for the payment of such a salary will be enforced.”). However, the controversy must be resolved “pursuant to ‘neutral principles of law[.]’” *Atkins*, 284 N.C. at 319, 200 S.E.2d at 650 (quoting *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449, 21 L. Ed. 2d 658, 665, 89 S. Ct. 601, 606 (1969)).

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Defendants seem to argue, without citing any pertinent authority, that the First Amendment of the United States Constitution immunizes, without exception, a religious institution from liability arising out of a contract between the religious institution and its ministerial employees. This unsupported assertion cannot be reconciled with *Smith*. This Court in *Smith* concluded that a holding “ ‘that a religious body must be held free from any responsibility for wholly predictable and foreseeable injurious consequences of personnel decisions, although such decisions incorporate no theological or dogmatic tenets – would go beyond First Amendment protection and cloak such bodies with an exclusive immunity greater than that required for the preservation of the principles constitutionally safeguarded.’ ” 128 N.C. App. at 495, 495 S.E.2d at 398 (quoting *Jones v. Trane*, 153 Misc. 2d 822, 830, 591 N.Y.S.2d 927, 932 (1992)).

Although defendants cite numerous decisions holding that civil courts cannot interject themselves into ecclesiastical disputes, they again focus their argument on the bar against courts determining the propriety of a church’s decision to dismiss a plaintiff from his position as pastor – an issue not present in this case. The only authority that defendants cite as barring a claim regarding compensation is *Tarasi v. Jugis*, 203 N.C. App. 150, 692 S.E.2d 194, 2010 WL 916050 at *2, 2010 N.C. App. LEXIS 493 at *3-5 (2010) (unpublished), in which this Court applied the ecclesiastical abstention doctrine when holding that the trial court lacked jurisdiction over a Wage and Hour Act claim.

In *Tarasi*, the plaintiff priest filed a Wage and Hour Act claim against the Roman Catholic Diocese of Charlotte and its bishop, alleging that, after being instructed by the Vatican to provide the plaintiff “ ‘with an adequate means of livelihood and the appropriate necessities as envisioned in canons 281 § 1 and 384 of the Code of Canon Law,’ ” the defendants failed to do so. *Id.*, 2010 WL 916050 at *1, 2010 N.C. App. LEXIS 493 at *2. In affirming the trial court’s dismissal of the plaintiff’s Wage and Hour Act claim, this Court held that “[t]o determine his claim, the court would be required to determine, under ecclesiastical law, the compensation to which plaintiff is entitled” and that “[s]uch a determination is beyond the subject matter jurisdiction of the North Carolina courts” *Id.*, 2010 WL 916050 at *2, 2010 N.C. App. LEXIS 493 at *5.

Thus, in *Tarasi*, the plaintiff was asking the court to decide whether the Catholic diocese had complied with the Vatican’s directive – a request that the court inject itself in the middle of a church dispute and decide what canonical law required. Here, plaintiff’s claims, rather than

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asking the court to address ecclesiastical doctrine or church law, require the court only to make a secular decision regarding the terms of the parties' contract and to apply the neutral principles of the Wage and Hour Act. Defendants acknowledge that they are not exempt from the Wage and Hour Act.

Accordingly, because a court can decide plaintiff's contract-based claims applying "neutral principles of law," without entangling the Court in an ecclesiastical dispute or interpretation, we hold that the ecclesiastical abstention doctrine does not require dismissal of plaintiff's complaint. We, therefore, hold plaintiff has sufficiently stated claims for relief and, therefore, reverse the trial court's order dismissing plaintiff's complaint.

REVERSED.

Judges HUNTER, JR. and DILLON concur.

STATE OF NORTH CAROLINA

v.

MICHAEL ANTONIO BULLOCK, DEFENDANT

No. COA15-731

Filed 10 May 2016

Search and Seizure—traffic stop—unlawfully extended

The Court of Appeals reversed defendant's convictions for charges involving trafficking of heroin where the police officer unlawfully extended the traffic stop by causing defendant to be subjected to a frisk, sit in the officer's patrol car, and answer questions while the officer searched law enforcement databases for reasons unrelated to the mission of the stop and exceeding routine checks authorized by case law.

Judge McCULLOUGH dissenting.

Appeal by defendant from judgment entered 30 July 2014 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 17 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General John A. Payne, for the State.

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Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jon H. Hunt, for defendant-appellant.

GEER, Judge.

Defendant Michael Antonio Bullock was indicted for trafficking in heroin by possession, trafficking in heroin by transportation, and possession with the intent to sell or deliver a Schedule I controlled substance (heroin). Following the denial of defendant's motion to suppress evidence obtained by law enforcement as a result of a search of his vehicle following a traffic stop, defendant pled guilty to the charged offenses. On appeal, defendant argues that the trial court erred in denying his motion to suppress because its findings of fact establish that the officer unlawfully extended the stop, making the subsequent search unlawful. In light of the United States Supreme Court's decision in *Rodriguez v. United States*, ___ U.S. ___, 191 L. Ed. 2d 492, 135 S. Ct. 1609 (2015), we agree and hold, based on the trial court's findings of fact, that the officer unlawfully extended the stop and that defendant's consent to the search did not, therefore, justify the search. Accordingly, we reverse.

Facts

The State presented evidence at the motion to suppress hearing that tended to show the following facts. On 27 November 2012, defendant was traveling south on I-85 through Durham. Officer John McDonough of the Durham Police Department was stationary on the side of the interstate when defendant drove past him in the far left lane in a white Chrysler, traveling approximately 70 mph in a 60 mph zone. Officer McDonough observed defendant change lanes to the middle lane "even though there was no car in front of him."

Officer McDonough began following defendant and paced him for about a mile, as defendant continued to maintain a speed of 70 mph, although the speed limit increased to 65 mph. Officer McDonough, while following defendant in a marked patrol car, observed defendant apply the brakes twice and cross over the white shoulder line. He also observed defendant following a truck too closely, coming within approximately one and a half car lengths of it.

Officer McDonough initiated a traffic stop and approached defendant's car from the passenger side. Officer McDonough asked how defendant was doing and for his driver's license and registration. Defendant already had his driver's license out when Officer McDonough approached and his hand was trembling a little. Officer McDonough

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observed two cell phones in the center console of defendant's vehicle. Officer McDonough understood defendant as saying that he was going to Century Oaks Drive to meet a girl, but that he had missed his exit.

Officer McDonough asked defendant for the rental agreement for the vehicle once defendant indicated that the car was a rental. The rental agreement specified that the car was rented by an "Alicia Bullock," and "it looked like [defendant] had written his name in at the date part down where the renter signed her name." However, the only authorized user on the rental agreement was Alicia Bullock.

Officer McDonough asked defendant to step back to his patrol car while he ran defendant's driver's license. He shook hands with defendant and told him that he would give him a warning for the traffic violation. He then asked if he could briefly search defendant for weapons before he got into his patrol car. Defendant agreed and lifted his arms up in the air -- Officer McDonough found only cash on him. Defendant later stated that the cash totaled about \$372.00. Defendant told Officer McDonough that he was about to go shopping.

While defendant was seated in his patrol car, Officer McDonough ran defendant's North Carolina driver's license through his mobile computer. Officer McDonough's K-9 was located in the back of his police car. Defendant claimed that he had just moved down from Washington, but Officer McDonough learned by running his license that the license was issued back in 2000 and that defendant had been arrested in North Carolina in 2001. Defendant later admitted he had been in the area for a while and claimed he was going to meet a girl he met on Facebook for the first time. However, defendant also mentioned that the same woman would sometimes come up to Henderson to meet him. In addition, when Officer McDonough misidentified the street that defendant had claimed he was traveling to, defendant did not correct him.

Officer McDonough thought defendant looked nervous while he was questioning him in the police car. He noted that defendant was "breathing in and out in his stomach" and was not making much eye contact. Officer McDonough then asked defendant if there were any weapons or drugs in the car and if he could search the vehicle. Defendant gave consent for Officer McDonough to search the car, but not his personal belongings in the car. Defendant clarified that his personal belongings included a bag, some clothes, and some condoms. Officer McDonough called for a backup officer and explained to defendant that he could not conduct a search of a car without a backup officer present. Officer McDonough testified that it took Officer Green around three to

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five minutes to arrive, although the surveillance tape indicates closer to 10 minutes elapsed.

While they were waiting for Officer Green, defendant asked what they were waiting for, and Officer McDonough explained that he could get in trouble if he searched the car without another officer present. Defendant asked Officer McDonough what would happen if he did not consent to a search of the car, and Officer McDonough stated that he would then deploy his K-9 dog to search the car. At that time, defendant and Officer McDonough spoke some more about the girl defendant was going to see and other matters unrelated to the traffic stop. Defendant then asked again, "What are we waiting for now?" He also expressed concern to Officer McDonough that he was "going to make me miss this."

Once Officer Green arrived, Officer McDonough began searching the front passenger area of the car. Officer McDonough felt that the car was still "kind of outside the shoulder" so he moved it further off to the side of the road. Officer McDonough rolled down the window of his patrol car in case defendant revoked consent to search the car, but other than limiting the search to not including the bags, defendant never revoked his consent to search his car. Officer McDonough got to the trunk and then defendant yelled out, "it's not my bag" and "those are not my hoodies" Defendant explained that it was his sister's bag and that he couldn't give Officer McDonough permission to search her bag.

Officer McDonough had Officer Green remove the bag and put it on the grass. He then got his K-9 dog out of the car. The K-9 went around the car and did not alert to any drugs being in the car. Officer McDonough then had his K-9 sniff the bag on the side of the road, and the dog "immediately put his nose on the bag and came to a sit" -- the behavior he exhibits when there is an odor of narcotics. According to Officer McDonough, his K-9 dog has never given a false alert. Officer Green opened the bag and found 100 bindles of heroin in it.

Defendant was indicted on 17 December 2012 by a grand jury for trafficking in heroin by possession, trafficking in heroin by transportation, and possession with the intent to sell or deliver a Schedule I controlled substance. Defendant filed a motion to suppress on 2 July 2014, arguing that the trial court should suppress all of the evidence obtained as a result of the search of the vehicle defendant was driving. A suppression hearing was held on 30 July 2014, and on 4 August 2014, the trial court entered an order denying defendant's motion.

In its order, the trial court made the following findings of fact. Officer McDonough initiated a traffic stop after observing defendant "traveling

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70 miles per hour in a 60 mile per hour zone in the far left travel lane.” In addition, Officer McDonough observed defendant “come within approximately one and a half car lengths of a silver Ford pickup truck.” The trial court noted that Officer McDonough requested defendant’s license and registration and that “Defendant’s hand was trembling when handing his license over to [Officer] McDonough.” Further, the trial court found that defendant was the sole occupant and driver of the car and he “was not listed as an authorized driver” on the rental agreement.

The trial court also found “[t]hat [Officer] McDonough observed that defendant had two cellular phones inside the Chrysler[.]” The trial court found that Officer McDonough “asked defendant where he was traveling” and that “Defendant responded he was going to his girlfriend’s house on Century Oaks Drive in Durham and he just missed his exit.” The court also found that defendant claimed he just moved from Washington, D.C. to Henderson, North Carolina and indicated that he was using the GPS on his cellphone in order to get to his destination.

In addition, the trial court found:

That [Officer] McDonough requested defendant to exit the Chrysler and have a seat in McDonough’s patrol vehicle in order to check defendant’s driver’s license. Before defendant sat in the passenger seat of the patrol vehicle, [Officer] McDonough met defendant at the rear of the Chrysler, shook defendant’s hand, told him he was going to give him a warning for the traffic violations, and briefly check him for weapons. While checking for weapons, [Officer] McDonough observed a small bundle of United States currency totaling \$372.00 in defendant’s right side pants pocket. Defendant stated he was about to go shopping.

Next, the trial court found that Officer McDonough told defendant he was receiving a warning ticket and that the reason Officer McDonough did so was “to calm [him] down to be able to gauge nervousness not caused by general fear of getting a ticket.” The court also noted that Officer McDonough claimed he asked defendant to sit next to him in his patrol vehicle “to observe defendant when defendant answer[ed] his questions.”

The court further found “[t]hat information came back to [Officer] McDonough from the various law enforcement databases that defendant was issued a North Carolina driver’s license in 2000 and had a criminal history in North Carolina that began in 2001.” Additionally, the court found that Officer McDonough requested that another officer check in

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with him so that two officers would be present and able to search the Chrysler. The court also noted that when Officer McDonough questioned defendant about certain items, such as “whether there were any guns in the vehicle, or a dead body in the trunk, defendant was able to make eye contact with [Officer] McDonough while answering the question.” When asked about his girlfriend or where he was traveling, however “defendant would not make eye contact and instead looked out the window and away from [Officer] McDonough.” Further, “defendant’s breathing was elevated and his stomach was rising and falling rapidly.”

The trial court then described what happened after Officer McDonough asked defendant if he could search his vehicle, finding “[t]hat [Officer] McDonough asked defendant if he had a problem with him searching the vehicle” and that defendant responded “ ‘yeah, I don’t want you to go in my stuff.’ ” But, defendant said Officer McDonough could check the car if he wanted. The court indicated “[t]hat at no time did defendant state that he changed his mind and that he did not want [Officer] McDonough to search the Chrysler.” Finally, the court found, in Finding of Fact No. 18, that 1,500 bindles of heroin were found in defendant’s bag.

Ultimately, the trial court concluded that Officer McDonough had reasonable, articulable suspicion to conduct the traffic stop because defendant was speeding and following another vehicle too closely. Additionally, the court concluded:

That [Officer] McDonough had reasonable, articulable suspicion to extend the traffic stop based on his observations that: defendant was driving on an interstate where illegal drugs are transported; defendant was operating a rental vehicle which he was not authorized to drive; defendant possessed two cellphones and a small bundle of United States currency; defendant was obviously nervous, deceptive, and evasive as noted in his trembling hands, elevated breathing, and lack of eye contact; and defendant made multiple inconsistent statements regarding his destination, who he was going to meet, and how long he had lived in North Carolina.

After the trial court denied defendant’s motion to suppress, he pled guilty to the charged offenses, and the trial court sentenced him to a term of 225 to 279 months imprisonment. Defendant timely appealed to this Court.

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Discussion

On appeal, defendant argues that the trial court erred in denying his motion to suppress because the officer unlawfully extended the traffic stop, making the subsequent search unlawful. In reviewing a trial court's ruling on a motion to suppress, this Court "determine[s] only whether the trial court's findings of fact are supported by competent evidence, and whether these findings of fact support the court's conclusions of law." *State v. Pulliam*, 139 N.C. App. 437, 439-40, 533 S.E.2d 280, 282 (2000). Conclusions of law are, however, reviewable de novo. *State v. Kincaid*, 147 N.C. App. 94, 97, 555 S.E.2d 294, 297 (2001).

This appeal is controlled by *Rodriguez*. In addressing the reasonableness of the duration of a traffic stop, the Supreme Court explained:

A seizure for a traffic violation justifies a police investigation of that violation. A relatively brief encounter, a routine traffic stop is more analogous to a so-called *Terry* stop than to a formal arrest. Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's mission – to address the traffic violation that warranted the stop, and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose. Authority for the seizure thus ends when tasks tied to the traffic infraction are – or reasonably should have been – completed.

Our decisions in [*Illinois v.*] *Caballes*[, 543 U.S. 405, 160 L. Ed. 2d 842, 125 S. Ct. 834 (2005)] and [*Arizona v.*] *Johnson*[, 555 U.S. 323, 172 L. Ed. 2d 694, 129 S. Ct. 781 (2009)] heed these constraints. In both cases, we concluded that the *Fourth Amendment* tolerated certain unrelated investigations that did not lengthen the roadside detention. In *Caballes*, however, we cautioned that a traffic stop can become unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a warning ticket. And we repeated that admonition in *Johnson*: The seizure remains lawful only so long as unrelated inquiries do not measurably extend the duration of the stop. An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop. *But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.*

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Id. at ____, 191 L. Ed. 2d at 498-99, 135 S. Ct. at 1614-15 (second emphasis added) (internal citations, quotation marks, brackets, and ellipses omitted).

Before the U.S. Supreme Court's *Rodriguez* decision, this Court had recognized essentially the same principles. In *State v. Myles*, 188 N.C. App. 42, 45, 654 S.E.2d 752, 754 (quoting *State v. Falana*, 129 N.C. App. 813, 816, 501 S.E.2d 358, 360 (1998)), *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008), this Court explained that "[o]nce the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay." "To determine whether the officer had reasonable suspicion, it is necessary to look at the totality of the circumstances." *Id.* The Court emphasized that "in order to justify [the officer's] further detention of defendant, [the officer] must have had defendant's consent or 'grounds which provide a reasonable and articulable suspicion in order to justify further delay' before he questioned defendant." *Id.*, 654 S.E.2d at 755 (quoting *Falana*, 129 N.C. App. at 816, 501 S.E.2d at 360).

Applying *Rodriguez* and *Myles* to this case, the mission of the stop was to issue a traffic infraction warning ticket to defendant for speeding and following a truck too closely. Officer McDonough's stop of defendant could, therefore, last only as long as necessary to complete that mission and certain permissible unrelated "checks," including checking defendant's driver's license, determining whether there were outstanding warrants against defendant, and inspecting the automobile's registration and proof of insurance. *Rodriguez*, ___ U.S. at ____, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615.

Officer McDonough completed the mission of the traffic stop when he told defendant that he was giving defendant a warning for the traffic violations as they were standing at the rear of defendant's car. With respect to the permissible checks, Officer McDonough checked the car rental agreement -- the equivalent of inspecting a car's registration and proof of insurance -- before he asked defendant to exit his car. Officer McDonough was still permitted to check defendant's license and check for outstanding warrants. But, he was not allowed to "do so in a way that prolong[ed] the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id.* at ____, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615.

Rather than taking the license back to his patrol car and running the checks, Officer McDonough required defendant to exit his car, subjected him to a pat down search, and had him sit in the patrol car while

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the officer ran his checks. The trial court's findings of fact set out the reason Officer McDonough proceeded in this manner. He told defendant that he was giving him just a warning so he could "attribute nervousness to something other than general anxiety from a routine traffic stop." In addition, the trial court found that Officer "McDonough [had] defendant sit in the passenger seat next to him to observe defendant when defendant answer[ed] his questions." Then, apart from just checking defendant's license and checking for warrants, Officer McDonough ran "defendant's name through various law enforcement databases" while he questioned defendant at length about subjects unrelated to the traffic stop's mission.

Under existing case law, an officer may, during a traffic stop, lawfully ask the driver to exit the vehicle. *See, e.g., State v. McRae*, 154 N.C. App. 624, 629, 573 S.E.2d 214, 218 (2002) ("When an officer has lawfully detained a vehicle based on probable cause to believe that a traffic law has been violated, he may order the driver to exit the vehicle."). In *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 54 L. Ed. 2d 331, 337, 98 S. Ct. 330, 333 (1977), the United States Supreme Court found that the "additional intrusion" into the personal liberty of the driver by the officer asking him to step out of the car was, at most, "*de minimis*." Although "prior to *Rodriguez*, many jurisdictions – including North Carolina – applied a *de minimis* rule, . . . the holdings in these cases to the extent that they apply the *de minimis* rule have been overruled by *Rodriguez*." *State v. Warren*, ___ N.C. App. ___, ___, 775 S.E.2d 362, 365 (2015), *aff'd per curiam*, ___ N.C. ___, 782 S.E.2d 509 (2016). Thus, under *Rodriguez*, even a *de minimis* extension is too long if it prolongs the stop beyond the time necessary to complete the mission. ___ U.S. at ___, 191 L. Ed. 2d at 500-01, 135 S. Ct. at 1616.

The *Rodriguez* Court considered *Mimms* and made comparisons to a dog sniff, noting that while ordering an individual to exit a car can be justified as being for officer safety, a dog sniff could not be justified on the same basis. *Id.* at ___, 191 L. Ed. 2d at 500, 135 S. Ct. at 1616. Even so, the Court noted that the "critical question . . . is not whether the dog sniff occurs before or after the officer issues a ticket, . . . but whether conducting the sniff 'prolongs' – i.e., adds time to – 'the stop[.]'" *Id.* at ___, 191 L. Ed. 2d at 501, 135 S. Ct. at 1616. Moreover, the Court focused on whether the imposition or interest "stems from the mission of the stop itself[,]" noting: "On-scene investigation into other crimes . . . detours from that mission. So too do safety precautions taken in order to facilitate such detours." *Id.* at ___, 191 L. Ed. 2d at 500, 135 S. Ct. at 1616 (internal citations omitted).

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Even assuming Officer McDonough had a right to ask defendant to exit the vehicle while he ran defendant's license, his actions that followed certainly extended the stop beyond what was necessary to complete the mission. The issue is not whether Officer McDonough could lawfully request defendant to exit the vehicle, but rather whether he unlawfully extended and prolonged the traffic stop by frisking defendant and then requiring defendant to sit in the patrol car while he was questioned. To resolve that issue, we follow *Rodriguez* and focus again on the overall mission of the stop. We hold, based on the trial court's findings of fact, that Officer McDonough unlawfully prolonged the detention by causing defendant to be subjected to a frisk, sit in the officer's patrol car, and answer questions while the officer searched law enforcement databases for reasons unrelated to the mission of the stop and for reasons exceeding the routine checks authorized by *Rodriguez*.

With respect to Officer McDonough's decision, as the trial court found, to "briefly check [defendant] for weapons," it is well established that "[d]uring 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. Johnson*, ___ N.C. App. ___, ___ S.E.2d ___, 2016 WL 1319083, at *10, 2016 N.C. App. LEXIS 341, at *28-29 (April 5, 2016) (No. COA15-29) (quoting *State v. Sanders*, 112 N.C. App. 477, 480, 435 S.E.2d 842, 844 (1993)) (emphasis added). Here, however, the trial court made no findings suggesting that Officer McDonough was justified in believing that defendant might be armed and presently dangerous. Thus, Officer McDonough's frisk of defendant for weapons, without reasonable suspicion that he was armed and dangerous, unlawfully extended the stop.

The dissent argues that defendant consented to the pat down search. We need not decide, however, whether defendant consented, because the moment Officer McDonough asked if he could search defendant's person, without reasonable suspicion that defendant was armed and dangerous, he unlawfully prolonged the stop. Under *Rodriguez*, other than running permissive checks, any additional amount of time Officer McDonough took that was unrelated to the mission of the stop unlawfully prolonged it.

Officer McDonough then extended the stop further when he had defendant get into his patrol vehicle and ran defendant's name through numerous databases while being questioned, as this went beyond an authorized, routine check of a driver's license or for warrants. The only basis found by the trial court for Officer McDonough's decision to

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have defendant get into his patrol vehicle was so that he could “observe defendant when defendant answer[ed] his questions.” In other words, the officer was prolonging the detention to conduct a check unrelated to the traffic stop. Under *Rodriguez*, he could “not do so in a way that prolong[ed] the stop absent the reasonable suspicion ordinarily demanded to justify detaining an individual.” ___ U.S. at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615. Consequently, given the trial court’s finding of fact and *Rodriguez*, Officer McDonough was required to have reasonable suspicion before asking defendant to go to his patrol vehicle to be questioned.

By requiring defendant to submit to a pat-down search and questioning in the patrol car unrelated to the purpose of the traffic stop, the officer prolonged the traffic stop beyond the time necessary to complete the stop’s mission and the routine checks authorized by *Rodriguez*. As this Court has recently emphasized in *State v. Castillo*, ___ N.C. App. ___, ___ S.E.2d ___, 2016 WL ___, 2016 N.C. App. LEXIS ___ (May 3, 2016) (No. COA15-855), under *Rodriguez*, investigation unrelated to the mission of the traffic stop “is not necessarily prohibited, but extending the stop to conduct such an investigation is prohibited.”

The question is, then, did Officer McDonough have reasonable articulable suspicion that criminal activity was occurring prior to the extended detention? *See Rodriguez*, ___ U.S. at ___, 191 L. Ed. 2d at 499, 135 S. Ct. at 1615 (holding that while officer may engage in checks unrelated to traffic stop, “he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual”); *Castillo*, ___ N.C. App. at ___, ___ S.E.2d at ___, 2016 WL ___, at *___, 2016 N.C. App. LEXIS ___, at *___ (in determining whether officer had reasonable suspicion to extend detention, Court looked at “factors . . . known to [the officer] while he stood on the roadside before defendant joined him in the patrol vehicle”).

“ ‘[A] trial court’s conclusions of law regarding whether the officer had reasonable suspicion [or probable cause] to detain a defendant is reviewable *de novo*.’ ” *State v. Hudgins*, 195 N.C. App. 430, 432, 672 S.E.2d 717, 718 (2009) (quoting *State v. Wilson*, 155 N.C. App. 89, 93-94, 574 S.E.2d 93, 97 (2002)). Thus, we review *de novo* the trial court’s conclusion in this case that Officer McDonough had reasonable, articulable suspicion to extend the defendant’s detention.

Based on the trial court’s findings, the only information that Officer McDonough had to raise suspicion prior to the officer subjecting defendant to the *Terry* pat down was: (1) defendant was driving on I-85, an

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interstate used for the transport of drugs; (2) defendant was operating a rental vehicle that he was not authorized to drive; (3) defendant possessed two cellphones; (4) defendant's hand trembled when he handed the officer his license; (5) defendant told the officer he was going to Century Oaks Drive, but had missed his exit, when in fact he had passed three major exits that would have allowed defendant to reach his claimed destination; and (6) defendant, when first observed, was traveling in the far left hand lane and did not appear to be intending to exit off of I-85. However, these circumstances, considered together, give rise to only a hunch and not the particularized suspicion necessary to justify detaining defendant. *See State v. Fields*, 195 N.C. App. 740, 744, 673 S.E.2d 765, 767-68 (2009) (holding that "police officer must develop more than an unparticularized suspicion or hunch before he or she is justified in conducting an investigatory stop" (internal quotation marks omitted)).

Officer McDonough's testimony and the trial court's findings that the officer told defendant he would get a warning ticket so that the officer would then be able to distinguish between nervousness over receiving a ticket and nervousness for other reasons shows that the nervousness before the warning – the hand tremble – was not enough to raise a suspicion. *See Myles*, 188 N.C. App. at 49, 654 S.E.2d at 757 (noting that the Supreme Court has held "that a defendant's extreme nervousness may be taken into account in determining whether reasonable suspicion exists"). Mere trembling of a hand when handing over a driver's license cannot be considered "extreme nervousness," *id.*, and, therefore, this tremble is not relevant to the totality of the circumstances. *See also State v. Pearson*, 348 N.C. 272, 276, 498 S.E.2d 599, 601 (1998) (noting that "[t]he nervousness of the defendant is not significant" because "[m]any people become nervous when stopped by a state trooper").

The other circumstances, without more, describe innocent behavior that even collectively does not raise a particularized suspicion of criminal activity. *See Myles*, 188 N.C. App. at 47, 50, 51, 654 S.E.2d at 756, 758 (holding no reasonable suspicion existed to extend traffic stop when rental car occupants' stories did not conflict, rental car was rented by passenger rather than driver, there was no odor of alcohol although car had weaved in lane, officer found no contraband or weapons upon frisking driver, and driver's license was valid, although driver's "heart was beating unusually fast" and rental car was one day overdue).

Indeed, the trial court's finding of reasonable suspicion depended substantially on circumstances that arose after Officer McDonough had extended the stop, including the discovery that defendant had \$372.00 in cash, defendant's elevated breathing and lack of eye contact, and his

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multiple inconsistent statements regarding his destination, who he was going to meet, and how long he had lived in North Carolina. Although both the trial court and Officer McDonough, in his testimony, relied substantially on inconsistencies in defendant's story that developed while he was questioned in the officer's patrol car, defendant's initial explanation for missing his exit – he was talking on his cell phone – presented no inconsistent statement and was not implausible without consideration of the further questioning. The State has pointed to no authority that suggests that in the absence of the post-extension circumstances, the circumstances present in this case prior to the frisk were sufficient to give rise to reasonable suspicion.

However, we find the Fourth Circuit's decision in *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011), persuasive. In *Digiovanni*, the Fourth Circuit acknowledged that “[t]he Supreme Court has recognized that factors consistent with innocent travel can, when taken together, give rise to reasonable suspicion.” *Id.* at 511. On the other hand, “[t]he articulated innocent factors collectively must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied.” *Id.* (internal quotation marks omitted).

The officer in *Digiovanni* claimed to have developed reasonable suspicion to prolong the traffic stop due to 10 factors, including that: (1) the car was a rental car; (2) the car was coming from a known drug-supply state (Florida); (3) the car was travelling on I-95, a known drug corridor; (4) the car was clean; (5) two shirts hanging in the back; (6) toiletry bag in backseat; (7) the defendant's hands trembled; (8) the defendant's response to questions; (9) the defendant's travel itinerary; and (10) the defendant said, “ ‘oh boy’ ” when the officer asked if he had any luggage in the car and if everything in the car belonged to him. *Id.* at 512. The Fourth Circuit dismissed the officer's reliance on the clean car, the two shirts, and the toiletry bag as absurd and accepted the district court's finding that the defendant's “ ‘oh boy’ ” statement referred to the heat. *Id.*

Turning to the remaining circumstances, the Fourth Circuit reasoned:

With regard to the car rental, the traveling on I-95, and the traveling from Florida factors, there is little doubt that these facts enter the reasonable suspicion calculus. With regard to [the defendant's] travel itinerary, [the officer] certainly was entitled to rely, to some degree, on its unusual nature in determining whether criminal activity was afoot.

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Nevertheless, we agree with the district court that reasonable suspicion was not present to turn this routine traffic stop into a drug investigation. The articulated facts, in their totality, simply do not eliminate a substantial portion of innocent travelers. . . . It is true that [the defendant's] travel itinerary is unusual – not many people are flying from Boston to Miami for the weekend, renting a car for the return trip to Boston, traveling part of the way on the Auto Train, and stopping in New York to pick up some paintings. The problem for the government is that this unusual travel itinerary is not keyed to other compelling suspicious behavior. In this case, other than [the defendant's] unusual travel itinerary, there is nothing compellingly suspicious about the case. There is no evidence of flight, suspicious or furtive movements, or suspicious odors, such as the smell of air fresheners, alcohol, or drugs. All the government can link to the unusual travel itinerary are the facts that [the defendant] rented a car from a source state, was stopped on I-95, and was initially nervous. Such facts, without more, simply do not eliminate a substantial portion of innocent travelers.

Id. at 512-13 (internal citations omitted).

We find *Digiovanni* remarkably similar to this case. As in *Digiovanni*, defendant was driving a rental car, was stopped on I-85, and his hand trembled. The issue with defendant's travel itinerary – missing multiple exits for his supposed destination while talking on the phone – was less unusual than that in *Digiovanni*. In addition, defendant had two cell phones, but, just as in *Digiovanni*, there was no compelling suspicious behavior. These circumstances considered together, “without more, simply do not eliminate a substantial portion of innocent travelers[.]” *id.* at 513, and, therefore, do not give rise to reasonable, articulable suspicion. *See also United States v. Williams*, 808 F.3d 238, 246 (4th Cir. 2015) (holding that “the relevant facts articulated by the officers and found by the trial court, after an appropriate hearing, must in their totality serve to eliminate a substantial portion of innocent travelers” (internal quotation marks omitted)).

In this Court's decision in *Castillo*, by contrast, the Court found that the trial court properly determined that an officer had reasonable suspicion to extend a traffic stop based on “defendant's bizarre travel plans, his extreme nervousness, the use of masking odors, the smell of marijuana on his person, and the third-party registration of the vehicle”

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___ N.C. App. at ___, ___ S.E.2d at ___, 2016 WL ___, at * ___, 2016 N.C. App. LEXIS ___, at * ___. The evidence in this case does not rise to the same level. *See also State v. Cottrell*, ___ N.C. App. ___, ___, 760 S.E.2d 274, 281 (2014) (holding that officer unlawfully extended stop when he based detention on only strong incense-like fragrance and defendant's felony and drug history). Accordingly, we hold that the trial court erred in concluding that Officer McDonough had reasonable articulable suspicion to extend the traffic stop.

However, the trial court also concluded that defendant voluntarily consented to the search of his vehicle. In its order denying defendant's motion to suppress, the trial court concluded "[t]hat defendant gave knowing, willing, and voluntary consent to search the vehicle" and "[t]hat at no point after giving his consent did defendant revoke his consent to search the vehicle." Since we have concluded that Officer McDonough did not have reasonable suspicion to extend the stop, whether defendant may have later consented to the search is irrelevant, as consent obtained during an unlawful extension of a stop is not voluntary. *See Myles*, 188 N.C. App. at 51, 654 S.E.2d at 758 ("Since [the officer's] continued detention of defendant was unconstitutional, defendant's consent to the search of his car was involuntary."); *see also Cottrell*, ___ N.C. App. at ___, 760 S.E.2d at 282 (holding that because officer unlawfully extended stop, did not give defendant his license back, and continuously questioned defendant, "the trial court correctly found that defendant's detention never became consensual in this case").

Thus, we hold that the trial court's order denying defendant's motion to suppress must be reversed. We, therefore, vacate defendant's guilty plea and remand to the trial court for further proceedings consistent with this opinion. Since we vacate defendant's plea, we do not need to address his additional arguments related to whether he entered into it knowing and voluntarily.

REVERSED.

Judge BRYANT concurs.

Judge McCULLOUGH dissents in a separate opinion.

McCULLOUGH, Judge, dissent.

From the majority's conclusion that Officer John McDonough of the Durham Police Department unnecessarily extended the traffic stop

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involving Michael Antonio Bullock (“defendant”), I respectfully dissent. The facts are fully set forth in the majority opinion and will not be repeated unless necessary to demonstrate the reasoning of this dissent. Needless to say, traffic stops are some of the most-litigated police-citizen encounters and have long been recognized as fraught with danger to officers. Thus, certain rules have evolved over the years to allow traffic law enforcement to be conducted safely and efficiently. We grapple with those rules in this opinion.

In the case at bar, the majority concludes that the traffic stop in question was extended when the officer caused defendant to exit his car, be subjected to a frisk, and sit in the patrol car while answering questions while the officer ran various data bases, thereby violating the traffic stop rules recently set forth by the United States Supreme Court in *Rodriguez v. U.S.*, ___ U.S. ___, 191 L. Ed. 2d 492, (2015). I disagree and believe his actions to be reasonable, well within the parameters allowed by *Rodriguez*. It is conceded by defendant that the initial traffic stop was based on reasonable suspicion, thus we focus on what Officer McDonough’s actions were from the time he approached the defendant’s vehicle until consent was given to search that vehicle.

As the majority opinion notes, before leaving defendant’s vehicle, the officer was aware that the car was on I-85, but being a local vehicle and licensee, this factor is not significant; defendant had two cell phones; was not the authorized user of the rental car; defendant told the officer he was going to Century Oaks Drive which was several exits previous to the one where he was stopped; when stopped defendant was accelerating in the far left lane and thus did not appear to be seeking an exit. Defendant had also told the officer he had been on his cell phone as an excuse for how he missed the proper exit. The majority concludes that based on these facts the officer did not have reasonable suspicion to extend the stop. I agree with that conclusion. Where the majority and I disagree is whether a stop is unnecessarily extended by having the motorist accompany the officer to the patrol car while a citation is prepared and data bases are checked.

Police questioning during a traffic stop is not subject to the strictures of *Miranda*, *Berkemer v. McCarty*, 468 U.S. 420, 435-42, 82 L. Ed. 2d 317, 331-36 (1984), and mere police questioning does not constitute a seizure. *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 398 (1991). As the majority notes, under existing case law, a driver may be ordered to exit the vehicle. *State v. McRae*, 154 N.C. App. 624, 629, 573 S.E.2d 214, 218 (2002). Such orders by police without any reasonable suspicion,

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but based on officer safety have long been permitted. *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 54 L. Ed. 2d 331, 337 (1977). The ultimate question here is can the officer, as a matter of routine, have the motorist sit in the police vehicle while the officer prepares his citation and runs any data base checks.

In *Rodriguez*, the United States Supreme Court held that a traffic stop cannot be unnecessarily extended while an unrelated investigation is conducted, absent reasonable suspicion. ___ U.S. at ___, 191 L. Ed. 2d at 496. Even a *de minimis* delay is impermissible. The holding in *Rodriguez* is actually unremarkable and is essentially what has been the rule for quite a while in North Carolina. See *State v. Myles*, 188 N.C. App. 42, 45, 645 S.E.2d 752, 754, *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008).

The majority opinion relies on two main reasons it believes the traffic stop was unnecessarily extended. First, the majority concludes that the pat down of defendant prior to directing him to sit in the patrol car extended the stop as the officer did not have any reasonable suspicion that defendant was armed and he testified he did not feel threatened. I disagree that this pat down search during which a sum of money (\$372) was discovered was an unnecessary extension as the pat down was conducted by consent. At the suppression hearing held on 30 July 2014, Officer McDonough testified as follows:

A. Just the two phones, and at that point, I asked him to step back to my car, and we were going to run his driver's license.

Q. Okay. And what happened when you made that request?

A. He agreed and got out. I met him in the back of his car. I shook his hand, gave him a warning for the traffic violation, and then I asked him if I could search him before he got into my patrol car.

Q. Okay. And what did he say to you?

A. He said, yes, and he lifted his arms up in the air.

Q. Okay. And then what happened after that?

A. I searched his right pants' pocket that had the currency of different denominations, and he said he was about to go shopping.

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Q. Do you know how much money he had in that bundle you were talking about that he was going shopping with?

A. It was – he told me later on in the traffic stop, I think he said \$372.

Q. And when he told you he was going shopping, when did he say that to you?

A. Right when I grabbed the money, that he was going shopping.

Q. And what kind of indicator was that to you?

A. Through my experience, a lot of times guys who are involved in activity of transporting or either be a courier or be involved in it will have large sums of money in their pockets.

I do not believe an officer unnecessarily extends a traffic stop by conducting a consensual search prior to running a driving history check or warrants check on a motorist.

The majority opinion quotes from *Rodriguez* emphasizing that a traffic stop may not be unnecessarily extended while an officer conducts an unrelated investigation. *Rodriguez* also noted however that the officer may conduct certain routine actions, stating:

Beyond determining whether to issue a traffic ticket, an officer’s mission includes “ordinary inquiries incident to [the traffic] stop.” Typically such inquiries involve checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. (A “warrant check makes it possible to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses.”).

Rodriguez, __ U.S. at __, 191 L. Ed. 2d at 499, (internal citations omitted).

It should also be noted that Officer McDonough’s questioning defendant about his travel plans, usually referred to as “coming and going” questions are part and parcel of a traffic stop as the questions and answers given can impact driver fatigue and other traffic related issues. See *U.S. v. Barahona*, 990 F.2d 412, 416 (8th Cir. 1993); *Ohio v. Carlson*,

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657 N.E.2d 591, 599 (Ohio Ct. App. 1995). In the case at bar the officer was also confronted by an unauthorized operator of a rental vehicle. The use of rental vehicles by unauthorized users was one of the major indicators of unlawful activity that the officer stressed in his suppression hearing testimony. Depending on what his data base checks revealed, Officer McDonough might have an individual who was in violation of several motor vehicle laws, N.C. Gen. Stat. § 14-72.2 (unauthorized use of motor-propelled conveyance) or even N.C. Gen. Stat. § 20-106 (possession of stolen vehicle). In other words, the officer is not obligated to credit the motorist's version of how he came into possession of the vehicle, but is entitled to conduct a short investigation into the circumstances. *See United States v. Sharpe*, 470 U.S. 675, 84 L. Ed. 2d 605 (1985).

With this background in mind, we must face the issue presented by the majority opinion, namely whether Officer McDonough had the authority to direct defendant to sit in the patrol car with him as he wrote him a warning ticket and conducted his background checks. For if he had that authority, almost immediately after sitting down in the patrol car defendant provided information that evolved into reasonable suspicion. If the encounter is to be limited to what the officer knew roadside, the majority opinion is correct and the trial court should be reversed. As far as delaying the mission of the traffic stop, directing a motorist to sit in the police vehicle does not in any way delay the traffic stop. The majority recognizes that the traffic stop is not unnecessarily extended while the officer prepares the ticket and runs his data base checks. Directing the motorist to accompany the officer does not create unnecessary delay as the two (motorist and officer) will walk to the police car in the same length of time as if the officer had walked alone.

Whether an officer can direct a motorist to sit in the police vehicle while these actions are taken, is an open question in North Carolina. The courts that have considered this issue view it through the prism of an additional seizure. Many cases, state and federal, have implicitly recognized that officers have the authority to direct a motorist to sit in the police vehicle while the ticketing process is accomplished. *See, Barahona*, 990 F.2d at 414 (in which the officer asked the defendant to exit the car and accompany him to the patrol car). Several federal courts have concluded that an officer needs a reasonable justification, normally a specific, articulable safety concern, before the officer may direct a motorist to sit in the patrol vehicle, *see U.S. v. Cannon*, 29 F.3d 472, 476-77 (9th Cir. 1994), *U.S. v. Ricardo D.*, 912 F.2d 337, 340-41 (9th Cir. 1990), while other courts have determined that if an officer's request is merely part of the ticketing procedure, then having the motorist sit in

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the police vehicle is within the permissible scope of a *Terry* stop. See *U.S. v. Rodriguez*, 831 F.2d 162, 166 (7th Cir. 1987), *U.S. v. Rivera*, 906 F.2d 319, 322-23 (7th Cir. 1990), *U.S. v. Bloomfield*, 40 F.3d 910, 915 (8th Cir. 1994) (reasonable investigation includes requesting that the driver sit in the patrol car), *Ohio v. Lozada*, 748 N.E.2d 520, 523 (Ohio Ct. App. 2001). Even those jurisdictions which believe the officer needs some justification to direct a motorist to accompany him or her to the patrol vehicle recognize some exceptions. Here Officer McDonough was faced with an unauthorized user of a rental vehicle. At the moment he directed defendant to proceed to the police vehicle, as stated earlier, he did not know if the data base check might reveal a reported theft. Even verification of defendant's story that he borrowed the car from a relative who was the renter could be facilitated by defendant's presence.

Thus, I maintain that an officer acts within the constitutional parameters of a "*Terry* stop" when he directs a motorist to accompany the officer to the police vehicle during the ticketing process. Based on the line of cases cited previously, it is my position that under either line of cases, Officer McDonough was justified in directing defendant to sit in the patrol car, even if it was only to be of assistance in determining if defendant had permission to use the vehicle from the renter. We know he did not have the owner's permission as he was not on the rental agreement. Upon entering the vehicle, defendant almost immediately provided enough information to provide the officer with enough reasonable suspicion to extend the stop until he received consent to search. It is not contested that consent was given, the only issue concerns whether the stop was unnecessarily extended in violation of *Rodriguez* so that the officer was never in a position to ask for consent.

At the suppression hearing Officer McDonough testified as follows:

A. I told him to have a seat in the patrol car.

Q. And did he comply?

A. Yes, sir.

Q. And when you had him in your patrol vehicle, what happened?

A. At that point, I started -- got his license and started running his license and other information in my mobile computer.

Q. Can you walk the Court through when you're running someone's name like how many programs are you running the names through?

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A. There's about three databases that I usually use. One is for our police program, CJ Leads, and I use a program called "TLO", also.

Q. What do those programs actually tell you?

A. CJ Leads will give all criminals in North Carolina. Our program will have driver's – had arrested in Durham, and TLO usually helps with people from out-of-state, shows their criminal history from out-of-state.

Q. Do you have an idea how long it takes you to run a CJ Lead or how long it takes to run somebody's license?

A. It takes a little bit because we have to go in and out, log in, run a wire – so it takes a little bit.

Q. You said it takes a little bit, like are you talking seconds, minutes?

A. It takes minutes.

Q. So while you're running his name through various databases, what is happening?

A. Well, I remember when he first got in the car and – where he was going, he said he just moved down here from Washington. So I started running that in CJ Leads and TLO, he said he was from Washington. When I ran his driver's license, it was issued back in 2000, and he had been arrested in North Carolina starting 2001. So he's already been down here 12 years when he said he just moved down here from Washington.

Q. What does that tell you?

A. I just thought I [sic] was strange because you just moved down here from Washington, but you've been here for 12 years. You didn't just move down from Washington. I don't know if he's just trying to throw that out at me, to throw me off or not.

Q. And what happened after you noticed that he had a license since 2000, and you were looking at records, an arrest record that started from 2001, and had indicated to you on November 27th, 2012 that he had just moved from DC?

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A. We started having some conversation. He did later say that he's been down here awhile, started talking about how he met this girl, he said he met her on Facebook, known her about two weeks, and he said it's the first time he came down here to meet her because she always comes to Henderson. And I think we were discussing his criminal history. He mentioned about the gun, he said he had two occasions where his ex-wife had put the gun in the glove box, and he was driving the car and got arrested for it in Vance County, and I think South Carolina -- and he started asking me questions about why I think that happened in Vance County while it was running his information.

Q. So taking a step back, so you are discussing you mention about how he met the girl he was apparently going to see on Century Oaks. Was there anything of note in your discussion about the woman he was apparently going to go see?

A. Like I said, he said he just met her on Facebook. He never met her face-to-face, but he confused me when he says, well, she always comes up to Henderson; if he never met her face-to-face, how does she always come to Henderson. And later on in the conversation, he said she's come to Henderson, but he's never met her I believe.

Q. So when you're speaking in regards to the girlfriend, what does that tell you?

A. That tells me that that story is -- he's not telling the truth about that story.

After having this conversation and running defendant's driver's license record as *Rodriguez* permits while also checking for warrants, Officer McDonough obtained reasonable suspicion to extend the stop and request consent to search. To summarize, the officer not only had that information he obtained prior to proceeding to the police vehicle, he also knew defendant had a sum of cash (\$372), defendant had not just come down from D.C. as claimed initially, but had been here since 2000, thus his story about not being that familiar with the roads is likely to be untrue, and defendant made contradictory statements about the girl he was going to meet. Also, during this dialogue, the officer twice mispronounced the name of the street defendant said he was going to without any correction being made by defendant. Contradictory statements

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regarding one's destination are a strong factor in providing reasonable suspicion. *See U.S. v. Carpenter*, 462 F.3d 981, 987 (8th Cir. 2006). After the conversation, while the data base for defendant's drivers license was checked, the officer had reasonable suspicion to detain defendant and ask for consent to search. I would then affirm the decision of the trial court to deny the motion to suppress.

STATE OF NORTH CAROLINA

v.

JOSHUA EARL HOLLOMAN, DEFENDANT

No. COA15-1042

Filed 10 May 2016

1. Criminal Law—instructions—self-defense—deviation from pattern instruction

The trial court erred in an assault with a deadly weapon inflicting serious injury case in its instruction on self-defense. The trial court's deviations from the pattern self-defense instruction, taken as a whole, misstated the law by suggesting that an aggressor could not under any circumstances regain justification for using defensive force.

2. Appeal and Error—improper personal feelings—issue not addressed—not likely to happen at retrial

Although defendant asserted that the trial court erred during sentencing by allegedly making comments demonstrating that it improperly considered certain personal feelings when sentencing defendant, the issue was not addressed. The case was reversed and remanded for a new trial, and the trial court was not likely to repeat the comments.

Appeal by Defendant from Judgment entered 27 April 2015 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 25 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

The Law Office of Bruce T. Cunningham, Jr., by Amanda S. Zimmer, for Defendant-appellant.

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INMAN, Judge.

Joshua Earl Holloman (“Defendant”) was convicted of assault with a deadly weapon inflicting serious injury. He appeals from a judgment entered 27 April 2015 that sentenced him to 25–42 months imprisonment but suspended the sentence, placing him on special probation.

Defendant argues that the trial court’s instruction on self-defense mislead the jury and inaccurately stated the law and that the trial court improperly considered its personal feelings during sentencing. After careful consideration, we hold that the trial court committed reversible error in its instructions. As a result, Defendant is entitled to a new trial.

I. Background

In the early morning hours of New Year’s Day 2014, Mariah Mann (“Ms. Mann”) contacted Defendant via cellphone, requesting that he drive and pick her up on the corner of Martin Luther King Boulevard and Rock Quarry Road in Raleigh. At that time Ms. Mann was with Darryl Bobbitt (“Mr. Bobbitt”). Defendant drove from Wendell to Raleigh and stopped in the middle of Martin Luther King Boulevard when he saw Ms. Mann and Mr. Bobbitt on the side of the road. Ms. Mann recognized Defendant’s vehicle, a silver Lincoln, as he approached. Defendant, who was armed with a handgun, got out of his vehicle and during an exchange with Mr. Bobbitt shot him multiple times. Mr. Bobbitt, who also was armed with a handgun, fired shots at Defendant. Several accounts of the incident were presented at trial, each differing slightly.

Mr. Bobbitt told police that Defendant got out of the car and asked “Did you put your hands on her?” Mr. Bobbitt said he could tell Defendant had a gun hidden behind his leg. Defendant then approached Mr. Bobbitt with the gun and fired multiple times. Mr. Bobbitt pulled his own gun out of his pocket and fired it twice. Mr. Bobbitt fell to the ground and Defendant continued to fire.

Defendant testified as follows: When he arrived to pick up Ms. Mann, he saw Mr. Bobbitt following her. Defendant then got out of his car with his gun and told Ms. Mann to get in the car. Defendant noticed that Ms. Mann had blood on her face. Defendant asked Mr. Bobbitt if he had put his hands on her. Mr. Bobbitt turned his back on Defendant until Defendant stepped closer and asked again if Mr. Bobbitt had put his hands on Ms. Mann. Mr. Bobbitt then turned around and opened fire on Defendant. Defendant feared for his life when he shot Mr. Bobbitt. Defendant left the scene after Mr. Bobbitt fell to the ground.

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Ms. Mann testified that Defendant got out of the Lincoln and asked Mr. Bobbitt if he had put his hands on her. She told police that Mr. Bobbitt aimed a gun at defendant and Ms. Mann got into the Lincoln. She then heard gunshots.

Anna Dajui was driving her fifteen-year-old daughter Roxana home from a party when she observed an “elegant,” “black vehicle, like the kind a detective would drive” pull out in front of her onto Martin Luther King Boulevard and stop. She then saw the driver exit the “elegant” vehicle and shoot a pedestrian twice. Roxana, who was sitting in the back of the van her mother was driving, also saw the driver of a big car with rims stop in the middle of the road and shoot someone.

By coincidence, Sergeant J.W. Bunch (“Sergeant Bunch”) of the Raleigh Police Department was also present at the intersection when the shots were fired. He testified that he was around thirty yards away from the incident. He saw a light-colored Lincoln Town Car stopped in the road. The driver of the Lincoln stepped out around the front of the vehicle and confronted two pedestrians, a woman and a man. Sergeant Bunch then heard a loud verbal altercation, but had the windows of his police vehicle rolled up and could not understand the words that were being said. He saw the driver usher the woman into the passenger seat of the car. The driver then grabbed the male pedestrian with his left arm and shots were fired. The male pedestrian tried to run toward the back of the car and the driver followed him while firing his gun. Sergeant Bunch got out of his vehicle and saw the pedestrian on the ground and the driver standing over him, pointing a gun at him. Sergeant Bunch fired a shot, aiming high, but Defendant did not move. Sergeant Bunch fired two more shots and Defendant looked at him, yelled “Oh, shit,” and ran away.

Mr. Bobbitt was shot four times: twice in the stomach, once in the left leg, and once in the right arm. He had to undergo four surgeries and remained in the hospital for over a week. His right arm is permanently disabled as a result of his injuries.

On 24 February 2014, Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury. The matter came on for trial on 20 April 2015. The jury found Defendant guilty of assault with a deadly weapon inflicting serious injury.

II. Jury Instruction on Self-Defense

[1] Defendant argues that the trial court committed reversible error in its instruction on self-defense by suggesting that if Defendant initiated the altercation, he could not be found to have acted in self-defense. We agree.

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A. Appellate Jurisdiction and Standard of Review

The State, citing *State v. Wilkinson*, 344 N.C. 198, 236, 474 S.E.2d 375, 396 (1996), contends that because Defendant requested a special instruction on self-defense deviating from the pattern instruction, any error by the trial court in this regard was invited error, which is not subject to appellate review. We disagree, because unlike the defendant in *Wilkinson*, Defendant here did not consent to the manner of instructions provided by the trial court. Rather, Defendant submitted a written request for an alternative special instruction on self-defense. His appeal is not barred.

Because the trial court's instruction on self-defense differed from the instruction requested by Defendant, our standard of review is *de novo*, even though Defendant did not specifically object to the trial court's jury instructions before the jury retired to consider its verdict. *State v. Smith*, 311 N.C. 287, 290, 316 S.E.2d 73, 75 (1984) (A defendant who submitted a written request for particular jury instructions that the trial court denied was "not required . . . to repeat his objection to the jury instructions, after the fact[] in order to properly preserve his exception for appellate review."); *State v. Montgomery*, 331 N.C. 559, 570, 417 S.E.2d 742, 748 (1992) ("The defendant's written request for a particular instruction . . . met the requirements of Appellate Rule 10[(a)(2)] and constituted a sufficient objection to the different instruction actually given to preserve this issue for appellate review."). Here, as in *Smith* and *Montgomery*, the trial court gave a different instruction than those Defendant requested, and none of the portions of the challenged instruction were included in the instruction requested by Defendant.

The standard of review for jury instructions is well established:

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, 177 (2006) (citations and quotation marks omitted).

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B. Analysis

The trial court's instruction deviated from North Carolina Pattern Jury Instruction 308.45 in certain respects, as explained below. The trial court was not required to follow the pattern instructions, so deviation is not *per se* error.

[W]hile the use of pattern jury instructions is encouraged, it is not required, and failure to follow the pattern instructions does not automatically result in error because we do not require adherence to any particular form, as long as the trial court's instruction adequately explains each essential element of an offense.

State v. McLean, 211 N.C. App. 321, 328, 712 S.E.2d 271, 277 (2011) (citation and quotation marks omitted).

Defendant asserts that he was deprived of the right to fully present his defense because of the trial court's omission of an instruction to the jury that even an initial aggressor may be justified in using defensive force in certain circumstances. He further contends that the trial court's instruction that "[j]ustification for lawful self-defense is not present if the person who uses defensive force voluntarily enters into a fight with the intent to use deadly force" is an incomplete and thus inaccurate statement of the law. Defendant argues error and prejudice, because the trial court did not explain to jurors that a person who voluntarily enters a fight can regain justification for using defensive force under certain circumstances.

In 2011, the General Assembly enacted a series of statutes related to self-defense and individual rights related to firearms. 2011 N.C. Sess. Laws 1002 (described in bill synopsis as "[a]n act to provide when a person may use defensive force and to amend various laws regarding the right to own, possess, or carry a firearm in North Carolina"). Among the new statutes added were N.C. Gen. Stat. § 14-51.3 (2015), entitled "Use of force in defense of person; relief from criminal or civil liability," and N.C. Gen. Stat. § 14-51.4 (2015), entitled "Justification for defensive force not available." Neither statute has been amended since it was enacted.

Section 14-51.3 provides in pertinent part:

(a) . . . [A] person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if . . .

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(1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.

Section 14-51.4 provides in pertinent part:

[J]ustification [for defensive force] is not available to a person . . . who:

(2) [i]nitially provokes the use of force against himself or herself. However, the person who initially provokes the use of force against himself or herself will be justified in using defensive force if either of the following occur:

a. The force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger.

b. The person who used defensive force withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that he or she desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force.

Prior to the 2011 legislation, the law of self-defense in North Carolina was largely governed by common law.¹ The new statute expressly provides that it “is not intended to repeal or limit any other defense that may exist under the common law.” N.C. Gen. Stat. § 14-51.2(g) (2015).

Witness accounts given at trial differed regarding whether Defendant or Mr. Bobbitt drew a gun first. Defendant testified that he did not know about Mr. Bobbitt’s gun until Mr. Bobbitt fired at him. Defendant testified at trial and argues that the force used by Mr. Bobbitt against him was so

1. A few statutes inapposite to this appeal were enacted before 2011. *See, e.g.*, N.C. Gen. Stat. § 14-51.1 (1993) (repealed by Sess. Laws 2011 ch. 268) (modifying the law of self-defense of one’s home).

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serious as to lead Defendant to reasonably believe that he was in imminent danger of death or serious bodily harm, that he had no reasonable means to retreat, and that the use of force likely to cause death or serious bodily harm to Mr. Bobbitt was the only way to escape the danger, thus satisfying the requirements of N.C. Gen. Stat. § 14-51.4(2)(a).

Defendant contends that the trial court erred in its self-defense instruction by omitting a key phrase and by changing the order of a portion of the pattern instruction which explained that under circumstances provided in N.C. Gen. Stat. § 14-51.4(2)(a) and supported by the evidence in this case, an aggressor may engage in lawful self-defense.

The trial court instructed jurors that if they found that Defendant had assaulted Mr. Bobbitt with intent to cause death or serious injury, they would then have to consider whether Defendant's actions were excused because Defendant acted in lawful self-defense. The trial court instructed the jury, *inter alia*, as follows:

A person is justified in using defensive force to defend himself when *the force used against him* is so serious that the person using defensive force reasonably believes that he is in imminent danger of death or serious bodily harm, the person using defensive force has no reasonable means to avoid the use of that force, and his use of force likely to cause death or serious bodily harm is the only way to escape the danger.

(emphasis added). The phrase “the force used against him” in the trial court’s instruction replaced the phrase “the force used by the person who was provoked” used in the pattern instruction. Defendant contends the omitted phrase was necessary to make it clear to the jury that this portion of the instruction referred to defensive force used by Defendant against “the person who was provoked” and not to defensive force used by Mr. Bobbitt.² The State contends that because both men claimed that the other fired first, their right to use defensive force was the same, so the

2. Defendant requested a variation on the pattern instruction that did not omit the phrase he contends was necessary. Defendant’s request for special instruction was as follows:

A person is also justified in using defensive force when the force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force likely to cause death or serious bodily harm was the only way to escape the danger.

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trial court's instruction did not misstate the law. This argument misses the point of Defendant's appeal and demonstrates the likelihood that the instruction confused the jury. Although Mr. Bobbitt may have also had a right to use defensive force, Defendant—not Mr. Bobbitt—was on trial and it was a question for the jury, properly instructed, to answer.

Defendant contends that the trial court compounded its error by reordering a significant portion of the self-defense instruction in a manner suggesting that because Defendant had initiated the fight, jurors could not under any circumstance find that he acted in self-defense. The trial court provided the explanation of lawful self-defense, quoted above, in the initial definition of self-defense. The pattern instruction, by contrast, provides this explanation later in a separate paragraph relating to the claim of self-defense by a defendant who was the aggressor.

The trial court instructed jurors, consistent with the pattern instruction in the separate paragraph, that "self-defense is justified only if the defendant was not himself the aggressor." Because the trial court did not then instruct jurors that an aggressor may be justified in using defensive force against certain "force used by the person who was provoked," and because of the placement of that portion of the instruction—before, rather than after, the "aggressor" exclusion—Defendant contends that jurors were misled to believe that if they found Defendant had started the fight with Mr. Bobbitt, Defendant could not, under any circumstance, lawfully defend himself against Mr. Bobbitt, which is contrary to factors provided in Section 14-51.4(2)(a).

The trial court also defined the term "aggressor" more narrowly than the pattern definition. The pattern instruction defines the "aggressor" as a person who "voluntarily entered into the fight or, in other words, initially provoked the use of force against himself," N.C.P.I.—Crim. 308.45 (2012), and immediately follows that definition with an explanation of the statutory circumstances in which an aggressor can lawfully defend himself. The trial court defined "aggressor" as a "person who uses defensive force [and] voluntarily enters into a fight with the intent to use deadly force." The trial court further explained:

In other words, if one initially displays a firearm to his opponent, intending to engage in a fight and intending to use deadly force in that fight and provokes the use of deadly force against himself by an alleged victim, he is himself an aggressor and cannot claim he acted lawfully to defend himself.

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The trial court included this instruction in its substantive discussion of the felony charge of assault with a deadly weapon with intent to kill inflicting serious injury. The trial court did not repeat its discussion of self-defense in its subsequent instruction on the lesser felony charge of assault with a deadly weapon inflicting serious injury.

The State appears to argue that the trial court's narrowed definition of "aggressor" as a person who acts "with the intent to use deadly force" insulated Defendant from any prejudice that could have resulted from the remainder of the self-defense instruction, because the jury by its verdict found that Defendant did not intend to kill Mr. Bobbitt.³ The intent to kill, however, is not the same as the intent to use deadly force. A person who shoots another person with the intent to frighten, maim, injure, or with no specific intent does not intend to kill, but necessarily intends to use deadly force—a firearm.

In the final mandate for both charges, the trial court instructed jurors as follows:

I further instruct you that, even if you are satisfied beyond a reasonable doubt that the defendant committed either of the felony assaults with a deadly weapon which I have defined, you may return a verdict of guilty only if the State has satisfied you beyond a reasonable doubt that the defendant's action was not in lawful self-defense; that is, that the defendant did not reasonably believe that the assault was necessary or appeared to be necessary to protect the defendant from death or serious bodily injury, or that the defendant used excessive force, or that the defendant was the aggressor, as I have defined that term to you.

The final mandate on self-defense was virtually identical to the pattern instruction. However, because the trial court's substantive explanation of self-defense eliminated references to circumstances in which an aggressor can lawfully defend himself, the mandate lends itself to the suggestion that if jurors determined Defendant had initiated the gun fight, they could not find that he acted in lawful self-defense, even if Mr. Bobbitt fired his gun first.

The trial court's deviations from the pattern self-defense instruction, taken as a whole, misstated the law by suggesting that an aggressor

3. The State also argues that any error in the definition of "aggressor" was invited by Defendant, who also requested a special instruction referring to "the aggressor with the intent to kill or inflict serious bodily injury." As explained above, we reject that argument

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cannot under any circumstances regain justification for using defensive force. Accordingly, the trial court erred. *See generally State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971) (“The chief purpose of a [jury] charge is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict.”); *Hammel*, 178 N.C. App. at 347, 631 S.E.2d at 177 (“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.”) (citations and quotation marks omitted).

We further hold that there is a reasonable possibility that, had the jury been properly instructed on self-defense, jurors would not have convicted Defendant of assault.⁴

The State argues that even if the trial court’s instruction was incorrect, “[g]iven his willing participation in a gun fight and Mr. Bobbitt’s resulting injuries, Defendant cannot show a reasonable probability that he would have been acquitted absent the alleged errors.” We disagree.

The State’s argument is flawed in two ways. First, the State wrongly presumes that to establish prejudice, Defendant is required to show a “reasonable probability that he would have been acquitted” but for the trial court’s erroneous instruction. The correct standard, codified in N.C. Gen. Stat. § 15A-1443(a), is “a reasonable possibility that, had the error in question not been committed, a different result would have been reached.”⁵ N.C. Gen. Stat. 15A-1443(a); *see, e.g., State v. Ramos*, 363 N.C. 352, 355–56, 678 S.E.2d 224, 227 (2009) (“reasonable possibility” of “different result” standard applied to determine that jury instruction was prejudicial and thus reversible); *State v. Strickland*, 307 N.C. 274, 300, 298 S.E.2d 645, 661 (1983), *overruled on other grounds, State v. Johnson*, 317 N.C. 193, 203, 344 S.E.2d 775, 781 (1986). Second, the State’s argument, like the trial court’s instruction, overlooks the statutory defenses provided to Defendant in Section 14-15.4. Based on the evidence viewed in the light most favorable to Defendant, we are persuaded that there is a reasonable possibility that if the trial court had not instructed jurors erroneously, the jury could have reached a different result.

4. Defendant does not contend that the trial court’s error violated his constitutional rights. Accordingly, Defendant bears the burden of showing prejudice. *See* N.C. Gen. Stat. § 15A-1443(a) (2015).

5. Defendant presumed the same wrong standard in his brief, citing only *Williams*, 280 N.C. at 136, 184 S.E.2d at 877, which did not articulate a specific standard and predated Section 15A-1443(a).

TOWN OF BEECH MOUNTAIN v. GENESIS WILDLIFE SANCTUARY, INC.

[247 N.C. App. 444 (2016)]

III. Statement by the Trial Court Regarding Personal Views

[2] Defendant asserts that the trial court erred when, during sentencing, it made comments demonstrating that it improperly considered certain personal feelings when sentencing defendant. Because we reverse Defendant's conviction and remand this matter for a new trial, and the trial court is not likely to repeat the comments, we need not address this issue.

IV. Conclusion

For the foregoing reasons, we hold that the trial court prejudicially erred in instructing the jury on self-defense. Defendant is entitled to a new trial.

NEW TRIAL.

Judges GEER and TYSON concur.

TOWN OF BEECH MOUNTAIN, PLAINTIFF

v.

GENESIS WILDLIFE SANCTUARY, INC., DEFENDANT

No. COA15-260

No. COA15-517

Filed 10 May 2016

1. Appeal and Error—interlocutory when appeal filed—final judgment subsequently entered—no longer interlocutory

This appeal was an improper interlocutory appeal when it was filed, but final judgment was subsequently entered, and the Court of Appeals had jurisdiction because the appeal was no longer interlocutory.

2. Landlord and Tenant—lease between town and wildlife center—legality of use

There were no genuine issues of material fact regarding whether Genesis Wildlife Sanctuary (Genesis) was in breach of a lease with the Town by violating the use of property clause. The plain language of the clause only prohibited Genesis from using the leased property for an illegal purpose; Genesis's use was not illegal even if it violated an ordinance concerning a near-by lake. In fact, Genesis's use as a wildlife center was the precise use authorized by the lease.

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3. Landlord and Tenant—lease—repairs clause—debris

There was no genuine issue of fact regarding an alleged breach of the repairs clause in a lease between a town and a wildlife sanctuary (Genesis) involving natural and artificial debris on the leased premises. Genesis presented uncontroverted evidence that winter storms had produced tree damage and debris and that Genesis was actively engaged in removing the debris well before the Town provided notice of the potential default. The Town did not present any basis for concluding that the lease required that Genesis complete its cleanup efforts 10 days after receiving notice of the debris.

4. Evidence—sewage overflows—relevance—other evidence admitted

The trial court did not err by admitting evidence of sewage spills by the Town in an action involving a wildlife refuge near a lake from which the Town drew its water. Other evidence about the sewage overflows was admitted without objection; moreover, the evidence was relevant to the issue of whether a new ordinance intended to eliminate the refuge was arbitrary or capricious.

5. Constitutional Law—substantive due process claim—not barred by possibility of state claim

Genesis Wildlife Sanctuary's 42 U.S.C. § 1983 counterclaim for violation of its substantive due process rights was not barred by Genesis's ability to bring an inverse condemnation action. A substantive due process violation is complete when the wrongful action is taken, rather than when the State failed to provide due process. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal remedy is invoked.

6. Constitutional Law—due process—set-back ordinance—drinking water source

The trial court did not err by denying the Town's motions for directed verdict and JNOV in an action involving a wildlife refuge (Genesis), a nearby lake used as a drinking water source, and the Town. Although the Town argued that its adoption of a set-back ordinance was rationally related to a legitimate governmental interest, the Town failed to recognize that Genesis brought an "as applied" counterclaim rather than attacking the facial validity of the ordinance. The evidence presented at trial was sufficient to create genuine issues of fact as to whether the motives of the Town and the purposes behind the 200-foot buffer—that prohibited both outdoor

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and indoor animals—were related to the legitimate interest of protecting the Town’s water supply or were to prevent Genesis from using its property for the purposes set forth in its 30-year lease with the Town.

7. Jury—jurors’ conversation with bailiff—judge’s action

The trial judge did not abuse his discretion in refusing to grant a mistrial in an action involving an animal refuge, a lake used as a drinking water source, and a municipal set-back requirement where the judge learned of a conversation between jurors and a bailiff concerning animal waste in water. The trial judge took the appropriate actions to investigate the conversation between the jurors and bailiff, he received an assurance from each juror that he or she was not prejudiced by the conversation with the bailiff, he allowed each party’s attorneys to question the jurors, and he explained orally that the conversation regarding sewage in bodies of water did not directly relate to jury’s deliberations.

8. Damages—set-back ordinance—enactment—enforcement—not a double recovery

The trial court did not err in denying the Town’s Rule 59 motion to amend the amount of damages on account of a double recovery. Genesis Wildlife Sanctuary incurred different damages as a result of different effects produced by the Town’s enactment and enforcement of the ordinance at issue.

9. Damages—unclear method for jury verdict—evidence at trial not inconsistent

The trial court did not abuse its discretion in denying the Town’s motion for an amended verdict based on the allegations that the jury’s award exceeded the actual damages. Although it is unclear exactly how the jury reached its verdict, there was no indication that this amount was inconsistent with the evidence presented at trial.

10. Constitutional Law—amendment of ordinance—mootness—“as applied” claim

The trial court did not err by entering a declaratory judgment that a town ordinance was unconstitutional in an action between the Town and Genesis Wildlife Refuge. Although the Town argued that the issue was moot because the ordinance was amended, Genesis had already incurred monetary damages resulting from the enactment and enforcement of the ordinance, and the elimination of the ordinance did not provide Genesis with the relief it sought, nor did

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it alter the fact that the ordinance was unconstitutional as applied to Genesis prior to its amendment.

11. Zoning—set-back ordinance—considered to be zoning

In an action between the Town and Genesis Wildlife Sanctuary concerning a set-back ordinance around a lake that was a drinking water resource, the trial court did not err in its declaration that the ordinance was a zoning ordinance adopted pursuant to N.C. Gen. Stat. § 160A-381(a) (2015), as opposed to an ordinance derived from the Town's police power pursuant to N.C. Gen. Stat. § 160A-174 (2015). Zoning ordinances are specifically adopted for the promotion of the health and general welfare of the community, and the N.C. Supreme Court has traditionally considered "buffer" ordinances, such as the one at issue here, to be zoning ordinances.

Judge DILLON dissenting.

Appeal by plaintiff from orders entered 30 October 2013 and 5 September 2014 by Judges Mark E. Powell and Gary M. Gavenus, respectively, and from judgment and orders entered 29 September 2014, 27 October 2014, and 24 November 2014 by Judge J. Thomas Davis in Watauga County Superior Court. Heard in the Court of Appeals 4 November 2015.

Eggers, Eggers, Eggers, & Eggers, PLLC, by Stacy C. Eggers, IV; and Cranfill Sumner & Hartzog, LLP, by Patrick H. Flanagan and Meagan I. Kiser, for plaintiff-appellant.

Wake Forest University School of Law Appellate Advocacy Clinic, by John J. Korzen; and Clement Law Office, by Charles E. Clement and Charles A. Brady, III, for defendant-appellee.

GEER, Judge.

Plaintiff, the Town of Beech Mountain (the "Town"), filed two appeals arising out of a lawsuit the Town brought against defendant Genesis Wildlife Sanctuary, Inc. ("Genesis") for summary ejectment. We have consolidated the appeals for hearing and decision. On appeal, the Town first argues that the trial court erroneously granted Genesis summary judgment on the Town's summary ejectment claim. Based on our review of the record, we agree with the trial court that there is no genuine issue of material fact as to whether Genesis breached its lease.

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The Town further argues that the trial court erred in denying its motions for directed verdict and judgment notwithstanding the verdict (“JNOV”) on Genesis’ counterclaim, which alleged that a buffer zone passed as part of the Town’s Buckeye Lake Protection Ordinance (“Ordinance”), as applied to Genesis, violated Genesis’ substantive due process rights. Because Genesis presented substantial evidence that § 93.21(F) of the Ordinance was arbitrary and capricious as applied to Genesis, given that § 93.21(F) was designed and enforced in a manner intended to preclude Genesis from operating as a wildlife sanctuary, the trial court properly allowed the case to go to the jury. Because we also find the Town’s additional arguments unpersuasive, we hold that the Town received a trial free of prejudicial error.

Facts

On 20 October 1999, the Town entered into a 30-year lease agreement with Genesis (the “Lease”) for a 0.84 acre tract of land located adjacent to Buckeye Lake in Watauga County, North Carolina. Genesis, a non-profit organization incorporated for the purposes of wildlife rehabilitation and education, entered into the Lease with the Town with the express intent to house animals on the property. The Lease specifically provided, consistent with Genesis’ intent: “The use of the Leased Premises is restricted to the construction, operation and maintenance of an education center that educates the general public as to how people and wildlife may peacefully co-exist. It is understood and agreed to by the parties that the Lessee may from time to time house wildlife upon the premises[.]”

Over the years from 2000 to 2006, in accordance with the Lease, Genesis built several structures on the property. A larger one, known as the “Dome,” was used as an office, a residential area for volunteers, and an animal display area. Genesis also built several animal habitats on the property, including caging and fencing. Relations with the Town during this time were good, and Genesis was very successful in attracting visitors – predominantly school groups – from across the state, and even enthusiasts from as far away as Germany.

Starting in 2008, however, the Town became interested in using Buckeye Lake for recreational purposes, and it contacted the Department of Environment and Natural Resources (“DENR”) to learn whether Buckeye Lake could be used for such purposes. Buckeye Lake serves as the Town’s drinking water source and is therefore classified by DENR as a Class I reservoir subject to numerous statewide laws and regulations. At the end of 2008, Tom Boyd, Environmental Senior Specialist of

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the Public Water Supply Section of DENR who had visited Buckeye Lake and Genesis' property, encouraged the Town to draft a municipal ordinance for the purposes of protecting Buckeye Lake as a public drinking source in accordance with section .1200 of the DENR's Rules Governing Public Water Supplies.

In a letter dated 18 December 2008, Boyd informed the Town he had visited Genesis' site in October 2008 and found one of its animal cages was in danger of contaminating a stream that fed into Buckeye Lake by animal waste runoff. Boyd also noted that Genesis had informed him it was planning to relocate the animal cages to a different location and maintain the tract of land for educational purposes. At this time, Genesis was in the process of moving at least some of its operations to a location known as Eagle's Nest in Banner Elk, North Carolina.

After two Town Council meetings in early 2009, the Town adopted the Buckeye Lake Protection Ordinance on 10 February 2009. In one section of the ordinance, § 93.21(F), the Town provided: "No animals can be caged or housed within 200 feet of Buckeye Lake, or within 2,000¹ feet of any stream that drains into Buckeye Lake." During the two Town Council meetings, Mayor Rick Owen and the Town Council members, when deciding on the 200-foot buffer, specifically emphasized that the 200-foot distance would cover all the structures on Genesis' property and even bar animals housed inside. Mayor Owen unambiguously stated that the intent of the Ordinance was to "eliminate [Genesis'] ability to have animals and continue to have animals at [the Buckeye Lake] facility."

The Town did not inform Genesis it had passed the Ordinance. Genesis, in May 2009, partially moved its operations to the Eagle's Nest location. However, Genesis' time at Eagle's Nest was short-lived. As a result of the lack of sewer and water at Eagle's Nest, and the bankruptcy of its financier, Genesis began moving the animals back to the Buckeye Lake location within a matter of months.

Before and after the Town passed the Ordinance, the Town experienced problems with sewage overflow from a lift station it owned and operated that was located in close proximity to Buckeye Lake. In fact, since as early as 2004 and on numerous different occasions, several hundred thousand gallons of sewage overflowed from this lift station into Buckeye Lake. Specifically, on 14 January 2010, the Town received

1. A copy of the Ordinance in the record on appeal states "2,000 feet." However, other sources from the record, particularly the Town Council minutes, suggest the Town intended this number to be 200 feet. The distinction is not directly relevant to the issues on appeal.

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a notice of violation from DENR employee Steve Tedder, indicating a sewage overflow of 147,000 gallons relating to two different incidents in December 2009.

On 24 August 2010, the Town received notification from DENR that the department had discovered pathogenic bacteria in Buckeye Lake, potentially threatening its use as a water supply. The notification also indicated that DENR believed Genesis' operation at Buckeye Lake was "in violation of the town of Beech Mountain's Buckeye Lake use Ordinance" and that "the town may be in violation of 15A NCAC 18C .1201(a) and .1202."

On 15 September 2010, the Town informed Genesis by letter that all outdoor animals and habitats, with the exception of one used for storage, had to be removed from the property within six months pursuant to a plan to comply with applicable state water safety codes. The letter threatened legal action if Genesis failed to comply.

In addition to this letter, the Town verbally enforced the terms of the Ordinance, informing Genesis that it not only had to remove all outside animals, but also had to remove all animals and cages housed inside the Dome structure. The Town falsely represented to Genesis that DENR and the State required the removal of animals and cages from the entirety of Genesis' Buckeye Lake site, including animals and cages entirely indoors. Under the threat of legal action from the State and the Town, Genesis removed all animals and cages from its Buckeye Lake facility, causing significant damage to the Dome's aesthetic structure and requiring significant effort and cost to move Genesis' operations to a new location known as "Fireweed," owned by Genesis' former president and founder, Leslie Hayhurst. Upon the relocation to Fireweed, Genesis was not permitted by the Town to host large groups as it had at Buckeye Lake, and it struggled to find a use for the Dome as it was contemplated in the Lease. Hayhurst later discovered that the Town's threats that the State would take action if they did not remove all the animals were unfounded.

On 28 March 2012, notwithstanding Genesis' efforts to comply with § 93.21(F) of the Ordinance, Genesis received a letter from the Town attorney claiming that Genesis was in breach of the Lease because, the Town claimed, (1) Genesis was using the property for purposes which violate the law and (2) Genesis was failing to "make all arrangements for repairs necessary to keep the Premises in good condition." Subsequently, the Town filed a summary ejectment action on 23 April 2012 and obtained a judgment of ejectment on 10 May 2012.

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Genesis appealed to district court, moved to transfer the action to superior court, and filed multiple counterclaims, including a § 1983 claim that the Town had violated Genesis' substantive due process rights.² The Town and Genesis each filed motions for summary judgment on all the parties' claims and counterclaims. Genesis also filed a request for a declaratory judgment that the Ordinance be classified a zoning ordinance – the trial court entered the requested declaratory judgment on 30 October 2013.

On 5 September 2014, the trial court granted Genesis' motion for summary judgment on the Town's breach of lease claim and also granted summary judgment in favor of the Town on Genesis' counterclaim for unfair and deceptive trade practices. Genesis voluntarily dismissed its counterclaim for violation of Article I, Section 9 of the United States Constitution. On 1 October 2014, the Town appealed the order granting Genesis' motion for summary judgment on the Town's breach of lease claim. This appeal was docketed as No. COA15-260.

Genesis' remaining counterclaims were tried on 15 September 2014. At the close of Genesis' evidence, the Town moved for a directed verdict, which the trial court granted with respect to Genesis' counterclaims asserting a Fifth Amendment taking, violation of procedural due process rights, and violation of the Contracts Clause of the United States Constitution. In addition, Genesis voluntarily dismissed its inverse condemnation and breach of lease counterclaims. The trial court denied the motion for a directed verdict with respect to Genesis' counterclaim alleging a violation of its substantive due process rights.

At the close of the Town's evidence, the Town again moved for directed verdict on the remaining substantive due process claim, which the trial court denied. The trial court then instructed the jury and commenced deliberations. During a break in the deliberations, a conversation among three jurors and a court bailiff was overheard in the courthouse stairwell concerning animal waste and trash in a lake. Once brought to the trial judge's attention, he questioned each of the jurors and invited the attorneys to ask their own questions, although none did. The jurors each indicated they could be fair and impartial. The Town moved for a

2. After amendments to its pleadings on 8 January 2013, Genesis asserted counterclaims for violation of its substantive due process rights, breach of lease, two counts of inverse condemnation, unfair and deceptive trade practices, a Fifth Amendment takings claim, violation of Genesis' procedural due process rights, and violations of Article I, Section 10 ("Contracts" Clause) and Section 9 ("Bill of Attainder") of the United States Constitution.

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mistrial, which the trial court denied, finding that the conversation did not prejudice the trial.

On 23 September 2014, the jury returned a verdict in favor of Genesis finding that the Town violated Genesis' substantive due process rights with its establishment and enforcement of § 93.21(F) of the Buckeye Lake Protection Ordinance. The jury awarded Genesis damages in the amount of \$211,142.10. The trial court entered judgment on 29 September 2014 in the amount of \$211,142.10 and included a declaration that the Ordinance was unconstitutional as applied to Genesis. Subsequently, the Town filed a joint motion for JNOV, to amend the verdict, and for a new trial on 3 October 2014. The trial court denied the motion on 27 October 2014. After entry of a final judgment awarding Genesis costs and attorney's fees, the Town timely appealed to this Court, resulting in the second appeal in this case, No. COA15-517.

Discussion

I. Breach of Lease

[1] The Town first appeals from the order entered by Judge Gary M. Gavenus on 5 September 2014, granting Genesis summary judgment on the Town's breach of lease claim. As an initial matter, we note that appeal No. COA15-260 was interlocutory on the date of filing because the order from which the Town appealed was "made during the pendency of an action" and did not dispose of the case. *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). At the time the Town filed this appeal, this Court lacked jurisdiction to hear the appeal because it was an improper interlocutory appeal. *See id.* at 364, 57 S.E.2d at 382-83.

However, final judgment has since been entered in this case, and the appeal is no longer interlocutory. Although we have not located any other case involving these precise circumstances, *Goodman v. Holmes & McLaurin Attorneys at Law*, 192 N.C. App. 467, 665 S.E.2d 526 (2008), is analogous. In *Goodman*, this Court refused to dismiss an appeal from an interlocutory order granting partial summary judgment after the remaining claims pending in the superior court were voluntarily dismissed. *Id.* at 471-72, 665 S.E.2d at 530. As we acknowledged in *Goodman* in language equally applicable here, "any rationale for dismissing the appeal as interlocutory fails." *Id.* at 472, 665 S.E.2d at 530. We, therefore, deem appeal No. COA15-260 properly before this Court, and we address the merits.

[2] The Town contends the trial court erred in granting summary judgment to Genesis on the Town's breach of lease claim because there are genuine issues of material fact regarding whether Genesis breached its

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Lease with the Town. “Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that ‘there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’ ” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

“North Carolina’s General Statutes allow for summary ejection ‘[w]hen the tenant or lessee . . . has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.’ ” *GRE Properties Thomasville LLC v. Libertywood Nursing Ctr., Inc.*, ___ N.C. App. ___, ___, 761 S.E.2d 676, 681 (quoting N.C. Gen. Stat. § 42-46(a)(2) (2013)), *appeal dismissed and disc. review denied*, 367 N.C. 796, 766 S.E.2d 659 (2014). We note, however, that “[o]ur courts do not look with favor on lease forfeitures.” *Stanley v. Harvey*, 90 N.C. App. 535, 539, 369 S.E.2d 382, 385 (1988). Furthermore, “[u]se restrictions in leases . . . will be construed against the landlord[,]” and “must be explicit and unambiguous.” *Alchemy Commc’ns Corp. v. Preston Dev. Co.*, 148 N.C. App. 219, 225, 558 S.E.2d 231, 235 (2002). When a term is not defined in a lease, “it should be given its natural and ordinary meaning.” *Charlotte Hous. Auth. v. Fleming*, 123 N.C. App. 511, 514, 473 S.E.2d 373, 375 (1996).

The Town first argues that genuine issues of fact remain whether Genesis violated the Lease’s “Use of Property” clause by violating four Town ordinances that required Genesis to (1) screen fuel tanks on the leased property, (2) control accumulation of waste on the leased property, (3) comply with setback requirements, and (4) comply with watershed buffer requirements. The Lease’s “Use of Property” clause provides: “[T]he Lessee shall not use or knowingly permit any part of the Leased Premises to be used for any purpose which violates any law.” The Town argues that Genesis’ alleged violations of the ordinances are violations of “any law” and, therefore, amount to a breach of the “Use of Property” clause of the Lease.

Although Genesis argues that summary judgment was proper because the Town failed to present evidence that it violated the ordinances, we do not need to reach that issue. Reading the “Use of Property” clause in accordance with its “natural and ordinary meaning,” as required by *Charlotte Housing Authority, id.*, the plain language of the clause only prohibits Genesis from *using* the leased property *for an illegal purpose*. Thus, even if the Town could show that Genesis had violated the ordinances, it still would not have shown that Genesis’ purpose in using the property was illegal. Indeed, it is undisputed that Genesis has used the property for the purpose of constructing, operating, and

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maintaining a wildlife refuge and educational center, which not only is a purpose that does not violate any law, but also is the precise use authorized by the Lease. Accordingly, there are no genuine issues of material fact regarding whether Genesis was in breach of the Lease by violating the “Use of Property” clause.

The dissent contends that we “read[] the Lease provision far too narrowly.” This argument and the dissent’s construction of the provision, which construes the “Use of Property” clause in the light most favorable to the Town, run counter to the mandate in *Alchemy Commc’ns Corp.*, 148 N.C. App. at 225, 558 S.E.2d at 235, that use restrictions in leases “will be construed against the landlord” and “must be explicit and unambiguous.” While the Lease provides that Genesis “shall not use . . . any part of the Leased Premises . . . for *any purpose* which violates any law” (emphasis added), the dissent would amend the provision to read that Genesis “shall not use . . . any part of the Leased Premises . . . *in any way* which violates any law.” The dissent cites no authority that authorizes such a broad construction of a lease in favor of a landlord seeking to eject its tenant. At a minimum, the dissent shows that the “Use of Property” clause is not explicit and unambiguous and, therefore, cannot be a basis for ejecting Genesis.

[3] The Town also asserts genuine issues of fact remain regarding whether Genesis breached the “Repairs” clause, which required Genesis to “make all arrangements for repairs necessary to keep the Leased Premises in good condition. This includes repairs for any and all damage caused by the Lessee, its agents and/or its invitees.” In the event of Genesis’ default, and its subsequent failure to cure the default within 10 days of notice of its default, the Town had the option of terminating the Lease.

In support of this argument, the Town relies on pictures it claims were taken by Town Manager Randy Feierabend on 11 April 2012 and attached to his affidavit, showing natural and artificial debris on the leased premises. The Town claims that Genesis had not removed this debris as of 31 May 2012. The Town, therefore, argues that Genesis was in breach of the “Repairs” clause and the Lease because it failed to remedy the debris within 10 days of notice from the Town.

Genesis argues that after the Town complained of this debris in a 29 March 2012 letter, Genesis’ president, Leslie Hayhurst, replied in a 2 April 2012 letter that defendant was in “an on-going effort to ‘clean up’ in and around the remaining structures and to recondition and refurbish” the property. The letter further indicated that this cleanup

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effort could only be completed once the animals were removed from the property, as the Town had demanded, and once the weather permitted. Genesis presented uncontroverted evidence that winter storms had produced tree damage and debris and that as of February 2012 – well before the Town had even provided notice of the potential default – Genesis was actively engaged in removing the debris with help from volunteers.

Following the principle in *Stanley* that we “do not look with favor on lease forfeitures,” 90 N.C. App. at 539, 369 S.E.2d at 385, and giving the “Repairs” and default clauses their plain and ordinary meaning, we hold that the Town has not shown that there is an issue of fact regarding whether Genesis, as required by the Repairs clause, had made “all arrangements for repairs necessary to keep the Premises in good condition” within 10 days after the Town gave notice of the need for action. The Town has not presented any basis for concluding that the Lease required that Genesis complete its cleanup efforts 10 days after receiving notice of the debris from the Town in its 29 March 2012 letter.

Moreover, while the Town asserts on appeal that Genesis still had not remedied the violation by 31 May 2012, the Town can point to no evidence supporting that claim. Finally, while the Town Manager claimed that the photos on which the Town has relied almost entirely for proving breach of the Repairs clause were taken on 11 April 2012, Genesis has made a compelling showing that the Town Manager’s statement regarding the date of the photos was untrue and that the photos were actually taken in March. Whether the date of the photos is true or not is, however, immaterial since the Town failed to show that Genesis had not, in violation of the Lease, made the necessary arrangements to keep the property in good condition.

Accordingly, we agree with the trial court that the Town has failed to show that a genuine issue of material fact exists as to whether Genesis breached the Lease. The trial court, therefore, properly granted summary judgment on the Town’s claims of breach of the Lease.

II. Admission of Evidence at Trial of Town’s Sewage Spills

[4] The Town next challenges the trial court’s admission at trial of evidence of sewage spills into Buckeye Lake coming from the Town’s lift station and the corresponding notices of violation that the Town received from DENR for the sewage overflows. The Town argues this evidence was both irrelevant and unfairly prejudicial and that the trial court not only erred in admitting the evidence, but also should have granted the Town’s motion for a new trial based on the admission of that evidence. We disagree.

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The Town points to the testimony of Susan Halliburton, a former Genesis board member and Town resident, about the sewage overflows and notices of violation from the State. The Town objected generally to the testimony on the grounds of relevancy. In overruling the Town's objections based on relevancy, the trial court noted, "But they have to show that that was arbitrary, capricious and all that. And if you're totally polluting this lake another way . . . doesn't that add to the absurdity of the 200-foot buffer?"

However, two other witnesses also testified about the sewage overflows, without objection, including Steve Tedder, a former DENR water quality supervisor. Mr. Tedder testified that thousands of gallons of "human waste" flowed into Buckeye Lake and that he personally signed and sent to the Town "a notice of violation for two different spills" in 2010 for "a total of 147,000 gallons of human waste going into Buckeye Lake."

It is well established that "[h]aving once allowed this evidence to come in without objection, the [Town] waived [its] objections to the evidence and lost the benefit of later objections to the same evidence." *State v. Burnett*, 39 N.C. App. 605, 610, 251 S.E.2d 717, 720 (1979). Thus, even if the evidence of the Town's contamination of the lake with human waste was irrelevant or unfairly prejudicial, the Town failed to preserve this error for appeal. *See also Lowery v. Newton*, 52 N.C. App. 234, 242, 278 S.E.2d 566, 572 (1981) ("Assuming such testimony was hearsay and unresponsive, it is harmless in view of the fact that the record discloses that similar testimony occurs elsewhere.").

Moreover, when a party has moved for a new trial pursuant to Rule 59(a)(8) of the Rules of Civil Procedure, a new trial may be granted where there is an "[e]rror in law occurring at the trial *and objected to by the party making the motion*["] (Emphasis added.) Because the Town did not object to each admission of evidence of the sewage overflow, this issue has not been properly preserved and any error in denying the motion for a new trial because of the admission of Ms. Halliburton's testimony would be harmless. *See Borg-Warner Acceptance Corp. v. Johnston*, 107 N.C. App. 174, 183, 419 S.E.2d 195, 200 (1992) (rejecting as unpreserved challenge to denial of motion for new trial based on admission of evidence that appellant had not objected to at trial).

Regardless, it is a general principal that "[e]vidence is relevant if it has any logical tendency to prove a fact at issue in a case[.]" *State v. Arnold*, 284 N.C. 41, 47, 199 S.E.2d 423, 427 (1973). "It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it is one of the circumstances surrounding the

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parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact.” *Id.* at 47-48, 199 S.E.2d at 427.

The trial court concluded, and we agree, that evidence of the Town’s sewage overflows is relevant to whether the Town’s Buckeye Lake Ordinance was arbitrary and capricious, a fact Genesis was required to prove for its substantive due process claim. More specifically, in accordance with *Arnold*, evidence that the Town’s own negligence was causing the contamination in Buckeye Lake speaks to the Town’s “conduct or motives” and the “general circumstances surrounding the parties” in adopting a 200-foot buffer zone preventing the caging and housing of animals. *Id.* In other words, it raises questions of fact whether the 200-foot buffer zone designed to eliminate the presence of all animals – indoors and out – at the Genesis wildlife refuge would have any appreciable effect on Buckeye Lake’s water quality when the Town itself was the source of more than 100,000 gallons of sewage spilling into the lake during the time frame of the adoption of the buffer. This evidence questions the purpose of the buffer zone, which speaks to whether § 93.21(F) of the Ordinance was arbitrary or capricious. Thus, we hold that the trial court did not err in admitting the evidence as relevant.

The Town also argues that the prejudice outweighed any benefit of admission of the evidence, apparently an argument for exclusion under Rule 403 of the Rules of Evidence, although the Town does not cite Rule 403. Nonetheless, the Town failed to object to the evidence on this basis at trial and, therefore, did not preserve this issue for appeal. *State v. Hueto*, 195 N.C. App. 67, 71, 671 S.E.2d 62, 65 (2009).

III. Denial of Motions for Directed Verdict and JNOV

The Town next challenges the denial of its motions for a directed verdict and JNOV pursuant to Rule 50 of the Rules of Civil Procedure. “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) (quoting *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (2009)). “A motion for either a directed verdict or JNOV should be denied if there is more than a scintilla of evidence supporting each element of the non-movant’s

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claim.’ ” *Id.* at 275, 704 S.E.2d at 323 (quoting *Shelton*, 197 N.C. App. at 410, 677 S.E.2d at 491).

A. Preclusion of Claims Brought Under 42 U.S.C. § 1983

[5] First, the Town argues that Genesis was precluded from bringing a § 1983 claim for violation of its substantive due process rights because it had an adequate post-deprivation state law remedy of inverse condemnation. As the United States Supreme Court has explained, there are three variations of claims brought under the Due Process Clause of the Fourteenth Amendment:

First, the Clause incorporates many of the specific protections defined in the Bill of Rights. . . . [*E.g.*, freedom of speech or freedom from unreasonable searches and seizures. Second, the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. *As to these two types of claims, the constitutional violation actionable under § 1983 is complete when the wrongful action is taken. A plaintiff . . . may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights.*

The Due Process Clause also encompasses a third type of protection, a guarantee of fair procedure. . . . The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.

Zinermon v. Burch, 494 U.S. 113, 125-26, 108 L. Ed. 2d 100, 113-14, 110 S. Ct. 975, 983 (1990) (emphasis added) (internal citations and quotation marks omitted)).

Thus, for substantive due process claims, “[i]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.’ ” *Id.* at 124, 108 L. Ed. 2d at 113, 110 S. Ct. at 982 (quoting *Monroe v. Pape*, 365 U.S. 167, 183, 5 L. Ed. 2d 492, 503, 81 S. Ct. 473, 482 (1961), *overruled on other grounds by Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)).

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While we are first and foremost bound by this decision of the United States Supreme Court, *Pender Cnty. v. Bartlett*, 361 N.C. 491, 516, 649 S.E.2d 364, 380 (2007), *aff'd*, 556 U.S. 1, 173 L. Ed. 2d 173, 129 S. Ct. 1231 (2009), our Supreme Court has also reached the same conclusion in *Edward Valves, Inc. v. Wake Cnty.*, 343 N.C. 426, 434, 471 S.E.2d 342, 347 (1996), where it held specifically that “[s]tate remedies are only relevant when a Section 1983 action is brought for a violation of procedural due process.” This Court has recently held the same. *See Swan Beach Corolla, L.L.C. v. Cnty. of Currituck*, 234 N.C. App. 617, 629, 760 S.E.2d 302, 312 (2014) (“While [§ 1983] claims for violation of procedural due process may be subject to exhaustion requirements, substantive constitutional claims are not[.]” (internal citation omitted)).

Despite this precedent, the Town claims that as a matter of law, Genesis is precluded from bringing this claim because North Carolina’s inverse condemnation statutes provide an adequate remedy. In asserting this position, the Town cites to numerous federal cases. However, even apart from *Zinermon*, we are required to follow the precedents established in *Edward Valves* and *Swan Beach Corolla*. Accordingly, we hold Genesis’ substantive due process claim is not barred by Genesis’ ability to bring an inverse condemnation action.

B. As-Applied Substantive Due Process Violations

[6] Secondly, the Town contends that the adoption and enforcement of § 93.21(F) of the Ordinance did not violate Genesis’ substantive due process rights because the Ordinance was not an arbitrary and capricious exercise of its municipal police power and was, therefore, rationally related to the legitimate government interest in protecting the Town’s water supply. In making this argument, the Town fails to recognize that Genesis brought an “as applied” claim rather than attacking the facial validity of the Ordinance.

“ ‘In general, substantive due process protects the public from government action that [1] unreasonably deprives them of [2] a liberty or property interest.’ ” *Amward Homes, Inc. v. Town of Cary*, 206 N.C. App. 38, 63, 698 S.E.2d 404, 422 (2010) (quoting *Toomer v. Garrett*, 155 N.C. App. 462, 469, 574 S.E.2d 76, 84 (2002)), *aff’d per curiam*, 365 N.C. 305, 716 S.E.2d 849 (2011). “[S]ubstantive due process denotes a standard of reasonableness and limits a state’s exercise of its police power. . . . ‘The traditional substantive due process test has been that a statute must have a rational relation to a valid state objective.’ ” *Beneficial N.C., Inc. v. State ex rel. N.C. State Banking Comm’n*, 126 N.C. App. 117, 127, 484 S.E.2d 808, 814 (1997) (quoting *In re Petition of Kermit Smith*, 82 N.C. App. 107, 111, 345 S.E.2d 423, 425-26 (1986)).

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In arguing that its motion for a directed verdict and motion for JNOV should have been granted, the Town relies upon the principles that unless a municipal ordinance is clearly prohibited by the Constitution, appellate courts presume it is constitutional and, quoting *Patmore v. Town of Chapel Hill*, 233 N.C. App. 133, 140, 757 S.E.2d 302, 306 (quoting *Graham v. City of Raleigh*, 55 N.C. App. 107, 110, 284 S.E.2d 742, 744 (1981)), *disc. rev. denied sub nom. Patmore v. Town of Chapel Hill*, 367 N.C. 519, 758 S.E.2d 874 (2014), that “ [w]hen the most that can be said against [zoning] ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere.’ ” The Town asserts that “ a constitutional violation exists only when the challenged governmental action does *not bear a rational relationship to a legitimate governmental objective.* ” (Emphasis original.)

In making this argument, the Town has addressed only a facial challenge to an ordinance. However, there is a difference between a challenge to the facial validity of an ordinance as opposed to a challenge to the ordinance as applied to a specific party. “ The basic distinction is that an as-applied challenge represents a plaintiff’s protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act, while a facial challenge represents a plaintiff’s contention that a statute is incapable of constitutional application in any context. ” *Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999). “ In an as-applied case, the plaintiff is contending that the defendant municipal agency violated his or her constitutional rights in the manner in which an ordinance was applied to his or her property. ” *Cornell Cos., Inc. v. Borough of New Morgan*, 512 F. Supp. 2d 238, 256 (E.D. Pa. 2007). “ [O]nly in as-applied challenges are facts surrounding the plaintiff’s particular circumstances relevant. ” *Frye*, 109 F. Supp. 2d at 439.

We have found no prior North Carolina precedent addressing an as-applied substantive due process claim under circumstances similar to those here. However, the Fourth Circuit has held that “ [t]o establish a violation of substantive due process, [a plaintiff] must demonstrate (1) that they had property or a property interest; (2) that the state deprived them of this property or property interest; and (3) that the state’s action falls so far beyond the outer limits of legitimate governmental action that *no process* could cure the deficiency. ” *MLC Auto., LLC v. Town of S. Pines*, 532 F.3d 269, 281 (4th Cir. 2008) (internal quotation marks omitted). “ And in the context of a zoning action involving property, it must be clear that the state’s action ‘has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation

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to the public health, the public morals, the public safety or the public welfare in its proper sense.’” *Id.* (quoting *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88, 72 L. Ed. 842, 844, 48 S. Ct. 447, 448 (1928)). Further, “[i]n making this determination we may consider, among other factors, whether: (1) the zoning decision is tainted with fundamental procedural irregularity; (2) the action is targeted at a single party; and (3) the action deviates from or is inconsistent with regular practice.” *Id.*

With particular emphasis on the second factor, it is clear that “government actors cannot single out a particular individual or entity for disparate treatment based on illegitimate, political or personal motives.” *Browning-Ferris Indus. of S. Atl., Inc. v. Wake Cnty.*, 905 F. Supp. 312, 321 (E.D.N.C. 1995). See also *Marks v. City of Chesapeake, Va.*, 883 F.2d 308, 311 (4th Cir. 1989) (“Such purposeful discrimination against a particular individual . . . violate[s] the Constitution *even where no recognized class-based or invidious discrimination was involved.*” (quoting *Scott v. Greenville Cnty.*, 716 F.2d 1409, 1420 (4th Cir. 1983)); *Scott*, 716 F.2d at 1420 (holding plaintiff presented sufficient evidence of due process violation when “it appear[ed] that the moratorium was directed solely” at plaintiff because municipal agency’s “moratorium on building permits was limited to the area in which [plaintiff] proposed to build, and that his was the only application pending in that area”); *Doctor John’s, Inc. v. City of Sioux City*, 438 F. Supp. 2d 1005, 1035 (N.D. Iowa 2006) (holding evidence that city “systematically targeted [plaintiff] for exclusion and has amended its ordinances for that purpose” sufficient “to generate genuine issues of material fact” regarding due process claim).

The Town’s arguments at trial and on appeal focus on its contention that the Ordinance’s prohibition of caged and housed animals within 200-feet of Buckeye Lake or any stream that drains into it was rationally related to the legitimate interest of protecting the Town’s water supply. Specifically, the Town contends that it adopted § 93.21(F) of the Ordinance in response to pressure from DENR to comply with Title 15A, Chapter 18 of the North Carolina Administrative Code, which requires, among other things, that “[p]recautions shall be taken on the watershed of class I and class II reservoirs . . . to control the drainage of wastes from animal and poultry pens or lots, into such sources.” 15A N.C. Admin. Code 18C.1208 (2014). The Town further argues that the eventual adoption of the 200-foot buffer zone was reasonable given the expert testimony of Lee Spencer, a former Regional Engineer of the Public Water Supply Section of DENR, who testified that 200 feet was a common buffer distance for other drinking water reservoirs in the state.

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These arguments, found persuasive by the dissent as well, focus, however, on the facial validity of the Ordinance and do not address the “facts surrounding the plaintiff’s particular circumstances,” *Frye*, 109 F. Supp. 2d at 439, whether the Town’s actions in adopting and enforcing the Ordinance lacked a substantial relationship to its interest in protecting the Town’s water supply, or whether these actions “singl[ed] out [Genesis] for disparate treatment based on illegitimate, political or personal motives.” *Browning-Ferris Indus.*, 905 F. Supp. at 321. Indeed, the Town acknowledges, referencing a letter dated 18 December 2008 from Tom Boyd, “it is clear that the Town’s enactment of Section 93.21(f) was in response to NCDENR’s actual notice to the Town that the conditions at Genesis ‘could be a serious health concern and needs to be addressed.’”

The dissent, however, expands on the Town’s arguments and asserts that Genesis’ evidence that the Town targeted it when adopting and enforcing § 93.21(F) cannot, in any event, give rise to an as-applied substantive due process claim. In support of this position, however, the dissent relies on First Amendment decisions, which apply an analysis that has no relevance to a substantive due process claim.

Each of the First Amendment decisions cited by the dissent addresses the issue whether the challenged statute or ordinance was content based or content neutral and held that when the legislation was valid on its face – in other words, was facially content neutral – mere allegations or hypotheses of a content-based motive for the legislation would not be sufficient to trigger strict scrutiny of the legislation under the First Amendment.

These decisions arising in the specialized context of the First Amendment are immaterial to the issues in this case. See *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 645, 652, 129 L. Ed. 2d 497, 520, 524, 114 S. Ct. 2445, 2461, 2464 (1994) (while noting that “even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys[.]” nevertheless holding that “[a]ppellants’ ability to *hypothesize* a content-based purpose for these provisions *rests on little more than speculation* and does not cast doubt upon the content-neutral character of” challenged regulations (emphasis added)); *United States v. O’Brien*, 391 U.S. 367, 382-83, 20 L. Ed. 2d 672, 683, 88 S. Ct. 1673, 1682 (1968) (concluding that legislation regulated conduct and was content neutral with respect to speech and rejecting defendant’s claim that Congress still had “purpose” of suppressing speech because “an otherwise constitutional statute” will not be struck down “on the basis of an *alleged* illicit legislative motive”

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(emphasis added)); *D.G. Rest. Corp. v. City of Myrtle Beach*, 953 F.2d 140, 146, 147 (4th Cir. 1991) (holding that because “the record discloses no evidence to support a conclusion that [the communicative] message [of nude dancing] was the target of the Myrtle Beach ordinance[.]” ordinance was content neutral “valid time, place, and manner restriction” for purposes of First Amendment); *Cricket Store 17, LLC v. City of Columbia*, 97 F. Supp. 3d 737, 745, 746 (D.S.C. 2015) (holding that ordinances restricting where sexually-oriented business can be located are valid, content neutral “time, place, and manner regulations” for First Amendment purposes and evidence that adoption of ordinance was “spurred” by opening of sexually-oriented business “is not controlling, as this does not demonstrate that a ban on [plaintiff’s] erotic message was a motive for the ordinances”).³

Under the applicable substantive due process analytical framework set out in *MLC*, in order to decide whether the Ordinance is an arbitrary or irrational exercise of power having no true substantial relation “to the public health, the public morals, the public safety or the public welfare in its proper sense[.]” 532 F.3d at 281 (quoting *Nectow*, 277 U.S. at 187-88, 72 L. Ed. at 844, 48 S. Ct. at 448), we first look at whether “the zoning decision is tainted with fundamental procedural irregularity[.]” *Id.* On this factor, Mr. Spencer, the Town’s expert witness formerly employed by DENR, testified that before a buffer is applied to an individual’s property, science should be “applied in some fashion” to determine the proper distance for that buffer and that a municipality should not pass an ordinance without consulting the only property owner it will affect.

Genesis presented evidence that the buffer was not based on science or even a recommendation by DENR. Although the Town argues that it adopted the Ordinance in response to pressure from DENR, both of the Town’s witnesses admitted that DENR never specifically required a 200-foot buffer. The Town Council meeting minutes for 13 January 2009 and 10 February 2009 evidenced how the Town in fact came up with the 200-foot buffer.

3. The dissent also mistakenly relies on *Waste Indus. USA, Inc. v. State*, 220 N.C. App. 163, 725 S.E.2d 875 (2012), a case addressing discrimination under the Commerce Clause, and asserts that this Court held that a buffer and size restriction “for landfills was constitutional even though *the purpose* of the legislation may have been to prevent a particular company from constructing certain landfills near our coast.” This Court actually held that “we have concluded that plaintiffs *failed to present evidence* giving rise to an issue of fact regarding the purpose of the legislation” being to prevent the construction of the particular landfills. *Id.* at 180, 725 S.E.2d at 887 (emphasis added).

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The discussion at the 13 January meeting progressed from simply preventing caging of animals in Buckeye Creek's floodplain to preventing it within 200 feet of the lake or any stream that feeds into Buckeye Lake, which was admittedly "more stringent." The minutes reveal that the rationale for this "more stringent" 200-foot requirement was solely an intent to "eliminate [Genesis'] ability to have animals and continue to have animals at that facility." Indeed, in discussing the size of the buffer, one Town council member pointed out, "I don't think 100 feet will [go beyond Genesis' buildings], but I think 200 feet will."

In addition, contrary to the proper procedure identified by Mr. Spencer, the Town did not consult with Genesis, the property owner that was the target of this part of § 93.21(F), prior to adopting the Ordinance. In fact, Genesis presented evidence that the Town did not even notify Genesis of the passage of the Ordinance. Instead, on 15 September 2010, more than a year after the passage of the Ordinance, the Town informed Genesis by letter that all outdoor animals and habitats, with the exception of one used for storage, had to be removed from the property within six months pursuant to a plan to comply with applicable *state water safety codes*. The letter threatened legal action if Genesis failed to comply. The Town then, orally, falsely represented to Genesis that DENR required the removal of animals and cages from the entirety of Genesis' Buckeye Lake site, including animals and cages entirely inside, and that the State would take legal action if Genesis failed to comply.

Thus, Genesis presented evidence meeting the first *MLC* factor. Contrary to proper procedure for the adoption of this kind of Ordinance, as established by the Town's own expert, the Town did not base its 200-foot buffer on any kind of science, but rather chose the buffer because it was the distance necessary to eliminate Genesis' ability to function consistent with the purposes set out in its Lease with the Town. Further, the Town did not consult with Genesis prior to adopting the Ordinance, even though this aspect of the Ordinance was directed at the property Genesis leased from the Town.

Genesis also presented substantial evidence regarding the second *MLC* factor: § 93.21(F) of the Ordinance provision was targeted at a single party, Genesis. In addition to the evidence relevant to the first factor, at the 10 February 2010 Town meeting, Mayor Owen stated: "There is one item that we were in particular wanting to be sure it was worded properly, and it's a reference to animals, caging and housing of animals around Buckeye Lake It will have an effect on Genesis Wildlife." In addition, the former Town attorney, David Paletta, in explaining the use of the word "housed" in the Ordinance's requirement that "[n]o animals

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can be caged or housed within” the buffer, reflected that Genesis was the target of that provision: “Well, basically what I’m trying to do, is I understand the Council is concerned about some caging of animals that the Council would like to get rid of”

Genesis likewise presented substantial evidence relating to the third *MLC* factor: the action deviates from or is inconsistent with regular practice. In this case, this factor overlaps with the first factor. In addition to evidence that the Town in fact arbitrarily selected a 200-foot buffer in order to ensure removal of all of Genesis’ facilities for animals, the Town’s utilities director, Robert Heaton, indicated that the Town had not performed any investigation or study in creating the 200-foot buffer, and he could not provide any rationale as to why the Town adopted that specific buffer distance or why it had included “housed” animals. Mr. Heaton also acknowledged that the animals housed inside Genesis’ Dome did not create a danger to Buckeye Lake.

Even though, as Genesis’ evidence showed, the Town told Genesis that DENR was threatening legal action unless all of Genesis’ animals were removed from the Buckeye Lake facility, Mr. Spencer testified that DENR’s only concern with Genesis’ operation was a “wolf habitat” that “should be removed” if Genesis were to stay at its Buckeye Lake site. Neither of the Town’s two witnesses – the only testimony it presented – provided any explanation how the prohibition of “housed” animals was reasonable or related to the Town’s interest in protecting the Town’s drinking water when the only concern was with Genesis’ open air cages “located in close proximity to a small branch that discharges into [Buckeye Lake].”

In sum, Genesis presented evidence supporting the existence of each of the *MLC* factors. In *MLC*, the Fourth Circuit concluded that comparable evidence was “sufficient to survive summary judgment” on the property owner’s substantive due process claim. 532 F.3d at 282. When the evidence was taken in the light most favorable to the property owner – which was precluded from building a car dealership when the defendant town rezoned its property – the court concluded that the evidence “satisfie[d] all three relevant factors.” *Id.* The evidence showed that “the zoning decision was procedurally irregular in that it occurred without any reference to the comprehensive plan; [the property owner] was singled out for treatment; and the zoning was made without any studies and at the behest of a citizen petition, the first such petition in the Town since at least 1989.” *Id.* In addition, apart from the three factors, “the record evidence at least suggests that citizenry opposition was based not upon legitimate land use issues but upon dislike of car

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dealerships. Statements such as ‘[l]ipstick on a pig does not change the nature of the beast,’ . . . do not relate to legitimate land use concern but rather to the very arbitrary exercise of power the due process clause is intended to protect against.” *Id.*

Likewise, here, in addition to evidence addressing the three *MLC* factors, Genesis also presented other evidence that would allow a jury to conclude that the adoption of the Ordinance did not relate to a legitimate concern with the safety of the Town’s water supply. Leslie Hayhurst and Susan Halliburton testified that the Town began enforcing the Ordinance in the fall of 2010 with the false threat of legal action from the State. This evidence in particular raises questions of fact whether the Town’s motives in passing this Ordinance were truly to protect the Town’s drinking water or simply to interfere with Genesis’ interest in its leased property. Such improper motives were the basis for the trial court granting summary judgment in favor of the plaintiff’s substantive due process claim in *Browning-Ferris*, 905 F. Supp. at 321.

In addition, evidence of the Town’s own sewage problems and its manner of enforcing § 93.21(F) of the Ordinance also raises issues of fact regarding the Town’s improper motives in adopting an ordinance directed solely at Genesis. As we have noted above, Ms. Halliburton and Mr. Tedder testified extensively about the Town’s sewage overflows. This evidence is particularly relevant here because if the Town was responsible for much of the contaminants in Buckeye Lake, and was receiving pressure from DENR to ameliorate those problems, then a jury could conclude that the motivation behind § 93.21(F), directed at removal of Genesis’ facility, was not for the purpose of maintaining drinking water safety.

In sum, the evidence presented at trial was sufficient to create genuine issues of fact whether the motives of the Town and the purposes behind the 200-foot buffer – that prohibited both outdoor and indoor animals – were related to the legitimate interest of protecting the Town’s water supply or were to prevent Genesis from using their property for the purposes set forth in their 30-year Lease with the Town. Accordingly, we hold the trial court’s denial of the Town’s motions for directed verdict and JNOV were not in error.

IV. The Town’s Motion for New Trial based on Jury Misconduct

[7] The Town next argues the trial court erred in denying the Town’s motion for a new trial pursuant to Rule 59 of the Rules of Civil Procedure based on jury misconduct. During a break in jury deliberations, three

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jurors and a court bailiff discussed in the courthouse hallway, generally, the harms of animal waste in bodies of water. The bailiff knew one of the jurors personally and also knew that he was a juror. After the trial judge was informed of this potential impropriety, he individually questioned each juror and the bailiff regarding the conversation. The trial judge learned that the conversation related to a juror's distress on learning of the pollution in Buckeye Lake because he had been eating fish from the lake his entire life. The bailiff suggested to the juror that the risk of animal waste in a small body of water was not significant because he grew up on a dairy farm and knew of someone who consumed fish from a stream on his property adjacent to livestock.

At the conclusion of the trial judge's questioning of each involved juror, the jurors each affirmed to the judge that they could be fair and impartial despite this conversation. Although attorneys from both sides were given the opportunity to also question each juror, no attorney did so. Ultimately, the trial court found that "the subject matter is of such a nature that it does not directly relate to the issues in which the jury is considering for purposes of deliberation in this matter" and that "[a]s a result thereof, . . . the conversation does not prejudice the trial in any respects, does not have any affect [sic] on the jurors and their ability to be fair and impartial in their deliberations in this matter[.]"

"When juror misconduct is alleged, it is the trial court's responsibility 'to make such investigations as may be appropriate, including examination of jurors when warranted, to determine whether misconduct has occurred and, if so, whether such conduct has resulted in prejudice to the [aggrieved party].'" *State v. Salentine*, ___ N.C. App. ___, ___, 763 S.E.2d 800, 804 (2014) (quoting *State v. Aldridge*, 139 N.C. App. 706, 712, 534 S.E.2d 629, 634 (2000)), *disc. review denied*, ___ N.C. ___, 771 S.E.2d 308 (2015). "On appeal, we give great weight to [the trial court's] determinations whether juror misconduct has occurred and, if so, whether to declare a mistrial. Its decision should only be overturned where the error is so serious that it substantially and irreparably prejudiced the defendant, making a fair and impartial verdict impossible." *Id.* at ___, 763 S.E.2d at 804 (internal citation and quotation marks omitted).

The Town argues that this Court *is required* to apply a seven-factor test in analyzing whether juror misconduct creates a prejudicial effect on a party requiring a new trial pursuant to the Supreme Court's decision in *Stone v. Griffin Baking Co. of Greensboro, Inc.*, 257 N.C. 103, 107-08, 125 S.E.2d 363, 366 (1962). Some of these factors include whether the non-juror had any relationship to the jurors, whether the non-juror knew

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of a juror's status as a juror, whether the conversation referenced the case, whether there was any intent to influence the jurors, and whether there was any prejudicial influence. *Id.* Although these factors may be relevant to the overall inquiry, we do not agree with the Town's contention that our Supreme Court mandated such a seven-factor test in *Stone*. In the years since *Stone*, our Supreme Court has never suggested that *Stone* created such a test. *See, e.g., State v. Sneeden*, 274 N.C. 498, 504, 164 S.E.2d 190, 195 (1968) (noting that *Stone* adopted general rule: "[N]either the common law nor statutes contemplate as ground for a new trial a conversation between a juror and a third person unless it is of such a character as is calculated to impress the case upon the mind of the juror in a different aspect than was presented by the evidence in the courtroom, or is of such a nature as is calculated to result in harm to a party on trial. The matter is one resting largely within the discretion of the trial judge." (quoting 39 Am. Jur., *New Trial*, § 101)).

We hold, under the standard set out in *Salentine*, that the trial judge took the appropriate actions to investigate the conversation between the jurors and bailiff. Furthermore, we find his questions generally addressed the concerns noted in *Stone*. The trial judge received an assurance from each juror that they were not prejudiced by the conversation with the bailiff, allowed each party's attorneys to question the jurors, and explained orally that the conversation regarding sewage in bodies of water did not directly relate to or influence the jury's deliberations. Because we find the conversation did not affect "the fairness of the trial or the integrity of the verdict[.]" the trial judge did not abuse his discretion in refusing to grant a mistrial. *Sneeden*, 274 N.C. at 505, 164 S.E.2d at 195.

V. Motion to Amend the Verdict

The Town next argues that the trial court erred by denying the Town's motion to amend the jury verdict pursuant to Rule 59 because (1) the jury awarded Genesis a double recovery for both repair and replacement damages and (2) the amount awarded was in excess of any actual damages proven at trial. We disagree.

A. Double Recovery

[8] It is a general principle that "[t]he measure of damages used should further the purpose of awarding damages, which is to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money." *Coley v. Champion Home Builders Co.*, 162 N.C. App. 163, 166, 590 S.E.2d 20, 22 (2004) (quoting *Bernard v. Cent. Carolina Truck Sales*, 68 N.C. App. 228, 233, 314 S.E.2d

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582, 585 (1984)). “North Carolina is committed to the general rule that the measure of damages for injury to personal property is the difference between the market value of the damaged property immediately before and immediately after the injury. . . . [T]he cost of repairs is some evidence of the extent of the damage.” *Carolina Power & Light Co. v. Paul*, 261 N.C. 710, 710-11, 136 S.E.2d 103, 104 (1964).

The Town argues the costs to rebuild the cages at the Buckeye Lake location duplicated the costs to reestablish Genesis’ operations at the Fireweed location and, therefore, Genesis should not be placed in a better position than before the alleged harm. The Town cites to *Sprinkle v. N.C. Wildlife Res. Comm’n*, 165 N.C. App. 721, 728, 600 S.E.2d 473, 478 (2004), for the proposition that a claimant cannot receive double recovery for “the difference in value before repair, plus the cost of repair.” We find this case is inapposite to the facts here.

In *Sprinkle*, this Court found the owner of a damaged boat was precluded from recovering two different measures of value for the same property. *Id.* To the contrary, here, the evidence shows separate and distinct costs to Genesis resulting from the Town’s arbitrary and capricious actions: (1) the costs to reconstruct animal cages at the Fireweed location when required by the Town to relocate the animals, and (2) further costs to restore Genesis’ operations at the Buckeye Lake location after Genesis was allowed to return the animals to the original location.

Ms. Halliburton testified to these different costs. She explained that Genesis incurred costs in the amount of approximately \$171,000.00 to move the animals and its operations to the Fireweed location, where it would not be able to operate and maintain “an education center” in the same manner that it had at the Buckeye Lake location pursuant to the terms of the Lease. Specifically, Ms. Halliburton stated, “Fireweed was not officially Genesis, but it was more or less our little satellite hospital. . . . [T]he town stipulated we could not have the public there as Genesis.” Thus, the Town’s arbitrary and capricious enforcement and enactment of the Ordinance prevented Genesis from operating as provided under the terms of the Lease.

Ms. Halliburton further testified to costs in the amount of \$14,373.84 incurred in repairing the damage to the Dome at the Buckeye Lake location resulting from the Town’s enforcement of the Ordinance. She claimed that in an attempt to make the Dome location an educational center, as was required by the terms of the Lease, Genesis had to repair a “pretty sad” interior resulting from Genesis having “to tear out the cages that were inside” pursuant to the Town’s mandate.

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Finally, David Shook, the contractor who quoted Genesis the cost of materials needed to restore the animal cages at its Buckeye Lake site and thus to restore Genesis' property interest pursuant to the Lease, testified to costs of approximately \$91,000.00. Thus, Genesis incurred different damages as a result of different effects produced by the Town's enactment and enforcement of the Ordinance. Accordingly, the trial court did not err in denying the Town's Rule 59 motion to amend the amount of damages on account of a double recovery.

B. Proof of Actual Damages

[9] We next examine the Town's argument that the trial court abused its discretion in denying the Town's motion for an amended verdict because the jury's award exceeded actual damages proven at trial. "The party seeking damages bears the burden of proving them in a manner that allows the fact-finder to calculate the amount of damages to a reasonable certainty. While the claiming party must present relevant data providing a basis for a reasonable estimate, proof to an absolute mathematical certainty is not required." *State Props., LLC v. Ray*, 155 N.C. App. 65, 76, 574 S.E.2d 180, 188 (2002) (internal citation omitted). Furthermore, where "it is unclear exactly how the jury reached its overall figure," the trial court does not abuse its discretion in denying a motion to amend the verdict if "the jury's verdict was consistent with [the claimant's] evidence[.]" *Blakeley v. Town of Taylortown*, 233 N.C. App. 441, 449, 756 S.E.2d 878, 884, *disc. review denied*, 367 N.C. 521, 762 S.E.2d 208 (2014).

Here, although it is unclear exactly how the jury reached a verdict of \$211,142.10, there is no indication that this amount is inconsistent with the evidence presented at trial. Ms. Halliburton and Mr. Shook testified to damages totaling \$276,824.92, which Genesis provided to the jury in a spreadsheet. Although the Town did not present any evidence to challenge the damages presented on these spreadsheets, cross-examination of Ms. Halliburton revealed that the labor costs on the spreadsheet were from unpaid volunteers and that a number of other costs on the spreadsheet resulted from donations. These amounts totaled just over \$65,000.00. A simple subtraction of the volunteered labor and material in the approximate amount of \$65,000.00 from the \$276,824.92 in total damages reveals an amount consistent with the jury's verdict of \$211,142.10. Thus, even though we cannot be sure exactly how the jury calculated its verdict, or that the verdict was calculated with mathematical certainty, we find the verdict is consistent with the evidence presented by Genesis. Therefore, the trial court did not abuse its discretion in denying the Town's motion to amend the jury verdict.

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VI. Declaratory Judgments

As a final matter, the Town argues that the trial court erred by entering a declaratory judgment (1) that the Town of Beech Mountain Ordinance § 93.21(F) was unconstitutional and (2) that the Ordinance was a zoning ordinance. We disagree with both contentions.

A. Declaration of the Constitutionality of the Town Ordinance

[10] The Town first claims the declaratory judgment that the Ordinance was unconstitutional was in error because the Town's amendment of the Buckeye Lake Protection Ordinance and corresponding removal of § 93.21(F), the specifically challenged provision, rendered the request for a declaratory judgment moot. The Town argues that the amendment eliminated the trial court's subject matter jurisdiction to enter such an order. We do not agree.

"The purpose of the Declaratory Judgment Act is, 'to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations[,] [and] is to be liberally construed and administered.'" *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 287, 134 S.E.2d 654, 657 (1964) (quoting *Walker v. Phelps*, 202 N.C. 344, 349, 162 S.E. 727, 729 (1932)). It is well settled that "[t]he Superior Court has jurisdiction to render a declaratory judgment only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a[n] . . . ordinance" *Id.*, 134 S.E.2d at 656-57. As a general matter, our Supreme Court has acknowledged that "[o]nce the jurisdiction of a court . . . attaches, . . . it will not be ousted by subsequent events." *In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978).

The Town points out that "[w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *Id.* at 147, 250 S.E.2d at 912. Such is not the case here. Upon modification and elimination of § 93.21(F) in January 2013, Genesis had already incurred monetary damages resulting from the Town's enactment and enforcement of the Ordinance. Thus, the January 2013 modification of the Buckeye Lake Protection Ordinance and the elimination of § 93.21(F) did not provide Genesis with the relief it sought and did not alter the fact that the Ordinance was unconstitutional as applied to Genesis prior to its amendment.

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In arguing the issue was moot, the Town also relies on *State v. McCluney*, 280 N.C. 404, 407, 185 S.E.2d 870, 872 (1972), which holds that “repeal of [a statute] renders moot the question of its constitutionality” However, that principle does not apply here as the Supreme Court has specifically limited the application of this rule to criminal statutes. *Id.* We also find that the Town’s reliance on *City of Raleigh v. Norfolk S. Ry. Co.*, 275 N.C. 454, 464, 168 S.E.2d 389, 396 (1969), is misplaced because, as the Supreme Court acknowledged, “[t]he very crux of [that] appeal lies in the construction of a *proposed* ordinance which the city *has not enacted*. . . . [Thus,] [n]o wrong has resulted to either party” (Second emphasis added.) Because § 93.21(F) was enacted, *City of Raleigh* is inapplicable to this dispute.

Here, the Town enacted § 93.21(F) of the Buckeye Lake Ordinance and enforced it against Genesis before the Ordinance was later amended and § 93.21(F) revised. The jury found that this section of the Ordinance, as originally applied to Genesis, resulted in a violation of Genesis’ substantive due process rights at the time it was adopted and enforced. Therefore, pursuant to *Roberts*, 261 N.C. at 287, 134 S.E.2d at 656, the Ordinance presented a “genuine controversy between” Genesis and the Town, and the trial court had the requisite jurisdiction to declare § 93.21(F) unconstitutional as applied to Genesis.

B. Declaration of the Ordinance as a “Zoning” Ordinance

[11] The Town next claims that the trial court’s declaration that § 93.21(F) is a “zoning” ordinance adopted pursuant to N.C. Gen. Stat. § 160A-381(a) (2015), as opposed to an ordinance derived from the Town’s police power pursuant to N.C. Gen. Stat. § 160A-174 (2015), was in error. The Town argues that the Ordinance “cannot be classified as a zoning ordinance because [the] Ordinance simply does not ‘zone’, but instead, seeks to prevent adverse effects on public water supply quality.” We do not agree.

N.C. Gen. Stat. § 160A-381(a) states:

For the purpose of promoting health, safety, morals, or the general welfare of the community, any city may adopt zoning and development regulation ordinances. These ordinances may be adopted as part of a unified development ordinance *or as a separate ordinance. A zoning ordinance may regulate and restrict . . . the location and use of buildings, structures and land.*

(Emphasis added).

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“Zoning laws, when valid, *are an exercise of the police power* of the sovereign reasonably to regulate or restrict the use of private property” *Zopfi v. City of Wilmington*, 273 N.C. 430, 433, 160 S.E.2d 325, 330 (1968) (emphasis added). This general concept, and the plain language of N.C. Gen. Stat. § 160A-381(a) undercut the Town’s argument that any ordinance adopted for the purpose of preventing adverse effects on the public water supply, pursuant to the Town’s police power, cannot be a zoning ordinance. Zoning ordinances are specifically adopted for the promotion of the health and general welfare of the community.

Lastly, it is evident that our Supreme Court has traditionally considered “buffer” ordinances, such as the one at issue here, zoning ordinances. *See, e.g., Armstrong v. McInnis*, 264 N.C. 616, 629, 142 S.E.2d 670, 679 (1965). Because the Town cites no case law supporting its argument that we invalidate the trial court’s declaration of the Buckeye Lake Protection Ordinance as a zoning ordinance, and because we find the purpose and scope of the Ordinance to be in accord with N.C. Gen. Stat. § 160A-381(a), we find no error.

Conclusion

In conclusion, we affirm the trial court’s grant of summary judgment to Genesis on the Town’s breach of lease claim. Further, we hold that the trial court did not err in denying the Town’s motions for directed verdict and JNOV on Genesis’ substantive due process counterclaim. We also hold that the Town has failed to demonstrate that the trial court erred in denying its motion for a new trial or amended verdict. Finally, we hold that trial court properly entered its declaratory judgments.

AFFIRMED AS TO COA15-260; NO ERROR AS TO COA15-517.

Judge HUNTER, JR. concurs.

Judge DILLON dissents in a separate opinion.

DILLON, Judge, dissenting.

I believe that the trial court erred in denying the Town’s motions for directed verdict and JNOV regarding Genesis’ substantive due process claim. Further, I believe that the trial court erred in granting summary judgment in favor of Genesis on the Town’s breach of Lease claim. Accordingly, I respectfully dissent.

TOWN OF BEECH MOUNTAIN v. GENESIS WILDLIFE SANCTUARY, INC.

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I. Genesis' Substantive Due Process Claim

In 1999, the Town entered into an agreement (the "Lease") to lease to Genesis certain property (the "Property") in close proximity to Buckeye Lake. Buckeye Lake is the source of the Town's drinking water. Genesis uses the property to maintain a wildlife refuge.

In 2009, the Town enacted an ordinance (the "Ordinance") prohibiting the housing of animals within 200 feet of Buckeye Lake or of any stream that drains into Buckeye Lake. This Ordinance severely affects Genesis' ability to operate its wildlife refuge on the Property. There is evidence that some Town officials were motivated in passing the Ordinance by a desire of forcing Genesis to move its operation to another site.

I believe that the Town's enactment of the Ordinance *may* give rise to certain causes of action in favor of Genesis, e.g., an inverse condemnation claim¹ and a breach of contract claim for breach of Lease's implied covenant of good faith and fair dealing². However, I do not believe that the Town's passage of the Ordinance gives rise to a substantive due process claim; and the trial court should have granted the Town's motions for directed verdict and JNOV on these claims.

Here, Genesis' substantive due process claim must fail, whether the challenge is *facial* or *as applied* in nature. *See Richardson v. Township of Brady*, 218 F.3d 508, 513 (6th Cir. 2000). ("A zoning ordinance may be challenged as violative of substantive due process either on its face or as applied to a particular parcel of land"). The difference between a *facial* challenge and an *as applied* challenge is as follows:

When one makes a "facial" challenge, he or she argues that *any* application of the ordinance is unconstitutional. He or she must show that, on its face, the ordinance is arbitrary, capricious, or not rationally related to a legitimate government interest.

1. *See, e.g., Naegele Outdoor Advertising v. City of Winston-Salem*, 340 N.C. 349, 350-51, 457 S.E.2d 874, 874-75 (1995) (recognizing inverse condemnation claim based on regulatory taking occasioned by the passing of an ordinance).

2. *See Smith v. State*, 289 N.C. 303, 322, 222 S.E.2d 412, 425 (1976) (holding that government entity waives immunity from breach of contract claims when it enters into a contract). *See also Bicycle Transit Authority v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (holding that "[i]n every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement").

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When one makes an “as applied” challenge, he or she is attacking only the decision that applied the ordinance to his or her property, not the ordinance in general. In this context, he or she must show that the government action complained of (i.e. denying a permit application) is “truly irrational.” (Citing an Eleventh Circuit decision.)

WMX Techs. v. Gasconade County, 105 F.3d 1195, 1198 (8th Cir. 1997).

First, the Ordinance is *facially* valid. That is, it satisfies the rational basis test. Under the rational basis test, a challenged law is upheld “as long as there could be some rational basis for enacting [it],” *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 181, 594 S.E.2d 1, 15 (2004), that is, that “the law in question is rationally related to a legitimate government purpose.” *Standley v. Town of Woodfin*, 362 N.C. 328, 332, 661 S.E.2d 728, 731 (2008).

It is certainly a core function of a municipal government to enact ordinances for the protection of the public water supply³. In carrying out this function, it is rational for a municipality to enact ordinances which seeks to protect the public water supply from animal waste contamination⁴. An ordinance which prohibits the housing of animals within a certain distance from the public water supply is an ordinance rationally tailored to protect the water supply from animal waste contamination. And the fact that an ordinance does not address every threat to water contamination at Buckeye Lake does not render the ordinance unconstitutional. *Adams v. N.C. Dep’t. of Natural & Econ. Res.*, 295 N.C. 683, 693, 249 S.E.2d 402, 408 (1978) (holding that “[t]here is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied”).

In the present case, it seems beyond question that the Town’s passage of the Ordinance clears the low “rational basis test” hurdle. *See Rhyne*, 358 N.C. at 181, 591 S.E.2d at 16 (recognizing that “the rational basis test is the lowest tier of review, requiring that a connection between the [ordinance] and a ‘conceivable’ or ‘any’ [citations omitted]

3. *See Trenton v. New Jersey*, 262 U.S. 182, 185 (1923); *Falls Church v. Fairfax County*, 272 Fed. Appx. 252, 256 (4th Cir. 2008) (“the provision and regulation of a healthful public water supply is at the core of [governmental] police power”); N.C. Gen. Stat. § 160A-312(b) (“A city shall have full authority to protect and regulate [water systems]”).

4. *See, e.g., Craig v. County of Chatham*, 356 N.C. 40, 52, 565 S.E.2d 172, 180 (2002) (recognizing government’s authority to prohibit the operation of hog farms within a certain distance from an occupied residence).

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legitimate governmental interest”). Further, the fact that the Town chose 200 feet as a buffer is not, in and of itself, particularly concerning. As the United States Supreme Court has instructed,

[a] classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific.

Heller v. Doe, 509 U.S. 312, 321, 113 S. Ct. 2637, 2643 (1993) (internal marks and citations omitted). *See also Schenck v. City of Hudson*, 114 F.3d 590, 593-94 (6th Cir. 1997) (“A legislative body need not even select the best of the least restrictive method of attaining its goals so long as the means selected are rationally related to those goals”) (citations omitted).

Admittedly, there is strong evidence that the Town drafted the Ordinance in a way to ensure that Genesis’ operation would fall within its ambit. However, this evidence does not render the Ordinance facially invalid. The Ordinance is drafted rationally and is not limited in scope in an arbitrary or irrational way. Rather, the Ordinance sets an unambiguous buffer (200 feet) – which may not be scientific but is otherwise not irrational – and its scope is uniform: the buffer is around all of Buckeye Lake and all streams that flow into Buckeye Lake⁵.

Second, I do not believe that Genesis has a valid *as applied* substantive due process claim. Specifically, there is no evidence that the Town has irrationally *applied* the Ordinance to Genesis’ operation. There is no evidence that the Town has singled out or targeted Genesis *for enforcement* or that the Town is not enforcing the Ordinance to all similarly situated properties within the 200-foot buffer. *See Dunes W. Golf Club v. Town of Mt. Pleasant*, 401 S.C. 280, 301, 737 S.E.2d 601, 612 (rejecting an *as applied* substantive due process claim, holding that an ordinance which applies uniformly to all similarly situated properties is “inherently” not arbitrary). Rather, here, the action complained

5. Had the Town *limited* the Ordinance’s reach territorially to property located near the particular stream or section of Buckeye Lake where Genesis operates, perhaps then Genesis would have an actionable constitutional challenge. In such a case, though protecting the water supply from animal waste is a legitimate function of the Town, there might be no rational basis to have *singled out* the particular stream or section of the Lake where Genesis has its operation. Here, though, the Ordinance is not so limited, but rather applies generally to all properties near the Lake and streams supplying the public water.

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of consists merely of the Town enforcing a facially-valid Ordinance exactly as it is written against one who is acting in clear violation of the Ordinance's language. *See also Rogin v. Bensalem Township*, 616 F.2d 680, 689 (3rd Cir. 1980) (stating that the test in an *as applied* challenge is whether it was "irrational" for the town to apply the ordinance to a specific lot).

The fact that the Town may have had Genesis in mind in drafting the Ordinance does not give rise to an *as applied* challenge, where there is no evidence that the Town is not enforcing the ordinance uniformly. Governmental bodies routinely enact regulations to address some activity already occurring within their jurisdiction.⁶ But the passage of a generally-applicable regulation does not give rise to a substantive due process claim by the party whose activity may have motivated the municipality to act, as long as the regulation is rationally tailored to address a legitimate concern, *see Turner Broad. Sys. v. FCC*, 512 U.S. 622, 652, 114 S. Ct. 2445, 2464 (1994) (stating that a Court will generally concern itself with some "alleged illicit legislative motive" where there is otherwise a conceivable rational motive), and the law is rationally applied to the lot in question, *see WMX Techs., supra*.⁷

In sum, the Ordinance on its face is not arbitrary in a constitutional sense, notwithstanding evidence that the Town drafted the Ordinance with Genesis in mind. *See United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter"). There is a rational basis for the Ordinance. Further, the Ordinance has not been applied arbitrarily to Genesis' operation. Rather, the buffer is unambiguous (200 feet) and applies uniformly to all property near Buckeye Lake and to all streams feeding into Buckeye Lake. Genesis may have *other* claims against the Town for the Town's action.

6. For instance, ordinances which prohibit adult establishments in certain areas are constitutional, even if enacted with the motivation to prevent a particular establishment from operating at a particular location. *See, e.g., D.G. Restaurant Corp. v. Myrtle Beach*, 953 F.2d 140 (1991); *Cricket Store 17 v. City of Columbia*, 97 F.Supp.3d 737 (2015) ("as applied" challenge).

7. Our Court has held that legislation which established a general buffer and size restriction for landfills was constitutional even though *the purpose* of the legislation may have been to prevent a particular company from constructing certain landfills near our coast. *Waste Industries USA v. State*, 220 N.C. App. 163, 180, 725 S.E.2d 875, 887-88 (2012) (applying rational basis test). Specifically, the Court noted that the legislation did not totally prohibit large landfills, but merely restricted where they could be built and the restrictions were rationally related to address a legitimate governmental concern. *Id.* at 180, 725 S.E.2d at 888.

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However, my vote is to reverse the trial court's denial of the Town's motions for directed verdict and JNOV on Genesis' substantive due process claim.

II. Breach of Lease Summary Judgment

My vote is to reverse the trial court's grant of summary judgment in favor of Genesis on the Town's breach of Lease claim.

The Lease provides that Genesis shall not use or permit the Leased Premises to be used "for any purpose which violates any law." The majority holds that since it is not illegal to operate a wildlife refuge and education center, there is no breach of the Lease. However, I believe that the majority reads the Lease provision far too narrowly.

While I agree with the majority that the "illegal purpose" provision in the Lease prevents Genesis from engaging in activities which are illegal, e.g., operating a gambling casino, I believe that the plain reading of the provision language also allows a landlord to declare a default where the tenant *purposefully persists* in violating zoning, setback, building, or other ordinances in the use of the landlord's property. To me, it seems beyond question that a landlord can declare a default where the tenant persists in violating laws concerning how the landlord's land may be used.

Here, there is evidence that Genesis has *persisted* in violating certain ordinances regarding the maintenance of certain structures and the housing of animals on the Property. Accordingly, I believe that there is a genuine issue of material fact that Genesis has breached the Lease provision preventing Genesis from using the Property for a "purpose which violates any law."

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 10 MAY 2016)

IN RE J.S.K. No. 15-1185	Cabarrus (15JA4) (15JA5)	Affirmed
IN RE SMITH No. 15-195	Columbus (13SP121)	Reversed and Remanded
IN RE T.L.M. No. 15-894	Richmond (15JB22)	Affirmed
STATE v. GRADY No. 15-433	Wayne (11CRS51265)	No Error
STATE v. HOLDEN No. 15-460	Vance (11CRS1136)	No Error
STATE v. JOE No. 15-878	Forsyth (12CRS61062-63) (13CRS54259-61) (13CRS7165) (14CRS9)	Vacated and Remanded
STATE v. KNIGHT No. 15-917	New Hanover (14CRS52925)	No Error
STATE v. LOPEZ No. 15-1072	Cabarrus (13CRS50796-97)	No Error
STATE v. PERRY No. 15-836	Mecklenburg (11CRS255017-18)	No Error
STATE v. WALLACE No. 15-783	Iredell (12CRS1423) (12CRS50902-03)	No Error
STATE v. WATERS No. 15-645	Iredell (06CRS57322) (06CRS57375) (06CRS58899) (06CRS60631-36) (14CRS2065-66)	Affirmed
U.S. BANK NAT'L ASS'N v. PINKNEY No. 15-797	Forsyth (14CVS5603)	Affirmed
UNIVERSAL CAB CO., INC. v. CITY OF CHARLOTTE No. 15-752	Mecklenburg (14CVS10914)	Affirmed

BLONDELL v. AHMED

[247 N.C. App. 480 (2016)]

COLLEEN BLONDELL, PLAINTIFF

v.

SHAKIL AHMED, SHABANA AHMED, MICHAEL FEKETE AND
SUSAN ELIZABETH FEKETE, INDIVIDUALLY, DEFENDANTS

No. COA15-796

Filed 17 May 2016

1. Vendor and Purchaser—realtor—action to collect commission—cancellation agreement

The trial court erred by granting summary judgment for the sellers of a house in an action by a realtor to collect a commission. Although the sellers and the realtor had agreed to cancel the listing, there was a dispute about when the Listing Agreement was actually terminated. Based on the parole evidence rule, an e-mail could not be considered because it contradicted the unambiguous language contained in the termination agreement. The sellers' execution of the Termination Agreement was an offer to terminate the listing agreement, which was not accepted until the termination agreement was executed by realtor.

2. Vendor and Purchaser—realtor—action to collect commission—sellers' breach of good faith

In an action by a realtor to collect a commission from the sellers of a house, there was evidence that created a genuine issue of material fact as to whether the sellers breached their duty of good faith and fair dealing and summary judgment should not have been granted for them. Clearly, a jury could determine that the sellers breached their duty of good faith and fair dealing by failing to disclose to the realtor a pending offer when they asked realtor to accept their offer to terminate the listing agreement.

Judge BRYANT dissenting.

Appeal by Plaintiff from order entered 12 January 2015 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 12 January 2016.

Martin & Gifford, PLLC, by William H. Gifford, Jr., for the Plaintiff-Appellant.

BLONDELL v. AHMED

[247 N.C. App. 480 (2016)]

Jordan Price Wall Gray Jones & Carlton, PLLC, by J. Matthew Waters and Joseph E. Propst, for the Defendants-Appellees.

DILLON, Judge.

Plaintiff Colleen Blondell (“Agent”) brought this action to collect a real estate commission she claims is due under a listing agreement (“Listing Agreement”) that her real estate firm entered into with Defendants Shakil and Shabana Ahmed (“Sellers”) to sell Sellers’ home. Agent appeals from the trial court’s order granting the Sellers’ motion for summary judgment. Because we believe that there is a genuine issue of fact as to whether Sellers breached their duty of good faith and fair dealing when they negotiated for the termination of the Listing Agreement, we reverse and remand for further proceedings consistent with this opinion.

I. Background

Agent is a real estate broker licensed by the North Carolina Real Estate Commission. She works as an agent with the firm Kiegiel, LLC d/b/a Keystone Properties (“Keystone Properties”). Sellers owned a home in Wake County. A timeline of events necessary for understanding the issues on appeal is as follows:

A. Parties Enter Into Listing Agreement; Agent Procures Offer

In March 2013, Sellers and Keystone Properties entered into the Listing Agreement. The parties used the “Exclusive Right to Sell Listing Agreement” form produced by the North Carolina Association of REALTORS®, Inc.¹ Pursuant to the Agreement, the listing would be for a period of one year (expiring in March 2014).

On 3 April 2013, Agent showed Sellers’ home to Michael and Susan Fekete² (“Buyers”). On 6 April 2013, Buyers made an offer which Agent presented to Sellers. Sellers promptly rejected the offer. Over the course of the next few weeks, Agent had a number of communications with both Sellers and Buyers regarding the Sellers’ home.

1. This Association is a private organization comprised of licensed real estate brokers. Membership in the Association is not compulsory. The relationship between the Association and its broker members is analogous to the relationship between licensed attorneys and the North Carolina Bar Association.

2. The Feketes were named defendants in this action; however, Agent has since dismissed all claims against the Feketes.

BLONDELL v. AHMED

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B. Parties Enter Termination Agreement; Sellers Sell Home To Buyers

On 22 April 2013, the Sellers informed Agent that they no longer wished to list their home for sale and of their desire to terminate the Listing Agreement. Accordingly, Agent prepared the Termination Agreement using another form provided by the Association of REALTORS® (entitled “Termination of Agency Agreement and Release,” hereinafter “Termination Agreement”). This Termination Agreement essentially provided that the parties would no longer be bound by the Listing Agreement. Further, the Termination Agreement provided that it would become “effective on the date that it has been signed by **both** the Parties.” (Emphasis added.)

That same evening (22 April), Agent e-mailed Sellers, attaching the Termination Agreement *unsigned*. The next day (23 April), Sellers executed the Termination Agreement and e-mailed it back to Agent.

Sometime thereafter, but prior to 2 May 2013 – without the knowledge of Agent – Buyers and Sellers met to discuss a possible transaction. On 2 May 2013, Sellers and Buyers tentatively agreed to a purchase price for the home. On 9 May 2013, Buyers presented a written offer to Sellers based on their verbal understanding.

Prior to executing Buyers’ offer, Sellers contacted Agent about the status of the Termination Agreement (which Sellers had signed and returned on 23 April). During this communication, Sellers did not disclose to Agent that they had a written offer from Buyers that they intended to sign.

On 10 May 2013, Agent executed the Termination Agreement on behalf of Keystone Properties and e-mailed a copy to Sellers.

On 11 May 2013, Sellers executed the contract to sell their home to Buyers. The transaction closed in late June 2013, unbeknownst to Agent.

Agent commenced this action against Sellers contending that, pursuant to the Listing Agreement, Sellers became obligated to pay Keystone Properties a real estate commission when Sellers sold their home to Buyers.³ Sellers answered, alleging that no commission was due because the Listing Agreement had been terminated in the Termination

3. Keystone Properties assigned to Agent all of their rights – including the right to any commission that may be owed – in the Listing Agreement.

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Agreement. After a hearing, the trial court entered summary judgment in favor of Sellers. Agent timely appealed.

II. Analysis

[1] The parties agree that the Listing Agreement would entitle Keystone Properties to a real estate commission in the absence of an effective termination agreement. Specifically, the Listing Agreement obligated Sellers to pay a commission if their home sold within the Agreement's one-year term.

The Termination Agreement, however, unambiguously states that Sellers were released from any obligation they may otherwise have under the Listing Agreement. Specifically, the Termination Agreement states:

2. Termination of Agreement. The Parties agree that all rights and obligations arising on account of the [Listing] Agreement are hereby terminated, and hereby release each other from their respective obligations under the Agreement.

3. Release from Liability. The Parties further release and forever discharge each other and their respective successors in interest from any and all claims, demands, rights and causes of action of whatsoever kind and nature arising from the [Listing] Agreement and the agency relationship existing between them.

Accordingly, if the Termination Agreement is enforceable, Sellers would be entitled to summary judgment in this case.

Agent argues that Sellers should not be allowed to benefit from the Termination Agreement. Specifically, Agent contends that Sellers breached their duty of good faith and fair dealing when Sellers negotiated for the termination of the Listing Agreement without disclosing to Agent or Keystone Properties that Sellers were negotiating directly with Buyers.

It is axiomatic that Sellers owed a duty of good faith and fair dealing to Keystone Properties during the term of the Listing Agreement and during the negotiation of the termination of that Agreement. Indeed, our Supreme Court has recently reiterated the long standing principle that there is implied in every contract a covenant of good faith and fair dealing. *Arnesen v. Rivers Edge Golf Club*, ___ N.C. ___, ___, 781 S.E.2d 1 (2015); see also *Great Am. Ins. Co. v. C.G. Tate Constr. Co.*, 303 N.C. 387, 399, 279 S.E.2d 769, 776 (1981) (recognizing "the common law

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principle that implicit in every contract is the obligation of each party to act in good faith”). Also, our Court has consistently held that “[i]t is a basic principle of contract law that a party who enters into an enforceable contract is required to act in good faith and to make reasonable efforts to perform his obligations under the agreement.” *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 40 N.C. App. 743, 746, 253 S.E.2d 625, 627 (1979).

The parties dispute when the Listing Agreement was actually terminated. Sellers contend that the Listing Agreement terminated on 23 April when Sellers executed the Termination Agreement. Sellers point to the language in Agent’s 22 April e-mail (attaching the Termination Agreement *unsigned*) in which Agent stated:

Attached you will find the Termination Agreement for the listing of your home. Please sign the form and return it to me at your earliest convenience thereby severing any obligation we have with one another.

Sellers contend that the e-mail constituted an offer that was accepted when they signed the agreement on 23 April. However, based on the Parol Evidence Rule, which has been adopted by our Supreme Court, we cannot consider this e-mail language because it contradicts the unambiguous language contained in the Termination Agreement. *See Root v. Allstate Ins. Co.*, 272 N.C. 580, 587, 158 S.E.2d 829, 835 (1968) (recognizing the general rule that “when a written instrument is introduced into evidence, its terms may not be contradicted by parol or extrinsic evidence, and it is presumed that all prior negotiations are merged into the written instrument”) The Termination Agreement unambiguously stated that “[t]his Agreement shall be effective on the date it has been signed by *both the Parties*.”

Our Court has recognized that the Parol Evidence Rule is a rule of substantive law which “prohibits the consideration of evidence as to anything which happened prior to or simultaneously with the making of a contract which would vary the terms of the agreement.” *Harrell v. First Union Nat. Bank*, 76 N.C. App. 666, 667, 334 S.E.2d 109, 110 (1985). In *Harrell*, the plaintiff signed a “Letter of Consent” with a bank that provided that certain common stock he owned could be used as collateral for advances to his son-in-law in the future. *Id.* At the time of signing, however, the plaintiff told the loan officer (defendant) that he did not want any advances to be made to his son-in-law unless he approved the advances, though the “Letter of Consent” did not require that he approve advances. The loan officer replied, “That’s right.” *Id.*

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Subsequently, several advances were made to the son-in-law secured by the plaintiff's stock without the plaintiff's approval, and the loan officer sold the stock when the loans were not paid. The plaintiff filed an action for the wrongful sale of his stock, and this Court affirmed the trial court's directed verdict in favor of the bank, holding that the Parol Evidence Rule barred the Court from considering the communication made contemporaneously with the signing of the contract. *Id.* at 667, 334 S.E.2d at 110-11.

Here, there is nothing within the four corners of the Termination Agreement that obfuscates or contradicts the term that it would not be effective until signed by *both* parties. Just as this Court did not consider a conversation that the plaintiff had with a loan officer in *Harrell* directly contradicting a term in the contract, we cannot consider the language in Agent's 22 April e-mail. The Termination Agreement is unambiguous. *See Thompson v. First Citizens Bank & Trust Co.*, 151 N.C. App. 704, 709, 567 S.E.2d 184, 188 (2002) ("Generally, the parol evidence rule prohibits the admission of evidence to contradict or add to the terms of a clear and unambiguous contract."). Accordingly, we hold that the Listing Agreement was not terminated nor did the obligations thereunder cease until the Termination Agreement was executed by Agent (on behalf of Keystone Properties) on 10 May. That is, Sellers' execution of the Termination Agreement was an *offer* to terminate the Listing Agreement, which was not accepted until the Termination Agreement was executed by Agent.

[2] Having concluded that the Listing Agreement was still in full effect until 10 May, we conclude that there is evidence which creates a genuine issue of material fact whether Sellers breached their duty of good faith and fair dealing under that Agreement. Specifically, prior to 10 May, before Sellers' offer to terminate the Listing Agreement was accepted by Agent and while Sellers still owed a duty of good faith and fair dealing toward Agent under the Listing Agreement: (1) Agent presented an offer from Buyers to Sellers, which would involve the paying of a commission to Agent under the Listing Agreement; (2) Sellers rejected the offer and then informed Agent that they no longer wanted to list their house for sale; (3) Sellers made an offer to Agent to terminate the Listing Agreement; (4) Sellers began negotiating directly with Buyers; (5) Sellers received a written offer in hand from Buyers that they were prepared to sign and which would not involve the paying of any real estate commission; (6) with Buyers' offer in hand, Sellers contacted Agent and asked her to accept their offer to terminate the Listing Agreement; (7) Sellers made the request to Agent without disclosing to Agent that they were

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about to accept Buyers' offer; and (8) Sellers signed Buyers' offer almost immediately after receiving the fully executed Termination Agreement from Agent. Clearly, a jury could determine that Sellers breached their duty of good faith and fair dealing by failing to disclose to Agent the pending offer when they asked Agent to accept their offer to terminate the Listing Agreement.

We are persuaded by our Court's decision in *Jaudon v. Swink*, 51 N.C. App. 433, 276 S.E.2d 511 (1981). In *Jaudon*, the real estate agent had a listing agreement with a homeowner/seller which was terminable at the will of either party. During the term of the listing, the agent showed the seller's home to the eventual buyers twice. During the second showing, the buyers made an offer through the agent which the seller promptly rejected. The seller then told the agent that he was terminating their listing agreement. The next day, the buyers went back to the seller's home and entered into a contract to purchase the home directly from the seller. *Id.* at 433-34, 276 S.E.2d at 512. This Court held that the evidence in *Jaudon* was "sufficient to submit to the trier of the facts [to determine] whether defendant terminated the listing agreement in good faith." *Id.* at 436, 276 S.E.2d at 513.

As in *Jaudon*, there is sufficient evidence in the instant case to raise a genuine issue of material fact as to whether the Sellers breached their implied contractual duty of good faith and fair dealing. The questions of whether the Ahmeds breached their duty of good faith and whether Blondell is entitled to her real estate commission are issues of fact for the jury to decide. *Id.*; *Lindsey v. Speight*, 224 N.C. 453, 455, 31 S.E.2d 371, 372 (1944). Accordingly, the trial court erred in granting the Sellers' motion for summary judgment.

REVERSED AND REMANDED.

Judge ZACHARY concurs.

Judge BRYANT dissents by separate opinion.

BRYANT, Judge, dissenting.

The majority opinion reverses and remands the trial court's order on summary judgment, determining that there existed a genuine issue of material fact regarding whether Sellers breached their duty of good faith and fair dealing when they "negotiated for the termination of the Listing Agreement." Because I do not see evidence in the record to indicate a

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genuine issue of material fact, *i.e.*, that Sellers violated their duty of good faith and fair dealing, especially where Agent herself represented that she no longer had an agreement with Sellers, I respectfully dissent.

I disagree with the majority that the facts are at issue. All parties agree on the facts and the basic timeline of the relevant events. Therefore, our obligation on appeal is to review *de novo* whether the trial court erred as a matter of law in granting summary judgment. *See In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

In order to reverse the trial court as the majority would do, there has to be evidence to indicate Sellers intended to deceive or conceal material facts from Agent. *See In re Estate of Loftin*, 285 N.C. 717, 722, 208 S.E.2d 670, 674 (1974) (citations omitted) (holding that in order to obtain relief from a contract on the ground that it was procured by fraud, a party must show false representation of a past or subsisting material fact, made with fraudulent intent and with knowledge of its falsity, which representation was relied upon when the party executed the instrument); *see also Hester v. Hubert Vester Ford, Inc.*, ___ N.C. App. ___, ___, 767 S.E.2d 129, 136 (2015) (holding that where plaintiff presented evidence that defendant intentionally made false representations which induced plaintiff to sign a contract, plaintiff's claim for fraud should survive summary judgment). However, Agent can point to nothing that would indicate such. Rather, Agent, in her deposition and brief, is able to offer only vague equivocations as to Sellers' alleged intent to fraudulently conceal from plaintiff the existence of the 9 May offer which resulted in the contract executed 11 May 2013. In fact, in ruling on summary judgment as to Agent's claims for breach of contract, fraud, or unjust enrichment, the trial court particularly noted that, in addition to the records and arguments of counsel, it reviewed the deposition of "Plaintiff Colleen Blondell," before determining that defendants were entitled to judgment as a matter of law.

Agent's vague allegations in her complaint and in her deposition fail to establish a factual basis for her claims and are insufficient to give rise to an inference of Sellers' intent to deceive plaintiff. Agent's allegations fail especially where Sellers did not initiate contact with Buyers as Sellers did not know the identity of the party who made the previous offer through Agent until Buyers sent their letter dated 25 April 2013. Indeed, the fact that earlier that same day, on 25 April 2013, Agent emailed Buyers stating that she no longer worked with Sellers, cuts decidedly against Agent's argument and the majority opinion, that Agent and Sellers' Listing Agreement was still valid.

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In *Jaudon v. Swink*, 51 N.C. App. 433, 276 S.E.2d 511 (1981), upon which the majority opinion relies, this Court found that because the seller of the real estate in question was present when the realtor brought the buyer to the home, it could be inferred that the seller knew the identity of the buyer. *Id.* at 436, 276 S.E.2d at 513.

Here, Sellers first came to know the identity of Buyers as a result of Buyers' 25 April 2013 letter to Sellers; the parties never met in person until 30 April 2013. Despite the fact that both the seller in *Jaudon* and Sellers here executed contracts to sell their respective properties the day after their listing agreements with their realtors terminated (in *Jaudon* the agreement and termination were both oral), *id.* at 433–34, 276 S.E.2d at 512, the facts in the instant case make clear that the termination of the Listing Agreement was instigated by Agent on 22 April 2013, over two weeks before Sellers executed a contract to sell their home with Buyers on 10 May 2013, regardless of when Agent ultimately signed the Termination Agreement. Indeed, Sellers promptly returned the signed Termination Agreement on 23 April 2013, which then remained in Agent's possession, unsigned for seventeen days. The majority characterizes this transaction—Sellers' signing of the Termination Agreement on 23 April 2013—as an *offer* by Sellers to terminate the Listing Agreement, which offer was not accepted until signed by Agent on 10 May 2013. I disagree with this characterization.

Nevertheless, even assuming Agent and Sellers' obligations towards one another were terminated at the latest on 10 May 2013, as Agent cannot point to any evidence in the record that would give rise to an inference of fraud or misrepresentation to survive a motion for summary judgment, I would affirm the trial court's entry of summary judgment in favor of Sellers.

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BRIAN BLUE, PLAINTIFF

v.

MOUNTAIRE FARMS, INC., MOUNTAIRE FARMS OF NORTH CAROLINA CORP., MOUNTAIRE FARMS, LLC, CHARLES BRANTON, DANIEL PATE, JAMES LANIER, ROBERT GARROUTTE, A/K/A ROBERT GARROUTTE, JR., CHRISTOPHER SMITH, HALLEY ONDONA, THOMAS SAUFLEY, DETRA SWAIN, AS EXECUTRIX OF THE ESTATE OF CLIFTON SWAIN, THE ESTATE OF CLIFTON SWAIN, AND BRADFORD SCOTT HANCOX, PUBLIC ADMINISTRATOR OF CUMBERLAND COUNTY, NORTH CAROLINA, AND AS SUCCESSOR OR SUBSTITUTE PERSONAL REPRESENTATIVE AND/OR ADMINISTRATOR AND/OR COLLECTOR OF THE ESTATE OF CLIFTON SWAIN, DEFENDANTS

No. COA15-751

Filed 17 May 2016

1. Appeal and Error—appealability—interlocutory orders—denial of summary judgment—Woodson and Pleasant claims—substantial right affected

The Court of Appeals had jurisdiction over issues in an appeal arising from an industrial accident where the appeal was interlocutory but the issues involved the denial of summary judgment on *Woodson* and *Pleasant* claims. Denials of the dispositive motions involving those claims affected substantial rights and were immediately appealable.

2. Workers' Compensation—Woodson claim—willful and wanton negligence—not sufficient

The trial court erred in denying defendant's motion for summary judgment as to plaintiff's *Woodson* claim in an action arising from the release of ammonia at a poultry processing plant during the maintenance of equipment. Willful and wanton negligence alone is not enough to establish a *Woodson* claim. The conduct must be so egregious as to be tantamount to an intentional tort. The mere fact, seen in hindsight, that additional safety measures should have been implemented was not enough to establish that the corporate defendants intentionally engaged in conduct that they knew was substantially certain to cause serious injury or death to their employees.

3. Workers' Compensation—Woodson claim—safety violations—not determinative

In a *Woodson* claim arising from an industrial accident, prior violations did not demonstrate egregious conduct by the corporate defendant in allowing a chicken processing plant to operate in non-compliance with applicable safety regulations. OSHA violations are not determinative, but they are a factor in determining whether a *Woodson* claim has been established.

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4. Workers' Compensation—Pleasant claims against individuals—summary judgment for defendants—erroneous

The trial court erred by denying the individual defendants' motion for summary judgment on plaintiff's *Pleasant* claims arising from an industrial accident. The individual defendants were not aware of the dangers involved; their decisions did not amount to willful, wanton and reckless conduct; and mistakes did not amount to the sort of willful, wanton, and reckless conduct between co-workers that lies at the heart of a *Pleasant* claim.

Appeal by defendants and cross-appeal by plaintiff from order entered 31 December 2014 by Judge James Gregory Bell in Robeson County Superior Court. Heard in the Court of Appeals 30 November 2015.

Smith Moore Leatherwood LLP, by Lisa W. Arthur and Lisa K. Shortt, for defendants.

Pinto Coates Kyre & Bowers, PLLC, by Jon Ward, Paul D. Coates, and Adam L. White, A.G. Linett & Associates, P.A., by Adam G. Linett and J. Rodrigo Pocasangre, for plaintiff.

DAVIS, Judge.

This appeal arises out of a tragic accident involving the release of ammonia at a poultry processing plant in which Brian Blue ("Plaintiff") was severely injured and a co-worker, Clifton Swain ("Swain"), was killed. In his lawsuit, Plaintiff asserted *Woodson*¹ claims against Defendants Mountaire Farms, Inc. ("Mountaire Farms"), Mountaire Farms of North Carolina Corp., and Mountaire Farms, LLC (collectively "the Mountaire Defendants"). Plaintiff also asserted *Pleasant*² claims against Charles Branton; Daniel Pate; James Lanier;³ Robert Garrouette, a/k/a Robert Garrouette, Jr.; Christopher Smith; Halley Ondona; Thomas

1. *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

2. *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985).

3. While both Plaintiff's complaint and the caption of the trial court's order from which this appeal arises lists James Lanier as a defendant, the record does not contain any indication that an individual by this name was employed by the Mountaire Defendants at any time relevant to the events giving rise to this appeal. Nor do the parties reference anyone by this name in their briefs to this Court. The record also fails to show that service of process was ever made on this defendant, and no responsive pleading was filed on his behalf.

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Saufley; Detra Swain, as executrix of the Estate of Clifton Swain; the Estate of Clifton Swain; and Bradford Scott Hancox, public administrator of Cumberland County, North Carolina, and as successor or substitute personal representative and/or administrator and/or collector of the Estate of Clifton Swain (collectively “the Individual Defendants”).

All of the Defendants appeal from the trial court’s order denying their motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Plaintiff cross-appeals from the trial court’s denial of his motion for summary judgment as to Defendants’ affirmative defense of contributory negligence. After careful review, we reverse the trial court’s denial of Defendants’ motion for summary judgment and remand for entry of summary judgment in favor of Defendants on all claims.

Factual Background

Mountaire Farms is a poultry processing plant located in Robeson County, North Carolina. As part of its business, Mountaire Farms utilizes anhydrous ammonia refrigeration to maintain the temperature of its poultry. This is accomplished, in part, through the use of machinery called “votators,”⁴ which encase the ammonia.

At all times relevant to this appeal, Mountaire Farms’ Engineering and Maintenance Department was responsible for overseeing the day-to-day operation and upkeep of the plant. The head of the department was Halley Ondona (“Ondona”). Christopher Smith (“Smith”), the maintenance manager, reported to Ondona. Robert Garrouette (“Garrouette”), the processing maintenance manager, in turn, reported to Smith. Below Garrouette was Jim Laird, the second processing area manager, who supervised several second processing shift superintendents, including Charles Branton (“Branton”). Thomas Saufley (“Saufley”) was Mountaire Farms’ safety and health manager who was in charge of overseeing its safety program. Daniel Pate (“Pate”) was Mountaire Farms’ second processing maintenance superintendent, who oversaw the operations of the second processing operation.

The second processing operation was divided into two separate departments — the refrigeration department and the maintenance department. The refrigeration department was comprised of mechanics

4. The manufacturer’s manual explains that votators “are scraped surface heat exchangers with jacketed shell pressure vessels. The jacket around the ingredient area of the vessel allows for ammonia cooling of the product medium to the desired temperature prior to packaging.”

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who dealt with any maintenance tasks at the plant involving ammonia. The maintenance department, in turn, handled non-refrigeration maintenance tasks. When the maintenance department was required to perform maintenance on equipment containing ammonia, the refrigeration department was typically tasked with ensuring the ammonia was evacuated from the equipment prior to the maintenance department beginning its work.

Branton's job was to supervise the plant's maintenance mechanics. He was the direct supervisor of Swain, who was the mechanic in charge of performing maintenance on the plant's votators. Branton also supervised Plaintiff, a maintenance mechanic responsible for repairing and maintaining certain processing equipment at the plant. Both Plaintiff and Swain worked in the maintenance department rather than the refrigeration department.

On 1 April 2009, the United States Department of Agriculture ("the USDA") performed an inspection of the plant. As a result of this inspection, Mountaire Farms was ordered by the USDA to replace the inner sleeve of one of its votators.

In response to the USDA's findings, a new votator sleeve was ordered. Ondona, Smith, and Garrouette held several meetings to discuss whether the new votator sleeve could be installed by Mountaire Farms employees or, alternatively, whether independent contractors needed to be hired for the installation. Ultimately, it was determined that Mountaire Farms employees could perform the installation.⁵

The new votator sleeve arrived at the plant on Tuesday, 16 June 2009. Branton assigned the installation of the votator sleeve to Swain for the following weekend and inputted the corresponding work order on the Mountaire Maintenance Log — a spreadsheet that organized maintenance tasks to be performed and identified the mechanic who was responsible for completing each task. The maintenance log did not list any Mountaire Farms employee other than Swain in connection with the installation of the votator sleeve.

Prior to the installation, Branton provided Swain with selected pages of the manufacturer's operator's manual for the votator, which detailed the procedure for replacing the inner sleeve of a votator. The following warning was contained within these pages of the manual:

5. There is conflicting evidence in the record as to who specifically made the decision to use employees of Mountaire Farms to install the votator sleeve.

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DANGER: Before removing the heat exchanger tube from the jacket, all refrigerant⁶ must be evacuated from the jacket assembly.

After Swain had reviewed these pages from the manual, Branton asked him “if he’d ever made the repair before . . . if there was gonna be a problem.” Swain responded that he “didn’t see a problem” with the assignment.

On the morning of Saturday, 20 June 2009, Branton met with the second processing shift mechanics he supervised — including Swain and Plaintiff — before they began work. During this meeting, Branton briefed the mechanics on their assigned tasks for the day based on the assignments previously entered in the maintenance log. Once again, Swain was the only employee mentioned with regard to the votator sleeve replacement.

Swain then began work on the votator sleeve project while Plaintiff performed other unrelated assignments in a separate area of the plant. Sometime later that morning, Swain called over the radio to request Plaintiff’s assistance with the replacement of the votator sleeve. Plaintiff then “went over to see what [he] could do for [Swain.]”

As Plaintiff entered the room where Swain was working, Swain was in the process of unscrewing a valve on the votator. Branton was observing Swain’s work from a position next to the ladder upon which Swain was standing. As he saw Swain unscrewing the valve, Plaintiff — who was aware of the fact that the votator contained ammonia and of the hazardous nature of ammonia — shouted at Swain: “Stop Cliff, stop.” However, his warning was too late as the pressure behind the partially opened votator sleeve forced ammonia out of the votator in an explosive manner, which caused the room to be filled with ammonia almost instantaneously.

Swain died as a result of his exposure to the ammonia, and Plaintiff and Branton were both seriously injured. Plaintiff’s injuries left him in a coma for four to five months. He was also required to undergo a double lung transplant as a result of his exposure to the ammonia. Branton required hospitalization and was incapacitated for approximately forty days.

6. An internal document prepared by Mountaire Farms and included in the exhibits to the record entitled “Specific Programs within the Written Compliance Plan” explains that “Mountaire Farms . . . utilizes Anhydrous Ammonia as a refrigerant coolant in its processing operation.”

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A subsequent investigation performed by the North Carolina Department of Environment and Natural Resources Division of Air Quality (“DAQ”) found several violations by Mountaire Farms of its risk management and safety guidelines in connection with the accident. As a result, DAQ imposed a civil penalty against Mountaire Farms in the amount of \$25,000.00. The North Carolina Occupational Safety and Health Review Commission performed its own investigation after the 20 June 2009 accident and assessed a penalty against Mountaire Farms in the amount of \$33,950.00.

On 19 June 2012, Plaintiff filed a lawsuit in Robeson County Superior Court asserting a *Woodson* claim against the Mountaire Defendants as well as a *Pleasant* claim against each of the Individual Defendants. On 20 August 2012, all Defendants except for Garrouette and Ondona filed motions to dismiss Plaintiff’s claims pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure. Garrouette and Ondona filed their own motions to dismiss on 31 August 2012 and 12 September 2012, respectively.

On 5 November 2012, Defendants’ motions to dismiss were heard before the Honorable Mary Ann L. Tally. Judge Tally entered an order on 28 November 2012 denying the motions. Defendants filed an answer to the complaint on that same date.

On 23 June 2014, Plaintiff filed a motion for summary judgment as to the defense of contributory negligence, which was listed as an affirmative defense in Defendants’ answer. Defendants filed a motion for summary judgment as to all claims contained in Plaintiff’s complaint on 25 August 2014. Plaintiff voluntarily dismissed his claims against Mountaire Farms, LLC and Pate on 25 September 2014.

On 1 December 2014, the parties’ summary judgment motions were heard before the Honorable James Gregory Bell. The trial court entered an order on 31 December 2014 denying both motions. On 12 January 2015, Defendants filed a notice of appeal, and on 15 January 2015, Plaintiff cross-appealed.

Analysis

I. Appellate Jurisdiction

[1] As an initial matter, we note that Defendants’ appeal is interlocutory. “[W]hether an appeal is interlocutory presents a jurisdictional issue, and this Court has an obligation to address the issue *sua sponte*.” *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation, quotation marks, and brackets omitted). “A final

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judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.” *Id.* (citation omitted). Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather “directs some further proceeding preliminary to the final decree.” *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985).

Generally, there is no right of immediate appeal from an interlocutory order. *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, 228 N.C. App. 314, 317, 745 S.E.2d 69, 72 (2013). The prohibition against appeals from interlocutory orders “prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts.” *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 800, 526 S.E.2d 494, 496 (2000) (citation and brackets omitted).

However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court’s decision deprives the appellant of a substantial right which would be lost absent immediate review.

N.C. Dep’t of Transp. v. Page, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (internal citations omitted).

This Court has held that a defendant’s interlocutory appeal from the denial of a dispositive motion involving a *Woodson* claim affects a substantial right and is therefore immediately appealable. *See Edwards v. GE Lighting Systems, Inc.*, 193 N.C. App. 578, 581, 668 S.E.2d 114, 116 (2008) (holding that employer’s appeal from denial of motion for summary judgment on *Woodson* claim was proper because denial of motion affected employer’s substantial right of immunity from liability based on North Carolina Workers’ Compensation Act).

This same principle applies equally to *Pleasant* claims as such claims are also an exception to the exclusivity of the Workers’ Compensation Act. *See Bruno v. Concept Fabrics, Inc.*, 140 N.C. App. 81, 85, 535 S.E.2d 408, 411 (2000) (“Normally, the Workers’ Compensation Act provides an exclusive remedy for an employee injured as a result of

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an on-the-job accident. Our Supreme Court held in *Pleasant*, however, that the Workers' Compensation Act does not shield a co-employee from liability for injury to another employee caused by willful, wanton and reckless negligence." (internal citations omitted)). Therefore, this Court possesses jurisdiction over both of the issues raised in Defendants' appeal.⁷

II. Woodson Claim

[2] On appeal, the Mountaire Defendants argue that the trial court erred in denying their motion for summary judgment as to Plaintiff's *Woodson* claim. We agree.

The standard of review relating to the granting or denial of a summary judgment motion is whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. In ruling on the motion, the court must consider the evidence in the light most favorable to the nonmovant, who is entitled to the benefit of all favorable inferences which may reasonably be drawn from the facts proffered. Summary judgment may be properly shown by proving that an essential element of the plaintiff's case is non-existent.

JPMorgan Chase Bank, Nat'l Ass'n v. Browning, 230 N.C. App. 537, 540-41, 750 S.E.2d 555, 559 (2013) (internal citations and quotation marks omitted). "When the denial of a summary judgment motion is properly before this Court . . . the standard of review is *de novo*." *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 191 N.C. App. 581, 583, 664 S.E.2d 8, 10 (2008).

As a general proposition, the North Carolina Workers' Compensation Act ("the Workers' Compensation Act") provides the exclusive remedy available to employees seeking relief for work-related injuries resulting from the acts or omissions of their employers. *See Wake Cty. Hosp. System, Inc. v. Safety Nat. Cas. Corp.*, 127 N.C. App. 33, 40, 487 S.E.2d 789, 793 ("[T]he exclusivity provision of the Act precludes a claim for

7. Because we hold that Defendants' motion for summary judgment was improperly denied by the trial court, Plaintiff's cross-appeal is rendered moot and, therefore, we need not determine whether we possess jurisdiction to consider the cross-appeal. *See Sellers v. FMC Corp.*, 216 N.C. App. 134, 143, 716 S.E.2d 661, 667 (2011) ("Due to our above decision on plaintiff's appeal, we must dismiss defendant's issues on cross-appeal as moot . . ."), *disc. review denied*, 366 N.C. 250, 731 S.E.2d 429 (2012). Defendants' motion to dismiss the cross-appeal is also denied as moot.

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ordinary negligence, even when the employer's conduct constitutes willful or wanton negligence.”), *disc. review denied*, 347 N.C. 410, 494 S.E.2d 600 (1997). We explained the rationale underlying this exclusive remedy in *Edwards*.

The North Carolina Workers' Compensation Act grants employers who fall under the purview of the act immunity from suit for civil negligence actions. In exchange for this immunity, the Act imposes liability, including medical expenses and lost income, on employers for work-related injuries without the worker having to prove employer negligence or face affirmative defenses such as contributory negligence and the fellow servant rule.

Edwards, 193 N.C. App. at 582, 668 S.E.2d at 117 (internal citations, quotation marks, and brackets omitted).

In *Woodson*, our Supreme Court adopted a narrow exception to the exclusivity of the Workers' Compensation Act as a remedy for injuries in the workplace. The employer in *Woodson* was a construction company that specialized in trench excavation. *Woodson*, 329 N.C. at 334, 407 S.E.2d at 225. Acting in disregard of applicable safety regulations and the obvious danger of a potential cave-in, the company's president ordered his employees to work in a trench that had sheer, unstable walls and lacked proper shoring without the use of a trench box (despite the fact that one was available). *Id.* at 345-46, 407 S.E.2d at 231. One of the company's employees was killed when the trench in which he was working collapsed. *Id.* at 336, 407 S.E.2d at 226. The record revealed that the company had been cited at least four times in the preceding six and a half years for violations of trenching safety regulations. *Id.* at 345, 407 S.E.2d at 231.

Based on these facts, our Supreme Court ruled that there was sufficient evidence from which “a reasonable juror could determine that upon placing a man in this trench serious injury or death as a result of a cave-in was a substantial certainty rather than an unforeseeable event, mere possibility, or even substantial probability.” *Id.* The Court proceeded to hold that

when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is

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tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the [Workers' Compensation] Act.

Id. at 340-41, 407 S.E.2d at 228.

The elements of a *Woodson* claim are: “(1) misconduct by the employer; (2) intentionally engaged in; (3) with the knowledge that the misconduct is substantially certain to cause serious injury or death to an employee; and (4) that employee is injured as a consequence of the misconduct.” *Hamby v. Profile Products, LLC*, 197 N.C. App. 99, 106, 676 S.E.2d 594, 599 (2009) (citation and quotation marks omitted).

The Supreme Court has cautioned, however, that “[t]he *Woodson* exception represents a narrow holding in a fact-specific case, and its guidelines stand by themselves. This exception applies only in the most egregious cases of employer misconduct. Such circumstances exist where there is uncontroverted evidence of the employer’s intentional misconduct and where such misconduct is substantially certain to lead to the employee’s serious injury or death.” *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 557, 597 S.E.2d 665, 668 (2003). This Court has held that “[w]illful and wanton negligence alone is not enough to establish a *Woodson* claim; a higher degree of negligence is required. The conduct must be so egregious as to be tantamount to an intentional tort.” *Shaw v. Goodyear Tire & Rubber Co.*, 225 N.C. App. 90, 101, 737 S.E.2d 168, 176 (citation omitted), *disc. review denied*, 367 N.C. 204, 748 S.E.2d 323 (2013).

In the present case, we conclude that the Mountaire Defendants were entitled to summary judgment on Plaintiff’s *Woodson* claim for several reasons. First, and most basically, it is undisputed that Plaintiff was not assigned to perform any work at all regarding the votator sleeve installation. As the record makes clear, *Swain* was the sole employee who was assigned this task. At no point was Plaintiff ever ordered by a supervisor to assist Swain with the project, and Plaintiff never actually performed any work on the installation. Instead, Plaintiff merely entered the room where Swain was working and “[t]he accident happened before [Plaintiff] could get to him.” Thus, Plaintiff’s injury occurred only after he voluntarily chose to enter the room in which Swain was working in response to a request for assistance from Swain, who did not occupy a supervisory position over Plaintiff. Moreover, Plaintiff’s deposition testimony makes clear that he did not inform his supervisor of his intent to assist Swain.

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Q. So you went there in response to Mr. Swain's request; is that right?

A. Yes, ma'am.

Q. You never spoke to Mr. Branton about going in to help Mr. Swain?

A. No, ma'am.

Consequently, the Mountaire Defendants did not place *Plaintiff* in danger in connection with the votator sleeve installation and, therefore, Plaintiff cannot establish a valid *Woodson* claim. In several prior cases, this Court has reached a similar conclusion where an employee engaged in a dangerous activity or placed himself in a dangerous area without first being instructed to do so by his employer. For example, in *Hamby*, the plaintiff was a truck-dump operator at a mulch company. On his own initiative, he decided to clear accumulated woodchips in an auger pit at his employer's plant that was used for grinding mulch. While doing so, he slipped and entangled his left leg in the augers, causing him to suffer serious injuries that ultimately required the amputation of his left leg above the knee. *Hamby*, 197 N.C. App. at 101, 676 S.E.2d at 596. The pit was found to be in violation of OSHA standards due to the fact that no protective guard rail surrounded it. The emergency deactivation switch for the auger pit was also inoperable at the time of the plaintiff's accident such that the augers could not be immediately shut down. *Id.*

The plaintiff brought a *Woodson* claim against his employer, and the trial court granted the employer's motion for summary judgment. *Id.* at 105, 676 S.E.2d at 598. On appeal, we affirmed the trial court's entry of summary judgment in favor of the employer, holding as follows:

Plaintiffs' forecast of evidence here shows that Hamby was injured by Terra-Mulch's inadequately guarded machinery — the rotating augers — in violation of OSHA standards. Our Supreme Court, however, [has] found this circumstance insufficient to establish a *Woodson* claim, even when coupled with an allegation that supervisors specifically directed the employee to work in the face of the hazard. *Plaintiffs' allegations and forecast of evidence in this case did not demonstrate that Hamby was specifically instructed to descend from the truck-dump operator platform in the manner that exposed him to the hazardous augers, or that Terra-Mulch was otherwise substantially certain he would be seriously*

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injured. Accordingly, we agree with the trial court that Plaintiffs' forecast of evidence at summary judgment was insufficient to establish their *Woodson* claim against Terra-Mulch.

Id. at 108, 676 S.E.2d at 600 (internal citations and quotation marks omitted and emphasis added).

In *Edwards*, an employee worked at his employer's plant, which manufactured industrial lighting through a process that "require[d] metal parts to be baked in annealing ovens in an oxygen-free gas which contains a high concentration of carbon monoxide." *Edwards*, 193 N.C. App. at 580, 668 S.E.2d at 115. The employee, an annealing oven operator, was working overtime and decided to take a break, choosing to do so behind one of the annealing ovens. However, due to a leak emanating from the rear of the annealing oven, he was exposed to fatal levels of carbon monoxide, ultimately causing his death. *Id.*

The employee's estate brought a *Woodson* claim against the employer. The employer filed a motion for summary judgment, which was denied by the trial court. *Id.* at 580, 668 S.E.2d at 115-16. On appeal, this Court held that because the employee had acted on his own initiative, the elements of a *Woodson* claim were lacking. We reasoned that

in contrast to *Woodson*, where the employer intentionally ordered the decedent to work in a known dangerous condition, in the instant case, decedent volunteered to work extra hours after his shift, and chose to take a break behind the annealing ovens, where the carbon monoxide concentration was very high. Although plaintiff contends that [the employer] could have done more to ensure its workers' safety, the evidence does not show that the employer engaged in misconduct *knowing* it was substantially certain to cause death or serious injury.

Id. at 584-85, 668 S.E.2d at 118 (citation, quotation marks, and brackets omitted).

The second primary reason why Plaintiff's *Woodson* claim fails as a matter of law is his inability to show knowledge on the part of the Mountaire Defendants that the attempt to replace the votator sleeve was substantially certain to cause serious injury or death. The evidence of record shows that Swain led his supervisor to believe that the installation of the votator sleeve could safely be performed. Swain informed Branton after examining the excerpt from the operator's manual that

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he “didn’t see a problem” with him performing the installation. This evidence belies the notion that Branton was on notice that Swain’s installation of the votator sleeve was substantially certain to result in serious injury or death.

Plaintiff points to his own deposition testimony in which he stated that he had a conversation with Swain prior to the accident in which Plaintiff expressed his belief that Swain could not perform the installation himself and that mechanics from Mountaire Farms’ refrigeration department needed to be involved. According to Plaintiff, Swain responded that he felt like he had no choice other than to perform the installation in order to keep his job. However, Plaintiff has failed to offer evidence that Plaintiff, Swain, or anyone else expressed concerns to management personnel at Mountaire Farms about Swain’s alleged inability to safely perform the installation.

Branton testified that he was unaware of the dangers posed by the installation in terms of the potential for the release of ammonia from the votator. His lack of awareness of this danger was aptly demonstrated by the fact that he stood next to Swain while Swain was performing the installation. Indeed, Branton testified that he did not know that there was any risk at all of ammonia being released during the replacement of the votator sleeve and, therefore, his testimony shows that he lacked any basis for believing that the refrigeration department needed to be brought in to assist with the project.

Q. If you had noted that this involved exposure – this involved an actual Ammonia exposure situation would you have signed [sic] this to Clifton Swain?

A. No.

Q. What would you have done?

A. Well, it would have – I would have gotten touch [sic] with refrigeration if it was – yeah. It would have been a – refrigeration would have been responsible to drain the Ammonia.

Q. Was refrigeration available that Saturday?

A. Yes.

....

Q. Have you ever assigned a task to your mechanics that you did not think they were qualified to do?

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A. No.

Q. At any time did Brian Blue or Clifton Swain express to you any concerns about doing this project?

A. No, no.

....

Q. Would you have -- you actually went into the room where Brian Blue was [sic] Clifton Swain were in there. Would you have gone into that room and exposed yourself to potential --

A. No.

Q. -- bodily injury or death if you thought --

A. No.

Q. -- there was exposure?

A. No.

Nor has Plaintiff shown that Mountaire Farms' managerial personnel had any basis for believing that any attempt by its mechanics to replace the votator sleeve was substantially certain to result in serious injury or death. While there was an internal discussion as to whether Mountaire Farms should hire an independent contractor to perform the installation, the mere fact that such a discussion took place, without more, falls short of meeting the "substantial certainty" element of *Woodson*.

Notably, the only evidence on this issue established that this was the first time Mountaire Farms had been required to address the need for repair of a votator. Ondona testified on this issue as follows:

Q. Okay. When the votators were installed, how many votators were there?

A. I think three.

....

Q. Okay. During the time that you were engineering and maintenance manager for Mountaire Farms, was there a process or a procedure for performing major repairs on votators?

A. We haven't [sic] done any repairs yet, so I could not recall initiating repair. And that's my recollection.

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When asked why the possibility of using independent contractors for the project had been discussed, Ondona responded that this was “[b]ecause it was never done before by the plant, and it’s the first time that we are going to undertake that kind of job. . . .”

Therefore, there were no past experiences upon which the Mountaire Defendants could have drawn in determining how to handle the installation of the new votator sleeve. Moreover, the evidence suggests that the votator sleeve *could*, in fact, have been safely installed by Mountaire Farms’ employees had the ammonia been drained from the votator — presumably by a mechanic with the refrigeration department — prior to Swain beginning the installation.

However, there is no evidence that at any time after being assigned the project Swain requested assistance from the refrigeration department in draining the ammonia from the votator. Nor did he or Plaintiff ask Branton or any other supervisor to arrange for such assistance. Plaintiff also did not alert any of the refrigeration mechanics about his belief that they needed to assist Swain on this project. Plaintiff testified as follows regarding the issue of whether refrigeration mechanics could have provided assistance:

Q. Could Mr. Swain that morning have had refrigeration drain the system?

MR. LINETT: Objection to form.

A. That was the supervisor’s call. We don’t have the authority to tell no supervisor what to do.

Q. But refrigeration personnel were there at the plant that day?

A. Yes, ma’am.

Q. And they could have drained the system?

A. Yes, ma’am.

MR. LINETT: Objection to form.

A. Excuse me.

Q. Could Mr. Swain have asked his supervisor to have refrigeration drain the system?

MR. LINETT: Objection to form.

A. I guess he could have, yes.

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Q. And could he have talked to his supervisor about this task?

MR. LINETT: Objection to form.

A. Yes.

To the extent that Mountaire Farms' manner of handling and staffing the project can be characterized as negligent, this Court — as noted above — has made clear that “[w]illful and wanton negligence alone is not enough to establish a *Woodson* claim; a higher degree of negligence is required. The conduct must be so egregious as to be tantamount to an intentional tort.” *Shaw*, 225 N.C. App. at 101, 737 S.E.2d at 176 (citation omitted). Similarly, the mere fact that additional safety measures should — in hindsight — have been implemented is not enough to establish that the Mountaire Defendants intentionally engaged in conduct that they knew was substantially certain to cause serious injury or death to their employees. *See Edwards*, 193 N.C. App. at 585, 668 S.E.2d at 118 (“Although plaintiff contends that [the employer] could have done more to ensure its workers’ safety, the evidence does not show that the employer engaged in misconduct *knowing* it was substantially certain to cause death or serious injury.” (citation, quotation marks, and brackets omitted)).

[3] We likewise reject Plaintiff’s contention that the existence of prior DAQ and OSHA violations demonstrates egregious conduct by Mountaire Farms in terms of allowing the plant to operate in a state of noncompliance with applicable safety regulations. “While OSHA violations are not determinative, they are a factor in determining whether a *Woodson* claim has been established.” *Kelly v. Parkdale Mills, Inc.*, 121 N.C. App. 758, 761, 468 S.E.2d 458, 460 (1996) (internal citation omitted). In the present case, prior to the 20 June 2009 accident, Mountaire Farms had been cited a total of three times — twice by OSHA and once by the DAQ. Notably, none of these violations related to the storage or release of ammonia.

On a number of occasions, North Carolina courts have rejected *Woodson* claims despite the presence of evidence in the record demonstrating that the workplace at issue was unsafe at the time of the accident. *See Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 238, 424 S.E.2d 391, 394 (1993) (employer “knew that certain dangerous parts of . . . machine were unguarded, in violation of OSHA regulations and industry standards”); *Hamby*, 197 N.C. App. at 108, 676 S.E.2d at 600 (“Plaintiffs’ forecast of evidence here shows that Hamby was injured by [the employer’s] inadequately guarded machinery — the rotating augers

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— in violation of OSHA standards.”); *Edwards*, 193 N.C. App. at 584, 668 S.E.2d at 118 (“[A]lthough the evidence tended to show that [the employer] did not adequately maintain its equipment, even a knowing failure to provide adequate safety equipment in violation of OSHA regulations does not give rise to liability under *Woodson*.” (citation, quotation marks, brackets, and ellipses omitted)); *Regan v. Amerimark Bldg. Products, Inc.*, 127 N.C. App. 225, 226, 489 S.E.2d 421, 423 (1997) (three months before plaintiff’s accident, employer was issued citations for “several serious violations of the Occupational Safety and Health Act”), *aff’d per curiam*, 347 N.C. 665, 496 S.E.2d 378 (1998).

For all of these reasons, we hold that Plaintiff has failed to show the existence of a genuine issue of material fact as to his *Woodson* claim and that the Mountaire Farms Defendants were entitled to judgment as a matter of law. The trial court therefore erred in denying the Mountaire Defendants’ motion for summary judgment as to this claim.

III. *Pleasant* Claims

[4] The Individual Defendants argue that the trial court also erred in denying their motion for summary judgment as to Plaintiff’s *Pleasant* claims. Once again, we agree.

In *Pleasant*, the plaintiff and his co-worker were both employees of a construction company. One afternoon, the plaintiff was walking back from lunch to the construction site. The co-worker, who was driving his truck at the time, saw the plaintiff walking and decided to “scare [him] by blowing the horn and by operating the truck close to him.” He drove too close to the plaintiff, hitting him with the truck and seriously injuring his right knee. *Pleasant*, 312 N.C. at 711, 325 S.E.2d at 246.

The plaintiff filed a personal injury action against the co-worker, who argued that the suit was barred by the exclusivity provision of the Workers’ Compensation Act. *Id.* The trial court entered a directed verdict in favor of the co-worker, and a divided panel of this Court affirmed. *Pleasant v. Johnson*, 69 N.C. App. 538, 317 S.E.2d 104 (1984), *rev’d*, 312 N.C. 710, 325 S.E.2d 244 (1985).

Our Supreme Court reversed, holding that “[t]he pivotal issue in this case is whether the North Carolina Workers’ Compensation Act provides the exclusive remedy when an employee is injured in the course of his employment by the willful, wanton and reckless conduct of a co-employee. We hold that it does not and that an employee may bring an action against the co-employee for injuries received as a result of such conduct.” *Pleasant*, 312 N.C. at 710-11, 325 S.E.2d at 246.

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In applying *Pleasant*, we have held that

[e]ngaging in willful, wanton, and reckless behavior is akin to the commission of an intentional tort, and, as such, the employee must form the constructive intent to injure. Such intent exists where conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified. Alternatively, when an employee is injured by the ordinary negligence of a co-employee, the Act is the exclusive remedy.

Pender v. Lambert, 225 N.C. App. 390, 395, 737 S.E.2d 778, 782 (internal citations and quotation marks omitted), *disc. review denied*, 366 N.C. 591, 743 S.E.2d 197 (2013); *see also Trivette v. Yount*, 366 N.C. 303, 312, 735 S.E.2d 306, 312 (2012) (“[E]ven unquestionably negligent behavior rarely meets the high standard of ‘willful, wanton and reckless’ negligence established in *Pleasant*.”).

The caselaw from this Court and the Supreme Court applying *Pleasant* illustrates the high bar that a plaintiff must meet in order to survive summary judgment on a *Pleasant* claim. *See, e.g., Jones v. Willamette Indus., Inc.*, 120 N.C. App. 591, 596, 463 S.E.2d 294, 297-98 (1995) (holding *Pleasant* claim not established where employee died while cleaning residue from boiler system at employer’s plant in unsafe manner in accordance with co-workers’ instructions because “although supervisory personnel at [employer] should have ensured that adequate and appropriate safety measures were in place, and being used . . . this does not support an inference that they intended for [the decedent] to be injured, nor does it support an inference that they were manifestly indifferent to the consequences”), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 714 (1996); *Dunleavy v. Yates Const. Co., Inc.*, 106 N.C. App. 146, 156, 416 S.E.2d 193, 199 (*Pleasant* claim not established where co-worker supervising inexperienced employee left employee unsupervised for brief period of time during which employee died as a result of trench collapse because “evidence show[ed] that [the co-worker’s] conduct, although arguably negligent, was not willful, wanton, and reckless”), *disc. review denied*, 332 N.C. 343, 421 S.E.2d 146 (1992).

We first address Plaintiff’s *Pleasant* claim against Branton, the supervisor at Mountaire Farms most directly involved in the assignment of the votator sleeve project. As discussed above in our analysis of Plaintiff’s *Woodson* claim, the record is devoid of evidence that Branton was aware of the dangers involved with the installation of the votator

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sleeve. Indeed, Branton's lack of knowledge on this subject was most fundamentally demonstrated by the fact that he stood close enough to the votator during the attempted installation so that when the ammonia was released he — like Plaintiff — was seriously injured. It logically follows that he could not have formed the constructive intent to expose Plaintiff to a hazardous situation as would be necessary in order for a viable *Pleasant* claim to exist on these facts. Moreover, as discussed earlier, Branton was not responsible for Plaintiff's presence in the room where the installation was being performed.

Plaintiff's *Pleasant* claims against Garrouette, Ondona, and Smith are premised on his assertion that in their roles as managerial employees of Mountaire Farms they failed to recognize that the votator sleeve needed to be installed by an independent contractor as opposed to a Mountaire Farms' employee. However, as discussed above, the record fails to support Plaintiff's argument that Mountaire Farms employees were clearly incapable of replacing the votator sleeve. Moreover, even assuming *arguendo* that these Defendants were mistaken in their belief that the project could be safely performed by their own employees, there is no indication in the record that the need to utilize independent contractors was so obvious that a contrary decision amounted to the sort of willful, wanton, and reckless conduct required to support a *Pleasant* claim.

Plaintiff also alleges that Ondona failed to keep Mountaire Farms' risk management plan up to date and that Saufley should be held liable because he possessed "responsibility for general employee safety." However, such assertions — without more — are insufficient to establish a valid *Pleasant* claim. See *Jones*, 120 N.C. App. at 596, 463 S.E.2d at 297-98 ("[A]lthough supervisory personnel . . . should have ensured that adequate and appropriate safety measures were in place, and being used . . . this does not support an inference that they intended for [the decedent] to be injured, nor does it support an inference that they were manifestly indifferent to the consequences.").

Finally, summary judgment is also proper as to Plaintiff's *Pleasant* claim against Swain. Swain's lack of understanding that the ammonia had to be drained from the votator prior to the installation of the new votator sleeve and his failure to take the necessary safety precautions were mistakes on his part that tragically ended up costing him his life. Such errors simply do not amount to the sort of willful, wanton, and reckless conduct between co-workers that lies at the heart of a *Pleasant* claim.

Thus, we hold that Plaintiff failed to forecast sufficient evidence in support of his *Pleasant* claims to defeat the Individual Defendants'

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motion for summary judgment. Therefore, the trial court erred in denying their motion.

Conclusion

For the reasons stated above, the trial court's denial of Defendants' motion for summary judgment is reversed. We remand this case to the trial court with instructions to enter summary judgment in favor of Defendants on all claims asserted by Plaintiff in this action. Plaintiff's cross-appeal is dismissed as moot.

REVERSED AND REMANDED IN PART; DISMISSED IN PART

Chief Judge McGEE and Judge DILLON concur.

HOPE C. BUTTERWORTH AND HUSBAND, LUKE T. BUTTERWORTH; MICHAEL D. SKRZYNSKI; SUZANNE A. FULLAR; KERRY BRIGHT AND WIFE, STEPHANIE LeGRAND; LAURENCE H. VICKERS AND WIFE, KAREN T. VICKERS; H. PETER LOEWER AND WIFE, JEAN LOEWER, PETITIONERS

v.

THE CITY OF ASHEVILLE AND FARMBOUND HOLDINGS, LLC, RESPONDENTS

No. COA15-919

Filed 17 May 2016

Cities and Towns—land use—fair trial rights—approval of subdivision preliminary plat—street width modification—quasi-judicial—exercise of discretion required—due process

The trial court erred in a land use case by concluding that the City was not required to afford petitioners all fair trial rights before approving the Developer's subdivision preliminary plat. The approval of the street width modification required the Commission to exercise discretion, and therefore, rendered the Commission's approval process quasi-judicial in nature, depriving petitioners of certain due process rights in the approval process.

Appeal by Petitioners from order entered 24 April 2015 by Judge Mark E. Powell in Buncombe County Superior Court. Heard in the Court of Appeals 9 February 2016.

Roberts & Stevens, P.A., by F. Lachicotte Zemp, Jr., and Eric P. Edgerton, for Petitioners.

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City of Asheville City Attorney's Office, by City Attorney Robin T. Currin and Assistant City Attorney Catherine A. Hofmann, and McGuire Wood & Bisette, P.A., by Joseph P. McGuire, for Respondents.

DILLON, Judge.

The subject matter of this appeal is a proposed residential subdivision being developed by Farmbound Holdings, LLC (the “Developer”), which was approved by the City of Asheville’s Planning and Zoning Commission (the “Commission”). Petitioners are individuals who reside near the proposed development. Petitioners (the “Neighbors”) appeal from the trial court’s order dismissing their action against the City of Asheville (“the City”) and the Developer. For the following reasons, we reverse the order of the trial court and remand the matter to the trial court for remand to the Commission for further proceedings.

I. Background

In May of 2014, the Developer submitted an application to the City to develop a major residential subdivision known as the Brynn Subdivision. In its application, the Developer requested that the subdivision be approved *with a modification* which would allow for the city streets within the proposed subdivision to be narrower in width than otherwise required by City regulations.

In October of 2014, the Commission convened a public meeting and heard a presentation by the City urban planner explaining the proposed project as well as the report of the City’s Technical Review Committee recommending that the subdivision be approved with the modification. The Commission also allowed for public comment from concerned citizens who opposed approval, including the Neighbors. Ultimately, though, the Commission voted to approve the Brynn Subdivision preliminary plat, five to one (5-1), *with* the requested street-width modification.

In December of 2014, the Neighbors filed a petition for *certiorari* in Buncombe County Superior Court, seeking review of the Commission’s decision. Respondents each filed an answer and moved for dismissal.

On 24 April 2015, after a hearing on the matter, the trial court entered its written order granting Respondents’ motions to dismiss. The Neighbors timely filed written notice of appeal to our Court from the trial court’s dismissal.

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II. Analysis

In their sole argument on appeal, the Neighbors contend that the trial court erred in concluding that the City was *not* required to afford them all fair trial rights before approving the Developer's subdivision preliminary plat. Specifically, the Neighbors contend that the approval of the street-width modification required the Commission to exercise discretion and, therefore, rendered the Commission's approval process quasi-judicial in nature, and *not* ministerial/administrative in nature. We hold that the Commission's approval of the plat in this case was, in fact, quasi-judicial in nature and that, therefore, the Neighbors¹ were deprived of certain due process rights in the approval process. Accordingly, we reverse the order of the trial court for remand to the Commission for further proceedings consistent with this opinion.

A. The Commission is Authorized to Approve Subdivision
Applications

Our General Assembly has empowered municipalities to regulate the subdivisions within their territorial jurisdiction. *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 107, 388 S.E.2d 538, 542 (1990). Specifically, N.C. Gen. Stat. § 160A-373 allows a municipality to exercise its power to approve subdivisions through either “(1) [t]he city council, (2) [t]he city council on recommendation of a designated body, or (3) [a] designated planning board, technical review committee, or other designated body or staff person.” N.C. Gen. Stat. § 160A-373 (2014).

With regard to a proposed subdivision requiring the extension of public and private streets, Asheville has elected the third option provided under our General Statutes. Specifically, Asheville's City Code of Ordinances delegates the power to approve a proposed subdivision which requires the extension of a public or private street to the Commission.² Asheville City Code of Ordinances § 7-5-8(a)(3)(d)(1) (2014).

1. Neither party argues the Neighbors' standing in this matter.

2. A proposed subdivision which involves the extension of public or private streets is deemed a “major” subdivision under Asheville's Code. Asheville City Code of Ordinances § 7-5-8(a)(1) (2014). “Minor” subdivisions are dealt with separately in the Code and need only be approved by City staff, *see id.* § 7-5-8(b)(4), as they “do not require the extension of public streets or private streets built to City of Asheville standards,” *see id.* § 7-5-8(b)(1).

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B. The Due Process Required in the Commission's Decision
Process Depends upon Whether its Decision was Quasi-judicial or
Administrative in Nature

Our Supreme Court has observed that the decision by a local government to approve or deny a particular land use is typically characterized as being one of four types – legislative, advisory, quasi-judicial, or administrative. *See County of Lancaster v. Mecklenburg*, 334 N.C. 496, 507, 434 S.E.2d 604, 612 (1993). As in *County of Lancaster*, the question in the present case is whether the Commission's approval of the subdivision plat is "properly characterized as a quasi-judicial decision or as an administrative [] decision." *Id.*

The level of due process required to be afforded by the Commission in deciding a land use request depends upon whether its decision process is quasi-judicial or administrative in nature. *See, e.g., Sanco of Wilmington Serv. Corp. v. New Hanover County*, 166 N.C. App. 471, 475, 601 S.E.2d 889, 892-93 (2004) (comparing administrative and quasi-judicial land use decisions). Specifically, our Supreme Court has recognized, "[d]ue process requirements mandate that certain *quasi-judicial* [land use] decisions comply with all fair trial standards when they are made." *County of Lancaster*, 334 N.C. at 506, 434 S.E.2d at 611 (emphasis added). The Supreme Court has described these "fair trial standards" as embracing "an evidentiary hearing with the right of the parties to offer evidence; cross-examine adverse witnesses; inspect documents; have sworn testimony; and have written findings of fact supported by competent, substantial, and material evidence." *Id.* at 507-08, 434 S.E.2d at 612. In contrast, an *administrative* land use decision does not require this level of due process and may be made "without a hearing at all[.]" *Id.* at 508, 434 S.E.2d at 612.

Our Supreme Court has differentiated between *quasi-judicial* decisions and administrative decisions as follows: In making quasi-judicial decisions, the decision-maker must "exercise discretion of a judicial nature"; and in the land use context, "these quasi-judicial decisions involve the application of zoning policies to individual situations, such as variances, special and conditional use permits, and appeals of administrative determinations." *Id.* at 507, 434 S.E.2d at 612. In sum, the Court has stated that such quasi-judicial decisions "involve two key elements: the finding of facts regarding the specific proposal and the exercise of some discretion in applying the standards of the ordinance." *Id.* Further, as explained by the Court, such quasi-judicial decisions may *not* be delegated to an individual administrator, *see id.* at 509, 434 S.E.2d at 613, but rather must be made by the municipality's governing council, board

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of adjustment or – as in the case of Asheville – a designated planning board, *see* N.C. Gen. Stat. § 160A-373.

By contrast, *administrative* decisions are “routine” and “nondiscretionary,” and may be delegated to a single individual. *County of Lancaster*, 334 N.C. at 507, 434 S.E.2d at 612. Moreover, while the decision-maker “may well engage in some fact finding [in making an administrative decision] . . . this involves determining objective facts that do not involve an element of discretion.” *Id.* (internal marks and citation omitted).

This is not to say that *every* decision to allow a modification in a subdivision proposal is quasi-judicial in nature. That is, the decision to allow a modification may be administrative in nature if the decision process does not involve the exercise of discretion but rather involves the application of specific, neutral, and objective criteria as set out in the municipality’s governing code. *See id.* at 510, 434 S.E.2d at 614 (explaining that a decision which requires the application of objective standards is administrative). However, where the decision requires the exercise of discretion in applying generally stated standards, the decision is of a quasi-judicial nature. As our General Assembly has provided,

an ordinance **shall be deemed to authorize a quasi-judicial decision** if the city council or planning board is authorized to decide whether to approve or deny the plat based not only upon whether the application complies with the specific requirements set forth in the ordinance, but also on **whether the application complies with one or more generally stated standards requiring a discretionary decision** to be made by the city council or planning board.

N.C. Gen. Stat. § 160A-377(c) (2014) (emphasis added).

C. The Commission Viewed its Decision as Ministerial/
Administrative in Nature and *Not* Quasi-judicial in Nature

Asheville’s Code grants the Commission the authority to allow modifications to the minimum subdivision standards required under the Code. Asheville City Code of Ordinances § 7-5-8(c)(1) (2014). Specifically, the Code states that such modifications may be allowed in cases of “physical hardship,” defining cases of physical hardship as

those cases where because of the topography of the tract to be subdivided, the condition or nature of adjoining areas, or the existence of other unusual physical characteristics, strict compliance with the provisions of [the]

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chapter would cause unusual and unnecessary hardship on the subdivision of the property by [the] property owner or developer.

Id. § 7-5-8(c)(2). In the event of a case of substantial hardship and the grant of a modification, the Code empowers the Commission to impose such conditions on the property owner or developer “as will ensure the purposes of the standards or requirements waived.” *Id.* § 7-5-8(c)(3).

Asheville’s Code, however, also provides that the Commission’s process in deciding whether to approve a preliminary plat “shall be ministerial in nature,” without making any separate provision for those cases which involve approving a modification due to a physical hardship. *Id.* § 7-5-8(a)(3)(d)(1). Instead, the Code simply states that the Commission must schedule a public hearing to receive comments regarding a proposed project upon receipt of a major subdivision preliminary plat from the Technical Review Committee,³ and that, in the event the preliminary plat as submitted is denied, the Commission must “set forth in writing the reasons for denying approval of the plat.” *Id.*

In the present case, the record of the proceedings before the Commission reveals that the Commission acted in a ministerial/administrative capacity, believing that it did not have the authority to reject the plat with the modification where City staff had already recommended approval. That is, it appears that the Commission was under the impression that modifications pursuant to § 7-5-8(c) of the City Code were administrative rather than quasi-judicial in nature, as the text of § 7-5-8(a)(3)(d)(1) of the City Code would seem to dictate. Specifically, the record of the Commission’s hearing demonstrates as follows: Existing City standards required a minimum forty-five (45) foot right-of-way for certain new streets, but the proposed subdivision’s streets had only a twenty-five (25) foot right-of-way. Nevertheless, the Commission was under the impression that the requested modification was part of the Technical Review Committee’s initial review; that there had been compliance with the process in place for an applicant to request such a modification; that City staff had recommended approval of the modification or alternately had already approved the modification; and that the matter had, therefore, already been resolved prior to the Commission’s approval of the plat, which was merely ministerial, as required by the Code.

3. The Technical Review Committee is tasked with the initial stage of review of new major subdivision applications and their compliance with applicable regulations. Asheville City Code of Ordinances § 7-5-8(a)(3)(d) (2014).

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D. The Commission's Decision to Approve the Developer's
Proposed Subdivision with the Modification was, in fact,
Quasi-judicial in Nature

Notwithstanding the provisions of the Asheville Code suggesting otherwise, the decision regarding the Developer's proposed modification required a determination of whether the Developer would suffer "physical hardship" if the modification was not allowed. *See id.* § 7-5-8(c)(2). We hold that this determination required an exercise of discretion in the application of this generally stated standard, rendering the Commission's decision quasi-judicial in nature. *See* N.C. Gen. Stat. § 160A-377(c) (2014). Our conclusion is in spite of the language in Asheville's Code stating that review before the Commission "shall be ministerial." *See* Asheville City Code of Ordinances § 7-5-8(a)(3)(d)(1) (2014). Indeed, our General Assembly has provided that "an ordinance shall be deemed to authorize a quasi-judicial decision if the . . . planning board is authorized to decide whether to approve or deny the plat based . . . on whether the application complies with one or more generally stated standards." N.C. Gen. Stat. § 160A-377(c) (2014).

Here, determining the presence of "physical hardship" as defined in § 7-5-8(c)(2) of Asheville's Code required the exercise of judgment and discretion in applying the relevant "generally stated standard[.]" *See id.* That is, the decision did not require the mere application of specific, neutral, and objective criteria, which would render the decision administrative in nature. Therefore, we hold that the Commission's approval of the Developer's plat with the street-width modification was a quasi-judicial decision. In approving the plat, the Commission was required to determine whether the Developer would suffer "physical hardship" without the modification, a decision which required the exercise of judgment and discretion in applying this general standard.⁴

4. Generally speaking, the weighing by a local government board of various burdens of a proposed use of land not strictly complying with local regulations to determine whether certain of the associated burdens constitute an undue hardship on a particular party requires application of a general standard – undue hardship – to a set of individualized circumstances, and the exercise of judgment and discretion. *See Harrison v. City of Batesville*, 73 So.3d 1145, 1152-56 (2011) (Mississippi Supreme Court reviewing quasi-judicial application of such a standard); *Matthew v. Smith*, 707 S.W.2d 411, 414-18 (1986) (Missouri Supreme Court: same); *Oklahoma City v. Harris*, 126 P.2d 988, 991-92 (1941) (Oklahoma Supreme Court: same); *Brandon v. Bd. of Comm'rs of Town of Montclair*, 124 N.J.L. 135, 139-41 (1940) (New Jersey Supreme Court: same).

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E. The Trial Court Erred in Dismissing the Petition for *Certiorari*, and Remand to the Commission is Necessary

Having found that the Commission's decision to approve the proposed subdivision was quasi-judicial in nature, we hold that the trial court erred in dismissing the Neighbor's petition for *certiorari*, and remand the matter to the trial court for further remand to the Commission so that a hearing with "fair trial standards" can be had.

While review of quasi-judicial decisions by local land use authorities is first to superior court and in the nature of *certiorari*, *see id.* § 153A-336(a); *id.* § 160A-377(a); *id.* § 153A-349(a); *id.* §§ 160A-393(a), (b)(3), our Court reviews the decisions of trial courts in such cases to determine whether (1) the trial court's review was within the appropriate scope of review and (2) whether the review was correct, *see Fehrenbacher v. City of Durham*, ___ N.C. App. ___, ___, 768 S.E.2d 186, 191 (2015). Moreover, the nature of the decision by the local authority, not the label assigned to it, controls. *Guilford Fin. Servs., LLC v. City of Brevard*, 150 N.C. App. 1, 6, 563 S.E.2d 27, 31 (2002), *rev'd on other grounds*, 356 N.C. 655, 576 S.E.2d 325 (2003) (per curiam).

Our Supreme Court has held that the appropriate scope of review on a petition for *certiorari* from a decision by a local governmental authority regarding otherwise non-compliant land use includes the following issues where the local authority is acting in a quasi-judicial capacity:

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

Coastal Ready-Mix Concrete Co., Inc. v. Bd. of Comm'rs of Town of Nags Head, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980).

Under the whole record test, which our Court has held is one of the standards of review applicable to these decisions, if the petitioner is alleging that the decision by the local authority was arbitrary and

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capricious, its findings of fact are binding on appeal if they are supported by substantial, competent evidence, provided such evidence was presented to the local authority before the decision was made. *Blue Ridge Co., L.L.C. v. Town of Pineville*, 188 N.C. App. 466, 469, 655 S.E.2d 843, 846 (2008). However, where the petitioner is alleging that the decision was based on legal error, *de novo* review, the other relevant standard, is applicable. *Id.* at 469, 655 S.E.2d at 845-46. Our Court has held that “[t]he superior court may apply both standards of review if required, but the standards should be applied separately to discrete issues.” *Id.* at 469-70, 655 S.E.2d at 846.

In the present case, the Neighbors alleged in their petition for *certiorari*, which they labeled in the alternative as a complaint seeking a declaratory judgment and injunctive relief, that the Commission failed to comply with the due process requirements for quasi-judicial proceedings, alleging additionally that in doing so the Commission acted arbitrarily and capriciously. Therefore, under *Blue Ridge Co.*, the allegations in the Neighbors’ petition required the trial court to review the Commission’s decision under both the *de novo* and whole record standards. *Id.* at 469-70, 655 S.E.2d at 845-46. The trial court, however, did neither, apparently simply agreeing with the Respondents’ position in their answers and motions to dismiss, ordering that the Neighbors’ petition be dismissed without addressing any of the relevant issues set out by our Supreme Court in *Coastal Ready-Mix Concrete*, or making any findings or conclusions indicating its rationale for so ruling.

In any event, we hold that the trial court on remand shall remand the case to the Commission to conduct further proceedings which provide the Neighbors with the level of due process required for quasi-judicial proceedings before that Commission.⁵ See *Humble Oil & Ref. Co. v. Bd. of Aldermen of Town of Chapel Hill*, 248 N.C. 458, 470, 202 S.E.2d 129, 137 (1974).

5. Our holding is not to be construed to deem *all* allowances of modifications, variances, or special uses, whether under Asheville’s Code or any other local land use regulation, as quasi-judicial decisions. Instead, our holding here is confined to the modification authorized by § 7-5-8(c) of the Asheville City Code, where a modification is required for approval of an otherwise non-compliant preliminary plat. For example, although § 7-7-8(c)(6) of the City Code, applicable to conditional use zoning, authorizes the City planning and development director to allow “minor modifications” to approved conditional use zoning ordinances, such modifications are prescribed by specific, neutral, and objective criteria, such as the limitation of a deviation not in excess of “up to ten percent or 24 inches . . . from the approved setback,” or a reduction of no more than “25 percent in the number of

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III. Conclusion

For the reasons stated herein, we reverse the order of the trial court and remand the matter for further proceedings.

REVERSED AND REMANDED.

Judges BRYANT and ZACHARY concur.

CSX TRANSPORTATION, INC., PLAINTIFF

v.

CITY OF FAYETTEVILLE AND PUBLIC WORKS COMMISSION OF THE CITY OF FAYETTEVILLE, A/K/A FAYETTEVILLE PUBLIC WORKS COMMISSION, DEFENDANTS

CITY OF FAYETTEVILLE, THIRD-PARTY PLAINTIFF

v.

TIME WARNER CABLE SOUTHEAST, LLC, THIRD-PARTY DEFENDANT

No. COA15-1286

Filed 17 May 2016

1. Indemnity—contractual agreement—summary judgment—admission of negligence not a bar to recovery

The trial court erred by granting summary judgment in favor of defendant Public Works Commission (PWC) on the issue of whether the parties' contractual agreement required PWC to indemnify CSX for its own negligence. The trial court erroneously concluded CSX was barred from recovering because of its admission of negligence.

2. Indemnity—contractual agreement—partial summary judgment

The trial court erred by denying plaintiff CSX's motion for partial summary judgment on its contractual indemnity claim. CenturyLink's equipment would not have been damaged as a result

parking spaces required[.]” *See* Asheville City Code of Ordinances § 7-7-8(c)(6) (2014). Whereas § 7-5-8(c) of the City Code authorizes a modification requiring application of the physical hardship standard without any other guiding standards, minor modifications under § 7-7-8(c)(6) are guided by clear standards. *See id.* Therefore, our review of a minor modification under § 7-7-8(c)(6), unlike a more general modification under § 7-5-8(c), would, like the legislative action empowering the planning and development director to authorize it, be deferential, presuming its validity. *See County of Lancaster v. Mecklenburg*, 334 N.C. 496, 510 n. 7, 434 S.E.2d 604, 614 n. 7 (1993).

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of CSX's crane colliding with PWC's power lines but for, or stemming from, defendant Power Work Commission's exercise of its privilege and license pursuant to the Crossings Agreement.

Appeal by plaintiff from order entered 28 May 2015 by Judge Tanya T. Wallace and order entered 8 June 2015 by Judge Beecher R. Gray in Cumberland County Superior Court. Heard in the Court of Appeals 27 April 2016.

Millberg Gordon Stewart PLLC, by Frank J. Gordon and B. Tyler Brooks, for plaintiff-appellant.

Hutchens Law Firm, by J. Scott Flowers and Natasha M. Barone, for defendants-appellees.

TYSON, Judge.

CSX Transportation, Inc. ("CSX") appeals from order granting summary judgment in favor of defendants City of Fayetteville and the Public Works Commission ("PWC") on whether the parties' contractual agreement required PWC to indemnify CSX for its own negligence, and denying CSX's motion for partial summary judgment on its contractual indemnity claim. CSX also appeals from order granting summary judgment in favor of PWC on CSX's claim for indemnification. We reverse the trial court's order granting summary judgment in favor of PWC, grant CSX's motion for partial summary judgment on its contractual indemnity claim, and remand.

I. Factual Background

In 1951, PWC entered into a contract ("the Crossings Agreement") with Atlantic Coast Line, CSX's predecessor-in-interest, which allowed PWC, as licensee, to install aerial power lines over a section of railroad tracks. The Crossings Agreement includes an indemnification provision, which states:

The Licensee will indemnify and save harmless the Railroad Company, its successors and assigns, from and against all loss, cost, damage and expense, and from and against any and all claims or demands therefor, on account of injury to person or property, which may be incurred by the Railroad Company by reason of the construction, maintenance, use or operation of the said conductors, wires or supports,

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or by reason of the exercise of any of the privileges conferred by this license or agreement.

It is not disputed that CSX, as successor-in-interest to the Atlantic Coast Line, has the right to enforce the 1951 agreement.

The Crossings Agreement requires all power lines installed by PWC to be maintained at an elevation of at least twenty-seven or twenty-eight feet above the top of the railroad tracks, depending on the line's voltage. Pursuant to the Crossings Agreement, PWC installed utility poles on both sides of the railroad tracks running adjacent to 3024 Clinton Road, in Fayetteville, North Carolina, and connected two aerial lines between these poles.

On 14 March 2011, CSX employee Donald Herring ("Mr. Herring") was operating a crane on the railroad tracks and struck one or more of the power lines crossing over the tracks. By the time Mr. Herring realized his crane would not pass under the power lines, it was too late for him to stop.

The parties' briefs present conflicting evidence of whether the height of PWC's lines complied with the elevation requirements contained in the Crossings Agreement. A CSX investigation concluded PWC's lines were hanging lower than required by the Crossings Agreement. CSX alleged in its complaint the power lines were hung no higher than eighteen feet, seven inches.

Conversely, PWC's engineer measured one of the power lines as twenty-seven feet, seven inches above the tracks. PWC also hired an independent electrical engineer who opined that the height of the power lines was in compliance with the Crossings Agreement.

The collision caused a power surge of electrical current into equipment owned by a third party, CenturyLink, through a "common ground" which connected PWC's and CenturyLink's lines. The power surge caused extensive damage to CenturyLink's equipment, including underground wiring and an above-ground utility pedestal. CenturyLink repaired its property and issued demands on CSX to pay for damages to CenturyLink's property purportedly caused by the power surge. CSX settled the CenturyLink claim by paying \$118,000.00 in March 2013.

After CSX compensated CenturyLink, it sought indemnification from PWC pursuant to the indemnification provision within the Crossings Agreement. PWC denied CSX's claim for indemnification. On 11 March 2014, CSX filed a complaint against PWC, and alleged claims for: (1) breach of contract/contractual indemnity; (2) negligence/

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gross negligence; (3) common law indemnity; (4) trespass; (5) private nuisance; and, (6) contribution. PWC responded by filing an answer, a counterclaim, and a third-party complaint against Time Warner Cable Southeast, LLC (“Time Warner”).

In April 2015, PWC and Time Warner filed motions for summary judgment, and CSX filed a motion for partial summary judgment. The parties’ motions were heard on 7 May and 12 May 2015 before the Honorable Tanya T. Wallace. The trial court granted Time Warner’s motion for summary judgment and dismissed it from the case. No party appealed from this ruling and order. The parties stipulate Time Warner is not a party to this appeal.

On 28 May 2015, Judge Wallace entered a written order granting in part and denying in part CSX’s motion for partial summary judgment. Judge Wallace concluded a genuine issue of material fact existed with regard to CSX’s claim for indemnification, and denied CSX’s motion for summary judgment on this issue. Judge Wallace granted CSX’s motion for summary judgment on PWC’s counterclaim, and dismissed the counterclaim with prejudice.

That same day, Judge Wallace also entered a written order, which granted in part and denied in part PWC’s motion for summary judgment. Judge Wallace ruled as follows:

1. [PWC’s] Motion for Summary Judgment as to [CSX’s] first claim for relief, Count One: Indemnification, is denied.
2. The Crossing[s] Agreement does not require [PWC] to indemnify [CSX] for the negligence of [CSX] or its employees. This issue is resolved as a matter of law.
3. [PWC’s] Motion for Summary Judgment as to all of [CSX’s] remaining claims for relief is granted. [CSX’s] claims for relief designated as Count Two: Negligence/Gross Negligence; Count Three: Common Law Indemnity; Count Four: Trespass; Count Five: Private Nuisance; and Count Six: Contribution are hereby dismissed with prejudice.

Judge Wallace denied PWC’s motion for summary judgment on CSX’s claim for indemnification after she determined a genuine issue of material fact existed with regard to CSX’s negligence.

On 18 May 2015, the day trial was scheduled to begin before the Honorable Beecher Gray, CSX filed an admission of negligence. In light of CSX’s admission of negligence, PWC orally renewed its motion for summary judgment on CSX’s claim for indemnification that same day.

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Judge Gray granted PWC's renewed motion for summary judgment based upon Judge Wallace's prior order, which had concluded as a matter of law PWC was not required to indemnify CSX for CSX's own negligence. This order was entered on 8 June 2015. CSX gave timely notice of appeal to this Court.

II. Issue

CSX argues the trial court erred by granting summary judgment in favor of PWC. CSX contends the trial court incorrectly concluded that North Carolina law does not allow a party to be indemnified for its own negligence.

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.

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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. Indemnification

[1] Both parties stipulated during oral argument that North Carolina law permits a party to be indemnified for its own negligence, but disagree on the application of this principle to the facts here.

CSX argues: (1) that portion of Judge Wallace's 28 May 2015 order, which granted summary judgment in favor of PWC as a matter of law on the issue of whether the Crossings Agreement required PWC to indemnify CSX for its own negligence; and, (2) Judge Gray's subsequent order, which granted summary judgment in favor of PWC on CSX's claim for indemnification are based upon a misapprehension of North Carolina indemnity law. We agree.

In its 28 May 2015 order, the trial court stated:

The Court further finds that, with regard to the issue of whether the indemnification agreement contained in the subject contract between the Parties . . . requires [PWC] to indemnify [CSX] for the negligence of [CSX] or [CSX]'s employees, there is no genuine issue of material fact and [PWC is] entitled to judgment as a matter of law.

. . . .

2. The Crossing[s] Agreement does not require [PWC] to indemnify [CSX] for the negligence of [CSX] or its employees. This issue is resolved as a matter of law.

North Carolina courts have long upheld the validity and enforcement of indemnification provisions in contracts, whereby one party is required to reimburse another for claims paid to a third party. Our Supreme Court explained the purpose of indemnity provisions, and our courts' role in interpreting these provisions, as follows:

An indemnity contract obligates the indemnitor to reimburse his indemnitee for loss suffered or to save him harmless from liability. Our primary purpose in construing a contract of indemnity is to ascertain and give effect

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to the intention of the parties, and the ordinary rules of construction apply. The court must construe the contract as a whole and an indemnity provision must be appraised in relation to all other provisions.

Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., P.C., 362 N.C. 269, 273, 658 S.E.2d 918, 921 (2008) (citations and internal quotation marks omitted).

Our Supreme Court has expressly recognized the right of a party to contractually provide for indemnification against its own negligence. *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 467, 144 S.E.2d 393, 400 (1965). The Court emphasized “[f]reedom of contract is a fundamental basic right” and held an indemnity clause which would allow defendant-company to be indemnified for its own negligence was valid and enforceable. The Court reasoned “[i]f the indemnity clause does not provide defendant indemnity against claims of the character of plaintiff’s claim, it has no meaning or purpose. The indemnity applies to claims based on defendant’s negligence for there is no other class of claims for which defendant would be responsible to [third-party’s] employees[.]” *Id.* at 466, 144 S.E.2d at 399 (distinguishing exculpatory contracts, “whereby one seeks to wholly exempt himself from liability for the consequences of his negligent acts, and contracts of indemnity against liability imposed for the consequences of his negligent acts[.]”).

This Court also unequivocally recognized the right of contracting parties to provide for indemnification for one’s own negligence. *Cooper v. H.B. Owsley & Son, Inc.*, 43 N.C. App. 261, 266-67, 258 S.E.2d 842, 846 (1979) (holding general contractor was required to indemnify crane owner for crane owner’s own negligence pursuant to indemnification provision in contract); *Beachboard v. S. Ry. Co.*, 16 N.C. App. 671, 679, 193 S.E.2d 577, 582-83 (1972) (holding language of indemnity provision in contract obligated paper company to indemnify railroad where both railroad and paper company were found to have been negligent), *cert. denied*, 283 N.C. 106, 194 S.E.2d 633 (1973).

In *Beachboard*, a railroad employee was injured while working in a paper company’s rail yard and sued his employer, the railroad, for his on-the-job injury. The railroad sought indemnification from the paper company pursuant to a contractual indemnification provision. The paper company contended the indemnification provision in its contract with the railroad was solely limited to instances in which the paper company was negligent, and because the railroad had “also been found guilty of negligence in this case, [the paper company] ha[d] no obligation to

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indemnify it.” *Id.* at 679, 193 S.E.2d at 582. We expressly rejected the paper company’s argument because “[t]o adopt [the paper company’s] interpretation effectively robs the indemnity clause of nearly all meaning.” *Id.*

In *Cooper*, this Court analogized indemnification provisions to liability insurance policies, which “have long been enforced by the courts.” *Cooper*, 43 N.C. App. at 266, 258 S.E.2d at 846. Rejecting the defendant’s argument that it would be against public policy to permit the plaintiff to be indemnified against its own negligence, we noted “it is now the prevailing rule that a contract may validly provide for the indemnification of one against, or relieve him from liability for, his own future acts of negligence[.]” *Id.* at 267, 258 S.E.2d at 846 (“[Defendant] contends that it is against public policy to permit [plaintiff] to be indemnified against its own negligence or against that of its employee for which it is responsible. We perceive, however, no sound reason why this must be so.”).

More recently, this Court, citing *Cooper*, explicitly rejected the notion that North Carolina does not permit the contractual indemnification of a party for its own negligent acts. *Malone v. Barnette*, __ N.C. App. __, __, 772 S.E.2d 256, 260-61 (2015). In *Malone*, this Court observed:

This Court has expressly held that North Carolina public policy is not violated by an indemnity contract that provides for the indemnification of a party against the consequences of its own negligent conduct, particularly when the agreement is made “at arms [sic] length and without the exercise of superior bargaining power.” *Cooper v. H.B. Owsley & Son, Inc.*, 43 N.C. App. 261, 267, 258 S.E.2d 842, 846 (1979). We further noted that the enforcement of such provisions “would have no greater tendency to promote carelessness on the part of the indemnitee than would enforcement against the insurer of a policy of liability insurance” and recognized that “the occasion for the indemnitee seeking indemnity would not arise unless it had itself been guilty of some fault, for otherwise no judgment could be recovered against it.” *Id.* at 266-68, 258 S.E.2d at 846 (citation and brackets omitted).

Malone, __ N.C. App. at __, 772 S.E.2d at 260 (footnote omitted); *see also Kirkpatrick & Assocs., Inc. v. Wickes Corp.*, 53 N.C. App. 306, 310, 280 S.E.2d 632, 635 (1981) (citation omitted) (holding plaintiff’s admission of negligence did not bar its claim for recovery based upon indemnity clause because “[d]efendant’s ultimate liability to plaintiff is in contract,

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not in tort[.]”); *Hargrove v. Plumbing and Heating Serv. of Greensboro, Inc.*, 31 N.C. App. 1, 7, 228 S.E.2d 461, 465 (holding that indemnification provision provided for full indemnity for all negligence, including any negligence on the part of the indemnitee), *disc. review denied*, 291 N.C. 448, 230 S.E.2d 765 (1976).

Here, the trial court granted summary judgment in favor of PWC on the grounds that CSX had admitted its negligence in causing or contributing to the incident, which gave rise to CenturyLink’s claim, and this admission barred CSX from receiving indemnification from PWC as a matter of law. As discussed supra, this conclusion is contrary to well-established North Carolina law. The trial court’s conclusion of law was incorrect and summary judgment entered upon this erroneous conclusion was improper. The trial court’s 8 June 2015 order, which granted summary judgment in favor of PWC as a result of CSX’s admitted negligence, is reversed.

B. Enforceability of the Indemnity Provision

[2] Both parties also stipulated at oral argument that the language of the indemnity provision in the Crossings Agreement is not ambiguous and should be interpreted by this Court as a matter of law. CSX contends the second phrase in the indemnification provision, which requires indemnification where the injury is “by reason of the exercise of any of the privileges conferred by this license or agreement[,]” mandates indemnification for the situation at bar. CSX reasons the only “privilege[] conferred” by the agreement was to allow PWC to place power lines over the railroad tracks. CSX argues if not for, or “but for,” the presence of the power lines above the railroad tracks, which exist only as a result of PWC’s exercise of its privilege under the license granted, CSX’s crane would not have hit PWC’s power lines and damaged CenturyLink’s equipment.

“A contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law.” *Schenkel & Shultz*, 362 N.C. at 273, 658 S.E.2d at 921.

As in the construction of any contract, the court’s primary purpose in construing a contract of indemnity is to ascertain and give effect to the intention of the parties, and the ordinary rules of construction apply. It will be construed to cover all losses, damages, and liabilities which reasonably appear to have been within the contemplation of the parties, but it cannot be extended to cover any losses which are neither expressly within its terms

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nor of such character that it can reasonably be inferred that they were intended to be within the contract.

Dixie Container Corp. v. Dale, 273 N.C. 624, 627, 160 S.E.2d 708, 711 (1968) (citations and internal quotation marks omitted).

The language in the Crossings Agreement provides for indemnification for damage “which may be incurred by the Railroad Company *by reason of* the construction, maintenance, use or operation of the said conductors, wires or supports, or *by reason of* the exercise of any of the privileges conferred by this license or agreement.” (emphasis supplied).

PWC forcefully argues “by reason of” does not mean “but for,” and is more akin to a proximate causation requirement. PWC asserts it is only required to indemnify CSX for injuries incurred “by reason of,” or caused by, the construction, maintenance, use, or operation of PWC’s equipment. We disagree with this narrow interpretation. *See One Beacon Ins. Co. v. United Mech. Corp.*, 207 N.C. App. 483, 488, 700 S.E.2d 121, 124-25 (2010) (interpreting “arising from or relating to, and by reason of” language in indemnity provision as synonymous with “stemm[ing] from”). If this Court were to accept PWC’s interpretation of the indemnification provision, it would “effectively rob[] the indemnity clause of nearly all meaning.” *Beachboard*, 16 N.C. App. at 679, 193 S.E.2d at 582.

Moreover, there is a want of authority to support PWC’s assertion that “by reason of” is synonymous with “caused by” or “proximately caused by.” Although “by reason of” has never expressly been defined by North Carolina’s appellate courts, the United States Court of Appeals for the First Circuit interpreted the phrase “by reason of” in an indemnification provision and held: “[W]e consider the language unambiguous: ‘by reason of’ means ‘because of,’ and thus necessitates an analysis at least approximating a ‘but-for’ causation test.” *Pac. Ins. Co., Ltd. v. Eaton Vance Mgmt.*, 369 F.3d 584, 589 (1st Cir. 2004) (citing Black’s Law Dictionary 201 (6th ed. 1990); *see also* Webster’s Third New Int’l Dictionary 307 (1993) (defining “by virtue of” to mean “by reason of”).

The Crossings Agreement was an arm’s length, bargained-for exchange between two equally sophisticated parties. The language in the indemnification provision, which both parties concede is unambiguous, was granted as consideration for, and as a result of, PWC’s power lines being installed and maintained over CSX’s railroad tracks. This provision allows CSX to be indemnified for damages paid to CenturyLink, because the damage was “by reason of,” or “by virtue of,” PWC’s exercise of its privilege, *i.e.* hanging power lines above the railroad tracks.

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In other words, but-for, or “stemm[ing] from,” PWC’s exercise of its privilege and license pursuant to the Crossings Agreement, CenturyLink’s equipment would not have been damaged as a result of CSX’s crane colliding with PWC’s power lines. *See One Beacon Ins. Co.*, 207 N.C. App. at 488, 700 S.E.2d at 124-25. Under the agreement, CSX is entitled to indemnification from PWC, even though damages resulted from CSX’s own negligence. On *de novo* review, CSX’s motion for partial summary judgment on its claim for contractual indemnity is granted.

V. Conclusion

The trial court erroneously concluded CSX was barred from recovering indemnification from PWC because of CSX’s admission of negligence in the harm caused to CenturyLink.

That portion of Judge Wallace’s order entered 28 May 2015, which: (1) granted summary judgment in favor of PWC on whether the Crossings Agreement required PWC to indemnify CSX for its own negligence as a matter of law; and, (2) denied CSX’s motion for partial summary judgment on its contractual indemnity claim is reversed. Upon *de novo* review, CSX’s motion for partial summary judgment on its contractual indemnity claim is granted.

Judge Gray’s order entered 8 June 2015, following CSX’s admission of negligence, which granted summary judgment in favor of PWC as to CSX’s claim for indemnification is reversed. This cause is remanded to the trial court for further proceedings and entry of judgment consistent with this opinion.

REVERSED AND REMANDED.

Judges CALABRIA and HUNTER, JR. concur.

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IN THE MATTER OF A.C.

No. COA15-1114

Filed 17 May 2016

Child Custody and Support—infant left in care of aunt—no meaningful interaction or support from mother—behavior inconsistent with status as parent—substantial change in circumstances—best interest of child

Where respondent-mother had left her infant daughter “April” in the care of April’s maternal aunt from May 2012 to December 2014 and made very little effort to have meaningful interaction with April or provide for her financially, the Court of Appeals affirmed the trial court’s “Review Order” granting sole legal and physical custody of April to her aunt and scheduling a permanency planning hearing. The trial court did not err by considering facts at issue in light of prior events; by concluding that the mother had acted in a manner inconsistent with her constitutionally protected paramount status as a parent; by concluding that a substantial change of circumstances had occurred to warrant a modification of the earlier permanent custody order when the mother abruptly removed April from the care of her aunt; and by concluding that awarding the sole care, custody, and control of April to her aunt was in the best interest of the child.

Appeal by respondent-mother from order entered on or about 15 July 2015 by Judge Andrea F. Dray in District Court, Buncombe County. Heard in the Court of Appeals 18 April 2016.

Buncombe County Department of Social Services, by John C. Adams, for petitioner-appellee.

Sydney Batch, for respondent-appellant.

Leake & Stokes, by Jamie A. Stokes, for intervenor-appellee.

Amanda Armstrong, for guardian ad litem.

STROUD, Judge.

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Respondent-mother appeals from a “Review Order” granting sole legal and physical custody of her daughter “April”¹ to April’s maternal aunt (“intervenor”) and scheduling a permanency planning hearing in accordance with N.C. Gen. Stat. § 7B-906.1(a) (2015). We affirm.

April was born out of wedlock to respondent-mother and respondent-father in November 2011. Respondent-father has a history of involvement with Buncombe County Department of Social Services (“DSS”) stemming from his substance abuse and reports of sexual abuse involving his three older daughters, who are April’s half-sisters. Respondent-father’s three daughters had been adjudicated neglected in 2003 and were in the custody of their paternal grandmother at the time of April’s birth.

On 2 May 2012, DSS received a child protective services (“CPS”) report regarding April and her half-sisters. An investigation revealed that respondent-father, respondent-mother, and April had moved into the home of the paternal grandmother in violation of a court order prohibiting unsupervised contact between respondent-father and his three older daughters.

Rather than obtain a separate residence from respondent-father, respondent-mother agreed to place five-month-old April in kinship care with intervenor on 4 May 2012. DSS did not seek nonsecure custody of the child but filed a petition alleging she was a neglected juvenile on 24 August 2012. The petition summarized respondent-father’s CPS history and alleged that the paternal grandmother had revealed respondent-father was bathing with April “all the time” in her home. The paternal grandmother also acknowledged that two of April’s half-sisters had previously disclosed sexual abuse by respondent-father after bathing with him.

Respondent-mother gave birth to April’s sister “Megan”² in October 2012. Megan immediately joined her sister in a kinship placement with intervenor.

The trial court adjudicated April a neglected juvenile in March 2013. At disposition, the court found that respondent-father was incarcerated for violating probation and had “abused drugs while living in the home with respondent mother.” The court maintained respondents’ legal custody of April but concluded that she should remain in her placement

1. The parties stipulate to the use of this pseudonym to protect the juvenile’s identity.
2. We use this pseudonym to protect the juvenile’s identity.

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with intervenor. The court concluded that respondent-mother “is capable of providing proper care and supervision for [April] in a safe home when the respondent father is not in the home.” It ordered that respondent-mother have one hour per week of supervised visitation with April and authorized additional supervised or unsupervised visitation for respondent-mother at the discretion of the Child and Family Team “so long as respondent father is not in the home.” The court subsequently established a permanent plan for April of “prevention of out of home placement.”

At a review hearing on 6 November 2013, and by written order entered 24 January 2014, the trial court granted sole legal and physical custody of April to respondent-mother. Though noting that respondent-mother “has not taken advantage of [her] opportunity to visit with [April,]” the court found she was residing with April’s maternal grandfather, had full-time employment, and was scheduled to begin parenting classes. Respondent-mother had also obtained a domestic violence protective order against respondent-father. Because “[t]he conditions that led to the involvement of [DSS] have been addressed[,]” the court concluded that “the respondent mother is willing and able to provide adequate care [of April] in a safe environment[.]” Respondent-mother was ordered to complete a parenting class and “engage in mental health counseling with [April] and follow all treatment recommendations.” The court granted respondent-father one hour of visitation per week at the Family Visitation Center. The court waived further review hearings and relieved DSS of its responsibilities in the case but retained jurisdiction pursuant to N.C. Gen. Stat. § 7B-201 (2013).

Despite receiving sole legal and physical custody of April in November 2013, respondent-mother left the child in intervenor’s care. On 29 October 2014, respondent-father filed a motion in the cause to enforce his visitation rights as established by the 24 January 2014 review order. The trial court entered an order on 11 December 2014, reopening the case and setting respondent-father’s motion for hearing the week of 9 February 2015.

On 19 December 2014, respondent-mother and her boyfriend (“Mr. C.”) drove to April’s daycare, presented a copy of the 24 January 2014 review order, and removed April. The daycare staff contacted intervenor, who asked respondent-mother to bring April home. Respondent-mother refused and informed intervenor that she also intended to take custody of Megan. Intervenor agreed to meet respondent-mother at the Madison County Sheriff’s Department the following day to surrender Megan.

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When intervenor arrived at the sheriff's office with Megan, respondent-mother had been jailed on an outstanding warrant for nonpayment of child support owed to intervenor. Respondent-mother refused to allow April and Megan to return to intervenor's care and directed that they be given to their maternal grandmother. Respondent-mother was released from jail later that day when Mr. C. paid her outstanding child support balance of \$2,675.55.

On 22 December 2014, intervenor filed a complaint in the District Court in Madison County seeking immediate, temporary, and permanent custody of April and Megan. The court entered an *ex parte* order granting immediate custody to intervenor on 22 December 2014. At a hearing on 2 January 2015, however, the court determined that it lacked jurisdiction over April in light of the pending proceedings in Buncombe County. The court granted intervenor temporary legal and physical custody of Megan, finding that respondent-mother and respondent-father had "abandoned" Megan. April was restored to respondent-mother's physical custody on 2 January 2015.

On or about 6 January 2015, intervenor filed a "Motion to Reopen, Motion to Intervene, and Motion in the Cause for Child Custody" in the juvenile proceeding in Buncombe County. (Original in all caps.) The motion alleged "a substantial change in circumstances" since the 24 January 2014 order granted respondent-mother sole custody of April. Intervenor claimed respondent-mother and respondent-father had "abrogated their constitutionally protected paramount status as the parents of [April]" and were each unfit to care for her.

On 7 January 2015, the trial court entered an *ex parte* order granting intervenor immediate custody of April but later struck its order and returned April to respondent-mother after a hearing on 21 January 2015. The court subsequently allowed intervenor's motion to intervene as April's caretaker under N.C. Gen. Stat. § 7B-401.1(e) (2015), but maintained April in respondent-mother's custody pending a hearing on intervenor's motion in the cause. On 11 March 2015, the District Court in Madison County granted respondent-mother eight hours per week of supervised visitation with Megan but maintained Megan in intervenor's legal and physical custody.

The District Court in Buncombe County heard twelve days of evidence and argument between 26 March and 27 May 2015 on the intervenor's motion to modify custody of April. On 24 April 2015, the trial court entered an interim order granting intervenor weekend visitation with April. On or about 15 July 2015, the trial court entered a "Review Order"

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granting intervenor “the sole legal and physical custody of [April]” and scheduling a permanency planning hearing for the 2 November 2015 term. Based on detailed findings of fact spanning fourteen pages and seventy-four numbered paragraphs, the court concluded that (1) since being awarded sole legal and physical custody of April on 6 November 2013, respondent-mother “has acted in a manner inconsistent with her constitutionally protected paramount status as a parent of [April;]” (2) “[t]here has been a substantial change in circumstances affecting the general welfare and best interest of [April]” since the Review Order [rendered] at the [6 November] 2013 hearing[;]” (3) respondent-mother is “unfit at this time to exercise the primary physical custody of [April;]” and (4) “it is in the best interest of [April] that her sole care, custody and control should be awarded to the intervenor . . . subject to visitation with the respondent parents[.]” Respondent-mother filed timely notice of appeal pursuant to N.C. Gen. Stat. § 7B-1001(a)(4) (2015).

I. Standards of Review

When the trial court awarded respondent-mother sole legal and physical custody of April on 24 January 2014, it did not enter a civil custody order pursuant to N.C. Gen. Stat. § 7B-911 (2013), but retained juvenile court jurisdiction pursuant to N.C. Gen. Stat. § 7B-201 (2013). By allowing April’s caretaker to intervene and seek custody of April from respondent-mother, the court was obliged to resolve a custody dispute between a parent and a nonparent in the context of a proceeding under Chapter 7B. *See, e.g., In re B.G.*, 197 N.C. App. 570, 571-75, 677 S.E.2d 549, 550-53 (2009). Our review of the 15 July 2015 “Review Order” thus requires recourse to legal principles typically applied in custody proceedings under N.C. Gen. Stat. Chapter 50, in addition to those governing abuse, neglect, and dependency proceedings under Chapter 7B.

The following standard of review applies to a trial court’s order entered after a review hearing under N.C. Gen. Stat. § 7B-906.1:

Our review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. The trial court’s findings of fact are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings. In choosing an appropriate permanent plan under N.C. Gen. Stat. § 7B-906.1 (2013), the juvenile’s best interests are paramount. We review a trial court’s determination as to the best interest of the child for an

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abuse of discretion. Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court.

In re J.H., ___ N.C. App. ___, ___, 780 S.E.2d 228, 238 (2015) (citations and quotation marks omitted). Unchallenged findings of fact are deemed to be supported by the evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Moreover, erroneous findings that are unnecessary to support the trial court's conclusions of law may be disregarded as harmless. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240-41 (2006).

The U.S. Constitution's Due Process Clause protects a "parent's paramount constitutional right to custody and control of his or her children." *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001). This protection ensures that "the government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody . . . or where the parent's conduct is inconsistent with his or her constitutionally protected status[.]" *Id.* (citations omitted). "While this analysis is often applied in civil custody cases under Chapter 50 of the North Carolina General Statutes, it also applies to custody awards arising out of juvenile petitions filed under Chapter 7B." *In re D.M.*, 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011).

The Due Process Clause further requires that "a trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence."³ *Adams*, 354 N.C. at 63, 550 S.E.2d at 503 (citing *Santosky v. Kramer*, 455 U.S. 745, 747-48, 71 L. Ed. 2d 599, 603 (1982)). "The clear and convincing standard requires evidence that should fully convince. This burden is more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters." *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721, 693 S.E.2d 640, 643 (2009) (citations and quotation marks omitted), *cert. denied*, 563 U.S. 988, 179 L. Ed. 2d 1211 (2011). Our inquiry as a reviewing court is "whether the evidence presented is such that a [fact-finder] applying that evidentiary standard could reasonably find" the fact in question. *Id.*, 693 S.E.2d at 644 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986)).

3. We note the trial court made all of its findings of fact by the requisite "clear, cogent and convincing evidence" standard. (Original in bold and all caps.) *Cf. David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 754 (2005) ("remand[ing] for findings of fact consistent with this standard").

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II. Evidence of Prior Events

Respondent-mother first claims that the trial court erred in relying on “irrelevant evidence” to support its conclusions of law that she acted inconsistently with her constitutionally protected status as a parent, that she was unfit to have custody of April, and that there had been a substantial change in circumstances since the 24 January 2014 review order. (Original in all caps.) She contends that the court wrongly considered evidence of events occurring prior to 6 November 2013—the date on which she obtained sole legal and physical custody of April—in reaching its conclusions of law. Because the court had already accounted for these prior events in its 24 January 2014 review order, respondent-mother argues that the same evidence could not then be used to modify custody. Therefore, according to respondent-mother, “the relevant time frame in this case is 6 November 2013 to [6] January 2015”—the approximate date intervenor filed her motion in the cause.

The “substantial change in circumstances” standard applies to a motion to modify a civil custody order under N.C. Gen. Stat. § 50-13.7(a) (2015), which requires “a showing of changed circumstances by either party or anyone interested.” See *Andrews v. Andrews*, 217 N.C. App. 154, 157, 719 S.E.2d 128, 130 (2011) (“Our case law has interpreted this standard to require a showing of a substantial change in circumstances affecting the welfare of the child.” (citation and quotation marks omitted)), *disc. review denied*, 365 N.C. 561, 722 S.E.2d 595 (2012). The controlling statute here, N.C. Gen. Stat. § 7B-1000(a) (2015), provides in pertinent part:

Upon motion in the cause or petition, and after notice, the court may conduct a review hearing to determine whether the order of the court is in the best interests of the juvenile, and the court may modify or vacate the order in light of changes in circumstances *or the needs of the juvenile*.

(Emphasis added.) In construing substantively identical language in former N.C. Gen. Stat. § 7A-664(a), we held that the statute authorized the court to modify a custody order upon a change in circumstances or “upon a showing that the needs of the juvenile had changed such that it was in her best interest that the order be modified[.]” *In re Botsford*, 75 N.C. App. 72, 75, 330 S.E.2d 23, 25 (1985).

Nonetheless, we agree with respondent-mother that the burden fell upon intervenor to demonstrate “changes” warranting a modification of the custody arrangement established by the 24 January 2014 review

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order. See N.C. Gen. Stat. § 7B-1000(a). By definition, such changes must have either occurred or come to light subsequent to the establishment of the *status quo* which intervenor sought to modify. See *Hensley v. Hensley*, 21 N.C. App. 306, 307, 204 S.E.2d 228, 229 (1974) (requiring a “showing that circumstances have changed between the time of the [custody] order and the time of the hearing on [the] motion [to modify]”); *Newsome v. Newsome*, 42 N.C. App. 416, 425, 256 S.E.2d 849, 854 (1979) (allowing court to consider “facts pertinent to the custody issue [which] were not disclosed to the court at the time the original custody decree was rendered”). Here, the trial court awarded respondent-mother legal and physical custody of April at the 6 November 2013 review hearing, and entered the attendant review order on 24 January 2014.

However, in assessing whether a change had occurred, the trial court was free to consider the historical facts of the case in assessing what occurred after respondent-mother was awarded custody of April. While a court may not rely on prior events to find changed circumstances, it may certainly consider facts at issue in light of prior events. Cf. *Cantrell v. Wishon*, 141 N.C. App. 340, 344, 540 S.E.2d 804, 806-07 (2000) (“[T]he trial court erroneously placed *no* emphasis on the mother’s past behavior, however inconsistent with her rights and responsibilities as a parent[;] . . . failed to consider the long-term relationship between the mother and her children; . . . and failed to make findings on the mother’s role in building the relationship between her children and the [nonparent custodians].”).

Insofar as respondent-mother faults the trial court for considering evidence and making findings about events that occurred prior to 6 November 2013, we find her objection without merit. Respondent-mother’s blanket exception to “[f]indings of fact 16-19, 31-32, parts of 33, and parts of 40” is overruled. Cf. *In re Beasley*, 147 N.C. App. 399, 405, 555 S.E.2d 643, 647 (2001) (holding that a “broadside exception that the trial court’s conclusion of law is not supported by the evidence, does not present for review the sufficiency of the evidence to support the entire body of the findings of fact”).

III. Respondent-Mother’s Constitutionally Protected Status

Respondent-mother next challenges the trial court’s conclusions that she “has acted in a manner inconsistent with her constitutionally protected paramount status as a parent” and that she was unfit to have primary physical custody of April. We review these conclusions of law *de novo*. See *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 502 (2010).

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“[P]arents have a constitutionally protected right to the custody, care and control of their child, absent a showing of unfitness to care for the child.” *Cantrell*, 141 N.C. App. at 342, 540 S.E.2d at 806. “So long as a parent has this paramount interest in the custody of his or her children,” the parent’s interest prevails in any custody dispute with a nonparent, regardless of the best interests of the child. *Boseman*, 364 N.C. at 549, 704 S.E.2d at 503; *accord Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994). However, “[a] parent loses this paramount interest if he or she is found to be unfit or acts inconsistently with his or her constitutionally protected status.” *Boseman*, 364 N.C. at 549, 704 S.E.2d at 503 (citation and quotation marks omitted); *see also Cantrell*, 141 N.C. App. at 342, 540 S.E.2d at 806 (“[A] parent may lose the constitutionally protected paramount right to child custody if the parent’s conduct is inconsistent with this presumption or if the parent fails to shoulder the responsibilities that are attendant to rearing a child.”). Once a parent cedes his or her protected status, custody issues must be resolved based on the best interests of the child. *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534-35 (1997).

A. Action Inconsistent with Constitutionally Protected Status

“[T]here is no bright line beyond which a parent’s conduct” amounts to action inconsistent with the parent’s constitutionally protected paramount status. *Boseman*, 364 N.C. at 549, 704 S.E.2d at 503. Our Supreme Court has emphasized the “fact-sensitive” nature of the inquiry, as well as the need to examine each parent’s circumstances on a “case-by-case basis[.]” *See id.* at 550, 704 S.E.2d at 503 (“[D]etermining whether the trial court erred is a fact-sensitive inquiry[.]”); *Price*, 346 N.C. at 79, 484 S.E.2d at 534-35 (“Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents.”). The court must consider “both the legal parent’s conduct and his or her intentions” *vis-à-vis* the child. *Estroff v. Chatterjee*, 190 N.C. App. 61, 70, 660 S.E.2d 73, 78-79 (2008).

1. Respondent-mother’s conduct

In *Price v. Howard*, the court articulated the following principle that guides our determination of whether respondent-mother’s actions were inconsistent with her constitutionally protected status:

[T]he legal right of a parent to custody may yield to the interests of the child where the “parent has voluntarily permitted the child to remain continuously in the custody

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of others in their home, and has taken little interest in [the child], thereby substituting such others in his own place, so that they stand *in loco parentis* to the child, and continuing this condition of affairs for so long a time that the love and affection of the child and the foster parents have become mutually engaged, to the extent that a severance of this relationship would tear the heart of the child[] and mar his happiness[.]”

Price, 346 N.C. at 75, 484 S.E.2d at 532 (quoting *In re Gibbons*, 247 N.C. 273, 280, 101 S.E.2d 16, 21-22 (1957)). Likewise, in *Boseman v. Jarrell*, the court held that “if a parent cedes paramount decision-making authority, then, so long as he or she creates no expectation that the arrangement is for only a temporary period, that parent has acted inconsistently with his or her paramount parental status.” *Boseman*, 364 N.C. at 552, 704 S.E.2d at 504. The *Price* Court recognized, however, “there are circumstances where the responsibility of a parent to act in the best interest of his or her child would require a temporary relinquishment of custody, such as under a foster-parent agreement or during a period of service in the military, a period of poor health, or a search for employment.” *Price*, 346 N.C. at 83, 484 S.E.2d at 537. When this kind of temporary arrangement is necessary, the parent nonetheless bears some responsibility for preserving his or her constitutionally protected status:

[T]he parent should notify the custodian upon relinquishment of custody that the relinquishment is temporary, and the parent should avoid conduct inconsistent with the protected parental interests. Such conduct would, of course, need to be viewed on a case-by-case basis, but may include failure to maintain personal contact with the child or failure to resume custody when able.

Id. at 83-84, 484 S.E.2d at 537.

The trial court made the following findings of fact⁴ regarding respondent-mother’s conduct after being awarded custody of April in November 2013:

4. Throughout her second argument in her appellant’s brief, respondent-mother objects generally to many of the trial court’s enumerated findings of fact, to wit: “[F]inding[s] of fact 61-65[;] . . . “finding[s] of fact 22-24 [and] 43[;] . . . [f]inding of fact 64[;]” . . . [f]inding of fact 21[;] . . . findings 25-28[;] . . . [f]indings of fact 37-38[; and] . . . [f]indings of fact 30-34, and 36[.]” Each of these numbered findings consist of multiple evidentiary facts in paragraphs of varying length. Finding of Fact 61, for example, consists of twenty-one lines of single-spaced text. The great majority of respondent-mother’s

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6. The intervener became the caretaker for the juvenile [April] on May 4, 2012, pursuant to a kinship placement. . . . [April] was five months old at the time of placement with the intervener.

. . . .

9. At the time of the filing of the Juvenile Petition, in August 2012, the respondent mother was pregnant with [Megan]. Upon her birth, [Megan] was immediately placed with the intervener by [DSS] with the consent of the respondent parents.

. . . .

13. Pursuant to a Review Order entered at the November 6, 2013[] term of Buncombe County Juvenile Court (hereafter “the Review Order”), sole legal and physical custody of [April] was returned to the respondent mother The juvenile court retained jurisdiction over [April]. The respondent mother was ordered to engage in and complete a parenting class; engage in mental health counseling with the minor child and follow all treatment recommendations; and continue family counseling with the minor child.

14. The respondent mother did complete the . . . parenting course on December 2, 2013. She initiated counseling with Ilene Procida . . . on November 18, 2013, but according to Ms. Procida’s records, she only attended one session in person in 2013. Ms. Procida’s records noted a phone call from the respondent mother in December 2013, along with a note at that time that services were being discontinued. . . . There is no evidence that the respondent mother engaged in any counseling services from the time of that call through the end of 2014.

. . . .

objections amount to the claim that the trial court should have credited her testimony, rather than the testimony of intervenor and other witnesses. Issues of credibility and the weight to be given to witness testimony “must be resolved by the trial court and are not a basis for overturning a finding of fact.” *Elliott v. Muehlbach*, 173 N.C. App. 709, 714, 620 S.E.2d 266, 270 (2005). Absent a more particularized argument as to particular facts, we decline to review the findings alluded to in respondent-mother’s broadside exceptions. *Cf. Beasley*, 147 N.C. App. at 405, 555 S.E.2d at 647.

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16. The respondent mother's family, and specifically the intervener and both of her parents, . . . significantly supported the respondent mother in 2013 and made it possible for [her] to meet all criteria necessary to regain legal custody of [April]. The intervener provided the respondent mother with a job at the Turkey Creek Café, which the intervener co-owned. [Her father] provided the respondent mother with free housing. All three relatives supervised the respondent mother's visits with [April] under the juvenile court's orders. Because the respondent mother had no transportation during 2013, all three relatives provided the respondent mother transportation to therapy sessions, parenting classes, visitations, work, and essentially anywhere else [she] needed to go.

. . . .

21. On November 6, 2013, the respondent mother did not make any effort to pick up [April] or otherwise take physical custody of her; did not articulate a plan to the intervener regarding how to transition custody back to her; and did not provide the intervener with any date or other anticipated length of time after which she intended to assume physical custody of the juvenile. Despite the intention of the respondent mother to leave the juvenile with the intervener and not assume custody, she did not provide the intervener with any legal mechanism to provide medical or educational care for the child, such as a power of attorney.

22. Following the entry of the Review Order, [April] remained in the physical custody of the intervener for more than thirteen (13) additional months, until December 19, 2014. During this time period, the respondent mother did not spend any overnights with the juvenile that were not supervised by one of her family members, in the home of a family member.^[5]

5. Respondent-mother objects to the trial court's use of the word "supervised" in this finding of fact. But the trial court did not suggest that respondent-mother's visits were pursuant to supervised visitation and properly recognized that respondent-mother had been awarded custody at the 6 November 2013 hearing. The trial court used the word "supervised" to indicate that respondent-mother did not spend an overnight visit with the juvenile alone or remove her from the family member's home during these overnight visits.

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23. From November 6, 2013, until December 19, 2014, the respondent mother only sporadically visited with [April] and did not adhere to any set visitation schedule. She would on occasion interact with [April] and [Megan] during her work hours at the Turkey Creek Café until her employment there ended in January of 2014. When her employment there ended, the respondent mother would occasionally text the intervener in an effort to schedule a visit with little notice The respondent mother rarely visited the juvenile for more than a half hour to an hour per week during this time period, and at times would go weeks without visiting with her. The respondent mother and her boyfriend [Mr. C.] took [April] and [Megan] away from a family member's home for unsupervised time for a few hours on only two occasions during this period.

24. From November 6, 2013, until December 19, 2014, the respondent mother did not regularly call the intervener to speak to [April] or [Megan]. She would sporadically text the intervener to ask "How's my girls?", but such texts were not on a regular basis.

25. From November 6, 2013, until December 19, 2014, the respondent mother did not provide any financial assistance to either the intervener or her parents for the benefit of [April]. On a few rare occasions, she brought clothes or diapers to the intervener for [April]. She was not regularly paying child support, as is evidenced by an order for arrest issued for the respondent mother for outstanding child support in the amount of \$2,675.55 in Madison County file number 13 CVD 198. When [she was] arrested on that order on December 20, 2014, [Mr. C.] was able to . . . pay the amount of child support arrears in full on that same date.

26. From November 6, 2013, until approximately July 2014, the respondent mother was living rent-free with family members and friends and had no vehicle and thus no transportation costs. She was sporadically employed during this period of time. When asked by her father . . . around December of 2013 to assist with the increased utility costs after she moved into his home, the respondent mother refused, stating that she needed to help [Mr. C.] make his truck payment. The respondent mother and [Mr. C.]

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spent at least two weekends in a hotel in Pigeon Forge, Tennessee, in late 2013 or early 2014, and the respondent mother paid for both [Mr. C.'s] and his friend's hotel room and restaurant meals during one of those weekends[.] . . . The respondent mother has maintained gainful employment . . . from June 2014 through this hearing.

27. From November 6, 2013, until December 19, 2014, the respondent mother was able-bodied, capable of maintaining gainful employment, and owed a duty of support to [April].

28. From November 6, 2013, until December 19, 2014, the intervener provided for all of [April's] needs, as well as [Megan's] needs, with assistance from [April's] maternal grandparents during her working hours. The intervener fed, clothed, and cared for the daily needs of [April] during this time. The intervener enrolled the juvenile in day care[,] . . . enrolled the juvenile in a dance class, and nurtured the juvenile's love of horses by purchasing her a horse and regularly attending horse shows with [April] and [Megan]. Either the intervener or one of her parents handled all medical appointments for [April] during this time.

. . . .

62. The respondent mother voluntarily allowed custody of [April] to remain with the intervener for an indefinite period of time following the return of legal custody to her on November 6, 2013, with no notice to the intervener that such relinquishment of custody would only be temporary. She failed to advise the intervener of an end date to the intervener's period of custody, failed to establish a transitional plan with the intervener regarding her resumption of custody, and failed to notify the intervener in a clear and definite manner that she intended to resume custody of [April]. The respondent mother induced the intervener, [April], and [Megan] to flourish as a family unit in a relationship of love and duty with no expectation that it would be terminated.

63. The intervener and the respondent mother never agreed that the surrender of [April's] custody to the intervener would be temporary.

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64. The respondent mother was legally and physically able to resume custody of [April] on November 6, 2013, and she induced the court to believe the same by accepting the award of custody from the court on that date. By failing to resume custody when she was able on November 6, 2013, the respondent mother acted in a manner inconsistent with her constitutionally protected paramount status as a parent.

The order's conclusions of law repeat the court's determination that respondent-mother "has acted in a manner inconsistent with her constitutionally protected paramount status as a parent of the minor child [April]."

As in *Price*, this case involves a voluntary act of the parent resulting in a "relatively lengthy period of nonparent custody[.]" *Price*, 346 N.C. at 82, 484 S.E.2d at 536 (citing *Bennett v. Jeffreys*, 356 N.E.2d 277 (N.Y. 1976)). Respondent-mother's conduct since obtaining sole legal and physical custody of April on 6 November 2013 represents an abdication of her parental role.

Respondent-mother contends she was not prepared to assume physical custody of April on 6 November 2013, notwithstanding her representations to the trial court at the time. The 24 January 2014 review order includes explicit findings that respondent-mother "is willing and able to provide adequate care in a safe environment" for April and that she "has adequate resources" to do so. Respondent-mother is estopped to re-litigate the issue of her circumstances as of 6 November 2013 at a subsequent hearing on intervenor's motion to modify custody in 2015. See *Newsome*, 42 N.C. App. at 425, 256 S.E.2d at 854. By her own account, respondent-mother was "completely honest with the Court" about her housing situation when she testified at the 6 November 2013 review hearing. She cannot now claim her housing "was not big enough" for April. See *id.* ("[A] prior decree is not res judicata as to those facts *not before the court.*" (emphasis added)).

Respondent-mother challenges the trial court's findings that she visited April and asked intervenor about her only "sporadically" between 6 November 2013 and 19 December 2014. These findings are amply supported by intervenor's testimony and the testimonies of April's maternal grandmother and grandfather, who kept April for intervenor on alternate weekends.⁶ Respondent-mother's assertion that she maintained

6. The grandmother and grandfather are separated.

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“extensive and consistent” contact with April is flatly contradicted by the accounts of these witnesses. (Original in italics.) The trial court was entitled to weigh this competing evidence and determine the credibility of each witness. *In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985). The court was further entitled to view respondent-mother’s lack of engagement with April as conduct inconsistent with her constitutionally protected status as parent. *See McRoy v. Hodges*, 160 N.C. App. 381, 387, 585 S.E.2d 441, 445 (2003).

Respondent-mother also objects to the findings regarding her failure to provide intervenor with financial support for April’s care. She notes that “April’s needs were appropriately met” at all times after respondent-mother obtained sole custody of the child on 6 November 2013. (Original in italics.) Regardless of intervenor’s performance in caring for April, respondent-mother’s failure to provide financial support for her child was properly considered in determining whether she had acted inconsistently with her constitutionally protected status. *See Price*, 346 N.C. at 77, 484 S.E.2d at 533 (discussing *Lehr v. Robertson*, 463 U.S. 248, 262, 77 L. Ed. 2d 614, 627 (1983)). Respondent-mother’s assertion that she provided assistance to intervenor “[w]hen financially able to do so” is contradicted by the testimony of both intervenor and April’s grandfather. The court was entitled to credit the version of events provided by these witnesses. Its findings are also corroborated by respondent-mother’s arrest for non-payment of child support in December 2014.

We find unavailing respondent-mother’s reliance on our decision in *Grindstaff v. Byers*, 152 N.C. App. 288, 567 S.E.2d 429 (2002). The father in *Grindstaff*—who “was working two jobs and did not have adequate room for the children”—signed a formal custody agreement placing the children in the care of their maternal grandmother. *Id.* at 290, 567 S.E.2d at 430. The agreement did not specify a duration but was understood by all parties to be temporary. *Id.* at 296, 567 S.E.2d at 434. Nine months later, when respondent-father refused to return the children to the grandmother after a visitation, she filed an action for custody. *Id.* at 290-91, 567 S.E.2d at 430-31. Reversing an order granting custody to the grandmother, we found “no evidence in the record[] that the [father] acted inconsistent[ly] with his constitutionally protected status.” *Id.* at 298, 567 S.E.2d at 435. We noted that the father “maintained or attempted to maintain contact and support for his children, and that he resumed custody when his circumstances permitted.” *Id.* at 297, 567 S.E.2d at 434. The “overwhelming evidence” showed that the father “supported the children financially,” kept in contact through regular visitation and phone calls, attended the children’s medical appointments, provided

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their health insurance, and paid for their daycare. *Id.* at 297-98, 567 S.E.2d at 434-35.

As recounted in the trial court's findings, respondent-mother's actions stand in stark contrast to the conduct of the father in *Grindstaff*. Respondent-mother placed April with intervenor in May 2012, rather than live apart from her then-boyfriend. She allowed April's newborn sister Megan to join April in intervenor's home in October 2012. Rather than reclaim April on 6 November 2013, respondent-mother left her and her younger sister in intervenor's uninterrupted care until 19 December 2014. During this period, respondent-mother had little meaningful interaction with April and made no effort to provide for her financially. Respondent-mother thus "not only created the family unit that [intervenor] and the child have established, but also induced them to allow that family unit to flourish . . . with no expectations that it would be terminated." *Price*, 346 N.C. at 83, 484 S.E.2d at 537.

2. Respondent-mother's intentions

Respondent-mother insists that she intended April's placement with intervenor to be temporary and that intervenor was aware of her intentions. *See id.* ("[I]f defendant and plaintiff agreed that plaintiff would have custody of the child only for a temporary period of time and defendant sought custody at the end of that period, she would still enjoy a constitutionally protected status absent other conduct inconsistent with that status."). Respondent-mother points to the trial court's findings that she "refused to consent to a change in plan to guardianship at the November 6, 2013 hearing" and that she "gloated [to intervenor] that she had 'won' custody of [April]" as they drove back to Turkey Creek Café following the hearing. As the court further found, however,

[o]n November 6, 2013, the respondent mother did not make any effort to pick up the juvenile or otherwise take physical custody of her; did not articulate a plan to the intervener regarding how to transition custody back to her; and did not provide the intervener with any date or other anticipated length of time after which she intended to assume physical custody of the juvenile. Despite the intention of the respondent mother to leave the juvenile with the intervener and not assume custody, she did not provide the intervener with any legal mechanism to provide medical or educational care for the child, such as a power of attorney.

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In light of her subsequent conduct, respondent-mother's mere refusal to authorize intervenor's appointment as April's guardian does not evince an intention to assume her responsibilities as a parent.

Respondent-mother further claims she informed intervenor during a car ride in March 2014 that "she wanted to get her life together so she could have her girls" with her. She testified that intervenor responded by threatening her with a handgun and promising a "blood bath" if she attempted to take April away from intervenor. According to respondent-mother, she did not broach the subject again "due to the fear that her sister and father would cause physical harm to her[.]"

The trial court explicitly found not credible "the respondent-mother's claims that she did not assume custody of [April] until December 19, 2014, due to her fear that the [intervenor] might cause bodily harm to her." The court's findings cite respondent-mother's history of relying on intervenor "for all of her needs" including "comfort and support" as well as respondent-mother's acknowledgement that intervenor "has never assaulted her as an adult and . . . has never been charged with any crime[.]" The court noted that intervenor "begrudgingly but voluntarily relinquished custody of [Megan]" to respondent-mother in December 2014 and "followed the proper legal channels" in attempting to regain custody of both children. The court found that respondent-mother thus "had no reasonable basis to believe that she could not exercise her custodial rights to [April] due to any risk of harm posed by the [intervenor]."

Respondent-mother described her intentions toward April as follows:

[Respondent-mother:] (Inaudible). I knew that one day I was going to get my children, as soon as I possibly could and could overcome my fear.

[Intervenor's counsel:] But you never articulated to [intervenor] any specific plan, a time-line or other specific plan of, "These are the steps I'm going to take to get them back by this day["]?"

[Respondent-mother:] Not by a certain day. No, ma'am.

[Intervenor's counsel:] It was a very general vague, "I want to get my life together and get them back one day["]?"

[Respondent-mother:] Yes.

Intervenor offered the following account of respondent-mother's stated intentions toward April:

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[Guardian *ad litem*'s counsel:] . . . When [respondent-mother] regained custody in November of 2013, when she left court that day, was there some kind of conversation? Did she come to you and say, "I have custody now. Let's talk about how I'm going to get the kids." [?] Did that ever happen?

[Intervenor:] She—no. She rode back to Turkey Creek Café with me. And it was pretty much like this, "I won custody. You didn't. Game over," and just went on with her life like, you know, nothing had changed. . . .

But she never attempted—it was never a conversation of, "Okay. Well, I've got my kids. You know, what's our next step?" That was never, ever brought up.

Regarding the March 2014 car ride, intervenor testified that she asked respondent-mother "what her intentions were[,] and that respondent-mother replied "that she would like to let the girls come stay with her and [Mr. C.] at some point, but that was about . . . the extent of that conversation." Intervenor did not recall threatening a "blood bath" to prevent respondent-mother from taking physical custody of the children.

It is true the trial court must consider "both the legal parent's conduct and his or her intentions" in determining whether the parent acted inconsistently with her constitutionally protected status. *See Estroff*, 190 N.C. App. at 70, 660 S.E.2d at 78-79. As revealed by her testimony, however, respondent-mother's intentions were vague, inchoate, and conveyed to intervenor on just two occasions—immediately after the 6 November 2013 review hearing, and during a car ride in March 2014. Her professed intentions were also completely at odds with her behavior toward April throughout this period. As the trial court found,

[t]he respondent mother voluntarily allowed custody of the juvenile to remain with the intervener for an indefinite period of time following the return of legal custody to her on November 6, 2013, with no notice to the intervener that such relinquishment of custody would only be temporary. She failed to advise the intervener of an end date to the intervener's period of custody, failed to establish a transitional plan with the intervener regarding her resumption of custody, and failed to notify the intervener in a clear and definite manner that she intended to resume custody of the juvenile.

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These findings are entirely consistent with both respondent-mother's and intervenor's testimony.

It is axiomatic that a party's "[i]ntent is a mental attitude seldom provable by direct evidence" and "must ordinarily be proved by circumstances from which it may be inferred." *State v. Campbell*, 368 N.C. 83, 87, 772 S.E.2d 440, 444 (2015) (citation omitted). Where "different inference[s] may be drawn from the evidence, [the trial court] alone determines which inferences to draw and which to reject." *In re Hughes*, 74 N.C. App. at 759, 330 S.E.2d at 218. Here, the trial court found that respondent-mother "induced the [intervenor], [April], and [Megan] to flourish as a family unit in a relationship of love and duty with no expectation that it would be terminated." Inasmuch as "an individual is presumed to intend the natural consequences of the individual's actions[,] it was reasonable for the trial court to infer that respondent-mother had no meaningful intention that intervenor's custody of April be temporary. *In re J.L.B.M.*, 176 N.C. App. 613, 627-28, 627 S.E.2d 239, 248 (2006) (citing *State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000)).

We hold that clear, cogent, and convincing evidence supports the trial court's findings of fact, which in turn support the trial court's conclusion of law that respondent-mother "acted in a manner inconsistent with her constitutionally protected paramount status" as April's parent.

B. Unfitness

Respondent-mother also challenges the trial court's determination that she is "unfit at this time to exercise the primary physical custody" of April. She contends the court's findings mischaracterize her as "easily agitated, aggressive, and violent" based on a single instance when she allegedly slapped April in the face in May 2014 and accounts of respondent-mother's cruelty to animals and other "childhood behavior" unrelated to her present parenting abilities. Respondent-mother notes that she and Mr. C. have custody of their infant son and care for him appropriately.

Because we have upheld the trial court's conclusion that respondent-mother acted inconsistently with her constitutionally protected status as April's parent, we need not also review the court's determination of her unfitness. As our Supreme Court has explained,

a natural parent may lose his [or her] constitutionally protected right to the control of his [or her] children *in one of two ways*: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is

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inconsistent with his or her constitutionally protected status. Therefore, . . . the trial court's finding of [a parent's] fitness . . . [does] not preclude it from granting joint or paramount custody to [a nonparent], based upon its finding that [the parent's] conduct was inconsistent with his [or her] constitutionally protected status.

David N., 359 N.C. at 307, 608 S.E.2d at 753 (emphasis added). Once the court concluded that respondent-mother had acted inconsistently with her status as a parent, it was required to apply the “best interest of the child” standard when ruling on intervenor’s motion for custody. See *Price*, 346 N.C. at 79, 484 S.E.2d at 534-35; see also N.C. Gen. Stat. §§ 7B-903(a), -906.1(i) (2015) (prescribing a “best interests of the juvenile” standard for dispositions and review hearings). Accordingly, we decline to address respondent-mother’s argument regarding the trial court’s second basis for applying the “best interest of the child” test. Cf. *In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005) (If one of the trial court’s grounds for termination of parental rights is valid, “it is unnecessary to address the remaining grounds.”), *aff’d per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

IV. Substantial Change in Circumstances

Respondent mother next argues that the “trial court erred when it concluded as a matter of law that a substantial change of circumstances had occurred” as required “to warrant a modification of the permanent custody order from the 6 November 2013 [review] hearing.”⁷ (Portion of original in all caps.) She claims the court impermissibly considered evidence of April’s mental health and behavioral changes that postdated intervenor’s filing of her motion to modify child custody on or about 6 January 2015. Respondent-mother further contends that the evidence fails to establish “that a ‘nexus’ exists between the changed circumstances and the welfare of the child[.]” (Quoting *Shipman v. Shipman*, 357 N.C. 471, 478, 586 S.E.2d 250, 255-56 (2003)).

“[O]nce the custody of a minor child is judicially determined, that order of the court cannot be modified until it is determined that (1) there has been a substantial change in circumstances affecting the welfare of

7. Unlike N.C. Gen. Stat. § 50-13.7(a), the Juvenile Code allows the court to modify custody in an abuse, neglect, or dependency proceeding “in light of changes in circumstances or the needs of the juvenile.” N.C. Gen. Stat. § 7B-1000(a) (emphasis added); see also *Botsford*, 75 N.C. App. at 75, 330 S.E.2d at 25. Because this distinction between the juvenile court and civil court standards does not affect our analysis, we adopt the parties’ framing of the issue.

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the child; and (2) a change in custody is in the best interest of the child.” *Hibshman v. Hibshman*, 212 N.C. App. 113, 121, 710 S.E.2d 438, 443 (2011) (citation and ellipsis omitted). “[T]he evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection.” *Shipman*, 357 N.C. at 478, 586 S.E.2d at 255. However, “[w]here the ‘effects of the substantial changes in circumstances on the minor child are self-evident,’ there is no need for evidence directly linking the change to the effect on the child.” *Lang v. Lang*, 197 N.C. App. 746, 750, 678 S.E.2d 395, 398 (2009) (ellipsis omitted) (quoting *Shipman*, 357 N.C. at 479, 586 S.E.2d at 256).

The evidence and the trial court’s findings amply support its conclusion that “[t]here has been a substantial change in circumstances affecting the general welfare and best interest of [April] since the Review Order entered [after] the November 6, 2013 hearing.” The findings reflect respondent-mother’s abdication of her parental role since 6 November 2013, as well as her perpetuation of intervenor, April, and Megan “as a family unit in a relationship of love and duty with no expectation that it would be terminated.” This substantial change in circumstances was compounded by respondent-mother’s decision on 19 December 2014 to wrest April from the only home and caretaker she had known since May 2012, without any notice or transition plan. After regaining custody of April on 21 January 2015, respondent-mother “did not allow the [intervenor] any contact with [April] for six weeks” until the District Court in Madison County granted respondent-mother supervised visitation with Megan. Respondent-mother did not return April to her daycare and “refused to allow [April] any contact with [her] extended family members,” other than her grandmother, until the court ordered her to do so on 16 April 2015.

The evidence and the trial court’s findings also make plain the adverse effect of the change in circumstances on April. After obtaining emergency custody from the District Court in Madison County on 21 December 2014, intervenor observed behavioral changes in April that included “clinginess to the [intervenor,]” aggression toward Megan, a refusal to nap, and “multiple episodes of aggression toward other children” at daycare. Since returning to respondent-mother’s custody in January 2015, April has experienced “extreme difficulty” and distress during transfers back to respondent-mother after visits with intervenor.

The trial court’s findings also include the observations of two therapists who worked with April in early 2015. Kristie Sluder performed an

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intake assessment of April at intervenor's request on 11 January 2015. Ms. Sluder described April as "clingy[.]" physically possessive of intervenor, and "needing constant reassurance from [intervenor]" in a manner "out of the scale of normal development" for a child of April's age. Noting the importance of "stability" and "[s]ecure attachments" to early childhood development, Ms. Sluder diagnosed April with adjustment disorder and attributed her maladaptive behaviors "to the changes in custody that had occurred in" December 2014 and January 2015. Ms. Sluder described respondent-mother's sudden, unannounced reclamation of April on 19 December 2014 as "disturbing and entirely negligent toward" April.

Respondent-mother engaged Ilene Procida in February 2015 to replace Ms. Sluder as April's therapist. Ms. Procida testified that April "was very emotionally attached" to intervenor and did not display a similar bond with respondent-mother.⁸ Having observed April as recently as the day before her testimony on 26 March 2015, Ms. Procida described April as "very cautious and tentative around [her] mom" and "very relaxed" with intervenor. Ms. Procida saw signs that respondent-mother was coaching April, noting that April "constantly looks to her biological mother for approval and for—or what to say next" and will "say one thing to [Ms. Procida] if she's alone and then something different if Mom is in the room." April had confided to Ms. Procida "on multiple occasions that she wishes to be with her aunt." Ms. Procida opined that it would be "very upsetting, especially for a toddler[.]" to be suddenly removed from her home and primary caretaker and described respondent-mother's abrupt reclamation of April on 19 December 2014 as "very traumatic" for April. Ms. Procida characterized April and Megan's relationship as "hugely important" to both girls and believed it would be "wrong" to separate the sisters.

We find no merit to respondent-mother's argument that the trial court erred in considering evidence of April's mental health and behavior after 6 January 2015, the approximate date intervenor filed her motion in the cause. "The party seeking to have the custody order vacated has the burden of showing that circumstances have changed between the time of the order *and the time of the hearing on his motion.*" *Hensley*, 21 N.C. App. at 307, 204 S.E.2d at 229 (emphasis added);

8. Although respondent-mother casts Ms. Procida's testimony as "unreliable" in light of her difficulty "recalling dates and pertinent information about April's case[.]" the trial court's credibility determinations are not a viable basis for relief on appeal. *See Elliott*, 173 N.C. App. at 714, 620 S.E.2d at 270.

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accord Crosby v. Crosby, 272 N.C. 235, 237, 158 S.E.2d 77, 79 (1967) (discussing rule in child support context). Section 7B-906.1 likewise allows the juvenile court at a review hearing to consider “any evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.” N.C. Gen. Stat. § 7B-906.1(c).

In *Lang*, this Court held the effects of changed circumstances on the child to be self-evident based on the trial court’s findings that “(1) the child needed ADHD medication and [the father] was willing to provide it; (2) [the father] was ‘very attentive to the child’s progress and behavior in school,’ while the mother was less attentive; and (3) ‘[the father] had been more consistent in treating the child’s various recurring medical conditions.’ ” *Lang*, 197 N.C. App. at 751, 678 S.E.2d at 399 (brackets omitted). We further found “the trial court’s consideration of the effect of the changes in circumstances on the child [to be] implicit in these three findings in the context of the whole order[.]” *Id.* at 751-52, 678 S.E.2d at 399.

In this case, the direct connection between the substantial change in circumstances and April’s well-being is both self-evident and explained in the trial court’s order, as follows:

In making the decision to assume custody of [April] on December 19, 2014, the respondent mother did not consider the trauma that [April] was likely to suffer in being removed from the only caregiver she knew, as well as her sister to whom she was extremely bonded; being denied access to that caregiver and all her extended family to whom she was extremely close; and being removed from her day care environment, all without advance notice to the child or any opportunity for her to physically or emotionally prepare for such a drastic change.

Respondent-mother’s argument is overruled.

V. Best Interest of the Child

In addition to finding a substantial change in circumstances affecting April’s welfare, the trial court was required to determine that “a change in custody is in the best interest of the child.” *Hibshman*, 212 N.C. App. at 121, 710 S.E.2d at 443 (citation omitted). We review a trial court’s best interest determination for an abuse of discretion. *In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007). “A ruling committed to a trial court’s discretion is to be accorded great deference and will be upset

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only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Respondent-mother does not directly contest the trial court’s assessment of April’s best interest. She instead contends that “the trial court is barred from considering the child’s best interest without clear and cogent evidence that a substantial change has occurred affecting April’s welfare.” Because we have rejected respondent-mother’s premise that no actionable change in circumstances occurred, her argument as to April’s best interest also fails. Moreover, we discern no abuse of discretion in the trial court’s conclusion of law that “it is in the best interest of the juvenile [April] that her sole care, custody, and control should be awarded to the [intervenor], subject to visitation with the respondent parents[.]” We affirm the trial court’s order.

AFFIRMED.

Chief Judge McGEE and Judge BRYANT concur.

IN THE MATTER OF C.A.D. AND B.E.R. (MINOR JUVENILES)

No. COA15-1195

Filed 17 May 2016

1. Jurisdiction—standing—grandparents in termination of parental rights

The mother in a termination of parental rights proceeding did not have standing to raise the contention that adoption should not have been the permanent plan because the maternal grandparents offered a safe and loving home. The maternal grandparents did not appeal the trial court’s permanency plan, they did not complain of the court’s findings of fact or conclusions of law, and they did not complain that they were injuriously affected by the trial court’s decision to pursue adoption as the permanency plan.

2. Termination of Parental Rights—permanency plan—adoption rather than placement with maternal grandparents

The trial court did not abuse its discretion in choosing adoption for the permanency plan.

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3. Termination of Parental Rights—neglected children—consideration of all factors

The trial court did not abuse its discretion in terminating a mother's parental rights in the best interests of the children. The trial court's written findings showed careful reflection upon all of the N.C.G.S. § 7B-1100(a) factors, the possibility of placing the children with the maternal grandparents, and the history of neglect by the maternal grandparents.

Appeal by Respondent-Mother from a permanency planning order entered 20 March 2014, and an order terminating her parental rights entered 9 July 2015 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 13 April 2016.

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

Mary McCullers Reece for Respondent-Mother.

Matthew D. Wunsche for Guardian ad Litem.

HUNTER, JR., Robert N., Judge.

Respondent-Mother Tabitha Nicole Rogers ("Respondent") appeals following an order terminating her parental rights to her minor children "Beth" and "Charlie."¹ We hold the trial court did not abuse its discretion in terminating Respondent's parental rights to serve Beth's and Charlie's best interests.

I. Factual and Procedural Background

Since 2002, the Cumberland County Department of Social Services ("DSS") visited Respondent's home over nine times for child protective service referrals. She is the biological mother of four children, "Richard," Beth, "Oliver" (now deceased), and Charlie.² Samuel Nolan is Beth's legal father. Brian Phillip "Tank" Davis is Respondent's boyfriend

1. Pseudonyms have been used to protect the minor children. N.C. App. Rule 3.1(b). In an effort to highlight the conduct of the adults in this case, the Court has not used pseudonyms to protect the adults because they were not "under the age of eighteen at the time of the proceedings in the trial division . . ." *See Id.*

2. Richard, the eldest, was born in 2002. Beth was born in 2005. Oliver was born in 2007. Charlie was born in 2008.

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and Charlie's putative father. Cory Bavousett is Richard's father and Christopher Morrison is Richard's putative father. Oliver's biological father is unidentified in the record.

Respondent lives in a two-bedroom single-wide trailer with her three children Oliver, Beth, and Richard, her parents Marjorie Rogers and Graham Rogers, Jr. (the "maternal grandparents"), her boyfriend Brian Phillip "Tank" Davis, and her brother Graham Rogers III. She is unemployed. Charlie had not yet been born into this environment. On 18 March 2008, social worker Yvette Jordan (Cumberland County DSS) visited the home to investigate a referral, which came from a 911 call from a member of this household.

Ms. Jordan walked into "clutter, disarray and squalor" that engulfed the residents. Oliver, Richard's and Beth's ten-month-old baby brother, Iain dead, his body decomposing "for an undetermined period of time." Bruises distorted his face, chest, arms, and legs. A sore left the flesh of his arm open and exposed. His skin was purple and lifeless, "slippage indicat[ed] he had been dead for a period of time." When asked about Oliver's death, Tabitha Rogers, Graham Rogers III, Marjorie Rogers, Graham Rogers Jr., and Brian Phillip "Tank" Davis, could not, or would not, give an explanation. The trial court heard allegations Brian Phillip "Tank" Davis had harmed Oliver. After an autopsy on Oliver's body, the examiner determined "there were total inconsistencies between the adults' statements and the time [of Oliver's death.]"

The home was "infested with roaches, had dirty diapers on the floor . . . piles of dirty clothes . . . one baby's bottle containing a dark liquid substance . . . [and] [t]he home smelled of urine and had a strong animal smell as well." "There was very little food in the home, [and] there was no food or formula for [Oliver] in the home."

Beth, then three years old, was "covered in dirt and she had a strong urine smell on her body." Scratches painted her legs, feet, and face. She was dressed unfit for the March weather. When taken to the hospital for her injuries, Beth "had to be bathed before the doctor could examine her."

Her five-year-old brother, Richard, wore disturbing injuries. Richard "had a rash under his left arm and a healing gash on top o[f] his head." When asked about the gash, Richard "replied that he could not talk about it." Like Beth, doctors had to bathe him before he could be examined.

The record discloses no criminal charges filed in this matter.

On the day after Ms. Jordan's visitation, DSS filed a verified juvenile petition alleging Beth and Richard were abused, neglected, and

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dependent. Cumberland County District Court Judge Edward A. Pone immediately ordered non-secure custody of the juveniles and placed them into foster care and therapy. While in foster care, the children evidenced “significant [] developmental delays.”

On 5 August 2008, Judge Pone adjudicated Beth and Richard as “neglected” and dismissed the allegations of abuse and dependency. Judge Pone found “[r]eturn of the juveniles to the Respondent[] would be contrary to the welfare and best interest of the juveniles in as much as additional services are needed.” Judge Pone found Beth’s and Richard’s home “an injurious environment,” and the family “has a long history of involvement with Child Protective Services,” and it was “imperative” for the children to reside in a clean and safe environment.

To achieve this end, Judge Pone ordered Respondent to enroll in parenting classes, and put the children in continued therapy and foster care. The record shows Respondent “by and through her counsel, admitted and stipulated that the juveniles were neglected.” The record does not disclose what party, if any, recommended the children be reunified with Respondent and/or the maternal grandparents. Notwithstanding this lack, Judge Pone statutorily set the permanent plan as reunification with Respondent. *See In re L.M.T., A.M.T.*, 367 N.C. 165, 167, 752 S.E.2d 453, 455 (2013) (citing N.C. Gen. Stat. § 7B-507(b) (2011)). DSS devised “a plan of structure for the family” which included intensive in-home services.

In September 2008, Respondent gave birth to her fourth child, Charlie. On 21 November 2008, Judge Pone ordered Beth and Richard to be transitioned back into the home with Respondent and the maternal grandparents. The record does not disclose what party advocated for this transition. Judge Pone ordered the family to participate in intensive in-home services and therapy, and set the following boundaries recommended by Richard’s therapist:

- a. [Richard] should have his own bed and space and preferably his own bedroom;
- b. [Richard] should sleep by himself in his own bed;
- c. [Richard] should not sleep with “Mr. and Mrs. Rogers.”
- d. The caregivers should not possess or access pornography in the home or on the property where [Richard] resides.
- e. The caregivers should maintain personal boundaries when in the presence of [Richard] by always being fully clothed i.e. underwear, pants, bra and shirts.

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f. [Richard] should not be responsible for the care giving or disciplining of any children including his siblings i.e. diaper changing, carrying, etc. . . .

h. [Richard] should have no contact with [Brian Phillip “Tank” Davis] by phone, in person, by written correspondence, or by seeing pictures. . . .

o. Ms. Tabitha Rogers should receive psychoeducation

q. Graham and Marjorie Rogers should receive psychoeducation

On 18 August 2009, Judge Pone gave Respondent and the maternal grandparents joint legal and physical custody of Beth and Richard, with Respondent having primary custody. Judge Pone found, “it would be inappropriate to enter any type of visitation order as to Samuel Nolan or Brian ‘Tank’ Davis. In fact, the Court specifically finds that any visitation with the Respondent Brian “Tank” Davis would be contrary to the welfare and best interest of the juveniles.” Accordingly, Judge Pone ordered, “[t]here shall be absolutely no contact allowed with [Brian Phillip “Tank” Davis] and either of the juveniles, most specifically [Richard]. That a violation of this [no contact] shall be considered as direct contempt of the Court and will be punishable by incarceration for the maximum period allowed by law.”

On 3 February 2011, DSS visited Respondent’s home after receiving another child protective service referral. Social worker, Lakendrick Smith, visited the home, where DSS had found Oliver’s dead body decomposing some three years prior.

During his investigation, Mr. Smith found bugs and dirty dishes throughout the trailer. Mr. Smith learned Brian Phillip “Tank” Davis had violated the trial court’s no-contact order and lived at the trailer, where he fought pit bulls in front of Beth, Richard, and Charlie. Beth, now five years old, was mature enough to describe the adult conduct in her home environment. She told DSS the following:

8. [Mommy and Brian Phillip “Tank” Davis] make their own cigarettes and those cigarettes smell funny. [] [T]hey call it weed. That weed looks brown and they get it out of a clear plastic bag. [They] smoke weed. . . .

10. [Richard] touched [me] in [my] private area. [He] sits on [my] face when [I’m] in the bed and he doesn’t have any clothes on.

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11. [Richard] touches [my] private area between [my] legs when [I] ha[ve] [my] clothes on and [I] always tell[] on him and [] [Mommy] says “go back to bed.”

12. [My] daddy (Brian “Tank” Davis) has dogs (pit bulls), and the dogs hurt each other sometimes. [T]he dogs, Macy and Hooch got in a fight and Macy has a lot of stitches.

13. [] “[M]ommy gets hurt because daddy [Brian Phillip “Tank” Davis] hits [M]ommy” and [I] see[] [it]. [I] “beat[] daddy [Brian Phillip “Tank” Davis] up when he hits [] [M]ommy and he just throws [me] down on the bed.”

Respondent denied she and Brian Phillip “Tank” Davis engaged in any domestic violence. Respondent denied using marijuana, though she “stated she couldn’t pass a drug test and she had last used marijuana about fifteen days [prior].” Graham Rogers, Jr. and Marjorie Rogers still lived at the home while this was happening.

On 4 February 2011, DSS obtained non-secured custody of Beth, Richard, and Charlie, and filed a verified juvenile petition alleging the children were neglected and dependent. DSS alleged the home environment was injurious to the children and that all of the adults had violated the trial court’s order.

On 7 February 2011, DSS filed a motion for show cause and contempt to have the trial court hold Respondent in contempt for violating the no-contact order. On 13 December 2011, DSS voluntarily dismissed the motion for contempt in exchange for the following stipulations from Respondent and the maternal grandparents:

The parties agree to the following stipulation:

Neglect Based on: improper supervision and injurious environment[:]

Dependency Based on: inability to care for the juveniles and lack of an appropriate alternative child care plan.

As a factual basis for the above stipulation, the parties agree and consent to the following

3. The parties admit that Brian “Tank” Davis was allowed contact with the juveniles in violation of the Court’s previous order(s).

4. That Tabitha Rogers admits to having a continuing relationship with Brian “Tank” Davis between approximately

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August 3, 2009, and approximately February 4, 2011, wherein she allowed her children [Beth, Richard, and Charlie] to be around him on a regular and continuing basis.

5. That Graham and Marjorie Rogers were aware of Tabitha Rogers' continued relationship with Brian "Tank" Davis and that the juveniles . . . were around him on a regular and continuing basis.

6. The juvenile [Beth] has reported that her "mommy gets hurt because daddy hits mommy" and she sees this. She reports that she "beats her daddy up when he hits her mommy and he just throws her down on the bed."

7. [The home] was found to be in a disarray and in an unsafe condition for the juveniles to live in

9. That disclosures from the juveniles have indicated that sexually inappropriate behavior occurred.

10. That Tabitha Rogers admits to the regular use of marijuana between August 3, 2009, and February 4, 2011.

11. That [Richard] was prescribed various necessary medications . . . [and he] was out of his prescribed medications and Tabitha Rogers had not consistently followed through with his necessary mental health treatment.

Judge Pone held hearings for the adjudication and disposition of Beth, Charlie, and Richard on 13 and 15 December 2011. The parties stipulated that the children were neglected and the home environment was "injurious to their welfare." Judge Pone adjudicated the children as neglected and dependent and placed them into foster care. Judge Pone set the matter for permanency planning review on 1 February 2012.

The court system and DSS made "extraordinary efforts" to reunify the children with Respondent and the maternal grandparents, but they did not utilize the resources and opportunities given to them. Judge Pone set the permanent plan as reunification with Respondent and the maternal grandparents and ordered Respondent to complete a psychological evaluation and parenting assessment. Judge Pone ordered DSS to continue providing foster care for the children.

While her children were in foster care, Respondent moved from her parents' trailer into Brian Phillip "Tank" Davis' motel room. At a 7 March 2013 hearing, Respondent told the trial court she wanted the maternal grandparents to have legal and physical custody of the children, as well

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as guardianship. The guardian *ad litem* “highly opposed” this. Judge Pone noted the history of court intervention in the case and stated, “once [DSS’s] and the [trial] Court’s involvement ceased, the same issues resurfaced.” Judge Pone found it was contrary to the children’s best interests to return them to Respondent or the maternal grandparents and ordered DSS to take legal and physical custody of the children. Judge Pone changed the permanent plan to custody with court approved caretakers concurrent with adoption. The maternal grandparents did not appeal this permanency plan.

On 30 June 2014, DSS filed a petition to terminate Respondent’s parental rights, and the rights of the uninvolved fathers. Due to the trial court’s scheduling conflicts, Richard was dismissed from the termination of parental rights petition on 11 March 2015, and his case was set for resolution on a future date.

While the termination of parental rights matter was pending, North Carolina Child Protective Services opened an adverse investigation into Beth’s and Charlie’s temporary foster parents who were probable adoptive parents. The result of this investigation left Beth and Charlie with no proposed adoptive parent at the termination of parental rights hearing.

The parties were heard on the termination of parental rights petition 23–27 February 2015 and 27 March 2015. Judge Pone found the following *inter alia*:

THE COURT, AFTER REVIEWING THE EVIDENCE, RECORD, SWORN TESTIMONY AND ARGUMENTS PRESENTED, MAKES THE FOLLOWING FINDING, BY CLEAR, COGENT, AND CONVINCING EVIDENCE:

66. [T]his was, and has always been, much more than a case of a dirty house. This time, there was domestic violence witnessed by [Beth] between the Respondents and she was able to describe substance abuse and drug and alcohol use by the Respondents. The Respondent Mother admitted regular drug use between August 3, 2009 and February 4, 2011. . . .

93. Clearly, the Respondents neglected the juveniles—both in 2008 and again in 2011. There has not been any substantial change in circumstances. The likelihood of neglect recurring is great. The juveniles were neglected and brought into care in 2008; they were returned home and in 2011 they returned neglected. It is clear that there

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is a substantial likelihood of the repetition of the neglect should the juveniles be returned home.

94. The Respondents have significant instability. Today, they say they have been stable in the current [address] for twelve (12) months. Yet, sheriff's deputies tried to locate the Respondent Mother at this address on two (2) separate occasions without success in the child support matter. . . .

101. The Respondent Mother has been less than candid with this Court at various time[s] throughout these proceedings. . . .

105. At [the] time [of the 18 March 2008 DSS petition], the juvenile [Oliver] had died in the home, and the home was in a deplorable and toxic condition. There were considerable questions surrounding the death of the juvenile; questions that still linger today. The Court, however, moved forward; over a period of time, and by August 3, 2009, the juveniles had been returned to the Respondent Mother and the maternal grandparents to what was believed to be a safe and nurturing environment. . . .

108. Each of the Respondents has acted in a manner that is inconsistent with the constitutionally protected status as a parent, and none of the Respondents is a fit or proper person for the care, custody, and control of the juveniles. Each of these Respondents have abdicated their requirements as parents. . . .

117. Moreover, this Court is not satisfied that there has been any fundamental change in the family culture which led to two (2) adjudications of neglect, and the death of one juvenile since 2008.

118. This Court does not have a crystal ball; no one can predict every detail in the future. However, the history in this case clearly indicates the likelihood of neglect being repeated should the juveniles be returned. The risk of such neglect is extraordinarily high.

119. The Court took a chance in 2009. Services were provided and the plan of reunification was implemented, only to have the juveniles returned in approximately eighteen (18) months. The fact is, the conditions are likely to have

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reverted much sooner than that. [Brian Phillip “Tank” Davis] had resumed his contact in, by his own testimony, a couple of months and the environment returned to being injurious and hazardous.

120. The Respondents . . . have demonstrated a pattern of failing to provide appropriate care and supervision for the juveniles; it is highly probable that such neglect would be repeated if custody of the juveniles were returned to any of the Respondents. . . .

128. To this date, none of the adults charged with caring for these children, including the Respondents, have offered any plausible explanation as to how—with at least four adults in the home—the juvenile [Oliver] died and had started to decompose without any of them knowing it. It is beyond this Court’s comprehension.

DISPOSITIONAL FINDINGS

3. The juveniles are of tender years. [Beth] . . . is currently ten (10) years old, and [Charlie] . . . is currently six (6) years old.

4. The likelihood of adoption for the juveniles is good. . . . The testimony provided is that the juveniles behaviorally are very good. . . .

5. That a termination of parental rights will assist in the accomplishment of the permanent plan; the permanent plan has been set to adoption and terminating the parental rights of the Respondents will be necessary in achieving that plan. . . .

6. There is a minimal bond between [Charlie] and the Respondents. [He] was removed from the home of the Respondents at an early age, and has been in foster care since that time. [Beth] remains very bonded to the Respondent Mother, and loves the Respondent Mother dearly. . . .

7. That at this time, there is not a proposed adoptive parent. The previous placement providers now have an open CPS investigation; this was a tragic turn of events. Those circumstances were unforeseeable. The Court has received this information for the first time on this date.

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8. The juveniles are in a very tragic situation. That it is clear the juveniles were seriously neglected by the Respondents; the juvenile [Beth] on two occasions now. The Respondents woefully failed these juveniles. The conditions which led to removal were not alleviated.

9. These juveniles, tragically, have now been failed again, by a system wherein things are not perfect. Just as the Court was unable to foresee the reinstatement of neglect following the 2009 reunification with the Respondents, no one was able to foresee the current situation with the former placement providers. . . .

12. Even absent a current approved adoptive parent, these juveniles deserve an opportunity to move forward as best they can, and it is therefore in the juveniles' best interests that the parental rights of the Respondents be terminated.

Judge Pone found it was in Beth's and Charlie's best interests to terminate Respondent's parental rights and awarded DSS custody of the children for placement in foster care. Respondent timely filed her notice of appeal 10 July 2015.

II. Standard of Review

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

"The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law. We then consider, based on the grounds found for termination, whether the trial court abused its discretion in finding termination to be in the best interest of the child." *In re Shepard*, 162 N.C. App. 215, 221-22, 591 S.E.2d 1, 6 (citation and quotation marks omitted), *disc. review denied sub nom.* See also *In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004).

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III. Analysis

First, Respondent contends the trial court erred in ceasing reunification efforts in its 20 March 2013 permanency plan because the children should have been placed with the maternal grandparents. Second, Respondent contends the trial court abused its discretion in terminating her parental rights because the findings do not support the conclusions of law. We disagree.

[1] When a trial court orders DSS to take non-secure custody of a juvenile as part of a permanency plan, the trial court must make findings that: (1) the juvenile's continuation or return to the home is contrary to their health and safety; (2) the county DSS office has made reasonable efforts to prevent the need for placement of the juvenile; and (3) shall specify that the juvenile's placement and care is DSS's responsibility and that DSS shall provide or arrange for foster care or other placement, unless the court orders a specific placement. N.C. Gen. Stat. § 7B-507(a) (2015).

Respondent does not contend the trial court failed to make these findings or abused its discretion in making adoption the permanency plan. Rather, Respondent contends the "maternal grandparents offered a safe, loving home, [and] the trial court's permanent plan of adoption or placement with a non-relative was error."

"Only a 'party aggrieved' may appeal from an order or judgment of the trial division." *Culton v. Culton*, 327 N.C. 624, 625, 398 S.E.2d 323, 324 (1990) (quoting N.C. Gen. Stat. § 1-271) (citations omitted). "An aggrieved party is one whose rights have been directly and injuriously affected by the action of the court." *Culton*, 327 N.C. at 625–26, 398 S.E.2d at 324–25 (citations omitted). Here, the maternal grandparents have not appealed the trial court's permanency plan. They do not complain of the court's findings of fact or conclusions of law, and they do not complain they were injuriously affected by the trial court's decision to pursue adoption. Respondent cannot claim an injury on their behalf. Therefore, she has no standing to raise her first claim.

[2] Presuming that Respondent could assert standing, the clear, cogent, and convincing evidence shows Beth's and Charlie's health and safety were endangered by Respondent, the maternal grandparents, and the home they lived in together. We hold the trial court made findings based upon credible evidence and the findings support the trial court's conclusions. We hold the trial court did not abuse its discretion in choosing adoption for the permanency plan.

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[3] Second, we review the termination of Respondent’s parental rights. After a trial court finds that one or more grounds for terminating parental rights exists, the court must determine if terminating parental rights is in the juvenile’s best interest. N.C. Gen. Stat. § 7B-1110(a) (2015). To determine the best interests of the child, the court must consider the following criteria:

- (1) The age of the juvenile.
- (2) The likelihood of adoption of the juvenile.
- (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
- (4) The bond between the juvenile and the parent.
- (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
- (6) Any relevant consideration.

Id. While the trial court must consider all of these factors, it is only required to make written findings regarding the relevant factors. *See In re D.H.*, 232 N.C. App. 217, 221–22, 753 S.E.2d 732, 735 (2014).

Respondent contends the trial court should have awarded the maternal grandparents custody of Beth and Charlie in an effort to keep the family together. Our Court has held, “[a] trial court may, but is not required to, consider the availability of a relative during the dispositional phase of a hearing to terminate parental rights.” *In re M.M.*, 200 N.C. App. 248, 684 S.E.2d 463 (2009), *disc. review denied*, 364 N.C. 241, 698 S.E.2d 401 (2010) (citation omitted). Therefore, Respondent’s contention is not determinative of this matter.

It is well settled that the child’s best interests are paramount to the parent’s interests when the two are in conflict. N.C. Gen. Stat. § 7B-1100(3) (2015); *see also In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984) (“As we stated in *Wilson v. Wilson*, 269 N.C. 676, 678, 153 S.E.2d 349, 351 (1967), “[t]he welfare or best interest of the child is always to be treated as the paramount consideration to which even parental love must yield . . .”).

Here, the trial court considered all six of the section 7B-1100(a) factors and the possibility of placing Beth and Charlie with the maternal grandparents. The trial court’s written findings show careful reflection upon all of these factors, and the history of neglect that Beth and Charlie

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faced in the home with Respondent and the maternal grandparents. Despite Respondent's contentions, Beth's and Charlie's best interests have not been served by their maternal grandparents. Like Respondent, the maternal grandparents repeatedly failed to meet Beth's, Charlie's, and Richard's needs, and created a home environment where a child, Oliver, died and decomposed for some time, without any explanation from the four adults living in the home. The record also shows Respondent stipulated to Beth's and Charlie's neglect multiple times, and admitted violating court orders.

Accordingly, we hold the trial court's findings of fact are supported by clear, cogent, and convincing evidence, and the findings support the conclusions of law. We hold the trial court did not abuse its discretion in terminating Respondent's parental rights to serve the best interests of Beth and Charlie. We observe this just result took almost seven years to achieve since the death of Oliver, a tragic delay.

IV. Conclusion

For the foregoing reasons, we affirm the trial court.

AFFIRMED.

Judge CALABRIA and TYSON concur.

IN THE MATTER OF CAROLE WINIFRED CRANOR, RESPONDENT

No. COA15-541

Filed 17 May 2016

1. Appeal and Error—jurisdiction on appeal—final order

Where there were two trial court orders in the case—one in September and one in December—the September order was not final because it was an order awarding attorney fees that did not set the amount. Timely notice of appeal was given from the December order, which did set the amount, and the Court of Appeals had jurisdiction over the appeal.

2. Attorneys—sanctions—Rule 11

The superior court erred in imposing Rule 11 sanctions on an attorney where the unchallenged findings and uncontroverted evidence supported a conclusion that the attorney acted in good faith.

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3. Attorneys—sanctions—inherent authority of court

The undisturbed findings of the trial court did not support a sanction against an attorney in the exercise of its inherent authority.

Judge HUNTER, JR., concurring in part and dissenting in part.

Appeal by Appellant Lynn Andrews from orders entered 12 September 2014 and 17 December 2014 by Judge George B. Collins, Jr., in Durham County Superior Court. Heard in the Court of Appeals 4 November 2015.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for the Appellant Lynn Andrews.

West Law Offices, P.C., by James P. West, for the Petitioner-Appellee Frank Taylor Cranor.

DILLON, Judge.

Lynn Andrews (“Attorney Andrews”) – who was retained by Carole Cranor in this incompetency proceeding – appeals from an order entered 12 September 2014 (the “September Order”) in which the trial court imposed judicial discipline on her, pursuant to Rule 11 and its inherent authority, and ordered her to pay attorneys’ fees to the Petitioner Frank Cranor and *his* attorney (“Attorney West”). Attorney Andrews also appeals two subsequent orders entered 17 December 2014 (the “December Orders”) in which the trial court set *the amount* of the attorneys’ fee award and denied Attorney Andrews’ Rule 60 motion for relief from the September Order.

I. Background

This matter involves an incompetency proceeding commenced by Frank Cranor to have his sister Carole Cranor declared incompetent and to have him appointed as her general guardian. Carole Cranor is a retired pharmacist residing in Durham who was diagnosed with early onset dementia. At the time of her diagnosis, Carole and her brother Frank Cranor were not close. There is evidence that they had a contentious relationship due to a past disagreement concerning the care of their mother and that they had very little contact with each other.

Carole Cranor consulted her long-time, close attorney-friend, Harriet Hopkins (“Ms. Hopkins”), for help in choosing a long-term care facility and in getting her legal and financial affairs in order. Carole

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Cranor also appointed Ms. Hopkins as her attorney-in-fact via a durable power of attorney (“DPOA”) that Ms. Hopkins drafted. The DPOA that Ms. Hopkins drafted contained a gifting provision which allowed Ms. Hopkins to make gifts to herself from Carole Cranor’s estate. However, there is no evidence that Ms. Hopkins ever made any such gifts, and the DPOA was subsequently replaced by another DPOA drafted by an independent attorney.

Frank Cranor, who resides in Arkansas, learned of his sister’s deteriorating condition and became aware that Ms. Hopkins was acting as Carole’s attorney-in-fact. On 3 June 2013, Frank Cranor filed the petition to have his sister Carole adjudicated incompetent and requested that he be appointed as her general guardian, citing a concern that his sister was being taken advantage of by Ms. Hopkins.

On 8 June 2013, Carole Cranor hired Attorney Andrews to represent her in the incompetency proceeding.¹

After a period of litigation, which included discovery and a series of motions, Attorney Andrews was successful in obtaining a Rule 12(b)(6) dismissal of Frank Cranor’s incompetency petition. This appeal, however, is unrelated to the dismissal or the issue of Carole Cranor’s competency. Rather, this appeal arises from orders entered *after the dismissal* of the incompetency petition.

Following the dismissal, Attorney Andrews filed motions seeking attorneys’ fees, costs, and sanctions against Frank Cranor and Attorney West. In these motions, Attorney Andrews alleged that Frank Cranor’s incompetency petition did not contain justiciable issues of fact or law, and thus was non-justiciable. In response, Frank Cranor and Attorney West filed motions for attorneys’ fees, costs, and Rule 11 sanctions against Attorney Andrews, contending that Attorney Andrews’ motions for fees, costs, and sanctions were filed in violation of Rule 11 because they were not well grounded in fact and were filed for the purpose of harassing Frank Cranor and Attorney West.

The clerk denied all motions. Specifically, the clerk determined that Frank Cranor’s incompetency petition *was* justiciable and that Attorney

1. The clerk had appointed Attorney Andrews to serve as Carole Cranor’s guardian ad litem on 3 June, the day Frank Cranor filed his petition. However, Attorney Andrews promptly withdrew, citing a conflict of interest, based on a previous discussion she had had with Ms. Hopkins regarding Carole Cranor’s situation. When Attorney Andrews was hired by Carole Cranor directly, Frank Cranor petitioned to have her disqualified; however, his motion was denied.

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Andrews had acted in good faith in seeking fees, costs, and sanctions.² All parties appealed to superior court.

Following a hearing on the matter, the superior court entered its September Order denying Attorney Andrews' motions *but allowing* Attorney West's motion for sanctions against Attorney Andrews. Specifically, in allowing Attorney West's motions, the court ordered that (1) Attorney Andrews be prohibited from accepting any fees or expenses from Carole Cranor; (2) Attorney Andrews be removed as attorney for Carole Cranor and be barred from representing her in any action or proceeding in any court in the State of North Carolina; and (3) Attorney Andrews pay the attorneys' fees and costs of Frank Cranor and Attorney West incurred in defending against Attorney Andrews' motions for fees, costs and sanctions, with the amount of the award to be determined in a future hearing.³

In December 2014, the superior court entered its December Orders in which it denied Attorney Andrews' Rule 60(b) motion for relief from the September Order and set *the amount* of attorneys' fees and costs awarded in the September Order at \$122,987.72. In January 2015, Attorney Andrews filed her notice of appeal to this Court from the September Order and from both December Orders.

II. Jurisdiction

[1] As a preliminary matter, we address Frank Cranor's contention that this Court lacks jurisdiction to consider Attorney Andrews' arguments concerning the September Order. Specifically, Frank Cranor contends that the September Order was a final order (notwithstanding the later December Orders) and that Attorney Andrews failed to file her notice of appeal from that order within the thirty (30) day period prescribed by Rule 3 of the North Carolina Rules of Civil Procedure. *See* N.C. R. App. P. 3(c)(1); N.C. R. Civ. P. 58. We disagree, and hold that we have jurisdiction to consider Ms. Andrews' arguments regarding the September Order.

Frank Cranor's argument turns on whether the September Order was a "final" order, notwithstanding the subsequent December Orders. Our Supreme Court has held that "[a]n order that completely decides

2. The Clerk did order Frank Cranor to pay the costs of a multidisciplinary evaluation of Carole Cranor ordered by the court that he sought as part of the incompetency proceeding.

3. The trial court also requested that the State Bar open an investigation into Attorney Andrews' conduct in its September Order.

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the merits of an action [] constitutes a final judgment for purposes of appeal even when the trial court reserves for later determination collateral issues such as attorney's fees and costs." *Duncan v. Duncan*, 366 N.C. 544, 546, 742 S.E.2d 799, 801 (2013).

The gist of Frank Cranor's argument is that the December Orders dealt only with collateral matters and, therefore, did not affect the status of the September Order as being a "final" order. However, we note that the September Order, itself, did not decide any substantive issue concerning Carole Cranor's competency, but rather only dealt with "collateral issues," including an award of attorneys' fees. *See Bryson v. Sullivan*, 330 N.C. 644, 653, 412 S.E.2d 327, 331 (1992) (noting that sanctions are collateral issues that "require consideration after the action has been terminated"). Where an order imposes judicial discipline, an appeal from such order is interlocutory if the order involves the imposition of attorneys' fees and if the *amount* of the fee award was not set in the order. *See, e.g., Sanders v. State Pers. Comm'n*, ___ N.C. App. ___, ___, 762 S.E.2d 850, 854 (2014) (stating that "an appeal of the [] issue of attorney fees, itself, is interlocutory if the trial court has not set the amount to be awarded").

Because the September Order was an order for attorneys' fees which did not set *the amount* of the fee award, instead leaving the issue for later determination, it was not a final order. Rather, the December Order, which *did set the amount* of the attorneys' fees, was the final order. Thus, since Attorney Andrews noticed her appeal from the December Orders within the time allowed by our Rules, we reject Frank Cranor's argument concerning our jurisdiction and address the merits of Attorney Andrews' appeal.

III. Analysis

A. Rule 11 Sanctions

[2] We first review the superior court's award based on Rule 11. N.C. Gen. Stat. § 1A-1, Rule 11 (2014). Our Supreme Court has held that a trial court's decision to impose sanctions under Rule 11 "is reviewable *de novo* as a legal issue." *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). That is not to say that the reviewing court reweighs the evidence and makes new factual findings. Rather, the Supreme Court instructs that "[i]n the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact

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are supported by a sufficiency of the evidence.” *Id.* The Supreme Court further instructs that if the appellate court makes these determinations in the affirmative, “it must uphold the trial court’s decision to impose or deny the imposition of mandatory sanctions under [Rule 11].” *Id.* The trial court’s decision concerning the *type* of sanction(s) to impose, however, is reviewed for an abuse of discretion. *Id.*

Based on our review, we hold that Rule 11 sanctions against Attorney Andrews were not warranted in this case.

First, many of the superior court’s findings are not supported by the evidence. For instance, the court found that Attorney Andrews “has repeatedly argued to [the superior court] that because [Frank Cranor] refused to consent to a limited guardianship with Harriet Hopkins as the guardian, that he was seeking to take away all of [Carole Cranor’s] rights. This argument is a misrepresentation of the facts and the law.” However, in his petition, Frank Cranor specifically stated that he was seeking to be named his sister’s general guardian, which would legally allow him great control over Carole’s life. Such relief, if granted, would have deprived Carole of her authority to choose Ms. Hopkins as her guardian or attorney-in-fact. Throughout the litigation, the record shows that Mr. Cranor persisted in objecting to Ms. Hopkins acting as Carole’s attorney-in-fact. Therefore, we hold that this finding is without evidentiary support.

The superior court also found that Attorney Andrews *admitted* that her client Carole Cranor was incompetent, which would tend to show that Attorney Andrews recognized the justiciability of Frank Cranor’s petition. However, the record clearly shows that Attorney Andrews conceded only that her client had limited capacity related to “early stage dementia,” maintaining that Carole was otherwise competent to make decisions concerning her own affairs, including the decision to name her attorney-in-fact.⁴ Therefore, we hold that this finding is also without evidentiary support.

Further, the superior court found that Attorney Andrews continued to insist during the proceeding that there was no evidence of wrongdoing by Carole’s attorney-in-fact, Ms. Hopkins. It is true that Ms. Hopkins’ drafting of a DPOA, which contained a gifting provision in her favor, may have constituted unethical conduct. However, the record does not disclose that Attorney Andrews ever contested this point or made any

4. Although not central to our analysis, we note that the evidence produced during discovery clearly suggested that Carole did have substantial capacity and was not totally incompetent.

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misrepresentation concerning this point. Rather, Attorney Andrews' statements on this issue are supported by another finding by the superior court – which *is* supported by the evidence – that although Ms. Hopkins had violated the Professional Rules of Conduct in drafting the gifting provision in her favor, “[t]here is no evidence that Ms. Hopkins ever received anything of value or otherwise benefitted from the DPOA.”

The superior court's concern seemingly was that Attorney Andrews was acting for the benefit of Ms. Hopkins and not for the benefit of her client, Carole Cranor. It is true that Attorney Andrews' advocacy in this matter had the potential of benefiting Ms. Hopkins by allowing her to continue serving as Carole's attorney-in-fact and/or as a limited guardian appointed by the court. However, Attorney Andrews' advocacy benefited her client as well, in that she was acting in accordance to Carole's wishes: that Ms. Hopkins, in whom she had great trust, remain in charge of her affairs during her decline and that her brother, with whom she had a strained relationship, would have no authority over the running of her affairs.

We hold that the evidence in the record and the superior court's findings which *are* supported by the evidence support a conclusion that Rule 11 sanctions are not warranted in this case, as found by the clerk in the initial hearing on the matter. We agree with the determination by the clerk that the petition filed by Frank Cranor was justiciable and that Attorney Andrews' motions were properly denied. However, we also conclude that Attorney Andrews acted in good faith and in the interest of zealously advocating for her client. We therefore agree with the clerk that “remarks and pleadings made and filed by [Attorney Andrews] in this matter were made in apparent good faith and do not rise to a level of culpability sufficient to justify imposition of sanctions pursuant to [Rule 11] nor to trigger payment of costs.”

Specifically, Attorney Andrews could reasonably have inferred from Frank Cranor's original and amended petitions for adjudication of Carole Cranor's incompetence that Frank Cranor was attempting to gain control over his sister's assets by having her declared incompetent and having himself named as her general guardian, and that the petitions were filed without a proper basis in fact. The petition was eventually dismissed for failure to state a claim.⁵ Frank Cranor represented in his

5. We note that while the grant of a 12(b)(6) motion is not sufficient to *establish* the absence of a justiciable issue, it *can serve as evidence* of the absence of a justiciable issue. *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 259, 400 S.E.2d 435, 439 (1991).

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petition that he had first-hand knowledge of Carole's condition though there is evidence that he had no first-hand knowledge of her condition, in that he had had very little contact with her for many years.

Further, Attorney Andrews could reasonably have inferred that Frank Cranor was not proceeding in good faith, based in part on his attempt to have Carole evaluated by his chosen psychiatrist without notifying Attorney Andrews. Specifically, on the morning of 8 June 2013, Attorney Andrews e-mailed Attorney West that she had been retained by Carole and that she objected to any evaluation of her client that day by Frank Cranor's chosen psychiatrist. However, whether Attorney West was aware of Attorney Andrews' e-mail or not, Attorney West appeared at Carole's residential care facility later that same day along with the psychiatrist for the purpose of performing an exam on Carole.

Finally, based on overwhelming evidence that Carole Cranor still retained significant capacity, Attorney Andrews could have reasonably concluded that Frank Cranor pursued his appeal of the clerk's dismissal of his amended petition after a point where he should reasonably have become aware that the pleading no longer contained a justiciable issue. *Sunamerica*, 328 N.C. at 258, 400 S.E.2d at 438; *see also Bryson v. Sullivan*, 330 N.C. 644, 658, 412 S.E.2d 327, 334 (1992) (“[O]nce the case has become meritless, failure to dismiss or further prosecution of the action may result in sanctions [under Rule 11] or pursuant to the inherent power of the court.”). Thus, we do not believe that the trial court's finding that “the record . . . clearly establishes the justiciability of the issues presented by the petition” supports the trial court's conclusion of law that “no reasonably competent attorney could conclude that the issues brought by [Frank Cranor] are non-justiciable in this proceeding.”

Again, we do not take a position regarding Attorney Andrews' beliefs about the motivation of Frank Cranor and Attorney West in filing the petition or in prosecuting this matter. Indeed, Carole was suffering from dementia, and there was a concern regarding the initial DPOA which contained the self-gifting provision in favor of Ms. Hopkins. We simply conclude that the unchallenged findings and uncontroverted evidence in the record supports a conclusion that Attorney Andrews acted in good faith in filing the Rule 11 motion and the motion for attorneys' fees. Accordingly, we hold that the superior court erred in imposing sanctions on Attorney Andrews in response to both motions.

B. Sanctions Imposed in the Trial Court's Inherent Authority

[3] In addition to the imposition of sanctions pursuant to Rule 11, the superior court imposed sanctions against Attorney Andrews in

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the exercise of its inherent authority. These sanctions included (1) prohibiting Attorney Andrews from collecting any fees or expenses from Carole Cranor, and (2) removing Attorney Andrews as Carole Cranor's attorney. The proper standard of review for acts by the trial court in the exercise of its inherent authority is abuse of discretion. *In re Key*, 182 N.C. App. 714, 721, 643 S.E.2d 452, 457 (2007).

The superior court prohibited Attorney Andrews from collecting fees or expenses from Carole Cranor pursuant to the provisions of Indigent Defense Services ("IDS") Rule 1.9(e), which governs the appointment of counsel to indigent clients and also applies to guardian ad litem appointments in certain situations. This was improper and constitutes an abuse of discretion. IDS Rule 1.9(e) addresses a situation where an attorney is appointed as **counsel** for an indigent client, *withdraws*, and then becomes *privately retained* as counsel for the same client. *See* Commentary to IDS Rule 1.9(e) (2014). That situation is markedly different from the facts of this case, where Ms. Andrews was appointed as Ms. Cranor's guardian ad litem and where the record clearly shows that Ms. Cranor was not indigent. IDS Rule 1.9(e) clearly does *not* apply in the present situation.

Additionally, we do not believe the record supports the trial court's removal of Attorney Andrews as counsel for Carole Cranor in this matter, or its order preventing Carole Cranor from retaining Attorney Andrews in any future matter.⁶ As previously discussed, many of the findings used by the trial court to support its conclusions were not supported by the evidence in the record. We do not believe that the undisturbed findings of the trial court support this sanction.

IV. Conclusion

In conclusion, we reverse the September Order and December Orders to the extent that they impose sanctions on Attorney Andrews pursuant to Rule 11 *and* the trial court's inherent authority, including the imposition of attorneys' fees and costs. Furthermore, we reverse the September Order to the extent that it orders that the cost of the multi-disciplinary evaluation of Carole Cranor be borne by the Department of Health and Human Services and reinstate the order of the clerk requiring that Frank Cranor bear the cost. *See* N.C. Gen. Stat. § 35A-1116(b)(3) (requiring that when a respondent is not adjudicated incompetent, the

6. It is not within the trial court's inherent authority to place a limitation on a lawyer's right to practice law for an *indefinite* period of time. *See Matter of Hunoval*, 294 N.C. 740, 744, 247 S.E.2d 230, 233 (1977).

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cost of a multidisciplinary evaluation may be taxed against either party in the court's discretion).⁷ These Orders are otherwise affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

Judge ZACHARY concurs.

Judge HUNTER, JR., concurs in part and dissents in part by separate opinion.

HUNTER, JR., Robert N., Judge, concurring in part and dissenting in part.

I agree with the majority that this Court has jurisdiction to hear Appellant's appeal. However, I must respectfully dissent from the majority's analysis in favor of affirming the trial court.

"The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a)." *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). Second, "in reviewing the appropriateness of the particular sanction imposed, an 'abuse of discretion' standard is proper because '[t]he rule's provision that the court "shall impose" sanctions for motions abuses . . . concentrates [the court's] discretion on the *selection* of an appropriate sanction rather than on the *decision* to impose sanctions.'" *Id.* (quoting *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985)).

7. Whether to tax the cost of the evaluation to Frank Cranor pursuant to N.C. Gen. Stat. § 35A-1116(b)(3) was within the discretion of the clerk. Here, since the superior court did not reverse the dismissal of the incompetency petition, the superior court's review of the clerk's order taxing costs of the evaluation was for an abuse of discretion. There is nothing in the record which would support a conclusion that the clerk abused its discretion in taxing the costs of the evaluation to Frank Cranor.

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The majority contends “many of the superior court’s findings are not supported by the evidence.” A full review of the record shows the following, in addition to the facts set forth by the majority.

Dementia runs in Frank Cranor’s (“Petitioner”) family. His mother and maternal aunt struggled with the disease, and he is aware that he and his sister, Carole Cranor (“Respondent”), face an increased likelihood of suffering from the disease. In 2000, Respondent began complaining of memory issues to Petitioner. In 2006, Respondent and Petitioner were emotionally strained when their mother’s health deteriorated. Respondent was tasked with managing her mother’s affairs, but her declining capacity failed her as a caretaker, and Petitioner took over as his mother’s caretaker, which caused some turmoil.

According to Petitioner, he and Respondent reconciled in 2009. Sometime in 2010–2011, Respondent told Petitioner she had quit her job and collected disability due to her memory problems. Petitioner visited Respondent in 2011, and he discovered she had hygiene issues because she did not remember to shower. He grew concerned for her, but had confidence that Respondent’s ex-husband was caring for her.

Respondent’s memory became significantly worse in 2012–2013. In April 2013, Respondent’s ex-husband called Petitioner and told him that Respondent had fallen and her friend and attorney, Harriet Hopkins (“Hopkins”), had taken her to the hospital. Then, Respondent learned that Hopkins “had taken control of [Respondent’s personal affairs and [] estate” by drafting a durable power of attorney document that gave Hopkins “the unilateral right to gift to herself any or all of [Respondent’s] property without any duty to provide an accounting to anyone.” This shocked Petitioner and made him feel that Respondent’s “personal and financial well-being were in too much jeopardy to continue to refrain from taking action to protect her from herself and others, particularly [] Hopkins.”¹

Respondent was discharged from the hospital and admitted to an assisted living facility. After some time, Petitioner called a nursing assistant to check on Respondent and she said Respondent’s condition was “poor.”

1. There is no record evidence that Hopkins represented Respondent as a client beyond this durable power of attorney document. There is also no evidence that Hopkins self-gifted any of Respondent’s property.

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On 3 June 2013, Petitioner filed a petition² to have Respondent adjudicated incompetent and have a general guardian appointed to protect her. Petitioner nominated himself to be Respondent's general guardian but he also contacted guardian *ad litem* ("GAL") Kelly Black-Oliver, and "adamantly [expressed to her] that he did not necessarily wish to be [Respondent's general] guardian, just that [he wanted] one [] appointed so that there was some accountability."

When the petition was filed, attorney Lynn Andrews ("Appellant"), was appointed to serve as Respondent's GAL. She immediately withdrew from the case as GAL and stated she had a conflict of interest because she is a friend of Hopkins' and discussed the case with her. Thereafter, Ms. Black-Oliver was appointed as GAL.

Several days later, Petitioner's counsel asked Ms. Black-Oliver if she would agree to have a forensic psychiatrist from Duke University examine Respondent. Ms. Black-Oliver agreed "that was a prudent thing to do," and the parties scheduled the examination on a Saturday. Appellant sent an email to Petitioner's counsel Saturday morning and stated, "I'm representing [Respondent], and I'm not going to allow this evaluation." The parties went to Respondent's assisted living facility so Ms. Black-Oliver could interview Respondent and the forensic psychiatrist could examine Respondent, but Appellant intervened "to try to delay or prevent Ms. Black-Oliver from speaking to [Respondent]."

On 13 June 2013, Appellant stated in a written motion that Respondent retained her as counsel. Appellant moved to stay the multi-disciplinary evaluation ("MDE"). She obtained an *ex parte* order staying the MDE. The parties were heard on the matter on 14 June 2013. At the hearing, Appellant debated the proper procedure to schedule a MDE and stated the following:

And we've already said that we will admit that [Respondent] has limited capacity. We're not alleging she's incompetent. If [Petitioner's counsel] says this is a contested case on incompetency, he's wrong. We will concede that the Respondent has early stage dementia or Alzheimer's. That's the reason she's in an assisted living facility. . . .

And, again, I don't blame Ms. Black-Oliver. I think [Petitioner's counsel] has been pushing and bullying and

2. Petitioner filed a Standard Form AOC-SP-200. It states, *inter alia*, "Respondent has suffered significant cognitive decline and memory loss, apparently due to dementia, as well as physical problems such as dehydration, extreme fatigue, and bad falls."

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trying to do everything as fast as he can in this case, but there's just nothing there. A [MDE] is appropriate in a case where incompetency is at question or contested. We'd advised him we're not contesting that [Respondent] has limited capacity. . . . And we will admit that [Respondent] has a diagnosis of early onset, early stage dementia. She's very forgetful. . . . Apparently [Petitioner's counsel] is trying to have [Respondent] declared completely incompetent with a full guardianship stripping her of every right she can possibly have.

Thereafter, the parties questioned Ms. Black-Oliver. Petitioner's counsel questioned Ms. Black-Oliver as follows:

[PETITIONER'S COUNSEL]: Did [Appellant] threaten to have you disqualified [as guardian *ad litem*]?

[MS. BLACK-OLIVER]: I believe she stated that it was her intention to do so yesterday, but she has not done so yes—yet.

[PETITIONER'S COUNSEL]: And did she go to the Public Defender who is the person that appoints the guardian *ad litem*s to complain that you had acted inappropriately and/or colluded and/or threatened to kidnap [Respondent] to your knowledge?

[MS. BLACK-OLIVER]: That is summarily my understanding.

Ms. Black-Oliver also testified that Petitioner is “independently wealthy himself” and “[r]eceived the same split of inheritance that [Respondent] received.” She stated, “[A]ny potential concerns I would have of [Petitioner's] interest in the proceedings being financial and having control of [Respondent's] assets was [sic] quelled”

At the conclusion of the hearing Petitioner's counsel asked the trial court to dissolve the MDE stay, and to disqualify Appellant as Respondent's counsel. The trial court stayed the MDE and denied Petitioner's motion to disqualify.

One week later, on 21 June 2013, Appellant filed a Rule 12(b)(6) motion to dismiss the petition. She alleged, “The Petition fails to state any facts tending to support a finding that the Respondent is an ‘Incompetent Adult’ as defined by NCGS 35A-1101(7). The Petition

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contains no factual allegations tending to show that the Respondent lacks sufficient capacity to manage her own affairs”

Petitioner filed a verified amended petition on 10 July 2013 and Appellant filed a response in which she admitted the following:

The Respondent admits that when she was living alone, her memory problems and inability to drive adversely impacted her ability to prepare adequate meals for herself, which led to her being hospitalized after a fall due to dehydration. . . . Respondent admits that during the time when she was living alone, she might have been vulnerable to being taken advantage of by unscrupulous persons offering to perform services on her home. Since the Respondent wisely decided to move into a facility where she no longer has the responsibility of keeping up a house and where there are other people around to look after her, this is no longer an issue.

The parties were heard on the motion to dismiss on 3 July 2013, and the Clerk of Durham County Superior Court concluded the Standard Form AOC-SP-200 petition was not specific enough. The Clerk dismissed the case without prejudice, allowing Petitioner to re-file or appeal to Superior Court “for trial *de novo*” and told Petitioner’s counsel to “keep intact all the work you’ve done”

Afterwards, Appellant prepared a draft order for dismissal *with* prejudice and emailed it to the Clerk without first allowing Petitioner’s counsel to review it. The Clerk signed the order and backdated it six days without consent of the parties. Petitioner’s counsel emailed the Clerk and told him the order should be without prejudice and asked him to correct it. The Clerk declined to do so and told Petitioner’s counsel that changes would only be made if Appellant consented to them. Consequently, Petitioner appealed to Superior Court.

In Superior Court, Appellant sought to limit the scope of the appeal to only the issue of dismissal. The Superior Court issued an order stating, “[Petitioner] is entitled to a *de novo* hearing . . . in accordance with G.S. 35A-1115 . . . [and the appeal is not] limited to the record before the Clerk of Court.” The Superior Court signed a MDE order to have Respondent evaluated and allowed Petitioner to amend his petition. The Superior Court scheduled the case for an evidentiary hearing.

Appellant appealed the Superior Court’s order and argued Petitioner had no right to appeal from a Clerk of Court’s dismissal. She argued the

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Clerk's dismissal should have been without prejudice, and the trial court remanded the case to the Clerk to allow him to amend the order, which the Clerk did on 2 October 2013. Once the Clerk amended the order to reflect the dismissal was without prejudice, the Superior Court entered an order dismissing Petitioner's appeal for lack of standing.

On 28 October 2013, Appellant filed a motion for attorneys fees pursuant to N.C. Gen. Stat. § 6-21.5, and alleged Petitioner and his counsel filed a nonjusticiable case when they petitioned to have Respondent declared incompetent. Appellant alleged the following, *inter alia*:

6. After the dismissal of [the original] Petition and Amended Petition and [the] appeal to Superior Court, Petitioner continued to file numerous pleadings that had no relevance to the issues pertinent to his pending appeal in a last-ditch effort to unearth some evidentiary support for his unsubstantiated claim that the Respondent is incompetent. . . .

9. [After a MDE stating Respondent has the capacity to manager her affairs] Petitioner continued to pursue this litigation, seeking additional discovery and further continuances, long after the time limit for a hearing prescribed by G.S. 35A-1108 had passed, and in the face of overwhelming evidence that Respondent is not incompetent and does not need a guardian. . . .

14. Petitioner did not have reasonable grounds to bring this proceeding, as shown by: the complete lack of any allegation or evidence tending to show that Respondent is incompetent; the complete lack of any medical evidence for such alleged incompetence; and the complete lack of any valid reason why an adjudication of incompetence was sought. . . .

16. The pleadings filed in this special proceeding reveal a complete absence of any justiciable issue of either law or fact. . . .

17. Petitioner did not advance any claim supported by a good faith argument for an extension, modification, or reversal of law in this proceeding.

Appellant filed a second motion on 28 October 2013 against Petitioner and Petitioner's counsel for Rule 11 sanctions. Appellant alleged the following, *inter alia*:

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1. . . . [The 22 May 2013] Petition did not contain any statements or allegations made upon information and belief. . . .

3. The Petition and other pleadings filed for Petitioner by his Attorney were presented for an improper purpose, such as intimidation or harassment of Respondent, [Appellant], [Hopkins], and other witnesses, and to cause unnecessary delay or needlessly increase the cost of litigation, in that:

a. The affidavit and other pleadings . . . strongly suggest that the reason Petitioner initiated this proceeding is because Petitioner does not like [Hopkins], rather out of than [sic] any genuine concern for Respondent's welfare

i. After the Clerk dismissed his Petition and Amended Petition and Petitioner elected to appeal said dismissal rather than initiate a new proceeding, Petitioner filed a barrage of voluminous and frivolous motions, requests, notices, and memoranda that had no relevance to the issues pertaining to Petitioner's appeal and said appeal was ultimately dismissed by the Superior Court for lack of standing . . .

[5.] e. Attorney for the Petitioner had ample time to investigate this matter, both before and after the filing of his Petition and, long past the timeframe prescribed by G.S. 35A-1108 for holding a hearing on his Petition for Adjudication of Incompetency, still had no evidentiary support for Petitioner's claim that Respondent is incompetent and would be unlikely to find any evidentiary support for such a claim.

On 21 December 2013, Petitioner and Petitioner's counsel moved for Rule 11 sanctions against Appellant. They alleged Appellant's motions for sanctions, attorneys fees, and costs violated Rule 11. On 17 December 2013, they filed a thirty-four page brief in response to Appellant's motions and included seventeen exhibits that included deposition and hearing transcripts, affidavits, email messages, and other pertinent information.

The parties were heard on the Rule 11 motions in Superior Court on 8 September 2014 through 10 September 2014. The trial court reviewed the entire record, heard arguments of counsel, and read counsel's briefs. In a 12 September 2014 order, the trial court made the following findings of fact and conclusions of law:

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Findings of Fact

1. Petitioner in this case, Respondent's brother, had been concerned about Respondent's health and well-being for several years preceding the filing of the petition in this case. These concerns were vastly increased when he received an email from Harriet Hopkins dated May 2, 2013 in which she informed him that his sister had really declined over the last month and expressed concerns about her worsening memory and physical issues, including bad falls and dehydration which she described as symptoms of dementia. She told him it was pretty clear that it was a safety risk for her to live alone.

2. The original petition was filed in this case on June 3, 2013, with the Durham County Clerk of Court, using Form AOC-SP-200. It alleged that Respondent lacked sufficient capacity to manage her own affairs, etc., and supported those allegations with facts that basically repeated what Hopkins told him in the email. It was signed and verified by Petitioner. There is not a place on Form AOC-SP-200 for Petitioner's attorney to sign. . . .

11. [Appellant] has repeatedly argued to this Court and to others in this case that because Petitioner refused to consent to a limited guardianship with Harriet Hopkins as the guardian, that he was seeking to take away all of Respondent's rights. That argument is a misrepresentation of the facts and the law.

11. [sic] The Clerk of Court, after he dismissed the petition in this case on Rule 12 (b) (8) grounds, advised [Petitioner's counsel] that he could appeal for a trial de novo before a Superior Court judge and that he could have a jury trial. (Emphasis added).

12. Superior Court Judge Paul Ridgeway also ordered the case set for a hearing on the merits in Superior Court in his August 8, 2013 Order, based on his understanding at that time that the Clerk's dismissal was with prejudice.

13. Based on the advice of the Clerk, Judge Ridgeway's Order and [Petitioner's Counsel's] interpretation of the law, [Petitioner's Counsel] began to prepare for trial in Superior Court. That preparation included signing and

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filing the pleadings complained of by Respondent in her Rule 11 motions. . . .

15. The record in this proceeding, including but not limited to the May 2, 2013, email of Harriet Hopkins, the durable power of attorney of Respondent that was drafted by Ms. Hopkins, and the admissions of [Appellant] and [Ms. Black-Oliver] as to the incompetence of the Respondent, clearly establishes the justiciability of the issues presented by the petition in this proceeding. . . .

17. [Appellant], who has the burden of proof to support her motions for sanctions, fails to identify any legal authority or provide any basis for a good faith argument for the extension, modification, or reversal of existing law as a basis to impose sanctions on the Petitioner and [his counsel] under Rule 11 of the North Carolina Rules of Civil Procedure and instead appears to rely solely on her personal opinion of what she believes the law in North Carolina should be.

18. [Appellant's] conduct in this proceeding, which includes numerous and repeated misrepresentations of fact and law that are clearly intentional, is egregious, and such conduct alone provides a sufficient basis for sanctioning [Appellant] under the inherent authority of the Court.

Conclusions of Law

1. No reasonably competent attorney could conclude that the issues brought by Petitioner are non-justiciable in this proceeding. [Appellant's] amended motion for attorney's fees pursuant to G.S. 6-21.5 is thus neither well-grounded in fact after reasonable inquiry nor warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. It was also interposed to harass, delay and drive up the costs of litigation, all of which are improper purposes. This motion is frivolous as a matter of law and should be denied. Filing this frivolous motion is in violation of Rule 11 and requires the imposition of sanctions against [Appellant].

2. In contrast, the Petitioner's initial Petition, Amendment to the Petition, and Second Amended Petition were clearly

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well-grounded in fact based upon reasonable inquiry and were warranted by Chapter 35A of the North Carolina General Statutes. None of them violate Rule 11.

3. As to Respondent's Amended Motion for Sanctions Against Petitioner, the Court finds that it is unwarranted by law and was interposed for an improper purpose, to wit: harassing Petitioner and causing needless increase in the cost of litigation. Therefore, it violates Rule 11 and requires that [Appellant] be sanctioned.

4. As to Respondent's Amended Motion for Sanctions Against Petitioner's Attorney, Respondent has failed to meet her burden of proving by the greater weight of the evidence that Petitioner's attorney signed any pleading that was not well grounded in fact, not warranted by existing law or was interposed for any improper purpose. . . .

8. The evident purpose of the totality of [Appellant's] actions in the case was to protect the interests of Harriet Hopkins to the detriment of Respondent. This purpose may be inferred from the objective behavior of [Appellant], including but not limited to: alleging that this case is non-justiciable, filing Rule 11 motions against Petitioner, accepting employment in this case after having been appointed GAL and then withdrawing as GAL because of a conflict arising out of her friendship with Harriet Hopkins, objecting to a multidisciplinary evaluation of Respondent and then acting to have it stayed after the Clerk ordered it, accusing [Ms. Black-Oliver] of threatening to kidnap Respondent, and making repeated claims that Harriet Hopkins had done nothing wrong. This evident purpose goes beyond the scope of Rule 11 in its severity and its potential adverse effect on the administration of justice. The Court is justified in such situations to look beyond the sanctions of Rule 11 and invoke its inherent authority.

The trial court allowed Petitioner's Rule 11 motion, prohibited Appellant from accepting any fees from her representation of Respondent, ordered Appellant to pay Petitioner's attorneys fees, removed Appellant as Respondent's attorney, ordered the Clerk to deliver a copy of the order to the Executive Director of the North Carolina State Bar, and requested the State Bar open an investigation into Appellant's behavior.

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The trial court set a second hearing date to determine the amount of attorneys fees and costs. On 2 October 2014, Petitioner's counsel filed a petition for attorneys fees and costs and included a log of the billable time they spent defending Petitioner and themselves against Appellant's Rule 11 motion. Appellant filed a response on 13 October 2014, and objected to the attorneys fees and costs. She also filed a Rule 60(b) motion seeking relief from the 12 September 2014 order awarding Rule 11 sanctions against her. The parties were heard on their motions on 12 December 2014.

At the hearing, the trial court stated the following:

I've read [Appellant's] Rule 60 motion, and even though it[] cites provisions of law that weren't necessarily brought up in the hearing back in September, I don't see anything in here that I didn't take into consideration in entering my order. I mean, for instance, I specifically read everything in Michael Crowell's materials concerning judicial discipline. I don't consider what I did in that September 12th order to be discipline. . . . I specifically wasn't disciplining [Appellant] in my mind, and that's why I referred it to the State Bar. . . . All right. Well, just [] for the record and so everybody understands, I took this case as seriously as any case I have ever heard. I did independent research. I didn't rely on the filings done by either side because, frankly, I wanted to go outside those. I labored over what the right thing to do in this case was and what the right procedure was. I thought about it a lot.

The trial court denied Appellant's Rule 60 motion. Additionally, the trial court scrutinized the affidavits of billable hours submitted by Petitioner's counsel and found that their hourly rates of \$250.00 and \$285.00 per hour were "more than reasonable."

Thereafter, the trial court issued an order on 17 December 2014. In the order, the trial court ordered Appellant to pay Petitioner \$122,987.72 in attorneys fees and costs. Appellant filed her notice of appeal on 13 January 2015.

Analysis

Rule 11 of the North Carolina Rules of Civil Procedure sets out the following:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one

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attorney of record The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

N.C. Gen. Stat. § 1A-1, Rule 11(a) (2015). A Rule 11 motion signed in violation of this rule subjects an attorney to sanctions.

Further, “the central purpose of Rule 11 is to deter baseless filings and to streamline the administration and procedure of our courts.” *Adams v. Bank United of Texas FSB*, 167 N.C. App. 395, 399, 606 S.E.2d 149, 153 (2004) (citation omitted). Rule 11 was enumerated to “prevent abuse of the legal system, [and] our General Assembly never intend[ed] to constrain or discourage counsel from the appropriate, well-reasoned pursuit of a just result for their client.” *Grover v. Norris*, 137 N.C. App. 487, 495, 529 S.E.2d 231, 235 (2000).

“Under Rule 11, an objective standard is used to determine whether a paper has been interposed for an improper purpose, with the burden on the movant to prove such improper purpose.” *Johns v. Johns*, 195 N.C. App. 201, 212, 672 S.E.2d 34, 42 (2009) (citation omitted). An “improper purpose” is “any purpose other than one to vindicate rights . . . or to put claims of right to a proper test.” *Persis Nova Const. Inc. v. Edwards*, 195 N.C. App. 55, 63, 671 S.E.2d 23, 28 (2009) (citation omitted). For example, an improper purpose may be inferred from the following:

[F]rom “the service or filing of excessive, successive, or repetitive [papers] ...,” from “filing successive lawsuits despite the res judicata bar of earlier judgments,” from “failing to serve the adversary with contested motions,” from filing numerous dispositive motions when trial is

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imminent, from “the filing of meritless papers by counsel who have extensive experience in the pertinent area of law,” from “filing suit with no factual basis for the purpose of ‘fishing’ for some evidence of liability,” from “continuing to press an obviously meritless claim after being specifically advised of its meritlessness by a judge or magistrate,” or from “filing papers containing ‘scandalous, libellous, and impertinent matters’ for the purpose of harassing a party or counsel.”

Id. (quoting *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (quoting Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* § 13(C) (Supp. 1992))).

After considering the context of Appellant’s Rule 11 motion, and carefully reviewing the record *de novo*, it is clear Appellant violated Rule 11 when she signed and filed her Rule 11 motion against Petitioner and Petitioner’s counsel. At the outset of litigation, Appellant conceded this is “[not a] contested case” of incompetency. She admitted Respondent has dementia and/or Alzheimer’s. The other GAL, Ms. Black-Oliver, conceded Respondent is incompetent and worked to have Respondent evaluated by a forensic psychiatrist. The record clearly shows Respondent has endured a downward trajectory of mental competency for many years. The evidence to support that contention comes from nurses, caregivers, Respondent’s ex-husband, Hopkins, and others, not just Petitioner. Appellant alleges there is “a complete lack of [] evidence,” and no “good faith” reason for Petitioner to bring this action. Her allegations are not supported by the record. The record shows Respondent failed to feed herself, suffered dehydrated, and sustained a serious fall, all due to her lack of mental capacity. Moreover, there is no substantive evidence to suggest Petitioner is trying to completely control Respondent, for financial incentive or otherwise, as Appellant alleges. Rather, the record shows Petitioner is financially well-off and has concern for his sister, due to his conversations with her ex-husband, friends, and caregivers, and after reviewing the durable power of attorney she executed that exposed her assets to Hopkins’ potential self-gifting. Therefore, Petitioner and Petitioner’s counsel carried their burden in proving Appellant’s Rule 11 motion was filed for an objectively improper purpose.

First, I would hold the trial court’s conclusions of law support its imposition of sanctions; the trial court’s conclusions of law are supported by its findings of fact; and the findings of fact are supported by a sufficiency of the evidence. Therefore, the trial court’s “decision to

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impose” Rule 11 sanctions is binding on this court. *Turner*, 352 N.C. at 165, 381 S.E.2d at 714.

Second, I would hold the trial court did not abuse its discretion in selecting the specific sanctions at issue. The trial court assigned the excess cost of litigation to Appellant, and prevented her from further representation in a case that she originally claimed presented a conflict of interest. Further, the trial court referred the matter to the State Bar, and in doing so, it did not abuse its discretion.

For the foregoing reasons, I respectfully dissent in favor of affirming the trial court.

MACK DEVAUGHN POPE, PLAINTIFF
v.
DAWN WRENCH POPE, DEFENDANT

No. COA15-1062

Filed 17 May 2016

1. Civil Procedure—Rule 60(b)—domestic violence protection order—not overruling prior order

The trial court did not abuse its discretion in a domestic violence protection order case by granting defendant wife’s Rule 60(b) motion. Although plaintiff husband contended that the trial court improperly reconsidered another trial court’s decision that plaintiff was a victim of domestic violence, a Rule 60(b) order does not overrule a prior order. Consistent with statutory authority, it relieves parties from the effect of an order.

2. Domestic Violence—protection order—setting aside—Rule 60(b)(5)—sufficiency of findings of fact

The trial court did not abuse its discretion by setting aside a domestic violence protection order based on Rule 60(b)(5). The trial court properly made specific findings of fact that plaintiff-husband no longer feared defendant wife.

Appeal by plaintiff from order entered 8 April 2015 by Judge R. Dale Stubbs in Harnett County District Court. Heard in the Court of Appeals 9 February 2016.

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Daughtry, Woodard, Lawrence & Starling, by Kelly K. Daughtry, for plaintiff-appellant.

The Armstrong Law Firm, P.A., by Eason Armstrong Keeney, L. Lamar Armstrong, III, and Marcia H. Armstrong, for defendant-appellee.

BRYANT, Judge.

Where a trial judge has authority to grant Rule 60(b) relief without offending the rule that precludes one trial judge from overruling the judgment of another, we affirm the order of the trial court.

Mack Devaughn Pope, plaintiff-husband, and Dawn Wrench Pope, defendant-wife, were married on 25 October 2000. Two children born of the marriage currently reside with defendant-wife.

The parties separated on 12 May 2014. On 12 August 2014, plaintiff-husband filed a Complaint seeking a Domestic Violence Protective Order (“DVPO”) against defendant-wife. On 14 August 2014, defendant-wife filed a DVPO Complaint against plaintiff-husband. Both parties obtained *ex parte* DVPOs, and a hearing for both DVPOs was set for 30 September 2014.

Defendant-wife did not appear for the 30 September 2014 DVPO hearings scheduled on both DVPO Complaints and the Honorable Jimmy L. Love, Jr., Judge presiding, dismissed defendant-wife’s DVPO Complaint.¹ Judge Love proceeded with the hearing on plaintiff-husband’s DVPO Complaint. Judge Love found that defendant-wife had committed acts of domestic violence by harassing, following, and yelling at plaintiff-husband, and that the DVPO was warranted for a period of one year in order to alleviate plaintiff-husband’s fear of imminent serious bodily injury and continued harassment. Defendant-wife was served with the DVPO that same day, on 30 September 2014.

Plaintiff-husband continued to contact defendant-wife after his DVPO was entered against her. Plaintiff-husband showed up at defendant-wife’s house, both when the children were present and when they were not. He also required defendant-wife to meet him at gas stations

1. Defendant-wife later testified that plaintiff-husband told her he was not going to the hearing and was going to have his DVPO complaint dropped. Defendant-wife claims she relied on plaintiff-husband’s assurances and believed him because in a prior matter, plaintiff-husband dropped criminal assault charges against her after promising to do so.

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to fill her truck up with gas rather than giving her the funds to do so. According to defendant-wife, plaintiff-husband continued to call her “quite often” and also “yell” and “cuss” at her.

On 2 December 2014, defendant-wife filed a second DVPO Complaint, alleging that plaintiff-husband was repeatedly coming by her residence and threatening to force her to leave the residence. Defendant-wife obtained an *ex parte* DVPO and the matter was set to be heard on 9 December 2014. Meanwhile, on 4 December 2014, plaintiff-husband filed a motion to correct the DVPO entered 30 September 2014 based on a clerical error: Judge Love set the effective date through 30 September 2014 rather than 30 September 2015. The hearing on 9 December 2014 was held before the Honorable Robert W. Bryant, Jr., who concluded that the “evidence does not support or provide grounds for [defendant-wife’s] DVPO.”

Three months later, on 13 March 2015, defendant-wife filed a Rule 60 Motion for relief from the 30 September 2014 order granting plaintiff-husband’s DVPO and from the 9 December 2014 order denying her DVPO, alleging (1) that she did not appear at the hearing before Judge Love because plaintiff fraudulently told her he was dismissing the DVPO Complaint; and (2) that incidents occurring since entry of the DVPO showed plaintiff-husband was not afraid of defendant-wife. A hearing was held on 7 April 2015 before the Honorable R. Dale Stubbs, Judge presiding. After hearing evidence from both parties and argument from counsel, Judge Stubbs set aside Judge Love’s 30 September 2014² DVPO based on his conclusion that it was “no longer equitable that the [DVPO] should have future application” and that there was “good reason justifying relief from the [DVPO]” because “the harassment has been on both sides” and plaintiff-husband was not afraid of defendant-wife. Plaintiff-husband filed his notice of appeal of Judge Stubbs’s order on 8 April 2015.

On appeal, plaintiff-husband argues that (I) the trial court could not properly reconsider another trial court’s decision that plaintiff-husband was a victim of domestic violence; (II) the trial court abused its discretion in setting aside the DVPO based on Rule 60(b)(5); and (III) there is otherwise no basis for this Court to affirm the set-aside order.

2. Judge Stubbs’s order referred to “a DVPO entered against [defendant-wife] and amended on 12-9-14.” As the order entered 30 September 2014 was the only DVPO “amended” to correct a clerical error, it is clear this is the order to which Judge Stubbs refers.

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I

[1] Plaintiff-husband first argues that Judge Stubbs could not properly revisit the findings supporting Judge Love’s decision that plaintiff-husband was a victim of domestic violence absent grounds to do so under Rule 60(b) of the North Carolina Rules of Civil Procedure. Specifically, plaintiff-husband argues that, in granting defendant-wife’s 60(b) motion, Judge Stubbs improperly reviewed or reconsidered Judge Love’s original decision granting the DVPO. We disagree.

A motion for relief from a final order made pursuant to Rule 60(b) is within the sound discretion of the trial court, and the trial court’s decision will not be disturbed absent: (1) an abuse of discretion; and/or (2) a trial court’s “misapprehension of the appropriate legal standard” for ruling on a Rule 60(b) motion. *Anuforo v. Dennie*, 119 N.C. App. 359, 361, 458 S.E.2d 523, 525 (1995) (citations omitted). As to the former, “[a] trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court’s discretion] was so arbitrary that it could not have been the result of a reasoned decision.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (internal citation omitted). Further, findings of fact made by the trial court upon a Rule 60(b) motion are binding on appeal if supported by any competent evidence. *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 132, 180 S.E.2d 407, 410 (1971) (citations omitted).

Rule 60(b) states, in pertinent part, as follows:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for one of the following reasons:

...

(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) Any other reason justifying relief from the operation of the judgment. . . .

N.C. Gen. Stat. § 1A-1, Rule 60(b)(5), (6) (2015).

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Plaintiff-husband argues that Judge Stubbs could not properly revisit Judge Love's findings—namely that plaintiff-husband feared he would be physically injured by defendant-wife and that plaintiff-husband was significantly distressed by the prospect of relentless torment—because it is “[t]he well established rule in North Carolina . . . that no appeal lies from one judge to another; . . . and that ordinarily one judge may not modify, overrule, or change the judgment of another . . . judge previously made in the same action.” *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (citations omitted). As such, “[a] judge of the District Court cannot modify a judgment or order of another judge of the District Court’ absent a showing of mistake, inadvertence, fraud, newly discovered evidence, satisfaction, or that the judgment is void.” *Duplin Cnty. DSS ex rel. Pulley v. Frazier*, 230 N.C. App. 480, 481, 751 S.E.2d 621, 623 (2013) (quoting *Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117 (1981)). For the reasons stated below, plaintiff-husband’s argument is misguided.

Rule 60(b) does not offend the rule which states that “one [trial] judge may not ordinarily . . . overrule . . . the judgment or order of another [trial] judge . . .” *Id.* (quoting *In re Royster*, 361 N.C. 560, 563, 648 S.E.2d 837, 840 (2007)). Indeed, “[a] 60(b) order does not *overrule* a prior order but, consistent with statutory authority, relieves parties from the *effect* of an order.” *Van Engen v. Que Scientific, Inc.*, 151 N.C. App. 683, 690, 567 S.E.2d 179, 184 (2002) (emphasis added) (quoting *Charns v. Brown*, 129 N.C. App. 635, 639, 502 S.E.2d 7, 10 (1998)). Thus, “a [trial] [c]ourt judge[3] may grant relief from the decision of another judge on a Rule 60(b) motion.” *Trent v. River Place, LLC*, 179 N.C. App. 72, 79, 632 S.E.2d 529, 534 (2006) (citation omitted); *Hieb v. Lowery*, 121 N.C. App. 33, 38, 464 S.E.2d 308, 311–12 (1995) (“[A] [trial] court judge has authority to grant relief under a [Rule 60](b) motion without offending the rule that precludes one [trial] court judge from reviewing the decision of another.” (citation omitted)); *Hoglen v. James*, 38 N.C. App. 728, 731, 248 S.E.2d 901, 904 (1978) (vacating and remanding where a judge erroneously believed he lacked the power to grant the relief requested in a 60(b) motion because he believed he did “ ‘not have authority to pass upon or reconsider’ ” another judge’s order).

3. Many cases refer to “Superior Court” judges in this context as most 60(b) appeals are from Superior Court. However, as “District Court” judges are able to hear 60(b) motions, cases analyzing the trial court’s ability to grant relief under 60(b) should be equally applicable to a District Court judge’s ability to do the same. *Cf. Duplin Cnty. DSS ex rel. Pulley v. Frazier*, 230 N.C. App. 480, 481, 751 S.E.2d 621, 623 (2013) (reviewing appeal from district court’s 60(b) order and noting that a district court’s setting aside an order based on one of the grounds in Rule 60(b) does not “overrule” a prior order).

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Furthermore, a trial judge commits reversible error by denying a Rule 60(b) motion because the judge believes it should be heard by the judge who entered the order from which relief is sought. *Trent*, 179 N.C. App. at 78–79, 632 S.E.2d at 534; *Hoglen*, 38 N.C. App. at 731, 248 S.E.2d at 904. As such, “[w]here a judge refuses to entertain such a motion because he labors under the erroneous belief that he is without power to grant it, then he has failed to exercise the discretion conferred on him by law.” *Trent*, 179 N.C. App. at 79, 632 S.E.2d at 534 (internal quotation marks and citation omitted).

Rule 60(b) is the proper vehicle by which a trial court may grant relief from DVPOs. When defendant-wife filed her Rule 60 motion to set aside the DVPO on 13 March 2015, Judge Stubbs was required to hear the motion—which he did on 7 April 2015—and exercise the “discretion conferred on him by law” by either granting or denying the motion. When Judge Stubbs granted defendant-wife’s motion to set aside the DVPO concluding that it was “no longer equitable,” his order was made using the form provided by the Administrative Office of the Courts (“AOC”) specifically for orders setting aside DVPOs. The form is titled “Order Setting Aside Domestic Violence Protective Order,” with the supporting statute listed under the title as “G.S. 1A-1: Rule 60(b).” Accordingly, Judge Stubbs was not re-litigating the issue, but rather was acting lawfully by hearing and granting the motion. Therefore, plaintiff-husband’s argument is overruled.

II

[2] Plaintiff-husband next argues that the trial court abused its discretion in setting aside the DVPO. Specifically, plaintiff-husband contends the trial court abused its discretion in granting defendant-wife’s Rule 60(b) Motion, *sua sponte*, under Rule 60(b)(5), where defendant-wife moved for relief under Rule 60(b)(6). We disagree.

“The purpose of Rule 60(b) is to strike a proper balance between the conflicting principles of finality and relief from unjust judgments.” *Carter v. Clowers*, 102 N.C. App. 247, 254, 401 S.E.2d 662, 666 (1991) (citing 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2851 (1971)). “Rule 60(b) is an unusual rule, having been described as ‘a grand reservoir of equitable power.’ ” *Id.* at 253, 401 S.E.2d at 665 (quoting *Jim Walter Homes, Inc. v. Peartree*, 28 N.C. App. 709, 712, 222 S.E.2d 706, 708 (1976)). As such, while “the usual method for seeking relief under Rule 60(b) is by filing a motion. . . . other means may be sufficient.” *Id.* For instance, a trial court may even act *sua sponte* to grant relief under Rule 60(b), even where a party has not moved for relief under that rule.

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Id. (“[N]omenclature is unimportant, moving papers that are mislabeled in other ways may be treated as motions under Rule 60(b) when relief would be proper under that rule.” (citation omitted)); *see also Hieb*, 121 N.C. App. at 38, 464 S.E.2d at 311.

Further, a Rule 60(b) movant need not specify under which subpart of Rule 60(b) relief is sought. *Sides v. Reid*, 35 N.C. App. 235, 237, 241 S.E.2d 110, 111 (1978) (“If a movant is uncertain whether to proceed under clause (1) or (6) of Rule 60(b), he need not specify if his motion is timely and the reason justifies relief.” (citation omitted)). Likewise, the trial court need not set aside a final judgment under the subpart specified by the movant. *Id.* It follows, then, that if a trial court may set aside a DVPO *sua sponte*, absent a party’s motion under Rule 60(b) entirely, and a Rule 60(b) movant need not specify under which subsection it seeks relief, a trial court may set aside a DVPO pursuant to Rule 60(b)(5), even where a party moved for relief pursuant to Rule 60(b)(6) or another subsection.

Plaintiff-husband argues that there is no case which specifically supports granting relief from a DVPO under Rule 60(b)(5). However, “[o]n motion *and upon such terms as are just*, a court may relieve a party from a judgment if, among other reasons, it is no longer equitable that the judgment have prospective application.” *Buie v. Johnston*, 313 N.C. 586, 589, 330 S.E.2d 197, 199 (1985) (citing N.C.G.S. § 1A-1, Rule 60(b)(5)). Rule 60(b)(5) allows relief from a judgment when “it is no longer equitable that the judgment should have prospective application” N.C.G.S. § 1A-1, Rule 60(b)(5). That is exactly what the trial court determined.

Here, the trial court relied on competent evidence to support its conclusion that plaintiff-husband was no longer afraid of defendant-wife. After the DVPO was entered in September 2014, plaintiff-husband continued to call defendant-wife, show up at her house “almost every day,” and require defendant-wife to meet him at gas stations to fill up her truck with gas rather than provide her with the funds to do so independently. Judge Stubbs properly made specific findings of fact that plaintiff-husband no longer feared defendant-wife.

Accordingly, the decision to set aside the DVPO under Rule 60(b)(5) was supported by findings of fact and was proper. Plaintiff-husband’s argument is overruled.

Furthermore, as we have already held there was no error in setting aside the DVPO, and plaintiff-husband’s third and final argument on

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appeal is essentially an alternative one, namely that there is otherwise no basis for this Court to affirm the set-aside order, we need not address it. The order of the trial court setting aside the 30 November 2014 DVPO is

AFFIRMED.

Judges DILLON and ZACHARY concur.

ERVIN RAINEY, EMPLOYEE, PLAINTIFF
v.

CITY OF CHARLOTTE, EMPLOYER, AND SELF-INSURED, CARRIER, DEFENDANTS

No. COA15-953

Filed 17 May 2016

Workers' Compensation—occupational disease—untimely claim

The Industrial Commission did not err in a workers' compensation case by dismissing plaintiff' worker's complaint seeking benefits for an occupational disease. Plaintiff failed to file his claim within the requisite time period of the two-year statute of limitations under N.C.G.S. § 97-58(c).

Appeal by plaintiff from opinion and award filed 9 June 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 January 2016.

The Sumwalt Law Firm, by Vernon Sumwalt, for plaintiff-employee.

Jones, Hewson & Woolard, by Lawrence J. Goldman, for defendant-employer.

ELMORE, Judge.

The North Carolina Industrial Commission dismissed plaintiff's claim for benefits for an occupational disease, concluding that plaintiff failed to timely file his claim pursuant to N.C. Gen. Stat. § 97-59(c). We affirm.

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I. Background

Ervin Rainey (plaintiff) worked as an automotive mechanic assistant for the City of Charlotte (defendant) for eighteen years, which required frequent strenuous use of his arms and shoulders. On 9 May 2000, plaintiff presented to Dr. H. Yates Dunaway, an orthopedic surgeon, for an evaluation of his right shoulder and knee. According to his medical report, plaintiff told Dr. Dunaway that his job requires heavy use of his shoulders to break down tires. The report also included Dr. Dunaway's diagnosis, "severe osteoarthritis right shoulder," and the following statement: "I have talked with [plaintiff] extensively about the likelihood of total shoulder arthroplasty in the near future. He will need to consider modifying his work."

Plaintiff declined surgical intervention and continued to work in his same position as an automotive mechanic assistant for defendant. His shoulder problems persisted, however, and at times plaintiff had to request assistance from co-workers. On 1 December 2009, he retired due to pain in his left shoulder, which had rendered him incapable of performing his normal job functions.

On 1 October 2012, plaintiff presented to Dr. Roy Majors with a history of left shoulder pain, which dated back twelve years and had become worse in recent months. Dr. Majors diagnosed plaintiff with end-stage arthritis in his left shoulder and referred him to Dr. Nady Hamid for surgery. Dr. Hamid performed a left total shoulder arthroplasty on 5 November 2012 and wrote plaintiff completely out of work after the surgery.

Plaintiff filed a workers' compensation claim on 29 November 2012, alleging an occupational disease in his left shoulder. The deputy commissioner, and later the Full Commission, concluded that plaintiff had failed to file his claim within the requisite time period and dismissed for lack of jurisdiction. Plaintiff appeals.

II. Discussion

The sole issue on appeal is whether plaintiff filed his claim before the expiration of the two-year statute of limitations. "Whether the claim for an occupational disease was filed timely is an issue of jurisdiction for the commission." *Terrell v. Terminix Servs., Inc.*, 142 N.C. App. 305, 307, 542 S.E.2d 332, 334 (2001). Our North Carolina Supreme Court has articulated the standard of review in cases involving challenges to the jurisdiction of the Industrial Commission:

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Except as to questions of jurisdiction, findings of fact by the Industrial Commission are conclusive on appeal when supported by competent evidence even though there is evidence to support contrary findings. G.S. 97-86; *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458 (1981). Findings of jurisdictional fact by the Industrial Commission, however, are not conclusive upon appeal even though supported by evidence in the record. *Richards v. Nationwide Homes*, 263 N.C. 295, 139 S.E.2d 645 (1965). A challenge to jurisdiction may be made at any time. *Id.* When a defendant employer challenges the jurisdiction of the Industrial Commission, any reviewing court, including the Supreme Court, has the duty to make its own independent findings of jurisdictional facts from its consideration of the entire record. *Lucas v. Stores*, 289 N.C. 212, 221 S.E.2d 257 (1976).

Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 705, 304 S.E.2d 215, 218 (1983).

N.C. Gen. Stat. § 97-58 (2015) establishes the time limit to file a claim for compensation for an occupational disease. Pursuant to subsection (c), the claim must be filed “within two years after death, disability, or disablement as the case may be.” N.C. Gen. Stat. § 97-58(c) (2015). Subsection (b) further provides that “[t]he time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has [the] same.” N.C. Gen. Stat. § 97-58(b) (2015). Our Supreme Court has construed these two subsections (b) and (c) *in pari materia* to “establish the factors which commence the running of the two year period within which claims must be filed . . .” *Dowdy*, 308 N.C. at 706, 304 S.E.2d at 218. The two-year period begins to run

when [1] an employee has suffered injury from an occupational disease which renders the employee incapable of earning the wages the employee was receiving at the time of the incapacity by such injury, and [2] the employee is informed by competent medical authority of the nature and work related cause of the disease. The two year period for filing claims for an occupational disease does not begin to run until all of these factors exist.

Id. at 308, 304 S.E.2d at 218–19 (citing *Taylor v. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980)).

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A. Informed by Competent Medical Authority

First, we must determine when plaintiff was informed by competent medical authority of the nature and work-related cause of his left shoulder condition. The Full Commission concluded that plaintiff had been adequately informed during his 9 May 2000 evaluation with Dr. Dunaway. Plaintiff maintains, however, that his appointment with Dr. Dunaway was for his right shoulder only, and it was not until his visit with Dr. Majors on 1 October 2012 that plaintiff was informed of the occupational disease in his left shoulder.

During his deposition, Dr. Dunaway confirmed that it was his diagnosis of arthritis that would have led to a total shoulder arthroplasty. He also acknowledged that the nature of plaintiff's work, as referenced in his report, would require use of both shoulders. When asked about certain statements in his report concerning his plan for treatment, Dr. Dunaway testified as follows:

Q. You reference in the following sentence that "[plaintiff] will need to consider modifying his work," correct?

A. Correct.

Q. And what was the basis for writing that [plaintiff] would need to modify his work?

A. Recognizing he had this arthritis in his shoulder, we know that the heavier you use the joint, the more likely that arthritis is to be a problem and be symptomatic.

Q. And would that be the case for either of [plaintiff]'s shoulders?

A. I would think so.

Dr. Dunaway admitted that he had no independent recollection of the examination apart from his report, though he believed he told plaintiff to consider modifying his work:

A. . . . usually when I make a sentence like that, then I discuss that with the patient.

Q. Any reason to doubt you discussed with [plaintiff] that he needed to modify his employment?

A. No reason that I'm aware of.

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Q. Okay. And would you have discussed with [plaintiff] the reason that you felt he needed to modify his employment, in light of the employment activities he did?

A. Yeah. I'm assuming. Obviously, I don't remember this. But as is usually my practice, we talk about the diagnosis, what the potential outcomes might be, and how you might modify that, to alter that outcome.

As to his conversations with plaintiff regarding the cause of his shoulder problems, Dr. Dunaway offered the following testimony:

Q. Okay. In your medical opinion, was the occasional heavy use, breaking down tires, aggravating the arthritis in his shoulders?

A. That would have been my opinion, I think.

. . . .

Q. And you discussed with him that his occasional heavy use, breaking down tires, could be contributing to that pain that he was having in his shoulders—

A. Correct.

Q. —and was contributing to the symptoms from his arthritis in his shoulders?

A. Correct.

While we are cautious to rely solely on statements that Dr. Dunaway “assumed” to have made or details that he “would think” to be true, see *Lawson v. Cone Mills Corp.*, 68 N.C. App. 402, 410, 315 S.E.2d 103, 108 (1984) (“[I]t is not enough for the medical authority to ‘assume’ he told a worker his disease ‘may have been’ work related.”), plaintiff’s own testimony tends to corroborate Dr. Dunaway’s recollection of the examination.¹ According to plaintiff, Dr. Dunaway evaluated and made recommendations pertaining to both the right and left shoulders:

1. We do not treat plaintiff’s own adverse testimony as a “judicial admission,” as argued by defendant, but as an “evidentiary admission.” The difference being that under the latter approach, the testimony is “admissible in evidence against such party, but . . . may be rebutted, denied, or explained away and is in no sense conclusive.” *Woods v. Smith*, 297 N.C. 363, 373–74, 255 S.E.2d 174, 181 (1979); cf. *Cogdill v. Scates*, 290 N.C. 31, 44, 224 S.E.2d 604, 611 (1976) (“If at the close of the evidence, a plaintiff’s own testimony has *unequivocally* repudiated the material allegations of his complaint and his testimony has shown no additional grounds for recovery, . . . the defendant’s motion for directed verdict should be allowed.” (emphasis added)).

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Q. If we were to represent to you that Dr. Dunaway recommended a total shoulder replacement—

A. Yeah, both—he said both.

Q. —in 2000—

A. Uh-huh.

Q. —do you remember that conversation with the doctor?

A. Yes, I remember that, yeah.

....

Q. Tell us about the conversation you had with Dr. Dunaway about you'll eventually need a total shoulder replacement.

A. Well, when I went there and after he put me in this machine and—you know, and checked me out, then he told me—he said, "Well, you might as well get ready to retire from the City, because you're going to have—both of your shoulders going [sic] to have to be replaced."

On cross-examination, plaintiff again stated that Dr. Dunaway had recommended replacement surgery for both shoulders:

Q. And the—you indicated that you saw Dr. Dunaway, and I think we've got his medical record, and I think Mr. Sumwalt indicated that was in the year 2000.

....

Q. The—he was recommending you need shoulder replacement surgery to your right shoulder, wasn't he?

A. No, he didn't speculate—he said both shoulders.

Plaintiff further testified that Dr. Dunaway told him that his job was causing his shoulder problems:

Q. Just so that I'm clear—

THE WITNESS: Okay.

Q. —when you and I were talking earlier—

A. Uh-huh.

Q. —you mentioned a doctor, sometime while you were employed by the City, who basically told you your job duties were hurting both your shoulders.

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A. He might have did, but I had to keep on working. I couldn't stop.

Q. And I don't want to know "he might of did"—did he?

A. Yeah, he did.

. . . .

Q. And did—did Dr. Dunaway indicate that if you kept doing your job, you're going to need shoulder replacement surgery?

A. Yes.

Q. And that would indicate to you that your job is—is going to cause shoulder replacement—

A. Yes.

Q. —shoulder surgery? So when Dr. Dunaway told you that, was that not an indication to you that your job was the cause of your shoulder problems?

A. Oh, yeah. He—yeah, he said, yeah.

Q. So it wasn't—it wasn't just Dr. Hamid. It was—

A. Yeah.

Q. —Dr. Dunaway—

A. Yeah.

Q. —years before?

A. Yeah, but I couldn't—I couldn't stop, though. I had to work.

Q. Understood. I just want to make sure that I—

A. Yes.

Q. —understand it was not just Dr. Hamid—

A. Oh, okay.

Q. —it was Dr. Dunaway, too.

A. Okay.

Q. Agreed?

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A. Yes, right.

Based on the foregoing, we conclude that plaintiff was informed by Dr. Dunaway on 9 May 2000 of the nature and work-related cause of his left shoulder injury.

B. Time of Disability

Next, we must determine when plaintiff became “disabled”—that is, when “an employee has suffered injury from an occupational disease which *renders the employee incapable of earning the wages the employee was receiving at the time of the incapacity by such injury.*” *Dowdy*, 308 N.C. at 706, 304 S.E.2d at 218 (emphasis added) (citation omitted). The Full Commission concluded that plaintiff was disabled on 1 December 2009, the date of his retirement. While neither party disputes that plaintiff has had no meaningful employment since he retired, plaintiff asserts that “retirement is irrelevant to any analysis of disability,” and that he could not have been disabled before 5 November 2012—the date that Dr. Hamid imposed medical restrictions on plaintiff’s ability to work.

We reject plaintiff’s argument that medical restrictions are the only competent evidence of disability, or as he states, “when there are no medical restrictions ‘because of’ a compensable injury or disease, ‘disability’ does not exist as a matter of law.” On the contrary, “[t]his Court has previously held that an employee’s own testimony as to pain and ability to work is competent evidence as to the employee’s ability to work.” *Byrd v. Ecofibers, Inc.*, 182 N.C. App. 728, 731, 645 S.E.2d 80, 82 (2007) (citing *Boles v. U.S. Air, Inc.*, 148 N.C. App. 493, 499, 560 S.E.2d 809, 813 (2002); *Matthews v. Petroleum Tank Serv., Inc.*, 108 N.C. App. 259, 265, 423 S.E.2d 532, 536 (1992); *Niple v. Seawell Realty & Indus. Co.*, 88 N.C. App. 136, 139, 362 S.E.2d 572, 574 (1987), *disc. review denied*, 321 N.C. 744, 365 S.E.2d 903 (1988)).

Moreover, unlike those cases cited by plaintiff, in which retirement was wholly unrelated to the occupational disease, *e.g.*, *Stroud v. Caswell Ctr.*, 124 N.C. App. 653, 654–55, 478 S.E.2d 234, 235 (1996), here plaintiff testified repeatedly that he stopped working for defendant *because of the pain in his left shoulder*:

Q. Okay. What went into your decision to retire from the City?

A. Well, I was up under the truck—most of the time, after I got through changing tires, I used to go up under the fire truck and I had to put a bottle jack under there and jack

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it up—you know, crawl up under there, and when I laid on my shoulder, you know—I mean, it hurt so bad, I said, “Look, I got to quit.” That’s why I retired. I said, “Man, I got to get out of here. I cannot make it,” you know. I had to crawl back from under the truck, and that’s why I retired.

Q. And why, specifically, did that bother you—what about that activity?

A. When I—when I turned on this side (indicating), this shoulder right here (indicating), I couldn’t—you know, I couldn’t hardly—I couldn’t use this shoulder, even when—

Q. And you’re pointing to your left shoulder?

A. Yeah, my left shoulder right here.

We agree with the Full Commission, therefore, that on 1 December 2009, plaintiff was disabled within the meaning of the Worker’s Compensation Act.

III. Conclusion

We conclude that, as of 1 December 2009, plaintiff had suffered injury from an occupational disease which rendered him incapable of earning the wages he was receiving at the time of his incapacity, and had been informed by competent medical authority of the nature and work-related cause of the disease. Because he did not file his worker’s compensation claim until 5 November 2012, plaintiff’s claim was barred by the two-year statute of limitations under N.C. Gen. Stat. § 97-58(c). We affirm the Full Commission’s dismissal for lack of jurisdiction.

AFFIRMED.

Judges STROUD and DIETZ concur.

STATE v. BASKINS

[247 N.C. App. 603 (2016)]

STATE OF NORTH CAROLINA

v.

SANDY KEITH BASKINS

No. COA15-1088

Filed 17 May 2016

1. Search and Seizure—traffic stop—registration and inspection status

Where defendant was convicted of drug trafficking charges and challenged on appeal the trial court's findings of fact related to his vehicle's registration and inspection status, the Court of Appeals concluded that the record did not contain substantial evidence that the vehicle was being operated with an expired inspection status.

2. Search and Seizure—suppression order—conclusion of law—specific violation of traffic law

Where defendant was convicted of drug trafficking charges and challenged on appeal the trial court's order denying his motion to suppress, the Court of Appeals held that the trial court's order contained no adequate conclusion of law concerning the initial stop of defendant's vehicle because it failed to state that the stop was justified based on any specific violation of a traffic law. The case was remanded for additional findings and conclusions.

3. Search and Seizure—suppression order—voluntary statement by defendant

Where defendant was convicted of drug trafficking charges and challenged on appeal the trial court's order denying his motion to suppress, the Court of Appeals held that defendant's statements concerning the heroin in his vehicle, made after hearing one officer tell another officer that he recovered heroin from a passenger, were voluntary and admissible.

Appeal by Defendant from order entered 10 July 2015 and judgment entered 14 July 2015 by Judge Susan E. Bray in Superior Court, Guilford County. Heard in the Court of Appeals 11 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Thomas O. Lawton III, for the State.

Marilyn G. Ozer for Defendant.

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McGEE, Chief Judge.

Greensboro Police Department Detective M.R. McPhatter (“Detective McPhatter”) was working in a drug interdiction capacity on the morning of Monday, 6 October 2014 when he positioned himself near a Shell gas station with a convenience store (“the store”) drop-off point for the China Bus Line. This line ran between Greensboro and New York City and, in the past, Greensboro police had made arrests of people who had transported illegal narcotics on that bus line. Detective McPhatter was wearing plain clothes and waiting in an unmarked car when the bus arrived at the store between 6:00 a.m. and 6:30 a.m. on 6 October 2014. Detective McPhatter observed Gregory Charles Baskins (“Gregory”) and Tomekia Bone (“Bone”) exit the bus. At that time, Detective McPhatter was not familiar with either Gregory or Bone. Both Gregory and Bone were carrying “smaller bags. Just for like a weekend-type trip, change of clothes.” Detective McPhatter watched Gregory and Bone enter the store, and then saw Gregory exit the store a couple of minutes later. After leaving the store, Detective McPhatter observed Gregory walking “backwards” in his direction, approach to about four parking spaces distance, and “gave a look inside my car as to see if he knew me or he was trying to . . . see who I was inside the vehicle. And then he kind of gave me a shoo-off type thing and then kind of walked back inside the store.” At approximately the same time, Detective McPhatter observed a burgundy Buick (“the Buick”) pull into the parking lot of the store. The driver of the Buick was later determined to be Gregory’s brother, Sandy Keith Baskins (“Defendant”). Gregory got into the front passenger side of the Buick and Bone got into the rear right seat. The Buick then left the store’s parking lot with Gregory and Bone inside.

Detective McPhatter had taken down the license plate number for the Buick, and he input that information into his mobile terminal, which accessed the Department of Motor Vehicles (“DMV”) data associated with that license plate number. According to Detective McPhatter’s testimony, the Buick’s “registration had . . . expired – it had expired and it had an inspection violation also.” Detective McPhatter relayed that information to other officers in the area because he wanted to stop the Buick in order to investigate possible drug trafficking activity. The information relating to the license plate of the Buick was obtained from DMV. Detective McPhatter did not want to stop the Buick himself because he did not want Gregory to recognize his vehicle as the same vehicle that had been waiting in the parking lot of the store.

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Greensboro Police Department Detective M. P. O’Hal (“Detective O’Hal”) was the officer who actually stopped the Buick on the morning of 6 October 2014. Detective O’Hal, who was part of the same drug interdiction squad as Detective McPhatter, had been alerted by Detective McPhatter concerning Gregory’s actions at the store. Detective McPhatter had read the Buick’s license plate number over the radio, so Detective O’Hal was able to type that information into his mobile service computer and obtain information concerning the license plate from DMV. A printout of the DMV screen information relied upon by Detective O’Hal was provided to Detective O’Hal during his testimony:

[THE STATE:] Want to show you what I’ve marked as State’s 1 and 2, couple of communications printouts, and just ask you about the information in each of these documents. You say when you initially ran the information through the Department of Motor Vehicles, it reflected that the license itself was expired.

[DET. O’HAL:] Yeah. The inspection was expired on it.

[THE STATE:] Okay. And I want to ask about each of these. Let me begin with what I’ve marked as State’s Exhibit Number 1. If I may approach, Your Honor.

THE COURT: Yes.

[THE STATE:] Can you explain what this first document reflects?

[DET. O’HAL:] This is what I saw on my – I call it a visual MCT or my computer, which was with me that day of the stop. And it shows that the customer I.D.’s name or driver’s license number, the name of the person that the vehicle is registered to, and it says “plate status expired.” And it says that it was issued on 9-26-2013 and showed a status of being expired.

. . . .

[THE STATE:] And so in layman’s terms . . . State’s Exhibit Number 1 . . . reflect[s] the status of the plate and the inspection on the date in which it was stopped in State’s 1.

[DET. O’HAL:] Correct.

. . . .

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[THE STATE:] Okay. And that information reflected in State's 1 . . . is the same information that was available to you on that particular day.

[DET. O'HAL:] Yes.

The communications printout, State's Exhibit 1, which was the same information Detective O'Hal relied upon to justify the stop of the Buick, contained the following two lines of information relevant to this appeal:

PLT STATUS: EXPIRED

ISSUE DT: 09262013 VALID THRU: 10152014

This DMV registration request response printout contained *no* information indicating the status of the Buick's inspection. As indicated in the information provided by DMV, the Buick's registration, though technically expired, was still valid on 6 October 2014, and would remain valid through 15 October 2014. This was because, according to N.C. Gen. Stat. § 20-66(g),

[t]he registration of a vehicle that is renewed by means of a registration renewal sticker expires at midnight on the last day of the month designated on the sticker. It is lawful, however, to operate the vehicle on a highway until midnight on the fifteenth day of the month following the month in which the sticker expired.

N.C. Gen. Stat. § 20-66(g) (2015).

Detective O'Hal successfully initiated the stop, and approached Defendant, who was the driver of the Buick. Detective O'Hal informed Defendant that he had been stopped due to an expired registration and an inspection violation, and asked Defendant to produce his driver's license and registration. Defendant informed Detective O'Hal that his license had been revoked. According to Detective O'Hal's testimony, while he was talking to Defendant, he noticed Gregory acting very nervous and sweating profusely. Detective O'Hal then noticed Gregory glance at Bone nervously, and Detective O'Hal noticed that Bone was also acting nervous. Detective O'Hal then asked if there were any weapons in the Buick, and Defendant responded that there were not. Detective O'Hal asked Defendant if he would consent to a search of the Buick, and Defendant gave consent. Defendant, Gregory, and Bone all exited the Buick, and Detective O'Hal conducted a sniff search with his drug-trained canine ("K-9"). The K-9 alerted in both the front and rear right side passenger seats, indicating the possible recent presence of illegal

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narcotics. Based upon the alert of the K-9, and the behavior of Gregory and Bone, they, along with Defendant, were searched. Approximately six ounces of what was later determined to be heroin was recovered from inside Bone's pants, and the suspects were arrested.

Defendant was indicted on 1 December 2014 for conspiracy to traffic in heroin, trafficking by possession of 28 grams or more of heroin, and trafficking by transportation of 28 grams or more of heroin. Defendant filed a motion to suppress on 27 April 2015. The suppression hearing was conducted on 6 July 2015, and Defendant's motion to suppress was denied by order entered 10 July 2015. Defendant was tried, found not guilty of the conspiracy charge, and found guilty of the two trafficking charges. Judgment was entered on 14 July 2015, and Defendant received an active sentence of 225 to 282 months. Defendant specifically preserved his right to appeal the denial of his motion to suppress.

I.

[1] Defendant challenges two of the trial court's findings of fact relating to Detective O'Hal's initial stop of the Buick, findings fourteen and eighteen. The relevant portions of the contested findings are as follows: "Detective McPhatter could see the license plate on the Buick, so he ran the number through DMV and learned the registration had expired, as had the inspection (last inspected 8-31-13). He relayed that information to the team members." "[Detective] O'Hal, who had also confirmed the DMV information about the registration and inspection . . . activated his lights to stop the Buick."

We first address the evidence concerning the Buick's registration. N.C. Gen. Stat. § 20-66(g) states:

When Renewal Sticker Expires. – The registration of a vehicle that is renewed by means of a registration renewal sticker expires at midnight on the last day of the month designated on the sticker. It is lawful, however, to operate the vehicle on a highway until midnight on the fifteenth day of the month following the month in which the sticker expired.

N.C. Gen. Stat. § 20-66(g). The Buick's license plate had a sticker on it indicating that the plate was valid until 30 September 2014. By operation of N.C. Gen. Stat. § 20-66(g), it was lawful to operate the Buick until midnight of 15 October 2014. *Id.* In accord with N.C. Gen. Stat. § 20-66(g), the communications printout, which was "the same information that was available to" Detective O'Hal prior to the stop, clearly stated that

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the plate registration was: “VALID THRU: 10152014[,]” or 15 October 2014. Detective O’Hal stopped the Buick on 6 October 2014.

As far as the registration was concerned, Defendant was operating the Buick lawfully, and Detective O’Hal was provided confirmation of this fact in the information he requested and received from DMV. While it might be technically true that the registration was expired, the trial court’s findings of fact fail to indicate that the registration was still valid on 6 October 2014, and this information was necessary for determination of the legitimacy of the stop based upon an alleged registration violation. Those portions of findings of fact fourteen and eighteen indicating that the Buick’s registration had expired are supported by substantial record evidence, but they do not, on these facts, establish that the Buick was being operated in an unlawful manner.

II.

Next, we address the findings related to the inspection status of the Buick. It constitutes an infraction when a person “[o]perates a motor vehicle that is subject to inspection under this Part on a highway or public vehicular area in the State when the vehicle has not been inspected in accordance with this Part, as evidenced by the vehicle’s lack of a current electronic inspection authorization or otherwise.” N.C. Gen. Stat. § 20-183.8(a)(1) (2015). “A law enforcement officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period in order to issue and serve him a citation.” N.C. Gen. Stat. § 15A-1113(b) (2015).

However, as the State concedes, “the inspection violation itself does not appear on the computer screens that the officers were looking at when they ran the [] Buick’s license number.” The State argues, however, that “the record contains plain and direct testimony from both Officer McPhatter and Officer O’Hal that they ran the tags on the Buick, learned that the registration had expired, and that there was an inspection violation, because the Buick had last been inspected 31 August 2013[.]” It is true that Detective O’Hal testified that the information he received from DMV indicated that the Buick’s inspection was not current. However, Detective O’Hal also testified that State’s Exhibit 1, a printout of a DMV request for the Buick, was identical to the information he received on 6 October 2014. Though it is possible Detective O’Hal had access to additional information concerning the inspection status of the Buick, Detective O’Hal testified that he based his stop solely on the information included in State’s Exhibit 1. If that testimony was correct, then Detective O’Hal could not have known that the Buick’s inspection was not current.

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The only non-testimonial evidence admitted at the hearing that included information about the inspection status was a copy of the registration card for the Buick, which stated: “INSPECTION DUE 09/30/2014.” This evidence cannot have served as the basis for Detective O’Hal’s testimony that the inspection was out-of-date for two reasons. First, Detective O’Hal did not have this card before he initiated the stop. In fact, he apparently did not obtain the card at any time during the stop. Second, the registration card cannot provide up-to-date information concerning whether the Buick had already been inspected for the purposes of registration renewal. According to N.C. Gen. Stat. § 20-183.4C(a):

(6) A vehicle that has been [previously] inspected in accordance with this Part must be inspected by the last day of the month in which the registration on the vehicle expires.

(7) A vehicle that is required to be inspected in accordance with this Part may be inspected 90 days prior to midnight of the last day of the month as designated by the vehicle registration sticker.

N.C. Gen. Stat. § 20-183.4C(a) (2015). The owner of a vehicle has ninety days prior to the expiration of the inspection within which to have the vehicle inspected.¹ There is no record evidence indicating that Detective O’Hal was provided information indicating that the Buick had not been properly inspected prior to the 6 October 2014 stop. Again, we recognize that the record may not contain all the relevant evidence available to Detective O’Hal on 6 October 2014, but our review is limited to the record evidence in this regard. This record does not contain substantial evidence that the Buick was being operated with an expired inspection status and, therefore, those portions of findings of fact fourteen and eighteen stating otherwise are overruled.

III.

[2] When ruling on a motion to suppress following a hearing, “[t]he judge must set forth in the record his findings of facts and conclusions of law.” N.C. Gen. Stat. § 15A-977(f) (2015). In the present case, the trial court’s order denying Defendant’s motion to suppress contains no adequate conclusion of law concerning its ruling regarding the initial stop of the

1. Even if the Buick had been inspected after 30 September 2014, but before the stop on 6 October 2014, it would still have been being operating legally as far as its inspection status was concerned.

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Buick by Detective O’Hal. As our Supreme Court has confirmed, it is the trial court that must make the required legal rulings in the first instance. *State v. Salinas*, 366 N.C. 119, 123-24, 729 S.E.2d 63, 66-67 (2012). When the trial court has not made all the required determinations:

Remand is necessary because it is the trial court that “is entrusted with the 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.”

Id. at 124, 729 S.E.2d at 67 (citation omitted); *see also State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 630-31 (2000) (“In examining the case before us, our review is limited. It is the trial judge’s responsibility to make findings of fact that are supported by the evidence, and then to derive conclusions of law based on those findings of fact.”) (citation omitted).

In the present case, the trial court entered the following conclusion of law as its sole conclusion regarding the validity of the initial stop of the Buick:

The temporary detention of a motorist upon probable cause to believe he has violated a traffic law (such as operating a vehicle with expired registration and inspection) is not inconsistent with the Fourth Amendment’s prohibition against unreasonable searches and seizures, even if a reasonable officer would not have stopped the motorist for the violation. [citation omitted] [Detective] O’Hal was justified in stopping Defendant[s] vehicle.

This conclusion consists of a statement of law, followed by the conclusion that Detective O’Hal was “justified” in initiating the stop. This conclusion does not specifically state that the stop was justified based upon any specific violation of a traffic law. This conclusion intimates that Detective O’Hal was justified in initiating the stop based upon either the alleged registration violation or the alleged inspection violation, but it does not actually make any such conclusion. This Court has reviewed a similar occurrence in *State v. McFarland*, 234 N.C. App. 274, 758 S.E.2d 457 (2014):

The “conclusions of law” in the written order were simply statements of law[.]

Generally, a conclusion of law requires “the exercise of judgment” in making a determination, “or the application

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of legal principles” to the facts found. Not one of the “conclusions” here applied the law to the facts of this case. Although we can imagine how the facts as found by the trial court would likely fit into the legal standards recited in the section of the order which is identified as “conclusions of law,” based upon the trial court’s denial of the motion, it is still the trial court’s responsibility to make the conclusions of law. The mandatory language of N.C. Gen. Stat. § 15A-977(f) (“The judge must set forth in the record his findings of facts *and conclusions of law.*” (emphasis added)) forces us to conclude that the trial court’s failure to make any conclusions of law in the record was error.

“Where there is prejudicial error in the trial court involving an issue or matter not fully determined by that court, the reviewing court may remand the cause to the trial court for appropriate proceedings to determine the issue or matter without ordering a new trial.”

Id. at 283-84, 758 S.E.2d at 464-65 (citations omitted). We remand for further action consistent with this opinion, including making additional findings of fact and conclusions of law as necessary. The trial court may, in its discretion, take additional evidence in order to comply with this holding. *See State v. Gabriel*, 192 N.C. App. 517, 523, 665 S.E.2d 581, 586 (2008). If the trial court again denies Defendant’s motion to suppress, Defendant’s convictions stand subject to appellate review. If the trial court grants Defendant’s motion to suppress, the trial court shall vacate the 14 July 2015 judgment and convictions and Defendant shall be granted a new trial on the charges of trafficking heroin by possession and trafficking heroin by transportation.

IV.

In the event the trial court again denies Defendant’s motion to suppress, based upon Defendant’s argument that Detective O’Hal improperly initiated the stop of the Buick due to registration or inspection issues, we address Defendant’s additional arguments.

A.

Defendant argues that “the [trial] court erred by concluding reasonable suspicion [that Defendant was involved in trafficking] existed to stop the [Buick.]” We do not address the merits of this argument because the trial court made no such conclusion.

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Though the order included findings of fact that could have been relevant to a reasonable suspicion analysis on that issue, there is no discussion in the trial court's order concerning reasonable suspicion that Defendant was engaged in criminal activity; and there is no conclusion, based upon any reasonable suspicion that Defendant was trafficking illegal drugs or engaged in any other type of criminal activity, that the stop of the Buick was proper. The only discussion in the order about the basis for the stop concerned the issues related to registration and inspection status. If, upon remand, the trial court again upholds the stop of the Buick as proper, that ruling must be based upon a conclusion that there was reasonable suspicion for Officer O'Hal to believe the Buick was being operated in violation of registration or inspection statutes.

B.

[3] Defendant next argues that “the [trial] court erred by denying Defendant's motion to suppress his statements made after the unconstitutional seizure.” We disagree.

Subsequent to the K-9 alerting for the possible presence of drugs, and Defendant and Gregory having been searched, a female officer approached Bone to search her. Bone then voluntarily produced the heroin she had hidden in her pants. Detective O'Hal, who was standing near Defendant, was informed that suspected heroin had been recovered from Bone. Defendant, who apparently overheard this exchange, then stated that “[t]he dope wasn't his, it was a guy named Maurice Antonio Nichols [(‘Nichols’)] out of High Point and they were just making a drop for him.” Following Defendant's statement, Defendant and Gregory were handcuffed and placed under arrest.

The sole conclusion of law related to this issue states: “Defendant[s] statement about [] Nichols and the drop for him was voluntary. There was no interrogation or functional equivalent of interrogation. [(Citations omitted).]” The relevant findings of fact in support of the trial court's conclusion were the following:

36. One of the detectives came back to the area where [Defendant] and [Gregory] were and said they had found narcotics on Bone.

37. Defendant . . . dropped his head, looked over at his brother Gregory and told Officer O'Hal that dope wasn't his that it was for a guy named Maurice Antonio Nichols out of High Point, and that they were making a drop for him.

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We hold these findings are supported by substantial evidence, and are sufficient to support the trial court's conclusion that Defendant's statement was voluntary and not the result of any custodial interrogation. Detective O'Hal testified that neither he, nor any other officer, asked or said anything to Defendant to elicit Defendant's statement. The evidence supports that Defendant volunteered this statement in response to an officer informing Detective O'Hal that suspected heroin had been recovered from Bone. "Spontaneous statements made by an individual while in custody are admissible despite the absence of *Miranda* warnings." *State v. Stover*, 200 N.C. App. 506, 515, 685 S.E.2d 127, 134 (2009) (citation and quotation marks omitted).

Defendant further argues that Detective O'Hal, shortly after initiating the stop of the Buick, improperly questioned him concerning "where he was going [that day]." However, during the suppression hearing Defendant did not argue that this statement should be suppressed. Presumably for that reason, the trial court's order contains no conclusion of law regarding that statement. Defendant has waived appellate review of this argument. *State v. Golphin*, 352 N.C. 364, 392-93, 533 S.E.2d 168, 191 (2000) (citations omitted) ("Generally, '[t]his Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal.'"). Assuming *arguendo* Defendant had preserved this argument for appellate review, we hold that Defendant's argument fails.

C.

In Defendant's final argument, he contends that the trial court committed plain error in failing to *sua sponte* exclude certain testimony of Defendant's witness, Mercedes Washington ("Washington"). Assuming *arguendo* the challenged testimony of Washington constituted error, we have thoroughly reviewed the record, and hold that Defendant fails to demonstrate "that, absent the error, the jury probably would have returned a different verdict." *State v. Lawrence*, 365 N.C. 506, 519, 723 S.E.2d 326, 335 (2012). This argument is without merit.

NO ERROR IN PART; REVERSED AND REMANDED IN PART.

Judges STEPHENS and DAVIS concur.

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STATE OF NORTH CAROLINA
v.
CHRISTOPHER ALLEN McKIVER

No. COA15-1070

Filed 17 May 2016

1. Firearms and Other Weapons—possession of firearm by convicted felon—motion to dismiss—sufficiency of evidence—constructive possession

The trial court did not err by denying defendant's motion to dismiss the charge of possession of a firearm by a convicted felon. The evidence was sufficient to support a reasonable juror in concluding that additional incriminating circumstances existed beyond defendant's mere presence at the scene and proximity to where the firearm was found. Thus, constructive possession of the firearm could be inferred.

2. Constitutional Law—Confrontation Clause—anonymous 911 call and call back—testimonial hearsay

The trial court erred in a possession of a firearm by a convicted felon case by denying defendant's motion to exclude evidence of an anonymous 911 call and the dispatcher's call back. Admission of the testimonial hearsay violated his rights under the Sixth Amendment's Confrontation Clause. It was not harmless error, and defendant was entitled to a new trial.

Appeal by Defendant from judgment entered 29 April 2015 by Judge Benjamin G. Alford in New Hanover County Superior Court. Heard in the Court of Appeals 11 February 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph E. Herrin, for the State.

Kimberly P. Hoppin for Defendant.

STEPHENS, Judge.

Defendant Christopher Allen McKiver appeals from the judgment entered upon his conviction for one count of possessing a firearm as a convicted felon following a jury trial in New Hanover County Superior Court. McKiver argues that the trial court committed reversible error, in

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violation of his rights under the Sixth Amendment to the United States Constitution to confront the witnesses against him, when it denied his motion *in limine* to exclude evidence of an anonymous 911 call and the subsequent 911 dispatcher's call back. McKiver also contends that the trial court erred in denying his motion to dismiss. We hold that although the trial court did not err in denying his motion to dismiss, McKiver is entitled to a new trial because the erroneous admission of testimonial statements violated his Sixth Amendment rights and was not harmless.

Factual Background

At 9:37 p.m. on 12 April 2014, Wilmington Police Department (“WPD”) Officer Scott Bramley was dispatched to Penn Street in the Long Leaf Park subdivision in response to an anonymous 911 caller's report that there was a possible dispute and a black man with a gun standing outside. Bramley activated his patrol car's blue lights and siren on his way to the scene, stopped a few blocks away to retrieve his patrol rifle from the vehicle's trunk, then proceeded to Penn Street and parked on the left side of the roadway. As he exited his vehicle, Bramley noticed two individuals standing near a black Mercedes that was parked beside a vacant lot. The Mercedes was still running, and Bramley could hear music “blaring” from its radio as he approached the two individuals, one of whom was a black male wearing a red and white plaid shirt, jeans, and a hat, who began to walk toward Bramley. Although Bramley had not yet received any description of the suspect, he “confronted [the man in the plaid shirt] about possibly having [a firearm], at which point he lifted his shirt to show [Bramley] he did not have a gun.” After performing a pat-down to confirm that the man was unarmed, Bramley let him go and continued his investigation.

By this time, several other WPD officers had arrived on the scene, which Bramley would later describe as “very dark” due to the “very sporadic” street lighting in the area. Bramley observed there were a number of other individuals watching from nearby residences and walking around near the vacant lot, perhaps 100 yards away from the Mercedes. After a few moments, Bramley asked the New Hanover County 911 dispatcher for a better description of the suspect, was informed that the anonymous 911 caller had already disconnected, and requested the dispatcher to initiate a call back. After reconnecting with the anonymous 911 caller, the dispatcher reported to Bramley that “[s]he said it was in a field in a black car,” and that “[s]omeone said he might have thrown the gun.” Several WPD officers searched for the gun in the vacant lot and eventually discovered a Sig Sauer P320 .45 caliber handgun located approximately 10 feet away from the Mercedes. Meanwhile, after Bramley told

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the dispatcher he had located a black Mercedes and asked whether the caller had provided a description of the suspect, the dispatcher replied, “Black male, light plaid shirt. He was last seen by the car with a gun in his hand and the [caller] went inside.” Bramley later testified that upon receiving this information, he “immediately knew [the suspect] was the first gentleman that I had come into contact with because no one else in that area was wearing anything remotely similar to that clothing description.” Bramley returned to his patrol car to see if he could pull a photograph off his vehicle’s dashboard camera of the man he had patted down upon first arriving in order to relay it to officers *en route* to the scene, but was unable to do so. Shortly thereafter, McKiver approached the WPD officers who were searching the Mercedes and asked what they were doing to his car. Upon seeing the red plaid shirt McKiver was wearing, Bramley recognized him as the same black male he had patted down upon his arrival, concluded he met the description provided in the call back to the anonymous 911 caller, and placed McKiver under arrest.

WPD officers subsequently determined that the Mercedes was registered to McKiver’s brother in Elizabethtown and found a red bag in the vehicle’s trunk containing cash and medications prescribed to McKiver. Although they found no fingerprints or DNA evidence on the firearm they found in the vacant lot, the officers traced its serial number to one that had been reported stolen from an individual in Elizabethtown.

Procedural History

On 22 September 2014, McKiver was indicted by a New Hanover County grand jury on one count of possession of a firearm by a felon and one count of possession of a stolen firearm. These matters came on for a jury trial in New Hanover County Superior Court on 27 April 2015, the Honorable Benjamin G. Alford, Judge presiding.

Prior to jury selection, the trial court held a hearing on McKiver’s motion *in limine* to exclude evidence of the anonymous 911 call and the dispatcher’s call back. After noting the lack of any fingerprints or DNA found on the firearm and the lack of any eyewitness testimony that he had ever possessed it, McKiver contended that both calls amounted to testimonial hearsay and that their admission in evidence would violate his Sixth Amendment right to confront the witnesses against him. In response, the State argued that the calls were nontestimonial, and therefore properly admissible, because the statements they contained were made to enable police assistance to meet an ongoing emergency. The trial court denied McKiver’s motion but granted his request for a continuing objection to the admission of this evidence in order to preserve the issue for appellate review.

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At trial, the State presented testimony from Bramley about the investigation he conducted in response to the initial 911 call and, over McKiver's timely objection, how he relied on the description provided during the dispatcher's call back of the suspect's shirt to identify and arrest McKiver. In addition to Bramley's testimony, the State introduced evidence of McKiver's prior felony conviction for possession with intent to sell or distribute marijuana; played a recording of the initial 911 call for the jury and admitted the 911 call logs into evidence; and also presented testimony from New Hanover County 911 communications manager Deborah Cottle, who explained how the 911 dispatch system works. WPD crime scene technician Max Cowart also testified and explained the procedures he followed for photographing and collecting evidence from the crime scene, and Elizabethtown resident Hunter Norris testified that the firearm recovered from the scene had belonged to his father before it was stolen.

At the close of the State's evidence, McKiver moved to dismiss both charges for insufficient evidence but the trial court denied this motion. McKiver declined to put on any evidence and renewed his motion to dismiss, which the court again denied before providing jury instructions on both actual and constructive possession. The case was submitted to the jury on 29 April 2015. That same day, the jurors returned verdicts convicting McKiver on the charge of possessing a firearm as a convicted felon but acquitting him on the charge of possessing a stolen firearm. The court sentenced McKiver to 14 to 26 months imprisonment, suspended for 36 months of supervised probation after completion of a six-month active term. After sentencing, McKiver gave notice of appeal to this Court.

*Analysis**Motion to dismiss*

[1] We first address McKiver's argument that the trial court erred in denying his motion to dismiss the charge of possession of a firearm by a convicted felon. Specifically, McKiver argues that the court should have dismissed the charges against him because there was insufficient evidence of additional incriminating circumstances to support a jury verdict that he constructively possessed the firearm. We disagree.

As this Court's prior decisions make clear, "[w]hen ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citations

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omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925 (citations omitted), *affirmed*, 301 N.C. 374, 271 S.E.2d 277 (1980). “[A]ll evidence admitted, whether competent or incompetent, must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence and resolving in its favor any contradictions in the evidence.” *State v. Worsley*, 336 N.C. 268, 274, 443 S.E.2d 68, 70-71 (1994) (citation omitted). Thus, a defendant’s motion to dismiss “is properly denied if the evidence, when viewed in the above light, is such that a rational trier of fact could find beyond a reasonable doubt the existence of each element of the crime charged.” *Id.* at 274, 443 S.E.2d at 71 (citation omitted). This Court reviews the trial court’s denial of a motion to dismiss *de novo*. *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33.

Section 14-415.1 of our General Statutes provides that “[i]t 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[.]” N.C. Gen. Stat. § 14-415.1(a) (2015). “[T]he State need only prove two elements to establish the crime of possession of a firearm by a felon: (1) [the] defendant was previously convicted of a felony; and (2) thereafter possessed a firearm.” *State v. Perry*, 222 N.C. App. 813, 818, 731 S.E.2d 714, 718 (2012) (citation omitted), *disc. review denied*, 366 N.C. 431, 736 S.E.2d 188 (2013). Possession of the firearm “may be actual or constructive. Actual possession requires that a party have physical or personal custody of the [firearm]. A person has constructive possession of [a firearm] when the [firearm] is not in his physical custody, but he nonetheless has the power and intent to control its disposition.” *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citations omitted), *superseded in part on other grounds by statute as stated in State v. Gaither*, 161 N.C. App. 96, 587 S.E.2d 505 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004). However, where a defendant does not have “exclusive control of the location where the [firearm] is found, constructive possession of the [firearm] may not be inferred without other incriminating circumstances.” *State v. Clark*, 159 N.C. App. 520, 525, 583 S.E.2d 680, 683 (2003) (citation and internal quotation marks omitted).

In the present case, the evidence introduced at trial tended to show that McKiver had previously been convicted of a felony; that an anonymous 911 caller saw a man wearing a plaid shirt and holding a gun near a black car beside a field; that someone saw that man drop the gun;

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that upon his arrival at the scene, Bramley saw McKiver standing near a black Mercedes wearing a plaid shirt; that Bramley saw multiple individuals watching from nearby residences and walking near the vacant lot; that McKiver later returned to the scene and said the car was his; that although the car was registered to McKiver's brother in Elizabethtown, WPD officers found medication prescribed to McKiver himself in the trunk; and that the WPD officers found a firearm that had been reported stolen from Elizabethtown in the vacant lot approximately 10 feet away from the Mercedes.

McKiver contends that because the firearm was found not in his possession but instead in a vacant lot that he did not maintain control over, the State failed to introduce sufficient evidence of incriminating circumstances from which it could be inferred that he constructively possessed the gun. However, this argument ignores the fact that the State also presented evidence that when Bramley arrived, McKiver was standing near the black Mercedes wearing a shirt similar to the one the anonymous caller described the man with the gun wearing before someone saw him drop it. Although McKiver takes issue with the admissibility of the initial 911 call and subsequent dispatcher's call back, our standard of review requires consideration of "all of the evidence actually admitted, whether competent or incompetent." *State v. Jones*, 208 N.C. App. 734, 737, 703 S.E.2d 772, 775 (2010) (holding that even though evidence was erroneously admitted in violation of the defendant's rights under the Confrontation Clause, it nevertheless "provid[ed] substantial evidence, for the purpose of [the] defendant's motion" to dismiss), *vacated on other grounds*, 365 N.C. 467, 722 S.E.2d 509 (2012); *see also State v. Jones*, 342 N.C. 523, 540, 467 S.E.2d 12, 23 (1996) ("[T]he fact that some of the evidence was erroneously admitted by the trial court is not a sufficient basis for granting a motion to dismiss."); *State v. Littlejohn*, 264 N.C. 571, 574, 142 S.E.2d 132, 134 (1965) ("Though the court below, in denying [the defendants'] motion for nonsuit, acted upon evidence which we now hold to be incompetent, yet if this evidence had not been admitted, the State might have followed a different course and produced competent evidence tending to establish [each element of the offense]."). Thus, even assuming *arguendo* that the trial court erred in admitting this evidence, it remains relevant to our analysis for purposes of this issue.¹ Because this evidence was sufficient to

1. Given our conclusion *infra* that McKiver is entitled to a new trial due to the violation of his Sixth Amendment rights, we note here that this evidence would clearly be inadmissible against McKiver at any subsequent trial, and thus would not be proper for the trial court to consider should the same inquiry arise again.

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support a reasonable juror in concluding that additional incriminating circumstances existed—beyond McKiver’s mere presence at the scene and proximity to where the firearm was found—and, thus, to infer that McKiver constructively possessed the firearm, we conclude the trial court did not err in denying McKiver’s motion to dismiss.

Confrontation Clause

[2] McKiver argues that the trial court erred in denying his motion to exclude evidence of the anonymous 911 call and the dispatcher’s call back because admission of the testimonial hearsay they contained violated his rights under the Sixth Amendment’s Confrontation Clause. We agree.

“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*, 363 N.C. 857, 694 S.E.2d 766 (2010). Once error is shown, the State bears the burden of proving the error was harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b) (2015).

The Sixth Amendment to the United States Constitution provides in pertinent part 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. In *Crawford v. Washington*, the United States Supreme Court held that the Confrontation Clause forbids “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” 541 U.S. 36, 53-54, 158 L. Ed. 2d 177, 194 (2004). Although it did not provide a specific definition in *Crawford* of what makes a statement “testimonial,” the Court offered clarification on this issue in its opinion consolidating two cases, *Davis v. Washington* and *Hammon v. Indiana*. *See Davis v. Washington*, 547 U.S. 813, 822, 165 L. Ed. 2d 224, 237 (2006).

The statements at issue in *Davis* were made by the victim to a 911 operator as the defendant, her ex-boyfriend, attacked her and then fled the scene as soon as she identified him by name to the 911 operator. *Id.* at 818, 165 L. Ed. 2d at 234. Although the victim did not testify at trial, the recording of the 911 call was admitted into evidence, and the defendant was convicted of violating a domestic no-contact order. *See id.* at 819, 165 L. Ed. 2d at 235. The statements at issue in *Hammon* were made after police responded to a reported domestic disturbance at a residence to find the victim “alone on the front porch, appearing somewhat frightened.” *Id.* (internal quotation marks omitted). When asked, however,

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the victim told the officers “nothing was the matter,” and granted them permission to enter the home, wherein they found the defendant, her husband, in the kitchen. *See id.* While one officer remained with him, another questioned the victim in another room, where she gave a verbal description of what had happened and completed a form battery affidavit. *See id.* at 820, 165 L. Ed. 2d at 235. Although the victim did not testify at trial, the defendant was convicted after the trial court admitted her affidavit into evidence and also allowed the officer who interviewed her to testify about what she told him. *Id.* at 820-21, 165 L. Ed. 2d at 236.

As the Court explained in *Davis*,

[s]tatements 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.

Id. at 822, 165 L. Ed. 2d at 237. The Court identified several factors relevant to the determination of whether a statement is testimonial, including: (1) whether the victim “was speaking about events *as they were actually happening*, rather than describing past events”; (2) whether a “reasonable listener” would recognize that the victim “was facing an ongoing emergency” and her “call was plainly a call for help against a *bona fide* physical threat”; (3) whether the questions asked and statements elicited by law enforcement “were necessary to be able to *resolve* the present emergency, rather than simply to learn . . . what had happened in the past”; and (4) the contextual formality (or lack thereof) in which the victim’s statements were made. *Id.* at 827, 165 L. Ed. 2d at 240 (citations and internal quotation marks omitted; emphasis in original).

Based on this analytic framework, the Court held that the victim’s statements to the 911 dispatcher in *Davis* were nontestimonial, and properly admissible, because they described events as they were happening, were made in the face of an ongoing emergency in a frantic environment that was neither tranquil nor safe, and provided information necessary to resolve the present emergency. *Id.* at 828-29, 165 L. Ed. 2d at 240-41. In so holding, the Court nevertheless cautioned that what begins as a conversation to elicit information needed to render emergency assistance could become testimonial and therefore inadmissible.

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See id. at 828, 165 L. Ed. 2d at 241 (“This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, . . . , evolve into testimonial statements, . . . , once that purpose has been achieved.”) (citations and internal quotation marks omitted). Such was the case in *Hammon*, the Court concluded, reasoning that the victim’s statements were testimonial, and therefore inadmissible, because they were made “some time after the events described were over” and thus were part of an investigation into past conduct and were not necessary for police to resolve any ongoing emergency. *Id.* at 830, 165 L. Ed. 2d at 242. As the Court explained in a footnote:

Police investigations themselves are, of course, in no way impugned by our characterization of their fruits as testimonial. Investigations of past crimes prevent future harms and lead to necessary arrests. While prosecutors may hope that inculpatory “nontestimonial” evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so. The Confrontation Clause in no way governs police conduct, because it is the trial *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that provision. But neither can police conduct govern the Confrontation Clause; testimonial statements are what they are.

Id. at 832 n.6, 165 L. Ed. 2d at 243 n.6 (emphasis in original).

The North Carolina Supreme Court first applied the approach established in *Davis* in *State v. Lewis*, 361 N.C. 541, 648 S.E.2d 824 (2007). There, a police officer responded to the victim’s call concerning a robbery at her apartment and took her statement, which included a description of the perpetrator, who the victim alleged had also assaulted her during the robbery, which had occurred several hours earlier. *Id.* at 543-44, 648 S.E.2d at 826. The victim was taken to the hospital to treat her injuries and later that evening, she selected the defendant’s photograph from a photographic line-up that another officer had assembled based in part on her statement. *See id.* The victim died prior to trial, but the trial court allowed both officers to testify about what the victim told them, and the defendant was convicted of assault with a deadly weapon inflicting serious injury, robbery with a dangerous weapon, and misdemeanor breaking and entering. *See id.*

On appeal, the defendant argued that the officers’ testimony violated her rights under the Confrontation Clause. After applying the

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framework outlined in *Davis*, our Supreme Court determined that at the time of her first statement, the victim “faced no immediate threat to her person”; that the officer “was seeking to determine what happened rather than what is happening”; that “the interrogation bore the requisite degree of formality”; that the victim’s statement “deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed”; and that the interrogation occurred “some time after the events described were over.” *Id.* at 548, 648 S.E.2d at 829 (internal quotation marks omitted). The Court also observed that “[a]lthough [the] defendant’s location was unknown at the time of the interrogation, *Davis* clearly indicates that this fact does not in and of itself create an ongoing emergency.” *Id.* at 549, 648 S.E.2d at 829 (citation omitted). Consequently, the Court held that the statements were testimonial, and thus inadmissible under the Confrontation Clause, because the circumstances surrounding them objectively indicated that no ongoing emergency existed and that “the primary purpose of the interrogation was to establish or prove past events potentially relevant to a later criminal prosecution.” *Id.* The Court ultimately concluded the defendant was entitled to a new trial because “we cannot say beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained” and also because “we cannot say beyond a reasonable doubt that the total evidence against [the] defendant was so overwhelming that the error was harmless[,]” given that the identification of the defendant as the perpetrator of the crimes alleged depended almost entirely on the victim’s statements. *Id.* at 549, 648 S.E.2d at 830 (citations and internal quotation marks omitted).

In the present case, the record before us does not include any recording or transcript of the initial anonymous 911 call or the dispatcher’s call back. However, McKiver’s counsel cross-examined Bramley extensively about these calls, and we find particularly relevant the following excerpt from the trial transcript in which Bramley testified about the statements made in the initial 911 call, as well as the actions he took in response to it and his observations upon arriving at the scene:

- Q. . . . When you arrived on the scene, there was just the [Mercedes] and two guys up by the car; is that right?
- A. Yes, sir, off to the left.
- Q. Now, the original caller from 911 informed the dispatch and you that there was a black guy outside with a gun. Is that your understanding?

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- A. Yes, sir. We were informed that there was an individual with a firearm and a possible dispute.
- Q. Possible dispute.
- A. Yes, sir.
- Q. You were also told [by the dispatcher] that the caller didn't know if the person was pointing [the gun] at anybody.
- A. We weren't advised whether or not they were pointing it, sir, we just know that they—there was someone with a firearm on-scene, as well as a possible dispute outside. I don't recall hearing whether or not they were pointing it.
- Q. Well, you listened to the 911 call, correct?
- A. I have listened to it as of today, yes, sir.
- Q. In fact, you're the way that the State introduced that into this trial; isn't that correct?
- A. Yes, sir.
- Q. Okay. Do you recall then that dispatch asked, "Okay. Is he pointing it at anyone?"
- A. That's correct.
- Q. And the response was, "I don't know."
- A. That's correct.
- Q. "I got away from the window." Then there's a question. Do you recall this? "Did you happen to see what he's wearing?" Do you recall that question?
- A. Yes, sir.
- Q. And her answer was, "No, I don't know what he's wearing." Do you recall that?
- A. I do.
- Q. And in addition to describ[ing] the scene, this caller describing the scene, "Do you hear anything right now? No, I just know they're out there." Do you recall that?

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- A. Yes, sir.
- Q. “Okay,” dispatcher says, “How many people were out there?” And do you recall that she answered, “It was people. I mean, it was just people outside. But he’s—he’s—I don’t know what he’s doing” ?
- A. Yes, sir.
- Q. “Okay, I mean, was he, like, around people or anything? He’s walking around.” Do you recall that?
- A. Yes, sir.
- Q. “Did you know what kind of gun? I don’t know, I just saw a gun in his hand. It’s dark outside.” You didn’t hear anything about waving the gun or brandishing the gun, it was “I just saw a gun in his hand.” Isn’t that correct as being your recollection?
- A. That’s correct.
- Q. And she agreed with you, as you have described it yourself, that it was dark outside.
- A. That’s correct.
- Q. Further question that was played here in the court in the trial from dispatch, “Do you hear anything else going on? Do you hear any arguments outside or anything?” “Uh-uh” was her answer. Do you recall that?
- A. That’s correct.
- Q. And she concludes, pretty close to the conclusion [of the call], the dispatcher asks, “Do you want me to stay on the line ‘til they get there?” talking about the police units. And the caller’s response was, “No, I’ll be fine.”
- A. That’s correct.
- Q. And when you arrived, those events appeared to have already happened, is that correct?
- A. Yes, sir.
- Q. Because there was no black man with a gun standing there in the street.
- A. That’s correct.

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- Q. There was—there were no people standing in a crowd around listening to music at that point; is that correct?
- A. That’s correct.
- Q. It appeared that what [the caller] was describing had already happened; is that correct?
- A. Yes, sir.
- Q. She did not describe anything more about the person she was observing, the clothing.
- A. At that time, you’re correct. Yes, sir.
- Q. When you arrived, it would appear that everything was pretty quiet, pretty calm; is that correct?
- A. Yes, sir.

Our review of the record demonstrates that the circumstances surrounding both the initial 911 call and the dispatcher’s subsequent call back objectively indicate that no ongoing emergency existed. Indeed, even before Bramley and other WPD officers arrived on the scene, the anonymous caller’s statements during her initial 911 call—that she did not know whether the man with the gun was pointing his weapon at or even arguing with anyone; that she was inside and had moved away from the window to a position of relative safety; and that she did not feel the need to remain on the line with authorities until help could arrive—make clear that she was not facing any *bona fide* physical threat. Moreover, Bramley’s testimony on cross-examination demonstrates that when he arrived at Penn Street, the scene was “pretty quiet” and “pretty calm.” Although it was dark, Bramley and the other WPD officers had several moments to survey their surroundings, during which time Bramley encountered McKiver and determined that he was unarmed. While the identity and location of the man with the gun were not yet known to the officers when Bramley requested the dispatcher to initiate a call back, our Supreme Court has made clear that “this fact alone does not in and of itself create an ongoing emergency,” *Lewis*, 361 N.C. at 549, 648 S.E.2d at 829 (citation omitted), and there is no other evidence in the record of circumstances suggesting that an ongoing emergency existed at that time. We therefore conclude the statements made during the initial 911 call were testimonial in nature.

We reach the same conclusion regarding the statements elicited by the dispatcher’s call back concerning what kind of shirt the caller saw

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the man with the gun wearing and the fact that someone saw the man drop the gun. Because these statements described past events rather than what was happening at the time and were not made under circumstances objectively indicating an ongoing emergency, we conclude that they were testimonial and therefore inadmissible. In our view, this case presents the same scenario the *Davis* Court cautioned against, insofar as what began “as an interrogation to determine the need for emergency assistance . . . evolve[d] into testimonial statements, . . . , once that purpose ha[d] been achieved.” 547 U.S. at 828, 165 L. Ed. 2d at 241. We emphasize that our conclusion here should by no means be read as a condemnation of Bramley or the other WPD officers, who reacted professionally and selflessly to a potentially dangerous situation. Nevertheless, as Justice Scalia explained in *Davis*, the harm the Confrontation Clause aims to prevent is the *use* of testimonial hearsay at trial, rather than its *collection* by law enforcement, and our inquiry on this issue is an objective one, rather than a determination from an officer’s perspective. *See id.* at 832 n.6, 165 L. Ed. 2d at 243 n.6 (“While prosecutors may hope that inculpatory “nontestimonial” evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so.”). Consequently, we hold that the trial court erred by denying McKiver’s motion *in limine* to exclude the testimonial statements from the initial 911 call and the dispatcher’s subsequent call back.

The State contends this error was harmless but provides no specific arguments or citations to authority to support such a conclusion. At trial, the identification of McKiver as the man who held and then dropped the gun depended almost entirely on the testimonial statements elicited during the initial 911 call and the dispatcher’s call back, and we cannot say beyond a reasonable doubt that the erroneous admission of this evidence did not contribute to the jury’s verdict convicting McKiver of possessing a firearm as a convicted felon, or that the remaining evidence against McKiver, considered collectively, was “so overwhelming that the error was harmless.” *See Lewis*, 361 N.C. at 549, 648 S.E.2d at 830 (citation omitted). Accordingly, we hold that McKiver is entitled to a

NEW TRIAL.

Judges HUNTER, JR., and INMAN concur.

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STATE OF NORTH CAROLINA

v.

BRENT TYLER MILLER

No. COA14-1310-2

Filed 17 May 2016

1. Appeal and Error—notice of appeal—oral and written

The State’s appeal was properly before the Court of Appeals pursuant to Rule 4 of the Rules of Appellate Procedure in a case involving a motion to suppress granted in district court, an appeal to superior court by the State, and the denial of a *de novo* hearing in superior court. The superior court orally affirmed the district court order, and the State entered oral and written notice of appeal; the written notice was superfluous following the State’s oral notice.

2. Evidence—motion to suppress—appeal from district to superior court—notice of appeal

The trial court erred in dismissing the State’s notice of appeal under N.C.G.S. § 20-38.7(a) as insufficient. Neither the plain language of N.C.G.S. § 20-38.7(a) nor § 15A-1432(b) required the State to set forth the specific findings of fact to which it objected in its notice of appeal from district to superior court.

Appeal by the State from order entered 2 June 2014 by Judge Linwood Foust in Mecklenburg County Superior Court. The case was originally heard before this Court on 22 April 2015. *State v. Miller*, __ N.C. App. __, 773 S.E.2d 574 (2015). Upon remand from the Supreme Court of North Carolina, *State v. Miller*, __N.C. __, __ S.E.2d __ (2016).

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Tin, Fulton, Walker, & Owen, PLLC, by Noell P. Tin, for defendant.

PER CURIAM.

Upon remand from the Supreme Court of North Carolina to address the remaining issues, *State v. Miller*, __ N.C. __, __ S.E.2d __ (2016). The State appeals from the superior court’s order, which denied the State a hearing *de novo* under N.C. Gen. Stat. § 20-38.7(a) from the district court’s “preliminary determination” that Defendant’s motion to suppress should be granted.

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I. Background

The procedural history of this case is set forth in this Court's prior opinion. *State v. Miller*, __ N.C. App. __, 773 S.E.2d 574, 2015 N.C. App. LEXIS 398 (unpublished).

This Court filed a unanimous, unpublished opinion on 19 May 2015, which dismissed the State's appeal for lack of appellate jurisdiction. We also did not have jurisdiction to review the State's issue on appeal by writ of certiorari. The record on appeal before us at that time failed to show the court's order the State had purportedly appealed from was "entered" pursuant to N.C. Gen. Stat. § 15A-1432(e) (2015) ("If the superior court finds that the order of the district court was correct, it must *enter an order* affirming the judgment of the district court. The State may appeal the order of the superior court to the appellate division upon certificate by the district attorney to the judge who affirmed the judgment that the appeal is not taken for the purpose of delay." (emphasis supplied)).

This Court's filed opinion, upon which the mandate issued on 8 June 2015, dismissed the State's appeal for lack of jurisdiction. *See* N.C. R. App. P. 32(b). The State failed to meet its burden, as appellant, to show in the record on appeal that the order appealed from had been "entered."

Entering a judgment or an order is a ministerial act which consists in spreading it upon the record. . . . [A] judgment or an order is entered under [Rule 4(a)] when the clerk of court records or files the judge's decision regarding the judgment or order.

State v. Oates, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012) (citation and quotation marks omitted) (emphasis in original).

The record before this Court, when the appeal was heard, failed to meet the State's jurisdictional burden to show the order the State purportedly appealed from had been "entered" in accordance with the N.C. Gen. Stat. § 15A-1432(e) and rule set forth in *Oates*. The Supreme Court entered an order allowing an amendment of the record to add the minutes of the relevant superior court session, to allow the appellant to show the Clerk of Superior Court of Mecklenburg County had, in fact, "entered" the order appealed from by recording or filing the judge's decision in accordance with the statute and *Oates*. *See* Order Amending Record on Appeal 17 Mar. 2016; *Miller*, __ N.C. at __, __ S.E.2d at __; *Oates*, 366 N.C. at 266, 732 S.E.2d at 573.

After amending the record on appeal to reflect the clerk's entry of the court's order, the Supreme Court determined the order appealed

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from had been properly “entered” to provide jurisdiction in the Appellate Division, and remanded to this Court for consideration of the remaining issues asserted in the State’s appeal.

“It is well established that the appellant bears the burden of showing to this Court that the appeal is proper.” *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *affirmed*, 360 N.C. 53, 619 S.E.2d 502 (2005). Appellant’s failure to initially demonstrate and establish appellate jurisdiction in this Court unnecessarily expended scarce appellate judicial resources. “ ‘It is . . . not the duty of this Court to construct arguments for or find support for appellant’s right to appeal.’ ” *Id.* (quoting *Thompson v. Norfolk & Southern Ry.*, 140 N.C. App. 115, 121, 535 S.E.2d 397, 401 (2000)).

II. State’s Notice of Appeal to the North Carolina Court of Appeals

[1] Defendant argues the State’s appeal should be dismissed because the State’s notice of appeal to this Court is insufficient to confer jurisdiction. This separate argument for dismissal of the State’s appeal has not been addressed by either this Court or by the Supreme Court. Prior to the original hearing date of this case, the State also filed a petition for writ of certiorari, to seek review of the superior court’s 15 November 2013 order, in the event this Court determines the State had failed to file a proper notice of appeal to this Court.

In a case involving an implied consent offense, “[t]he State may appeal to superior court any district court preliminary determination granting a motion to suppress or dismiss.” N.C. Gen. Stat. § 20-38.7(a) (2015). After it considers the State’s appeal from the district court’s “preliminary determination”, the superior court must “then enter an order remanding the matter to the district court with instructions to finally grant or deny the defendant’s pretrial motion.” *State v. Fowler*, 197 N.C. App. 1, 11, 676 S.E.2d 523, 535 (2009), *disc. review denied*, 364 N.C. 129, 696 S.E.2d 695 (2010).

The State does not have any right to directly appeal to the appellate division from the district court’s final order granting a defendant’s pretrial motion to suppress evidence. *Id.* at 29, 676 S.E.2d at 546. The State must again appeal “to the superior court from [the] district court’s final *dismissal* of criminal charges against [the] defendant.” *Id.* (emphasis in original). Only then may the State appeal to the appellate division from the superior court’s entered order, affirming the district court’s final order of dismissal under N.C. Gen. Stat. § 15A-1432(e). *Id.* at 7, 676 S.E.2d at 532 (“[N.C. Gen. Stat.] § 15A-1432(a)(1) gives the State a statutory right of appeal to superior court from a district court’s order

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dismissing criminal charges against a defendant, and [N.C. Gen. Stat.] § 15A-1432(e) gives the State a statutory right of appeal to this Court from a superior court's order affirming a district court's dismissal.”).

Here, the State appealed to the superior court from the district court's preliminary determination granting Defendant's motion to suppress. N.C. Gen. Stat. § 20-38.7(a). By order entered 15 November 2013, the superior court determined the State's general notice of appeal, without more, was insufficient and declined to grant the State a *de novo* hearing.

The superior court remanded the case to the district court for entry of a final order. The superior court entered an oral order “affirming” the final order of the district court on 2 June 2014, which provided a statutory avenue for the State's appeal to this Court under N.C. Gen. Stat. § 15A-1432(e). The State's “notice of appeal” to this Court states as follows:

NOW COMES the State of North Carolina, by and through the undersigned Assistant District Attorney, pursuant to N.C.G.S. § 15A-1445(a)(1), and gives notice of appeal from the Superior Court of Mecklenburg County to the North Carolina Court of Appeals from the Order of the Honorable Linwood O. Foust, Superior Court Judge presiding, issued June 2, 2014, in which the Court granted the defendant's motion to suppress pursuant to N.C.G.S. § 15A-954(a)(1) and N.C.G.S. § 15A-954(a)(8).

In its sole argument on appeal, the State argues the superior court erred by denying the State a *de novo* evidentiary hearing from the district court's order granting Defendant's motion to suppress. The order to which the State assigns error was issued by the superior court on 15 November 2013, and which dismissed the State's appeal and denied the State's request for a *de novo* hearing. This order is not mentioned nor addressed in the State's notice of appeal to this Court.

Defendant argues this Court is without jurisdiction to address the State's appeal, because the State has appealed from the incorrect order. Defendant asserts the express language of the State's notice of appeal shows the State has appealed from the superior court's order issued on 2 June 2014, which was entered at the State's request to affirm the district court's final order granting Defendant's motion to suppress.

“As a general rule an appeal will not lie until there is a final determination of the whole case.” *State v. Newman*, 186 N.C. App. 382, 384, 651 S.E.2d 584, 586 (2007), *disc. review denied*, 362 N.C. 478, 667 S.E.2d 234

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(2008) (citation omitted). The 15 November 2013 order of the superior court was not a final order and is interlocutory under the current statutory scheme. For the State to appeal from the 15 November 2013 order, the case was required to be remanded to the district court for entry of a final order of its “preliminary determination” to suppress and subsequently be appealed to the superior court to enter an order affirming the district court’s final order. *Fowler*, 197 N.C. App. at 11, 676 S.E.2d at 535; N.C. Gen. Stat. § 15A-1432(a) and (e).

The district court’s final order, affirmed by the superior court on 2 June 2014, stated the superior court’s denial of a hearing *de novo* was the basis for entry of the order. Here, notice of appeal from the superior court’s order entered 2 June 2014, constituted notice of appeal to the previous proceedings. The State’s failure to cite to the 15 November 2013 order does not divest this Court of jurisdiction to hear the issues raised by the State’s appeal.

Defendant also argues the State’s notice of appeal to this Court cites an incorrect statute to support its contention that the State has a right to seek review in the appellate division. The statute cited in the State’s notice of appeal to this Court, N.C. Gen. Stat. § 15A-1445(a)(1), provides the State may appeal from the superior court to the appellate division “[w]hen there has been a decision or judgment dismissing criminal charges as to one or more counts.” N.C. Gen. Stat. § 15A-1445(a)(1) (2015). Defendant contends N.C. Gen. Stat. § 15A-1445(a)(1) is inapplicable to his appeal. *See State v. Bryan*, 230 N.C. App. 324, 327, 749 S.E.2d 900, 903 (2013) (“In contrast [to N.C. Gen. Stat. § 15A-1432(e)], the legislative history of [N.C. Gen. Stat.] § 15A-1445(a)(1) indicates that this statute is applicable to final orders issued by a superior court acting in its *original jurisdiction*. . . . This statutory application is supported by our case law, as the State receives an automatic appeal as of right only from decisions by a superior court acting in its normal capacity.” (emphasis supplied) (internal citations omitted)), *disc. review denied*, 367 N.C. 330, 755 S.E.2d 615 (2014).

While we agree that N.C. Gen. Stat. § 15A-1432(e), and not § 15A-1445(a)(1), is the statute that confers jurisdiction upon this Court to hear the issue raised by the State’s appeal, Defendant’s motion to dismiss does not address the State’s oral notice of appeal. The State entered both an oral and written notice of appeal. Pursuant to Rule 4 of the North Carolina Rules of Appellate Procedure, “*any party* entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by . . . giving oral notice of appeal at trial.” N.C. R. App. P. 4 (a)(1) (emphasis supplied).

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In *Oates*, the Supreme Court stated Appellate Rule 4(a) “permits oral notice of appeal, but only if given at the time of trial or, as here, *of the pretrial hearing.*” 366 N.C. at 268, 732 S.E.2d at 574 (emphasis supplied). Here, the superior court orally affirmed the final order of the district court pursuant to the State’s request. The prosecutor orally entered notice of appeal to this Court immediately thereafter.

Following the State’s oral notice of appeal, the written notice was superfluous. The State’s appeal is properly before this Court pursuant to Rule 4. It is unnecessary to rule upon the State’s petition for writ of certiorari. That petition is dismissed as moot.

III. Denial of a Hearing *De Novo*

[2] The State argues the superior court erred by denying the State a hearing *de novo* from the district court’s “preliminary determination” that Defendant’s motion to suppress should be granted.

Pursuant to N.C. Gen. Stat. § 20-38.7,

[t]he State may appeal to superior court any district court preliminary determination granting a motion to suppress or dismiss. *If there is a dispute about the findings of fact*, the superior court shall not be bound by the findings of the district court but shall determine the matter *de novo*. Any further appeal shall be governed by Article 90 of Chapter 15A of the General Statutes.

N.C. Gen. Stat. § 20-38.7(a) (emphasis supplied). The plain language of the statute requires the superior court to determine the matter “*de novo*” only “if there is a dispute about the findings of fact.” *Id.*

Here, the district court judge made six findings of fact based upon the officer’s testimony, and pertaining to the officer’s stop of Defendant’s vehicle. The State’s notice of appeal to the superior court states as follows:

NOW COMES the undersigned Assistant District Attorney for the Twenty-Sixth Prosecutorial District and respectfully enters notice of appeal pursuant to N.C.G.S. §§ 20-38.7 in the above captioned case and shows the Court the following:

1. On June 3, 2013, Defendant through his attorney made a pre-trial motion to suppress alleging a lack of reasonable suspicion to stop the Defendant.

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2. The Honorable Kim Best-Staton, District Court Judge presiding, indicated in open court on June 3, 2013 that she would take the matter under advisement after hearing arguments from defense counsel and the State.

3. On June 7, 2013, the Honorable Kim Best-Staton granted Defendant's motion to suppress for lack of reasonable suspicion to stop the Defendant.

4. On July 12, 2013, the Honorable Kim Best-Staton made the required written findings and signed her Findings of Fact and Conclusions of Law.

5. The State respectfully contends that the District Court's decision to grant the Defendant's motion to suppress was contrary to the law.

6. The State disputes the District Court Judge's Findings of Fact and respectfully requests a hearing *de novo* in Superior Court.

THEREFORE, based on the foregoing, the State of North Carolina respectfully enters notice of appeal and requests a hearing *de novo* in superior court.

The superior court dismissed the State's appeal and denied the State a hearing *de novo*, because "the State could not articulate in the written Notice of Appeal which specific FINDINGS OF FACT or CONCLUSIONS OF LAW the State objected." The court did review, and affirmed, the district court's decision.

Statutes granting the State a right to appeal are strictly construed. *State v. Murrell*, 54 N.C. App. 342, 343, 283 S.E.2d 173, 173, *disc. review denied*, 304 N.C. 731, 288 S.E.2d 804 (1982). The statute is silent in the manner in which the State is required to give notice of appeal from the district court's "preliminary determination" that it intends to grant a defendant's pretrial motion to suppress or dismiss. N.C. Gen. Stat. § 20-38.7(a).

The key inquiry becomes whether N.C. Gen. Stat. § 20-38.7(a) requires more than a general objection by the State to the district court judge's findings of fact or an assertion of new facts or evidence in order to demonstrate a "dispute about the findings of fact." N.C. Gen. Stat. § 20-38.7(a).

In *State v. Palmer*, 197 N.C. App. 201, 676 S.E.2d 559, *disc. review denied*, 363 N.C. 810, 692 S.E.2d 394 (2010), this Court addressed the

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defendant's notice of appeal to superior court from the district court's "preliminary determination." This Court looked to the procedures set forth in N.C. Gen. Stat. § 15A-1432(b) to guide whether the State had properly appealed to the superior court under N.C. Gen. Stat. § 20-38.7(a). *Id.* at 205-06, 676 S.E.2d at 562.

This Court reasoned that N.C. Gen. Stat. § 15A-1432 was enacted to "create[] a simplified motion practice for the State's appeal," "regulates the appeals by the State to superior court from a district's court's final order dismissing criminal charges against a defendant," and "is analogous to [N.C. Gen. Stat.] § 20-38.7(a)." *Id.* at 205, 676 S.E.2d at 562.

N.C. Gen. Stat. § 15A-1432, entitled "Appeals by State from district court judge," provides, in part:

(a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the district court judge to the superior court:

(1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.

. . . .

(b) When the State appeals pursuant to subsection (a) the appeal is by written motion *specifying the basis of the appeal* made within 10 days after the entry of the judgment in the district court. The motion must be filed with the clerk and a copy served upon the defendant.

N.C. Gen. Stat. § 15A-1432(a)(1), (b) (2015) (emphasis supplied). Here, Defendant contends the State failed to sufficiently "specify[] the basis of the appeal." *Id.*

The State's written notice of appeal in *Palmer* included the defendant's name and address, and file number. *Id.* at 206, 676 S.E.2d at 562. The document stated the State " 'appeals to superior court the district court preliminary determination granting a motion to suppress or dismiss.' " *Id.* at 206, 676 S.E.2d at 562-63. The document "also enumerated the issues raised in defendant's . . . pretrial motion to suppress, and recited almost verbatim all of the district court's findings of fact from its . . . preliminary determination." *Id.* at 206, 676 S.E.2d at 563.

The State's notice of appeal in *Palmer* did not specify the date of the district court's preliminary determination from which it was appealing. The superior court concluded it had no basis to determine whether the

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notice of appeal was timely and was without jurisdiction to hear the State's appeal. *Id.* at 206-07, 676 S.E.2d at 563.

This Court held in *Palmer*:

[W]e have declined to infer that the General Assembly intended to engraft upon N.C. Gen. Stat. § 20-38.7(a) the ten-day time limit for making an appeal specified in N.C. Gen. Stat. § 15A-1432(b). Accordingly, in light of the information that was included in the State's written motion, we hold the State's appeal sufficiently comported with the *remaining* requirements of N.C.G.S. § 15A-1432(b), and that the superior court erred by concluding that it was "unable to determine that it ha[d] jurisdiction to hear the State's 'appeal[,] as the proper basis for this 'appeal' and the [superior c]ourt's jurisdiction to hear an appeal of this matter [wa]s not properly alleged in the State's sole filing in this matter."

Id. at 207, 676 S.E.2d at 563 (emphasis supplied).

In *Palmer*, this Court upheld the validity of the State's written notice of appeal, despite the State's failure to note the specific findings of fact in dispute. Here, the State's notice of appeal reads the "State disputes the District Court Judge's Findings of Fact."

We are bound by *Palmer* and hold the trial court erred in dismissing the State's notice of appeal under N.C. Gen. Stat. § 20-38.7(a) as insufficient. Neither the plain language of N.C. Gen. Stat. § 20-38.7(a) nor § 15A-1432(b) requires the State to set forth the specific findings of fact to which it objects in its notice of appeal to superior court. We decline to extend the language of the statute to require this.

The record states on 30 May 2014, after the State filed its notice of appeal to superior court, the Senior Resident Superior Court Judge of the 26th Judicial District entered an Administrative Order, as follows:

ADMINISTRATIVE ORDER CONCERNING APPEALS BY
THE STATE UNDER NCGS SEC. 20-38.7

Pursuant to the inherent authority of the Court and for the purpose of promoting the efficient disposition of appeals made by the State of North Carolina from the District Court of Mecklenburg County to the Superior Court of Mecklenburg under the provisions of NCGS Sec. 20-38.7,

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IT IS ORDERED:

1. Whenever the State appeals from a district court preliminary determination granting a motion to suppress or dismiss as permitted by NCGS 20-38.7, the State shall specify with particularity in its written notice of appeal those findings of fact made by the district court, or portions thereof, which the State disputes in good faith; a broadside exception to the district court's findings of fact is not permitted.
2. Prior to the hearing of the State's appeal, counsel for the defendant and the assistant district attorney prosecuting the appeal shall confer and make a good faith effort to stipulate to any facts that are not in dispute. The stipulations, if any, shall be reduced to writing, signed by the attorneys for the State and defendant, and filed with the Clerk of Superior Court.
3. This Order shall apply to all appeals made by the State under the provisions of NCGS Sec. 20-38.7 on and after June 9, 2014.

The Senior Resident Superior Court Judge has the authority to enter local rules and administrative orders governing practices and procedures within that Judicial District. *See* N.C. Gen. Stat. § 7A-41.1(c) (2015). The entered administrative order provides guidance on the local practice and procedure concerning "dispute(s) about the findings of fact." N.C. Gen. Stat. § 20-38.7(a).

The State has not appealed from this order and it is not before us on this appeal. The State's notice of appeal to superior court was entered prior to the filing of this administrative order, and it is not applicable to this case on remand.

IV. Conclusion

We remand this matter to the superior court to review the district court's 12 June 2013 "preliminary determination" on Defendant's motion to suppress according to the statutory standard of review set forth in N.C. Gen. Stat. § 20-38.7(a). The trial court should address the State's challenges to the district court's findings of fact at a hearing pursuant to N.C. Gen. Stat. § 20-38.7(a) and N.C. Gen. Stat. §15A-1432.

REMANDED.

Panel Consisting of: Calabria, Stroud, Tyson, JJ.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 MAY 2016)

CENTOR, INC. v. MAKINO, INC. No. 15-863	Mecklenburg (14CVS10733)	Remanded
ELTRINGHAM v. ROSE No. 15-662	New Hanover (08CVD2561)	Dismissed
IN RE A.E.M. No. 15-1022	Guilford (08JT1) (08JT724)	Affirmed
IN RE A.H. No. 15-1177	Forsyth (14JA77-79)	Remanded
IN RE A.T. No. 15-931	Martin (04JT76) (04JT77) (12JT9)	Affirmed
IN RE C.L. No. 15-1176	Alamance (06JB87)	Affirmed
IN RE C.N.H-P No. 15-1199	Wake (13JT86-88) (14JT53)	Affirmed
IN RE E.B. No. 15-1087	Wake (15SPC0155)	Reversed
IN RE K.S. No. 15-1165	Randolph (13JT148)	Affirmed
IN RE M.G. No. 15-1355	Mecklenburg (12JA661-663)	Affirmed in part, reversed and remanded in part
IN RE K.P. No. 15-1319	Cumberland (10JT666)	Affirmed
IN RE L.A.S. No. 15-1224	Columbus (13JT45)	Affirmed
IN RE REEB No. 15-927	Union (14SP158)	Dismissed
KIRKMAN v. N.C. DEP'T OF COMMERCE No. 15-1332	Jackson (15CVS306)	Dismissed

N.C. DEP'T OF TRANSP. v. HERMAN No. 15-1032	Ashe (12CVS430)	Modified and Affirmed
RODRIGUEZ v. BECKWITH No. 15-1021	Swain (14CVD140)	Reversed and Remanded
SMITH v. YOUNG No. 15-1147	N.C. Industrial Commission (PH-3197) (Y16313)	Dismissed
STATE v. ALSTON No. 15-966	Halifax (13CRS53859)	No Error
STATE v. BANKS No. 15-828	Cabarrus (12CRS50987-89)	Affirmed
STATE v. BRUTON No. 15-942	Stokes (14CRS456) (14CRS51128)	Reversed
STATE v. COLES No. 15-899	Forsyth (12CRS60562)	No Error
STATE v. DARDEN No. 15-1134	Wayne (12CRS50294) (14CRS3139)	Reversed and Remanded
STATE v. FLEMING No. 16-43	Union (13CRS52352) (14CRS797)	No Error
STATE v. LUCKADOO No. 15-775	Martin (12CRS51372) (13CRS126)	AFFIRMED IN PART; REMANDED FOR NEW SENTENCING HEARING.
STATE v. LYONS No. 15-964	Pitt (13CRS56785)	No Error
STATE v. LYTLE No. 15-1215	Mecklenburg (11CRS257261)	Dismissed
STATE v. PALMER No. 15-1112	Rowan (12CRS55410)	No Error
STATE v. PUGH No. 15-1133	Wake (13CRS214277)	Dismissed
STATE v. SCHNEBELEN No. 15-974	Burke (14CRS50888)	Affirmed

STATE v. SHIPMAN No. 15-1146	Mecklenburg (13CRS229395)	No error at trial; vacated and remanded as to restitution
STATE v. STEELE No. 15-827	Mecklenburg (09CRS65417-20)	NO ERROR IN PART; REVERSED AND REMANDED IN PART.
STATE v. WILLIAMS No. 15-1212	Edgecombe (13CRS52685) (13CRS52689)	No Plain Error In Part; No Error in Part
STATE v. WILLIAMS No. 15-1076	Alamance (13CRS4268) (13CRS54632)	Remanded for resentencing
STROUD v. PATE DAWSON, INC. No. 15-1066	Iredell (15CVS1383)	Dismissed
TOWN OF CARY v. SOUTHERLAND No. 15-740	Wake (13CVS4896)	Dismissed
YOUNG v. YOUNG No. 15-1121	Iredell (13CVD585)	Dismissed

FRIDAY INVS., LLC v. BALLY TOTAL FITNESS OF MID-ATL., INC.

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FRIDAY INVESTMENTS, LLC, PLAINTIFF

v.

BALLY TOTAL FITNESS OF THE MID-ATLANTIC, INC. F/K/A BALLY TOTAL FITNESS
OF THE SOUTHEAST, INC. F/K/A/ HOLIDAY HEALTH CLUBS OF THE SOUTHEAST, INC. AS
SUCCESSOR- IN-INTEREST TO BALLY TOTAL FITNESS CORPORATION; AND BALLY
TOTAL FITNESS HOLDINGS CORPORATION, DEFENDANTS

No. COA15-680

Filed 7 June 2016

Evidence—privileged communications—tripartite attorney-client relationship—indemnification clause—asset purchase agreement

Where plaintiff lessor brought suit against defendants for payment of back rent and other claims under the lease, the trial court did not abuse its discretion when it compelled defendants to produce correspondence and documents exchanged between defendants and a third-party indemnitor, who had agreed in an asset purchase agreement to defend defendants. Defendants and the third-party indemnitor shared a common business interest as opposed to the common legal interest necessary to support a tripartite attorney-client relationship.

Appeal by Defendants from Order entered 9 April 2015 by Judge Jesse B. Caldwell III in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 November 2015.

Knox, Brotherton, Knox & Godfrey, by Lisa Godfrey, for Defendants-Appellants.

Horack, Talley, Pharr & Lowndes, P.A., by Keith B. Nichols, for Plaintiff-Appellee.

INMAN, Judge.

This appeal requires us to consider the common interest doctrine, which extends the attorney-client privilege to communications between and among multiple parties sharing a common legal interest. We hold that an indemnification provision in an asset purchase agreement, standing alone, is insufficient to create a common legal interest between a civil litigant indemnitee and a third-party indemnitor.

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Bally Total Fitness of the Mid-Atlantic, Inc. (“Mid-Atlantic”) and Bally Total Fitness Holding Corporation (“Holding”) (collectively “Defendants”) appeal the trial court’s Order denying their Motion for a Protective Order on Supplementation of Written Discovery and granting Plaintiff Friday Investments, LLC’s (“Plaintiff”) Motion to Compel production of email and written communication between Defendants and third party Blast Fitness Group (“Blast”). Defendants contend that the trial court failed to recognize that they had entered into a tripartite attorney-client relationship with Blast, so that communications between Defendants and Blast are protected by the attorney-client privilege. After careful review, we affirm.

Facts and Background

In February 2000, the predecessor in interest of Mid-Atlantic entered into a lease agreement with the predecessor in interest of Plaintiff for a 25,000 square foot commercial suite in the Tower Place Festival Shopping Center in Charlotte, North Carolina. The lease was guaranteed by Holding, the parent company of both Mid-Atlantic and the original tenant. In 2012, Mid-Atlantic sold certain of its health clubs, including the Tower Place Club, to Blast. The Asset Purchase Agreement between Mid-Atlantic and Blast (the “Blast Agreement”) provided that the sale transferred any “obligations . . . arising . . . under the Real Property Leases” of the clubs sold. The Blast Agreement also included an indemnification clause wherein Blast agreed to “defend, indemnify, and hold [Defendants] . . . harmless of, from[,] and against any [l]osses incurred . . . on account of or relating to . . . any Assumed Liabilities, including those arising from or under the Real Property Leases after closing.”

Plaintiff brought suit against Defendants on 9 May 2014 in Mecklenburg County Superior Court for payment of back rent and other charges under the lease. Blast subsequently agreed to defend Defendants as provided for in the Blast Agreement.

Defendants and Plaintiff completed an initial exchange of documents and answers to interrogatories on 24 October 2014. Defendants’ Senior Vice President and General Counsel, Earl Acquaviva, was deposed by Plaintiff on 11 February 2015. On 19 February 2015, counsel for Plaintiff sent an email to Defendants’ counsel requesting copies of “post-suit correspondence and documents exchanged between [Defendants] and Blast.” Defendants refused, and on 3 March 2015, Plaintiff filed a Motion to Compel production of the requested documents. Defendants responded by filing a Motion for a Protective Order on 24 March 2015, claiming that communications between themselves and Blast were subject to attorney-client privilege. On 25 March 2015, the trial court orally

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ordered Defendants to produce the documents and a privilege log for *in camera* inspection.

On 27 March 2015, Defendants submitted to the trial court the requested documents and a privilege log. After completing an *in camera* review of the documents, the trial court notified counsel via email on 2 April 2015 that it had denied Defendants' Motion for a Protective Order and granted Plaintiff's Motion to Compel. The trial court entered a written order on 13 April 2015 consistent with the court's email notice but granted a motion by Defendants to stay the decision for review by this Court.

Defendants timely appealed. The Record on Appeal was settled via stipulation, pursuant to Rule 11 of the North Carolina Rules of Appellate Procedure, on 29 May 2015. The Record was amended on Defendants' Motion on 24 July 2015 to include the trial court's 2 April 2015 email message.¹ On 1 September 2015, Defendants filed a "Motion to Submit Documents Under Seal," seeking to transmit the documents reviewed *in camera* to this Court for review.

I. Plaintiff's Motion to Dismiss

Plaintiff argues that a "substantial right" is not at stake because Defendants waived their right to appeal the discovery order by failing to specifically assert their attorney-client privilege during the initial round of discovery, and that Defendants' subsequent Motion for a Protective Order was insufficient to constitute an objection. We disagree.

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). While there is generally "no right of immediate appeal from interlocutory orders and judgments," *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990), immediate appeals are available under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) (2015) if the order "deprives the appellant of a substantial right which would be lost absent immediate review." *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995).

1. Defendants initially filed Notice of Appeal from the 2 April 2015 ruling communicated to counsel via email, but they also filed Notice of Appeal from the order entered 13 April 2015. Both notices are contained in the Record on Appeal. The email is not an order because it was not filed with the Clerk of Court. N.C. Gen. Stat. § 1A-1, Rule 58 (2015) ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.") Accordingly, this opinion reviews only the 13 April 2015 Order.

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Both this Court and the North Carolina Supreme Court have recognized that a trial court's "determination of the applicability of [attorney-client] privilege . . . affects a substantial right and is therefore immediately appealable." *In re Miller*, 357 N.C. 316, 343, 584 S.E.2d 772, 791 (2003); see also *Evans v. U.S. Auto. Ass'n*, 142 N.C. App. 18, 24, 541 S.E.2d 782, 786 (2001) (holding that the appeal of a trial court order denying the assertion of attorney client privilege after an *in camera* review affects "a substantial right which would be lost if not reviewed before the entry of final judgment").

Nevertheless, the availability of such appeals is contingent upon the proper assertion of the claimed privilege. In *K-2 Asia Ventures v. Trota*, this Court held that to assert a statutory privilege for interlocutory review, the appellant must have complied with Rule 34(b) of the North Carolina Rules of Civil Procedure by lodging specific objections to individual discovery requests. 215 N.C. App. 443, 446–47, 717 S.E.2d 1, 4–5 (2011). Blanket objections that broadly assert a privilege without attaching it to a particular request, such as the one made by one set of defendants in *K-2 Asia Ventures*, are not only procedurally deficient but also fail to satisfy the requirement that the assertion of privilege be "not otherwise frivolous or insubstantial." *Id.* at 447, 717 S.E.2d at 4 (internal quotation marks and citations omitted).

Plaintiff attempts to draw a parallel to *K-2 Asia Ventures*, noting that Defendants asserted no particularized claim of attorney-client privilege in their responses to the initial round of discovery. We are unpersuaded. None of the initial discovery requests expressly sought correspondence between Defendants and Blast. The initial discovery request that most plainly encompasses these documents—if the documents are not privileged—is the fourth "Request for Production of Documents," which requests "[a]ll *non-privileged* correspondence or written communication of any kind between [Defendants] and any other person or entity concerning the [Tower Place Club], Lease Agreement, Guaranty, or any other issues described or referenced in the Pleadings in this action."² (Emphasis added.) Given the limiting language in the request, it is unreasonable—for the purpose of determining waiver—to require Defendants

2. Plaintiff argues that correspondence between Defendants and Blast also was within the scope of several other specific discovery requests that were not limited to non-privileged information. Request 4, which specifically seeks communications between Defendants and "any other person or entity" most plainly encompasses correspondence between Defendants and non-parties to the litigation, such as Blast. Because we affirm the trial court's ruling that the documents at issue are responsive to Request 4, analysis of the other discovery requests is unnecessary.

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to have first acknowledged the existence of correspondence they considered privileged and to have objected to production in response to a request for “non-privileged” information.³

The record reflects that when faced with a specific request for their communications with Blast, Defendants promptly asserted the attorney-client privilege. During the 11 February 2015 deposition, counsel for Plaintiff asked the deponent, Mid-Atlantic’s General Counsel Earl Acquaviva, to describe “all of the conversations that you have had personally with Blast or any representatives of Blast about this lawsuit.” Defendants’ counsel immediately objected on the basis of attorney-client privilege and advised the deponent not to answer. Plaintiff’s further attempts to probe the issue were all met with similar objections by Defendants’ counsel, and the deponent refused to answer such questions.

Based on the foregoing details in the record, we hold that Defendants properly asserted the attorney-client privilege in a manner that is neither frivolous nor insubstantial and that this interlocutory appeal affects a “substantial right” of Defendants. We therefore deny Plaintiff’s motion to dismiss.

II. Defendants’ Motion to Submit Documents Under Seal

In support of their argument that the trial court failed to recognize a tripartite attorney-client relationship between themselves, Blast, and their counsel, Defendants submitted a “Motion to Submit Documents Under Seal” to this Court to examine the documents reviewed *in camera* by the trial court. We decline to grant this motion because it is improper, untimely, and unfairly prejudicial.

This Court has repeatedly held that “[i]t is the appellant’s duty and responsibility to see that the record is in proper form and complete.” *State v. Williamson*, 220 N.C. App. 512, 516, 727 S.E.2d 358, 361 (2012)

3. Our holding should not be construed to encourage litigants to assert particularized objections only when a request clearly seeks privileged information or documents. The best practice for counsel responding to discovery is to give each request the broadest possible interpretation and to assert objections to producing information or documents the litigant believes to be beyond the scope of discovery allowed by the Rules of Civil Procedure. Even when privilege is claimed in good faith, the adage that it is easier to beg forgiveness than to seek permission undermines public confidence in the legal profession and our justice system. Defendants would have saved themselves, Plaintiff, the trial court, and this Court significant resources had they more broadly construed Plaintiff’s requests and asserted a particularized objection in the first place.

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(quoting *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983)). Defendants failed to “request[] that the trial court review the documents *in camera* and then seal the documents for possible appellate review.” *Miller v. Forsyth Mem’l Hospital*, 174 N.C. App. 619, 621, 625 S.E.2d 115, 116 (2005). Defendants could have remedied this failure in the trial court prior to settling the Record on Appeal.

Even after the Record on Appeal has been settled in the trial court, but prior to the filing of the Record on Appeal, a party may move this Court to “order additional portions of a trial court record or transcript sent up and added to the record on appeal.” N.C. R. App. P. 9(b)(5)(b) (2015). Once the record has been filed, a party may still move to amend the record at any time prior to the filing of the opposing party’s responsive brief. N.C. R. App. P. 9(b)(5)(a) (2015). Here, Defendants failed to ask the trial court to seal the records for appellate review, did not move this Court to order the records be sent from the trial court, and filed its unorthodox motion several days after the submission of Plaintiff’s Brief.

To allow these documents to enter the record after briefing would be unfairly prejudicial to Plaintiff because such a significant amendment of the record would likely require both parties to re-brief the case to address legal issues not previously raised. For example, this Court reviews a trial court’s *in camera* review of documents placed under seal *de novo*, as opposed to for abuse of discretion. *E.g.*, *State v. Minyard*, 231 N.C. App. 605, 615, 753 S.E.2d 176, 184 (2014); *State v. McCoy*, 228 N.C. App. 488, 492, 745 S.E.2d 367, 370 (2013). Amending the appellate record to include these documents would add issues on appeal, including whether the trial court erred in its *in camera* review and whether the documents, based on this Court’s *in camera* review, were subject to attorney-client privilege under the five factor *Murvin* test. *Raymond v. N.C. Police Benevolent Ass’n*, 365 N.C. 94, 100–01, 721 S.E.2d 923, 928 (2011); *State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981). Accordingly, we deny Defendants’ Motion to Submit Documents Under Seal.

Because the question presented by Defendants may be addressed by reference to the nature of the relationship between the parties and the existing Record on Appeal, the Court can reach the merits of this appeal without reviewing the documents submitted to the trial court for *in camera* review.

III. Tripartite Attorney-Client Privilege (Common Interest Doctrine)

Defendants claim that the trial court abused its discretion by “disregard[ing] a tripartite attorney-client relationship” between

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Defendants, their attorneys, and Blast and ordering the production of communications between them. We hold that Defendants have failed to show that the trial court's ruling was either "manifestly unsupported by reason" or "arbitrary." See *K-2 Asia Ventures*, 215 N.C. App. at 453, 717 S.E.2d at 8 (citation and quotation marks omitted).

A. Standard of Review

This Court reviews trial court orders relating to discovery issues for abuse of discretion. *Id.* To prevail, an appellant must show that the trial court's ruling was "manifestly unsupported by reason" and "so arbitrary that it could not have been the result of a reasoned decision." *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998).

B. Analysis

Although attorney-client arrangements between two or more clients have been recognized by North Carolina courts for more than half a century, *Dobias v. White*, 240 N.C. 680, 684–85, 83 S.E.2d 785, 788 (1954), there is a dearth of controlling appellate precedent explaining the precise nature of these arrangements and the extension of privilege invoked in disputes with third parties.⁴ Accordingly, our discussion of the issue presented in this case is best addressed by reference to not only the limited controlling authority from our state appellate courts, but also non-binding, persuasive decisions by other courts.

Arrangements between two or more parties to obtain legal counsel for a shared legal purpose are known as "tripartite" attorney-client relationships. *Raymond*, 365 N.C. at 98–99, 721 S.E.2d at 926–27. A tripartite relationship most commonly exists "when an insurance company employs counsel to defend its insured against a claim." *Id.* at 98, 721 S.E.2d at 926.⁵ A tripartite relationship may also exist between an

4. Our Supreme Court in *Dobias* did not address a claim of privilege by members of a tripartite relationship adverse to a third party, but rather a claim of privilege by one party seeking to bar an adverse party from discovering documents related to a business transaction in which the parties had employed joint counsel. The Supreme Court held that "as a general rule, where two or more persons employ the same attorney to act for them in some business transaction, their communications to him are not ordinarily privileged *inter sese*." 240 N.C. at 685, 83 S.E.2d at 788.

5. The most often cited controlling authority recognizing a tripartite relationship between insurer, insured, and counsel retained by the insurance company to represent the insured is *Nationwide Mut. Fire Ins. Co. v. Boulton*, 172 N.C. App. 595, 602–03, 617 S.E.2d 40, 45–46 (2005). However, like *Dobias*, *Nationwide Mut. Fire Ins. Co.* sheds little light on the issue presented here, because that appeal arose from an insurance coverage dispute between the insured and the insurer. *Id.*

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individual and a “trade association or lobbying group that represents a special interest if there is specific, ongoing litigation.” *Raymond*, 365 N.C. at 99, 721 S.E.2d at 927 (citations omitted).

The linchpin in any analysis of a tripartite attorney-client relationship is the finding of a common legal interest between the attorney, client, and third party. *See Raymond*, 365 N.C. at 100, 721 S.E.2d at 927 (tripartite attorney-client relationship existed between attorney, client, and benevolence organization due to the common interest of “protecting and promoting the livelihood” of the client). “[T]he parties must first share a common interest about a legal matter.” *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996).

North Carolina courts have yet to formulate a bright line rule or articulate criteria for determining whether a common legal interest exists to extend the attorney-client privilege between multiple parties. Instead, our courts have engaged in specific analysis of the facts in each case involving this issue. *See, e.g., Raymond*, 365 N.C. at 100, 721 S.E.2d at 927 (common legal interest based on mission of benevolent organization); *Nationwide Mut. Fire Ins.*, 172 N.C. App. at 602–03, 617 S.E.2d at 45–46 (common legal interest based on contract between insured and insurer).

All fifty states and federal courts have recognized the extension of the attorney-client privilege to certain tripartite relationships under various monikers including, *inter alia*, the “joint defense privilege,” the “common interest privilege,” the “common interest doctrine,” and the “common defense rule.” *See, e.g., Aramony*, 88 F.3d at 1392; *United States v. Schwimmer*, 892 F.2d 237, 243–46 (2d. Cir. 1989); *United States v. McPartlin*, 595 F.2d 1321, 1336–37 (7th Cir. 1979); *Ferko v. NASCAR*, 219 F.R.D. 396, 401–03 (E.D. Tex. 2003); Craig S. Lerner, *Conspirators’ Privilege and Innocents’ Refuge: A New Approach to Joint Defense Agreements*, 77 *Notre Dame L. Rev.* 1449, 1491 (2002). To extend the attorney-client privilege between or among them, parties must (1) share a common interest; (2) agree to exchange information for the purpose of facilitating legal representation of the parties; and (3) the information must otherwise be confidential. *Schwimmer*, 892 F.2d at 243–244. Although prudent counsel would always put a representation agreement in writing, there is no requirement that the agreement be in writing. *See McPartlin*, 595 F.2d at 1336. Despite being labeled a “privilege” by some courts, the common interest doctrine does not recognize an independent privilege, but is “an exception to the general rule that the attorney-client privilege is waived upon disclosure of privileged information [to] a third party.” *Ferko*, 219 F.R.D. at 401. Extension of the

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attorney-client privilege to these relationships “serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.” *Schwimmer*, 892 F.2d at 244. The extension of privilege applies in disputes between third parties and one or more members of the tripartite arrangement, but not in disputes *inter sese*. *Nationwide Mut. Fire Ins. Co.*, 172 N.C. App. at 602–03, 617 S.E.2d at 45–46 (2005) (insured who was represented by counsel retained by insurance company in tort litigation by a third party against the insured was entitled, in separate litigation against the insurer, to discover communications between the insurer and counsel related to the defense strategy in underlying litigation); *Dobias*, 240 N.C. 680 at 683, 83 S.E.2d at 788 (seller and purchaser of real estate were each entitled to discover the other’s communications about the deal with their common real estate attorney).

While not binding, decisions by several federal courts and the North Carolina Business Court provide some clarity as to what constitutes a common *legal* interest, distinguishing it in particular from a common *business* interest. “For the privilege to apply, the proponent must establish that the parties had some common interest about a *legal* matter.” *In re Grand Jury Subpoena Under Seal*, 415 F.3d 333, 341 (4th Cir. 2005) (emphasis added) (citations and quotation marks omitted). In that vein, the North Carolina Business Court has held that the common interest doctrine applies to “communications between separate groups of counsel representing separate clients having similar interests and actually cooperating in the pursuit of those interests.” *Morris v. Scenera Research, LLC*, 2011 NCBC 33, 2011 WL 3808544, at *7 (N.C. Bus. Ct. Aug. 26, 2011). The Business Court distinguishes such legal interests from “business interest[s] that may be impacted by litigation involving one of the parties.” *SCR-Tech LLC v. Evonik Energy Serv. LLC*, 2013 NCBC 42, 2013 WL 4134602, at *6 (N.C. Bus. Ct. Aug. 13, 2013) (“A party seeking to rely on the common interest doctrine must demonstrate that the specific communications at issue were designed to facilitate a common legal interest; a business or commercial interest will not suffice.”) (internal citations and quotation marks omitted); *see also Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995) (“[T]he common interest doctrine does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation.”).

In *SCR-Tech*, the parties seeking protection under the common interest doctrine were linked by ownership interests as well as a

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cooperation agreement. 2013 WL 4134602, at *1. SCR-Tech, the proponent of the privilege, had been previously owned by Ebinger. *Id.* After selling SCR-Tech, Ebinger had come into legal conflict with defendant Evonik over the same technology, and had executed an agreement to support SCR-Tech in its claims against Evonik. *Id.* The Business Court distinguished between “communications between Ebinger and SCR-Tech to coordinate positions to be taken in the separate lawsuits between them and Defendants, and . . . communications by which Ebinger provided SCR-Tech assistance in the present litigation pursuant to the Cooperation Agreement[,]” finding that the former, but not the latter, was sufficient to “rise to a level of [a] shared legal interest.” *Id.* at *7.

In *Nationwide Mut. Fire Ins.*, the agreement between the insurer and the insured provided that the insurer would pay damages up to an amount specified in the policy, would provide a defense “at [the insurer’s] expense by counsel of [the insurer’s] choice,” and could settle the claim at any time and on any terms the insurer deemed appropriate. 172 N.C. App. at 598, 617 S.E.2d at 43. This Court held that the insurer and the insured had a shared legal interest in defending against the underlying claim, relying in part on a North Carolina State Bar Opinion recognizing that an attorney may enter into dual representation of both an insurer and an insured. *Id.* at 602–03, 617 S.E.2d at 45.

Indeed, the primary purpose of an insurance contract is defense and indemnification. By contrast, an indemnification provision in an asset purchase agreement is generally ancillary to the sale of a business, and Defendants have presented no evidence that their agreement with Blast was otherwise. The agreement and resulting arrangement is almost identical in nature to the cooperation agreement in *SCR-Tech*. While Defendants attempt to analogize to the insured-insurer agreements recognized in *Nationwide Mut. Fire Ins.*, the analogy is unpersuasive. The indemnification provision in the asset purchase agreement requires Blast to defend and indemnify Defendants from “[l]osses incurred or sustained . . . on account of or relating to . . . the use of the [a]ssets by [p]urchaser and the operation of the . . . [h]ealth [c]lubs” This language, and the nature of the asset purchase agreement, are most similar to the purchase agreement which was held to be insufficient in *SCR-Tech* to create a tripartite privileged relationship. *SCR-Tech*, 2013 WL 4134602, at *7. Blast is not a party to this litigation. Nor does Blast have any contractual authority to settle or otherwise affect the outcome of the suit against Defendants, unlike the insurer in *Nationwide Mut. Fire Ins.*, 172 N.C. App. at 598, 617 S.E.2d at 43.

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Neither this Court nor the North Carolina Supreme Court has extended the common interest doctrine to relationships formed primarily for purposes other than indemnification or coordination in anticipated litigation. *Cf. Raymond*, 365 N.C. at 99, 721 S.E.2d at 924 (law enforcement officer communicated with counsel provided by professional association, of which he was a member, seeking legal advice regarding a specific employment dispute that resulted in litigation); *Nationwide Mut. Fire Ins.*, 172 N.C. App. at 598, 617 S.E.2d at 43 (insurer provided counsel to represent insured in litigation and maintained the right to settle the case); *SCR-Tech*, 2013 WL 4134602, at *1 (parties each involved in separate lawsuits against defendant). Further, we are aware of no precedent indicating that federal courts within the Fourth Circuit have extended the common interest doctrine to a case “where the sharing was not done by agreement relating to some shared actual or imminent, specific litigation.” *United States v. Duke Energy Corp.*, 214 F.R.D. 383, 388 (M.D.N.C. 2003); *see also In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990) (parent company and its subsidiary had agreement to jointly prosecute contract claims against U.S. Army). Decisions from other circuits suggest this limitation as well. *Schwimmer*, 892 F.2d at 243; *see also McPartlin*, 595 F.2d at 1337 (“The privilege protects pooling of information for any defense purpose common to the participating defendants.”). Blast’s status as a non-party and the absence of evidence that this litigation was material to its asset purchase agreement with Defendants distinguishes this case from decisions relied upon by Defendants for protection through the common interest doctrine.

We hold that Defendants and Blast shared a common business interest as opposed to the common legal interest necessary to support a tripartite attorney-client relationship. Consequently, we hold that the trial court did not abuse its discretion in compelling Defendants to produce the documents.

AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.

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[247 N.C. App. 652 (2016)]

KEVIN GERITY, PETITIONER

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA15-843

Filed 7 June 2016

Employer and Employee—Whistleblower Act—autopsy report

On appeal from the final decision of a Senior Administrative Law Judge concluding that petitioner was not entitled to relief under the Whistleblower Act, the Court of Appeals affirmed the order, concluding that petitioner failed to establish that he reported protected activity. Petitioner, an autopsy technician, failed to follow protocol when he discovered evidence during clean-up after an autopsy, and the medical examiner's decision not to mention the evidence in his report did not make the report fraudulent.

Appeal by petitioner from Final Decision entered 12 March 2015 by Judge Fred Gilbert Morrison, Jr. in the Office of Administrative Hearings. Heard in the Court of Appeals 10 February 2016.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Joseph E. Elder, for respondent.

ELMORE, Judge.

The issue on appeal is whether Kevin Gerity (petitioner) is entitled to relief under the Whistleblower Act, N.C. Gen. Stat. § 126-84 *et seq.* Senior Administrative Law Judge Fred Gilbert Morrison, Jr. (ALJ) entered a final decision concluding that petitioner is not as he failed to prove any of the three elements of a claim. We conclude that petitioner failed to establish that he reported protected activity, and thus we affirm.

I. Background

In December 2013, the North Carolina Department of Health and Human Services (DHHS) decided to pursue termination of petitioner's employment, and petitioner subsequently submitted a letter of resignation. Petitioner filed the instant action in April 2014 alleging that he was threatened with discharge because he made reports that constituted protected activity under the Whistleblower Act. The events

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preceding, as set out in the ALJ's findings of fact, tend to show the following: Petitioner worked as an autopsy technician and autopsy facility manager at the Office of the Chief Medical Examiner (OCME), which is within the Division of Public Health (DPH) and ultimately under DHHS. In 2010, Dr. Deborah Radisch became Chief Medical Examiner and hired Dr. Clay Nichols for the position of Deputy Chief Medical Examiner. Dr. Nichols served as petitioner's supervisor.

In May 2011, petitioner assisted Dr. Nichols in performing an autopsy on Terrell Boykin who presented with a gunshot wound to the head and was one of the apparent victims of a double homicide. An x-ray "was said to indicate what appeared to be the presence of an item in the brain." The x-ray was not produced at the hearing. Neither petitioner nor Dr. Nichols recovered a bullet from the brain or skull cavity during the autopsy. Petitioner asked Dr. Nichols if he should perform a second x-ray, and Dr. Nichols instructed petitioner it was not necessary. Dr. Nichols concluded the autopsy, instructed petitioner to release the body to law enforcement, and returned to his office. Despite Dr. Nichols's instruction, petitioner performed a second x-ray, which did not show the presence of an object in the brain, and then he released the body to law enforcement.

As an autopsy technician, petitioner was responsible for cleaning the autopsy room. Petitioner testified at the hearing that the Boykin autopsy "was the last case on that table for that day[.]" Petitioner stated that after he washed the cutting board and started washing the coagulated blood off the autopsy bench, "an object appeared." He rinsed off the object, picked it up, and determined it was a round, whole bullet. Petitioner put it in an evidence bag and called the photographer, William Holloman, to return to the autopsy room. Petitioner explained to Holloman how he found the object and asked Holloman to photograph it. When Holloman refused, petitioner took a picture of the bagged object with his personal cell phone.

Petitioner did not call Dr. Nichols to return to the autopsy room. Instead, he took the bagged object to Dr. Nichols's office, which was located on a different level in the building. Petitioner did not label the evidence bag or document where he found the object, but he told Dr. Nichols that he found it near the cutting board. Dr. Nichols took the bagged object but did not mention it in his autopsy report.

On 28 July 2011, petitioner met with Dr. Radisch and informed her that the Boykin autopsy report "inaccurately stated the bullet exists and is not recovered." Dr. Radisch testified that she subsequently reviewed

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the preliminary autopsy report and the x-ray but did not discuss them with Dr. Nichols and did not follow up with petitioner.

On 9 September 2011, Dr. Nichols sent petitioner an e-mail instructing him not to use his cell phone to “conduct outside business on OCME time.” Dr. Nichols also stated, “[Y]our contempt for Dr. Radisch is palpable. This includes a long history of belligerence, snide remarks and on at least one occasion, openly confrontational [sic].” Dr. Nichols listed three training classes for petitioner to attend, and concluded, “I sincerely hope that we can use your years of experience in a constructive manner for a long time to come.”

Later that morning, petitioner e-mailed Dr. Radisch, OCME administrator Pat Barnes, and Dr. Lou Turner (Dr. Radisch’s supervisor) stating, “I am formally requesting a follow up meeting to the conversation we had on July 28, 2011, in regards to the [Boykin] case I worked with Dr. Nichols.” Petitioner continued, “The autopsy report released to the public states ‘no bullet was recovered’. This disturbs me because I personally recovered the bullet in this case and personally handed it to Dr. Nichols, yet this is not reflected in the final report.” Dr. Radisch forwarded the e-mail to Dr. Nichols but did not take any additional action.

In September 2013, DHHS leadership learned that the State Bureau of Investigation (S.B.I.) was investigating the Boykin autopsy. Investigators interviewed petitioner regarding his role in the autopsy. Around the same time, the local media reported about understaffing and other problems at the OCME. As a result of information discovered during the S.B.I. investigation, the following month DHHS ordered an internal personnel investigation into the Boykin autopsy. According to DHHS’s final report submitted to the ALJ, “Petitioner provided detailed information about the OCME’s unwritten policies, protocols and practices for evidence collection.” Additionally, he “acknowledged that an autopsy technician should call the pathologist back into the room upon finding evidence outside the body.”

In November 2013, DHHS terminated Dr. Nichols’s employment. In December 2013, DHHS decided to pursue termination of petitioner’s employment. On 6 December 2013, Dr. Turner delivered a pre-disciplinary letter to petitioner, which was signed by DPH Acting Division Director Danny Staley and stated, “This letter is to notify you that a pre-disciplinary conference has been scheduled for December 9, 2013, at 11:00 a.m. . . . The purpose of this conference is to ensure that the decision to be made is not based on misinformation and to give you an opportunity to respond.”

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On 9 December 2013, petitioner, Mr. Staley, Dr. Turner, and DHHS Human Resources Manager Greg Chavez attended the pre-disciplinary conference. Mr. Staley began by stating, "This is your opportunity to give me your side of the story," and no decision has been made. Before addressing the content of the pre-disciplinary letter, petitioner presented a typed resignation letter addressed to Mr. Staley. In the letter, petitioner stated, "Please accept this letter of resignation effective today, December 9, 2013. . . . It is my intention to retire effective January 1, 2014." Mr. Staley accepted petitioner's resignation and sent him a letter that day to confirm. In April 2014, petitioner filed a petition for a contested case hearing alleging a violation of the Whistleblower Act. Petitioner filed a prehearing statement on 30 May 2014 stating the following:

[Petitioner] was threatened with discharge and was constructively discharged from the Respondent because he made reports that were protected activity under the Whistleblower Act. These reports were on matters of public concern that involved (a) substantial and specific dangers to the public health and safety, specifically mishandling and incompetence of autopsies [sic] of murder victims by superiors or colleagues, (b) gross mismanagement, and (c) gross abuse of authority.

On 7 January 2015, Senior Administrative Law Judge Fred Gilbert Morrison, Jr. heard arguments, and on 12 March 2015, he entered a final decision concluding that petitioner was not entitled to relief. Petitioner appeals.

II. Analysis

"It is well settled that in cases appealed from administrative tribunals, '[q]uestions of law receive *de novo* review,' whereas fact-intensive issues 'such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test.'" *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894–95 (2004) (quoting *In re Greens of Pine Glen Ltd. P'ship.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). Under a *de novo* review, the reviewing court " 'consider[s] the matter anew[] and freely substitutes its own judgment for the agency's.'" *Id.* at 660, 599 S.E.2d at 895 (quoting *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13–14, 565 S.E.2d 9, 17 (2002)). When applying the whole record test, however, the reviewing court " 'may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*.'" *Id.* (quoting

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Watkins v. N.C. State Bd. of Dental Exam'rs, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004)). If the “findings are supported by substantial evidence—that amount of evidence that a reasonable mind would accept as adequate to support a decision, the reviewing court must uphold the . . . decision.” *N.C. Dep't of Corr. v. McNeely*, 135 N.C. App. 587, 592, 521 S.E.2d 730, 733 (1999) (citing *ACT-UP Triangle v. Comm'n for Health Sci.*, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997)).

The Whistleblower Act, codified at N.C. Gen. Stat. § 126-84 *et seq.* (2015), provides,

(a) It is the policy of this State 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). Furthermore,

[n]o head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee regarding the State employee's compensation, terms, conditions, location, or privileges of employment because the State employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, any activity described in G.S. 126-84, unless the State employee knows or has reason to believe that the report is inaccurate.

N.C. Gen. Stat. § 126-85(a) (2015).

In order to succeed on a claim under the Whistleblower Act, a plaintiff has the burden of proving by a preponderance of the evidence the following three elements: “(1) that the plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff

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in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff.” *Newberne v. Dep’t of Crime Control & Pub. Safety*, 359 N.C. 782, 788, 618 S.E.2d 201, 206 (2005).

On appeal, petitioner claims that the ALJ erred in concluding that he did not engage in protected activity for two reasons. First, he argues no evidence supports the ALJ’s conclusion that his 9 September 2011 e-mail was a “tit for tat.” Petitioner contends that the Boykin autopsy report was inaccurate or fraudulent, without further explanation. Second, petitioner states that the Whistleblower Act applies if his employer retaliated based on a misapprehension that petitioner reported protected activity.

We do not find merit in petitioner’s first argument. Although petitioner takes issue with the ALJ’s “tit for tat” theory, petitioner fails to present any argument on why the numerous other findings are not supported by substantial evidence or why the conclusions of law are in error. Likewise, petitioner does not present any argument on why his allegations constituted any one of the five protected activities under N.C. Gen. Stat. § 126-84 (2015). In the three-and-a-half pages petitioner devotes to discussing protected activity in his brief, he cites only one case, from California, on public policy. “It is not the duty of this Court to supplement an appellant’s brief with legal authority or arguments not contained therein.” *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005) (noting that the appellant “fail[ed] to cite any legal authority or even a legal definition of the term ratification in its brief to this Court”).

In its final decision, the ALJ concluded in part,

8. After considering all of the evidence, it is found that Petitioner failed to show by a preponderance of the evidence that he found a whole bullet during the Boykin autopsy. Neither party produced the x-ray, the bagged object, or any photographs thereof, and the parties offered conflicting evidence on whether the bagged item consisted of a whole bullet, a bullet jacket, a bullet fragment, or something else. It is concluded that Dr. Radisch’s description of the object as a “piece of copper projectile jacket” is more credible than Petitioner’s description of a “whole bullet,” particularly in light of the autopsy report which clearly describes a “gaping” exit wound.

9. Even if the object Petitioner said he found was a whole bullet, it is not clear that Dr. Nichols’ autopsy report

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was fraudulent or even inaccurate. Dr. Nichols prepared a thorough autopsy report that identified Mr. Boykin's cause of death and described in considerable detail the entry and exit wounds made by a bullet. Petitioner claims to have discovered a bullet and contends that the report was fraudulent because Dr. Nichols stated that a "bullet exists and is not recovered." But although Dr. Nichols' statement could be read as an assertion that no one at the OCME found a bullet, it could also be interpreted as a truthful assertion that Dr. Nichols did not personally find and recover a bullet and thus he could not verify or vouch for one's recovery. This interpretation is supported by the fact that the OCME had no rules for how pathologists should respond to items presented to them outside the autopsy room, likely because this situation had never arisen before.

10. After considering all of the evidence, it is concluded that Petitioner's complaints about the Boykin autopsy primarily concerned his dissatisfaction with Dr. Nichols' job performance rather than fraud or a substantial and specific threat to public safety. Petitioner admitted that he did not trust Dr. Nichols and that he called Mr. Holloman to show him that Dr. Nichols' work was "sloppy." Dr. Nichols, in turn, obviously distrusted and was not always satisfied with Petitioner. The timing of Petitioner's complaints about the Boykin autopsy also suggest a kind of "tit for tat," with Petitioner complaining about Dr. Nichols' work in retaliation for Dr. Nichols' warnings about Petitioner's secondary employment and interactions with others.

In sum, the ALJ concluded that "the greater weight of the evidence does not support a conclusion that Petitioner engaged in protected activity when he reported his concerns about the Boykin autopsy to his superiors at the OCME[.]" We agree.

The evidence supports the ALJ's findings that petitioner knew under known protocol and work rules that he should have called Dr. Nichols, the pathologist, to return to the autopsy room so that Dr. Nichols could properly collect and bag any newly discovered evidence. It is evident from the record that petitioner and Dr. Nichols disagreed on what to do with the later-found object. However, Dr. Nichols's decision not to mention the object—presented to him in his office, after the autopsy ended,

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in an unmarked evidence bag, with no documented record of where it came from—in his autopsy report does not, as petitioner alleges, make the autopsy report fraudulent. N.C. Gen. Stat. § 126-84 (2015).

Although the ALJ made additional remarks suggesting petitioner was complaining about Dr. Nichols due to Dr. Nichols's 9 September 2011 e-mail, we do not find it necessary to speculate as to petitioner's timing in reporting to Dr. Radisch—i.e., whether it was a “tit for tat.” Instead, in analyzing the substance of petitioner's 28 July 2011 oral report and 9 September 2011 written report to Dr. Radisch, we conclude petitioner failed to establish by a preponderance of the evidence that he reported or was about to report protected activity.

We address petitioner's second argument without reaching the merits. At the hearing, petitioner testified that an S.B.I. agent and Dr. Turner asked him if he spoke to the media regarding the Boykin autopsy. Although petitioner denied speaking to the media, he stated, “[I]t seemed to me I was being zeroed in on as far as being a leak.”

The ALJ addressed petitioner's allegation by stating that because petitioner did “not contend that he actually prompted the media reports or S.B.I. investigation . . . there is no need to determine whether such behavior would qualify as protected activity under the Whistleblower Act.” Later in the final decision, in discussing the third element of a claim and the absence of a retaliatory motive—assuming *arguendo* that petitioner satisfied the first two elements—the ALJ stated, “[E]ven if Petitioner could show that DHHS management sought his dismissal because they mistakenly believed him to be the source of the media and S.B.I. leaks, this would be insufficient to establish a claim under the Whistleblower Act.”

As the ALJ pointed out, our courts have not considered whether a “perceived whistleblower” is entitled to protection under the Whistleblower Act. However, this Court need not decide that issue today as it is not necessary to reach a conclusion in this case. For the reasons discussed above, because petitioner's reports to Dr. Radisch did not constitute protected activity under N.C. Gen. Stat. § 126-84 (2015), a perceived report of the same content to a different party (the S.B.I. or the media) would likewise not constitute protected activity.

Because petitioner did not engage in protected activity, we need not address petitioner's arguments on the remaining two elements of a claim under the Whistleblower Act.

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III. Conclusion

The ALJ did not err in determining that petitioner was not entitled to relief under the Whistleblower Act.

AFFIRMED.

Judges STROUD and DIETZ concur.

NORMAN GLENN, PLAINTIFF

v.

EDGAR JOHNSON, INDIVIDUALLY AND AS CHAIRMAN OF THE BOARD OF TRUSTEES; EVERETTE W. JOHNSON, JR., INDIVIDUALLY AND AS CHAIRMAN OF THE BOARD OF DEACONS; AND NEW RED MOUNTAIN MISSIONARY BAPTIST CHURCH, INC., DEFENDANTS

No. COA15-523

Filed 7 June 2016

1. Emotional Distress—negligent and intentional—internal church disagreement

Where plaintiff was treasurer of his church and asserted claims against the church and two members of the church's board for claims arising from a disagreement over monetary issues, the trial court did not err by granting defendants' motions for summary judgment on plaintiff's negligent infliction of emotional distress (NIED) and intentional infliction of emotional distress (IIED) claims. On the NIED claim, plaintiff failed to identify defendants' negligent conduct, and on the IIED claim, plaintiff failed to allege or present evidence of defendants' conduct that rose to level of extreme and outrageous.

2. Libel and Slander—internal church disagreement—insufficient evidence

Where plaintiff was treasurer of his church and asserted claims against the church and two members of the church's board for claims arising from a disagreement over monetary issues, the trial court did not err by granting summary judgment in favor of defendants on plaintiff's claims for libel and slander per quod. There was no forecasted evidence that could be construed as libel or slander per quod.

Appeal by plaintiff from orders entered 29 April 2014 by Judge R. Allen Baddour, Jr., and 24 February 2015 by Judge Elaine M. O'Neal

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Bushfan in Orange County Superior Court. Heard in the Court of Appeals 22 October 2015.

Law Offices of Hayes Hofler, P.A., by R. Hayes Hofler, III, for plaintiff-appellant.

Teague Campbell Dennis & Gorham, LLP, by Jacob H. Wellman, for defendant-appellees Edgar Johnson and Everette W. Johnson, Jr.

Bailey & Dixon, LLP, by Philip A. Collins and G. Lawrence Reeves, for defendant-appellee New Red Mountain Missionary Baptist Church, Inc.

McCULLOUGH, Judge.

Norman Glenn (“plaintiff”) appeals from the trial court’s order to dismiss in part and order granting summary judgment in favor of Edgar Johnson (“Edgar”), Everette W. Johnson, Jr. (“Everette”), and New Red Mountain Missionary Baptist Church, Inc. (the “Church”) (together “defendants”). Upon review, we affirm.

I. Background

At all times relevant to this appeal, the Church was a nonprofit corporate entity operating as a church in Durham, Edgar was a member of the Church and Chairman of the Board of Trustees, Everette was a member of the Church and Chairman of the Board of Deacons, and plaintiff was a member of the church. Plaintiff also served as the treasurer of the Church and was a member of the Board of Trustees. It was disagreements between defendants and plaintiff while he was treasurer that allegedly resulted in harm to plaintiff and caused plaintiff to initiate this action against defendants.

That contentious relationship is summarized as follows: The Church bylaws require the Board of Trustees to obtain an audit annually. Edgar proposed an audit at the quarterly Church conference in July 2012 and the proposal was approved by the Church body. Yet, over plaintiffs’ objection, that vote of approval was later rescinded at the quarterly Church conference in October 2012 after concerns were raised over the cost of an audit. Also over plaintiff’s objection, Edgar then moved to have a less costly “compilation” of the Church’s financial records completed. After Edgar’s motion carried at the October 2012 conference, in November 2012, Edgar requested that plaintiff write a check for a \$250 retainer for

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the accountant who would perform the compilation. Plaintiff refused to do so. Aware of Edgar's request in November 2012, in early December 2012, the Board of Deacons, chaired by Everette, sent a letter to plaintiff requesting that he write the retainer check. Plaintiff again refused to do so and did not respond. As a result of plaintiff's repeated refusal, the Board of Deacons sent plaintiff another letter in early January 2013 requesting that plaintiff meet with the Board of Deacons to discuss the matter. Plaintiff, however, did not attend the meeting. At the quarterly Church conference in January 2013, the Board of Deacons then read and presented a letter to the Church body asking for plaintiff's resignation from the position of treasurer. Plaintiff, who was surprised by the request, then stood up in front of the Church body, handed over his keys, and renounced further responsibilities as treasurer. Since that time, plaintiff has sought on numerous occasions for the Church to clarify the reasons the Board of Deacons requested his resignation, but defendants never did so to the satisfaction of plaintiff.

Based on these facts, plaintiff asserted the following claims for relief in the complaint against defendants filed on 20 December 2013

- (1) Injunctive relief to enjoin the Church from "conducting any financial transactions by the treasurer until such time as it has legally replaced plaintiff as treasurer following the bylaws and established church procedure[]" and to enjoin the individual defendants from "in any way retaliating against plaintiff, or defaming plaintiff[.]"
- (2) Libel and/or slander *per se* because "[t]he acts of defendants . . . have been committed with malice and intent to cause plaintiff to suffer humiliation and damage his reputation within the church community. They have been defamatory *per se*, constituting publications by the defendants to third persons which, when considered alone . . . untruthfully charge that plaintiff has committed wrongdoing that amounts to a crime or otherwise has subjected plaintiff to ridicule, contempt, or disgrace in his church community."
- (3) Libel and/or slander *per quod* because "defendants' actions have constituted publications by defendants of statements to third parties which, when considered with innuendo, colloquium, and explanatory circumstances, have become defamatory, causing plaintiff

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to suffer ridicule, contempt, or disgrace, and further causing special damages”

- (4) Negligent infliction of emotional distress (“NIED”) in that “defendants negligently engaged in the . . . wrongful conduct. It was reasonably foreseeable that said conduct would cause the plaintiff severe emotional distress, and the conduct did in fact cause the plaintiff severe emotional distress, necessitating professional treatment being rendered to plaintiff”
- (5) Intentional infliction of emotional distress (“IIED”) in that the “conduct of defendants was extreme and outrageous, intended to cause severe emotional distress, or committed with a reckless indifference to the likelihood that such conduct would cause severe emotional distress, and which did cause severe emotional distress to the plaintiff.”

Defendant further alleged grounds existed to justify awards of compensatory, special, and punitive damages.

On 24 February 2014, the Church filed a motion to dismiss and answer and Edgar and Everette filed a separate joint motion to dismiss and answer. In response, plaintiff filed an affidavit on 7 April 2014. Plaintiff’s affidavit reasserted the factual bases of his claims and included copies of the Church constitution and bylaws, letters to him from the Board of Deacons, and documentation of Church meetings as attachments to support his claims.

Following a 7 April 2014 hearing in Orange County Superior Court on defendants’ motions to dismiss, on 29 April 2014, Judge R. Allen Baddour, Jr., filed an order granting defendants’ motions to dismiss in part after determining that plaintiff “failed to state claims for . . . (1) [l]ibel and slander per se against all defendants; and (2) [l]ibel and slander per quod against defendants Everette . . . and [the Church], to the extent that such claim(s) are founded upon statements made by . . . Everette” Thus, the judge dismissed those claims with prejudice and allowed plaintiff’s other claims to proceed.

Defendants then filed motions to exclude expert testimony and for summary judgment on the remaining claims on 9 January 2015. In support of the summary judgment motions, defendants submitted numerous depositions with exhibits for the trial court’s consideration. Following a 9 February 2015 hearing on defendants’ motions for summary judgment,

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on 24 February 2015, Judge Elaine M. O’Neal Bushfan filed an order granting summary judgment in favor of defendants. Specifically, the trial court “determined that there are no genuine issues of material fact and that defendants are entitled to judgment as a matter of law as to all of plaintiff’s remaining claims for [NIED], [IIED], slander *per quod*, injunctive relief and punitive damages.”

Plaintiff filed notice of appeal on 18 March 2015 from the 29 April 2014 order dismissing some of his claims and from the 24 February 2015 summary judgment order.

II. Discussion

On appeal, plaintiff contends the trial court erred in entering summary judgment in favor of defendants on his claims for NIED, IIED, and libel and/or slander *per quod*. We address plaintiff’s arguments in order.

As noted above, plaintiff also appealed from the 29 April 2014 order dismissing his libel and slander *per se* claims against all defendants and his libel and slander *per quod* claims against Everette and the Church. Plaintiff, however, has not raised any issues in his brief on appeal concerning the dismissal order and has abandoned any issues concerning the dismissed claims. *See* N.C. R. App. P. 28(b)(6) (2016) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”). Plaintiff has also abandoned any issues concerning summary judgment on his claims for injunctive relief and punitive damages by failing to raise arguments on appeal.

Standard of Review

“Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that ‘there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

In order to prevail on a motion for summary judgment, a moving party meets its burden by proving that an essential element of the opposing party’s claim is non-existent, 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. Once the moving party meets this burden, the burden is then on the opposing party to show that a genuine issue of material fact exists. . . . If

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the opponent fails to forecast such evidence, then the trial court's entry of summary judgment is proper.

Finley Forest Condo. Ass'n v. Perry, 163 N.C. App. 735, 738-39, 594 S.E.2d 227, 230 (2004) (internal quotation marks and citations omitted).

Emotional Distress Claims

[1] Plaintiff first contends the trial court erred by granting defendants' motions for summary judgment as to his NIED and IIED claims. Plaintiff claims he has raised genuine issues of material fact as to the essential elements of both claims.

NIED

We first address plaintiff's argument with respect to his claim for NIED.

Our cases have established that to state a claim for negligent infliction of emotional distress, a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as "mental anguish"), and (3) the conduct did in fact cause the plaintiff severe emotional distress. Although an allegation of ordinary negligence will suffice, a plaintiff must also allege that severe emotional distress was the foreseeable and proximate result of such negligence in order to state a claim; mere temporary fright, disappointment or regret will not suffice. In this context, the term "severe emotional distress" means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

Johnson v. Ruark Obstetrics and Gynecology Associates, P.A., 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990) (internal citations omitted). Thus, summary judgment in favor of defendants on the NIED claim is proper where the evidence does not establish negligence by defendants or establishes that the alleged negligent conduct was not the foreseeable and proximate cause of plaintiff's severe emotional distress. *Robblee v. Budd Services, Inc.*, 136 N.C. App. 793, 795, 525 S.E.2d 847, 849, *disc. review denied*, 352 N.C. 676, 545 S.E.2d 228 (2000).

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Now on appeal, plaintiff asserts he has suffered severe emotional distress that was both a foreseeable result of and proximately caused by defendants' negligent conduct. Plaintiff cites various cases and points to evidence tending to show that there was sufficient evidence of severe emotional distress for the questions of foreseeability and proximate cause to be determined by a jury.

Upon review of the record, it is clear that there was evidence in the record from which the jury could determine plaintiff had suffered severe emotional distress. Furthermore, plaintiff is correct that foreseeability and proximate cause are generally questions for the jury. *See Acosta v. Byrum*, 180 N.C. App. 562, 568, 638 S.E.2d 246, 251 (2006) ("Questions of proximate cause and foreseeability are questions of fact to be decided by the jury."). Plaintiff's arguments on appeal, however, only address the second and third elements of NIED. Plaintiff never clearly identifies in what way defendants' conduct was negligent.

It is clear from the elements listed above that "[a] claim of negligent infliction of emotional distress requires proof of negligent conduct." *Pittman v. Hyatt Coin & Gun, Inc.*, 224 N.C. App. 326, 330, 735 S.E.2d 856, 859 (2012). In reviewing a trial court's grant of a motion to dismiss a NIED claim, this Court has explained that "[t]he first element of an NIED claim requires allegations that the defendant failed to exercise due care in the performance of some legal duty owed to [the] plaintiff under the circumstances[.]" *Horne v. Cumberland Cnty. Hosp. Sys., Inc.*, 228 N.C. App. 142, 148, 746 S.E.2d 13, 19 (2013) (internal quotation marks and citation omitted). "Generally, where the facts are undisputed, [t]he issue of whether a duty exists is a question of law for the court." *Finley Forest Condo. Ass'n*, 163 N.C. App. at 739, 594 S.E.2d at 230 (internal quotation marks and citation omitted).

In *Horne*, the plaintiff's failure to allege such a legal duty owed by the defendant to the plaintiff was fatal to the plaintiff's NIED claim. *Horne*, 228 N.C. App. at 149, 746 S.E.2d at 19. In addition to failing to allege a legal duty, this Court also explained in *Horne* that "[b]eyond the conclusory assertion that '[the defendant] negligently engaged in the aforementioned conduct against [the] plaintiff,' [the] plaintiff's complaint recounts only *intentional* conduct on the part of [the defendant]." *Id.* (alterations in original omitted) (emphasis in original). As a result, the plaintiff in *Horne* "failed to properly plead an element essential to her NIED claim[]" because "[a]llegations of intentional conduct, . . . even when construed liberally on a motion to dismiss, cannot satisfy the negligence element of an NIED claim." *Id.*

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Although defendants did not move to dismiss plaintiff's NIED claim in the present case, *Horne* is instructive in our review of the trial court's grant of defendants' motions for summary judgment.

The evidence in this case is that plaintiff was a member of the Church and served as treasurer and a member of the Board of Trustees. Edgar and Everette were also members of the Church and members of church boards. As in *Horne*, plaintiff does not assert that defendants owed him a legal duty and fails to cite any authority showing that a legal duty exists between church members. The only conceivable duty owed by defendants to plaintiff was to act in accordance with the bylaws of the Church, but it is clear from the record that any conduct by the individual defendants in contravention to the bylaws was intentional, rather than negligent.

In arguing the trial court erred in granting summary judgment for defendants on the NIED claim, plaintiff glosses over the first element of NIED, stating that "[he] satisfie[d] the first two elements by offering evidence showing that it was reasonably foreseeable that such negligence would proximately cause [his] severe emotional distress." Yet, as noted above, plaintiff never identifies defendants' negligent conduct. Even in his NIED claim in the complaint, plaintiff merely incorporates the factual allegations and asserts as follows:

28. The defendants negligently engaged in the above wrongful conduct. It was reasonably foreseeable that said conduct would cause the plaintiff severe emotional distress, and the conduct did in fact cause the plaintiff severe emotional distress, necessitating professional treatment being rendered to plaintiff

We hold these conclusory allegations and the evidence presented are insufficient to avoid summary judgment.

Where defendant failed to allege a duty owed by defendants and there is no evidence of negligent acts by defendants, plaintiff has failed to establish a *prima facie* case of NIED and summary judgment was proper. See *Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 354, 595 S.E.2d 778, 782 (2004) (Summary judgment was proper because an essential element of NIED was unsupported by the evidence where the plaintiff presented no evidence that the defendant owed a duty of care or that there was a breach such a duty.) Thus, we hold the trial court did not err in entering summary judgment in favor of defendants on plaintiff's NIED claim.

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IIED

We next address plaintiff's argument regarding to his claim for IIED. "A claim for [IIED] exists when a defendant's conduct exceeds all bounds usually tolerated by decent society and the conduct causes mental distress of a very serious kind." *Watson v. Dixon*, 130 N.C. App. 47, 52, 502 S.E.2d 15, 19 (1998) (internal quotation marks and citations omitted). Broken down into its elements, IIED consists of: "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another. The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981).

Although plaintiff acknowledges that, "[a]s to the first element, a determination at summary judgment of whether 'alleged acts may be reasonably regarded as extreme and outrageous is initially a question of law[.]" *Phillips v. Rest. Mgmt. of Carolina, L.P.*, 146 N.C. App. 203, 213, 552 S.E.2d 686, 693 (2001) (quoting *Shreve v. Duke Power Co.*, 85 N.C. App. 253, 257, 354 S.E.2d 357, 359 (1987)), *disc. rev. denied*, 355 N.C. 214, 560 S.E.2d 132 (2002), plaintiff asserts the trial court in this case could not determine, as a matter of law, that defendants' conduct did not rise to the level of "extreme and outrageous" and, therefore, the issue should have been determined by the jury, along with the issues of intent, or reckless indifference, and severe emotional distress. *See also Johnson v. Bollinger*, 86 N.C. App. 1, 6, 356 S.E.2d 378, 381-82 (1987) ("[T]his Court held the initial determination of whether conduct is extreme and outrageous is a question of law for the court: If the court determines that it may reasonably be so regarded, then it is for the jury to decide whether, under the facts of a particular case, defendants' conduct . . . was in fact extreme and outrageous.") (internal quotation marks, citation, and emphasis in original omitted). Consequently, plaintiff concludes summary judgment on his IIED claim was improper. In support of his arguments, defendant relies solely on *Phillips*, in which the plaintiff alleged IIED after consuming food that had been spit on. *Phillips*, 146 N.C. App. at 207, 552 S.E.2d at 689. On appeal of the trial court's grant of summary judgment in favor of the restaurant owner/operator, this Court agreed that the trial court erred in granting summary judgment in favor of the owner/operator. *Id.* at 213, 552 S.E.2d at 693. Recognizing that other states had made similar conduct criminal or determined similar conduct toward prisoners was unconstitutional, this Court "[could not] say, as a matter of law, that a food preparer surreptitiously spitting in food intended for a patron's consumption [did] not rise to the level of

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‘extreme and outrageous.’ ” *Id.* We are not convinced that the present case is comparable to *Phillips*.

This Court has explained that

[c]onduct is extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. The behavior must be more than mere insults, indignities, threats, and plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate or unkind.

Smith-Price, 164 N.C. App. at 354, 595 S.E.2d at 782 (internal quotation marks, citations, and alterations in original omitted).

In this case, plaintiff asserts that the same conduct that was alleged to be the basis of his NIED claim is intentional, extreme, and outrageous to support a claim of IIED. Specifically, after incorporating by reference the factual allegations, plaintiff asserted as follows in his complaint:

31. The above-described conduct of defendants was extreme and outrageous, intended to cause severe emotional distress, or committed with a reckless indifference to the likelihood that such conduct would cause severe emotional distress, and which did cause severe emotional distress to the plaintiff.

The conduct by defendants alleged to be extreme and outrageous includes the following: requesting that plaintiff, as treasurer of the Church, write a check for a compilation although plaintiff was against conducting a compilation instead of a full audit; requesting through letters that plaintiff write a check and meet with the Board of Deacons to discuss his refusal to write a check; requesting plaintiff’s resignation through a letter read and presented to the Church body at the quarterly conference; ignoring, refusing, or laughing at efforts by plaintiff for reconciliation or mediation.

These acts by defendants are simply not comparable to spitting in food and we now hold that, as a matter of law, plaintiff has failed to allege or present evidence that defendants’ conduct in this case rose to the level of extreme and outrageous. As a result, the trial court did not err in entering summary judgment in favor of defendant on plaintiff’s IIED claim.

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Defamation Claims

[2] In the last issue on appeal, plaintiff contends the trial court erred in granting summary judgment as to his claims for libel and slander *per quod*. We disagree.

We begin our analysis of this final issue by noting that it not entirely clear what ruling by the trial court is being challenged. In his brief on appeal, plaintiff asserts that “Judge Bushfan allowed dismissal of all claims, including *per quod* defamation claims[,]” and contends that “Judge Bushfan, ruling on Rule 56 motions, should have denied those motions as to defamation *per quod*, because she had actual evidence before her which went beyond the mere allegations of the complaint and created genuine issues of material fact as to *per quod* defamation among all three defendants.” However, Judge Bushfan did not dismiss any claims, but instead granted summary judgment in favor of defendants. Moreover, the only defamation claims addressed in the summary judgment order were plaintiff’s libel and slander *per quod* claims against Edgar and the Church, as the other defamation claims were previously dismissed by Judge Baddour. It is the grant of summary judgment on the libel and slander *per quod* claims against Edgar and the Church that we now review on appeal.

Libel and slander are both forms of defamation – libel is written and slander is oral. *Aycock v. Padgett*, 134 N.C. App. 164, 165, 516 S.E.2d 907, 909 (1999). “To be actionable, a defamatory statement must be false and must be communicated to a person or persons other than the person defamed.’ ” *Daniels v. Metro Magazine Holding Co., L.L.C.*, 179 N.C. App. 533, 538-39, 634 S.E.2d 586, 590 (2006) (quoting *Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 430, 432 (1993)), *appeal dismissed and disc. rev. denied*, 361 N.C. 692, 654 S.E.2d 251 (2007); *see also Desmond v. News and Observer Pub. Co.*, __ N.C. App. __, __, 772 S.E.2d 128, 135, *appeal dismissed and disc. rev. denied*, __ N.C. __, 776 S.E.2d 195 (2015).

Where the injurious character of the words do not appear on their face as a matter of general acceptance, but only in consequence of extrinsic, explanatory facts showing their injurious effect, such utterance is actionable only *per quod*. Where the words spoken or written are actionable only *per quod*, the injurious character of the words and some special damage must be pleaded and proved.

Beane v. Weiman Co., 5 N.C. App. 276, 278, 168 S.E.2d 236, 237-38 (1969).

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In this case, it is not clear what plaintiff contends to be libelous or slanderous. Plaintiff identifies both the letter from the Board of Deacons requesting his resignation that was read and presented at the Church conference and prior statements by Edgar concerning whether plaintiff had used church funds to purchase a home and an automobile. Plaintiff then asserts that the sudden demand that he resign after he refused to write a check fueled innuendo and speculation that he must have done something wrong. Plaintiff further asserts that any misperception was magnified by the refusal of the Board of Deacons and Board of Trustees to explain their actions and to dispel any misunderstandings about plaintiff's resignation.

Yet, upon review of the record, there is no evidence of any conduct that could be construed as libel or slander *per quod*. First, concerning Edgar's prior questions insinuating plaintiff's misuse of church funds allegedly made in 2009 or early 2010, there is no evidence that the statements were made to anyone other than plaintiff. In fact, plaintiff indicated Edgar's statements were made directly to him. Furthermore, any defamation claim based on those statements in 2009 or early 2010 is now barred by the statute of limitations. *See* N.C. Gen. Stat. § 1-54(3) (2015) (providing a one year statute of limitations for libel and slander). Second, concerning the Board of Deacons' letter requesting plaintiff's resignation, Edgar was not a member of the Board of Deacons and plaintiff has failed to identify any false statement in the letter.

As the individual defendants assert, plaintiff's "primary argument seems to be that the letter, [or defendants in general,] did not do enough to prevent others from speculating that [p]laintiff may have done something wrong." But where there is no evidence of actionable defamation in the record, the trial court did not err in granting summary judgment in favor of defendants on the claims of libel and slander *per quod* against Edgar and the Church.

III. Conclusion

For the reasons discussed above, we hold the trial court did not err in entering summary judgment on plaintiffs' claims for NIED, IIED, or defamation *per quod*.

AFFIRMED.

Judges DIETZ and TYSON concur.

IN RE A.M.

[247 N.C. App. 672 (2016)]

IN THE MATTER OF A.M., E.R.

No. COA15-1035

Filed 7 June 2016

1. Child Abuse, Dependency, and Neglect—abuse—findings—sufficient

In a case in which a child (the first of two) was adjudicated abused based on serious emotional damage, the findings were sufficient to sustain the adjudication even though they did not track the specific language used in N.C.G.S. § 7B-101(1)(e).

2. Child Abuse, Dependency, and Neglect—abuse—findings—not sufficient

An adjudication that a child (the second of two) was abused was remanded for the trial court to make findings of fact addressing the directives of N.C.G.S. § 7B-101(1)(e) concerning the child's serious emotional damage based on the evidence presented.

3. Child Custody and Support—child in DSS custody—support—findings—not sufficient

The trial court erred by ordering a mother to pay child support where it failed to make the required findings as to a reasonable sum and the mother's ability to pay.

Appeal by Respondent-Mother from orders entered 11 June 2015 by Judge W. Fred Gore in District Court, Brunswick County. Heard in the Court of Appeals 9 May 2016.

Elva L. Jess for Petitioner-Appellee Brunswick County Department of Social Services.

Michael E. Casterline for Respondent-Appellant Mother.

Michael N. Tousey for Guardian ad Litem.

McGEE, Chief Judge.

Respondent-Mother ("Mother") appeals from orders adjudicating A.M. and E.R. (together, "the Children") to be abused and neglected and ordering that the Children remain in the custody of the Brunswick

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County Department of Social Services (“DSS”). We affirm in part, and remand in part for additional findings of fact.

I. Background

DSS filed juvenile petitions on 12 March 2015 (“the petitions”), alleging that sixteen-year-old A.M. and six-year-old E.R. were abused, neglected, and dependent. The trial court entered nonsecure custody orders that same day and placed the Children in the custody of DSS. The petitions alleged Mother had an extensive history with DSS, which dated back to 2001. Mother has two daughters older than A.M. who left home at age sixteen. Mother relinquished her parental rights to her oldest child, a son. A.M. and her two older sisters were in foster care for approximately two years around the time Mother was pregnant with E.R.

The petitions alleged Mother yelled and screamed at the Children and routinely called them derogatory names, such as “bitch,” “slut,” “hussy,” and “ass.” The petitions also alleged Mother tended to single out A.M. for cruel treatment. A.M. allegedly told a social worker she wanted to go into foster care again, but A.M. felt she was rearing E.R. and was worried about leaving her alone with Mother. The petitions further alleged that DSS had offered Mother numerous services, but Mother’s inappropriate behavior continued.

The trial court held an adjudication and disposition hearing on 15 April 2015. During the adjudicatory portion of the hearing, the following witnesses testified: Rebecca Blake (“Ms. Blake”), an intensive family preservation specialist who worked with Mother and the Children for approximately five weeks in 2014; Dr. Maria O’Tuel (“Dr. O’Tuel”), a licensed psychologist who conducted a Child/Family Forensic Evaluation with Mother and the Children; a family friend; an older sister of the Children; and Mother. At the conclusion of the hearing, the trial court adjudicated the children as abused, but declined to adjudicate the Children neglected or dependent.

DSS filed a motion on 30 April 2015 asking the trial court to reconsider its ruling. The trial court held a hearing on the motion on 6 May 2015. In an order entered 11 June 2015, the trial court adjudicated the Children abused and neglected. The trial court entered a separate disposition order on the same day, concluding it was in the Children’s best interest to remain in DSS custody. Mother appeals.¹

1. The fathers of the juveniles participated in the trial court proceedings but are not parties to this appeal.

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II. Abuse Adjudications

Mother contends on appeal that the findings of fact in the adjudication order do not support the trial court's conclusion that the Children were abused. An abused juvenile is defined, in relevant part, as "[a]ny juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker . . . [c]reates or allows to be created serious emotional damage to the juvenile." N.C. Gen. Stat. § 7B-101(1)(e) (2013). This subsection also provides that "serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward [herself] or others." *Id.* "The role of this Court in reviewing an initial adjudication of [abuse] is to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re T.M.*, 180 N.C. App. 539, 544, 638 S.E.2d 236, 239 (2006) (quotation marks omitted). Unchallenged findings are binding on appeal. *See In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009).

In the present case, Mother does not challenge the findings in the adjudication order, and they are binding on appeal. *See id.* Instead, Mother contends the findings in the adjudication order do not support the trial court's conclusion that the Children were abused. Specifically, Mother argues the findings of fact fail to establish that either of the Children suffered from severe anxiety, depression, withdrawal, or aggressive behavior. She contends, therefore, that the findings fail to establish serious emotional damage.

A. Abuse Adjudication of A.M.

[1] Regarding A.M.'s abuse adjudication, the trial court made the following findings:

14. [A.M.] expresses *hopelessness* about [DSS's] involvement. She advised Dr. O'Tuel that [DSS] had been involved on numerous occasions, that . . . [M]other did not like any of [DSS's] personnel and got irritated at all of them.
15. Dr. O'Tuel believes, and the [c]ourt finds, that [A.M.'s] expressions of *hopelessness* [have] resulted in her *withdrawal* from the situation, *withdrawal being her coping mechanism*.

. . . .

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17. . . . [A.M.] expressed to her social worker that “I want you to figure out how I can leave legally [sic]. I don’t care if it is foster care I really just need to be out of here. Im [sic] tired of her always calling me names and threatening me and of this stuff. I should [not] . . . have to sit here and deal with it. But no body [sic] seems to get that.” This text demonstrates the *anxiety* under which the child suffers and the efforts on her part to *with[draw]* from the situation.

. . . .

24. [A.M.] was upset by the names that . . . [M]other called her. She expressed a sense of *helplessness* that anyone could help her. She does not feel that there are any programs that can be offered that can change . . . [M]other’s behavior.

. . . .

26. . . . Dr. O’Tuel opined and this [c]ourt finds that “[t]he safety of the children is paramount as the functioning of the mother is severely compromised and her maltreatment appears intentional with no remorse evident or expressed.”

. . . .

31. The toxic environment based upon continued foul and abusive language to which the children have been exposed creates a substantial risk of mental or emotional impairment. [A.M.] has expressed that she is upset by . . . [M]other’s constant tirades and believes that leaving the home, even being placed in foster care, would be preferable to remaining in the home. The [statements of A.M.] demonstrate[] the level of her *anxiety* and the desire to *with[draw]* from the home situation.

(Emphases added). Mother argues these findings of fact are insufficient because they do not reflect an actual mental health diagnosis. Mother also argues that, while the trial court used the terms “withdrawal” and “anxiety[,]” the trial court did not actually find that A.M. suffered emotional damage evidenced by these conditions. We are not persuaded.

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The findings of fact quoted above repeatedly state that A.M. was upset by Mother's behavior, that she felt a sense of hopelessness regarding the situation, and that her coping mechanism was withdrawal. Additionally, the trial court found that A.M.'s home life created anxiety for her. While the anxiety found by the trial court was not the product of a formal psychiatric diagnosis, N.C.G.S. § 7B-101(1)(e) imposes no such requirement.

Mother also argues that the withdrawal A.M. suffered was not the withdrawal contemplated by N.C.G.S. § 7B-101(1)(e). Mother contends that A.M.'s withdrawal was not a manifestation of emotional abuse, but rather a desire to get away from Mother. Again, we disagree. While some of the findings of fact do show a desire by A.M. to leave Mother's home, the findings also demonstrate that A.M.'s coping mechanism was withdrawal. This view is supported by the evidence from the hearing. When asked about the impact on A.M. of Mother's yelling, screaming, and cursing, Dr. O'Tuel responded:

That it definitely has a negative impact on her. It's manifested both — mostly in [A.M.] of her *withdrawing emotionally from others* as well as her difficulty trusting others. She seems to have this sense of . . . learned helplessness and it just sort of means that, you know, no matter [what] I do nothing's going to change.

(Emphasis added). Based on Dr. O'Tuel's testimony, it is apparent that the withdrawal found by the trial court was not only a manifestation of A.M.'s desire to leave Mother's home, but also of the psychological condition contemplated by N.C.G.S. § 7B-101(1)(e).

Although the findings of fact do not track the specific language used in N.C.G.S. § 7B-101(1)(e), we nevertheless find them sufficient to sustain an adjudication of abuse based on serious emotional damage. "The trial court's written findings must address the statute's concerns, but need not quote its exact language." *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013) (concluding that findings of fact in an order ceasing reunification efforts were sufficient where the order embraced the substance of the statutory provision). Here, the findings of fact address the statute's concerns regarding A.M.'s serious emotional damage. We, therefore, affirm the trial court's adjudication of abuse as to A.M.

B. Abuse Adjudication of E.R.

[2] Regarding E.R.'s abuse adjudication, the trial court's only finding of fact that expressly touched solely on the emotional condition of

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E.R. stated: “[E.R.] had defiant behaviors and presented with a fear of sleeping in her own bed.” Although Dr. O’Tuel opined that E.R.’s defiant behavior was related to inconsistent discipline and lack of structure or guidance from Mother, Dr. O’Tuel also stated Mother “is not attune[d] to [the Children’s] emotional needs and indeed contributes to their denying their emotions to cope with the insults she spews daily.” Dr. O’Tuel’s evaluation showed that E.R.’s fear of sleeping in her own bed was related to (1) E.R.’s concern regarding Mother’s health conditions; and (2) a sexual assault she allegedly suffered when she was three years old. However, Dr. O’Tuel also questioned “where was [Mother] during the alleged abuse incident in which someone broke into the house, took [E.R.], left the premises, and sexually abused her.”

There were other findings of the trial court demonstrating: (1) that E.R. witnessed Mother’s tirades against A.M.; (2) that Mother’s foul language was at times directed at E.R.; (3) that A.M. was concerned about E.R.’s emotional well-being should E.R. be left alone with Mother; and (4) that Mother’s language was “demeaning, offensive[,] and not nurturing[.]” As to both A.M. and E.R., the trial court did find that “[t]he toxic environment based upon continued foul and abusive language to which the [C]hildren have been exposed creates a substantial risk of mental or emotional impairment.” Although these findings were not sufficient to connect Mother’s behavior to E.R.’s having “serious emotional damage [as] evidenced by . . . severe anxiety, depression, withdrawal, or aggressive behavior toward [herself] or others,” *see* N.C.G.S. § 7B-101(1)(e), there was sufficient evidence presented at trial to support such a determination. Dr. O’Tuel stated that

[e]motional abuse can involve . . . screaming and cursing at a child, or calling a child names. . . . Every professional involved in this case, through documentation or interview, has indicated that the [C]hildren are experiencing severe emotional abuse by the [M]other. . . . This situation is chronic, with acute exacerbations, meaning verbal assaults by . . . [M]other are a part of normal, everyday life for these girls, and . . . [M]other is frequently worse at times.

Dr. O’Tuel’s evaluation further noted that “toxic stress . . . occurs with strong, frequent or prolonged adversity, disrupts brain architecture and other organ systems, and increases risk of stress-related disease and cognitive impairment. It is highly likely that . . . [M]other’s interaction with her children qualifies as providing the toxic stress discussed here.”

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We remand for the trial court to make findings of fact that address the directives of N.C.G.S. § 7B-101(1)(e) concerning E.R.'s serious emotional damage based on the evidence presented.

III. Child Support

[3] Mother also challenges a decree in the trial court's disposition order. Specifically, the trial court ordered the Children's parents to "arrange to provide child support for the benefit of their children." Mother argues the trial court erred in ordering her to pay child support because the court failed to make necessary findings of fact in support of this decree and failed to specify an amount of child support. We agree.

Pursuant to N.C. Gen. Stat. § 7B-904(d) (2013), a trial court is authorized to order a parent in a Chapter 7B proceeding to pay child support under the following circumstances:

At the dispositional hearing or a subsequent hearing, when legal custody of a juvenile is vested in someone other than the juvenile's parent, *if the court finds that the parent is able to do so*, the court may order that the parent pay a reasonable sum that will cover, in whole or in part, the support of the juvenile after the order is entered. If the court requires the payment of child support, the amount of the payments shall be determined as provided in G.S. 50-13.4(c).

(Emphasis added). Under N.C. Gen. Stat. § 50-13.4(c) (2013), which governs orders for child support in Chapter 50 proceedings,

an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount. These conclusions *must themselves be based upon factual findings specific enough* to indicate to the appellate court that the judge below took due regard of the particular estates, earnings, conditions, (and) accustomed standard of living of both the child and the parents. It is a question of fairness and justice to all concerned.

Coble v. Coble, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (quotation marks omitted).

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In the present case, custody of the Children was vested in DSS; therefore, the trial court was authorized to order Mother to pay child support. *See* N.C.G.S. § 7B-904(d). However, the trial court also was obligated to find that Mother had the ability to pay support and determine a reasonable sum in accordance with N.C.G.S. § 50-13.4(d). *See id.* The trial court made no findings regarding Mother's income, ability to work, or ability to pay. Nor did the trial court make findings regarding the reasonable needs of the Children or an appropriate amount of support. Accordingly, we remand this matter to the trial court for additional findings and for entry of an order consistent therewith. *See In re W.V.*, 204 N.C. App. 290, 296–97, 693 S.E.2d 383, 387–88 (2010) (remanding a child support award for further findings of fact where the trial court failed to make findings of fact regarding the reasonable needs of the child and the relative ability of the parent to pay support).

IV. Conclusion

We affirm the adjudication of abuse as to A.M. and remand for additional findings as to the adjudication of abuse of E.R. Because Mother has not challenged the trial court's conclusion that the Children were neglected, we affirm the trial court's neglect adjudications. We remand the trial court's order for child support for further findings and for entry of an order consistent therewith. Because Mother has not otherwise challenged the trial court's disposition order, we affirm the remainder of it.

AFFIRMED IN PART; REMANDED IN PART.

Judges BRYANT and STROUD concur.

IN RE CORNING INC.

[247 N.C. App. 680 (2016)]

IN THE MATTER OF APPEAL OF CORNING INCORPORATED FROM THE DECISIONS OF THE
CABARRUS COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATIONS OF CERTAIN
REAL PROPERTY FOR TAX YEARS 2012 AND 2013.

No. COA15-954

Filed 7 June 2016

1. Taxation—property tax—industrial facility—valuation

The property owner (Corning) in a contested tax valuation met its initial burden of producing competent, material, and substantial evidence tending to show that the County used an arbitrary or illegal method of valuation and that the assessments substantially exceeded the true value of the property.

2. Taxation—property tax—partially outdated industrial facility—continued use—no market—valuation

The County did not meet its subsequent burden of going forward in a disputed tax valuation case where the property owner (Corning) had met its initial burden of showing that the County had used an erroneous method of valuation. The property had originally been built for the manufacture of fiber optic cable, it was shuttered due to market conditions, production resumed eight years later with Corning as the only major optical fiber producer, and technology had changed in the meantime so that the need for space was reduced and part of the multi-story building design was not needed. The County's position was that the property was being used for the purpose for which it was designed, the manufacture of fiber optic cable, and based its cost analysis on that use rather than its value to a willing buyer, which would involve adoptive reuse and a lower sales price.

3. Taxation—property tax—partially outdated industrial facility—current use unique—no bearing on value

In a case challenging a tax valuation of an industrial property that had only one use, the overwhelming evidence showed that the property could not have been sold as a fiber optics manufacturing facility (the current use), and that use had no bearing on the property's value to a potential buyer.

4. Taxation—outdated industrial facility—valuation—blended sales approach

The Property Tax Commission did not err in a case challenging the tax valuation of an industrial property that had only one use

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by adopting a blended cost-sales approach. Although the County maintained that case law required special-purpose facilities to be valued at cost, North Carolina statutes required that property be assessed at its true value, N.C.G.S. § 105-283. While experts could opine that the cost approach was an appropriate method for assessing true value of a specialty property, N.C. case law did not necessarily demand the same.

5. Taxation—property—outdated industrial facility—highest and best use

The highest and best use of property in a challenged tax valuation was future industrial use where there was no market for the current use, the manufacture of fiber optic cable.

Appeal by Cabarrus County from the Final Decision entered 20 March 2015 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 24 February 2016.

Richard M. Koch for Cabarrus County.

Nelson Mullins Riley & Scarborough, LLP, by Charles H. Mercer, Jr. and Reed J. Hollander, and Stavitsky & Associates, LLC, by Bruce J. Stavitsky, for Corning Inc.

ELMORE, Judge.

Cabarrus County appeals from the Final Decision of the North Carolina Property Tax Commission lowering the assessed property values for Tax Years 2012 and 2013 to the values urged by the taxpayer, Corning Inc. The County argues that the Commission's Final Decision is not supported by competent, material, and substantial evidence, and is otherwise affected by errors of law. We affirm.

I. Background

Corning owns and operates a large fiber optic manufacturing facility in Cabarrus County. It was constructed in 1997 when the technology for manufacturing optical fiber required specific design features, such as a four-story layout, interior partitions, and numerous draw towers penetrating multiple floors of the building. Due to market conditions in the fiber optic industry, the facility was shuttered in 2002. Corning resumed production on a limited basis in 2010 as the only major optical fiber company to survive the telecom bust. Around that same time, however, the technology for manufacturing optical fiber changed, eliminating the

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need for the multi-story building design and substantially reducing the space required for manufacturing.

The County initially assessed the property at a value of \$172,218,270 for each of the Tax Years 2012 and 2013. On appeal to the Cabarrus County Board of Equalization and Review, the County Board lowered the assessed values to \$147,609,250 and \$152,183,290 for Tax Years 2012 and 2013, respectively. Corning then appealed to the North Carolina Property Tax Commission, arguing that (1) the County used an arbitrary or illegal method of appraisal in reaching its assessed values, (2) the County assigned values to the subject property that substantially exceeded its true value in money, and (3) the County's assessments were significantly greater than those of other locally assessed property.

At the hearing, Corning offered an appraisal report prepared by Fitzhugh L. Stout, who also testified as an expert in industrial real estate appraisal. Mr. Stout explained that he valued the property for alternative industrial use because "there is no demand for either building or buying a fiber optic manufacturing facility." Using a blended cost-sales approach, he assigned values of \$26,370,000 and \$30,490,000 for Tax Years 2012 and 2013, respectively. Corning also presented the expert testimony of John T. Cashion, an industrial real estate broker. Based on the industrial attributes of the property and the useful area to a likely buyer, Mr. Cashion testified that he would have marketed the property for \$15,000,000 or \$16,000,000.

In support of its assessments, the County offered the expert testimony of its tax administrator, J. Brent Weisner. Mr. Weisner opined that the property was "special-purpose" property, and he valued it under the cost approach. In addition, the County contracted with Michael P. Berkowitz and Thomas B. Harris, Jr. of T.B. Harris, Jr. & Associates, Inc., to provide a retrospective valuation of the property as of 1 January 2012. Their expert testimony and written appraisal report, which included a \$148,890,000 valuation for Tax Year 2012, was also received at the hearing. They did not establish a value for Tax Year 2013.

In its Final Decision, the Commission determined that the County's valuation methods were arbitrary or illegal based, in part, on the following findings of fact:

10. When determining the market value for the subject property, an appraiser should rely upon the appraisal approach that will best determine the market value for the subject property.

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. . . .

15. When relying on the cost approach, Cabarrus County classified the subject property as a special-purpose or special-use property since Corning was using the property for its intended purpose. As such, Cabarrus County appraised the subject property based on Corning's use of the subject facility, which caused the County to implicitly value the subject property at the subjective worth to Corning and not at the objective value to a willing buyer.

16. When arriving at the assessments for the subject property, the County's application of the 2012 schedules of values, standards, and rules to determine the values assigned to the subject property was flawed when the County's schedules of values, standards, and rules provided no category for the assessment or appraisal of the subject facility as special-purpose property.

17. Cabarrus County used an arbitrary method to value the subject property as [of] January 1, 2012 and January 1, 2013 when it categorized the subject facility as a special-purpose property.

18. Cabarrus County failed to consider acceptable appraisal methodology to determine the loss in value due to economic and functional obsolescence related to the subject property when its method of appraisal considered all costs that added no value to the subject property given that the building is not a modern facility, there is obsolescence associated with the multiple-level floor layouts, and there is building area that is still in shell condition.

19. Cabarrus County's arbitrary cost approaches, and the results thereof, do not constitute the market values for the subject property as of January 1, 2012, and January 1, 2013.

. . . .

22. To arrive at the market value for the subject property as of January 1, 2012 and a market value for the subject property as of January 1, 2013, Mr. Stout determined the highest and best use of the subject property, as if vacant, would be holding the property for future development for an industrial use; and when considering that the subject

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property is improved with an industrial facility, the continuation of this use is concluded to be financially feasible.

....

26. Mr. Stout determined the market value for the subject property to be \$26,370,000 as of January 1, 2012, and the market value for the subject property to be \$30,490,000 as of January 1, 2013. Mr. Stout arrived at his market values for the subject property by considering the loss in value due to economic and functional obsolescence including, but not limited to, the subject facility's size, multiple-level floor layouts, and area in shell condition.

27. Mr. Stout did substantially dispute the County's assessment of \$147,609,250 for the subject property as of January 1, 2012, and the County's assessment of \$152,183,290 for the subject property as of January 1, 2013.

28. The discrepancy between the values assigned to the subject property by the County Board and Mr. Stout's market values is due to (a) the County's arbitrary classification of the subject property as a special-purpose property when applying the cost approach to develop its assessments; (b) the County's failure to consider acceptable appraisal methodology to determine the loss in value due to economic and functional obsolescence associated with the subject property that Mr. Stout did consider when applying his analysis to determine the market values for the subject property; and (c) the County's focus on the special use of the subject property by Corning, which caused the County to implicitly value the property at the subjective worth to Corning and not at the objective value to a [] willing buyer.

(Footnotes omitted). The Commission then entered the following conclusions of law:

1. Corning's evidence from Mr. Stout, taken alone and by itself, tends to show that the County's methods are arbitrary or illegal due to (a) the County's classification of the subject property as a special-purpose property; (b) the County's failure to consider acceptable appraisal methodology to show loss in value due to economic and functional obsolescence associated with the subject

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property; and (c) the County's focus on the specific use of the subject property, which caused the County to implicitly value the subject property at the subjective worth to Corning and not at the objective value to a willing buyer.

2. Corning thus rebutted the presumption of correctness of the two assessments at issue, and the burden shifted to Cabarrus County to demonstrate that its methods produced the true values for the subject property as of January 1, 2012 and January 1, 2013.

3. Cabarrus County did not carry its burden when it failed to demonstrate that its appraisal methodology produced true values in view of both sides' evidence and the weight and sufficiency of the evidence, the credibility of the witnesses, and inferences as well as conflicting and circumstantial evidence; and thus its methods are arbitrary or illegal.

The Commission implicitly adopted Mr. Stout's valuation and lowered the assessed values for each of the two tax years to the values urged by Corning. The County appeals.

II. Discussion

Our review is governed by N.C. Gen. Stat. § 105-345.2, which provides in pertinent part as follows:

(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

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- (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).

The proper standard of review “depends upon the particular issues presented on appeal.” *Amanini v. N.C. Dep’t of Human Res.*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994) (citation omitted). Where a petitioner argues that the Commission’s decision was affected by an error of law, we apply a *de novo* review. *In re Appeal of Greens of Pine Glen Ltd. P’ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). “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 *Greens of Pine Glen*, 356 N.C. at 647, 576 S.E.2d at 319). We apply the “whole record” test to determine whether the Commission’s decision is supported by competent, material, and substantial evidence. *Greens of Pine Glen*, 356 N.C. at 647, 576 S.E.2d at 319. “The ‘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.” *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979) (citations omitted).

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*. On the other hand, [it] requires the court, in determining the substantiality of evidence supporting the [Commission’s] decision, to take into account whatever in the record fairly detracts from the weight of the [Commission’s] evidence. . . . [T]he court may not consider the evidence which in and of itself justifies the [Commission’s] result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

Thompson v. Wake Cnty. Bd. of Educ., 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citations omitted).

In North Carolina, *ad valorem* tax assessments are conducted under a uniform standard. A county must appraise all real and personal

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property “at its true value in money,” which is its “market value.” N.C. Gen. Stat. § 105-283 (2015). “Market value” is defined by statute as the estimated price

at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

Id.; see also *In re Appeal of S. Ry. Co.*, 313 N.C. 177, 188, 328 S.E.2d 235, 243 (1985) (holding that appraisals “from the perspective of the present owner to the exclusion of the willing buyer were in clear violation of the statutory ‘market value’ standard”); *In re Ad Valorem Valuation of Prop. in Forsyth Cnty.*, 282 N.C. 71, 80, 191 S.E.2d 692, 698 (1972) (“To conform to the statutory policy of equality in valuation of all types of properties, the statute requires the assessors to value all properties, real and personal, at the amount for which they, respectively, can be sold in the customary manner in which they are sold.”).

“An important factor in determining the property’s market value is its highest and best use.” *In re Appeal of Belk-Broome Co.*, 119 N.C. App. 470, 473–74, 458 S.E.2d 921, 923 (1995) (citing *Rainbow Springs P’ship v. Cnty. of Macon*, 79 N.C. App. 335, 339 S.E.2d 681 (1986)), *aff’d per curiam*, 342 N.C. 890, 467 S.E.2d 242 (1996). “Highest and best use” has been defined as “the reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value.” Appraisal Inst., *The Appraisal of Real Estate* 297 (11th ed. 1996). It “is not determined through subjective analysis by the property owner, the developer, or the appraiser; rather, highest and best use is shaped by the competitive forces within the market where the property is located.” *Id.* at 298.

A. Corning’s Burden

[1] We first address the County’s argument that Corning failed to produce competent, material, and substantial evidence tending to show that the County used an arbitrary or illegal method of valuation.

A county’s *ad valorem* tax assessment is presumptively correct. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975). To rebut this presumption, the taxpayer must produce “competent, material and substantial evidence” which tends to show that the county used

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either (1) an arbitrary or (2) illegal method of valuation, and (3) “the assessment substantially exceeded the true value in money of the property.” *Id.* at 563, 215 S.E.2d at 762; see also *In re Appeal of IBM Credit Corp. (IBM Credit I)*, 186 N.C. App. 223, 226, 650 S.E.2d 828, 830 (2007) (citations omitted) (clarifying that the taxpayer’s burden “is one of production and not persuasion”), *aff’d per curiam*, 362 N.C. 228, 657 S.E.2d 355 (2008). If the taxpayer successfully rebuts the initial presumption, the burden shifts back to the county to “demonstrate that its methods produce true values.” *In re Appeal of Parkdale Mills*, 225 N.C. App. 713, 717, 741 S.E.2d 416, 420 (2013) (citing *In re Appeal of IBM Credit Corp. (IBM Credit II)*, 201 N.C. App. 343, 345, 689 S.E.2d 487, 489 (2009); see also *S. Ry.*, 313 N.C. at 182, 328 S.E.2d at 239 (explaining that the taxing authority has the final “burden of going forward with evidence and of persuasion”).

A method of valuation is illegal if it does not result in “true value,” as defined under N.C. Gen. Stat. § 105-283. *S. Ry.*, 313 N.C. at 181, 328 S.E.2d at 239 (citations omitted). Our decisions have further held that an illegal appraisal methodology is also arbitrary. *In re Appeal of Blue Ridge Mall LLC*, 214 N.C. App. 263, 269, 713 S.E.2d 779, 784 (2011); *In re Appeal of Lane Co.*, 153 N.C. App. 119, 124, 571 S.E.2d 224, 227 (2002).

In this case, the Commission concluded that “Corning’s evidence from Mr. Stout, taken alone and by itself, tends to show that the County’s methods are arbitrary or illegal . . .” Mr. Stout’s research revealed that “Corning is the only major company that still produces optical fiber in the United States and North America.” The cost of labor has driven the majority of fiber optic manufacturers overseas, and even if Corning’s facility was put on the market, those manufacturers “would not come here because [the cost] of labor is just too high.” Based in part on the lack of market demand for fiber optics manufacturing facilities, Mr. Stout concluded that the highest and best use of the property, as vacant, would be future industrial use, and as improved, would be continued industrial use. He explained that

[a]s improved, we realize that, you know, the highest and best use would be continued use as the fiber optic manufacturing plant, but under the market value premise, what we found was there is no demand for either building or buying a fiber optic manufacturing facility. We found no evidence in market in North America that there was a competitor who would be willing to come up and buy this plant for continued fiber optic manufacturing. . . . And there are other fiber optic producers, but no one of this magnitude.

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While Mr. Stout appreciated the unique features of the improvements, he did not consider the property to be special-purpose property:

[A]lthough there—this is a unique property, that the County considers this special purpose, it's really not. This is what we call a limited market property. There are adaptive reuse. They wouldn't level this if they left it. They would—someone would come in and use what we feel is the functional useable area of that, so we feel like the highest and best use as improved would be for continued industrial use.

Although the improvements would have to be retrofitted for a different use, Mr. Stout opined that the property would have value to an alternative industrial user:

A: There would be a market for it at a certain price, which I believe the price that I put on it could be sold to an alternative user. And through my career, I've done a lot of adaptive reuse, and certainly this isn't a building that would be scrapped. It would be cost prohibitive. So the most likely alternative user, they'll find some industrial user at a price, and my sales reflected a much lower price than this. But there is a market for adaptive reuse, but they wouldn't use those other floors.

Q: Would it be fair to say that these alternative users that you envision for the property would need to adapt it for their own use?

A: Yes.

Q: And would that mean they'd have to spend some money on it to make it useful to them?

A: Most conversion of manufacturing plants, that's what we call limited market properties because all of them have to do that, all manufacturing in the first generation in specialized properties. The second generation will have to do certain gutting and retrofitting to meet their manufacturing processes.

Q: Then, of course, after they do that, it really wouldn't be necessarily useful to another alternative user.

A: Well, the next alternative user would do the same thing. They'll come and gut those things that don't work for

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them and convert it, and we have plenty of evidence of that market.

Q: But once they do that, once they do that adaptation and spend that money, it would have value to them to be able to use it for the purpose for which they intended.

A: Correct.

Q: So do I understand you to be saying basically that this particular property just needs to be valued as a generic manufacturing or warehouse facility for tax purposes; is that correct?

A: Well, under my understanding, the definition, the way I interpret it, it has to sell between a willing buyer and a willing—there has to have been a change. It's not to this specific user. It's not a use value or value of use. Under those premises, that's the way we valued it.

Under the assumption that the highest and best use would be for continued industrial use, Mr. Stout proceeded with his property analysis. He estimated that 536,285 square feet of the 1,208,996 gross square feet of the improvements was “functional rentable or usable area for adaptive reuse or alternative use,” which included the lower level of the processing area and half of the second floor. A large portion of the facility was “vacant shell space”: As of 1 January 2012, 38 percent of the gross square footage, and 34 percent of the total functional rentable area, was in shell condition. As of 1 January 2013, those estimates had been reduced to 26 percent and 31 percent, respectively, due to some additional up-fit.

Mr. Stout assigned no value to the third and fourth floors of the facility because “industrial users typically don't recognize multistory buildings And although there are some users that use second-level space, it's rare that you see any that are three and four stories” The property also had a “number of ancillary buildings that are used specifically for Corning's process which . . . would not have any value to any other user.” Three different brokers agreed with Mr. Stout's opinion regarding the value of the multi-story design and ancillary buildings. The first broker “was not familiar with any recent multi-floor industrial sales.” He would give “some value” to the second floor, “no value” to the third and fourth floors, and “little to no value” to the ancillary buildings in the rear of the site. The second broker opined that the “upper floors in [the] production warehouse would get no value on [the] resale market,” and that the ancillary buildings “have little value.” The third broker simply

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stated, “Multi-story industrial buildings are functionally obsolete.” Mr. Stout viewed the brokers’ comments as “reflective of what’s going on in the market for industrial properties.”

Mr. Stout initially valued the property under all three methods of valuation, but ultimately used a blended cost-sales approach, assigning 75 percent of the weighted average to the cost and 25 percent to the sales comparison. He explained his consideration of these two approaches in his report:

The cost approach is most reliable for newer properties that have no significant amount of accrued depreciation. The subject is not new construction, and there is a relatively active market for land sales in the area. The subject was specifically built for Corning, Inc. and has a number of building components that are not suitable for alternative industrial users. As a result, the property suffers from a significant amount of functional/external obsolescence. Although significant adjustments for functional/external obsolescence reduce the reliability and credibility of the approach, this approach would be given consideration due to the quality of the improvements.

The sales comparison approach is most reliable in an active market when an adequate quantity and quality of comparable sales data are available. In addition, it is typically the most relevant method for owner-user properties, because it directly considers the prices of alternative properties with similar utility for which potential buyers would be competing. There is a reasonably active market for industrial properties, and this approach most closely reflects buyer behavior. Accordingly, the sales comparison approach is given weight in the value conclusion.

He did not give weight to the income approach, however, because “[a]n owner-user is the most likely purchaser of the appraised property, and the income capitalization approach does not represent the primary analysis undertaken by the typical owner-user.”

Using his cost approach, Mr. Stout began with an estimated replacement cost of \$75,702,482. He then subtracted \$20,766,391 for age-life depreciation and \$28,917,261 for functional and external obsolescence. After adding \$3,850,000 for the land value, Mr. Stout valued the property at \$29,870,000 as of 1 January 2012. He used the same formula to value the property at \$35,300,000 as of 1 January 2013, which was slightly

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higher due to interim up-fit. Under his sales comparison approach, Mr. Stout identified four transactions involving similar industrial properties in the region during the relevant time period. The sales indicated an average adjusted value of \$33.00 per square foot. Recognizing once again the obsolescence associated with the multi-story structure and ancillary buildings, Mr. Stout applied the average rate to only the functional rentable area of 536,285 square feet. He made further adjustments for capital expenditures and arrived at the value of \$15,870,000 and \$16,040,000 for Tax Years 2012 and 2013, respectively. Finally, after assigning the appropriate weight to each approach, Mr. Stout valued the property at \$26,370,000 for Tax Year 2012 and \$30,490,000 for Tax Year 2013.

On more than one occasion at the hearing, Mr. Stout testified that he used the “true value” appraisal standard and that his valuation was “consistent with the concept of value-in-exchange.” The following testimony shows that while he considered Corning’s current use of the property in his analysis, he valued the property from the standpoint of a likely buyer:

Q: Now, in your appraisal, you didn’t really consider the use that it’s presently being used for, did you?

A: Well, of course, I did. That was in my replacement cost I did.

Q: And presently it’s being used by Corning—

A: That’s correct.

Q: —is that correct? And it’s being used for the same purpose for which it was constructed—

A: That’s correct.

Q: —is that correct? And that is, in fact, the use that would be considered among all the other uses, is it not?

A: Well, considering they’re the only major employer or manufacturer of optical fiber, there are no other likely buyers out here for that type of use.

....

Q: Well, wouldn’t it be fair to say that the highest and best use of this property as of 2012 or 2013, either one, was the very use that was being made of it at that time? Wouldn’t that be the highest and best use?

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A: Well, the purpose of true value is you're looking at that value in exchange, so I'm not looking at a value and use to Corning or a use value, who is that alternative user, were they willing to pay, so it has to be between a willing—and there are no potential buyers in North America we are aware of that are of this magnitude. There are other manufacturers, but none of this size.

Q: Well, then, would it be fair to say that overall, your appraisal is for an alternative industrial user, not for Corning?

A: That's correct.

Based on the foregoing, we conclude that Corning met its initial burden to produce competent, material, and substantial evidence tending to show that the County used an arbitrary or illegal method of valuation and the assessments substantially exceeded the true value of the property. Specifically, Mr. Stout's report and testimony tended to show that the property was not special-purpose property, but rather a "limited-market" property which had value to an alternative industrial user. At the same time, he acknowledged the obsolescence associated with the multi-story design, the improvements in shell condition, and the ancillary buildings. Most importantly, he priced the property based on its value in-exchange, recognizing that Corning's use of the facility was not a dispositive factor because there was no market demand for fiber optic manufacturing facilities.

B. The County's Burden

[2] Next, we must determine whether the County met its subsequent "burden of going forward with the evidence and of persuasion." *S. Ry.*, 313 N.C. at 182, 328 S.E.2d at 239. In this final stage of the burden-shifting framework, the critical inquiry is whether the County's valuation approach "is the proper means or methodology" to produce "true value" based on the characteristics of the subject property. *IBM Credit II*, 201 N.C. App. at 349, 689 S.E.2d at 491 (internal quotation marks omitted). The Commission has a duty " 'to hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inferences, and to appraise conflicting and circumstantial evidence, all in order to determine whether the [County] met its burden.' " *Id.* (quoting *S. Ry.*, 313 N.C. at 182, 328 S.E.2d at 239). In this part of our discussion, we also address the County's challenges to Findings of Fact Nos. 15, 17–19 and 28 as being contrary to the evidence.

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The Commission concluded that the County “did not carry its burden when it failed to demonstrate that its appraisal methodology produced true values.” At the hearing, Mr. Weisner explained that when the facility closed in 2002, the County reduced the assessed value from \$172 million to \$51 million “because at that point in time it was a special purpose building that was no longer being used for its special purpose, so . . . [the] only thing you could do with it is adapt it to some other use.” The County “looked at the possibility of having to sell it to a secondary user as opposed to looking at . . . the replacement cost to produce the fiber that it was designed to produce.” When the facility resumed production, the County “took off all of the obsolescence that [it] applied earlier when [Corning] was out of business and there was no market for the fiber . . . and that allowed the value to float back up to a higher value.” As Mr. Weisner confirmed, “the reason the value increased by almost three times was because Corning started using the facility again to manufacture product.”

Relying solely on the cost approach, Mr. Weisner testified that the County did not assign any functional or economic obsolescence to the property in Tax Year 2012 or 2013. When asked how he would know what a willing buyer would pay for the subject property without factoring in obsolescence, Mr. Weisner testified that

we’re calling it a special purpose property, so we’re looking at any obsolescence that may occur due to . . . its ability to produce the product that it was designed to produce. This is the most modern plant in the world that produces this particular type of fiber, and when you walk through this plant and you look at this plant, it is fully in operation, there’s—equipment is covering all the floors, it’s being used exactly as it was designed to be used, so there was no, in our opinion, no functional obsolescence to the building.

(Emphasis added.) Mr. Weisner also agreed with Commissioner Morgan, however, that obsolescence would be inherent to specialty property. When Commissioner Morgan asked how that obsolescence is measured in the County’s system, Mr. Weisner explained he would adjust for functional obsolescence “if the plant stopped producing—if there was no longer any valid use for that building to produce its product that it was designed to produce, then that’s the time that we would look at all the secondary uses that it could be put to, and we would—we certainly would increase its functional obsolescence.”

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In his appraisal report, Mr. Berkowitz referenced the uniform appraisal standard set forth in N.C. Gen. Stat. § 105-283 and offered the statutory definition of “true value.” The subsequent paragraph in the appraisal, however, seems to add to that definition the following caveat:

The most significant factor with respect to the subject is that a substantial portion of the improvements are specific to the operations of the property as a fiber optic manufacturing plant. We consider it unlikely that many of the physical characteristics of the primary building would be constructed for any other use. The “reasonable knowledge” as mentioned in the definition of true value is applicable to the current and historic use of the facility as a fiber optic manufacturing plant.

At the hearing, Mr. Berkowitz offered an explanation of the foregoing paragraph:

A: That there are some small variances with respect to the definitions, and the one most pertinent with respect to the valuation is the latter half of that definition in saying that both the buyer and seller have a reasonable knowledge of all the uses to which the property is adapted and for which it's capable of being used.

Q: And what does that mean to you?

A: To me, *I think it identifies specifically special use properties in that if they are specifically designed for intended use and are being used as such, then it should be valued as such.*

(Emphasis added.)

Mr. Berkowitz and Mr. Harris determined that the highest and best use of the property would be “its continued use as a fiber optic manufacturing facility, with the limited possibility of expansion as market conditions improved.” Their highest and best use analysis suggests that they reached this determination based on Corning’s use of the property:

The market for large manufacturing facilities is limited. However, the information provided by Corning with respect to new fiber optic cable manufacturing facilities indicates that the design of the improvements is somewhat outdated. *Regardless, the property owner continues to use the manufacturing portion of the property for its*

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intended use. Therefore, the highest and best use of the property as improved is for continued use as a fiber optic manufacturing facility with the possibilities of expansion depending on market conditions.

(Emphasis added.) At the hearing, Mr. Berkowitz confirmed the focus of the County's highest and best use analysis: "[I]n consideration of how it was used for the special purpose for which it was designed, the highest and best use would be for continued use as a fiber optic manufacturing facility." If not simultaneously, Mr. Berkowitz subsequently concluded that the property was special-purpose property because "it has unique design characteristics that are specific to the intended use that it is being used for."

Nevertheless, the County takes exception to the Commission's finding that "when relying on the cost approach, Cabarrus County classified the subject property as a special-purpose property," insisting that it "considered" the property to be "special-purpose" but did not "classify" the property as such for special treatment under its schedule of values. As Corning correctly notes, however, this argument is semantic rather than substantive. In context, the Commission's finding explains how the County came to rely on the cost approach. Ultimately, the record amply demonstrates that the County determined the property was special-purpose property, which helped form the foundation for its methodology. Mr. Weisner stated, "[W]e feel like it's a special purpose property and the best approach is the cost approach." Mr. Berkowitz testified, "Special purpose properties by definition have unique characteristics for which they're designed for their intended use. The most applicable methodology with respect to valuing those properties is the cost approach." Mr. Harris's appraisal report similarly concludes, "The subject is considered a 'special purpose' property. As such, the cost approach is considered the most reliable indicator of value. For this appraisal, we include a cost approach only."

We also acknowledge that to some extent it may be true, as the County contends, that it used the cost approach due to the lack of comparable sales data. By insisting that the highest and best use was for manufacturing optical fiber, however, the County pigeon-holed the property into a market with no user-owner demand, and thus, no comparable sales. Mr. Weisner testified that "there's not really good comparables to tell you the true value of this property as it's being used as a fiber optics plant. So then that drives us to the cost approach to look at—because it is special purpose." Mr. Berkowitz's testimony also demonstrates how his highest and best use analysis effectively precluded consideration of alternative use:

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A: We did consider the sales comparison approach, but we felt that the sales that were in the market, none of them included fiber optic manufacturing facilities, and that any adjustments would be misleading as far as the conclusions from a sales comparison approach.

Q: You just looked at fiber optics?

A: That's correct.

Q: And the reason for that is?

A: Because in using sales that were not this design would be misleading.

Q: Do you consider there to be alternate users for this property?

A: Not under its highest and best use.

Q: Do you consider there to be any way that this property could be positioned in the market to be used by others than a fiber optic manufacturer?

A: It could be.

Q: What would be some of those things that could be done to make it usable for others?

A: Well, usable for others?

Q: For other manufacturers.

A: That would be inconsistent with its highest and best use.

Q: The highest and best use is as fiber optic manufacturing?

A: Yes.

Q: What analysis did you do to determine that this was the most profitable return on this use of this property, maximally productive, the standard, in other words?

A: Yes. It would be the highest and best use because it would return—make the highest return to the investor. If you're using it and adapting it for another use, inherently there would be more economic and functional obsolescence of the building.

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Q: Are you valuing this property, sir, to Corning, Incorporated?

A: I'm valuing it under its highest and best use.

While the County maintains that the highest and best use of the property was for manufacturing optical fiber, each of the County's experts recognized that there was no market for the same. Mr. Harris testified that he researched national markets for fiber optics manufacturing facilities in preparing the appraisal report, and when asked if there was a national market for those facilities, he responded, "No." Mr. Berkowitz reached the same conclusion, though he posited that the property would still be attractive to "an investor." When asked if he conducted any research to determine whether there had been investor acquisitions of similar "large industrial facilities," Mr. Berkowitz admitted, "I didn't." In a similar effort to defend the County's position, Mr. Weisner's testimony also fell short:

Q: As you sit here today before the Commission, is it the position of the County that the value that a willing buyer would pay for this property as of 1/1/2012 is \$147 million and change?

A: Yes. To use it as a fiber optics manufacturing plant, yes.

Q: And is it the position of the County that a willing buyer would pay approximately \$152 million for the property as of January 1, 2013?

A: Yes.

Q: Okay. And can you identify for us who that buyer is, hypothetical or real, that would pay that amount of money for this facility?

A: Somebody that wanted to use the facility for the purpose in which it was intended to be used.

Q: And have you identified anybody actually active in the economy that would want to buy this facility for that specific use you just identified?

A: I have not.

Based on the foregoing, we conclude that the Commission's findings are supported by competent, material, and substantial evidence, and the Commission's decision has a rational basis in the evidence. The evidence shows that the County's highest and best use analysis was

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based on Corning's use of the property, rather than its value to a willing buyer. The same subjectivity was evident in the County's classification of the property as special-purpose property. Consequently, the County used the cost approach but failed to account for obsolescence which, in the Commission's discretion, should have been deducted in light of Mr. Stout's testimony. Moreover, while the County determined the highest and best use of the property was for manufacturing optical fiber, the testimony from its own experts reveals its failure to use a valuation method that reflects what willing buyers in the market for fiber optics manufacturing facilities would pay for the property. *See Belk-Broome*, 119 N.C. App. at 474, 458 S.E.2d at 923–24 (concluding that where property's highest and best use was "its present use as an anchor department store," the County was "required to use a valuation methodology that reflects what willing buyers in the market for anchor department stores will pay for the subject property").

C. Affected by Other Errors of Law

[3] The County also argues that the Commission's Final Decision was affected by errors of law. Throughout its brief, the County maintains that Corning's valuation, as adopted by the Commission, is contrary to the existing law because it did not appraise the property "based on what is there and how it is being used." Instead, it is "based on a hypothetical, potential generic industrial buyer purchasing a closed and vacant property."

The County insists on valuing the property by its value in-use despite our uniform appraisal standard for valuation at fair market value. N.C. Gen. Stat. § 105-283. Value in-use is relevant to fair market value in that an owner's current use of the property may be indicative of its economic utility, and therefore, its value to a potential buyer. Our statutes actually direct appraisers to consider the adaptability of real property and improvements for commercial, industrial, or other uses. N.C. Gen. Stat. § 105-317(a)(1) & (2) (2015). Inevitably, this also "requires consideration of its declining attractiveness for such use." *Prop. in Forsyth Cnty.*, 282 N.C. at 78, 191 S.E.2d at 697. As the evidence overwhelmingly shows that the property could not have been sold as a fiber optics manufacturing facility, Corning's current use of the property has no bearing on its value to a potential buyer. *See Parkdale Mills*, 225 N.C. App. at 720, 741 S.E.2d at 421–22 (explaining that the Commission's emphasis on the taxpayer's current use of the facility implicitly allowed the County to value the property at its subjective worth to the taxpayer, which "is obviously not the same as adequately determining the objective value of these properties to another willing buyer.")

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[4] Next, the County argues that case law requires special-purpose facilities to be valued at cost, and therefore, the Commission erred as a matter of law in adopting Mr. Stout's blended cost-sales approach to arrive at its final value.

In support of its argument, the County cites to the Commission's findings in *In re Appeal of Federal Reserve Bank of Richmond*, 92 PTC 152 (1994), a prior decision which was not appealed to this Court. In that case, the Commission found that "[b]ased upon the specific features of this facility, the highest and best use of the subject property is as a special purpose building," and "[s]pecial purpose buildings are most accurately appraised at a cost of reproduction or replacement." Even assuming that decision has precedential value here, which it does not, the County's attempt to analogize the facts of that case to those *sub judice* is misplaced. Here, the Commission recognized that one of the flaws in the County's cost approach method was its initial designation of the property as special-purpose property. In arguing that the Commission failed to follow case law requiring special-purpose property to be valued at cost, therefore, the County relies on a faulty premise, i.e., that this was specialty property.

No other case offered by the County requires special-purpose property be valued exclusively at cost. The County cites to *In re Appeal of Phillip Morris*, 130 N.C. App. 529, 503 S.E.2d 679 (1998), where the taxpayer argued unsuccessfully that the appraiser's cost approach method was not designed to determine market value of the specialty property based on a hypothetical arms-length transaction. *Id.* at 537, 503 S.E.2d at 684. This Court noted that experts from both parties agreed, "where, as here, evidence of comparable sales is not readily available, the cost approach is the most accepted method of determining true value." *Id.* Contrary to the County's assertion, that statement was not a holding of our Court; it was simply a fact agreed upon by the expert witnesses. Nowhere in *Phillip Morris* does this Court hold that specialty property must be valued exclusively at cost.

The County's reliance on *Belk-Broome* fares no better. While *Belk-Broome* noted instances where the cost approach may be appropriate, e.g., "for specialty property or newly developed property," we further explained that

when applied to other property, the cost approach receives more criticism than praise. For example, the cost approach's primary use is to establish a ceiling on valuation, rather than actual market value. It seems to be

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used most often when no other method will yield a realistic value. The modern appraisal practice is to use cost approach as a secondary approach “because cost may not effectively reflect market conditions.”

Belk-Broome, 119 N.C. App. at 474, 458 S.E.2d at 924 (citations omitted). Again, nowhere in *Belk-Broome* does this Court hold that specialty property must be valued exclusively at cost. Our statutes require that property be assessed at its true value, N.C. Gen. Stat. § 105-283, and while experts may opine that the cost approach is an appropriate method for assessing true value of a specialty property, our case law does not necessarily demand the same. *See Greens of Pine Glen*, 356 N.C. at 648, 576 S.E.2d at 320 (“In light of the innumerable possible situations that may arise, authorities that have the obligation of assigning a value to land sensibly are given discretion to apply the method that most accurately captures the ‘true value’ of the property in question.”).

In addition, the County challenges the Commission’s finding that the County’s application of its schedule of values, standards, and rules was flawed because it “provided no category for the assessment or appraisal of the subject facility as special-purpose property.” According to the County, there is no factual basis for this assertion and no support for it in the law.

Corning challenged the assessments based, *inter alia*, on the County’s failure to follow the uniform appraisal methods and its schedule of values. N.C. Gen. Stat. § 105-317 states that “it shall be the duty of the assessor to see that . . . [u]niform schedules of values, standards, and rules to be used in appraising real property at its true value . . . are prepared and are sufficiently detailed to enable those making appraisals to adhere to them in appraising real property.” N.C. Gen. Stat. § 105-317(b)(1) (2015). The County’s schedule of values, standards, and rules, however, provides no guidance for the appraisal or assessment of special-purpose property. While the subheading in Chapter 9—“valuation of special properties”—seems promising, it describes only how the County values mobile home parks and cemeteries. At the hearing, when asked if there was “anything in the County’s schedule of values that’s specific to what the County has termed special purpose properties,” Mr. Weisner replied, “I don’t believe there is.” He also testified that due to the superadequacy and obsolescence associated with technology changes, the County “appraise[d] it as a heavy manufacturing building. So instead of trying to develop a schedule of values on this fiber optics building at \$420 a square foot, we chose to price them at our base price for an

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excellent quality heavy manufacturing facility.” Accordingly, we reject the County’s argument.

[5] Turning now to the County’s final argument, the County challenges Mr. Stout’s opinion regarding the highest and best use of the property, which was implicitly adopted by the Commission. According to the County, the Commission’s finding as to the highest and best use of the property is “fatally flawed” for three reasons.

First, the County avers that the Commission’s finding does not follow the law as enunciated in *Belk-Broome*, where the parties agreed that the highest and best use of the subject property was “its present use as an anchor department store.” *Belk-Broome*, 119 N.C. App. at 474, 458 S.E.2d at 923. It is not clear what “enunciated law” the County is referencing. But to the extent the County contends that this factual stipulation should be treated as a rule of law, we disagree. We see no basis in *Belk-Broome* or elsewhere to hold that current use necessarily equates to highest and best use, especially under the facts of this case.

Second, the County argues that if the highest and best use of the facility is a vacant industrial facility, then the up-fit would have no additional value to an alternate industrial user. According to the County, therefore, the discrepancy between Mr. Stout’s assigned values for Tax Years 2012 and 2013 is further evidence that the highest and best use of the property is its current use as a fiber optics manufacturing facility. This argument is not based on legal error. Instead, the County is asking this Court to reweigh the evidence of the highest and best use. It is the Commission’s duty, however, to resolve conflicts in the evidence and weigh the credibility of the witnesses. *Rainbow Springs*, 79 N.C. App. at 343, 339 S.E.2d at 686. Because “[t]he Commission’s judgment ‘as between two reasonably conflicting views’ is supported by substantial evidence”, we will not overturn its decision on this ground. *Id.* (quoting *Thompson*, 292 N.C. at 410, 223 S.E.2d at 541).

Third and finally, the County claims that if the highest and best use of the property is to manufacture optical fiber, then Corning would not sell the property for any other use unless it was under duress. As such, it would not be a “willing seller” as required by N.C. Gen. Stat. § 105-283. The County ignores the fact that the highest and best use, as found by the Commission, is future industrial use. It disregards the evidence which amply demonstrates there is no market for a fiber optic manufacturing facility in North America, much less in North Carolina. And it speculates that Corning would be a “willing seller” if and only if it sold the property in a market with no willing buyer. There is no support for this argument in the law or the facts of this case.

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III. Conclusion

Based on the foregoing, we conclude that the Commission's Final Decision is supported by competent, material, and substantial evidence in view of the whole record, and was not affected by errors of law. The Final Decision is affirmed.

AFFIRMED.

Judges HUNTER, JR. and DAVIS concur.

IN THE MATTER OF CHRISTOPHER KORFMANN

No. COA15-1005

Filed 7 June 2016

1. Contempt—required notice—not given

The trial court erred by finding a juror in contempt for using his cell phone, contrary to instructions, where the court did not give the juror the required notice.

2. Contempt—confiscated cell phone—return—request and refusal required for appellate action

The Court of Appeals could not order returned a cell phone confiscated from a juror until the juror applied for his phone's release and was refused.

Appeal by Christopher Korfmann from Order entered 10 June 2015 by Judge Milton F. Fitch, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 9 March 2016.

Womble Carlyle Sandridge & Rice, LLP, by Brent F. Powell and James A. Dean.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

ELMORE, Judge.

Christopher Korfmann (appellant) appeals from the trial court's order finding him in direct criminal contempt for using a cell phone

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during jury deliberations and sentencing him to thirty days in prison. After careful consideration, we reverse and vacate the order.

I. Background

On 8 June 2015, appellant was selected to serve as a juror for a civil trial in Wilson County Superior Court. After the trial and during jury deliberations, the trial judge received a note from the jury room. As a result, he recalled the jury to the courtroom and asked the foreperson, who happened to be appellant, “Was a cell phone utilized by one of the jurors in this matter, yes or no?” Appellant responded, “Yes . . . That was myself.” After a bench conference with the attorneys, the following colloquy took place:

THE COURT: Sir, were you using that cell phone during this trial?

THE FOREPERSON: No, sir.

THE COURT: How was the cell phone utilized?

THE FOREPERSON: Yesterday when I left the courthouse.

THE BAILIFF: Stand up, sir.

(Foreperson stood.)

THE FOREPERSON: Yes, sir. Yesterday when I left the courthouse I went to lunch and while I was at lunch I used the note taking program on my cell phone to record my notes because I didn’t have a piece of paper to write down.

THE COURT: Your notes, where did the notes come from?

THE FOREPERSON: The notes, the things that I wanted to remember from the trial just so I could think about it and that I wouldn’t forget if I had—there was a few questions that I had that I wanted to ask today during deliberation and I wrote down those questions that I wanted to ask so I wouldn’t forget.

THE COURT: And who were you going to ask those questions of?

THE FOREPERSON: They were the questions I was planning to ask you, sir.

THE COURT: You were going to ask me the questions?

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THE FOREPERSON: Well, no. I was going to ask the Court because they were questions I didn't feel were answered during—

THE COURT: Do you understand what your function is as a juror?

THE FOREPERSON: Yes, sir.

THE COURT: So why would you have these questions to ask me, the Court?

THE FOREPERSON: Well, there were—perhaps I mis-spoke. They were questions that I had about the case, that I wrote down the questions simply because I didn't have a pen and paper to write down the questions and it was more, it was, aside from questions it was things that I wanted to remember that—

THE COURT: Did you hear my instruction that it is your duty to recall and remember?

THE FOREPERSON: I did, sir, yes.

THE COURT: All right. Have a seat.

(Foreperson sat down.)

THE COURT: Come.

([The attorneys] approached the bench and a discussion was held off the record.)

THE COURT: Madam Court Reporter, for the record, at the beginning of this trial the parties agreed further and stipulated further that the jury verdict could go down to ten; thus I did not pick an alternate.

Because of the developments as I understand the developments to have occurred in this jury room in this matter, that is, an individual utilized a cell phone for the purposes of questions, answers, notes or whatever, and then informed the Court that the purpose of his notes were to pose questions to the Court when the Court has made it crystal clear that the jury is to rely on their recollection, not their notes, not a cell phone, but their recollection. And then come to find that the party who had utilized technology turns out to be the Foreperson which cause [sic] some problems in the jury room; thus how I got the issue.

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I am going to declare a mistrial in this matter. And this matter will have to be tried again.

It is the Court's responsibility to avoid impropriety as well as the appearance of impropriety. The court system through its citizens that this court system belongs to often-times gets a black eye from citizens who are not willing to participate in the court system and to follow the rules that are outlined by them.

This Court takes the strong position that technology is not to be utilized by jurors and, in fact, this jury has been warned several times not to use.

In my opinion the utilization by the juror is blatantly disrespecting the Court's order not to use.

Sir, I think that what I am going to do with you is I am going to send you to Wilson County Jail for 30 days for failing to follow the order given to you by this Court.

The ladies and gentlemen of this jury are now excused. You can get a certificate as to where you have been for the last several days. You are excused.

This gentleman is in your custody.

A "Direct Criminal Contempt/Summary Proceedings/Findings and Order" was entered that same day stating the following:

The court finds beyond a reasonable doubt that during the proceeding the above contemnor willfully behaved in a contemptuous manner, in that the above named contemnor did

DEFENDANT WAS A JUROR IN THE MIDDLE OF DELIBERATIONS AND USED HIS CELL PHONE AFTER BEING INSTRUCTED NOT TO DO SO.

The undersigned gave a clear warning that the contemnor's conduct was improper. In addition, the contemnor was given summary notice of the charges and summary opportunity to respond.

The contemnor's conduct interrupted the proceedings of the court and impaired the respect due its authority.

Therefore, it is adjudged that the above named contemnor is in contempt of court. It is ordered that the contemnor . . .

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be imprisoned for a term of 30 days in the custody of the Sheriff.

Appellant was taken to the Wilson County Jail where he stayed for six nights before being released on bail. According to appellant, upon his release all of his personal belongings were returned to him with the exception of his phone. Appellant filed notice of appeal on 15 June 2015 and a Motion for Appropriate Relief (MAR) on 19 June 2015. As of the filing of appellant's brief on 7 October 2015, the trial court had not scheduled a hearing for the MAR.

II. Analysis

[1] “[O]ur standard of review for contempt cases is ‘whether there is competent evidence to support the trial court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment.’” *State v. Phair*, 193 N.C. App. 591, 593, 668 S.E.2d 110, 111 (2008) (quoting *State v. Simon*, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855 (2007)).

N.C. Gen. Stat. § 5A-11 provides a list of conduct that constitutes criminal contempt. N.C. Gen. Stat. § 5A-11(a)(1)–(10) (2015). Although the trial court’s order does not specify which subsection applies, it appears that the court based its order on section 5A-11(a)(3), which states that criminal contempt is the “[w]illful disobedience of, resistance to, or interference with a court’s lawful process, order, directive, or instruction or its execution.” N.C. Gen. Stat. § 5A-11(a)(3) (2015).

Direct criminal contempt occurs when the act “(1) [i]s committed within the sight or hearing of a presiding judicial official; and (2) [i]s committed in, or in immediate proximity to, the room where proceedings are being held before the court; and (3) [i]s likely to interrupt or interfere with matters then before the court.” N.C. Gen. Stat. § 5A-13(a) (2015). “Any criminal contempt other than direct criminal contempt is indirect criminal contempt and is punishable only after proceedings in accordance with the procedure required by G.S. 5A-15.” N.C. Gen. Stat. § 5A-13(b).

On appeal, appellant submits a number of challenges to the trial court’s order.¹ Assuming without deciding that appellant engaged in

1. Appellant argues that he did not violate a court process, order, directive, or instruction; the trial court did not instruct him not to take or use notes; the trial court did not instruct him that he could not use his phone during recesses or deliberations; the evidence does not support the finding he actually used his phone during deliberations; the trial court failed to make the requisite finding of willfulness; and he did not engage in direct criminal contempt.

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direct criminal contempt, we hold that the trial court failed to follow the requirements of N.C. Gen. Stat. § 5A-14 and the order must be vacated. Thus, we do not reach each of appellant's arguments.

Appellant argues that "the process used to convict him fell short of the requirements of North Carolina law."

N.C. Gen. Stat. § 5A-14 allows a judge to "summarily impose measures in response to direct criminal contempt[.]" N.C. Gen. Stat. § 5A-14(a) (2015). Before imposing measures in response to direct criminal contempt, though, "the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt. The facts must be established beyond a reasonable doubt." N.C. Gen. Stat. § 5A-14(b) (2015). This Court has previously noted that "the requirements of [N.C. Gen. Stat. § 5A-14] are meant to ensure that the individual has an opportunity to present reasons not to impose a sanction." *In re Owens*, 128 N.C. App. 577, 581, 496 S.E.2d 592, 594 (1998). Moreover, "imprisonment may not be imposed for criminal contempt, whether direct or indirect, unless: (1) The act or omission was willfully contemptuous; or (2) The act or omission was preceded by a clear warning by the court that the conduct is improper." N.C. Gen. Stat. § 5A-12(b) (2015).

In *Peaches v. Payne*, this Court concluded that "the trial court failed to follow the procedure mandated by N.C. Gen. Stat. § 5A-14(b)," and as a result we reversed the finding of contempt. 139 N.C. App. 580, 587, 533 S.E.2d 851, 855 (2000). We reasoned, "The transcript reveals that the court advised contemnor that, because he had questioned the rulings of the court and shown disrespect for the court, he was in the bailiff's custody. Court was immediately recessed without contemnor having been given an opportunity to present reasons not to impose a sanction." *Id.* (quotations omitted).

Here, like in *Peaches*, the transcript shows that the trial court did not advise appellant that he was being charged with contempt and appellant was not provided an opportunity to respond to the charge. Instead, the trial court stated, "Sir, I think that what I am going to do with you is I am going to send you to Wilson County Jail for 30 days for failing to follow the order given to you by this Court." The trial court immediately excused the other jurors, told the bailiff that appellant was in his custody, and announced that court was adjourned *sine die*.

The trial court did not give appellant the necessary "summary notice of the charges and a summary opportunity to respond" before imposing

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measures under N.C. Gen. Stat. § 5A-14. The State's argument that appellant "was given notice and an opportunity to explain his actions" is not supported by the transcript. Although appellant was able to respond to the trial judge's preliminary questions, appellant was not given an opportunity to respond to the charge. *See* N.C. Gen. Stat. § 5A-14 (2015). Accordingly, because the trial court failed to comply with the statutory requirements of N.C. Gen. Stat. § 5A-14, we reverse and vacate the contempt order.

In *Peaches*, we stated, "Trial judges must have the ability to control their courts. However, because a finding of contempt against a practitioner may have significant repercussions for that lawyer, judges must also be punctilious about following statutory requirements." 139 N.C. App. at 587, 533 S.E.2d at 855. We point out that a finding of contempt against a citizen, attempting to fulfill his civic duty to serve as a juror for the first time, along with a thirty-day jail sentence, may also have significant repercussions.

While the presiding judge is given large discretionary power as to the conduct of a trial, we note that specifically instructing the jury as to certain discretionary decisions may help jurors properly fulfill their role in court. For instance, North Carolina Pattern Jury Instruction 100.70, "Taking of Notes by Jurors," states the following:

While the Rules of Civil Procedure have no statutory analogue to G.S. § 15A-1228, which permits jurors in a criminal case to make notes and take them into the jury room (except where the judge on his own motion or the motion of a party rules otherwise in his discretion), note-taking in civil cases has been left, as a matter of practice, to the sound discretion of the trial judge.

[*If Denied:* In my discretion, members of the jury, you will not be allowed to take notes in this case.]

[*If Allowed:* In my discretion, you will be allowed to take notes in this case.]

When you begin your deliberations, you may use your notes to help refresh your memory as to what was said in court. I caution you, however, not to give your notes or the notes of any of the other jurors undue significance in your deliberations. All of the evidence is important. Do not let note-taking distract you. Listen at all times intently to the testimony.

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Any notes taken by you are not to be considered evidence in this case. Your notes are only to assist your memory and are not entitled to any greater weight than the individual recollections of other jurors.]

N.C.P.I.–Civil 100.70 (2004).

While “[o]ur trial court judges must be allowed to maintain order, respect and proper function in their courtrooms[,]” *State v. Randell*, 152 N.C. App. 469, 473, 567 S.E.2d 814, 817 (2002), they must also follow all statutory requirements before imposing a finding of contempt. *See Peaches*, 139 N.C. App. at 587, 533 S.E.2d at 855.

[2] Appellant also claims that, even if he could have been properly held in contempt, confiscation of his phone exceeds the sanctions allowed under North Carolina law. In appellant’s affidavit, he states,

After telling me he was sending me to jail, the Judge dismissed everyone. The bailiff took me to a room behind the courtroom. Eventually, I was handcuffed and shackled around my ankles and waste. All my personal belongings were taken. I was told everything would be taken to the jail, other than my phone. The phone was placed in an envelope and put in a locked box in the room. The bailiff told me the Judge would keep the phone and was still deciding whether to destroy it.

The record is devoid of any attempts by appellant to recover his phone. Until appellant applies for his phone’s release and is refused, we cannot order the phone to be returned to appellant. *See* N.C. Gen. Stat. § 15-11.1(a) (2015).

III. Conclusion

Because appellant was not given summary notice of the charge against him and was not given an opportunity to respond to the charge, we reverse and vacate the trial court’s order.

REVERSED AND VACATED.

Judges McCULLOUGH and INMAN concur.

IN RE O.D.S.

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IN THE MATTER OF O.D.S.

No. COA15-1148

Filed 7 June 2016

**Termination of Parental Rights—oral statement of judgment—
ground omitted—included in written order**

Where the trial court’s written order terminated respondent-father’s parental rights based on the grounds of neglect and dependency, the Court of Appeals held that the trial court did not err even though it did not orally find the ground of dependency at the conclusion of the adjudication portion of the hearing.

Appeal by Respondent-Father from order entered 11 August 2015 by Judge Beverly Scarlett in District Court, Orange County. Heard in the Court of Appeals 9 May 2016.

Holcomb & Cabe, LLP, by Carol J. Holcomb and Samantha H. Cabe, for Petitioner-Appellee Orange County Department of Social Services.

Richard Croutharmel for Respondent-Appellant Father.

Winston & Strawn LLP, by Amanda L. Groves and Kobi Kennedy Brinson, for Guardian ad Litem.

McGEE, Chief Judge.

Respondent-Father appeals from an order terminating his parental rights as to his minor child O.D.S. We hold the trial court did not err in terminating Respondent-Father’s parental rights on the ground of dependency, even though the trial court did not orally find that ground at the conclusion of the adjudication portion of the hearing, and we affirm the trial court’s order.

The Orange County Department of Social Services (“DSS”) obtained non-secure custody of O.D.S. and filed a petition on 25 February 2014, alleging he was a neglected and dependent juvenile. The trial court held a hearing on 3 April 2014 and entered an order on 8 May 2014, in which it adjudicated O.D.S. to be a neglected juvenile, and continued custody with DSS. By order entered 17 November 2014, the trial court relieved DSS from having to make further reunification efforts with

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Respondent-Father and set the permanent plan for O.D.S. as reunification with his mother (“Mother”). Mother, however, failed to meet the goals of her case plan and, by order entered 20 February 2015, the trial court relieved DSS from having to make further reunification efforts with Mother, set the permanent plan for O.D.S. as adoption, and ordered DSS to file motions to terminate Respondent-Father’s and Mother’s parental rights as to O.D.S.¹

DSS subsequently filed a motion to terminate Respondent-Father’s parental rights, alleging grounds of neglect and dependency. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (6) (2015). The trial court held a hearing on the motion on 16 July 2015, and entered an order on 11 August 2015 terminating Respondent-Father’s parental rights as to O.D.S. In that order, the trial court found the existence of both grounds alleged in the motion and concluded that termination of Respondent-Father’s parental rights was in O.D.S.’s best interests. However, at the conclusion of the adjudication portion of the termination hearing, the trial court stated it found that DSS had proven neglect as a ground for terminating Respondent-Father’s parental rights, but the trial court did not reference the ground of dependency. Respondent-Father filed notice of appeal on 17 August 2015.

Respondent-Father argues the trial court erred in finding that the ground of dependency existed to terminate his parental rights. Respondent-Father contends the trial court erred because, at the conclusion of the adjudication portion of the hearing, the trial court did not orally state it was finding dependency as a ground for termination, but included that ground in the written order entered 11 August 2015. We disagree.

Specifically, Respondent-Father contends that, because the trial court did not state at the conclusion of the adjudication hearing that DSS had proven the ground of dependency pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), it was precluded from finding dependency as a ground to terminate Respondent-Father’s parental rights in its written order. We note that Respondent-Father does not make any argument challenging the adjudication of dependency based upon a lack of evidence or insufficient findings of fact. Respondent-Father’s argument is entirely predicated on his contention that the trial court was precluded from including a ground in its written order that it did not address when rendering

1. The motion to terminate the parental rights of Mother was heard at a separate hearing, and she is not a party to this appeal.

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judgment in open court. Therefore, our review is limited to whether the trial court was precluded from basing termination of Respondent-Father's parental rights on the ground of dependency when it did not state dependency as a ground for termination in open court.

N.C. Gen. Stat. § 7B-1109 requires the trial court to do the following in response to any adjudication hearing deciding whether grounds exist to terminate a person's parental rights:

The court shall take evidence, find the facts, and *shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent.* The adjudicatory order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing.

N.C. Gen. Stat. § 7B-1109(e) (2015). Thus, the trial court is required to address every ground brought forth in a petition or motion to terminate a parent's rights to his or her child, and make a determination for *every* ground alleged, whether the petitioning party has proved that ground, or failed to prove that ground. More generally, our Supreme Court has held that Rule 52 of the North Carolina Rules of Civil Procedure

imposes three requirements on the court sitting as finder of fact: it must (1) find the facts on *all* issues joined in the pleadings; (2) *declare the conclusions of law arising from the facts found*; and (3) *enter judgment accordingly*. The court logically must comply with these three requirements in the above order. Thus, under Rule 58 there can be no valid entry of judgment absent necessary findings.

Stachlowski v. Stach, 328 N.C. 276, 285, 401 S.E.2d 638, 644 (1991) (citations omitted) (emphasis added). We note that N.C. Gen. Stat. § 7B-1109 includes no requirement that the trial court render its decisions in open court. *See, e.g., Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 215, 580 S.E.2d 732, 737 (2003) (The trial court rendered judgment in open court granting summary judgment in favor of three of four defendants, stating: "I'm going to review the documents as to [the fourth defendant] and rule on that later."² The trial court then entered a written order in which it granted summary judgment in favor of all four defendants.).

2. This citation comes from the hearing transcript in *Draughon*.

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In the present case, DSS moved to terminate Respondent-Father's parental rights based upon the grounds of neglect, N.C. Gen. Stat. § 7B-1111(a)(1), and dependency, N.C. Gen. Stat. § 7B-1111(a)(6). These grounds were considered at the 16 July 2015 termination hearing. The trial court was therefore required to address both grounds, and enter findings of fact, conclusions of law, and rulings for each ground. In what appears to have been an oversight, the trial court did not address the ground of dependency when it rendered judgment in open court. Neither Respondent-Father, DSS, nor O.D.S.'s guardian *ad litem* brought this oversight to the attention of the trial court. However, the trial court's written order, entered 11 August 2015, complied with the dictates of N.C. Gen. Stat. § 7B-1109(e) by making adjudicatory determinations for both the grounds for termination that had been brought before it.

Because many of our appellate decisions addressing these issues were based upon rules that have since changed, it is important to note how entry of judgment and notice of appeal from civil judgments have changed in light of revisions to Rule 58 of the North Carolina Rules of Civil Procedure, which became effective 1 October 1994 for "all judgments subject to entry on or after that date." 1994 N.C. Sess. Laws, Ch. 594; *Capital Outdoor Advertising v. City of Raleigh*, 337 N.C. 150, 159, 446 S.E.2d 289, 295 (1994). Prior to the 1994 amendments, judgments and orders could be entered by the clerk simply making a notation of the orally rendered judgment. The trial court would then, after official entry of judgment, "make a written judgment that conform[ed] in general terms with [the] oral judgment pronounced in open court." *Morris v. Bailey*, 86 N.C. App. 378, 389, 358 S.E.2d 120, 126 (1987) (citation omitted). Entry of judgment based upon oral rendition of judgments is no longer allowed in civil matters; currently, judgments and orders are only "entered when [they are] reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2015). The pre-1994 provisions of Rule 58 are discussed in *Morris*:

Defendant's final argument is that the trial judge erred in signing the judgment. Here, the trial court announced the general terms of its judgment in open court. Defendant gave oral notice of appeal in open court immediately after the court announced its judgment.³ Five days later, the

3. "Prior to 1 July 1989, notice of appeal in civil actions could be given either in writing or orally in open court. Appellate Rule 3(a), however, was amended on 8 December 1988 to provide that an appeal in a civil action is taken, effective for all judgments entered on or after 1 July 1989, by filing notice of appeal with the clerk of superior court and

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court executed a written judgment. Defendant contends the trial judge was not permitted to execute any written judgment that was different in any manner from the announcement of the judgment made in open court.

Defendant's contention hinges on our interpretation of the trial court's actions under Rule 58 of the North Carolina Rules of Civil Procedure, N.C.G.S. Sec. 1A-1, Rule 58:

Subject to the provisions of Rule 54(b): Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.

In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.

In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof.

Here, the verdict was not for "only a sum certain or cost or that all relief" be denied, but the trial judge awarded attorney fees and relief other than damages. Although the trial judge announced his general holdings at the end of the trial, he did not direct the clerk to make any entry in

serving copies thereof upon all other parties." *Currin-Dillehay Bldg. Supply v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, 683 (1990). Rule 3(a) also applies to orders. *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803-04, 486 S.E.2d 735, 737-38 (1997).

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the record. Therefore, under the second paragraph of Rule 58, the judgment was not entered in open court and the written judgment of 9 June 1986 is the judgment for the purposes of the Rules of Civil Procedure under the third paragraph of Rule 58. The written judgment did not determine any issue different from those dealt with in the judgment announced in open court. Therefore, defendant's oral notice of appeal, though given in open court prior to the entry of judgment, was effective to give notice of appeal to the written judgment under N.C.G.S. Sec. 1-279(a).

Even if the judgment had been entered in open court, the subsequent written judgment is not invalid. A trial court has the authority under N.C.G.S. Sec. 1A-1, Rule 58 to make a written judgment that conforms in general terms with an oral judgment pronounced in open court. A trial judge cannot be expected to enter in open court immediately after trial the detailed findings of fact and conclusions of law that are generally required for a final judgment. If the written judgment conforms in general terms with the oral entry, it is a valid judgment. A notice of appeal entered in open court immediately after entry of the oral judgment does not remove the authority of the trial court to enter its written judgment which conforms substantially with the court's oral announcement. Here, the written judgment conforms in general terms with the oral announcement of the judgment in open court and therefore, *even if the judgment had been entered in open court*, the subsequent written judgment is valid.⁴

Morris, 86 N.C. App. at 387-89, 358 S.E.2d at 126-27 (citations omitted) (emphasis added). Though *Morris* states “[i]f the written judgment conforms in general terms with the oral entry, it is a valid judgment[,]” *Id.* at 389, 358 S.E.2d at 127, this statement must be understood in context. The requirement that the written judgment generally conform to the orally rendered judgment is based upon the fact that the orally rendered

4. *But see Hopkins v. Hopkins*, 268 N.C. 575, 576, 151 S.E.2d 11, 11-12 (1966) (“During a term of court a judgment is said to be within the breast of the court, and it may be changed at any time. It has been the settled rule for some time that any order or decree made was, during the term, *in fieri*, and that the court during the term could *vacate* or modify the same.”); *Stokes Co. Soil Conservation Dist. v. Shelton*, 67 N.C. App. 728, 731, 314 S.E.2d 2, 4 (1984) (trial court can “change the judgment during the same term of court”).

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judgment *had already been entered* and was therefore *already in effect*.⁵ The subsequent written judgment was merely providing written factual and legal support for the already *entered* oral judgment. In *Morris*, this Court treated orally rendered judgments that had been entered differently than those that had *not* been entered, stating:

Although the trial judge announced his general holdings at the end of the trial, he did not direct the clerk to make any entry in the record. Therefore, under the second paragraph of Rule 58, the judgment was not entered in open court and the written judgment of 9 June 1986 is the judgment for the purposes of the Rules of Civil Procedure under the third paragraph of Rule 58. The written judgment did not determine any issue different from those dealt with in the judgment announced in open court. *Therefore, defendant's oral notice of appeal, though given in open court prior to the entry of judgment, was effective to give notice of appeal to the written judgment under N.C.G.S. Sec. 1-279(a).*

Id. at 388-89, 358 S.E.2d at 126 (citations omitted) (emphasis added). The reason the *Morris* Court emphasized that the written judgment did “not determine any issue different from” the orally rendered judgment was that the substantial accord between the two is what gave effect to the oral notice of appeal, *even though the notice of appeal was given before actual entry of the judgment.*

The implication is that, had the subsequent written judgment differed from the oral judgment, the notice of appeal would not have been effective because, though it was given *after* judgment had been rendered in open court, it was given *before* the judgment was entered. Therefore, it could not serve to give notice of appeal from anything in the later written judgment that differed substantially from the oral rendering of that judgment. The further implication is that the judgment later written and entered controlled, and the trial court was not bound by its earlier rendered judgment. This is so because *if* the trial court was bound by its non-entered orally rendered judgment, notice of appeal from that judgment would *always* be effective – the trial court would simply have to

5. Once a judgment has been entered, the trial court cannot make substantial changes to that judgment without notice to the parties and an opportunity to be heard. See N.C. Gen. Stat. § 1A-1, Rules 59 and 60; *Lee v. Lee*, 167 N.C. App. 250, 254, 605 S.E.2d 222, 224-25 (2004); *Scott v. Scott*, 106 N.C. App. 379, 416 S.E.2d 583 (1992).

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insure that its entered written judgments always conformed with their corresponding non-entered orally rendered judgments. If this were the case, remedy for failure of the entered written order to conform to the orally rendered order would be remand to make the written order conform with the orally rendered order; but the validity of the notice of appeal would not be in question. However, the issue in *Morris* was the validity of the notice of appeal, not the validity of the written and entered judgment itself.

Furthermore, this Court has not generally required written entered judgments to adhere to the prior non-entered, orally rendered judgments upon which they were based. “The announcement of judgment in open court is the mere rendering of judgment,’ and is *subject to change* before ‘entry of judgment.’ ‘A judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.’” *Morris v. Southeastern Orthopedics Sports Med. & Shoulder Ctr.*, 199 N.C. App. 425, 433, 681 S.E.2d 840, 846 (2009) (citations omitted) (emphasis added); *see also Fayetteville Publ’g Co. v. Advanced Internet Techs., Inc.*, 192 N.C. App. 419, 425, 665 S.E.2d 518, 522 (2008) (“The trial judge’s comments during the hearing as to its consideration of the entire case file, evidence and law are not controlling; the written court order as entered is controlling.”). In fact, this Court has held that the trial court can consider evidence presented *following* the oral rendering of the judgment in order to better inform its subsequent written judgment. *Morris*, 199 N.C. App. at 433, 681 S.E.2d at 846 (the trial court could consider an affidavit filed after rendering of the judgment in open court so long as it was filed before the trial court *entered* judgment); *Fayetteville Publ’g*, 192 N.C. App. at 425-26, 665 S.E.2d at 522 (the fact that there was only a short period of time “between hearing the motion and rendering the order in open court” is not dispositive of whether trial court fully weighed the evidence because the written order wasn’t entered until days later); *see also Stachlowski*, 328 N.C. at 282-83, 401 S.E.2d at 642-43 (“The record indicates that on 17 January 1989, the trial court announced in open court that . . . custody would not change from defendant to plaintiff. The court thus *rendered* judgment that day on the custody issue. There is no indication, however, that it made any direction to the clerk to *enter* judgment. On the contrary, the court directed counsel for defendant to “draw the Order.” The parties continued to negotiate visitation privileges with the express understanding that counsel would not draw the order until the parties got ‘squared away on . . . Christmas.’ Though the court *rendered* judgment as to custody on 17 January 1989, these circumstances do not establish an entry of judgment at that time.”).

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What this Court has continually held, however, is that a notice of appeal from a judgment rendered in open court will not vest jurisdiction in this Court until that judgment is entered – meaning until a written judgment, generally conforming with the judgment rendered, is filed with the appropriate clerk. *Abels*, 126 N.C. App. at 804-05, 486 S.E.2d at 738. The logical continuation of the reasoning of this holding is that jurisdiction will not vest in this Court if notice of appeal is given after oral rendering of the judgment but before entry of the judgment *if* the written judgment entered does not generally comply with the judgment rendered in open court. This is an issue of appellate jurisdiction, not a limitation on what the trial court may include in its written order. Though it does not appear that this Court has directly addressed this issue, it follows that an appellant must file a written notice of appeal from the written and entered judgment, even if that appellant has already filed a written notice of appeal from the orally rendered judgment, *if the written and entered judgment does not generally comply with the earlier rendered judgment*. However, the present case does not include any issues related to our jurisdiction or the validity or timeliness of the notice of appeal. Respondent-Father filed his notice of appeal *following* the *entry* of the order terminating his parental rights, so there was no requirement, for purposes of appellate jurisdiction, that the order entered 11 August 2015 generally conform with the order rendered in open court on 16 July 2015. *See Morris*, 86 N.C. App. at 388-89, 358 S.E.2d at 126.

This is not to say there are no circumstances in which deviation from judgments rendered in open court will constitute error. Respondent-Father relies on this Court's holding in *In re J.C. & J.C.*, ___ N.C. App. ___, 783 S.E.2d 202 (2014), which stated that "if there is a discrepancy between the written order and the oral rendering of the order in open court as reflected by the transcript, the transcript is considered dispositive." *Id.* at ___, 783 S.E.2d at 205. In *J.C.*, which was an appeal from an order that changed custody of a child under DSS supervision, the trial court announced at the hearing that it was adopting all of the recommendations from the Department of Social Services, except that the department would continue to supervise visitation with the respondent-mother until it could find a replacement supervisor, and that the visitation would be every other week at DSS's offices. *Id.* at ___, 783 S.E.2d at 205. However, the trial court's written order directly contradicted the order rendered from the bench and directed that the respondent-mother's visitation would be supervised by third parties at a visitation center, and at respondent-mother's expense. *Id.* at ___, 783 S.E.2d at 205. Because this Court concluded that the differences between the oral

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rendering and the written order were substantive, we vacated the written order's visitation provisions, and remanded for entry of an amended order that accurately reflected the trial court's oral disposition. *Id.* at ___, 783 S.E.2d at 205.

Respondent-Father, relying on *J.C.*, argues that, because the order entered in the matter before us did not generally comply with the order rendered in open court, we, and the trial court, are bound by the order as rendered in open court on 16 July 2015, which did not address dependency as a ground for terminating his parental rights. In *J.C.*, this Court stated the following:

“[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.” N.C. Gen. Stat. § 1A-1, Rule 58 (2013). Thus, “[a]nnouncement of judgment in open court merely constitutes ‘rendering’ of judgment, not entry of judgment.” *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737 (1997). “If the written judgment conforms generally with the oral judgment, the judgment is valid.” *Edwards v. Taylor*, 182 N.C. App. 722, 727, 643 S.E.2d 51, 54 (2007). However, if there is a discrepancy between the written order and the oral rendering of the order in open court as reflected by the transcript, the transcript is considered dispositive. *See State v. Sellers*, 155 N.C. App. 51, 59, 574 S.E.2d 101, 106-07 (2002).

Id. at ___, 783 S.E.2d at 205.

However, *J.C.* appears to be in conflict with certain established precedents. *J.C.* cites to *Edwards*, which in turn cites *Morris, supra*. As stated above, this portion of *Morris* is discussing a situation when an order was *entered* orally in open court, then subsequently reduced to writing and filed. *Morris*, 86 N.C. App. at 389, 358 S.E.2d at 127. Judgments and orders in civil cases can no longer be *entered* in open court and, therefore, this portion of *Morris* is no longer relevant. It is true that general conformity between the orally rendered judgment and the written judgment entered is still relevant for determining the validity of notices of appeal filed following oral rendering of the judgment, but before the judgment has been entered, *Id.* at 388-89, 358 S.E.2d at 126, but that is not the situation before us. Further, the holding in *Edwards* that “[i]f the written judgment conforms generally with the oral judgment, the judgment is valid[.]” *Edwards*, 182 N.C. App. at 727, 643 S.E.2d at 54, does not command the converse, i.e. that any written judgment

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that does not generally conform with the oral judgment is necessarily *invalid*. Though there may be situations when this is true, we can find no opinion in which it has been held that the written and entered judgment must always generally conform with a prior oral rendition of that judgment in order to be valid. However, as noted above, there are plenary opinions in which our appellate courts have affirmed entered judgments and orders that do not conform to the associated orally rendered judgments and orders.

J.C. cites a criminal case, *Sellers*, for the proposition that “if there is a discrepancy between the written order and the oral rendering of the order in open court as reflected by the transcript, the transcript is considered dispositive.” *J.C.*, __ N.C. App. at __, 783 S.E.2d at 205. *J.C.* bases this statement on the following analysis in *Sellers*:

Defendant asserts the trial court erred in failing to make the requisite finding that the aggravating factors outweighed the mitigating factors before sentencing defendant to an aggravated term for assault with a firearm on Officer Denny. The transcript reveals the trial court stated, “[t]he Court finds that the factors, factors in aggravation outweigh the factors in mitigation, and that an aggravated sentence is justified in the judgments to be entered.” The form, however, leaves unchecked this important finding. From the transcript and the aggravated sentence imposed, it is clear that the court intended to have this box checked. Clerical errors are properly addressed with correction upon remand because of the importance that the records “speak the truth.” Accordingly, upon remand the trial court should correct the clerical error when it enters a new judgment.

Sellers, 155 N.C. App. at 59, 574 S.E.2d at 106-07 (citation omitted). This holding in *Sellers* stands for the proposition that, when it is apparent from the transcript that a clerical error has been committed on the written order, remand is appropriate so that the trial court can correct the clerical error. *Sellers* does not stand for the proposition that the trial court is always bound by its pronouncements in open court.

As discussed above, prior opinions of this Court have made clear that, as a general proposition, the written and entered order or judgment controls over an oral rendition of that order or judgment. *See, e.g., Fayetteville Publ’g*, 192 N.C. App. at 425-26, 665 S.E.2d at 522. One panel of this Court cannot overrule a prior panel of this Court, or our Supreme

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Court. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). To the extent that *J.C.* is in conflict with prior holdings of this Court, or our Supreme Court, we are bound by the prior holdings.

Assuming *arguendo* *J.C.* is not in conflict with prior opinions, we believe it is limited to the facts in that case. In *J.C.*,

the trial court made two statements [in open court] which constituted [the oral rendering of its] order regarding visitation: “I’m going to adopt the recommendations put for[th] by the Department with the exception that DSS will supervise until they can find a replacement[,]” and “I’m adopting every recommendation [by DSS] with the exception of the visitation will be at Social Services every other week.” Nonetheless, in its written order, the trial court directly contradicted the order it rendered from the bench, instead adopting DSS’s recommendation by ordering that respondent’s visitation would continue to be at a visitation center at respondent’s expense.

J.C., __ N.C. App. at __, 783 S.E.2d at 205. In the present case, the trial court did not directly contradict itself. Instead, the trial court was silent on the ground of dependency at the end of the trial, apparently unaware of its omission. Neither Respondent-Father nor any other party alerted the trial court to the omission. No order or judgment had been entered at that time and, therefore, no party was bound by the judgment. The judgment entered, by filing of the written order terminating Respondent-Father’s parental rights, included both grounds for termination argued at trial, neglect and dependency. Respondent-Father properly noticed appeal from this entered judgment. On these facts, we hold that the trial court was not bound by its oversight in rendering judgment, and that the written order, subsequently entered, controls.

We further note that were we to find error in the trial court’s omission in rendering judgment in open court, the remedy would be to remand for the trial court to make findings of fact and conclusions of law and determine whether DSS proved the ground of dependency. This, of course, the trial court has already done. This Court has decided that, when the trial court has failed to find *any* specific N.C. Gen. Stat. § 7B-1111 ground for terminating a respondent’s parental rights, it will not dismiss the action, it will vacate the erroneous judgment and remand to the trial court, to either amend its order to demonstrate that it correctly found a ground for termination pursuant to N.C. Gen. Stat.

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§ 7B-1111, or take other appropriate action to insure the matter was properly decided. *See, e.g., In re T.M.H.*, 186 N.C. App. 451, 456, 652 S.E.2d 1, 3 (2007) (“We vacate the order and remand the matter to the trial court with instructions . . . , if appropriate, to articulate conclusions of law that include the grounds under N.C.G.S. § 7B-1111(a) which form the basis for termination. The trial court may, in its discretion, receive additional evidence on remand.”); *In re D.R.B.*, 182 N.C. App. 733, 738-39, 643 S.E.2d 77, 81 (2007) (this Court vacated a judgment that failed to articulate the specific grounds for termination and remanded for the trial court to make the appropriate findings and conclusions); *see also In re T.B., C.P., & I.P.*, 203 N.C. App. 497, 509, 692 S.E.2d 182, 190 (2010) (In adjudication hearing trial court adjudicated children dependent, but failed to adjudicate whether children were neglected as alleged in petition. This Court remanded for determination of the neglect allegation).

In the present case, the trial court found that DSS had proven the two grounds alleged in its motion to terminate, neglect and dependency. Even assuming *arguendo* it was error for the trial court to fail to announce in open court that it would rule in favor of DSS on the ground of dependency, our remedy would be to remand to the trial court to give it the opportunity to provide findings and conclusions in support of terminating Respondent-Father’s parental rights on the ground of dependency, assuming that was the trial court’s intention. Because there is already a judgment, written and entered on 11 August 2015, in which the trial court ruled that the ground of dependency had been proven, remand would be an unnecessary delay, and a waste of judicial resources. We hold that the trial court was not precluded from finding dependency as a ground for terminating Respondent-Father’s parental rights even though it did not include that ground when it rendered the judgment in open court.

We now address dependency as a basis for the trial court’s decision to terminate Respondent-Father’s parental rights. The trial court concluded in its 11 August 2015 order:

Grounds exist to terminate Respondent[s] parental rights under N.C.G.S. § 7[B-]1111(6) in that Respondent [] is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101; there is a reasonable probability that such incapability will continue for the foreseeable future; and Respondent lacks an appropriate alternative childcare arrangement.

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We find no evidence that the ground of dependency had been dismissed, and note that Respondent-Father's counsel put on evidence in an attempt to rebut the allegation that Respondent-Father lacked an appropriate alternative caregiver. The trial court was thus statutorily required to determine the existence or non-existence of the ground of dependency because it was alleged in the motion to terminate Respondent-Father's parental rights. N.C. Gen. Stat. § 7B-1109(e).

Respondent-Father does not otherwise challenge the trial court's conclusion that termination of his parental rights was appropriate based upon the ground of dependency, and does not challenge the court's conclusion that termination of Respondent-Father's parental rights was in O.D.S.'s best interests. Because Respondent-Father does not argue on appeal that the trial court's findings of fact and conclusions of law do not support its determination that termination of his parental rights was proper based upon N.C. Gen. Stat. § 7B-1111(a)(6), we hold that this ground supports the trial court's decision to terminate Respondent-Father's parental rights. Thus, we need not address Respondent-Father's arguments regarding the ground of neglect, *see In re N.T.U.*, ___ N.C. App. ___, ___, 760 S.E.2d 49, 57 ("In termination of parental rights proceedings, the trial court's 'finding of any one of the . . . enumerated grounds is sufficient to support a termination.'"), *disc. review denied*, ___ N.C. ___, 763 S.E.2d 517 (2014), and we affirm the trial court's order terminating Respondent-Father's parental rights to O.D.S.

AFFIRMED.

Judges BRYANT and STROUD concur.

MYERS v. CLODFELTER

[247 N.C. App. 725 (2016)]

JACK L. MYERS AND ANNA BIANCA COE, PLAINTIFFS
v.
STANLEY CLODFELTER AND WIFE, RUBY Y. CLODFELTER, DEFENDANTS

No. COA15-1307

Filed 7 June 2016

Easements—prescriptive—road through property

Where defendants appealed from the trial court's grant of a perpetual prescriptive easement in favor of plaintiffs, the Court of Appeals held that plaintiffs presented sufficient evidence to show all requirements for a prescriptive easement of a road that plaintiffs and their predecessors had used for access to their own properties through defendants' properties.

Appeal by defendants from order entered 10 August 2015 by Judge Ted S. Royster, Jr. in Davidson County Superior Court. Heard in the Court of Appeals 11 May 2016.

Roberson Haworth & Reese, PLLC, by Christopher C. Finan and Matthew A.L. Anderson, for plaintiff-appellees.

Jon W. Myers for defendant-appellants.

TYSON, Judge.

Stanley and Ruby Clodfelter ("Defendants") appeal from the trial court's grant of a perpetual prescriptive easement in favor of Jack L. Myers and Anna Bianca Coe ("Plaintiffs"). We affirm.

I. Background

Coe Road intersects Highway 64 in Lexington, North Carolina, and is identified by a street sign. The tract where Coe Road intersects with Highway 64 is owned by Plaintiff Myers. Coe Road runs south through two tracts owned by Defendants. The road continues south through two tracts owned by other parties, who are not involved in this dispute. The road then crosses an 18.5 acre tract owned by Plaintiff Myers, and continues to travel south through a 4.1 acre tract owned by Plaintiff Coe.

The 18.5 acre tract owned by Mr. Myers and the 4.1 acre tract owned by Ms. Coe are the properties affected by this easement dispute. Coe Road provides the only means of ingress to and egress from these

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properties. A house, garage, and storage building are located on Ms. Coe's property. Ms. Coe lived on the property with her parents when she was a child. Ms. Coe's father lived on the property until 2005. Ms. Coe testified her parents and grandparents maintained Coe Road by "scrapping" it, trimming trees, and adding gravel to the road.

A house is also located upon Mr. Myers's property, which he has leased to others in the past. Mr. Myers testified he also performed maintenance of Coe Road by adding gravel and cinderblock, and trimming back trees. Water lines run from Highway 64 along Coe Road to Plaintiffs' properties.

Defendants became upset after Mr. Myers began to consider using his property for a commercial paintball field. In 2005, Defendants dug a large ditch across Coe Road, where the road traverses Defendants' property. Plaintiffs have not been able to access their properties by vehicles since the ditch was constructed.

Plaintiffs filed suit in superior court on 15 January 2013. Plaintiffs alleged they, and their predecessors in title, have openly, notoriously, continually, and adversely used Coe Road to cross Defendants' property for over fifty years. Plaintiffs sought an adjudication, finding they are the holders of a non-exclusive prescriptive easement through Defendants' property along Coe Road, and an order permanently enjoining Defendants from obstructing the road. Both Plaintiffs also sought monetary damages to compensate for the loss of use of their properties.

The case came before the trial court 17 March 2015. The court found Plaintiffs, or their predecessors in title, have used Coe Road to access their properties and provide utilities to their properties for over sixty years. The court further found: Plaintiffs never asked Defendants for permission to use the road; Defendants never gave Plaintiffs permission to use the road; Plaintiffs have used the road by claim of right; and, Plaintiffs have maintained the road.

The trial court concluded Plaintiffs have openly, notoriously, and by claim of right, used Coe Road to access their properties. The court decreed Plaintiffs as the holders of a twelve foot wide perpetual prescriptive easement for ingress, regress and utilities, over and across Defendants' tracts. The court further concluded Defendants wrongfully closed the road, and ordered them to return the road to its pre-existing condition. The court did not award any damages to either Plaintiff. Defendants appeal. Plaintiffs did not cross appeal.

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II. Standard of Review

The standard of review on appeal from a judgment entered after a non-jury trial is “whether there was competent evidence to support the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts.” *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (citation omitted). The findings of fact “are conclusive on appeal if there is evidence to support those findings.” *Id.* (citation omitted). “A trial court’s conclusions of law, however, are reviewable *de novo*.” *Id.* (citation omitted).

III. Prescriptive Easement

“An easement by prescription, like adverse possession, is not favored in the law[.]” *Godfrey v. Van Harris Realty, Inc.*, 72 N.C. App. 466, 469, 325 S.E.2d 27, 29 (1985) (citation omitted). To establish the existence of a prescriptive easement, the party claiming the easement must prove four elements:

- (1) that the use is adverse, hostile, or under claim of right;
- (2) that the use has been open and notorious such that the true owner had notice of the claim;
- (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and
- (4) that there is substantial identity of the easement claimed throughout the twenty-year period.

Perry v. Williams, 84 N.C. App. 527, 528-29, 353 S.E.2d 226, 227 (1987) (citation and quotation marks omitted).

Defendants argue Plaintiffs failed to show either a hostile or adverse use of Coe Road, or a use of the road under claim of right, for a continuous and uninterrupted period of at least twenty years.

Ms. Coe was two years old in 1992, when she acquired title to the 4.1 acre tract from her great-grandparents. Ms. Coe’s great-grandparents had acquired ownership of the tract in 1953. Since that time, Coe Road provided the only means of access and egress to and regress from the property via Highway 64, and was used by Ms. Coe and her predecessors in interest for that purpose. She had owned the tract around 13 years when Defendants closed the road in 2005.

Ms. Coe lived on the property with her parents while she was a child. While Ms. Coe lived on the property, her parents “scraped” the road, cut back trees, and added gravel to the roadbed. Ms. Coe’s parents and grandparents shared the costs of maintaining the road.

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Mr. Myers' 18.5 acre property is directly north of Ms. Coe's property. Mr. Myers acquired his tract from Ms. Coe's relatives by general warranty deeds recorded in 2001 and 2002. He had owned the tract three or four years when Defendants closed access to his property. Evidence showed Mr. Myers also performed maintenance work on the road. Neither Plaintiff had owned their property for the previous twenty years.

“‘Tacking’ is the legal principle whereby successive adverse users in privity with prior adverse users can tack successive adverse possession of land so as to aggregate the prescriptive period of twenty years.” *Dickinson v. Pake*, 284 N.C. 576, 585, 201 S.E.2d 897, 903 (1974) (citation omitted) (internal quotation marks supplied). Plaintiffs must prove they or their predecessors in interest engaged in a continuous and hostile or adverse use of the easement for at least twenty years prior to the time Defendants closed the road. *Id.*; *Perry*, 84 N.C. App. at 528-29, 353 S.E.2d at 227.

“A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription.” *Dickinson*, 284 N.C. at 581, 201 S.E.2d at 900. “To establish that a use is ‘hostile’ rather than permissive, it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate.” *Id.* at 580-81, 201 S.E.2d at 900. Rather, “[a] ‘hostile’ use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right.” *Id.* at 581, 201 S.E.2d at 900 (citation omitted).

Hostile use is established by the introduction of “some evidence accompanying the user which tends to show that the use is hostile in character and tends to repel the inference that it is permissive and with the owner's consent.” *Id.* See also James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 15.18[2] (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 6th ed. 2011) (“‘[H]ostility’ can be sufficiently shown by demonstrating a use exercised under such circumstances as to manifest and give notice that the use was made under a claim of right. Permission given after the hostile use has begun does not destroy the hostility.”)

Defendants argue, while Plaintiffs may “tack,” their period of alleged adverse use of the road with the period of use by their predecessors, they failed to present evidence to show their predecessors' use of the road was adverse. Mr. Myers has known the Coe family for over fifty years, and the Coe family had always used the easement to access his tract and Ms. Coe's tract. He purchased his property from the Coe family.

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Defendant Ruby Clodfelter testified she had no problem with the use of the road “as long as the Coes lived there,” but opposed Myers’ use of the road because of his plan to allow a paintball field on his property. She did not specify which Coe family member she referenced.

It is undisputed that Plaintiffs or their predecessors in interest continuously and uninterruptedly used Coe Road for any and all purposes incident to the use and enjoyment of their properties, and as their only means of access, for a period of at least twenty years. Coe Road is identified by a sign at its intersection with Highway 64. The use of the road was open and notorious and with full knowledge by Defendants.

Our Supreme Court has found the “hostility” requirement to establish a prescriptive easement was satisfied in cases with nearly identical facts. In *Potts v. Burnette*, the Court stated:

Plaintiffs’ evidence, viewed in the most favorable light, shows that the disputed roadway is the only means of access to plaintiffs’ land and the cemetery located thereon and has been openly and continuously used by plaintiffs, their predecessors in title and the public for a period of at least fifty years. No permission has ever been asked or given. Plaintiffs, on at least one occasion, smoothed, graded and gravelled the road, and have, on other occasions, attempted to work on it. Although there was no evidence that plaintiffs thought they owned the road, there was abundant evidence that plaintiffs considered their use of the road to be a right and not a privilege. This evidence is sufficient to rebut the presumption of permissive use and to allow, but not compel, a jury to conclude that the road was used under such circumstances as to give defendants notice that the use was adverse, hostile, and under claim of right and that the use was open and notorious and with defendants’ full knowledge and acquiescence.

301 N.C. 663, 668, 273 S.E.2d 285, 289 (1981) (emphasis omitted).

Likewise, in *Dickinson*, the plaintiffs and their predecessor maintained the road in passable condition by raking leaves and scattering oyster shells. No evidence was presented that the plaintiffs sought, or the defendants gave, permission for the plaintiffs to use the road. The Court determined the evidence was sufficient to overcome the presumption that the use of the road was permissive. 284 N.C. at 583-84, 201 S.E.2d at 901-02. See also *Perry*, 84 N.C. App. at 529, 353 S.E.2d at 228 (finding testimony that the plaintiff’s agent maintained a farm path for

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the plaintiff's use, and that the plaintiff never asked for and was never given permission to use the farm path, to be "evidence sufficient to rebut the presumption of permissive use").

The record shows "abundant evidence" that Plaintiffs considered and demonstrated their use of Coe Road to be by right, and not a privilege. *Potts*, 301 N.C. at 668, 273 S.E.2d at 289. Under these precedents, the evidence is sufficient to rebut the presumption that Plaintiffs' and their predecessors' use of Coe Road was permissive. This evidence supports the trial court's conclusion the "hostility" requirement was met for a period of at least twenty years to establish a prescriptive easement.

IV. Conclusion

Plaintiffs presented sufficient evidence to show all requirements for a prescriptive easement. The trial court properly ordered that Plaintiffs possess a non-exclusive perpetual prescriptive easement, known as Coe Road, for access, ingress, egress, regress and utilities, in, over, across and through the properties of Defendants. The judgment of the trial court is affirmed.

AFFIRMED.

Judges CALABRIA and HUNTER, JR. concur.

POWELL v. P2ENTERS., LLC

[247 N.C. App. 731 (2016)]

ROBERT V. POWELL, PLAINTIFF

v.

P2ENTERPRISES, LLC AND ROBERT HENRY POWELL, DEFENDANTS

No. COA15-542

Filed 7 June 2016

Employer and Employee—unpaid wages—employer—economic reality test

There was no genuine issue of fact for trial, and the trial court properly granted defendants' motion for summary judgment in an action for unpaid wages. Although defendant Powell maintained financial control over the restaurant by virtue of his position as the sole Member of P2E (the LLC which owned the restaurant involved in this action), he did not have significant day-to-day, operational control over the restaurant's employees. Plaintiff Robert's (the other member of the LLC) operational control over the restaurant's operations was substantial as well as consistently exercised.

Appeal by plaintiff from order entered 11 June 2014 by Judge Richard W. Stone in Forsyth County Superior Court. Heard in the Court of Appeals 20 October 2015.

The Law Office of Herman L. Stephens, by Herman L. Stephens, for plaintiff.

Morrow Porter Vermitsky Fowler & Taylor, PLLC, by John N. Taylor, Jr. and John C. Vermitsky, for defendants.

CALABRIA, Judge.

Plaintiff Robert V. Powell ("Robert") initiated this action on 13 March 2013 by filing a complaint against P2Enterprises, LLC ("P2E") and his father, Robert Henry Powell ("Powell") (collectively, "defendants"), alleging unpaid wages under the North Carolina Wage and Hour Act ("NCWHA"), N.C. Gen. Stat. §§ 95–25.1, *et seq.* Robert now appeals the trial court's grant of summary judgment in favor of defendants. We affirm.

In 2008, after Robert approached Powell with the idea of owning and operating a restaurant, the parties set up P2E, a manager-managed limited liability company organized under the laws of North Carolina.

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They named the company “P2Enterprises” to reflect the two Powells who were involved in the restaurant venture. According to P2E’s Articles of Organization and related documents, Robert was its only Manager and Powell was the company’s sole Member. On 2 July 2010, the parties executed a document giving P2E’s Member and Manager “signing authority in all matters concerning the Corporation.” On 4 October 2010, P2E acquired a restaurant located in Winston-Salem, North Carolina, and named it “Bob’s Big Gas Subs and Pub” (“the restaurant”). Together, Robert and Powell created the idea and concept for the restaurant, a sub sandwich shop housed in a converted gas station. Both parties’ signatures and titles appear on loan documents and the restaurant’s lease.

In addition to his role as Manager of P2E, Robert also served as general manager of the restaurant. He was in charge of hiring and training employees; dealing with vendors; managing payroll and other expenses; setting employees’ schedules; ordering food, beer, and supplies; and handling other daily operational tasks. Powell was rarely involved in the restaurant’s day-to-day operations. He provided free labor when the restaurant was short-staffed, but his main role was serving as the “money man.”

Although the restaurant appeared to be operating well, it was chronically short on cash. Whenever there were insufficient funds to pay vendors and restaurant staff, Robert would call Powell to request additional money. Occasionally, Powell responded that he could not contribute funds. When funds were not forthcoming from Powell, Robert decided not to pay himself for that pay period rather than default on other expenses.

By early 2011, Robert and Powell’s working relationship started to suffer. In April 2011, Robert told head chef Tim Papenbrock (“Papenbrock”) that he planned to buy Powell out. Around the same time, Powell distanced himself from the operation of the restaurant and took another job. Robert retained full control over the restaurant’s operations. In 2012, a dispute arose between Robert and Powell regarding Robert’s failure to pay the restaurant’s expenses, including rent, utilities, and vendor bills. At that time, Powell learned that due to the restaurant’s financial struggles, Robert had not paid himself for certain pay periods. Powell agreed to pay Robert \$16,917.00 in back wages. However, in December 2012, when Powell sought to reassert some control over the restaurant’s management, Robert tried to convince Papenbrock and other employees to leave with him in an attempt to force the restaurant to shut down. He intended to reopen without Powell and rehire the restaurant staff, but none of the employees agreed to Robert’s plan. In

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January 2013, following a dispute with his father, Robert quit his job as general manager of the restaurant.

On 15 March 2013, Robert filed a complaint against defendants, alleging liability for unpaid wages plus interest, liquidated damages, and attorneys' fees, pursuant to the NCWhA. In response, defendants filed counterclaims and sought damages for breach of contract, conversion, constructive fraud, and breach of fiduciary duty. Defendants also moved for summary judgment on Robert's claims. The motion was heard by the Honorable Richard W. Stone on 5 May 2014 in Forsyth County Superior Court. On 11 June 2014, Judge Stone entered an order granting defendants' motion and dismissing all of Robert's claims with prejudice. Defendant's voluntarily dismissed their counterclaims against Robert without prejudice on 7 October 2014. Robert appeals.

On appeal, Robert argues that several factors establish defendants' liability for his unpaid wages under the NCWhA. Specifically, Robert contends that, *inter alia*, the appearance of Powell's electronic signature on all paychecks, Powell's establishment of and control over bank accounts that funded the restaurant, P2E's use of Powell's home address as its mailing and registered office address, and Powell's role as P2E's "money man" are dispositive of his claims. We disagree.

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). "In ruling on a motion for summary judgment the evidence is viewed in the light most favorable to the non-moving party." *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986) (citation omitted). "A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense." *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003) (internal quotation marks and citation omitted). Furthermore, if a grant of summary judgment "can be sustained on any grounds, it should be affirmed on appeal." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

The NCWhA and the federal Fair Labor Standards Act ("FLSA") provide for recovery of an employee's unpaid wages from an "employer." N.C. Gen. Stat. § 95-25.22(a); 29 U.S.C. § 216(b). "The NCWhA is

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modeled after the FLSA.” *Hyman v. Efficiency, Inc.*, 167 N.C. App. 134, 137, 605 S.E.2d 254, 257 (2004) (citing *Laborers’ Int’l Union of N. Am. v. Case Farms, Inc.*, 127 N.C. App. 312, 314, 488 S.E.2d 632, 634 (1997)). As such, “[i]n interpreting the NCWHA, North Carolina courts look to the FLSA for guidance.” *Garcia v. Frog Island Seafood, Inc.*, 644 F. Supp. 2d 696, 707 (E.D.N.C. 2009); see also *Hyman*, 167 N.C. App. at 142-49, 605 S.E.2d 260-64 (applying federal employment case law to wage withholding and other claims brought pursuant to the NCWHA); *Laborers’ Int’l*, 127 N.C. App. at 314, 488 S.E.2d at 634 (noting the NCWHA is modeled after the FLSA and relying on federal case law’s interpretation of the term “employee”). Under the FLSA, a plaintiff bears the burden of establishing that he or she is an “employee.” *Steelman v. Hirsch*, 473 F.3d 124, 128 (4th Cir. 2007) (citation omitted).

An “employer” is “any person acting directly or indirectly in the interest of an employer in relation to an employee.” N.C. Gen. Stat. § 95–25.2(5); 29 U.S.C. § 203(d). Under both state and federal law, the term “person” includes individuals as well as commercial entities such as corporations. N.C. Gen. Stat. § 95–25.2(11); 29 U.S.C. § 203(a). “Accordingly, it is well established that, under certain conditions, individuals may be subjected to liability for unpaid wages[.]” *Garcia*, 644 F.Supp. 2d at 720. Specifically, the NCWHA makes an “employer” liable for unpaid wages, liquidated damages, costs, and reasonable attorneys’ fees. N.C. Gen. Stat. § 95–25.22.

“Described as ‘expansive’ by the [United States] Supreme Court, see *Falk v. Brennan*, 414 U.S. 190, 195 (1973), the term ‘employer’ is ‘to be construed liberally [under the FLSA] because by it Congress intended to protect the country’s workers.’” *Garcia*, 644 F. Supp. 2d at 720 (citation omitted). But the term “does have its limits.” *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 295 (1985). As a result, whether a person constitutes an “employer” under the FLSA “turns upon the degree of control and direction one has over the daily work of an individual. The right to control, not necessarily the actual existence of control, is important.” *Zelaya v. J.M. Macias, Inc.*, 175 F.R.D. 625, 626 (E.D.N.C. 1997) (citations omitted). To decide whether an individual is an “employer” for purposes of NCWHA and FLSA liability, courts apply an “economic reality” test.¹ *Garcia*, 644 F. Supp. 2d at 720. This test examines “the totality

1. We note that the Fourth Circuit applies a different, six-factor “economic realities” test to determine whether an individual is an employee or independent contractor under the FLSA. See *Sigala v. ABR of VA, Inc.*, No. GJH-15-1779, 2016 WL 1643759, at *5 (D. Md. Apr. 21, 2016) (citing *Schultz v. Capital International Security, Inc.*, 466 F.3d 298, 305 (4th Cir. 2006)).

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of the circumstances to determine whether the individual has sufficient operational control over the workers in question and the allegedly violative actions to be held liable for unpaid wages or other damages.” *Id.* (citation and quotations omitted).

Factors commonly relied on by courts in determining the extent of an individual’s operational control over employees include whether the individual: (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records.

Id. at 721 (citations omitted); see also *Thompson v. Blessed Home Inc.*, 22 F. Supp. 3d 542, 550 (E.D.N.C. 2014) (citing *Garcia* and applying the “economic reality” test to the plaintiff’s FLSA and NCSHA claims). “These factors are not exclusive nor is any one factor dispositive. Rather, the determination of whether a particular individual had sufficient operational control within a business enterprise to be considered an ‘employer’ for purposes of the FLSA requires a consideration of all of the circumstances and relevant evidence.” *Garcia*, 644 F. Supp. 2d at 720 (internal brackets and citations omitted); see also *Steelman*, 473 F.3d at 128 (noting that “courts have been exhorted to examine ‘the circumstances of the whole activity,’ rather than ‘isolated factors,’ or ‘technical concepts’ ”) (internal citations omitted). The gist of federal case law is that since economic reality must be determined based upon all the circumstances, courts should examine any relevant evidence so as to avoid applying the test in a narrow, mechanical fashion. See *Steelman v. Hirsch*, 473 F.3d 124, 128 (4th Cir. 2007) (noting that federal case law makes it “clear that the ‘economic reality’ standard calls for pragmatic construction” of employment relationships and that any judicial evaluation in this context must examine “the circumstances of the whole activity” instead of “isolated factors”) (citations omitted).

Applying the economic reality test to the instant case, it appears that Robert, rather than Powell, fits the definition of an “employer” under the NCSHA. As to the first factor, the power to hire and fire employees, both Robert and Powell appear to have shared that authority. Regarding Robert’s employment at the restaurant, the parties disagree as to whether he quit or was fired. Although Robert asserts that he was terminated, employee affidavits that were submitted by defendants suggest that Robert voluntarily left his position following a dispute with Powell over his decision to retain Papenbrock as head chef. Regardless of the characterization, however, this type of departure seems to be

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less relevant in the context of NCWHA and FLSA liability. Considering all relevant evidence, including Robert's deposition and the affidavits of several restaurant employees, it appears that Powell held the authority to hire and fire simply by virtue of his executive position in P2E. By contrast, as general manager of the restaurant, Robert directly hired and fired staff, and exercised control over employees' daily responsibilities. Although Powell attended the interview process that took place during the restaurant's start-up phase, and he participated in a decision to hire two additional operational managers who were subordinate to Robert, Robert agreed that it was ultimately his decision to hire both managers. Subsequently, Robert, along with one of the newly hired operational managers, organized a two-day interview process to hire restaurant staff and conducted "ServSafe" training for the new employees.

Regarding the second economic reality test factor, the ability to supervise and control employees' work schedules, Robert acknowledged that he was an operational manager, but denied having "operational authority" or control. However, the facts of this case prove this is a distinction without a difference. When he managed the restaurant, Robert was responsible for setting employee and management schedules (including his own), ordering food and beer, paying vendors, supervising the kitchen and dining areas, and answering customer concerns and complaints. Conversely, Powell was merely the restaurant's "money man." Although he sometimes provided free labor whenever the restaurant was short-staffed, he was off-site more often than not. Furthermore, at his deposition, Robert testified that Powell was "not active in the operation" during the period of time between October 2011 and December 2012.

As to the third factor, during his deposition, Robert agreed that it was "fair" to state that he set the rate and method of payment for employees. Robert initially paid the restaurant staff \$9.00 per hour based on his own experience in the hospitality industry and the fact that the restaurant would not be a full-service establishment employing tipped wait staff. According to Robert, a separate company processed payroll, including withholding and other calculations, for all restaurant employees. Robert and one of the operational managers, Brian Zollicoffer ("Zollicoffer"), submitted biweekly reports to the payroll company for processing. Powell did not actively participate in the payroll process. According to Zollicoffer, Powell "had nothing to do with deciding" whether the salaried employees, including Robert, got paid for any particular pay period. When cash flow was tight and Powell could or would not fund the shortfall, Robert decided not to submit information to the payroll company regarding the hours he had worked. As a result, he did not get

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paid for those periods. While no one factor of the economic reality test is dispositive, we nonetheless find this third factor to be especially significant in this case, since Robert's primary objective in this action was to recover unpaid wages that he claimed Powell owed him. Although Powell may have had some control over the amount of money in the P2E bank accounts, his only direct involvement in the payroll process was the appearance of his "electronic signature" on all paychecks. When Robert chose not to submit information regarding the hours he worked to the payroll company that would have generated a check for his salary during a particular pay period, he did so at his own discretion and without Powell's prior knowledge or approval. Consequently, given Robert's control over the payroll process and, more importantly, his control over his own salary, it was Robert who failed to pay himself the wages he now seeks to recover from Powell.

Finally, as to the fourth economic reality test factor, Robert agreed at his deposition that he was in charge of maintaining employment records and personnel files. There is no record evidence to suggest that Powell maintained any employment records.

Reviewing the evidence in the light most favorable to Robert, he fails to explain how these factors pertain to the economic realities of this case. Powell and P2E cannot be adjudged an "employer" for purposes of the NCWHA under any analysis based in "economic reality." The record reveals that Robert consulted with Powell prior to significant expenditures, and that he relied on Powell for funding during the restaurant's economic shortfalls. Yet Robert's operational control over the restaurant's operations was substantial as well as consistently exercised. Powell took no responsibility for the direct supervision of the restaurant's employees. Even when the record is viewed in the light most favorable to Robert, it could not lead a rational trier of fact to find for him. As a result, there was no genuine issue of fact for trial and the trial court properly granted defendants' motion for summary judgment.

Pursuant to the NCWHA and the economic reality test, Powell and P2E were not employers for the purposes of Robert's unpaid wages claim. Although Powell maintained financial control over the restaurant by virtue of his position as the sole Member of P2E, he did not have significant day-to-day, operational control over the restaurant's employees. Accordingly, we affirm the trial court's grant of summary judgment in favor of defendants.

AFFIRMED.

Judges BRYANT and ZACHARY concur.

RAGLAND v. NASH-ROCKY MOUNT BD. OF EDUC.

[247 N.C. App. 738 (2016)]

KIMARLO RAGLAND, PETITIONER

v.

NASH-ROCKY MOUNT BOARD OF EDUCATION, RESPONDENT

No. COA15-862

Filed 7 June 2016

1. Appeal and Error—record—administrative record—CD—motion to strike denied

A CD that was part of an administrative record, which was filed by respondent-Board pursuant to N.C.G.S. § 150B-47 for review by the trial court and filed with the Court of Appeals pursuant to N.C. Rule of Appellate Procedure 9(d)(2), was properly a part of the record on appeal, and petitioner's motion to strike the CD video recording was denied.

2. Appeal and Error—record—motion to quash subpoena—no ruling at trial indicated

Petitioner did not preserve for appeal an issue involving respondent's motion to quash a subpoena where the record did not indicate a ruling on the motion.

3. Schools and Education—dismissed teacher—decision on administrative record

Assuming the issue was preserved for appellate review, petitioner could not have prevailed on the question of whether a subpoena should have been suppressed in a case involving a teacher's dismissal. N.C.G.S. § 115C-325.8 explicitly provided that a teacher's appeal of a dismissal shall be decided on the administrative record. Once the administrative record was closed, petitioner had no right to request additional discovery or to subpoena additional witnesses before the superior court.

4. Schools and Education—teacher dismissal—appeal to superior court—pleading—not a civil action

Respondent-Board responded in a timely manner to a petition in an action by a teacher challenging his dismissal where petitioner assumed the status of one who had filed a complaint in the superior court, but what petitioner actually sought in the superior court was an administrative review of respondent-Board's decision. Respondent-Board was not required to respond in accordance with the Rule of Civil Procedure applicable to a party in a civil action.

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5. Schools and Education—dismissal of teacher—trial court review—proper

In a case in which a teacher challenged his dismissal, there was nothing in the record on appeal that would suggest the trial court neglected its duty and failed to perform the review required by law.

6. Administrative Law—appeal of agency—trial court sitting as an appellate court—findings not required

Although petitioner argued that the trial court's order was not factual in nature in an action by a teacher challenging his dismissal, a trial court sitting as an appellate court to review an administrative agency decision is not required to make findings of fact, and, if the court does make such findings, they may be disregarded on appellate review.

7. Schools and Education—teacher dismissal—change in attorneys

In an action by a teacher challenging his dismissal, the trial court did not err by allowing “impromptu” counsel for respondent-Board. The record, however, established that counsel filed a Notice of Appearance and properly served petitioner with the notice in advance of the hearing. Petitioner cited to no authority to support his argument that respondent-Board's counsel was not properly before the court, nor did he put forth any basis for his claim of prejudice other than accusations that the change in attorneys was made in order to personally attack petitioner.

8. Schools and Education—teacher dismissal—not arbitrary or capricious

Respondent-Board's decision to terminate a teacher was supported by substantial evidence in the record and was not arbitrary or capricious. Reviewing the entire record, there was substantial evidence to support respondent-Board's decision to terminate petitioner's employment for neglect of duty, inadequate performance, failure to fulfill the duties and responsibilities imposed upon teachers by state law, and failure to comply with reasonable requirements prescribed by the Board, any of which, standing alone, would be sufficient to support respondent-Board's decision.

9. Schools and Education—dismissal of teacher—evidence proper

The evidence relied upon by respondent-Board in considering the dismissal of a teacher constituted the type of probative evidence to which respondent-Board was entitled to give consideration.

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10. Schools and Education—dismissal of teacher—specific findings and conclusions—not required

The procedures for a teacher dismissal hearing that governed petitioner’s case did not require the Board to make specific findings of fact or conclusions of law. Respondent-Board provided the requisite notice to petitioner pursuant to N.C.G.S. § 115C-325.6, and petitioner’s argument that respondent-Board was required to make findings of fact and conclusions of law was overruled.

11. Schools and Education—dismissal of teacher—not unconstitutional

Respondent-Board’s decision to dismiss a teacher was not unconstitutional or otherwise made upon improper procedures or affected by error of law. Petitioner made a generalized argument that his constitutional rights were violated and his property taken without due process but did not cite any authority in support of those assertions. The record fully established that petitioner was afforded the process and procedure to which he was entitled pursuant to N.C.G.S. §§ 115C-325.4 through -325.8.

Appeal by petitioner from order entered 15 April 2015 by Judge Alma L. Hinton in Nash County Superior Court. Heard in the Court of Appeals 9 February 2016.

Kimarlo A. Ragland, B.S., M.S., pro se.

Tharrington Smith, L.L.P., by Deborah R. Stagner and Colin A. Shive, for respondent-appellee.

BRYANT, Judge.

Where the trial court’s decision following review of a school board’s termination of a teacher’s employment was supported by substantial evidence and was not arbitrary or capricious, and where the decision was made upon lawful procedures and was not affected by other error of law, we affirm.

On 6 October 2014, respondent, Nash-Rocky Mount Board of Education (“respondent-Board”), hired Kimarlo Ragland, petitioner, as a math teacher at Tar River Academy, respondent-Board’s alternative school. On 17 October 2014, less than two weeks after starting work, petitioner had a confrontation with a student (“M”). M had been making threats to another student in the classroom, and petitioner was escorting

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M to the in-school suspension office. Once in the hallway, petitioner and M exchanged remarks; M became angry, dropped his books, and told petitioner that petitioner “[was] not going to keep talking to [him] like th[at].” Petitioner retreated to his classroom and locked the door. M hit and kicked the door, attempting to get into the classroom. M eventually broke the glass panels of the door, cutting himself and bleeding profusely. A teacher from the classroom across the hall, Charman Pearson, came over and placed herself between M and the door.

During this time, petitioner remained in the classroom but stripped off his shirt as though preparing for a fight. Students within the classroom were out of their seats and moving around as petitioner paced shirtless near the door. A female student (“S.B.”), told petitioner to put his shirt on or he would get fired. Petitioner did not respond to S.B., but he did put his shirt back on. Although there was a phone in the classroom, at no time during the incident did petitioner attempt to notify the school administration or otherwise obtain assistance. The school’s administrative office was ultimately notified of the incident by students from another classroom. The injured student, M, was escorted away by the school resource officer.

Later, the school principal John Milliner-Williams, obtained written statements from students. Principal Williams then had the students removed from the classroom and he reviewed the statements. He also spoke to some of the students who were in the classroom and learned that another student, S.B., had made a cell phone video recording of the incident. Principal Williams then talked to petitioner. When asked why he had removed his shirt, petitioner stated that he was preparing for combat and thought that he would have to defend himself. As a result of petitioner’s handling of the incident, Principal Williams issued a written letter to petitioner reprimanding him for his bad judgment, failure to follow standard procedures, failure to call for assistance, and “complete lack of concern for the safety of [his] students or the adherence to school and district guidelines.”

On the next school day, Monday, 20 October 2014, petitioner approached S.B., stroked her hair and told her that he had been “thinking about [her] the whole weekend, how [she] tried to help [him] save [his] job.” At the end of the class period, as S.B. was leaving, petitioner asked her why she had told him to put his shirt back on and asked, “[y]ou didn’t want to see my muscles?” In her next class, S.B. shared with Ms. Pearson that she was uncomfortable and did not want to go back to petitioner’s class. Ms. Pearson referred S.B. to administration, where she met with Principal Williams. S.B. was visibly shaken and looked as

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if she had been crying. In her statement to Principal Williams and later at the hearing before respondent-Board, S.B. said that petitioner's comments and his touching her made her "uncomfortable," and she "felt his [comments were] out of line."

That same day, Principal Williams called petitioner into his office to question him about his conduct. Petitioner admitted that he had touched S.B.'s hair, but did not seem to think he had done anything wrong by stroking her hair and making the statements he had made. The combination of the two incidents that day (Monday) and the previous Friday led Principal Williams to believe it would be impossible for petitioner to be an effective educator at Tar River Academy. Principal Williams informed the superintendent, Dr. Anthony Jackson, of petitioner's actions, and the superintendent met with petitioner on 22 October 2014 in order to allow him an opportunity to respond to the allegations against him. Dr. Jackson testified that he was concerned about the lack of judgment petitioner had shown in such a short time. After the meeting, Dr. Jackson suspended petitioner with pay effective immediately. Dr. Jackson then recommended petitioner's dismissal by written letter dated 25 November 2014.

Petitioner appealed Dr. Jackson's dismissal recommendation to respondent-Board, which conducted a hearing that lasted over three hours on 8 January 2015. Three students, including S.B., along with Ms. Pearson, Principal Williams, and Dr. Jackson, testified at the hearing. Respondent-Board viewed the video recording. Respondent-Board also received documentary evidence from both the superintendent, Dr. Jackson, and petitioner. The documentary evidence included, *inter alia*, copies of petitioner's written reprimand, the dismissal letter, students' handwritten statements regarding the incident, copies of pertinent statutes (N.C.G.S. §§ 115C-325.4, -325.6, -325.7), and applicable pages from the Nash-Rocky Mount Board of Education Policy Manual.

Following the hearing, respondent-Board voted to terminate petitioner based on grounds of inadequate performance, neglect of duty, failure to comply with such reasonable requirements as respondent-Board may prescribe, and failure to fulfill the duties and responsibilities imposed upon teachers by state law. On 12 January 2015, respondent-Board notified petitioner in writing of its decision to dismiss him from his position as a teacher on the grounds listed above. Petitioner filed a "Petition for Judicial Review and Notice of Appeal" and later an Amended Petition in the Superior Court. Petitioner asserted that he was seeking review of respondent-Board's decision pursuant to N.C. Gen. Stat. §§ 150B-45 and 115C-325.8.

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Respondent-Board timely filed in the Superior Court the Administrative Record from petitioner's 8 January 2015 dismissal hearing before respondent-Board. Respondent-Board also filed a Response to the Petition for Judicial Review pursuant to N.C. Gen. Stat. § 150B-46.

Meanwhile, petitioner filed a Motion to Enter Default, a Motion for Judgment by Default, a Motion for Summary Judgment, and later a revised Motion for Summary Judgment. Petitioner noticed these three motions for hearing on 13 April 2015, and respondent-Board subsequently filed a Notice of Hearing on the Petition.

On 13 April 2015, the case came on for hearing before the Honorable Alma Hinton, Superior Court Judge presiding. By order entered 15 April 2015, Judge Hinton denied petitioner's three motions, dismissed the Petition for Judicial Review, and affirmed respondent-Board's decision dismissing petitioner from his position as a teacher. Petitioner timely filed Notice of Appeal to this Court.

Petitioner's Motion to Strike the Video Recording

[1] The Record on Appeal was deemed settled by operation of Rule 11(c) of the North Carolina Rules of Appellate Procedure. Included in the Record on Appeal filed with the Clerk of the Court of Appeals was a "CD of video evidence filed pursuant to Rule 9(d)" ("video recording"). Petitioner filed a Motion to Strike the video recording, arguing, *inter alia*, that the trial court did not view or examine the recording, and therefore, it is not properly before this Court. Thereafter, respondent-Board filed a response to petitioner's Motion to Strike.

"Pursuant to the North Carolina Rules of Appellate Procedure, our review is limited to the record on appeal . . . and any other items filed with the record in accordance with Rule 9(c) and 9(d)." *N.C. Concrete Finishers, Inc. v. N.C. Farm Bureau Mut. Ins. Co., Inc.*, 202 N.C. App. 334, 337, 688 S.E.2d 534, 536 (2010) (emphasis added) (quoting *Kerr v. Long*, 189 N.C. App. 331, 334, 657 S.E.2d 920, 922 (2008)). Rule 9(d) states in relevant part:

Any exhibit filed, served, submitted for consideration, admitted, or made the subject of an offer of proof may be made a part of the record on appeal if a party believes that its inclusion is necessary to understand an issue on appeal.

...

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(2) Exhibits Not Included in the Printed Record on Appeal. A documentary exhibit that is not included in the printed record on appeal can be made a part of the record on appeal by filing three copies with the clerk of the appellate court.

N.C. R. App. P. 9(d)(2) (2014).

Here, the CD video recording was part of the Administrative Record, which was filed by respondent-Board pursuant to N.C. Gen. Stat. § 150B-47 for review by the trial court and filed with this Court pursuant to Rule 9(d)(2). Petitioner concedes that the CD video recording is part of the administrative record. Because the CD was part of the Administrative Record, which in turn was before and reviewed by the trial court, it is properly a part of the record here. *See Batch v. Town of Chapel Hill*, 326 N.C. 1, 12, 387 S.E.2d 655, 662 (1990) (making “an examination of the administrative record which was correctly before the trial court on review”). Accordingly, petitioner’s Motion to Strike the CD video recording is denied.

On appeal, petitioner asserts the following arguments (condensed for purposes of clarity and ease of reading): (I) the trial court erred in committing various errors of law and procedure in hearing and deciding the petition; and (II) respondent-Board’s decision to terminate petitioner’s employment was not supported by substantial evidence in the record, was arbitrary or capricious, and was made upon unlawful procedures or affected by other error of law.

This case arises from a judicial review of respondent-Board’s decision to terminate petitioner’s employment as a teacher with the Tar River Academy. A superior court sitting in review of a local school board’s decision to dismiss a teacher may reverse the school board’s decision if it determines that the decision:

- (1) Is in violation of constitutional provisions.
- (2) Is in excess of the statutory authority or jurisdiction of the board.
- (3) Was made upon unlawful procedure.
- (4) Is affected by other error of law.
- (5) Is unsupported by substantial evidence in view of the entire record as submitted.

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(6) Is arbitrary or capricious.

N.C. Gen. Stat. § 115C-325.8 (2015).

The language of N.C. Gen. Stat. § 115C-325.8 is nearly identical to the language set forth in N.C. Gen. Stat. § 150B-51(b) of the Administrative Procedure Act (“APA”).¹ Prior to the adoption of N.C. Gen. Stat. § 115C-325.8, effective 1 July 2014, the right of appeal to superior court for a dismissed teacher was previously codified in N.C. Gen. Stat. § 115C-325(n).² Under N.C. Gen. Stat. § 115C-325(n), North Carolina’s appellate courts consistently applied the standards for judicial review set out in N.C.G.S. § 150B-51(b) of the APA to appeals from school

1. N.C. Gen. Stat. § 150B-51(b) of the APA states as follows:

(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.

N.C.G.S. § 150B-51(b) (2015); *see also Joyner v. Perquimans Cnty. Bd. of Educ.*, 231 N.C. App. 358, 364–65, 752 S.E.2d 517, 521–22 (2013) (holding the trial court was correct in applying the “whole record test” in undertaking its review of the Board of Education’s decision and citing N.C. Gen. Stat. § 150B-51(b) for the appropriate standard of review).

2. N.C. Gen. Stat. § 115C-325(n) states as follows:

(n) **Appeal.** – Any career employee who has been dismissed or demoted under G.S. 115-325(e)(2), or under G.S. 115C-325(j2), or who has been suspended without pay under G.S. 115C-325(a)(4a), or any school administrator whose contract is not renewed in accordance with G.S. 115C-287.1, or any probationary teacher whose contract is not renewed under G.S. 115C-325(m)(2) shall have the right to appeal from the decision of the board to the superior court for the superior court district or set of districts as defined in G.S. 7A-41.1 in which the career employee is employed. This appeal shall be filed within a period of 30 days after notification of the decision of the board. The cost of preparing the transcript shall be determined under G.S. 115C-325(j2)(8) or G.S. 115C-325(j3)(10).

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boards to the courts. *See, e.g., Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 185 N.C. App. 566, 572, 649 S.E.2d 410, 414 (2007) (“On appeal of a decision of a school board, pursuant to the amended N.C. Gen. Stat. § 115C-325(n), ‘a trial court sits as an appellate court and reviews the evidence presented to the school board.’” (citation omitted)); *Joyner v. Perquimans Cnty. Bd. of Educ.*, 231 N.C. App. 358, 363–64, 752 S.E.2d 517, 521 (citing to N.C.G.S. § 150B-51(b) for the standard of review where a probationary teacher whose contract had not been renewed appealed the decision pursuant to N.C.G.S. § 115C-325(n)). Accordingly, the case law developed under the prior statutory framework of N.C.G.S. § 115C-325(n) is instructive, particularly where no appellate court has addressed the standard of review for N.C.G.S. § 115C-325.8 and where N.C.G.S. § 115C-325.8 is practically indistinguishable from the standard of review set forth in N.C.G.S. § 150B-51(b).

In reviewing administrative proceedings like those conducted by school boards, the trial court acts as an appellate court and may not substitute its judgment for that of a school board. *See, e.g., Rector v. N.C. Sheriffs’ Educ. & Training Stds. Comm’n*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 617 (1991). Further, “the substantive nature of each assignment of error dictates the standard of review.” *N.C. Dep’t of Env’t and Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004) (citations omitted). “When this court reviews appeals from superior court either affirming or reversing the decision of an administrative agency, our scope of review is twofold, and is limited to determining: (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard.” *Mayo v. N.C. State Univ.*, 168 N.C. App. 503, 507, 608 S.E.2d 116, 120 (2005) (citing *In re Appeal by McCrary*, 112 N.C. App. 161, 166, 435 S.E.2d 359, 363 (1993)).

De novo review applies to a petitioner’s claims regarding the violation of subsections (1) through (4) of N.C.G.S. § 115C-325.8. *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 895 (interpreting similar provisions of N.C.G.S. § 150B-51(b)). “Under the *de novo* standard of review, the trial court considers the matter anew and freely substitutes its own

A career employee who has been demoted or dismissed, or a school administrator whose contract is not renewed, who has not requested a hearing before the board of education pursuant to this section shall not be entitled to judicial review of the board’s action.

Id. § 115C-325(n) (2015).

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judgment” for that of the board. *Id.* at 660, 559 S.E.2d at 895 (citation and quotation marks omitted).

The remaining two grounds for violations under N.C.G.S. § 115C-325.8, claims that respondent-Board’s decision was unsupported by substantial evidence (subsection (5)) or was arbitrary or capricious (subsection (6)), are subject to the whole record test. *See Davis v. Macon Cnty. Bd. of Educ.*, 178 N.C. App. 646, 652, 632 S.E.2d 590, 594 (2006). The whole record test requires a reviewing court to consider the entire record to determine whether there is “substantial evidence” to support a school board’s final decision. *Joyner*, 231 N.C. App. at 365, 752 S.E.2d at 521–22 “Substantial evidence is that which a reasonable mind would regard as adequately supporting a particular conclusion.” *Walker v. N.C. Dep’t of Human Res.*, 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990) (citation omitted). “[T]he reviewing court must examine all competent evidence, including that which contradicts the agency’s findings, to determine if the agency decision is possessed of a rational basis in the evidence.” *Beauchesne v. Univ. of N.C. at Chapel Hill*, 125 N.C. App. 457, 465, 481 S.E.2d 685, 691 (1997) (citation omitted).

In applying the whole record test, the reviewing trial court “may not substitute its judgment for the agency’s as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*.” *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895 (citation omitted). The decisions of local school boards may be reversed as arbitrary or capricious only if they are “patently in bad faith, or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment.” *Alexander v. Cumberland Cnty. Bd. of Educ.*, 171 N.C. App. 649, 660, 615 S.E.2d 408, 416 (2005) (citations and quotation marks omitted).

Additionally, “[i]n all actions brought in any court against a local board of education, the order or action of the board shall be presumed to be correct and the burden of proof shall be on the complaining party to show to the contrary.” N.C. Gen. Stat. § 115C-44(b) (2015); *see also Alexander*, 171 N.C. App. at 660, 615 S.E.2d at 416 (citing statutory presumption of correctness in administrative review of school board decisions). The burden is on petitioner to show that the school board acted arbitrarily or capriciously. *Abell v. Nash Cnty. Bd. of Educ.*, 89 N.C. App. 262, 265, 365 S.E.2d 706, 708 (1988) (*Abell II*) (citing Edward L. Winn, *Teacher Nonrenewal in North Carolina*, 14 Wake Forest L. Rev. 739, 762 (1978)). Arbitrary or capricious reasons “are those without any rational

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basis in the record . . .” *Abell v. Nash Cnty. Bd. of Educ.*, 71 N.C. App. 48, 52, 321 S.E.2d 502, 506 (1984) (*Abell I*).

I

Petitioner first argues that the trial court’s decision was made upon unlawful procedures and was affected by error of law. Specifically, petitioner contends that the trial court (1) erred and violated his rights by not “adjudicating” his subpoena; (2) improperly denied petitioner’s motions to enter default, judgment by default, and for summary judgment; (3) erred in its review and resulting order because the order was not “factual in nature”; and (4) erred in hearing from respondent-Board’s “impromptu” counsel at the 13 April 2015 hearing. On all points, we disagree.

(1) Subpoena

[2] Once petitioner’s case was before the trial court for review, petitioner sought to compel (1) the addresses of two students, as petitioner claimed the students assaulted him, and (2) the minutes of the Board’s closed session deliberation following petitioner’s dismissal. Respondent-Board filed a Motion to Quash Subpoena on the grounds that the subpoena (1) required disclosure of privileged or other protected matter to which no exception or waiver applied and (2) was otherwise unreasonable or oppressive. However, there is nothing in the record before this Court to indicate whether the trial court ruled on respondent-Board’s Motion to Quash Subpoena. As petitioner failed to “obtain a ruling upon the . . . motion,” he has failed to preserve this issue for appeal. N.C. R. App. P. 10(a)(1) (2014).

[3] Nevertheless, assuming *arguendo* the issue is preserved for review, petitioner could not prevail. Section 115C-325.8 explicitly provides that a teacher’s appeal of a dismissal “shall be decided on the administrative record.” N.C.G.S. § 115C-325.8(b). In the instant case, at petitioner’s dismissal hearing before respondent-Board, petitioner was permitted to subpoena witnesses, and he did so. He subpoenaed three students to testify—the female student who recorded the video, a male student who observed petitioner’s exchange with S.B. where petitioner touched her hair, and another female student who was in the classroom when petitioner removed his shirt. Petitioner questioned those students, and he was also given the opportunity to present documentary evidence. Once the administrative record was closed, petitioner had no right to request additional discovery or to subpoena additional witnesses before the Superior Court. Indeed,

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when a superior court judge sits as an appellate court to review an administrative agency decision the judge is not required to make findings of fact. . . . *If the superior court judge does make findings of fact and conclusions of law, these will not be considered in our appellate review.*

Shepherd v. Consolidated Judicial Retirement Sys., 89 N.C. App. 560, 562, 366 S.E.2d 604, 605–06 (1988) (emphasis added) (internal citations omitted). Thus, even if petitioner had obtained a ruling from the trial court on respondent-Board’s Motion to Quash petitioner’s subpoena, the ruling would not have been favorable to petitioner as petitioner could not have presented additional evidence to the superior court that had not been presented to respondent-Board. *See id.*; *see also Macon Cnty. Bd. of Educ.*, 178 N.C. App. at 651, 632 S.E.2d at 594 (“On appeal of a decision of a school board, a trial court sits as an appellate court and reviews the evidence *presented to the school board.*” (emphasis added) (citation omitted)).

Accordingly, there is no basis for petitioner’s assertion that he was entitled to subpoena records or was otherwise entitled to additional discovery on appeal once the matter was before the trial court. The trial court was permitted to review respondent-Board’s decision only on the administrative record before it, *see* N.C.G.S. § 115C-325.8(b), and thus, the trial court did not err in concluding that it was “only empowered to consider the record”

(2) *Petitioner’s Motions*

[4] Petitioner next contends that the trial court erred in determining that his motions—Motion to Enter Default, Motion for Judgment by Default, and Motion for Summary Judgment—were inappropriate as respondent-Board’s “answer” failed to set forth affirmative defenses and deny allegations set forth in his Petition, which petitioner considers to be a “complaint.” Specifically, petitioner contends that there was “no genuine issue of any material fact” as respondent-Board failed to deny any of petitioner’s allegations set forth in his petition. Thus, petitioner argues, as there was “no genuine issue of any material fact,” the trial court should have granted default, default judgment, and summary judgment in favor of petitioner. Petitioner’s argument is without merit.

Based on his motions before the trial court and his arguments before this Court, petitioner is trying to assume the status of one who has filed a “complaint” in the superior court. However, what petitioner actually sought in the superior court was an *administrative* review of respondent-Board’s decision. Both the Petition and the Amended

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Petition specifically state that they are brought pursuant to N.C. Gen. Stat. §§ 150B-45 and 115C-325.8. Petitioner did not file a complaint or commence a *civil action* under Rule 3 of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 3 (2015) (“A *civil action* is commenced by filing a complaint with the court.” (emphasis added)). Thus, respondent-Board was not required to respond in accordance with the Rule of Civil Procedure applicable to a party in a civil action after service of a summons and a complaint. *See* N.C. Gen. Stat. § 1A-1, Rule 12(a)(1) (2015) (“A defendant shall serve his answer within 30 day after service of the *summons and complaint* against him.” (emphasis added)).

Indeed, the Rules of Civil Procedure “shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature *except when a differing procedure is prescribed by statute.*” N.C. Gen. Stat. § 1A-1, Rule 1 (2015) (emphasis added). Thus, “when a statute under which an administrative board has acted provides an orderly procedure for an appeal to the superior court for review of the board’s action, this procedure is the exclusive means for obtaining such judicial review.” *Presnell v. Pell*, 298 N.C. 715, 722, 260 S.E.2d 611, 615 (1979) (citations and quotation marks omitted). Here, N.C. Gen. Stat. § 150B-46 provides that, in response to a petition filed following administrative proceedings, “parties to the proceeding may file a response to the petition within 30 days of service. Parties, including agencies, may state exceptions to the decision or procedure and what relief is sought in the response.” *Id.* § 150B-46 (2015).

Respondent-Board responded in a timely manner to the Petition. Respondent-Board was served with a copy of the Amended Petition by certified mail on 24 February 2015 and respondent-Board filed a copy with the trial court on 25 March 2015, within thirty days after receipt of the Petition (twenty-nine days later). Respondent-Board had no duty to respond to petitioner’s improper motions. Accordingly, petitioner’s arguments are overruled as his motions for default and summary judgment were inappropriate and properly denied by the trial court.

(3) *Trial Court’s Review and Order*

[5] Petitioner also contends that the trial court failed to review the Petition, Administrative Record, and other materials. This contention is without merit. The Order dismissing the Petition and affirming respondent-Board’s decision clearly states as follows: “The Court has reviewed the Petition and Amended Petition, the Administrative Record filed by Respondent[-Board] . . . and Respondent[-Board’s] Response

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. . . and has considered the arguments of Petitioner and counsel for Respondent[-Board], as well as the briefs and legal authorities submitted.” There is nothing in the record before this Court that would suggest the trial court neglected its duty and failed to perform the review required by law. *See Moore*, 185 N.C. App. at 573, 649 S.E.2d at 415 (noting that the appellate court’s task “is essentially twofold: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.”)

[6] Petitioner also argues that the trial court’s order was not “factual in nature.” However, when a trial court sits as an appellate court to review an administrative agency decision, the court is not required to make findings of fact, and if the court does make such findings, they may be disregarded on appellate review. *See id.*; *Shepherd*, 89 N.C. App. at 562, 366 S.E.2d at 605–06 (1988); *see also Area Mental Health Auth. v. Speed*, 69 N.C. App. 247, 250, 317 S.E.2d 22, 25 (1984) (noting that “it is unnecessary for a trial judge who reviews administrative action . . . to explain the reasons for his decision to affirm such action”). We find nothing in the record to suggest the trial court erred in its review of the administrative record or in its order. Accordingly, petitioner’s argument is overruled.

(4) *Respondent’s Counsel at the 13 April 2015 Hearing*

[7] Petitioner also argues that the trial court erred in allowing “impromptu” counsel for respondent-Board and contends that he was prejudiced by the fact that respondent-Board was represented by a different attorney, albeit from the same law firm, at the 13 April 2015 hearing. The record, however, establishes that counsel filed a Notice of Appearance and properly served petitioner with the notice in advance of the hearing. Petitioner cites to no authority to support his argument that respondent-Board’s counsel was not properly before the court, nor does he put forth any basis for his claim of prejudice other than accusations that the change in attorneys was made in order to personally attack petitioner. This argument, which is wholly without merit and is not supported by the record, is overruled.

II

[8] In petitioner’s next argument, he contends that the trial court’s order affirming respondent-Board’s decision to terminate petitioner’s employment was in error as respondent-Board’s decision was not supported by substantial evidence in the record and was arbitrary and capricious; that respondent-Board’s decision was based on improper evidence; that respondent-Board was required to make findings of fact; and that

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respondent-Board's decision was unconstitutional and otherwise made upon improper procedures or affected by error of law. We disagree.

Petitioner challenges the evidence relied upon to sustain his termination based on "inadequate performance" and "neglect of duty" as insufficient.

It is well settled that the credibility of witnesses and the probative value of particular testimony are for the administrative body to determine, and it may accept or reject in whole or in part the testimony of any witness. While an administrative body must consider all of the evidence and may not disregard credible undisputed evidence, it is not required to accept particular testimony as true.

State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 21, 287 S.E.2d 786, 798 (1982) (citation omitted). Moreover, "it is the responsibility of the administrative agency," here respondent-Board, "to determine the weight and sufficiency of the evidence and the credibility of witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. See *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 202, 593 S.E.2d 764, 771 (2004) (citation and quotation marks omitted).

During the hearing held on 8 January 2015, respondent-Board heard testimony from a female student S.B. and two other students, Ms. Pearson, Principal Williams, and Superintendent Anthony Jackson. Respondent-Board reviewed the video recording of the 17 October 2015 incident, considered the handwritten statements and other documentary evidence presented by both petitioner and the superintendent, and heard petitioner's statements and arguments. The evidence, which petitioner argues is not substantial and, therefore, cannot support respondent-Board's dismissal of petitioner, is summarized below.

Petitioner does not dispute the essential facts, he only challenges the conclusions to be drawn therefrom. Petitioner has never denied that during a situation with an out-of-control student, he removed his shirt and prepared for a physical confrontation. Instead of calling a school administrator, the school resource officer, or other assistance, petitioner became agitated, stripped to his bare torso, and "prepared for combat." Meanwhile, another teacher, Ms. Pearson, placed herself between the door and the violent student, trying to calm him down, while also entreat-ing petitioner to please call "downstairs" for assistance. Ultimately, another student contacted the main office and summoned help.

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Ms. Pearson testified that on 17 October 2015 there was no order in petitioner's classroom during the incident and that it is a teacher's "responsibility to keep order in a classroom at all points in time." Principal Williams testified as follows:

Based on the statements I had from the students and my conversation with [petitioner], I had determined that he had not acted in the best interests of the students, which is always our primary objective. He didn't call the front office when – when the incident occurred. And I just felt like him preparing for combat instead of mitigating the circumstances, he was actually adding to the situation at that time.

Following the incident with the violent student and petitioner's removal of his shirt in the classroom on 17 October 2014, the following Monday, petitioner approached a female student S.B., stroked her hair, and told her that he had been thinking about her over the weekend. Petitioner also asked S.B., "[y]ou didn't want to see my muscles?" When questioned by Principal Williams, petitioner never denied this conduct but instead claimed he was being "friendly" towards S.B.

S.B. was extremely upset by petitioner's actions towards her, testifying that he had made her uncomfortable. Principal Williams testified that he was concerned that petitioner did not seem to think he had done anything wrong and he further felt that he could not risk petitioner possibly engaging in other inappropriate behavior with students.

Superintendent Jackson also testified regarding the applicable policies that petitioner had failed to follow, including the Board's policy against sexual harassment. The Board also considered the North Carolina State Board of Education policy outlining the Code of Ethics for professional educators.

Reviewing the entire record, there is substantial evidence to support respondent-Board's decision to terminate petitioner's employment as a teacher for neglect of duty, inadequate performance, failure to fulfill the duties and responsibilities imposed upon teachers by state law, and failure to comply with reasonable requirements prescribed by the Board, any of which, standing alone, would be sufficient to support respondent-Board's decision. *See* N.C. Gen. Stat. §§ 115C-325.4(a)(1), (4), (9), (10) (2014), *amended by* 2015 N.C. Sess. Laws 2015-24, § 8.38(a) ("No teacher shall be dismissed . . . except for one or more of the following: (1) Inadequate performance. . . . (4) Neglect of duty. . . . (9) Failure to fulfill the duties and responsibilities imposed upon teachers

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(10) Failure to comply with such reasonable requirements as the board may prescribe.”).

Further, there is nothing in the record to suggest that respondent-Board failed to consider and weigh all of the evidence or that respondent-Board’s decision was “patently in bad faith, or whimsical.” *In re Alexander*, 171 N.C. App. at 660, 615 S.E.2d at 416 (citation omitted). Accordingly, respondent-Board’s decision to terminate petitioner was supported by substantial evidence in the record and was not arbitrary or capricious.

[9] Petitioner complains that the evidence relied upon by respondent-Board was “incompetent, unsubstantial, unreliable, and/or inadmissible.” In a dismissal hearing before a school board, the board “may give probative effect to evidence that is of a kind commonly relied on by reasonably prudent persons in the conduct of serious affairs.” N.C. Gen. Stat. § 115C-325.7(4) (2014). Here, the testimony of students, a teacher, the principal, the superintendent, written student statements, a video recording of petitioner’s actions, and school board policies all constitute the type of probative evidence to which respondent-Board was entitled to give consideration. Petitioner’s argument on this point is without merit.

[10] Petitioner also challenges what he deems respondent-Board’s lack of required findings of fact. However, the procedures for a teacher dismissal hearing that govern petitioner’s case do not require the board to make specific findings of fact or conclusions of law. *See* N.C. Gen. Stat. §§ 115C-325.4 through -325.8 (2014). Rather, a teacher “may not be dismissed . . . except upon the superintendent’s recommendation based on one or more of the grounds in G.S. 115C-325.4.” *Id.* § 115C-325.6(a). Those grounds include, *inter alia*, inadequate performance, neglect of duty, and failure to fulfill the duties and responsibilities imposed upon teachers or administrators. *See id.* §§ 115C-325.4(a)(1)–(9). Prior to a recommendation of dismissal or demotion, written notice to the teacher, setting forth “the grounds upon which [the superintendent] believes such dismissal or demotion is justified,” *id.* § 115C-325.6(b), is also required.

Respondent-Board’s written notice to petitioner of the basis for his dismissal included the following:

The board determined that your conduct in your classroom at Tar River Academy on Friday, October 17, and Monday, October 20, required your termination. Your failure to appropriately respond to a student who became agitated in your classroom on Friday, October 17, created an unsafe situation during which the student injured himself.

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Rather than maintaining order in your classroom and contacting the front office for assistance with the student in the hallway, you created additional commotion inside the classroom by removing your shirt.

Despite being provided an opportunity to prove that the Friday incident was an aberration, on the following Monday, you made an inappropriate comment to a female student while touching her hair. Despite testimony at the January 8 hearing about the effect that your conduct had on the student in question and a student who witnessed the interaction, you continued to maintain that you had done nothing wrong.

The above written notice clearly conveys respondent-Board's determination that petitioner's conduct warranted dismissal and the precise facts upon which that determination was based. Accordingly, as respondent-Board provided the requisite notice to petitioner pursuant to N.C.G.S. § 115C-325.6, petitioner's argument that respondent-Board was required to make "findings of fact and conclusions of law" is overruled.

[11] Finally, petitioner makes a generalized argument that his constitutional rights were violated and his property taken without due process. He neglects to cite to any authority in support of these assertions. *See State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) ("[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." (citations omitted)). Further, because the record fully establishes that petitioner was afforded the process and procedure to which he was entitled pursuant to N.C. Gen. Stat. §§ 115C-325.4 through -325.8, petitioner's argument is overruled, and we find that respondent-Board's decision was not unconstitutional or otherwise made upon improper procedures or affected by error of law.

Thus, as the trial court's order affirming respondent-Board's termination of petitioner was made upon lawful procedures, was not affected by error of law, was supported by substantial evidence, and was not arbitrary or capricious, the order of the trial court is

AFFIRMED.

Judges DILLON and ZACHARY concur.

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[247 N.C. App. 756 (2016)]

STATE OF NORTH CAROLINA

v.

CHALMERS GRAY BOHANNON, JR.

No. COA15-389

Filed 7 June 2016

1. Child Abuse, Dependency, and Neglect—felonious—evidence of serious injury—sufficient

The trial court did not err in denying defendant’s motion to dismiss a charge of felony child abuse inflicting serious bodily injury due to insufficient evidence. Significant, internal bleeding clearly had the potential to kill the child and that risk was created when the brain injury was inflicted.

2. Criminal Law—prosecutor’s closing argument—not grossly improper

The trial court did not err by not intervening ex mero motu to address the prosecutor’s allegedly improper closing remarks in a prosecution for felony child abuse inflicting serious bodily injury. In light of the overall factual circumstances, the prosecutor’s closing arguments were not so grossly improper as to infect the trial with unfairness and render the conviction fundamentally unfair.

Appeal by defendant from judgment entered 27 March 2014 by Judge Edwin G. Wilson in Forsyth County Superior Court. Heard in the Court of Appeals 6 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Jennie Wilhelm Hauser, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender, John F. Carella, for defendant.

CALABRIA, Judge.

Chalmers Bohannon (“defendant”) appeals from a judgment entered upon a jury verdict finding him guilty of felony child abuse inflicting serious bodily injury. For the reasons that follow, we find no error.

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I. Background

The State presented evidence that on the evening minor victim A.B.¹ sustained injuries, he was approximately three months old and he lived with his mother, Brittany Fulp (“Fulp”), and his father, defendant, in a small apartment located in Winston-Salem. During the early evening hours of 7 September 2012, Fulp placed A.B. in his crib and he went to sleep. Since A.B. was asleep and defendant was home, Fulp walked to a nearby drugstore. When Fulp returned to the apartment approximately thirty to forty-five minutes later, A.B. was propped up on defendant and Fulp’s bed; he was whimpering but was unable to cry. A.B.’s face and chest were bruised, and his eye was swollen. When Fulp asked defendant what happened, he responded that he was not sure. After settling A.B., Fulp laid him down for the night and planned to seek medical assistance if he appeared worse the next day. A.B. slept through the night for the first time in his life. Although Fulp checked on A.B. the following morning, she could not properly assess his condition due to the dim lighting around his crib. Sometime during the evening hours of 8 September 2012, defendant’s mother, defendant, and Fulp transported A.B. to the hospital to have his injuries evaluated.

In the pediatric emergency department, A.B. was first assessed by a triage nurse. He was then further examined by Dr. David Klein, an emergency medicine specialist, and Dr. Coker, the chief resident at the hospital. Dr. Klein observed bruising in the following areas: A.B.’s left forehead; the right side of his face going towards the ear; the middle portion of the right side of his face; the upper left chest going toward his shoulder; and the right side of his chest going toward his upper abdomen. When the physicians asked defendant and Fulp what happened to A.B, neither one provided an answer. After remaining in the emergency room for fifteen minutes, defendant left the hospital and went home.

While at the hospital, A.B. underwent a series of diagnostic tests which included a CAT scan and an MRI of his head as well as x-rays of all his bones. Dr. Lauren Golding was the attending pediatric radiologist on duty when A.B. was brought to the hospital on 8 September. She discovered that A.B. had sustained a broken right tibia (i.e., leg fracture). A.B.’s leg injury was thought to be the result of a “buckle fracture,” an injury that occurs when a bone “buckles” after being subjected to

1. The minor victim’s initials will be used to protect his identity in conformity with N.C. R.App. P. 3.1(b) and 4.

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substantial force or pressure. Buckle fractures in infants can result from significant twisting or torquing of the bone. Follow-up x-ray scans (on 25 September 2012) revealed that A.B. had also sustained a buckle fracture to his left tibia. A.B.'s MRI revealed subarachnoid hemorrhaging consistent with the external bruising on both sides of his brain. Subarachnoid hemorrhages refer to bleeding under the arachnoid, or innermost, layer of the brain. At trial, Dr. Golding testified that bleeding around the brain is a sign of significant trauma and can result in acute illness or death depending on the volume of the bleeding and the increase in intracranial pressure. A.B. was eventually admitted to the hospital for orthopedic surgery, general observation, and physical protection. He was hospitalized for two days.

Since neither Fulp nor defendant could explain what happened to A.B., hospital staff reported suspected child abuse to Forsyth County's Child Protective Services (FCCPS) and local law enforcement. As a result, Winston-Salem Police Officer Aaron Jessup ("Officer Jessup") was dispatched to the hospital, where he found medical staff with A.B. in his room. Officer Jessup then located Fulp in the parking lot where it appeared she was trying to leave. Fulp told Officer Jessup she was not in the room because she was frightened and concerned for defendant. She also reported her version of events from the night of 7 September 2012. After continued questioning, Fulp informed the police officer that defendant was at their apartment. In following up on the information Fulp provided, Officer Jessup went to the family's apartment and interviewed defendant, who stated that he was cooking in the kitchen on the night of 7 September 2012 when A.B. fell off the couch and landed face down on the carpeted floor.

On 10 September 2012, Dr. Meggan Goodpasture, director of the hospital's Child Abuse and Neglect Team, conducted a complete physical exam on A.B. and observed that he had "significant bruising" on his chest, both cheeks, and his face extending from his left ear to his right ear. Upon A.B.'s release to FCCPS, hospital staff recommended that social workers have A.B. examined by a neurosurgeon in two to three weeks.

On 25 February 2013, the State indicted defendant and charged him with three counts of felony child abuse inflicting serious physical injury. Subsequently, the State offered a plea arrangement pursuant to which defendant could "plead as indicted" or face indictments on additional charges. After defendant rejected the plea offer, the State obtained additional indictments charging him with felony child abuse inflicting serious bodily injury and habitual felon status. The case proceeded to trial and, on 27 March 2014, a jury returned verdicts finding defendant guilty

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on two counts of felony child abuse inflicting serious physical injury (a Class E felony) for A.B.'s broken tibias and bruising, and one count of felony child abuse inflicting serious bodily injury (a Class C felony) for A.B.'s brain injury. The trial court sentenced defendant to 127 to 165 months' imprisonment for the Class C felony and 44 to 65 months for each of the Class E felonies. The three sentences were ordered to run consecutively in the North Carolina Department of Public Safety, Division of Adult Correction. Defendant appeals.

II. Analysis

A. Motion to Dismiss

[1] Defendant first asserts that the trial court erred by denying his motion to dismiss because the State presented insufficient evidence of a serious bodily injury as required by N.C. Gen. Stat. § 14-318.4(a3). We disagree.

We review a 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 [c]ourt is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000), *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." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citation omitted). "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). Contradictions and discrepancies in the evidence "are for the jury to resolve." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993).

Felonious child abuse inflicting serious bodily injury is defined by subsection 14-318.4(a3), which provides that

[a] parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child, or which results in permanent or protracted loss or

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impairment of any mental or emotional function of the child, is guilty of a Class C² felony.

N.C. Gen. Stat. § 14-318.4(a³) (2012). A “serious bodily injury” is a “[b]odily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.” N.C. Gen. Stat. § 14-318.4(d)(1).

The separate, lesser offense of felonious child abuse inflicting serious physical injury is defined under N.C. Gen. Stat. § 14-318.4(a), which states:

A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child is guilty of a Class E³ felony, except as otherwise provided in subsection (a³) of this section.

N.C. Gen. Stat. § 14-318.4(a) (2012). A “serious physical injury” is defined as a “[p]hysical injury that causes great pain and suffering. The term includes serious mental injury.” N.C. Gen. Stat. § 14-318.4(d)(2).

In order to prove felonious child abuse inflicting serious bodily injury, the State must prove that: “(1) the defendant was the parent of the child; (2) the child had not reached [sixteen years of age]; and (3) the defendant intentionally and without justification or excuse inflicted serious bodily injury.” *State v. Wilson*, 181 N.C. App. 540, 543, 640 S.E.2d 403, 405-06 (2007). “[W]hen an adult has exclusive custody of a child for a period of time during which the child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries.” *State v. Liberato*, 156 N.C. App. 182, 186, 576 S.E.2d 118, 120-21 (2003).

In the instant case, it is undisputed that defendant is A.B.’s father and that A.B. is less than sixteen years of age. Defendant had exclusive

2. 2013 N.C. Sess. Law 35, section 1, effective 1 December 2013, upgraded a violation of N.C. Gen. Stat. § 14-318.4(a³) from a Class C felony to a Class B2 felony. Defendant was properly indicted and convicted under the statute as it existed at the time of A.B.’s injuries.

3. 2013 N.C. Sess. Law 35, section 1, effective 1 December 2013, upgraded a violation of N.C. Gen. Stat. § 14-318.4(a) from a Class E felony to a Class D felony.

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custody over A.B. at the time that A.B. was injured, and defendant does not challenge that he intentionally caused those injuries. Therefore, the only remaining issue is whether A.B.'s subarachnoid hemorrhaging constitutes a "serious bodily injury" under N.C. Gen. Stat. § 14-318.4(d)(1).

This Court has previously noted that "the definition of 'serious bodily injury' in this statute mirrors the definition of the same in [N.C. Gen. Stat.] § 14-32.4[.]" our assault inflicting serious bodily injury statute. *State v. Lowe*, 154 N.C. App. 607, 615, 572 S.E.2d 850, 856 (2002). In the context of our assault statute, the term "requires proof of more severe injury than the 'serious injury' element of [assault with a deadly weapon with intent to kill or inflicting serious injury]." *Id.* However, neither subdivision 14-318.4(d)(1) nor case law further define the term in the context of felonious child abuse, nor do they explain what constitutes a "substantial risk of death." *See* N.C. Gen. Stat. § 14-318.4(d)(1). Even so, it is clear that subsection 14-318.4(a3) is violated whenever a parent or caretaker inflicts a bodily injury on a minor that "creates" such a risk. *See id.* As a result, the age and particular vulnerability of a minor victim must factor into this analysis.

Defendant argues "the State failed to present evidence that the bleeding [around A.B.'s brain] created 'a substantial risk of death' or caused 'serious permanent disfigurement, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ,' or resulted in 'prolonged hospitalization.'" According to defendant, since A.B. did not actually suffer acute consequences from his subarachnoid hemorrhages, his brain injury never presented a substantial risk of death. In making this argument, defendant portrays A.B.'s hospitalization as one based on "protection," not "treatment," and he notes that A.B. was released only "with a prescription for Tylenol, if needed." Based on this characterization of the evidence, defendant asks us to remand for entry of judgment on the lesser offense of felony child abuse inflicting serious physical injury.

In response, the State contends that this Court's holding in *State v. Wilson*, 181 N.C. App. 540, 640 S.E.2d 403 (2007) should control our analysis in this case. *Wilson* is distinguishable, however, because the defendant in that case challenged the sufficiency of the evidence proving "that [she] intentionally abused her child[.]" rather than the evidence offered to prove a serious bodily injury. *Id.* at 542, 640 S.E.2d at 405. Furthermore, the *Wilson* defendant was convicted of a single count of felonious child abuse inflicting serious bodily injury for a series of injuries including first and second degree burns caused by scalding water and cigarette butts; "chronic signs of neglect"; and a blood clot

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appearing on the right side of the child's brain. *Id.* at 541, 640 S.E.2d at 401. By contrast, in the instant case, defendant was convicted of three counts of felonious child abuse—two inflicting serious physical injury (for the fractured tibia and bruises appearing on A.B.'s face, ear, and chest), and one inflicting serious bodily injury (for the subarachnoid hemorrhages). Consequently, the "serious bodily injury" in *Wilson* was actually a series of injuries that included a subdural hematoma, rather than the brain injury alone.

Although *Wilson* does not control our analysis in this case, we nevertheless hold that there was sufficient evidence to submit to the jury the question of whether A.B. suffered a serious bodily injury. Our examination of the record evidence, considered in the light most favorable to the State, shows that A.B. was a normal, healthy baby who had no prior medical problems. Dr. Klein, the attending physician in the hospital's pediatric emergency department on 8 September 2012, testified about his examination of A.B. He stated that a CAT scan revealed an abnormality in A.B.'s skull, but the radiologist could not determine at that time whether "that was a separation due to a break [in the skull] or a separation due to a slow closing of those bones" forming the area commonly referred to as the "soft spot" on a baby's head. After A.B. was admitted to the hospital, Dr. Golding examined A.B.'s MRI, which revealed multiple areas of hemorrhaging on his brain. Dr. Golding testified that bleeding on the brain could lead to a number of issues, including "developmental delays" or even "acute illness and death" when there is significant volume and increasing intracranial pressure. Similarly, Dr. Goodpasture testified that bleeding around the brain is "certainly a sign of serious trauma" that, in infants, can cause "irritability, seizures, and . . . even . . . life-threatening events[.]" Although the subarachnoid hemorrhaging did not appear to be immediately life-threatening when A.B. was evaluated at the hospital, Dr. Goodpasture stated that it is very difficult to predict the full effect of brain injuries in infants because "an infant's brain at this time is growing and developing a tremendous amount, and . . . injury to their brain at this age could be more traumatic or damaging than to [an adult's]." She further testified that A.B.'s brain injury would require him to be continuously monitored for dangerous side effects down the road. Defendant did not offer any evidence.

When viewed in the light most favorable to the State, the evidence was sufficient to withstand defendant's motion to dismiss. More specifically, based on the facts of this case, we believe the record demonstrates that A.B.'s brain injury created a substantial risk of his death. The evidence suggests that defendant intentionally inflicted serious trauma to the head of A.B., thereby causing subarachnoid hemorrhaging. Indeed,

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the force was so strong as to crack A.B.'s skull, or at the very least, cause bleeding in the brain of an infant so young that his "soft spot" had not yet closed. This significant, internal bleeding clearly had the potential to kill A.B. and that risk was created when the brain injury was inflicted. The dangers inherent in such a situation—one where some action or mechanism delivered multiple, vicious blows to a three-month-old baby's skull—could be inferred by the fact finder as a matter of common knowledge. Given the uncontroverted testimony of three expert witnesses who personally treated A.B., we conclude that there was sufficient evidence from which a reasonable jury could find that A.B.'s brain injury constituted a "serious bodily injury" in accordance with N.C. Gen. Stat. § 14-318.4(a3). Thus, the trial court did not err in denying defendant's motion to dismiss due to insufficiency of the evidence.

B. The State's Closing Argument

[2] Defendant next argues that the trial court erred in failing to intervene *ex mero motu* during the State's closing argument. We disagree.

Initially, we note that defendant did not object to the State's closing at trial.

The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. Under this standard, only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken. Defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.

State v. Jones, 231 N.C. App. 433, 437, 752 S.E.2d 212, 215 (2013) (internal citations, quotation marks, and brackets omitted), *disc. review denied*, 367 N.C. 322, 755 S.E.2d 616 (2014).

It is well established that "[s]tatements made during closing arguments to the jury are to be viewed in the context in which the remarks are made and the overall factual circumstances to which they make reference." *State v. Harris*, __ N.C. App. __, __, 763 S.E.2d 302, 311 (2014) (citation omitted). "As a general proposition, counsel are allowed wide latitude in closing arguments, so that a prosecutor is entitled to argue

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all reasonable inferences drawn from the facts contained in the record.” *Id.* (citations omitted). “Unless the defendant objects, the trial court is not required to interfere *ex mero motu* unless the arguments stray so far from the bounds of propriety as to impede the defendant’s right to a fair trial.” *State v. Small*, 328 N.C. 175, 185, 400 S.E.2d 413, 418 (1991) (quotation marks and citations omitted). Nor is the trial court required “to intervene *ex mero motu* where a prosecutor makes comments during closing argument which are substantially correct shorthand summaries of the law, even if slightly slanted toward the State’s perspective.” *State v. Barden*, 356 N.C. 316, 366, 572 S.E.2d 108, 140 (2002) (citation omitted). Moreover, a prosecutor’s misstatement of the law may be cured by the trial court’s subsequent correct instructions. *Id.*

Here, defendant challenges the following statement made by the prosecutor during her closing argument:

And I contend you’ve heard evidence from Dr. [Klein], Dr. Golding, and Dr. Goodpasture about the concerns about infants having subarachnoid hematoma [sic] or bleeding in the subarachnoid space; that infants are particularly vulnerable when they’re this age, and that that kind of bleeding can lead to death, developmental delays, you know, brain disfigurement, a number of things; so much so that they have to monitor infants for a significant period of time to make sure that they develop normally and that they meet their milestones. And so what’s required in that is a substantial risk. The State is not required to prove that [A.B.] actually suffered death or disfigurement or whatever. But I would contend to you that if you have a bleed in your brain, which is the organ that controls all your bodily functions, that that bleeding can lead to swelling, which cuts off oxygen, which could lead to death, which could lead to impairment, which could lead to delays, all kinds of significant problems down the road.

Defendant argues that this statement “misrepresented the State’s burden of proof and asked the jury to find that [A.B.] suffered a ‘serious bodily injury’ if it concluded that there was *some possibility* of future impairment or disfigurement.” Further, defendant argues that the trial court’s failure to intervene and correct the State’s misrepresentations deprived defendant of his right to a fair trial.

During closing argument, the prosecutor stated that she must prove “substantial risk” that “could lead” to prolonged or permanent injuries. The jury charge, however, clarified the law and the State’s burden of proof:

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The defendant has been charged with Felonious Child Abuse Inflicting Serious Bodily Injury. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt: . . . And third, that the defendant intentionally inflicted a serious bodily injury to the child or intentionally assaulted the child which proximately resulted in serious bodily injury to the child.

A serious bodily injury is defined as a bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ or that results in prolonged hospitalization.

Both the State and defendant approved the jury charge before it was delivered. Moreover, following a question from the jury, the judge clarified the definitions of “serious bodily injury” and “serious physical injury” under the statute. This request for clarification manifested the jury’s understanding that the State’s burden of proof for the charge stemming from A.B.’s head injury was different than those related to his bruises and broken tibias. Given the opportunity to convict defendant of the lesser charge of felonious child abuse inflicting serious physical injury, the jury nevertheless determined that A.B.’s subarachnoid hemorrhaging constituted a “serious bodily injury.”

In light of the “overall factual circumstances” of this case, *Harris*, ___ N.C. App. at ___, 763 S.E.2d at 311, we conclude that the prosecutor’s closing arguments were not “so grossly improper” as to “infect[] the trial with unfairness” and “render[] the conviction fundamentally unfair.” *Jones*, 231 N.C. App. at 437, 752 S.E.2d at 215. Therefore, the trial court did not err by failing to intervene *ex mero motu* to address the prosecutor’s allegedly improper closing remarks.

III. Conclusion

Based on the foregoing analysis, we hold that the trial court did not err in denying defendant’s motion to dismiss for insufficient evidence the charge of felonious child abuse inflicting serious bodily injury. Additionally, we hold that the trial court did not err in failing to intervene *ex mero motu* during the prosecutor’s closing argument.

NO ERROR.

Judges BRYANT and ZACHARY concur.

STATE v. BRICE

[247 N.C. App.766 (2016)]

STATE OF NORTH CAROLINA

v.

SANDRA MESHELL BRICE, DEFENDANT

No. COA15-904

Filed 7 June 2016

Indictment and Information—habitual larceny—prior convictions—listed in single count

Where the sole indictment issued against defendant listed a single count of habitual misdemeanor larceny and alleged defendant's prior convictions thereafter, the Court of Appeals allowed defendant's petition for certiorari and held that the indictment failed to comply with N.C.G.S. § 15A-928 and was insufficient to confer jurisdiction upon the trial court. The conviction was vacated and remanded for entry of judgment and sentence on misdemeanor larceny.

Appeal by defendant from judgment entered 12 February 2015 by Judge Michael D. Duncan in Catawba County Superior Court. Heard in the Court of Appeals 24 February 2016.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel L. Spiegel, for defendant.

Attorney General Roy Cooper, by Assistant Attorney General Nancy Dunn Hardison, for the State.

ELMORE, Judge.

Defendant argues on appeal that the indictment against her was fatally defective because it failed to comply with the requirements set forth in N.C. Gen. Stat. § 15A-928. Defendant's petition for *certiorari* is allowed by this Court so that we may review the judgment entered. In accordance with *State v. Williams*, 153 N.C. App. 192, 568 S.E.2d 890 (2002), we hold that the indictment was insufficient to confer jurisdiction upon the trial court. We vacate defendant's conviction for habitual misdemeanor larceny and remand for entry of judgment and sentence for misdemeanor larceny.

I. Background

On 22 July 2013, a Catawba County Grand Jury indicted Sandra Meshell Brice (defendant) on one count of "habitual misdemeanor

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larceny” for stealing five packs of steaks valued at \$70.00. The indictment alleged:

that on or about [21 April 2013] and in [Catawba County] the defendant named unlawfully, willfully, and feloniously did steal, take, and carry away FIVE PACKS OF STEAKS, the personal property of FOOD LION, LLC, such property having a value of SEVENTY DOLLARS (\$70.00), and the defendant has had the following four prior larceny convictions in which he was represented by counsel or waived counsel:

On or about MAY 8, 1996 the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, G.S. 14-72, and on or about SEPTEMBER 10, 1996 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Lincoln County, North Carolina; and that

On or about FEBRUARY 19, 1997 the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, GS. 14-72, and on or about JULY 29, 1997 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Catawba County, North Carolina; and that

On or about JUNE 13, 2003 the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, G.S. 14-72, and on or about OCTOBER 17, 2003 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Catawba County, North Carolina; and that

On or about JULY 7, 2007 the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, G.S. 14-72, and on or about SEPTEMBER 24, 2007 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Catawba County, North Carolina.

At the beginning of trial, defendant stipulated to four prior misdemeanor larceny convictions outside the presence of the jury. The trial court informed counsel that it intended to proceed as if the trial was for misdemeanor larceny. The court also informed the jury that defendant had been charged “with the offense larceny.”

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At the conclusion of trial, the jury found defendant guilty of larceny. The court entered judgment against defendant for habitual misdemeanor larceny, and sentenced defendant to ten to twenty-one months of imprisonment, suspended for twenty-four months of supervised probation, and a seventy-five-day active term as a condition of special probation. Defendant appeals.

II. Discussion

Defendant argues that the trial court lacked jurisdiction to enter a judgment for habitual misdemeanor larceny because the indictment was fatally defective in that it failed to comply with the mandates of N.C. Gen. Stat. § 15A-928. Although defendant failed to challenge the sufficiency of the indictment in the trial court, “where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court.” *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (citations omitted), *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000), *reh’g denied*, 531 U.S. 1120, 148 L. Ed. 2d 784 (2001). Therefore, we address defendant’s argument on the merits.

A valid indictment is required to confer jurisdiction upon the trial court. *State v. Covington*, 258 N.C. 501, 503, 128 S.E.2d 827, 829 (1963); *State v. Morgan*, 226 N.C. 414, 415, 38 S.E.2d 166, 167 (1946). “ ‘When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority.’ ” *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 836 (1993) (quoting *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981)). Challenges to the sufficiency of an indictment are reviewed *de novo*. *State v. Pendergraft*, ___ N.C. App. ___, ___, 767 S.E.2d 674, 679 (Dec. 31, 2014) (COA14-39) (citing *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008)).

In trials in superior court where a defendant’s prior convictions are alleged as part of a charged offense, the pleading must comply with the provisions of section 15A-928. N.C. Gen. Stat. § 15A-924(c) (2015). Section 15A-928 provides, in pertinent part, as follows:

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

(b) An indictment or information for the offense must be accompanied by a special indictment or information, filed

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with the principal pleading, charging that the defendant was previously convicted of a specified offense. *At the prosecutor's option, the special indictment or information may be incorporated in the principal indictment as a separate count. . . .*

. . . .

(d) When a misdemeanor is tried de novo in superior court in which the fact of a previous conviction is an element of the offense affecting punishment, *the State must replace the pleading in the case with superseding statements of charges separately alleging the substantive offense and the fact of any prior conviction, in accordance with the provisions of this section relating to indictments and informations.*

N.C. Gen. Stat. § 15A-928(a), (b) & (d) (2015) (emphasis added).

Turning to the offenses at issue, larceny is punishable as a Class 1 misdemeanor where the value of the property stolen is not more than \$1,000.00. N.C. Gen. Stat. § 14-72(a) (2015). If, however, at the time of the offense the defendant had four prior larceny convictions, then the offense is punishable as a Class H felony. N.C. Gen. Stat. § 14-72(a) & (b) (6) (2015). In such a case, the defendant's prior convictions are treated as elements to elevate the principal offense from a misdemeanor to a felony. Therefore, an indictment for habitual misdemeanor larceny is subject to the provisions of N.C. Gen. Stat. § 15A-928.

On its face, the indictment here failed to comply with N.C. Gen. Stat. § 15A-928. The State used the instrument to charge defendant with habitual misdemeanor larceny and to list defendant's prior convictions. Although section 15A-928(b) allows the State to incorporate "the special indictment or information" into the principal indictment, defendant's prior convictions were not alleged in a separate count. Rather, the sole indictment issued in this case lists a single count of "habitual misdemeanor larceny," alleging defendant's prior convictions thereafter.

Nevertheless, the State cites *State v. Jernigan*, 118 N.C. App. 240, 455 S.E.2d 163 (1995), for the proposition that errors under section 15A-928 are not reversible unless the defendant was prejudiced. In *Jernigan*, the trial court failed to arraign defendant in accordance with N.C. Gen. Stat. § 15A-928(c), as it "did not formally arraign defendant upon the charge alleging the previous convictions and did not advise defendant that he could admit the previous convictions, deny them, or

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remain silent” *Id.* at 243, 455 S.E.2d at 165. Before trial, however, defendant stipulated to his previous convictions which were set forth in the indictment. *Id.* at 243–44, 455 S.E.2d at 165–66. We held that the trial court’s failure to follow the arraignment procedures under section 15A-928(c) was not reversible error because it was “clear that defendant was fully aware of the charges against him, that he understood his rights and the effect of the stipulation, and that he was in no way prejudiced by the failure of the court to formally arraign him and advise him of his rights.” *Id.* at 245, 455 S.E.2d at 167.

While the State’s argument under *Jernigan* is persuasive, its proposition fails because a formal arraignment under section 15A-928(c) is not a matter of jurisdictional consequence. In *State v. Williams*, 153 N.C. App. 192, 568 S.E.2d 890 (2002), *disc. review improvidently allowed*, 375 N.C. 45, 577 S.E.2d 618 (2003), we held that where the State failed to charge the defendant with habitual misdemeanor assault in a special indictment or separate count of the principal indictment, in accordance with section 15A-928(b), the trial court was without jurisdiction to sentence defendant for habitual misdemeanor assault. *Id.* at 194–95, 568 S.E.2d at 892. Despite this Court’s previous decision in *Jernigan*, no showing of prejudice was required to vacate the judgment in *Williams*. We believe *Williams* controls the disposition *sub judice*.

III. Conclusion

Because the indictment did not comply with the requirements of N.C. Gen. Stat. § 15A-928 regarding indictments and informations, the trial court was without jurisdiction to enter judgment against defendant for habitual misdemeanor larceny. We vacate defendant’s conviction and remand for entry of judgment and sentence on misdemeanor larceny. *See Williams*, 153 N.C. App. at 196, 568 S.E.2d at 893 (remanding for entry of judgment on misdemeanor assault on a female).

VACATED AND REMANDED. NEW SENTENCING.

Judges HUNTER, JR. and DAVIS concur.

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[247 N.C. App. 771 (2016)]

STATE OF NORTH CAROLINA

v.

TIMOTHY TERRELL CRANDELL

No. COA15-461

Filed 7 June 2016

1. Appeal and Error—notice of appeal—motion to suppress—plea agreement

Defendant gave timely, proper notice of appeal where he gave notice of his intent to appeal the trial court's denial of his motion to suppress in his plea agreement. Moreover, at the conclusion of the plea hearing, defendant gave oral notice of appeal in open court.

2. Search and Seizure—totality of circumstances—area known for drugs and stolen property

The trial court did not err by denying defendant's motion to suppress in a prosecution for offenses including burglary, larceny, and possession of stolen goods. The prosecution arose from a deputy sheriff seeing defendant in a location known for the sale of drugs and stolen property, the deputy stopped defendant's car and found marijuana, the deputy also noticed a ring that matched the description of stolen property, and the police searched defendant's car the next day with consent and found the ring and other items. The totality of the circumstances gave rise to a reasonable, articulable suspicion that defendant was engaged in criminal activity, and the trial court did not err in holding that the deputy had reasonable suspicion to stop defendant's vehicle.

Appeal by defendant from judgments entered on or about 23 September 2014 by Judge Claire V. Hill in Superior Court, Johnston County. Heard in the Court of Appeals on 21 October 2015.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Patrick S. Wooten, for the State.

Kimberly P. Hoppin, for defendant-appellant.

STROUD, Judge.

Timothy Terrell Crandell ("defendant") appeals from the trial court's judgments entered upon a plea agreement. Defendant argues that the

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trial court erred in denying his motion to suppress, because the police officer who stopped defendant's car lacked reasonable suspicion. Defendant also filed a petition for writ of certiorari. We deny defendant's petition and affirm the trial court's judgments.

I. Background

"Blazing Saddles" is a partially burned, abandoned building in Johnston County. It is not a residence or a business—at least not a business allowed by law—and is "known for one thing and that is selling drugs and dealing in stolen property." Around 3:00 p.m. on 17 September 2013, Deputy Clifton, a member of the Johnston County Sheriff's Aggressive Field Enforcement ("SAFE") team, observed defendant drive into the area adjacent to "Blazing Saddles." He also noticed that a metal cable, which served as a gate, was down, which in his experience indicated that "Blazing Saddles" was "open for business." About two minutes later, Deputy Clifton observed defendant drive away from "Blazing Saddles." Deputy Clifton then stopped defendant's car and found that defendant possessed some marijuana. During the stop, Deputy Clifton also noticed that defendant had a ring which matched the description of a ring which had recently been reported as stolen.

The following day, the police arrived at defendant's house and asked to search defendant's car; defendant consented. The police found the stolen ring in defendant's car. During the search, a detective noticed a tub "with some miscellaneous items" in the yard. The detective returned the following day to arrest defendant and noticed that the tub contained "quite a few tools that . . . [had not] been there the day before." The police discovered that these tools had recently been stolen from defendant's neighbor's shed. The police later discovered that defendant had repeatedly instructed his girlfriend to testify that she had not given the police consent to search his house.

On 16 December 2013, a grand jury indicted defendant for attaining the status of a habitual felon. *See* N.C. Gen. Stat. § 14-7.1 (2011). On 5 May 2014, a grand jury indicted defendant for second-degree burglary, larceny after breaking or entering, felony possession of stolen goods, and common law obstruction of justice. *See* N.C. Gen. Stat. §§ 14-3(b), -51, -71.1., -72(b)(2) (2013). On 5 May 2014, a grand jury indicted defendant for breaking or entering, larceny after breaking or entering, and felony possession of stolen goods. *See* N.C. Gen. Stat. §§ 14-54(a), -71.1., -72(b)(2) (2013). On 21 July 2014, a grand jury indicted defendant for five counts of common law obstruction of justice. *See* N.C. Gen. Stat. § 14-3(b) (2013).

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On 2 April 2014, defendant moved to suppress evidence obtained as a result of Deputy Clifton's stop. At a suppression hearing on 4 September 2014, the trial court rendered its order denying defendant's motion to suppress, which was memorialized in a written order entered on 17 October 2014. On or about 22 September 2014, the State and defendant executed a plea agreement in which the State dismissed two counts of possession of stolen goods and one count of common law obstruction of justice and defendant pled guilty to the remaining charges pursuant to *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970). In the plea agreement, defendant gave notice of his intent to appeal the trial court's denial of his motion to suppress. On or about 23 September 2014, after a plea hearing, the trial court convicted defendant of one count of second-degree burglary, two counts of larceny after breaking or entering, five counts of common law obstruction of justice, and one count of breaking or entering. The trial court adjudged defendant to be a habitual felon and sentenced him to 117 to 153 months of imprisonment. At the conclusion of the plea hearing, defendant gave oral notice of appeal in open court.

II. Petition for Writ of Certiorari

[1] Defendant filed a petition for writ of certiorari "asking this Court to permit appellate review in the event the Court should conclude that the notice of appeal was defective."

[I]n order to properly appeal the denial of a motion to suppress after a guilty plea, a defendant must take two steps: (1) he must, prior to finalization of the guilty plea, provide the trial court and the prosecutor with notice of his intent to appeal the motion to suppress order, and (2) he must timely and properly appeal from the final judgment.

State v. Cottrell, 234 N.C. App. 736, 739-40, 760 S.E.2d 274, 277 (2014). In the plea agreement, defendant gave notice of his intent to appeal the trial court's denial of his motion to suppress. At the conclusion of the plea hearing, defendant gave oral notice of appeal in open court. Accordingly, we hold that defendant gave timely, proper notice of appeal. *See id.* We therefore review the merits of defendant's appeal and deny defendant's petition.

III. Motion to Suppress

[2] Defendant's only argument on appeal is that the trial court erred in denying his motion to suppress, because Deputy Clifton lacked

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reasonable suspicion to stop defendant's car, in contravention of the Fourth Amendment of the U.S. Constitution and article I, section 20 of the North Carolina Constitution. *See* U.S. Const. amend. IV; N.C. Const. art. I, § 20.

A. Standard of Review

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. However, when . . . the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed *de novo* and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Biber, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted).

B. Findings of Fact

Defendant argues that competent evidence does not support the trial court's Findings of Fact 2, 5, and 27 in its order denying his motion to suppress. Defendant challenges the underlined portion of Finding of Fact 2:

2. Defendant was charged with Second Degree Burglary, Felony Breaking and or Entering, 2 counts of Felony Larceny after Breaking and/or Entering, 2 counts of Felony Possession of Stolen Goods and Obstruction of Justice. The defendant also attained the status as a Habitual Felon and Habitual Breaking and/or Entering Offender.

(Emphasis added.) Defendant contends that at the time of the suppression hearing, he had not yet attained the status of a habitual felon although he had been *indicted* for attaining the status of a habitual felon. *See* N.C. Gen. Stat. § 14-7.1. It is possible that some words were inadvertently omitted from this sentence, since it appears that in this paragraph the trial court was listing the offenses with which defendant had been charged. But in any event, we need not address this issue as it has no bearing on the issue of whether the trial court erred in denying his motion to suppress.

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Defendant next challenges Finding of Fact 5, which states:

5. Deputy Clifton and other officers on the Safe Team routinely share information regarding these high crime areas, including the area referred to as “Blazing Saddles[,”] to stay informed of what type of criminal activity is going on throughout high crime areas.

Defendant contends that “[t]here is no evidence to support a finding that this sharing occurred *prior* to [his] arrest.” (Emphasis added.) We note that this finding of fact does not state that the sharing occurred prior to defendant’s stop, but we agree with defendant that if Deputy Clifton had never heard of “Blazing Saddles” before and had no knowledge either directly or by reputation of its “business,” he may have had far less basis for a suspicion of criminal activity. But there is abundant evidence that Deputy Clifton was quite familiar with “Blazing Saddles,” both from personal experience and from the sharing of information with other officers, well before he ever saw defendant there. Deputy Clifton gave the following testimony:

[The Court:] So since the date of this incident, how many times have you been out there?

[Deputy Clifton:] Since the day—about 15 or so—

[The Court:] Okay.

[Deputy Clifton:] —or more charges since then.

[The Court:] Okay.

[Deputy Clifton:] And that’s just me personally. [There have] been other officers that have made drug charges, been search warrants executed at this location.

[The Court:] These other officers are part of the S.A.F.E. Team?

[Deputy Clifton:] S.A.F.E. Team and our narcotics division.

[The Court:] So, *generally* when they make arrests out there, do they come back and brief the rest of the S.A.F.E. Team with regard to the activity there?

[Deputy Clifton:] Yes. The information is *constantly* passed back and forth between them and us.

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(Emphasis added.) Although Deputy Clifton testified to the sharing of information among SAFE team members after he had mentioned the number of stops he had made since defendant's stop, nothing in his testimony suggests that this sharing of information did not take place *before* defendant's stop. In addition, Deputy Clifton further testified that before defendant's stop, from January 2011 to 17 September 2013, the date of defendant's stop, he had made 23 stops in connection with activity at "Blazing Saddles" which led to drug-related charges. It is clear from his testimony generally and from other uncontested findings of fact that he was quite familiar with "Blazing Saddles" before he observed defendant there. Deputy Clifton testified: "This particular place, *ever since I have been at the sheriff's office*, has been known for one thing and that is selling drugs and dealing in stolen property." (Emphasis added.) We hold that this evidence is competent to support Finding of Fact 5 that Deputy Clifton and other police officers on the SAFE team "routinely share information" about criminal activity at "Blazing Saddles," as well as any implication that this "routine[]" sharing of information had occurred both before and after defendant's stop. *See Biber*, 365 N.C. at 167-68, 712 S.E.2d at 878.

Defendant also challenges Finding of Fact 27, which states:

27. Based upon the location, the time of day, the amount of time Defendant was on the premises and his training and experience, Deputy Clifton, through his testimony, articulated specific facts that gave rise to his suspicion that criminal activity was afoot.

Defendant "does not challenge this statement to the extent that the trial court found that Deputy Clifton articulated some facts which gave rise to his suspicion that some criminal activity was afoot." (Emphasis added.) Rather, he argues that these facts were insufficient to constitute reasonable suspicion that defendant, in particular, was engaged in criminal activity. Because defendant's argument is more properly characterized as a challenge to the trial court's conclusion of law that Deputy Clifton had reasonable suspicion to stop defendant's car, we address this argument below.

C. Conclusion of Law

Defendant argues that the findings of fact do not support the trial court's conclusion of law that Deputy Clifton had reasonable suspicion to stop defendant's car.

The Fourth Amendment protects individuals against unreasonable searches and seizures. The North Carolina

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Constitution provides similar protection. A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief. Such stops have been historically viewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Despite some initial confusion following the United States Supreme Court's decision in *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), courts have continued to hold that a traffic stop is constitutional if the officer has a reasonable articulable suspicion that criminal activity is afoot.

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

State v. Barnard, 362 N.C. 244, 246-47, 658 S.E.2d 643, 645 (emphasis added and citations, quotation marks, brackets, and ellipsis omitted), *cert. denied*, 555 U.S. 914, 172 L. Ed. 2d 198 (2008).

The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. *First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.*

The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities

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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. *Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.*

The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in *Terry v. Ohio*, . . . said that, “this demand for specificity in the information upon which police action is predicated is *the central teaching of this Court’s Fourth Amendment jurisprudence.*” [See *Terry*, 392 U.S. at 21 n.18, 20 L. Ed. 2d 906 n.18] (emphasis added).

United States v. Cortez, 449 U.S. 411, 418, 66 L. Ed. 2d 621, 629 (1981) (emphasis added and brackets omitted).

In *Barnard*, around 12:15 a.m. “in a high crime area of downtown Asheville where a number of bars are located[,]” a police officer stopped the defendant’s vehicle after the defendant remained stopped at an intersection for approximately 30 seconds after the traffic light had turned green “without any reasonable appearance of explanation for doing so.” *Barnard*, 362 N.C. at 244, 247, 658 S.E.2d at 644-45. At a suppression hearing, the officer testified that the defendant’s delayed reaction was an indicator of impairment. *Id.* at 247, 658 S.E.2d at 645. Our Supreme Court held that “[b]ecause [the] defendant’s thirty-second delay at a green traffic light under these circumstances gave rise to a reasonable, articulable suspicion that [the] defendant may have been driving while impaired, the stop of [the] defendant’s vehicle was constitutional[.]” *Id.* at 248, 658 S.E.2d at 645.

Here, the trial court made the following findings of fact in support of its conclusion that Deputy Clifton had reasonable suspicion to stop defendant’s car:

3. [Deputy Clifton] has been a law enforcement officer since 1999, then moved from patrol to the narcotics division to sergeant of patrol, subsequently deployed by the military and since returning to the sheriff’s office has

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been a member of the SAFE (Sheriff's Aggressive Field Enforcement) team.

4. The SAFE team is responsible for responding to high crime areas where complaints have been made, and those areas of surveillance, where sometimes checkpoints and traffic stops are set up.

5. Deputy Clifton and other officers on the Safe Team routinely share information regarding these high crime areas, including the area referred to as "Blazing Saddles[,"] to stay informed of what type of criminal activity is going on throughout high crime areas.

6. "Blazing Saddles" consists of a piece of property that includes an abandoned building that is partially burned down, containing no electricity and where people frequent when dealing in drugs and/or stolen property.

7. People often frequent the property at all hours, all the time.

8. From the year 2011 to the date of this hearing Deputy Clifton had made a total of 37 arrests at this location.

9. [Thirty-two] (32) of those arrests at this location were made during the day and the other 5 were made at night.

10. [Twenty-three] (23) of those arrests were made prior to September 17, 2013 at [3:00 p.m.], when the arrest of the Defendant occurred.

11. Deputy Clifton's other vehicle stops originating from this area were made as a result of his observation of motor vehicle violations and ultimately resulted in arrests for possession of narcotics.

12. At the "Blazing Saddles[,"] there is a cable fence connected to the property.

13. Deputy Clifton testified that his experience is that when the gate is down, the property is "open for business[,"] or it is the time period when people are selling or doing drugs on the property.

14. On the date of this incident, the gate was down, indicating to Deputy Clifton that drug or other criminal activity may be occurring.

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15. On September 17, 2013, Deputy Clifton was on routine patrol.

16. On September 17, 2013, Deputy Clifton observed Defendant turn into the premises of the “Blazing Saddles[,”] which is known to him and other officers, as a place where drugs are sold and where stolen items are possessed and sold as well.

17. On September 17, 2013, there were at least 5 to 10 people already present at the “Blazing Saddles” location.

18. Based upon Deputy Clifton’s training, experience, conversations with drug suspects and arrestees and his own observations, the usual time period for a drug transaction occurs within approximately two minutes.

19. Deputy Clifton had previously observed numerous drug transactions occurring at “Blazing Saddles” frequently for a period of time, lasting no more than five minutes.

20. Deputy Clifton observed the defendant turn into the premises of the “Blazing Saddles” while [Deputy Clifton] proceeded down the road.

21. Deputy Clifton then turned around, looped back, and then observed the Defendant exit the premises of the “Blazing Saddles.”

22. Deputy Clifton did not observe Defendant’s activities at the “Blazing Saddles” but observed that the Defendant was on the premises of “Blazing Saddles” for approximately two minutes.

23. Deputy Clifton testified that he didn’t pull into the premises directly in his marked patrol car, because based upon experiences, perpetrators of drug crimes at “Blazing Saddles” flee when marked patrol cars enter the premises.

24. Deputy Clifton further testified that Defendant’s car turned [onto] the property and when [Deputy Clifton] saw the car exiting the property, based on [his] training and experience, the length of time was consistent with drug activity.

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25. After seeing the defendant enter the “Blazing Saddles” and then leave in a time frame consistent with a drug transaction, [Deputy Clifton] initiated an investigatory stop.

On the date of the stop, based on his experience making 23 arrests in connection with drug activity at “Blazing Saddles” and other police officers’ experiences at “Blazing Saddles,” Deputy Clifton was aware of a steady pattern that people involved in drug transactions visit “Blazing Saddles” when the gate is down and stay only for approximately two minutes. Defendant followed this exact pattern: he visited “Blazing Saddles” when the gate was down and stayed approximately two minutes. Deputy Clifton’s stop was “based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.” *See id.* at 247, 658 S.E.2d at 645 (citation omitted). Deputy Clifton had observed a “pattern[] of operation of [a] certain kind[] of lawbreaker[]” and “[f]rom these data” had drawn inferences and made deductions “that might well elude an untrained person.” *See Cortez*, 449 U.S. at 418, 66 L. Ed. 2d at 629. Accordingly, we hold that the totality of the circumstances gave rise to a reasonable, articulable suspicion that defendant was engaged in criminal activity. *See Barnard*, 362 N.C. at 248, 658 S.E.2d at 645.

Defendant also specifically challenges the trial court’s Conclusion of Law 4, which states:

4. This case is distinguishable both from [*State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992)] and from [*Brown v. Texas*, 443 U.S. 47, 61 L. Ed. 2d 357 (1979)] because [Deputy Clifton] had specific knowledge of activity that was going on there because he had previously made arrests at the location for possession of narcotics and had been previously briefed by his colleagues regarding criminal activity being conducted at the location.

We agree with the trial court that *Brown* and *Fleming* are distinguishable.

In *Brown*, a police officer stopped the defendant after he and another police officer observed the defendant and another man “walking in opposite directions away from one another in an alley” in a neighborhood which “has a high incidence of drug traffic.” *Brown*, 443 U.S. at 48-49, 61 L. Ed. 2d at 360. The police officer testified that “[a]lthough the two men were a few feet apart when they first were seen, . . . both officers believed the two had been together or were about to meet until the patrol car appeared.” *Id.* at 48, 61 L. Ed. 2d at 360. The U.S. Supreme

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Court held that the police officer lacked reasonable suspicion to stop the defendant for the following reasons:

[The police officer] testified at [the defendant's] trial that the situation in the alley "looked suspicious," but he was unable to point to any facts supporting that conclusion. There is no indication in the record that it was unusual for people to be in the alley. The fact that [the defendant] was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that [the defendant] himself was engaged in criminal conduct. In short, the [defendant's] activity was no different from the activity of other pedestrians in that neighborhood. When pressed, [the police officer] acknowledged that the only reason he stopped [the defendant] was to ascertain his identity.

Id. at 52, 61 L. Ed. 2d at 362-63 (footnote omitted). The U.S. Supreme Court was careful to narrow its holding: "This situation is to be distinguished from the observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." *Id.* at 52 n.2, 61 L. Ed. 2d at 362 n.2.

This Court in *Fleming* held that the facts in that case were analogous to the facts in *Brown*:

[A]t the time [the police officer] first observed defendant and his companion, they were merely standing in an open area between two apartment buildings. At this point, they were just watching the group of officers standing on the street and talking. The officer observed no overt act by defendant at this time nor any contact between defendant and his companion. Next, the officer observed the two men *walk* between two buildings, out of the open area, toward Rugby Street and then begin *walking* down the public sidewalk in front of the apartments. These actions were not sufficient to create a reasonable suspicion that defendant was involved in criminal conduct, it being neither unusual nor suspicious that they chose to walk in a direction which led away from the group of officers. At this time, [the police officer] "stopped" defendant and his companion and immediately proceeded to ask them questions while he simultaneously "patted" them down.

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We find that the facts in this case are analogous to those found in *Brown*. [The police officer] had only a generalized suspicion that the defendant was engaged in criminal activity, based upon the time, place, and the officer's knowledge that defendant was unfamiliar to the area. Should these factors be found sufficient to justify the seizure of this defendant, such factors could obviously justify the seizure of innocent citizens unfamiliar to the observing officer, who, late at night, happen to be seen standing in an open area of a housing project or walking down a public sidewalk in a "high drug area." This would not be reasonable.

Fleming, 106 N.C. App. at 170-71, 415 S.E.2d at 785-86. Defendant argues that he, like the defendant in *Fleming*, made "no overt act" sufficient to create a reasonable suspicion. *See id.* at 170, 415 S.E.2d at 785.

But we distinguish this case from *Brown* and *Fleming*, because Deputy Clifton observed defendant follow a specific pattern that was closely consistent with his knowledge and experience of a certain kind of lawbreaker at this particular location: defendant visited "Blazing Saddles" when the gate was down and stayed only for approximately two minutes. In addition, this was not just a "high drug area"; it was a location with no use or purpose other than criminal activity. *See id.* at 171, 415 S.E.2d at 785-86. "Blazing Saddles" was notorious for "selling drugs and dealing in stolen property." It was an abandoned, partially burned building with no electricity, and there was no apparent legal reason for anyone to go there at all, unlike the neighborhood in *Brown* or the apartment complex in *Fleming*, where people actually lived. *See id.* at 170-71, 415 S.E.2d at 785-86; *Brown*, 443 U.S. at 52, 61 L. Ed. 2d at 362-63. The U.S. Supreme Court in *Brown* was careful to distinguish the facts in that case from factual situations like the one present here: "This situation is to be distinguished from the observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." *See Brown*, 443 U.S. at 52 n.2, 61 L. Ed. 2d at 362 n.2. This case is much more comparable to *Barnard*, where our Supreme Court held that the "defendant's thirty-second delay at a green traffic light under [those] circumstances gave rise to a reasonable, articulable suspicion that [the] defendant may have been driving while impaired[.]" 362 N.C. at 248, 658 S.E.2d at 645. Following *Barnard*, we hold that the trial court did not err in holding that Deputy Clifton had reasonable suspicion to stop defendant's vehicle and thus did not err in denying defendant's motion to suppress. *See id.*

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IV. Conclusion

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

AFFIRMED.

Judges STEPHENS and DAVIS concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER MICHAEL CROOK, DEFENDANT

No. COA15-893

Filed 7 June 2016

1. Confessions and Incriminating Statements—custodial interrogation—no Miranda warning

The trial court erred in a prosecution for possession of drugs, drug paraphernalia, and other offenses, by concluding that defendant was not subject to custodial interrogation when he made a statement about having marijuana and by denying his motion to suppress. The need for answers to questions did not pose a threat to the public safety, outweighing the need for a rule protecting defendant's privilege against self-incrimination.

2. Confessions and Incriminating Statements—erroneous admission of statement—prejudicial

The defendant in a prosecution for drug offenses established that he was prejudiced by the trial court's error in refusing to exclude his custodial statement indicating possession of marijuana. The State did not present "overwhelming evidence," excluding defendant's statement, which linked him to the marijuana and drug paraphernalia, and there was a reasonable possibility that a different result would have been reached at the trial had the error not been committed.

3. Identity Theft—driver's license—personal identifying information

The trial court's peremptory instruction on identity theft (that a driver's license would be personal identifying information) was not erroneous in light of the overwhelming evidence presented.

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4. Sentencing—prior record level—probation point

The trial court erred by including a probation point when sentencing defendant as a prior record level II offender. The error was prejudicial because the additional point raised defendant's prior record level from I to II. The trial court did not determine that the State had provided the required notice.

Appeal by defendant from Judgment entered 14 March 2014 by Judge Marvin P. Pope, Jr. in Henderson County Superior Court. Heard in the Court of Appeals 9 March 2016.

Attorney General Roy Cooper, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for defendant.

ELMORE, Judge.

Christopher Michael Crook (defendant) appeals from his two consecutive sentences of thirteen to twenty-five months imprisonment, arguing that the trial court erred in denying his motion to suppress a statement he made prior to receiving *Miranda* warnings, erred in sentencing him as a prior record level II offender, and committed plain error in its jury instructions. We reverse in part, find no error in part, and vacate and remand for resentencing.

I. Background

The State's evidence tended to show the following: On 14 June 2013, Detective Daniel Barale with the Fletcher Police Department was patrolling the hotels and motels of the area. He parked at the Knights Inn Motel and was sitting in his vehicle when he saw a black Jeep pull in and park behind him. Detective Barale entered the license plate number into a program on his computer, which indicated that the license plate had been revoked and belonged to a Crown Victoria.

Detective Barale then searched for the registered owner of the Crown Victoria via the computer program and learned that Nicholas Taylor, who had an active warrant out of Buncombe County, owned the car. Detective Barale testified that around the same time, "two younger white males came out [of the Jeep] and walked right in front of me." The computer program displayed a picture of Taylor with a neck tattoo, which allowed Detective Barale to identify one of the men who walked

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in front of his car as Taylor. Detective Barale also testified that one of the men had a large, fixed-blade knife on his belt. The men walked up the stairs on the outside of the motel and entered a motel room.

After Detective Barale confirmed with dispatch that the Buncombe County warrant for Taylor was still active, he called for backup. A few minutes later, Officer Brian Fulmer arrived, and they knocked on the motel room door where Taylor and the other male had entered. Detective Barale knocked “a couple times,” and announced, “Fletcher Police,” but no one answered. Detective Barale testified that he could see through the blinds and observed Taylor and the other male sitting on the beds as well as a third person coming from the back of the room where the bathroom was located. Around that same time, Detective Barale retrieved a passkey from a maintenance worker to unlock the door, however, the chain on the inside was latched. Defendant opened the door, walked outside, and tried to shut the door behind him. Detective Barale told him “to get out of the way” and that “we had a warrant for arrest for one of the persons inside.” Detective Barale testified that defendant “tried to turn around and go back inside. I grabbed him. And we started wrestling. I took him to the ground and handcuffed him.” Detective Barale stated that he placed defendant under arrest for resisting his investigation.

Detective Barale testified as follows:

Q. Once you got handcuffs on him what did you do at that point?

A. I first did a quick pat down of him. First off, I asked him to sit down and I checked on the other officer, because I knew he had two to deal with. Once I did that, I went back to [defendant] and I asked—I patted him down. I found scales in his pocket. I retrieved the scales. And I asked him did he have anything else on him.

...

Q. And what was his response?

MR. JOHNSON: Objection.

THE COURT: Overruled.

MR. JOHNSON: I would just like to renew it on—based on the pretrial motion and due process.

THE COURT: Objection noted.

Q. Well, let me ask. What did you ask the defendant again?

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A. I asked him if he had anything else on him.

Q. And what was his response?

A. "I have weed in the room."

Q. And what did you do at that point?

A. At that point once we made sure that the other two were not going to be an issue, I helped [defendant] to his feet, and we went into the room. There is a—there was a small table right next to the room and two chairs, and I sat him down right there on those chairs. I then went into the back area of the room where the bathroom is located to make sure there was nobody else and do a quick check and make sure there are no weapons anywhere within reach of [defendant]. When I entered the bathroom, the toilet seat was up, and there was leaves, green leaves, floating in the toilet bowl and a syringe. And there was another syringe—well, appeared to be another syringe at the bottom that sunk.

Q. What did you do once you saw that?

A. At that point I left it where it was. I went back and asked [defendant] to tell me—point to me where the weed was. He went in between the two beds to a nightstand, and there was a small jewelry box.¹ He opened the jewelry box and grabbed a plastic bag, like a Ziploc bag, and there were—that contained marijuana. He then tried to close the jewelry box very quickly. But before he did, I could see that there was more in the jewelry box, including at least one glass pipe that I could see and a small baggy that had—little small clear plastic bag that had some kind of white or light tan powder.²

Q. What did you do once he tried to close that box?

A. I sat him back down on the chair and seized the box.

Q. What—once you seized the box what did you do?

1. On cross-examination, Detective Barale noted that "he was handcuffed behind his back. . . . [He] was backing up to . . . [the] jewelry box . . . so he could use his hands."

2. The powder was later identified as heroin.

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A. Looked in the box. And I believe there were actually two glass pipes in the box and two bags of marijuana, some, what we call, blunts which is an empty cigar that are used to smoke marijuana, stuff them with marijuana and smoke them. And I believe there was also one marijuana cigarette that was all ready to be smoked.

Q. What did you do once you found those items in the jewelry box? Let me back you up. Who took you to that jewelry box?

A. [Defendant] did.

Q. And what did you do once you found those items in the jewelry box?

A. I seized the jewelry box.

Q. And what did you do at that point?

A. At that point I believe I asked [defendant] what else in the room was his. I think he pointed to a backpack. And I went back to the bathroom to retrieve the evidence that was in the toilet bowl.

Q. And this was the, I believe you said, green leafy substance and the syringe?

A. Correct.

Q. What did you do once you went in there to retrieve that?

A. I got in there and I was looking for something that I could use to reach in the toilet bowl. Some hotels have those clear trash bag liners, I was looking for one of those I could put my hand in that and try to pick up stuff from the toilet bowl. So I looked up, and there was a towel rack that's facing right above the toilet. And on that I saw a wrapped toilet paper roll, and it was on its side about 45 degrees pointing to the wall. The end of it was wet. The wrapper around the toilet paper was wet. And I looked around and I saw that there was a clear plastic bag pointing—sticking out of it. And I looked at a little bit closer and I also saw it was [sic] light or white tan powder in that plastic bag.

Q. And what did you do once you found that powder?

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A. I retrieved it.

Q. What did you do at that point?

A. At that point I came back to [defendant] and I read [defendant] his *Miranda* rights.

Q. And what happened at that point?

A. I asked [defendant], you know, who the powder belonged to, if he knew anything about it. He denied. I asked him if he had bought it or sold it—I believe the way I put it: Did you buy or sell anything to Mr. Dawkins and Mr. Taylor, the other two? And he said no.

Detective Barale also found a wallet on the table where defendant was seated, which defendant admitted was his. The wallet contained two North Carolina driver's licenses: one in the name of Christopher Messer, and another in the name of Kyle Andre. When asked who they belonged to, defendant stated "it was his friends." Detective Barale also testified that defendant stated the Christopher Messer license was his own.

Detective Barale placed defendant, who was handcuffed with his hands behind his back, in Officer Fulmer's patrol vehicle. Detective Barale testified that he saw defendant looking toward him, so he opened the car door and saw a small, folded piece of paper on the floorboard that contained a "very small amount of clear crystal."³ When Detective Barale asked defendant what it was, defendant "denied knowing anything about it and told me that I had planted it in the vehicle." Officer Fulmer then transported defendant to the Henderson County jail for processing. Detective Barale presented the evidence from that day to a magistrate, who issued an order in the name of Christopher Messer. Additionally, defendant applied for and obtained an appearance bond in the name of Christopher Messer. Days later, on 17 June 2013, Officer Fulmer informed Detective Barale that the person he booked on 14 June 2013 was not Christopher Messer but was actually Christopher Crook.

Defendant's evidence tended to show that when Officer Fulmer asked defendant what his name was, he stated, "Christopher Crook." Officer Fulmer testified that he called the name, "Christopher Crook," into dispatch, and that defendant never told him that his name was Christopher Messer.

3. The crystal was later identified as methamphetamine.

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On 30 September 2013, defendant was indicted for the following charges: possession of methamphetamine, trafficking in heroin, two counts of identity theft, resisting a public officer, possession of a schedule IV controlled substance, possession of up to one half ounce of marijuana, and possession of drug paraphernalia. On 18 February 2014, defendant filed a motion to suppress statements defendant made while in custody and prior to receiving *Miranda* warnings.

The matter came on for trial at the 10 March 2014 Criminal Session of Henderson County Superior Court. After a *voir dire* examination of Detective Barale, the trial court denied defendant's motion to suppress. The jury found defendant not guilty of possession of methamphetamine and not guilty of trafficking in heroin. Defendant pleaded guilty to possession of a schedule IV controlled substance, and the jury found defendant guilty of the remaining charges. On 14 March 2014, the trial court sentenced defendant to a term of thirteen to twenty-five months for one count of identity theft and to a consecutive term of thirteen to twenty-five months for the remaining convictions. Defendant filed a petition for writ of *certiorari* on 22 January 2015, which we allowed.

II. Analysis

A. Motion to Suppress

[1] Defendant argues that the trial court erred in denying his motion to suppress his statement, "I have weed in the room." Defendant states, "To the extent the trial court concluded that [defendant] was not in custody when Detective Barale questioned him, the trial court's conclusion was unsupported by the findings and the evidence." Moreover, the statement was made in response to Detective Barale's direct questioning.

"The standard of review when appealing from a trial court's ruling on a motion to suppress is that 'the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. The trial court's conclusions of law, however, are fully reviewable.'" *State v. Evans*, 201 N.C. App. 572, 574, 688 S.E.2d 25, 26–27 (2009) (quoting *State v. Green*, 194 N.C. App. 623, 626, 670 S.E.2d 635, 637 (2009)).

Here, the trial court found that the "officer was searching the defendant for his own safety and was not conducting an in-custody interrogation at that time." It concluded that the "officer was reasonable based on the particular circumstances of placing the defendant under arrest to inquire as to whether or not the defendant had any other objects on him. And the response of the defendant was voluntarily made, that the marijuana

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or weed, end quote, was the marijuana of the defendant.” The trial court concluded that “this question asked by the officer prior to the *Miranda* rights being given to the defendant was not a custodial interrogation.”

In *Miranda v. Arizona*, the Supreme Court held, “[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966). The Court explained, “By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Id.* The North Carolina Supreme Court has likewise confirmed that “the rule of *Miranda* applies only where a defendant is subjected to custodial interrogation.” *State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 404 (1997) (citation omitted).

We have previously stated that “the determination of whether a defendant was in custody is a question of law, [and] it is fully reviewable here.” *State v. Fisher*, 158 N.C. App. 133, 145, 580 S.E.2d 405, 415 (2003) (citing *State v. Briggs*, 137 N.C. App. 125, 128, 526 S.E.2d 678, 680 (2000)), *aff’d*, 358 N.C. 215, 593 S.E.2d 583 (2004). In determining if a suspect is in custody, “the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest.” *Gaines*, 345 N.C. at 662, 483 S.E.2d at 405 (citing *Stansbury v. California*, 511 U.S. 318, 128 L. Ed. 2d 293 (1994)).

Here, as found by the trial court, immediately following the scuffle with Detective Barale, defendant was handcuffed behind his back and placed under arrest for resisting a public officer. Accordingly, because defendant was under formal arrest, he was in custody. *Gaines*, 345 N.C. at 662, 483 S.E.2d at 405. The trial court erred inasmuch as it concluded defendant was not in custody.

“[T]he trial court’s determination of whether an interrogation is conducted while a person is in custody involves reaching a conclusion of law, which is fully reviewable on appeal.” *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citing *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992)). In *Rhode Island v. Innis*, the Supreme Court discussed the meaning of interrogation and concluded that “the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.” 446 U.S. 291, 300–01, 64 L. Ed. 2d 297, 307–08 (1980). In this case, because Detective Barale asked defendant an express question, we need

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not determine whether Detective Barale's conduct amounted to the "functional equivalent." See *id.* at 301, 64 L. Ed. 2d at 308 (noting that the functional equivalent includes "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect"); *Fisher*, 158 N.C. App. at 142, 580 S.E.2d at 413.

Here, after Detective Barale handcuffed defendant, placed him under arrest, and conducted a pat-down which led to the recovery of a digital scale, he expressly asked defendant, "Do you have anything else on you?" Defendant, in custody in front of the doorway to the motel room, stated, "I have weed in the room." Accordingly, because defendant was subjected to express questioning while he was in custody, under *Miranda*, he was entitled to procedural safeguards informing him of, *inter alia*, his right to remain silent. As defendant did not receive *Miranda* warnings, the prosecution was not permitted to use defendant's statement stemming from the custodial interrogation. *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 706. Therefore, the trial court erred in concluding that defendant was not subject to custodial interrogation and in denying defendant's motion to suppress his statement.

We disagree with the State's argument that the public safety exception established in *New York v. Quarles*, 467 U.S. 649, 81 L. Ed. 2d 550 (1984), applies. In that case, a woman approached two officers' patrol vehicle and informed them that she had just been raped, and that the man, whom she described to the officers, had just entered an A&P supermarket located nearby and was carrying a gun. *Id.* at 651-52, 81 L. Ed. 2d at 554. The officers drove to the supermarket, spotted a man who matched the description, and pursued him as he ran toward the rear of the store. *Id.* at 652, 81 L. Ed. 2d at 554. As one of the officers placed the man in custody, he noticed the man was wearing an empty shoulder holster, so he asked him where the gun was. *Id.* In holding that the state court erred in excluding the suspect's response to the question, the Supreme Court recognized "a narrow exception to the *Miranda* rule" when it concluded that "there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence[.]" *Id.* at 658, 655, 81 L. Ed. 2d at 558, 557.

The facts of this case are noticeably distinguishable from those in *Quarles*. Here, "the need for answers to questions" did not pose a threat to the public safety, outweighing the need for a rule protecting defendant's privilege against self-incrimination. *Id.* at 657, 81 L. Ed. 2d at 558. Defendant was not suspected of carrying a gun or other weapon. Rather, he was sitting on the ground in handcuffs and he had already

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been “patted down,” which produced only a digital scale. Moreover, in *Quarles*, immediately after securing the loaded revolver, the officer advised the suspect of his rights before continuing with “investigatory questions about the ownership[.]” *Id.* at 659, 81 L. Ed. 2d at 559. In contrast, here, the officers conducted a full search of the motel room and posed further investigatory questions to defendant, including asking him to reveal everything he owned in the motel room, before ultimately reading him his rights. Accordingly, we reject the State’s argument that the public safety exception should apply in this case. *See State v. Crudup*, 157 N.C. App. 657, 661, 580 S.E.2d 21, 25 (2003) (holding that the “circumstances in this case exceed the narrow scope of the public safety exception [as] [d]efendant was handcuffed[,] . . . surrounded by three officers[,] and [t]here was no risk of imminent danger to the public, the officers, or even to the defendant”).

[2] For the following reasons, defendant has established he was prejudiced by the trial court’s error in refusing to exclude his statement. “A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” N.C. Gen. Stat. § 15A-1443 (2015).⁴

In *State v. Phelps*, this Court concluded that the trial court erred in admitting the defendant’s statement because the officer failed to advise the defendant of his *Miranda* warnings prior to the custodial interrogation. 156 N.C. App. 119, 123, 575 S.E.2d 818, 821 (2003), *rev’d*, 358 N.C. 142, 592 S.E.2d 687 (2004). Nonetheless, we held that there was “no reasonable possibility that the exclusion of defendant’s statement would have resulted in a different verdict.” *Id.* at 124, 575 S.E.2d at 822. Judge Hunter, dissenting in part, maintained that “the admission of defendant’s statement to [the officer] that he had some crack in his coat pocket was highly inflammatory on the issue of whether defendant knowingly possessed the cocaine” and the State’s evidence, excluding the defendant’s statement, was “hardly overwhelming.” *Id.* at 127, 575 S.E.2d at 824 (Hunter, J., dissenting in part). He wrote, “In fact, the only evidence

4. *See United States v. Patane*, 542 U.S. 630, 636, 159 L. Ed. 2d 667, 674 (2004) (holding that “the *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause”); *Oregon v. Elstad*, 470 U.S. 298, 309, 84 L. Ed. 2d 222, 232 (1985) (discussing the prophylactic *Miranda* procedures); *State v. Goodman*, 165 N.C. App. 865, 868–69, 600 S.E.2d 28, 30–31 (2004). *But see Dickerson v. United States*, 530 U.S. 428, 444, 147 L. Ed. 2d 405, 420 (2000) (holding that “*Miranda* announced a constitutional rule”).

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against defendant is that cocaine, discovered as a result of a *Miranda* violation, was found inside the coat defendant was wearing. Thus, without the admission of defendant's incriminating statement, there is a reasonable possibility that the jury would have had reasonable doubt as to whether defendant knowingly possessed the cocaine and returned a different verdict." *Id.* at 127–28, 575 S.E.2d at 824. Our Supreme Court reversed for the reasons stated in Judge Hunter's dissenting opinion. 358 N.C. 142, 592 S.E.2d 687 (2004).

Here, like in *Phelps*, the State did not present "overwhelming evidence," excluding defendant's statement, which linked him to the marijuana and corresponding drug paraphernalia found in the same location. Defendant was acquitted of the charges for other drugs to which he did not admit ownership, two other people were in the motel room when officers arrived, and a fourth individual rented the motel room. Accordingly, there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. N.C. Gen. Stat. § 15A-1443.

B. Jury Instruction

[3] Defendant argues, "The trial court erroneously gave peremptory instructions on both counts of identity theft that 'the driver's license of Christopher Michael Messer would be personal identifying information' when a driver's license does not qualify as 'identifying information' under the identity theft statute." Defendant contends that N.C. Gen. Stat. § 14-113.20(b)(2) states that "identifying information" includes only a driver's license *number*. Defendant claims that because "the instructions lessened the State's burden of proof and the evidence was conflicting, the erroneous jury instructions had a probable impact on the jury's verdicts."

The State contends, "Defendant's argument fails to acknowledge that a North Carolina driver[']s license holder's driver[']s license number appears on an actual North Carolina driver[']s license." Alternatively, the State argues that "a driver[']s license is personal identifying information under N.C.G.S. § 14-113.20(b)(10) as '[a]ny other . . . information that can be used to access a person's financial resources.'"

"A defendant who does not object to jury instructions at trial will be subject to a plain error standard of review on appeal." *State v. Oakman*, 191 N.C. App. 796, 798, 663 S.E.2d 453, 456 (2008) (citing *State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (2005)); N.C. R. App. P. 10(a)(4) (2009). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State*

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v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). “To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” *Id.* (citation and quotation marks omitted).

Defendant was charged with two counts of identity theft under N.C. Gen. Stat. § 14-113.20, which provides as follows:

(a) A person who knowingly obtains, possesses, or uses identifying information of another person, living or dead, with the intent to fraudulently represent that the person is the other person for the purposes of making financial or credit transactions in the other person’s name, to obtain anything of value, benefit, or advantage, or for the purpose of avoiding legal consequences is guilty of a felony punishable as provided in G.S. 14-113.22(a).

(b) The term “identifying information” as used in this Article includes the following:

(1) Social security or employer taxpayer identification numbers.

(2) Drivers license, State identification card, or passport numbers.

....

(10) Any other numbers or information that can be used to access a person’s financial resources.

N.C. Gen. Stat. § 14-113.20 (2015).

As to the first count of identity theft, the trial court stated in pertinent part that “the driver’s license of Christopher Michael Messer would be personal identifying information.” Regarding the second count, the trial court stated that “the driver’s license and Social Security number of Christopher Michael Messer would be personal identifying information.”

The evidence shows that defendant possessed Christopher Messer’s driver’s license in his own wallet. After defendant was arrested, Detective Barale entered Christopher Messer’s driver’s license number into the computer system so that the magistrate could issue arrest warrants in that name, and defendant accepted service of the arrest warrants in Christopher Messer’s name. Defendant then used Christopher Messer’s name, social security number, and driver’s license number on his application for an appearance bond, which was accepted.

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In light of the overwhelming evidence presented, the jury instruction did not have a probable impact on the jury's verdict, and defendant cannot establish plain error. Christopher Messer's driver's license included the driver's license number. Moreover, even if failing to include the word "number" after "driver's license" in the instruction was error under N.C. Gen. Stat. § 14-113.20(b)(2), the driver's license constitutes "any other . . . information that can be used to access a person's financial resources" under N.C. Gen. Stat. § 14-113.20(b)(10).

C. Sentencing

[4] Defendant argues that the trial court erred by including the probation, parole, or post-release supervision point and sentencing him as a prior record level II offender because the State did not provide him with notice of intent under N.C. Gen. Stat. § 15A-1340.16(a6). Defendant contends this case is controlled by *State v. Snelling*, 231 N.C. App. 676, 752 S.E.2d 739 (2014).

"The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citing *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007)). "It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review." *Id.* (citing *State v. Morgan*, 164 N.C. App. 298, 304, 595 S.E.2d 804, 809 (2004); N.C. Gen. Stat. § 15A-1446(d)(5), (d)(18)).

Pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7) (2015), a trial court can assess one prior record level point "[i]f the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment[.]" The statute further states, "G.S. 15A-1340.16(a5) specifies the procedure to be used to determine if a point exists under subdivision (7) of this subsection. The State must provide a defendant with written notice of its intent to prove the existence of the prior record point under subdivision (7) of this subsection as required by G.S. 15A-1340.16(a6)." N.C. Gen. Stat. § 15A-1340.14(b).

N.C. Gen. Stat. § 15A-1340.16 (a6) (2015), "Notice of Intent to Use Aggravating Factors or Prior Record Level Points," states,

The State must provide a defendant with written notice of its intent to prove the existence of . . . a prior record level point under G.S. 15A-1340.14(b)(7) at least 30 days before

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trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice.

The State contends that “defendant’s prior record level worksheet was made available to [him] in discovery on 8 August 2013, more than 30 days prior to the trial. . . . As such, the defendant was provided notice of his prior record level calculation of a prior record level II with two prior record level points[.]” The State also argues that by stipulating that he was a prior record level II offender for sentencing, with one sentencing point not related to a prior conviction, defendant “consented to the calculation and waived any notice requirements[.]” The State’s position, however, has already been rejected by this Court in *State v. Williams*, No. COA11-1256, 2012 WL 1317821 (N.C. Ct. App. Apr. 17, 2012).

In *Williams*, the defendant filed a motion alleging that the State had failed to provide sufficient notice of its intent to attempt to establish the existence of a prior record point authorized by N.C. Gen. Stat. § 15A-1340.14(b)(7). *Id.* at *2. The trial court agreed, concluding, “[T]he prior record level worksheet that the State had provided to Defendant in discovery did not constitute written notice of the State’s intent to prove that Defendant had committed the offense for which he was being sentenced while on probation.” *Id.* This Court affirmed, stating, “At most, this prior record worksheet constituted a possible calculation of Defendant’s prior record level and did not provide affirmative notice that the State intended to prove the existence of the prior record point authorized by N.C. Gen. Stat. § 15A-1340.14(b)(7) as required by N.C. Gen. Stat. § 15A-1340.16(a6).” *Id.* at *7. We noted that the State “had the ability to comply with the statute using regular forms promulgated for this specific purpose by the Administrative Office of the Courts.” *Id.* (quoting *State v. Mackey*, 209 N.C. App. 116, 121, 708 S.E.2d 719, 722 (2011)).

In *State v. Snelling*, we held that the trial court erred in sentencing the defendant as a prior record level III because it failed to comply with N.C. Gen. Stat. § 15A-1340.16(a6). 231 N.C. App. at 682, 752 S.E.2d at 744. Because the trial court did not determine if the statutory requirements of N.C. Gen. Stat. § 15A-1340.16(a6) were met, no evidence showed that the State provided notice of its intent to prove that probation point, and no evidence indicated that defendant waived his right to receive such notice, we found prejudicial error and remanded for resentencing. *Id.* at 682–83, 752 S.E.2d at 744. As defendant points out, the defendant in *Snelling* also stipulated to his prior record level points, including one point for an offense committed while he was on probation. *Id.* at 678, 752 S.E.2d at 742.

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Here, like in *Snelling*, the trial court did not determine that the State had provided notice of its intent to prove defendant committed the crimes charged while on probation, parole, or post-release supervision. Additionally, like in *Williams*, assuming that the State had included defendant's prior record level worksheet in discovery, such action does not constitute "written notice of its intent to prove the existence of . . . a prior record level point under G.S. 15A-1340.14(b)(7)." N.C. Gen. Stat. § 15A-1340.16(a6). Moreover, no evidence shows defendant waived such notice.

Acknowledging that *Williams* is not controlling legal authority as it is an unpublished case,⁵ we decline the State's invitation to reach a different conclusion here. Moreover, we do not find merit in the State's distinction that unlike in *Williams*, the prior record level calculation here was "typewritten on the prior record level worksheet, rather than handwritten, which indicates permanency." The trial court erred by including the probation point in sentencing defendant as a prior record level II offender. This error was prejudicial because the additional point raised defendant's prior record level from I to II.

III. Conclusion

The trial court erred in denying defendant's motion to suppress his statement, "I have weed in the room." Accordingly, we reverse and remand for a new trial on the possession of marijuana and drug paraphernalia charges. The trial court did not commit plain error in its jury instructions on identity theft. The trial court committed prejudicial error by including the probation point in sentencing defendant as a prior record level II offender. Therefore, we vacate defendant's sentence, and we remand to the trial court for resentencing.

REVERSED IN PART; NO ERROR IN PART; VACATED AND REMANDED.

Judges McCULLOUGH and INMAN concur.

5. See N.C. R. App. P. 30(e)(3) ("An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority.").

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STATE OF NORTH CAROLINA

v.

RICHARD DULIN, III, DEFENDANT

No. COA15-547

Filed 7 June 2016

1. Drugs—possession of drug paraphernalia—motion to dismiss—constructive possession—plain view

The trial court did not err by denying defendant's motion to dismiss the charge of possession of drug paraphernalia. Viewing the evidence in the light most favorable to the State, the evidence supported an inference that the police found the drug paraphernalia in plain view in a common living area where defendant, as a resident of the house, exercised nonexclusive control. Further, the State proffered sufficient evidence to establish defendant's constructive possession of the drug paraphernalia seized from the house.

2. Drugs—possession of marijuana with intent to sell or deliver—motion to dismiss—uncovered fishing boat in yard

The trial court erred by denying defendant's motion to dismiss the charge of possession of marijuana with intent to sell or deliver. The State failed to proffer sufficient evidence linking defendant to the marijuana found in an uncovered fishing boat in the yard. The case was remanded for resentencing.

Appeal by defendant from judgments entered on or about 11 September 2014 by Judge A. Moses Massey in Superior Court, Forsyth County. Heard in the Court of Appeals on 21 October 2015.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Karen A. Blum, for the State.

Kimberly P. Hoppin for defendant-appellant.

STROUD, Judge.

Richard Dulin, III ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of possession with the intent to sell or deliver marijuana and possession of drug paraphernalia. Defendant contends that the trial court erred in denying his motion to dismiss. We find no error in part, vacate in part, and remand.

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I. Background

Around noon on 10 January 2012, Officers Shuskey and Honaker began watching a house in Winston-Salem. At 12:01 p.m., the officers observed a man working on a white truck in the carport of the house. Officer Honaker noted that at some point, the white truck left the house, but he did not record whether the man left the house. Between 12:01 p.m. and 1:38 p.m., several people traveled to and from the house, by either car, moped, bicycle, or on foot, each spending only a few minutes at the house. At 1:39 p.m., defendant left the house driving a black truck. During defendant's absence, there was no activity at the house, other than a man who briefly walked in front of it. At 3:02 p.m., defendant returned in the black truck and parked it in front of the house. At 3:09 p.m., a man on a bicycle arrived and approached defendant in front of the house. The two men shook hands "as if they were passing an item back and forth."

A few minutes later, another man walked by the police officers and noticed their presence. He walked over to defendant and pointed out their location to him. Defendant immediately began using his cell phone. Defendant then got in the truck, drove it behind the house, and then returned a minute later, parking it in front of the house again. Defendant began washing the truck while the man who had informed him of the officers' location began raking leaves in the yard.

Officers Shuskey and Honaker, along with other police officers, detained defendant and the other man while they were working in the front yard and began searching for drugs. Defendant admitted to one of the police officers that he had a "blunt" in the black truck. Officer Shuskey searched the black truck that defendant had been driving and washing and found a small bag of marijuana in the console. Another police officer searched one of the house's multiple bedrooms and found marijuana located in a picture frame behind a photograph of defendant. The police officer also found a feminine deodorant bar in the bedroom.

Officer Barker searched a different room of the house which appeared to be a common living area as it had a television, couch, bookcases, and other "general furniture items[.]" There, he found a marijuana grinder, a digital scale with residue on it, \$400 in cash tucked between books on a bookshelf, packaging material, plastic bags, and some clear glass jars which had a green leafy residue and smelled of unburnt marijuana. Officer Barker testified that the digital scale was in plain view and that the marijuana grinder was on the bookshelf where he found the cash.

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Another police officer searched the kitchen and found an off-white powdery substance splattered in a microwave and on razor blades lying on the kitchen counter. At trial, Amanda Battin, a forensic scientist, testified that there was cocaine residue on one of the razor blades. In their search, the police officers also found a piece of mail addressed to defendant at the house's address, as well as a photograph of defendant and another person.

Sergeant McDonald searched a part of the yard, to the right of the house, where Officers Shuskey and Honaker had observed defendant driving the truck. There, he found an uncovered "flat-bottom style fishing boat" on a trailer that was located in an open, unfenced area roughly seventy feet from the side of the house. He also observed a "freestanding swing" somewhere between the house and the boat. In plain view under the boat's steering console, he found four or five individually packaged bags of marijuana, all contained within a large foil package. At trial, Officer Honaker opined that this marijuana was packaged for sale, and Ms. Battin testified that the total amount of marijuana recovered during the search was more than one half of an ounce. Officers Shuskey and Honaker did not testify that they observed defendant near the boat, nor did they testify that they heard defendant leave the truck when he was out of their view or do anything that would indicate that he may have hidden the marijuana in the boat. The police did not check to whom the boat was registered.

On or about 4 June 2012, a grand jury indicted defendant for possession with intent to sell or deliver marijuana, felony possession of cocaine, and possession of drug paraphernalia. *See* N.C. Gen. Stat. §§ 90-95(a)(1), (3), -113.22 (2011). At trial, defendant moved to dismiss at the close of the State's evidence and at the close of all the evidence, and the trial court denied both motions. On or about 10 September 2014, a jury found defendant guilty of possession with intent to sell or deliver marijuana and possession of drug paraphernalia and not guilty of possession of cocaine. On or about 11 September 2014, the trial court entered consecutive sentences of six to 17 months of imprisonment for the offense of possession with intent to sell or deliver marijuana and 120 days of imprisonment for the offense of possession of drug paraphernalia. The trial court suspended the two sentences and placed defendant on 36 months of supervised probation, which included an active term of 120 days of imprisonment as a condition of special probation. Defendant gave notice of appeal in open court.

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II. Motion to Dismiss

[1] Defendant solely contends that the trial court erred in denying his motion to dismiss because insufficient evidence established that he actually or constructively possessed drug paraphernalia or marijuana with intent to sell or deliver.

A. Standard of Review

Evidence is sufficient to sustain a conviction when, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, there is substantial evidence to support a jury finding of each essential element of the offense charged, and of defendant's being the perpetrator of such offense.

Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility. Evidence is not substantial if it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, and the motion to dismiss should be allowed even though the suspicion so aroused by the evidence is strong. This Court reviews the denial of a motion to dismiss for insufficient evidence *de novo*.

State v. Robledo, 193 N.C. App. 521, 524-25, 668 S.E.2d 91, 94 (2008) (citations, quotation marks, brackets, and ellipses omitted). "In deciding whether the trial court's denial of [a] defendant's motion to dismiss violated [the] defendant's due process rights, this Court must determine whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Penland*, 343 N.C. 634, 648, 472 S.E.2d 734, 741 (1996) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573 (1979)), *cert. denied*, 519 U.S. 1098, 136 L. Ed. 2d 725 (1997).

B. Possession of Drug Paraphernalia

A person is in "possession" of a controlled substance within the meaning of G.S. 90-95 if they have the power and intent to control it; possession need not be actual. The State is not required to prove that the defendant owned

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the controlled substance . . . or that defendant was the only person with access to it.

. . . Where control of the premises is nonexclusive, however, constructive possession may not be inferred without other incriminating circumstances.

State v. Rich, 87 N.C. App. 380, 382, 361 S.E.2d 321, 323 (1987) (citations and quotation marks omitted).

Incriminating circumstances relevant to constructive possession

include evidence that defendant: (1) owned other items found in proximity to the contraband; (2) was the only person who could have placed the contraband in the position where it was found; (3) acted nervously in the presence of law enforcement; (4) resided in, had some control of, or regularly visited the premises where the contraband was found; (5) was near contraband in plain view; or (6) possessed a large amount of cash.

Evidence of conduct by the defendant indicating knowledge of the controlled substance or fear of discovery is also sufficient to permit a jury to find constructive possession. Our determination of whether the State presented sufficient evidence of incriminating circumstances depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the questions will be for the jury.

State v. Alston, 193 N.C. App. 712, 716, 668 S.E.2d 383, 386-87 (2008) (citations, quotation marks, and emphasis omitted), *aff'd per curiam*, 363 N.C. 367, 677 S.E.2d 455 (2009).

In *Rich*, the defendant argued that insufficient evidence established that she possessed cocaine, which the police had found in the bedroom of a house. *Rich*, 87 N.C. App. at 382, 361 S.E.2d at 323. The State proffered evidence that

defendant was seen on the premises the evening before [the search], that on the night of her arrest she was cooking dinner at the house when the agents arrived, that women's casual clothes and undergarments were found in the bedroom [where the cocaine was found], and that mail

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addressed to defendant, including an insurance policy listing the house as her residence, was found in the house.

Id. This Court held that this evidence was sufficient to show that the defendant had nonexclusive control of the premises. *Id.* This Court held that the State also proffered evidence of “other incriminating circumstances” by establishing “more than [the] defendant’s mere residence in the house.” *Id.* at 382-83, 361 S.E.2d at 323. The State’s “evidence showed that [the] defendant was present on the premises when the cocaine was found, that women’s clothes and undergarments were in the room and in the dresser where the cocaine was found, and that letters with [the] defendant’s name on them were also found in the room.” *Id.* at 382, 361 S.E.2d at 323.

Here, the State established defendant’s nonexclusive control of the house by introducing the following evidence: (1) defendant spent hours at the house on the day of the search, either inside it or in the front yard washing the black truck; (2) the police found a piece of mail addressed to defendant at the house’s address; (3) the police found photographs of defendant inside the house; and (4) several people visited the house while defendant was present, but no one visited the house while defendant was absent, other than a man who briefly walked in front of it. *See id.*

Officer Barker found the drug paraphernalia in a room in “the southern part of the house” which appeared to be a common living area as it had a television, couch, bookcases, and other “general furniture items[.]” In describing this room, Officer Barker did not mention a bed or anything akin to bedroom furniture. But later Officer Barker testified that he found the drug paraphernalia in “the southern bedroom[.]” The jury could have reasonably inferred that defendant and any other residents treated this room as a common living area even though it may have been constructed as a bedroom. Officer Barker also testified that the digital scale was in plain view and that the marijuana grinder was on the bookshelf where he found the cash. Viewing the evidence in the light most favorable to the State and giving the State every reasonable inference therefrom, we hold that the evidence supports an inference that the police found the drug paraphernalia in plain view in a common living area where defendant, as a resident of the house, exercised non-exclusive control. *See Robledo*, 193 N.C. App. at 524-25, 668 S.E.2d at 94.

In addition, the following evidence constitutes “other incriminating circumstances” which prove “more than defendant’s mere residence in the house”: (1) defendant spent hours at the house on the day of the search, either inside it or in the front yard washing the black truck;

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(2) the defendant admitted to the police that he had a “blunt” in the black truck, which was parked in front of the house, and the police found marijuana in the black truck’s console; (3) the police found marijuana in the house behind a photograph of defendant; and (4) several people visited the house while defendant was there, including a man who shook hands with defendant “as if they were passing an item back and forth.” *See Rich*, 87 N.C. App. at 382-83, 361 S.E.2d at 323 (holding that evidence which showed that the “defendant was present on the premises when the cocaine was found,” along with other evidence, constituted evidence of “other incriminating circumstances”). We find most significant the fact that the police found marijuana in a picture frame behind a photograph of defendant.¹ We conclude that

[a]lthough the evidence tends to show that defendant shared the house with at least one other individual, *considering the totality of the circumstances*, a reasonable inference may be drawn that defendant had the power to control the use and disposition of the [drug paraphernalia] since it was located in a common area of his residence.

See State v. Baldwin, 161 N.C. App. 382, 392, 588 S.E.2d 497, 505 (2003) (emphasis added); *Alston*, 193 N.C. App. at 716, 668 S.E.2d at 386-87 (“Our determination of whether the State presented sufficient evidence of incriminating circumstances depends on the totality of the circumstances in each case.” (citation and quotation marks omitted)).

Defendant argues that the fact that the police found marijuana behind a photograph of himself “suggests as much that someone else residing in the home had a picture of [defendant] as it did that [defendant] would have had a framed picture of himself by his bed.” Defendant also points to the fact that a police officer found a feminine deodorant bar in that bedroom. But in reviewing a motion to dismiss, we view the evidence “in the light most favorable to the State” and give the State “every reasonable inference therefrom[.]” *See Robledo*, 193 N.C. App. at 524, 668 S.E.2d at 94 (citation omitted). We hold that the jury could have reasonably inferred from the evidence as a whole that defendant had nonexclusive control of the house. *See id.*

Defendant also argues that while the evidence might have been sufficient to support defendant’s control over the black truck and therefore

1. We note that it appears from the record that defendant was not indicted for simple possession of marijuana, and the State did not proffer evidence of the amount of this marijuana although it almost certainly was not large given its location.

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over the marijuana found in the truck's console, there was insufficient evidence "establishing his exclusive control over the home[.]" But in order to establish constructive possession, the State need not prove *exclusive* control; it is sufficient to prove nonexclusive control plus other incriminating circumstances. *See Rich*, 87 N.C. App. at 382-83, 361 S.E.2d at 323. As discussed above, we hold that the State proffered evidence of defendant's nonexclusive control of the house plus other incriminating circumstances.

Defendant relies on *State v. McLaurin*, 320 N.C. 143, 357 S.E.2d 636 (1987). But *McLaurin* is distinguishable. There, the State proffered evidence that the defendant lived at a house with other individuals, where the police had found drug paraphernalia, but the State presented no additional evidence relating to the defendant. *McLaurin*, 320 N.C. at 146, 357 S.E.2d at 638. Our Supreme Court held that "because [the] defendant's control over the premises in which the [drug] paraphernalia were found was nonexclusive, and because *there was no evidence of other incriminating circumstances linking her to those items*, her control was insufficiently substantial to support a conclusion of her possession of the seized paraphernalia." *Id.* at 147, 357 S.E.2d at 638 (emphasis added).

In contrast, here, the State proffered evidence of "other incriminating circumstances" linking defendant to the drug paraphernalia found in plain view in a common living area of the house: (1) defendant spent hours at the house on the day of the search, either inside it or in the front yard washing the black truck; (2) the defendant admitted to the police that he had a "blunt" in the black truck, which was parked in front of the house, and the police found marijuana in the black truck's console; (3) the police found marijuana in the house behind a photograph of defendant; and (4) several people visited the house while defendant was there, including a man who shook hands with defendant "as if they were passing an item back and forth." *See Rich*, 87 N.C. App. at 382-83, 361 S.E.2d at 323. Following *Rich*, we hold that the State proffered sufficient evidence to establish defendant's constructive possession of the drug paraphernalia seized from the house. *See id.* Accordingly, we hold that the trial court did not err in denying defendant's motion to dismiss with respect to the charge of possession of drug paraphernalia.

C. Possession of Marijuana with Intent to Sell or Deliver

[2] Defendant next argues that the trial court erred in denying his motion to dismiss with respect to the charge of possession of marijuana with intent to sell or deliver, because the State failed to proffer

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sufficient evidence linking him to the marijuana found in the uncovered fishing boat.

The State produced no evidence linking defendant to the marijuana found in the boat other than the evidence that the boat was present in the yard. Sergeant McDonald testified that the boat was located roughly seventy feet from the side of the house and within the “curtilage” of the house. It is not clear why he used this term, but it is possible that the search warrant for the house also authorized a search of the curtilage so he described the boat as being within the curtilage and thus within the scope of the search warrant.² “Curtilage” is a term of art which is normally used in cases raising Fourth Amendment issues from a search and seizure without a warrant in an area near a defendant’s residence. In that context, our Supreme Court has noted:

The curtilage is the area immediately surrounding and associated with the home. In a non-Fourth Amendment case, we have said “the curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings.” *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955) (citations omitted). The curtilage does enjoy some measure of Fourth Amendment protection, . . . because it is intimately linked to the home, both physically and psychologically[.] As such, it serves as the buffer between the intimate activities of the home and the prying eyes of the outside world. But, law enforcement is not required to turn a blind eye to contraband or otherwise incriminating materials left out in the open on the curtilage. Neither is law enforcement absolutely prohibited from crossing the curtilage and approaching the home, based on our society’s recognition that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers[.]

As a buffer, the curtilage protects privacy interests and prevents unreasonable searches on the curtilage.

2. The search warrant is not in our record and defendant has not raised any argument regarding the scope of the search conducted under the search warrant, and we express no opinion upon that issue. We discuss the use of the term “curtilage” only because it was used in the evidence and because the State relies upon this term in its argument that the boat was within defendant’s area of constructive possession.

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State v. Grice, 367 N.C. 753, 759-60, 767 S.E.2d 312, 317-18 (citations, quotation marks, and ellipsis omitted), *cert. denied*, ___ U.S. ___, 192 L. Ed. 2d 882 (2015). “The 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 [the] home itself for Fourth Amendment purposes.” *State v. Smith*, ___ N.C. App. ___, ___, 783 S.E.2d 504, 511 (No. COA 15-305) (Mar. 1, 2016) (brackets omitted) (quoting *Oliver v. United States*, 466 U.S. 170, 180, 80 L. Ed. 2d 214, 225 (1984)).

The protection afforded to curtilage under the privacy interest of [the] 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.”

Id. at ___ n.2, ___ S.E.2d at 511 n.2 (quoting *United States v. Dunn*, 480 U.S. 294, 301, 94 L. Ed. 2d 326, 334-35 (1987)).

In *Grice*, police officers who approached the door of the defendant’s home for a “knock and talk” noticed some plants growing in containers in an unfenced area about fifteen yards from the residence. 367 N.C. at 754-55, 767 S.E.2d at 314-15. The officers recognized the plants as marijuana, seized them, and later arrested the defendant. *Id.* at 755, 767 S.E.2d at 315. The defendant argued that evidence of the plants should have been suppressed because the officers’ warrantless search and seizure of the plants violated the Fourth Amendment, as the plants were within the curtilage of his home and thus were protected. *Id.* at 757-59, 767 S.E.2d at 316-17. Our Supreme Court rejected this argument, concluding “that the unfenced portion of the property fifteen yards from the home and bordering a wood line is closer in kind to an open field than it is to the paradigmatic curtilage which protects ‘the privacies of life’ inside the home.” *Id.* at 760, 767 S.E.2d at 318 (quoting *Oliver*, 466 U.S. at 180, 80 L. Ed. 2d at 225).

Sergeant McDonald’s testimony characterizing the boat as within the “curtilage” of the house does not make it so. His testimony in this regard is more of a legal conclusion than a factual description of the premises, and we note that on appeal, the State makes no argument in support of his conclusion. The facts in evidence cannot support his conclusion that the boat was actually within the curtilage. The evidence showed that the

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boat was out in the open, in an unfenced area of the yard about seventy feet from the home. There was no evidence that this area of the yard was in any way “intimately linked to the home,” either “physically [or] psychologically[.]” See *id.* at 759, 767 S.E.2d at 317 (quoting *California v. Ciraolo*, 476 U.S. 207, 212-13, 90 L. Ed. 2d 210, 216 (1986)). In fact, the boat was farther from defendant’s home than the marijuana plants were from the home of the defendant in *Grice* and was also located in an open, unfenced area. See *id.* at 754-55, 767 S.E.2d at 314-15. In addition, all four *Dunn* factors militate against a conclusion that the boat was within the house’s curtilage. See *Dunn*, 480 U.S. at 301, 94 L. Ed. 2d at 334-35. Thus, the boat was not in an area “intimately” associated with the home and could not be connected to defendant simply based upon its location in the yard. See *Grice*, 367 N.C. at 759, 767 S.E.2d at 317 (citation omitted).

Nor was there any evidence to show that defendant had any ownership interest in or possession of the boat, even assuming that it was in his yard. Sergeant McDonald testified that the boat was located in a part of the yard which defendant had driven through when driving the truck behind the house, as observed by Officers Shuskey and Honaker. But Officers Shuskey and Honaker did not testify that they observed defendant near the boat, nor did they testify that they heard defendant leave the truck when he was out of their view or do anything that would indicate that he may have hidden the marijuana in the boat. As best we can tell from the testimony, Officers Shuskey and Honaker observed defendant driving through the right side of the yard, disappearing behind the house, and then driving back to the front, but there is no evidence that defendant stopped at the boat or hid anything in the boat, and the officers testified that he was aware of their presence at that point.³ In addition, the police did not check to whom the boat was registered, and Sergeant McDonald testified that the boat was uncovered. The house had multiple bedrooms, and Officer Honaker testified that at 12:01 p.m., he had observed another man working on a white truck in the carport of the house, so the boat may have belonged to someone else residing in the home. But there was no evidence regarding the ownership or use of the boat or of any items found within the boat which could have connected it to defendant or anyone else. And even if the boat had been

3. Using a map, Officer Shuskey clarified the two locations from which he and Officer Honaker observed defendant, but we do not have this map in the record on appeal. Nevertheless, we have carefully reviewed their testimony and have given the State the benefit of every reasonable inference based upon their descriptions. See *Robledo*, 193 N.C. App. at 524-25, 668 S.E.2d at 94.

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within the curtilage, it still does not automatically follow that defendant had actual or constructive possession of every item within the curtilage, just as the fact that if an item is found in a house where a defendant and other people live does not mean that the defendant automatically had actual or constructive possession of that item.

The “other incriminating circumstances” as noted above are not particularly strong, even for the drug paraphernalia, and are simply too weak to connect defendant to the marijuana found in the boat so far from the house. Those circumstances were, as noted above, that (1) defendant spent hours at the house on the day of the search, either inside it or in the front yard washing the black truck; (2) the defendant admitted to the police that he had a “blunt” in the black truck, which was parked in front of the house, and the police found marijuana in the black truck’s console; (3) the police found marijuana in the house behind a photograph of defendant; and (4) several people visited the house while defendant was there, including a man who shook hands with defendant “as if they were passing an item back and forth.” See *Rich*, 87 N.C. App. at 382-83, 361 S.E.2d at 323.

These circumstances generally tend to show that defendant did reside in the house, but most significant is the fact that the police found marijuana in a picture frame behind a photograph of defendant. As noted above, defendant argues that it is unlikely that a person would display a photograph of himself and that he would hide his own marijuana behind it, but a jury could certainly infer that defendant himself did this. See *Robledo*, 193 N.C. App. at 524, 668 S.E.2d at 94. That fact thus provides some evidence of other incriminating circumstances linking defendant to the drug paraphernalia found in the house, but it cannot connect defendant to something found in an open boat in the yard so far from the house. We therefore hold that the State failed to present sufficient evidence of defendant’s constructive possession of the marijuana found in the boat. See *McLaurin*, 320 N.C. at 147, 357 S.E.2d at 638 (“[B]ecause [the] defendant’s control over the premises in which the paraphernalia were found was nonexclusive, and because there was no evidence of other incriminating circumstances *linking* her to those items, her control was insufficiently substantial to support a conclusion of her possession of the seized paraphernalia.” (emphasis added)). In other words, the State’s evidence was insufficient to convince any rational juror *beyond a reasonable doubt* that defendant constructively possessed the marijuana found in the boat. See *Penland*, 343 N.C. at 648, 472 S.E.2d at 741 (In reviewing a motion to dismiss, we “must determine

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whether ‘any rational trier of fact could have found the essential elements of the crime *beyond a reasonable doubt.*’ ” (emphasis added and emphasis omitted) (quoting *Jackson*, 443 U.S. at 319, 61 L. Ed. 2d at 573)); *State v. Marshall*, 94 N.C. App. 20, 29, 33-34, 380 S.E.2d 360, 365-66, 368 (noting that the trial court excluded evidence that the police had found marijuana in a car parked within the curtilage of the defendant’s house, which was registered to a woman living at the house with the defendant, “because the State failed to link its possession or control to the defendant”), *appeal dismissed and disc. review denied*, 325 N.C. 275, 384 S.E.2d 526 (1989).

Officer Honaker opined that the marijuana found in the boat was packaged for sale and Ms. Battin testified that the total amount of marijuana recovered was more than one half of an ounce. But excluding the marijuana found in the boat, the State did not proffer sufficient evidence to convince any rational juror beyond a reasonable doubt that defendant had actual or constructive possession of the marijuana or committed all the elements of the offense of possession of marijuana with intent to sell or deliver. *See id.*; *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001) (“The offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) the substance must be a controlled substance; (3) there must be intent to sell or distribute the controlled substance.”); N.C. Gen. Stat. § 90-95(a)(1). On appeal, the State directs us to no other evidence to support defendant’s conviction for possession of marijuana with intent to sell or deliver. Accordingly, we hold that the trial court erred in denying defendant’s motion to dismiss with respect to the charge of possession of marijuana with intent to sell or deliver and thus vacate that conviction. *See Robledo*, 193 N.C. App. at 525, 668 S.E.2d at 94.

Although the trial court did not consolidate defendant’s convictions in sentencing, we remand the case for resentencing out of an abundance of caution. We note that in sentencing defendant for the possession of drug paraphernalia conviction, the trial court found that a longer period of probation was necessary than that which is specified in N.C. Gen. Stat. § 15A-1343.2(d) (2013), although we cannot discern if the other conviction influenced the trial court’s determination. It is also possible that the conviction of possession of marijuana with intent to sell or deliver had no effect upon the sentencing for the conviction of possession of drug paraphernalia, and if so, the trial court need not revise the sentence on remand. Accordingly, we remand the case to the trial court for resentencing in light of this opinion.

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III. Conclusion

For the foregoing reasons, we hold that the trial court did not err in denying defendant's motion to dismiss with respect to the charge of possession of drug paraphernalia but that it did err in denying defendant's motion to dismiss with respect to the charge of possession of marijuana with intent to sell or deliver. Accordingly, we hold that that the trial court committed no error in convicting defendant of possession of drug paraphernalia, vacate defendant's conviction for possession of marijuana with intent to sell or deliver, and remand for resentencing.

NO ERROR IN PART, VACATED IN PART and REMANDED.

Judges STEPHENS and DAVIS concur.

STATE OF NORTH CAROLINA
v.
TIMOTHY CHADWICK FLEMING

No. COA16-37

Filed 7 June 2016

1. Evidence—videotape of confession—illustrative purposes

Where defendant appealed from convictions arising from the theft of handbags from a Marshalls store, the Court of Appeals rejected his argument that the State failed to lay a proper foundation for admission of the videotape of his confession. The tape was admitted for illustrative purposes, and testimony asserted that the tape fairly and accurately illustrated the events filmed.

2. Evidence—other crimes—voir dire testimony—authentication—surveillance video

Where defendant appealed from convictions arising from the theft of handbags from a Marshalls store, the Court of Appeals rejected his argument that the trial court erred by allowing the State to introduce hearsay evidence of other crimes committed by defendant. The trial court was not bound by the Rules of Evidence when it admitted an investigator's testimony during voir dire, and the investigator's testimony adequately authenticated the surveillance video introduced for Rule 404(b) purposes.

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3. Conspiracy—common law robbery—lack of agreement

Where defendant appealed from convictions arising from the theft of handbags from a Marshalls store, the Court of Appeals held that the trial court erred by denying defendant's motion to dismiss the charge of conspiracy to commit common law robbery. There was no evidence of an agreement between defendant and his co-perpetrator to use "means of violence or fear" to take the handbags.

4. Sentencing—trial court's comments

Where defendant appealed from convictions arising from the theft of handbags from a Marshalls store, he failed to show any reversible error resulting from the trial court's comments at sentencing. His sentence was imposed within the presumptive range and was presumed regular and valid.

Appeal by defendant from judgment entered 16 July 2015 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde for the State.

Marilyn G. Ozer for defendant.

TYSON, Judge.

Timothy Chadwick Fleming ("Defendant") appeals from jury convictions of common law robbery, conspiracy to commit common law robbery, misdemeanor larceny, and of having attained habitual felon status. The trial court arrested judgment on the misdemeanor larceny charge. We find no error in part, reverse the judgment in part, and remand for re-sentencing.

I. Factual Background

On 30 April 2013, a theft occurred at a Marshalls store located in Charlotte, North Carolina. The store's video surveillance system recorded the theft and depicted a male, later identified as Defendant, enter Marshalls, walk around the women's handbag area, and leave the store. A second male entered the store five minutes later. The second male, identified as Roger McCain ("McCain"), walked directly to the women's handbag area, picked up several handbags, and attempted to exit the store.

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Assistant manager Tracy Wetzel (“Wetzel”) was working in the front vestibule of the store arranging shopping carts, when she observed McCain approach the exit with an armload of Michael Kors purses. Wetzel stepped toward McCain and asked him “if [she] could help him.” McCain pushed Wetzel out of the way and exited the store.

While Wetzel was not physically injured, McCain pushed her with enough force into the sliding doors to knock them off of their hinges. McCain jumped into a white Toyota Camry, which displayed a hand-made cardboard license plate. The Toyota was waiting for McCain at the curb. Defendant was the driver.

Charlotte-Mecklenburg Police Department Detective Barry C. Kipp (“Detective Kipp”) used license plate information obtained from the Toyota’s cardboard plate and learned the vehicle belonged to Defendant’s mother and it was parked at Defendant’s address. He identified Defendant as the first man seen in the Marshalls surveillance video. Detective Kipp asked to interview Defendant. Defendant waived his Miranda rights and agreed to speak with Detective Kipp.

During the interview, Defendant admitted to his involvement in the Marshalls theft. Defendant stated he and McCain had planned to steal handbags from Marshalls. Defendant identified himself and McCain as the perpetrators in the surveillance video. Defendant stated he was not aware of an altercation with Wetzel until McCain got into the vehicle after stealing the handbags.

On 6 January 2014, Defendant was indicted for common law robbery, conspiracy to commit common law robbery, felonious larceny, and having attained the status of habitual felon.

The State presented the evidence summarized above and the video of Detective Kipp’s interview with Defendant. The trial court also admitted the State’s Rule 404(b) evidence of other crimes. The first incident was introduced through Marshalls and T.J. Maxx corporate investigator Jonathan Nix (“Nix”). Nix testified that he was called to investigate a theft, which had occurred on 12 April 2013 at a T.J. Maxx retail store in Mooresville, North Carolina.

Nix testified he was familiar with the camera system used at the Mooresville T.J. Maxx store, the system was functioning correctly at the time of the theft, and he made a copy of the surveillance video showing a theft of handbags similar to the theft at the Charlotte Marshalls. Nix testified the video proffered by the State was the one he had copied

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and it had not been edited. This video was admitted into evidence and published to the jury.

The second incident was introduced through Mark Armstrong (“Armstrong”). Armstrong testified he was operating the surveillance camera system at Dillard’s Department Store in Gastonia, North Carolina on 1 April 2013. From the surveillance camera, he observed a male subject enter the store and steal five or six handbags.

The court instructed the jury to limit their use of this evidence to:

“show the identity of the person who committed the crimes charged in this case if they were committed, that the defendant had motive for the commission of the crimes charged in this case, that the defendant had the intent which was a necessary element of the crimes charged in this case, that the defendant had the knowledge which is a necessary element of the crimes charged in this case, that there existed in the mind of the defendant a plan, scheme, system or design involving the crimes charged in this case, the absence of mistake and absence of accident.”

Defendant did not present any evidence.

The jury convicted Defendant of common law robbery, conspiracy to commit common law robbery, and misdemeanor larceny. He was also convicted of attaining habitual felon status. The trial court arrested judgment on the conviction of misdemeanor larceny.

For common law robbery, Defendant was sentenced to 127 to 165 months imprisonment as an habitual felon. For conspiracy to commit common law robbery, Defendant was sentenced to 89 to 119 months imprisonment as an habitual felon.

II. Issues

Defendant argues the trial court erred by: (1) admitting his videotaped confession into evidence; (2) admitting 404(b) evidence of other crimes or bad acts through hearsay testimony; (3) denying his motion to dismiss; and, (4) sentencing Defendant to two consecutive sentence terms which would run consecutively to any sentence which may be imposed upon Defendant in the future.

III. Admission of Videotape Confession as Illustrative Evidence

[1] Defendant argues the State failed to lay a proper foundation for admission of the videotape of his confession. We disagree.

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A. Standard of Review

“In determining whether to admit photographic evidence, the trial court must weigh the probative value of the photographs against the danger of unfair prejudice to defendant.” *State v. Blakeney*, 352 N.C. 287, 309, 531 S.E.2d 799, 816 (2000). “This determination lies within the sound discretion of the trial court, and the trial court’s ruling should not be overturned on appeal unless the ruling was manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision.” *State v. Goode*, 350 N.C. 247, 258, 512 S.E.2d 414, 421 (quotations omitted).

B. Analysis

“Photographs and video are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words.” *State v. Stewart*, 231 N.C. App. 134, 141, 750 S.E.2d 875, 880 (2013) (citation omitted). *See also State v. Billings*, 104 N.C. App. 362, 371, 409 S.E.2d 707, 712 (1991) (basic principles governing the admissibility of photographs apply also to motion pictures).

Video images may be introduced into evidence for illustrative purposes after a proper foundation is laid. N.C. Gen. Stat. § 8-97 (2015). The proponent for admission of a video lays this foundation with “testimony that the motion picture or videotape fairly and accurately illustrates the events filmed (illustrative purposes).” *State v. Cannon*, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608-09 (1988), *rev’d on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990), *cert. denied*, 356 N.C. 311, 571 S.E.2d 208 (2002).

Over Defendant’s objection, videotape of Detective Kipp’s interview with Defendant was allowed into evidence. Defendant’s objection only addressed whether the State had laid a proper foundation to admit the evidence, not whether Detective Kipp was competent to testify to the interview. He testified that the videotape was a “fair and accurate depiction of the interview.” The videotape was shown to the jury solely to illustrate Detective Kipp’s testimony.

Because the videotape was admitted only for illustrative purposes, and testimony asserted the videotape fairly and accurately illustrated the events filmed, this testimony meets the authentication requirements enunciated in *Cannon* for admission for illustrative purposes. This assignment of error is overruled.

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IV. 404(b) Evidence of Other Crimes

[2] Defendant argues the trial court erred by allowing the State to introduce hearsay evidence of other crimes committed by Defendant pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b).

A. Standard of Review

“Determining the competency of a witness to testify is a matter which rests in the sound discretion of the trial court.” *State v. Phillips*, 328 N.C. 1, 17, 399 S.E.2d 293, 301, *cert. denied*, 501 U.S. 1208, 115 L. Ed. 2d 977 (1991). “To test the competency of a witness, the trial judge must assess the capacity of the proposed witness to understand and to relate under oath the facts which will assist the jury in determining the truth with respect to the ultimate facts.” *State v. Liles*, 324 N.C. 529, 533, 379 S.E.2d 821, 823 (1989).

“The trial court must make only sufficient inquiry to satisfy itself that the witness is or is not competent to testify. The form and manner of that inquiry rests within the discretion of the trial judge.” *In re Will of Leonard*, 82 N.C. App. 646, 649, 347 S.E.2d 478, 480 (1986).

B. Analysis

The challenged testimony was elicited during the *voir dire* of Nix, who investigated a theft of handbags in Union County. The *voir dire* was held to determine the admissibility of surveillance video of the theft. This evidence was introduced pursuant to Rule 404(b) for the purpose of showing motive, intent, preparation, or plan. *See* N.C. Gen. Stat. § 8C-1, Rule 404(b) (2015). “[P]reliminary questions concerning the qualification of a person to be a witness are determined by the trial court, which is not bound by the rules of evidence in making such a determination. In determining whether a person is competent to testify, the court may consider any relevant information which may come to its attention.” *In re Faircloth*, 137 N.C. App. 311, 316, 527 S.E.2d 679, 682 (2000) (citation omitted).

The trial court was not acting as the trier of fact, and was not bound by the Rules of Evidence while making a preliminary determination outside the presence of the jury. The testimony of Nix was properly admitted by the trial court during the *voir dire* hearing.

Defendant also argues surveillance video from the Union County T.J. Maxx was inadmissible because it was not based on Nix’s personal knowledge. Nix was not present when the theft recorded took place.

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“Real evidence is properly received into evidence if it is identified as being the same object involved in the incident and it [is] shown that the object has undergone no material change.” *State v. Snead*, __ N.C. __, __, 783 S.E.2d 733, __, 2016 WL 1551403, at *3 (N.C. Apr. 15, 2016) (internal quotation marks and citation omitted). “Recordings such as a tape from an automatic surveillance camera can be authenticated as the accurate product of an automated process under Rule 901(b)(9).” *Id.* (quotation and citation omitted). The State may authenticate the video and lay a proper foundation for its admission with evidence showing that the recording process is reliable and that the video introduced at trial is the same video that was produced by the recording process. *Id.*

During *voir dire*, Nix testified the surveillance video system was functioning properly at the time the video was captured and the video images introduced at trial were unedited and were the same video images created by this system. The surveillance video was adequately authenticated. *See id.* The State laid a proper foundation to support its introduction into evidence. This assignment of error is overruled.

V. Conspiracy to Commit Common Law Robbery

[3] Defendant argues the State presented insufficient evidence tending to show he entered into an agreement to perform every element of common law robbery. We agree.

A. Standard of Review

“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.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation and internal quotation marks omitted). “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). “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).

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B. Analysis

“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) (citations omitted).

Whether or not an agreement exists to support a finding of guilt in a conspiracy case is generally inferred from an analysis of the surrounding facts and circumstances, rather than established by direct proof. *State v. Whiteside*, 204 N.C. 710, 712-13, 169 S.E. 711, 712 (1933). The mere fact that the crime the defendant allegedly conspired with others to commit took place does not, without more, prove the existence of a conspiracy. *State v. Arnold*, 329 N.C. 128, 142, 404 S.E.2d 822, 831 (1991). “If the conspiracy is to be proved by inferences drawn by the evidence, such evidence must point unerringly to the existence of a conspiracy.” *State v. Massey*, 76 N.C. App. 660, 662, 334 S.E.2d 71, 72 (1985). “There is a distinction between the offense to be committed and the conspiracy to commit the offense. In the one, the *corpus delicti* is the act itself; in the other, it is the conspiracy to do the act.” *Whiteside*, 204 N.C. at 712, 169 S.E. at 712 (citations omitted).

Here, to survive a motion to dismiss, the State was required to prove “an agreement [between Defendant and Roger McCain] to perform every element of” common law robbery. *State v. Dubose*, 208 N.C. App. 406, 409, 702 S.E.2d 330, 333 (2010) (quoting *State v. Suggs*, 117 N.C. App. 654, 661, 453 S.E.2d 211, 215 (1995)) (emphasis supplied). Common law robbery is “the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear.” *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270, cert. denied, 459 U.S. 1056, 74 L.Ed.2d 622 (1982).

The State attempted to connect Defendant with the “violence or fear” element of the common law robbery through the testimony of Detective Kipp. When asked whether Defendant stated “he was aware of the altercation with the manager at Marshalls” [Ms. Wetzel], during his conversations with police, Detective Kipp testified that Defendant indicated that he was only aware an altercation had occurred once Roger McCain “got back in the vehicle” as they escaped following the robbery.

During cross-examination of Detective Kipp, this exchange occurred regarding the common law robbery charge:

- Q. Now, in your interview and investigation in this case you had no – you received no information at all that

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Mr. Fleming was involved at all with the actual assault upon Ms. Wetzel; is that correct?

A. Correct.

Q. He was sitting in the car [sic] far as what you understand the situation?

A. He was driving the car, correct.

Q. He said he didn't see the incident at all, and you don't have any evidence to prove otherwise, do you?

A. No.

Q. Now, when Assistant DA says a plan, you haven't – Mr. Fleming said nothing about any plan, did he?

A. I don't remember.

Q. Okay. And, in fact, there is no evidence at all from Mr. Fleming about any plan to commit any kind of common law robbery, was there – or has he?

A. No. There's no plan for that, no.

Considering this evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference, and resolving any contradictions in its favor, the State presented no evidence of an agreement to support a conspiracy to commit common law robbery between Defendant and McCain.

The only evidence presented at trial tended to show the absence of such an agreement. McCain's use of or "means of violence or fear" to push Wetzel aside to consummate the larceny was unknown to Defendant until after the robbery. None of the other "grab and run" larcenies involving Defendant and McCain showed any other takings occurred "by means of violence or fear." The trial court erred by denying Defendant's motion to dismiss the charge of conspiracy to commit common law robbery.

VI. Sentencing

[4] Defendant argues the trial court erred by sentencing him to two consecutive sentences, which would also run consecutively to any sentence imposed upon Defendant in the future. Defendant contends such sentence violates his constitutional right to be free from cruel and unusual punishment. U.S. Const. Amend. VIII; N.C. Const. Art. I, Sec. 27.

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A. Preservation of Error

The State argues Defendant has not preserved this issue for appellate review, as he failed to raise this constitutional issue at trial. *See State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) (“[C]onstitutional matters that are not raised and passed upon at trial will not be reviewed for the first time on appeal.” (Internal citations and quotation marks omitted)).

“An error at sentencing is not considered an error at trial for the purpose of [Appellate] Rule 10(a) because this rule is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal.” *State v. Curmon*, 171 N.C. App. 697, 703, 615 S.E.2d 417, 422 (2005) (internal citation and quotation marks omitted). Defendant was not required to object at sentencing to preserve the issue on appeal. *State v. Pettigrew*, 204 N.C. App. 248, 258, 693 S.E.2d 698, 704-05 (2010) (citation omitted).

B. Standard of Review

Within the limits of the sentence permitted by law, the character and extent of the punishment to be imposed rests within the sound discretion of the court. We review the sentence for manifest and gross abuse. *State v. Hullender*, 8 N.C. App. 41, 42, 173 S.E.2d 581, 583 (1970), *see also State v. Sudderth*, 184 N.C. 753, 114 S.E. 828 (1922).

C. Analysis

Not every improper remark made by the trial court requires resentencing. “When considering an improper remark in the light of the circumstances under which it was made, the underlying result may manifest mere harmless error.” *State v. Pickard*, 143 N.C. App. 485, 490, 547 S.E.2d 102, 106 (2001) (quotation and citation omitted).

The sentence contained in the written judgment is the actual entry of judgment and the sentence imposed. *State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999). The sentence announced in open court is merely the rendering of judgment and does not control. *State v. Hanner*, 188 N.C. App. 137, 139, 654 S.E.2d 820, 821 (2008). *See also Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737 (“Announcement of judgment in open court merely constitutes ‘rendering’ of judgment, not entry of judgment.”), *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997).

While the transcript shows the trial court made oral comments during sentencing that the sentences imposed would run consecutively to

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any sentence Defendant might receive in the future, these comments or conditions are not reflected in Defendant's written and entered judgment. Defendant's sentence was imposed within the presumptive range allowed by statute and is presumed to be regular and valid. *State v. Earls*, 234 N.C. App. 186, 193, 758 S.E.2d 654, 659 (2014). Defendant has not overcome this presumption. This argument is overruled.

VII. Conclusion

The State laid a proper foundation to admit a recording of Defendant's confession to illustrate the witness' testimony. Surveillance recordings of other larcenies Defendant participated in were properly introduced and limited as Rule 404(b) evidence.

The State's evidence was insufficient to support submitting the charge of conspiracy to commit common law robbery to the jury. Defendant's motion to dismiss should have been granted. Defendant's conviction for conspiracy to commit common law robbery is reversed.

Defendant has failed to show any reversible error resulting from the trial court's comments at sentencing. These comments are not reflected in the final written judgment entered.

NO ERROR IN PART, REVERSED IN PART, AND REMANDED.

Judges CALABRIA and HUNTER, JR concur.

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STATE OF NORTH CAROLINA

v.

JOEL JUAN NAVARRO, DEFENDANT, AND
CRUM & FORSTER INDEMNITY CO., SURETY

No. COA15-1065

Filed 7 June 2016

1. Jurisdiction—Rule 59 motion—bond forfeiture proceeding

The Court of Appeals had jurisdiction in a bond forfeiture case over surety's appeal from the trial court's 23 January 2015 order. The surety filed a proper Rule 59 motion to toll the thirty-day period for appeal.

2. Evidence—findings of fact—sufficiency of evidence

The trial court erred in a bond forfeiture case by its finding of fact no. 15. Because it was not supported by competent evidence, it could not be used to support the conclusion of law that surety failed to demonstrate extraordinary circumstances. However, this error did not warrant reversal.

3. Penalties, Fines, and Forfeitures—bond forfeiture—motion to remit—findings of fact—numerous tasks completed by surety not required

The trial court did not err by denying surety's motion to remit the bond forfeiture. The trial court was not required to make findings of fact specifying the numerous tasks completed by surety in its effort to surrender defendant.

4. Civil Procedure—Rule 59 motion—extraordinary circumstances—substantial costs

The trial court did not abuse its discretion in a bond forfeiture case by denying surety's Rule 59 motion. The findings were both relevant to and determinative of the ultimate issue regarding extraordinary circumstances. The fact that surety incurred substantial costs to surrender defendant did not warrant relief from judgment. It could not be said that the court's decision to deny surety's motion was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision.

Appeal by surety from orders entered 23 January 2015 and 10 June 2015 by Judge Jim Love, Jr. in Harnett County District Court. Heard in the Court of Appeals 24 February 2016.

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W. Robert Denning, III and Mary McCullers Reece for surety-appellant Crum & Forster Indemnity Co.

Rod Malone and Stephen G. Rawson, for respondent-appellee Harnett County Board of Education.

Harnett County District Attorney Vernon K. Stewart for the State.

ELMORE, Judge.

This cases arises from an order of bond forfeiture issued after defendant failed to appear in court. The trial court denied surety's petition to remit and subsequent Rule 59(e) motion on the grounds that surety failed to demonstrate "extraordinary circumstances" which warrant relief from judgment. On appeal, surety principally argues that (1) in its order denying surety's motion to remit, the trial court failed to make sufficient findings of fact determinative of the ultimate issue, and (2) the trial court abused its discretion in denying surety's Rule 59(e) motion. We affirm.

I. Background

Joel Juan Navarro (defendant) was arrested in Harnett County for cocaine trafficking. He was released after posting a \$100,000.00 bond written by Jessica Matthews, a bail agent for Crum & Forster Indemnity Co. (surety). Defendant was scheduled to appear in Harnett County District Court on 27 May 2014, but failed to do so. The next day, the court issued an order of forfeiture on the \$100,000.00 bond. The forfeiture notice listed 25 October 2014 as the final judgment date.

On 2 October 2014, surety contacted David Marshburn, one of its bail agents, for assistance in finding defendant. Marshburn, along with Agents Berube and Ward, drove from North Carolina to Miami and located defendant's home. After conducting surveillance, the agents entered the house. They observed no sign of defendant but his girlfriend, Miriam Roche, and friend, Maria Romero, were present. Both told the agents that defendant was in Boston and had not been back since he was released from jail. Marshburn told Roche to "call Defendant's Attorney in Harnett County North Carolina and have the order for arrest and failure to appear recalled and make sure Defendant goes to court." He also told Romero to contact him when defendant's case was recalled. The agents then left and returned to North Carolina.

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On 16 October 2014, Marshburn learned from defendant's attorney that the district attorney was not willing to recall the order for arrest and failure to appear. Nevertheless, the next day Marshburn traveled back to Miami in hopes that defendant "would come back out of hiding since defendant thinks he does not have a warrant." At defendant's home, Romero told Marshburn that defendant is in Boston and that he was stopped a few days ago at the airport by TSA. Marshburn decided to head to Boston.

Upon his arrival, Marshburn began conducting surveillance at the address listed on the appearance bond. A neighbor told Marshburn that he saw defendant at the address several weeks ago, at which point Marshburn decided to approach the house. A woman answered the door and told Marshburn that defendant had been in Miami with Roche about two weeks ago, but he was not at the house in Boston. She also told Marshburn that if he "wanted to find defendant, he was going to have to follow [Roche]."

Marshburn arrived back in North Carolina on 22 October 2014 before making his way to Miami with Agents Berube and Ward. At defendant's home, the agents again questioned Roche and Romero, who told them that defendant was now in Phoenix staying with a friend. The agents decided to return to North Carolina and verify defendant's travel with TSA.

On 25 October 2014, Marshburn flew to Phoenix and found the apartment complex where defendant was allegedly staying. After a day of surveillance, Marshburn decided to question the maintenance man. He directed Marshburn to defendant's apartment unit, but added that he had "not seen defendant in a while." Hoping for an update on defendant's location, Marshburn texted Romero, who told him that defendant "went across the border into Mexico." Marshburn returned to North Carolina.

On 31 October 2014, Marshburn and Berube flew to Miami after hearing that defendant "might show up" at a Halloween party hosted by Roche. They did not find defendant, but they did install a tracking device on his car before returning to North Carolina. A week later, Marshburn received information from the tracking device showing that defendant's car had moved to an unfamiliar address. Marshburn traveled back to Miami with Agents Berube and Griggs to conduct surveillance and tail cars leaving the house. On 14 November 2014, after no sign of defendant, the agents once again returned to North Carolina.

The trail went cold until 7 December 2014, when Marshburn received a text message containing defendant's new phone number. He

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purchased a phone with a Phoenix area code and had Agent Jiminez call defendant to “befriend” him. Six days later, Marshburn and Jiminez flew to Phoenix to set up a meeting with defendant but, according to Marshburn, defendant “gave Agent Jiminez the run around and never would meet.” Eventually, defendant disconnected the phone and the agents’ subsequent attempts to track it failed. They returned to North Carolina.

On 27 December 2014, Marshburn made his final visit to Miami with Agent Trotter. Marshburn had received another text message containing defendant’s location and intercepted defendant as he was heading toward his home in Miami. On 30 December 2014, the agents surrendered defendant into custody in Harnett County on behalf of surety.

Following defendant’s surrender, Marshburn submitted a petition seeking full remission of the \$100,000.00 bond. The court denied the petition by a written order entered 23 January 2015, which contained the following relevant findings of fact:

5. The Harnett County Clerk of Court issued a Bond Forfeiture Notice giving notice of the Defendant’s failure to appear to the Defendant, Surety, and Bail Agent on 28 May 2014.

6. The Bond Forfeiture Notice indicated 25 October 2014 was the Final Judgment Date.

7. The Surety surrendered the Defendant on 30 December 2014 to the Harnett County Detention Center.

8. On 6 January 2015, the Surety filed a Petition for Remission with the Harnett County Clerk of Court requesting the Court remit the 100,000.00 dollar bond which was paid by the Surety on 27 October 2015.

....

10. The Surety and the Bail Agent are engaged in the bail bonding profession.

11. The Surety and the Bail Agent received proper notice of the pending bond forfeiture and the final judgment date.

12. The Surety and Bail Agent were aware the Defendant owned property in Massachusetts and Florida prior to posting the Defendant’s bond.

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13. The Surety and Bail Agent were aware the Defendant did not reside in the State of North Carolina.

14. The Defendant was apprehended by the Surety in the State of Florida where he owned a home.

15. Prior to posting the Defendant's bond, the surety secured a 100,000.00 dollar lien against the Defendant's home located in Florida.

Based on these findings, the trial court concluded surety and bail agent failed to demonstrate that any extraordinary cause exists to warrant relief from the final judgment of the Court.¹

On 2 February 2015, surety filed a motion to alter or amend the judgment pursuant to Rule 59. Along with the motion, surety included exhibits and affidavits from Marshburn describing his efforts to apprehend and surrender defendant. After a hearing, the trial court took the matter under advisement and later denied surety's motion by an order entered 10 June 2015. On 23 June 2015, surety appealed both the 10 June 2015 order denying the motion to alter or amend the judgment, and the 23 January 2015 order denying surety's petition to remit.

II. Discussion

A. Jurisdiction

[1] As a threshold matter, the Board argues that this Court lacks jurisdiction over surety's appeal from the trial court's 23 January 2015 order. The Board maintains that surety's motion to alter or amend the judgment was not a proper Rule 59 motion because (1) it failed to state the grounds with particularity, as required by Rule 7, and (2) it attempts only to reargue matters from the original hearing and present evidence that could have been offered but was not. According to the Board, therefore, surety's motion was insufficient to toll the time for appeal of the underlying order.

"[A] bond forfeiture proceeding, while ancillary to the underlying criminal proceeding, is a civil matter." *State ex rel. Moore Cnty. Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 222, 606 S.E.2d 907, 909 (2005)

1. Although the trial court included this statement in its findings of fact, we agree with both surety and the Board that it is more properly characterized as a conclusion of law, as it requires "the exercise of judgment, or the application of legal principles" *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations and quotation marks omitted).

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(citing *State v. Mathis*, 349 N.C. 503, 509 S.E.2d 155 (1998)). Pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure, a party has thirty days to appeal from a judgment or order in a civil action. N.C. R. App. P. 3(c) (2016). “The running of the time for filing and serving a notice of appeal in a civil action . . . is tolled . . . by a timely [Rule 59] motion’ for a new trial or to alter or amend a judgment.” *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 (1997) (quoting N.C. R. App. P. 3(c), (c)(3), (c)(4)).

Rule 59 of the North Carolina Rules of Civil Procedure lists nine grounds upon which a party may move to alter or amend a judgment. N.C. Gen. Stat. § 1A-1, Rule 59(a) & (e) (2015). Such grounds include “[i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law,” and “[a]ny other reason heretofore recognized as grounds for new trial.” N.C. Gen. Stat. § 1A-1, Rule 59(a)(7) & (9). Like any other written motion, a Rule 59 motion is subject to the requirements of Rule 7. N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) (2015); *see, e.g., N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep’t of Transp.*, 183 N.C. App. 466, 468–70, 645 S.E.2d 105, 107–08 (2007) (finding a Rule 59 motion procedurally deficient under Rule 7(b)(1)).

Rule 7(b)(1) states, “An 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.” N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) (2015) (emphasis added). “The mere recitation of the rule number relied upon by the movant is not a statement of the grounds within the meaning of Rule 7(b)(1).” *Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417. Rather, the movant “must supply information revealing the basis of the motion.” *Id.* (citing *Sherman v. Myers*, 29 N.C. App. 29, 30, 222 S.E.2d 749, 750 (1976); 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil* § 2811 (2d ed. 1995)). If necessary, a Rule 59 motion may be supported by accompanying affidavits. *See* N.C. Gen. Stat. § 1A-1, Rule 59(c) (2015) (“When a motion for new trial is based upon affidavits they shall be served with the motion.”).

After examining the contents of the challenged motion and attached affidavits, we are convinced that surety’s motion satisfied the particularity requirements expressed in Rule 7. In its motion, surety offered the following grounds for relief: “[P]etitioner asserts that there was an insufficiency of the evidence before the Court to justify the verdict or judgment and the conclusions of law as well as other reasons heretofore recognized as grounds to alter or amend judgment.” While the foregoing statement tracks the language from Rule 59(a)(7) and (9), surety

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elaborates on the basis of its motion: “Movant prays the Court open this judgment previously entered, take additional testimony on the issue of extraordinary cause and upon such evidence to amend the findings of fact and conclusions of law will make [sic] new findings and conclusions and direct the entry of an amended and new judgment.”

Surety also attached and incorporated by reference Marshburn’s affidavit, which included a brief description of his efforts to surrender defendant and his assertion that “[s]uch efforts constitute extraordinary cause to justify relief from judgment under North Carolina law.” Marshburn’s second affidavit, attached and incorporated into his first, as well as the exhibits documenting Marshburn’s travel, receipts, text messages, and other information, provides a detailed account of his efforts to locate and surrender defendant. The affidavits and exhibits offer evidentiary support for surety’s argument that the verdict was based on insufficient evidence—which is not the same as “re-arguing matters from the original hearing.” We conclude, therefore, that surety filed a proper Rule 59 motion to toll the thirty-day period for appeal.

B. Challenged Finding of Fact No. 15

[2] Turning now to the merits of the appeal, surety first argues that the trial court’s Finding of Fact No. 15 is not supported by competent evidence. Surety does not challenge the court’s finding that defendant owned a home in Florida, as stated in Finding of Fact No. 14, but instead argues that the home securing the bond belonged to a person other than defendant.

“In reviewing a trial judge’s findings of fact, we are ‘strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.’ ” *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); see also *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (“[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.” (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100–01, 655 S.E.2d 362, 369 (2008))).

After careful review of the record, we have found no evidence that surety secured a \$100,000.00 lien against defendant’s home in Florida. The record actually shows that the bond was secured by the home of Alexander Garcia, who executed a mortgage deed and contingent

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promissory note securing \$100,000.00 in future advances to surety in the event of forfeiture. The address of the encumbered property described in the mortgage deed does not match defendant's address listed in Marshburn's affidavit. There is no evidence that defendant owned or had any interest in the encumbered property. Nor can we even determine the nature of Garcia's relationship to defendant. Because Finding of Fact No. 15 is not supported by competent evidence, it may not be used to support the conclusion of law that surety failed to demonstrate "extraordinary circumstances." See *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 658, 347 S.E.2d 19, 23 (1986) ("Since the trial judge's findings of fact are not supported by competent evidence, they cannot be used to support a conclusion of law . . .").

C. Sufficiency of the Trial Court's Findings of Fact

[3] Next, surety argues that the trial court erred in denying surety's motion to remit the bond forfeiture because it failed to make pertinent findings of fact on contested matters, as required by N.C. Gen. Stat. § 1A-1, Rule 52.

"In all actions tried upon the facts without a jury," Rule 52 of the North Carolina Rules of Civil Procedure requires the trial court to "find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2015). To satisfy Rule 52,

the trial court must make "a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment." Rule 52(a)(1) does not require recitation of evidentiary facts, but it does require specific findings on the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

Chem. Realty Corp. v. Home Fed. Sav. & Loan Ass'n, 65 N.C. App. 242, 249, 310 S.E.2d 33, 37 (1983) (citations and quotation marks omitted), *disc. review denied*, 310 N.C. 624, 315 S.E.2d 689, *cert. denied*, 469 U.S. 835, 83 L. Ed. 2d 69 (1984); *see also State v. Rakina*, 49 N.C. App. 537, 540-41, 272 S.E.2d 3, 5 (1980) ("Under Rule 52(a), . . . the court need only make brief, definite, pertinent findings and conclusions upon the contested matters."). "Where a trial court's findings of fact ignore questions of fact that must be resolved before judgment can be entered, the

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action should be remanded.” *State v. Escobar*, 187 N.C. App. 267, 270, 652 S.E.2d 694, 697 (2007) (citing *Chem. Realty Corp.*, 65 N.C. App. at 250, 310 S.E.2d at 37).

There are only two grounds upon which a surety may obtain relief from a final judgment of forfeiture: “The person seeking relief was not given notice as provided in G.S. 15A-544.4”; or “[o]ther extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief.” N.C. Gen. Stat. § 15A-544.8(b)(1) & (2) (2015). “ ‘Extraordinary circumstances’ in the context of bond forfeiture has been defined as ‘going beyond what is usual, regular, common, or customary . . . of, relating to, or having the nature of an occurrence or risk of a kind other than what ordinary experience or prudence would foresee.’ ” *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 49, 612 S.E.2d 148, 152 (2005) (quoting *State v. Vikre*, 86 N.C. App. 196, 198, 356 S.E.2d 802, 804 (1987)).

Whether extraordinary circumstances exist “is a heavily fact-based inquiry” and “should be reviewed on a case by case basis.” *State v. Coronel*, 145 N.C. App. 237, 244, 550 S.E.2d 561, 566 (2001). Our courts have articulated several factors to determine whether “extraordinary circumstances” exist to remit a judgment of forfeiture. Those relevant to our discussion *sub judice* include (1) “the inconvenience and cost to the State and the courts,” (2) “the surety’s status, be it private or professional,” (3) “the risk assumed by the sureties,” and (4) “the diligence of sureties in staying abreast of the defendant’s whereabouts prior to the date of appearance.” *Id.* at 248, 550 S.E.2d at 569 (citations omitted).

As for the weight of particular factors, we have specifically cautioned that “diligence alone will not constitute ‘extraordinary cause,’ for due diligence by a surety is expected.” *Id.* (citation omitted). Nor “will the amount of expenses incurred by professional sureties due to a forfeiture” be sufficient in and of itself. *Id.* (citation omitted). A surety assumes the risk of expending resources to the extent of its foreseeable efforts. *See Gonzalez-Fernandez*, 170 N.C. App. at 53, 612 S.E.2d at 154 (“A surety’s efforts to bring a defendant to North Carolina to appear in court are not extraordinary if it was foreseeable that the surety would have to expend those efforts to produce the defendant in court.”); *Vikre*, 86 N.C. App. at 199, 356 S.E.2d at 804 (“It was entirely foreseeable . . . that the sureties would be required to expend considerable efforts and money to locate [the defendant] in the event he failed to appear. The fact that the sureties incurred expenses in connection with the forfeiture does not necessarily constitute extraordinary cause.”); *see also Escobar*, 187 N.C. App. at 273, 652 S.E.2d at 699 (concluding that the surety failed

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to demonstrate “extraordinary circumstances” where the surety was aware of the defendant’s ties to Mexico but failed to stay abreast of his location after he was deported).

Here, surety claims that the trial court’s findings failed to address the determinative factors necessary to support its conclusion on “extraordinary circumstances.” According to surety, the trial court was required to make specific findings regarding surety’s efforts and expenses—an argument similar to the one we addressed in *State v. Escobar*. In *Escobar*, the trial court denied the surety’s motion for relief from judgment of forfeiture, concluding that there were no extraordinary circumstances which entitled the surety to relief. *Escobar*, 187 N.C. App. at 269, 273, 652 S.E.2d at 696, 699. In its order, the trial court found that the surety’s efforts

resulted in locating [the defendant] in the penal system of another jurisdiction, but did not result in the apprehension or capture of [the defendant] by authorities in that jurisdiction [The defendant]’s return to this jurisdiction is by writ based upon the continuing efforts of the District Attorney to prosecute [the defendant] on the original charges in this jurisdiction.

Id. at 271, 652 S.E.2d at 697–98. On appeal, we rejected the surety’s argument that Rule 52 required the trial court to enter more specific findings about its efforts to locate the defendant, as “Rule 52(a)(1) does not require recitation of evidentiary facts.” *Id.* at 271, 652 S.E.2d at 698 (quoting *Chem. Realty Corp.*, 65 N.C. App. at 249, 310 S.E.2d at 37). We determined instead that “[t]he trial court fulfilled its obligations under Rule 52(a)(1) because it made a specific finding of fact that [the surety]’s efforts resulted in locating Defendant, but the District Attorney was ultimately responsible for returning Defendant to Union County.” *Id.* at 271, 652 S.E.2d at 698.

As in *Escobar*, here the trial court was not required to make “findings of fact specifying the numerous tasks completed” by surety in its effort to surrender defendant. *Escobar*, 187 N.C. App. at 271, 652 S.E.2d at 698. The court’s findings demonstrate that it considered factors relevant to an “extraordinary circumstances” analysis. Findings of Fact Nos. 6 and 7 show that surety surrendered defendant nearly two months after the final judgment date, which bears on surety’s diligence. Finding of Fact No. 10 addresses surety’s professional status in the bail bond profession. Finding of Fact Nos. 12 and 13 show that, before posting the bond, surety had notice of defendant’s flight risk and it was foreseeable that

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surety would have to travel to other states to surrender defendant. And finally, Finding of Fact No. 14 shows that defendant was apprehended in Florida, where surety knew that defendant owned property. These findings were both relevant to and determinative of the ultimate issue regarding “extraordinary circumstances.” To require a specific finding that surety sent six agents on several trips to three different states, for example, would be to require “a recitation of the evidentiary facts.” *Chem. Realty Corp.*, 65 N.C. App. at 249, 310 S.E.2d at 37. We conclude, therefore, that the trial court satisfied its obligation under Rule 52.

D. Denial of Surety’s Rule 59 Motion

[4] Finally, surety argues that the trial court abused its discretion in denying surety’s Rule 59 motion. Similar to its Rule 52 argument, surety maintains that “the circumstances of defendant’s surrender were extraordinary” and “the trial court did not consider and did not make any findings of fact regarding surety’s efforts and expenses to produce [defendant] for trial” Pointing to the court’s Finding of Fact No. 15, surety further asserts that the court improperly “focused on surety’s resources for recoupment of the bond if [defendant] did not appear,” a factor which surety claims has “no bearing on the ultimate goal of producing the defendant for trial.”

After reviewing the trial court’s conclusion without the support of Finding of Fact No. 15, we cannot say that the court’s decision to deny surety’s motion was “manifestly unsupported by reason” or was “so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Surety’s efforts, while taxing, were not unexpected. Defendant’s property ownership in Massachusetts and Florida, coupled with the fact that he did not live in North Carolina, put surety on notice of defendant’s flight risk. And as a professional bond agent, surety was especially aware of that risk. Surety’s expenses were largely based on its travel to states where it knew defendant owned property and its continued willingness to trust the information from Roche and Romero. The fact that surety incurred substantial costs to surrender defendant does not warrant relief from judgment in this case.

III. Conclusion

Although the trial court’s Finding of Fact No. 15 is not supported by competent evidence, this error does not warrant a reversal. *See In re Estate of Mullins*, 182 N.C. App. 667, 670–71, 643 S.E.2d 599, 601 (2007) (“In a non-jury trial, where there are sufficient findings of fact based on competent evidence to support the trial court’s conclusions of law,

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the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions.” (quoting *In re Estate of Pate*, 119 N.C. App. 400, 402–03, 459 S.E.2d 1, 2–3 (1995))). The court’s remaining findings were both relevant and determinative of the ultimate issue regarding “extraordinary circumstances,” and the court did not abuse its discretion in denying surety’s Rule 59 motion.

AFFIRMED.

Judges HUNTER, JR. and DAVIS concur.

 STATE OF NORTH CAROLINA

v.

JOSE MERLIN HENRIQUEZ PORTILLO

No. COA14-1206

Filed 7 June 2016

1. Confessions and Incriminating Statements—custodial interview—motion to suppress—totality of circumstances—restraint—medication—officers’ plans

The trial court did not err in a first-degree murder case by denying defendant’s motion to suppress his 17 December statements to investigating officers. The totality of circumstances would not have caused a reasonable person to believe that there was a restriction on defendant’s freedom of movement to indicate a formal arrest. Any restraint defendant may have experienced at the hospital was due to his medical treatment and not the actions of the police officers. The record did not support that defendant’s medication had an adverse effect on his ability to think rationally. Finally, an officers’ plans, when not made known to a defendant, have no bearing on whether an interview is custodial.

2. Confessions and Incriminating Statements—second confession—no Miranda violations for first confession—no statutory violations

The trial court did not err in a first-degree murder case by refusing to suppress defendant’s 23 December statement. Even assuming that the investigating officers were required to advise defendant of his *Miranda* rights on 17 December and failed to do so, such a violation would not require suppression of defendant’s 23 December

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statement because his 17 December statement was neither coerced nor made under circumstances calculated to undermine his free will. Further, the trial court properly concluded that the inculpatory statements did not result from substantial violations of Chapter 15A's provisions.

3. Confessions and Incriminating Statements—self-serving exculpatory statement—separate and apart from other statements

The trial court did not err in a first-degree murder case by excluding a statement defendant made to a bilingual officer. In order for the State to have opened the door to this testimony, defendant's exculpatory statement had to have been made at the same time as other statements that had been introduced into evidence. Defendant's self-serving exculpatory statement to the officer was made on 19 December 2009, separate and apart from the statements he made on 17 and 23 December.

Appeal by defendant from judgment entered 31 July 2013 by Judge Edgar B. Gregory in Forsyth County Superior Court. Heard in the Court of Appeals 26 August 2015.

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

Michael E. Casterline, for defendant.

CALABRIA, Judge.

Jose Merlin Henriquez Portillo ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of first degree murder. Defendant contends the trial court committed reversible error by excluding certain evidence he offered at trial, and by failing to suppress two statements he made to police officers in the hospital. We conclude that defendant received a fair trial free from error.

I. Background

On the evening of 16 December 2009, Cirilo Avila ("Avila") drove a grocery truck to the Pepper Ridge apartment complex in Winston-Salem. He planned to sell produce and earn money to purchase Christmas presents for his family. Since the truck had been robbed on previous occasions, Avila was carrying a .380 caliber handgun for his protection. Later in the evening, officers from the Winston-Salem Police

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Department (“WSPD”) responded to a shooting in Pepper Ridge’s parking lot. Responding officers found Avila’s lifeless body in the back of his truck, and a .380 handgun with an empty magazine lay in his hand. Avila had been shot four times; two .45 caliber shell casings were found inside the truck and two were found outside of it. A few feet away from the truck, defendant was lying on his back on the pavement. He had been shot in the lower back, was unconscious, and had no radial pulse when EMS arrived. Several feet away from where defendant lay in the parking lot, the police found a .45 handgun with a wooden grip that had been partially shattered. Witnesses at the scene reported that they heard several gunshots from what sounded like multiple guns. Another witness saw someone run away from the scene.

Defendant was transported to the hospital by EMS and underwent immediate emergency surgery for injuries he sustained in his lower right back and his wrist. Defendant was then placed in the intensive care unit (“ICU”). While defendant was being treated, medical personnel turned his clothes, two gloves, a wallet, two .45 automatic pistol magazines, and other personal items over to police officers. Inside the wallet was an identification card with defendant’s picture and the name Jose Carranza Massimo.

On 17 December 2009, Detectives Bell and Flynn of the WSPD arrived at the hospital to speak with defendant. Defendant’s nurse informed the officers that while defendant was taking pain medication, he was able to answer questions coherently. WSPD Detective Bowen told the attending doctor that defendant was a suspect in a homicide case and asked that his identity be restricted and that he not be allowed to receive visitors. The doctor was also informed that WSPD officers would stand guard over defendant while he remained in the hospital. Officers assigned to guard duty wore standard-issue police uniforms.

Defendant’s hospital bed was in a room with about ten other patients that formed a semicircle facing the nurse’s station. His bed curtain was open and any officer standing guard was seated about ten feet behind him, out of defendant’s sight. In accordance with a WSPD policy designed to protect victims, suspects, and witnesses, the officer on duty could enter and leave without being seen by the patient.

When defendant was being interviewed, he was alert, spoke clearly, and did not appear to be impaired in any way. His answers matched the officers’ questions and he appeared to be in “full control of his mental faculties while he was speaking with the officers.” Sometime during the interview, to ensure privacy, the detectives closed the curtains around

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defendant's bed. However, aside from the monitors and machines that were attached to him, defendant was not physically restrained during the interview.

Detective Bell interviewed defendant in Spanish. At the time of the interview, the officers knew defendant had been shot and had undergone surgery the previous night. They did not know whether defendant was the person who shot Avila or was simply someone who had been injured in the gunfire. However, the officers expressed their belief that defendant had intended to rob the grocery truck and defendant acknowledged this fact. He also provided detailed information in response to open-ended questions, such as the progression of events on the night of the shooting.

Defendant responded to the questions as follows: the robbery was his roommate's idea; his roommate's name was Chundo, who had a red two-door Honda Civic; Chundo was wearing dark clothes and drove both of them to the apartment complex between 7 and 8 p.m.; Chundo gave defendant a black semiautomatic .45 caliber pistol as they walked up to the grocery truck; the worker was inside the truck as they approached the truck, but there were no customers around; defendant pointed the gun at the worker and Chundo demanded money from the victim; defendant did not say anything; the plan was that he and Chundo would divide the proceeds of the robbery evenly; the man in the truck pulled a gun out of his front right pant pocket and shot at defendant; defendant fired two shots; and defendant did not know where Chundo went and did not know if the victim said anything. Defendant provided this information twice: once during a twenty-minute conversation and again during a five to six-minute audio recording. The statement defendant gave the detectives "made complete sense with what [they] knew from the crime scene," and it later proved consistent with information they eventually received. Defendant was not arrested after giving his initial statement, as he was still admitted to the hospital and the WSPD needed to follow up on the information it had obtained.

Later that same day, Detective D.C. Taylor obtained a warrant charging defendant with murder and attempted robbery with a dangerous weapon. On 20 December 2009, defendant was restrained in handcuffs while he was still at the hospital, but there was no further contact between defendant and Detective Bell until defendant was discharged on 23 December 2009.

On 23 December, Detectives Bell and Taylor visited defendant in his hospital room. Defendant appeared alert and coherent. There were officers outside the room and defendant was still in handcuffs. The officers

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read defendant his *Miranda* rights orally in Spanish, and also provided a written copy in Spanish. Defendant, who did not appear to be impaired, acknowledged understanding his rights, which he waived both verbally and in writing.

The same day, defendant was interviewed at the WSPD. The interview was videotaped and recorded in Spanish, and lasted under one hour. At the time of the interview, defendant did not seem impaired, and officers had been told that the medication defendant had been given would not affect his cognitive abilities. After defendant was *Mirandized* yet again, he confirmed that he understood his rights and affirmed that he had signed the form. Defendant again told the officers what happened, in detail. Initially, defendant gave them the same false name he had given before, Jose Carranza Massimo, but he eventually acknowledged his real name and admitted that the name on the identification in his wallet was not his own.

When asked if he could remember what happened on the day of the shooting, defendant stated the robbery was Chundo's idea, and that he had only known Chundo for a few weeks. Defendant also maintained that: Chundo gave him a black .45 caliber handgun; defendant had two of Chundo's gun magazines in his pocket; defendant pointed the gun at the driver; the driver was a Mexican male he did not recognize and he did not think Chundo knew him; both defendant and Chundo told the driver to give them money; as defendant stood in front of the man in the truck with Chundo behind defendant, the driver of the truck took a gun out of his right front pant pocket and shot him; defendant was not sure how many times the victim shot at him but he was hit twice, in the hand and the torso; he did not see if Chundo took anything because he fell; and defendant shot once or twice at the man in the truck. The interview concluded at 1:37 p.m. and defendant was taken to the magistrate shortly thereafter.

In August 2010, defendant was indicted on one count of first degree murder and one count of attempted robbery with a dangerous weapon. The State gave notice of its intent to seek the death penalty, and on its own motion, the court ordered that defendant be examined for capacity to proceed to trial. At a November 2012 hearing, the court concluded defendant possessed the capacity to proceed to trial under N.C. Gen. Stat. § 15A-1001(a). Counsel for defendant filed a motion asking the court to deem him mentally incompetent and barred from receiving the death penalty. In addition, defendant moved to suppress his 17 December 2009 statement to Detectives Bell and Flynn, as well as his 23 December 2009 statement to Detectives Bell and Taylor.

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During a pretrial evidentiary hearing, the court declared the case as non-capital. The court also entered a detailed written order on the suppression matters, concluding Portillo was not in custody when he gave his 17 December statement and that he made his statement knowingly and voluntarily. In addition, the court concluded Portillo was properly advised of his right to counsel on 23 December, and he voluntarily waived that right. Consequently, the trial court denied defendant's motion to suppress both statements. The court's conclusion as to defendant's 17 December statement was based, in pertinent part, on the following findings of fact:

41. The Court finds based on the evidence that the defendant entered Baptist Hospital of his own volition to have gunshot wounds treated. The wounds were not inflicted by any state agency; instead, the wounds were inflicted as a result of the defendant's participation in an attempted armed robbery. The defendant was transported to the hospital by EMS personnel and not by police officers. There were not any overt actions by police officers at the hospital that indicated the defendant was in custody.

42. The Court finds that the objective circumstances of the interview would not have caused a reasonable person to believe that there was a restriction on his or her freedom of movement to indicate a formal arrest. First, the Court finds that the defendant was not under arrest and was not handcuffed at the time of the interview. The warrant for arrest had not been issued prior to the interview.

43. Second, the Court finds that the defendant was not restrained in any manner. The layout of the intensive care unit at Baptist Hospital where the defendant was recovering at the time of the interview and the location of the uniformed officer present would not have caused a reasonable person to believe his or her freedom of movement was being restrained. The intensive care unit in the North Tower is an open area in which the patients do not have individual rooms. There were not any locked doors or any evidence that a guard was behind the defendant at the time of the interview. There were no overt actions that indicated the defendant was in custody. Therefore, "the atmosphere and physical surroundings during the questioning manifest a lack of restraint or compulsion." *State v. Thomas*, 22 N.C. App. 206, 211 (1974).

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44. Third, the Court notes that Detective Bell and Detective Flynn were wearing plain clothes at the time of the interview with the defendant. This fact, as noted in [*State v. Waring*, [364 N.C. 443, 471, 701 S.E.2d 615, 633 (2010)]], dictates that a subject is not in custody. Therefore, the totality of the circumstances in the interview supports a finding that the defendant was not in custody.

Defendant was tried in July 2013 in Forsyth County Superior Court. On 31 July 2013, the jury returned verdicts finding defendant guilty of first degree murder and attempted robbery with a dangerous weapon. After the trial court arrested judgment on the attempted robbery charge, defendant was sentenced to life imprisonment on the murder conviction. Defendant appeals.

II. Motion to Suppress

Defendant argues the trial court erred in denying his motion to suppress his 17 December and 23 December 2009 statements he gave to investigating officers. Specifically, defendant contends that he should have been advised of his *Miranda* rights since he was in custody when he made his 17 December statement. In addition, defendant argues his 23 December statement was tainted by the illegality of his 17 December statement and should have been excluded.

A. Defendant's 17 December Statement

[1] Defendant first contends that his 17 December statement was inadmissible at trial because it was elicited during a custodial interrogation and because he was not *Mirandized* prior to making it. For these reasons, defendant argues the trial court committed reversible error by admitting his 17 December statement into evidence. We disagree.

In reviewing a trial court's denial of a motion to suppress, "the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.'" *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120-21 (2002) (quoting *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994)). However, "the trial court's determination of whether an interrogation is conducted while a person is in custody involves reaching a conclusion of law, which is fully reviewable on appeal." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citing *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992)). "The trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826 (internal citation

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and quotation omitted). Since “defendant does not challenge the findings of fact on appeal, they are binding, and the only question before this Court is whether those findings support the trial court’s conclusions.” *State v. Fuller*, 196 N.C. App. 412, 418, 674 S.E.2d 824, 829 (2009) (citation omitted).

The Fifth Amendment to the United States Constitution protects a person from being compelled to be a witness against himself in a criminal case. U.S. Const. amend. V. This privilege against self-incrimination “is made applicable to the states by the Fourteenth Amendment.” *State v. Richardson*, 226 N.C. App. 292, 299, 741 S.E.2d 434, 440 (2013). In *Miranda v. Arizona*, the United States Supreme Court decreed that statements obtained from a suspect during a custodial police interrogation are presumed to be compelled in violation of the Fifth Amendment’s Self-Incrimination Clause and are thus inadmissible in the State’s case-in-chief. 384 U.S. 436, 457-58, 16 L. Ed. 2d 694, 713-14 (1966). Under *Miranda*, “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” *Id.* at 444, 16 L. Ed. 2d at 706. These safeguards include warning a criminal suspect being questioned that he “has the right to remain silent, that anything he says can be used against him in a court of law, [and] that he has the right to the presence of an attorney,” either retained or appointed. *Id.* at 479, 16 L. Ed. 2d at 726.

Police officers, however, “are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because . . . the questioned person is one whom the police suspect.” *Buchanan*, 353 N.C. at 337, 543 S.E.2d at 827 (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977)). Non-custodial interrogations do not require *Miranda* warnings. *Id.* at 337, 543 S.E.2d at 826. Rather, “*Miranda* warnings are required only where there has been such a restriction on a person’s freedom as to render him ‘in custody.’ It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.” *Id.* at 337, 543 S.E.2d at 827 (citation omitted). Thus, when deciding whether *Miranda* warnings were required, a court must initially determine whether a defendant was “in custody” at the time of questioning. *Id.* at 337, 543 S.E.2d at 826.

To that end, our Supreme Court has held the definitive “inquiry in determining whether [an individual] is ‘in custody’ for purposes of *Miranda* is, based on the totality of the circumstances, whether there

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was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” *Id.* at 339, 543 S.E.2d at 828 (internal quotation marks omitted). This objective inquiry, labeled the “indicia of formal arrest test,” is not synonymous with the “free to leave test,” which courts use to determine whether a person has been seized for Fourth Amendment purposes. *Id.* at 339, 543 S.E.2d at 828 (citing *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980)). Instead, “the indicia of formal arrest test has been consistently applied to Fifth Amendment custodial inquiries and requires circumstances which go beyond those supporting a finding of temporary seizure and create an objectively reasonable belief that one is actually or ostensibly ‘in custody.’” *Id.* (internal quotation marks and citation omitted).

For purposes of *Miranda*, custody analysis must be holistic and contextual in nature: it is based on the totality of circumstances and is necessarily “dependent upon the unique facts surrounding each incriminating statement.” *State v. Garcia*, 358 N.C. 382, 399, 597 S.E.2d 724, 738 (2004) (citing *State v. Barden*, 356 N.C. 316, 337, 572 S.E.2d 108, 123 (2002)). “No one factor is determinative.” *Id.* at 400, 597 S.E.2d at 738. In addition, “the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.” *Stansbury v. California*, 511 U.S. 318, 323, 128 L. Ed. 2d 293, 298 (1994). As such, the circumstances are examined from the interrogation subject’s point of view. *Id.* at 324, 128 L. Ed. 2d at 299 (“[T]he only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.”) (citation omitted). All told, custody analysis turns on “whether a reasonable person in [the suspect’s] position would believe that they were under arrest or significantly restrained in their movement.” *State v. Allen*, 200 N.C. App. 709, 713, 684 S.E.2d 526, 530 (2009).

This Court has previously addressed whether a defendant is considered to be in custody while being treated at a hospital. *E.g., Allen, State v. Fuller*, 166 N.C. App. 548, 603 S.E.2d 569 (2004); *State v. Thomas*, 22 N.C. App. 206, 206 S.E.2d 390 (1974). The fact that a suspect is hospitalized at the time he is questioned by police does not, by itself, make an interview custodial. *State v. Sweatt*, 333 N.C. 407, 417-18, 427 S.E.2d 112, 118 (1993). Instead, all relevant factors must be balanced, including: “(1) whether the defendant was free to go at his pleasure; (2) whether the defendant was coherent in thought and speech, and not under the influence of drugs or alcohol; and (3) whether officers intended to arrest the defendant.” *Allen*, 200 N.C. App. at 714, 684 S.E.2d at 530 (internal citation omitted).

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The *Allen* Court held that the hospitalized defendant was not in custody during an interrogation because any restraint in his movement was due to his medical treatment rather than any coercion or show of force by the police officers. *Id.* at 715, 684 S.E.2d at 531. In *Thomas*, the trial court found that when the officers first addressed the defendant, they did not know what caused the accident that was the subject of the case, nor did they know the extent of defendant's involvement. 22 N.C. App. at 209-10, 206 S.E.2d at 392-93. The officers also had no intention of arresting the defendant, who appeared coherent, articulate, and not under the influence of any narcotic drugs. *Id.* at 210, 206 S.E.2d at 393. Further, the officers' placement in the room did not restrict the defendant's freedom of movement. *Id.* On appeal, this Court held that since the "atmosphere and physical surroundings during the questioning manifest[ed] a lack of restraint or compulsion[.]" a custodial interrogation had not occurred. *Id.* at 211, 206 S.E.2d at 393.

In the instant case, defendant's argument tracks the three factors articulated in *Allen*. Defendant first contends that "neither [his] grave medical condition nor the police presence would have allowed [him] to *freely leave* the ICU at the time Detectives Bell and Flynn arrived to question him." (Emphasis added). However, as noted above, this is not the proper inquiry. The dispositive issue is whether defendant's freedom of movement was restrained to the extent associated with a formal arrest. *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (1997) (citation omitted). Nothing in the record establishes defendant knew that a guard was present when the challenged interview was conducted. Defendant, who was interrogated in an open area of the ICU where other patients, nurses, and doctors were situated, had no legitimate reason to believe he was in police custody. Significantly, the trial court found that none of the officers on guard duty with defendant spoke "with [him] about the case . . . prior to the [17 December] interview" and that Detectives Bell and Flynn wore plain clothes to the hospital. The court also found that "the objective circumstances of the interview would not have caused a reasonable person to believe that there was a restriction on his or her freedom of movement to indicate a formal arrest" because "defendant was not under arrest and was not handcuffed at the time of the interview." Even though the interrogating officers stood around defendant as he lay in a hospital bed, there is no evidence that defendant's movements were restricted by anything other than the injuries he had sustained and the medical equipment that was connected to him. Consequently, "[a]ny restraint in movement defendant may have experienced at the hospital was due to his medical treatment and not the actions of the police officers." *Allen*, 200 N.C. App. at 715, 684 S.E.2d at 531.

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Furthermore, while it is true defendant would not have been permitted to leave the hospital on 17 December unless he obtained police clearance, this has no bearing on our custody analysis. Courts have repeatedly emphasized that a determination of custody depends on objective circumstances and not the undisclosed, subjective views of the interrogating officers. *Buchanan*, 353 N.C. at 341, 543 S.E.2d at 829 (internal citation omitted). “Unless they are communicated or otherwise manifested to the person being questioned, an officer’s evolving but unarticulated suspicions do not affect the objective circumstances of an interrogation . . . and thus cannot affect the *Miranda* custody inquiry.” *Id.* (internal quotation marks and citation omitted).

Second, defendant argues that the interrogation was custodial because he “was undoubtedly under the influence of the previous night’s anesthesia and of pain medication” and “the detectives . . . [did not] consult the attending physician as to the actual effect the drugs might be having on his comprehension.” Yet nothing in the record indicates that defendant was incapable of understanding the questions he was asked. Although defendant had the ability to administer 1cc of morphine to himself at every ten minutes, he did not use any morphine between 12:45 and 4:55 p.m. on 17 December. When the investigating officers arrived at approximately 2:07 p.m., the ICU nurse specifically told Detective Flynn that the pain medication would not impair defendant’s ability to answer questions. The record merely reveals the amount of morphine defendant could receive at one time, it does not establish the medication’s effect on him. Indeed, the record suggests that any effect was minimal. Defendant was alert and coherent, and he spoke quietly, clearly, and deliberately. His statement “made complete sense with what [was] kn[own] from the crime scene,” and it proved to be consistent with information that emerged later in the investigation. As a result, the record does not support defendant’s argument that the medication had an adverse effect on his ability to think rationally, and the issue of impairment was one for the jury.

Third, and finally, defendant argues that he was in custody because “the detectives arrived at the hospital with the intention of arresting him.” This contention has no legal force here. Although the officers may have arrived at the hospital with the intention of arresting him, officers’ plans, when not made known to a defendant, have no bearing on whether an interview is custodial. *Id.* at 341-42, 543 S.E.2d at 829. Defendant’s *Miranda* rights were not triggered simply because he had become the focus of the detectives’ suspicions. See *In re D.A.C.*, 225 N.C. App. 547, 553, 741 S.E.2d 378, 382 (2013) (noting that “[a]bsent

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indicia of formal arrest, [the facts] that police have identified the person interviewed as a suspect and that the interview was designed to produce incriminating responses from the person are not relevant in assessing whether that person was in custody for *Miranda* purposes”). In any event, the warrant for defendant’s arrest was not issued until after the 17 December interview was completed. Defendant fails to identify any evidence suggesting that he was aware of the detectives’ knowledge and beliefs regarding the case at the time of questioning. Whatever degree of suspicion the detectives may have conveyed through their questioning, a reasonable person in defendant’s position would not have been justified in believing he was the subject of a formal arrest or was restrained in his movement by police action.

Reviewing the totality of the circumstances, we conclude that the evidence supports the trial court’s findings, which in turn support its conclusion that defendant was not in custody when his 17 December statement was given. Because defendant was not in custody, *Miranda* warnings were not required, and the trial court did not err in admitting defendant’s voluntary statement at trial. Accordingly, we reject defendant’s argument.

B. Defendant’s 23 December Statement

[2] Defendant next contends that since his 17 December statement was taken in violation of *Miranda* and inadmissible, his 23 December statement was tainted and thus also inadmissible. We disagree.

When a defendant’s initial statement is taken in violation of *Miranda*, “a presumption arises which imputes the same prior influence to any subsequent confession, and this presumption must be overcome before the subsequent confession can be received in evidence.” *Greene*, 332 N.C. at 578-79, 422 S.E.2d at 738 (citation omitted). The justification for this rule is a concern by courts that a second confession is so influenced by the first involuntary confession as to “deprive the defendant of his free will during subsequent confessions.” *Id.* at 579, 422 S.E.2d at 738 (citation omitted).

Defendant cites *State v. Edwards*, 284 N.C. 76, 199 S.E.2d 459 (1973), in support of his argument that his 23 December statement was inadmissible. In *Edwards*, our Supreme Court applied a rule from one of its much earlier cases, *State v. Gibson*, 216 N.C. 535, 5 S.E.2d 717, 718 (1939), and determined that a defendant’s later statement was inadmissible when it had been made after an earlier statement that was determined to be involuntary. *Edwards*, 284 N.C. at 80, 199 S.E.2d at 461. The rule announced by the *Gibson* Court was as follows: “It is established by

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numerous decisions that where a confession has been obtained under such circumstances or by such methods as to render it involuntary, a presumption arises which imputes the same prior influence to any subsequent confession of the same or similar facts, and this presumption must be overcome before the subsequent confession can be received in evidence.” *Gibson*, 216 at 535, 5 S.E.2d at 718. *Gibson*, however, was decided nearly three decades before *Miranda*.

While it is true that *Miranda*’s protections are such that no actual compulsion need be shown to result in the suppression of a statement obtained in violation of them, where no threats or coercion were used to extract an initial confession, “the reason for the rule giving rise to the presumption that subsequent confessions are tainted by the same influences that rendered the earlier confession[] involuntary does not exist.” *Greene*, 332 N.C. at 579, 234 S.E.2d at 738 (quoting *Siler*, 292 N.C. at 552, 234 S.E.2d at 739). “[T]he objective of *Miranda* is to protect against coerced confessions, not to suppress voluntary confessions, which ‘are essential to society’s compelling interest in finding, convicting, and punishing those who violate the law.’ ” *Buchanan*, 353 N.C. at 342, 543 S.E.2d at 829 (quoting *Moran v. Burbine*, 475 U.S. 412, 426, 89 L. Ed. 2d 410, 424 (1986)). Because no record evidence shows the 17 December statement was coerced, there is no support for defendant’s contention that “[t]he [23 December statement] [was] thus tainted by the first.” Moreover, the principle recognized in *State v. Morrell* resolves defendant’s argument against him: “The Fifth Amendment requires suppression of a confession that is the fruit of an earlier statement obtained in violation of *Miranda* only when the earlier inadmissible statement is ‘coerced or given under circumstances calculated to undermine the suspect’s ability to exercise his or her free will.’ ” 108 N.C. App. 465, 474, 424 S.E.2d 147, 153 (1993) (quoting *Oregon v. Elstad*, 470 U.S. 298, 309, 84 L. Ed. 2d 222, 232 (1985)).

In the instant case, we have already determined that defendant’s 17 December statement was not given in the context of a custodial interrogation. Thus, his initial statement was not taken in violation of *Miranda*. Further, even assuming that the investigating officers were required to advise defendant of his *Miranda* rights on 17 December and failed to do so, such a violation would not require suppression of defendant’s 23 December statement because his 17 December statement was neither coerced nor made under circumstances calculated to undermine his free will. *See id.* at 474, 424 S.E.2d at 153. Accordingly, the trial court did not err in refusing to suppress defendant’s 23 December statement.

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C. Trial Court's Refusal to Suppress Defendant's 23 December Statement on Grounds of Technical Statutory Violations

Next, defendant argues that his 23 December statement was inadmissible under N.C. Gen. Stat. § 15A-974 and should have been suppressed by the trial court. According to defendant, the arresting police officers in this case committed substantial violations of our Criminal Procedure Act by failing to comply with N.C. Gen. Stat. §§ 15A-501 and 15A-511.

Section 15A-974 provides, in relevant part, as follows:

- a) Upon timely motion, evidence must be suppressed if:
 - (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or
 - (2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:
 - a. The importance of the particular interest violated;
 - b. The extent of the deviation from lawful conduct;
 - c. The extent to which the violation was willful;
 - d. The extent to which exclusion will tend to deter future violations of this Chapter.

N.C. Gen. Stat. § 15A-974(a) (2013). Section 15A-501 outlines the general duties of police officers upon arrest of a person, which include an officer's duty to "inform the person arrested of the charge against him or the cause for his arrest." N.C. Gen. Stat. § 15A-501(1) (2013). In addition, once a police officer makes an arrest with or without a warrant, the officer "must take the arrested person without unnecessary delay before a magistrate as provided in [section] 15A-501." N.C. Gen. Stat. § 15A-511 (2013). Our Supreme Court has held that "[f]or a violation [of section 15A-511] to be substantial, [a] defendant must show that the delay in some way prejudiced him, for example, by causing a violation of his constitutional rights, . . . or by resulting in a confession that would not have been obtained but for the delay[.]" *State v. Martin*, 315 N.C. 667, 679, 340 S.E.2d 326, 333 (1986) (citations omitted).

Here, defendant was restrained in handcuffs while a patient in the hospital (20 December), but he was not taken before a magistrate until

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the day he was released from the hospital (23 December). Defendant was informed of the first degree murder charge against him after giving his 23 December statement. Defendant argues that, because the police obtained a warrant charging him with murder after his 17 December statement, he “had a fundamental right to know that formal criminal proceedings had been initiated against him before he was asked to make [another] statement on 23 December.” Defendant also insists he was prejudiced by the delay in taking him before a magistrate. In its written order denying defendant’s motion to suppress, the trial court conducted the following analysis after finding that the arresting officers committed “technical violation[s]” of sections 15A-501 and 15A-511:

The defendant was handcuffed on December 20, 2009 but was not taken before a magistrate until December 23, 2009. However, the Court finds that the defendant was not prejudiced by the technical violation. The defendant was still advised of his *Miranda* rights prior to the December 23, 2009 interview, and the defendant waived his rights. The defendant’s waiver was voluntary for the same reasons cited previously.

By his own admission, defendant cited violations of sections 15A-501 and 15A-511 in support of his motion to suppress at the trial level, while on appeal he argues that section 15A-974 “require[d] suppression” of his 23 December statement. Our appellate courts have “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 [on appeal].’” *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)). For this reason, defendant has failed to properly preserve this issue for appellate review. Nevertheless, defendant contends we should review this issue, citing the following language in *State v. Ashe*: “When a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court’s action is preserved, notwithstanding defendant’s failure to object at trial.” 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). This line of reasoning, however, is not persuasive here—defendant claims that police officers violated certain statutes governing arrest, not that the trial court acted contrary to a statutory mandate.

Moreover, even assuming defendant’s argument was properly before us, we find that it has no merit. Defendant claims he had a fundamental right to be informed of the pending charges before being questioned by law enforcement because “[w]ithout that knowledge, he could not

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knowingly and intelligently make a decision about the exercise of his rights.” But no such principle of law exists. “A person does not have to know all the legal consequences of making a confession in order for the confession to be admitted into evidence.” *State v. Shytle*, 323 N.C. 684, 690, 374 S.E.2d 573, 576 (1989) (citation omitted). And there is no requirement that an accused “be made aware of all facts which might influence his or her decision” to confess. *Id.* (citation omitted); *Moran*, 475 U.S. at 422-23, 89 L. Ed. 2d at 421-22 (“[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights. . . . Once it is determined that a suspect’s decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State’s intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.”). Though additional information may have been useful to defendant or may have influenced his decision to confess, any violation of section 15A-501 was “technical” as opposed to substantial and did not render defendant’s 23 December statement involuntary or inadmissible. *See State v. Carter*, 296 N.C. 344, 352-53, 250 S.E.2d 263, 268 (1979) (“We believe that *Miranda* not only lacks an explicit requirement that an individual be informed of the charges about which he is to be questioned prior to waiving his rights but also lacks any implicit requirement that such action be taken by authorities before a valid waiver of rights can be executed by one who is to be interrogated. . . . In the instant case the court specifically found that defendant was fully and accurately advised of his rights prior to answering any questions. . . . We also note that defendant had knowledge of his rights and was aware that the investigation concerned a homicide before he made the incriminating statement. Yet, he willingly continued to answer the questions put to him.”).

As for defendant’s claim that he was prejudiced by the lapse of time between his arrest and his first appearance before a magistrate, the central issue is whether his confession resulted from the delay. Our Supreme Court has repeatedly held that when a defendant is interrogated before being taken before a magistrate, the confession that resulted was not obtained as a result of a substantial violation of Chapter 15A. *See, e.g., Martin; State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990); *State v. Littlejohn*, 340 N.C. 750, 459 S.E.2d 629 (1995). In *Littlejohn*, the defendant argued that, but for the thirteen-hour delay between his arrest and the time he was taken before a magistrate, he would not have confessed. 340 N.C. at 758, 459 S.E.2d at 633. In rejecting this argument, our

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Supreme Court noted that the defendant had been advised of his rights before the interrogation and that he would have received the same notification from a magistrate. *Id.* at 758, 459 S.E.2d at 634. As a result, the defendant failed to establish that he “would have exercised his right to remain silent if he had been warned of this right by a magistrate rather than the officer.” *Id.*

Similarly, in the instant case, defendant was advised of his rights before being interviewed on 23 December regarding Avila’s murder. Defendant has failed to show that the delay in appearing before a magistrate undermined his free will and rendered his confession involuntary. At first glance, the three-day period between defendant’s arrest and his first appearance before a magistrate seems significant. However, since defendant was arrested while recuperating from gunshot wounds and taken before a magistrate on the same day he was released from the hospital, the actual “delay” at issue should be measured in hours not days. When the delay—which was largely due to defendant’s medical treatment—is viewed in context, no substantial violation of section 15A-511 occurred. *See id.* at 758, 459 S.E.2d at 633-34; *State v. Chapman*, 343 N.C. 495, 499, 471 S.E.2d 354, 356 (1996) (ten-hour delay between arrest and first appearance before a magistrate, where most of the time was spent questioning the defendant, did not constitute an unnecessary delay because officers had a right to conduct the interrogations). Accordingly, the trial court properly concluded that the inculpatory statements at issue did not result from substantial violations of Chapter 15A’s provisions and the court did not err in denying defendant’s motion to suppress his 23 December statement.

III. Trial Court’s Exclusion of Defendant’s Purported Inconsistent Statement Made to Police

[3] In his final argument, defendant contends that the trial court erred by excluding a statement he made to Officer Charles Olivio,¹ a bilingual officer with the WSPD. Once again, we disagree.

Officer Olivio had been posted to guard defendant on the morning of 19 December 2009. At some point, defendant offered an unsolicited statement to Officer Olivio, all in Spanish: “I am . . . getting in trouble for nothing. My friend asked me to go with him. I stood around, and then I got shot. My friend ran. And now I can’t feel my leg.” At trial, defendant

1. We note that Officer Olivio’s last name is also spelled as “Olivo” in the transcript. We use the former spelling of his name because that is how the court reporter transcribed it when he was introduced as witness and stated his title and full name.

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called Officer Olivio, who was examined outside the jury's presence. Because the State had placed great emphasis on the consistency between defendant's 17 and 23 December statements, defense counsel argued that defendant's "inconsistent statement" to Officer Olivio was admissible. After the State objected, the trial court ruled that the statement constituted "inadmissible self-serving hearsay of the defendant who has not testified . . ." Consequently, this evidence was not before the jury.

On appeal, defendant argues that "the State opened the door to the admission of [his] statement to Officer Olivio by the prosecutor's repeated emphasis on the consistency of . . . defendant's two recorded statements."

When the State offers into evidence a part of a confession the accused may require the whole confession to be admitted. Thus, when the State introduces part of a statement made by a defendant, the defendant is then entitled to have everything brought out that was said by him *at the time the statement was made* to enable him to take whatever advantage the statement introduced may afford him. However, if the State does not introduce statements of a defendant made on a later date, a defendant is not entitled to introduce these later self-serving statements since the State has not opened the door for such testimony.

State v. Weeks, 322 N.C. 152, 167, 367 S.E.2d 895, 904 (1988) (emphasis added) (citations omitted).

Despite defendant's protestations on this issue, we need say little more than this argument has already been rejected by our Supreme Court. *See id.* at 168, 367 S.E.2d at 905 ("The evidence shows that [the defendant's purported exculpatory] statement was not made at the same time as the oral statements that were introduced into evidence. Therefore, in order for [the] defendant to be entitled to introduce this later self-serving statement, the State must have 'opened the door[,] [which did not happen in this case.];' *State v. Lovin*, 339 N.C. 695, 709-10, 454 S.E.2d 229, 237 (1995) ("When the State elicited testimony from [the defendant's girlfriend] of a statement made by the defendant earlier in the day, it did not open the door for a statement the defendant later made from the jail to [her]. The statement did not corroborate [the] defendant's testimony because he did not testify. It would have been hearsay testimony and was properly excluded."). *Weeks* and *Lovin* require a defendant's exculpatory statement to have been made at the same time as other statements that have been introduced into evidence. Because defendant's self-serving, exculpatory statement to

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Officer Olivio was made on 19 December 2009, separate and apart from the statements he made on 17 and 23 December, the State did not open the door for its admission. Accordingly, the trial court properly excluded it at trial.

IV. Conclusion

We conclude that the evidence supports the findings entered in the trial court's suppression order, and those findings support the court's conclusions that defendant's 17 and 23 December statements were admissible. The trial court also did not err in concluding that technical statutory violations did not warrant the suppression of defendant's 23 December statement. Finally, the trial court properly excluded defendant's exculpatory statement to Officer Olivio.

NO ERROR.

Judges STROUD and INMAN concur.

STATE OF NORTH CAROLINA
v.
ERIC PRESTON SAWYERS

No. COA15-980

Filed 7 June 2016

1. Appeal and Error—writ of certiorari—appeal lost through no fault of own

Because defendant's right to appeal from the 15 October 2014 judgment was lost through no fault of his own, the Court of Appeals exercised its discretion and allowed defendant's petition for writ of certiorari pursuant to Rule 21(a)(1). Trial counsel inadvertently failed to specifically state that the appeal was from both the denial of the suppression motions and also from the judgment entered on October 15, 2014.

2. Search and Seizure—investigatory stop—driving while impaired—motion to suppress evidence—community care-taking exception

The trial court did not err in a driving while impaired case by denying defendant's motion to suppress the evidence. The officer had specific and articulable facts sufficient to support an investigatory

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stop of defendant. The public need and interest outweighed defendant's privacy interest in being free from government seizure and defendant's seizure fit within the community caretaking exception.

3. Motor Vehicles—driving while impaired—motion to suppress—breath test

The trial court did not err in a driving while impaired driving case by denying defendant's motion to suppress the breath test results where defendant alleged the seizure of his cell phone prevented him from obtaining a witness in time to observe the test. Police officers complied with the requirements set out in N.C.G.S. § 20-16.2(a)(6) as defendant's first breath test was not administered until more than thirty minutes after defendant was informed of his rights.

Appeal by defendant from order and judgment entered 15 October 2014 by Judge Lucy N. Inman in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Christopher R. McLennan, for the State.

Tarlton Law PLLC, by Raymond C. Tarlton, for defendant-appellant.

McCULLOUGH, Judge.

Eric Preston Sawyers ("defendant") appeals from judgment entered upon his plea of guilty to driving while impaired. Defendant argues that the trial court erred by denying his motion to suppress. For the reasons stated herein, we affirm the order of the trial court.

I. Background

On 12 November 2011, defendant was arrested and issued a citation for driving while impaired in violation of N.C. Gen. Stat. § 20-138.1.

On 29 April 2013, defendant filed a "Motion to Dismiss" charges against him alleging statutory and constitutional violations regarding his right to pre-trial release, his right to obtain additional chemical analysis, and his right to have an opportunity to obtain evidence. On the same date, defendant filed a "Motion to Suppress Evidence Obtained without Reasonable Suspicion to Stop and Seize Defendant" and a "Motion to Suppress EC/IR II Test Results."

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Following a hearing held on 27 September 2013, the trial court entered an order on 15 October 2013 denying defendant's motion to dismiss. The trial court made the following pertinent findings of fact:

3. That Trooper Keller . . . assisted Sergeant Dorty with the DWI investigation and thereafter arrested the defendant at 2:26am for Driving While Impaired[.]

. . . .

5. That Trooper Keller then transported the defendant to the Charlotte Mecklenburg detention facility for an EC/IR II test of his breath for alcohol, arriving at approximately 3:05am.

6. That the defendant was taken to the nurse, fingerprinting, and image capturing until 3:34am.

7. That Trooper Keller advised the defendant of his rights to a chemical analysis of his breath and the defendant reviewed and acknowledged the rights form regarding chemical analysis at 3:45am, but refused to sign. . . .

8. That the defendant was allowed to retrieve phone numbers from his phone and make phone calls. He called his mother Christine Sawyers at approximately 4:00am to let her know he was in jail and she needed to come get him, *but there was no mention of observing the EC/IR II testing procedures.*

9. That Christine Sawyers lives in South Charlotte and arrived within approximately 30 minutes of receiving the defendant's phone call.

10. That a witness did not appear for the defendant within the requisite 30 minutes, so Trooper Keller requested the defendant submit to a test of his breath for alcohol at 4:19am and 4:22 am. The lower of the two readings was .15 g/210L. . . .

(emphasis added). The trial court concluded:

1. That there was no substantial violation of the United States Constitution, the North Carolina Constitution, or any statutory violation.
2. That the defendant was informed of his right to have a witness present and was allowed a witness, Christine

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Sawyers, at the Mecklenburg County Jail, who was able to communicate and speak to the defendant for 30 minutes and assist in forming his defense.

3. That there was no evidence that anyone who came to the Mecklenburg County Jail to see or speak with defendant was denied that right.

A hearing on defendant's motions to suppress was held during the 15 October 2014 criminal session of Mecklenburg County Superior Court.

In regards to defendant's "Motion to Suppress Evidence Obtained without Reasonable Suspicion to Stop and Seize Defendant," the State offered the testimony of Sergeant Henry Hill Dorthy, Jr. ("Sergeant Dorthy") with the North Carolina Highway Patrol. Sergeant Dorthy testified that on 12 November 2011 at 2:26 a.m., he was on patrol on Tryon Street in downtown Charlotte. He was sitting stationary in his vehicle at a stoplight. Sergeant Dorthy observed defendant walking down the sidewalk and noticed that he had a slight limp. Sergeant Dorthy testified that directly behind defendant was what appeared to be a homeless male dragging a female. The female "appeared to either be very intoxicated or drugged." Defendant stopped at a car on the side of the road and opened the back door behind the driver's seat. Defendant and the other male put the female in the backseat of the vehicle. Dorthy testified that "I didn't know whether she was being kidnapped, if she was in danger or what the situation was." Thereafter, defendant got into the driver's seat and the other male got into the front passenger seat of the car. Defendant got into traffic two car lengths in front of Sergeant Dorthy. Sergeant Dorthy testified that he stayed behind defendant and planned to stop defendant's vehicle "[t]o investigate to see if the female in the vehicle was okay, what was going on." After defendant made two turns, Sergeant Dorthy activated his blue lights and pulled defendant over.

The trial court denied defendant's motion to suppress for lack of reasonable suspicion by stating as follows:

THE COURT: . . . I am persuaded, based on the evidence presented and the very eloquent arguments of counsel for both sides, the authorities cited, that Trooper Dorthy had a reasonable and articulable suspicion to initiate the stop and that the stop falls within the community caretaker exception to the Fourth Amendment.

In regards to defendant's "Motion to Suppress EC/IR II Test Results,"

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Trooper Robert B. Keller (“Trooper Keller”) and defendant testified. Trooper Keller with the North Carolina State Highway Patrol testified that he came into contact with defendant during the early hours of 12 November 2011. Trooper Keller was contacted by Sergeant Dorthy. Subsequent to arriving on the scene, Trooper Keller formed the opinion that defendant was impaired and arrested defendant for driving while impaired at 2:26 a.m. Defendant was taken to “Mecklenburg County intake downtown” and entered the room containing the Intoximeter ECIR/II machines. Defendant’s rights were read to him at 3:45 a.m. and defendant refused to sign the form acknowledging his rights. Defendant called for a witness using the landline provided by the sheriff’s department and spoke with his mother at 3:59 a.m. When asked whether Trooper Keller had a disagreement with defendant over defendant’s access to his cell phone, Trooper Keller testified that he did not “recall communication a whole lot about the cell phone.” Trooper Keller further testified that he could not recall whether he heard defendant asking his mother to come down to the jail or whether he asked his mother to serve as a witness for the breath test. Trooper Keller testified that to his recollection, defendant failed to indicate to him at 3:45 a.m. that he had a witness coming to view the testing procedures and that if defendant had so indicated, Trooper Keller would have waited thirty minutes for the witness to arrive. Defendant provided two samples at 4:19 a.m. and 4:22 a.m. Trooper Keller testified that between 3:45 a.m. and 4:19 a.m., he was not notified that anyone had arrived to view the testing procedures.

Defendant testified that he and Trooper Keller had disagreements regarding signing paperwork and accessing his cell phone so that he could access his attorney’s phone number. Defendant recalled Trooper Keller reading him his rights as it pertained to submitting to a test of his breath but testified that he refused to sign the rights form. At 3:59 a.m. defendant made a phone call to his mother. Defendant testified that the purpose of calling his mother was because he “wanted a witness to watch the Breathalyzer test.” It would have taken ten to fifteen minutes for his mother to arrive at the jail. Defendant testified that to his knowledge, his mother arrived within thirty minutes of his phone call.

The trial court adopted the findings of fact made in the 15 October 2013 order denying defendant’s motion to dismiss. The trial court denied defendant’s motion to suppress evidence from defendant’s breath test and stated as follows:

THE COURT: . . . And I do find that the State has met the burden of producing evidence, which hasn’t been impeached, that Trooper Keller observed the defendant.

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The standard is not -- as I understand it, there's not any authority that says the standard is that you're not allowed to fill out paperwork or talk on the phone or do anything else during that observation period. So I'm going to find that the State's met its burden on that. And for all those reasons, I'm going to deny the motion to suppress[.]

On 15 October 2014, the trial court entered an order, denying both of defendant's motions to suppress. Thereafter, defendant pled guilty to driving while impaired while reserving his right to appeal the denial of his motions to suppress. On the same date, the trial court entered judgment, sentencing defendant to a DWI Level Five punishment. Defendant was sentenced to 30 days in jail. This sentence was suspended and defendant was placed on supervised probation for a term of 12 months. On 16 October 2014, defendant entered notice of appeal.

II. Standard of Review

Review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial [court]'s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the [court]'s ultimate conclusions of law." *State v. Salinas*, 366 N.C. 119, 123, 729 S.E.2d 63, 66 (2012) (citation omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

III. Discussion

Defendant presents two issues on appeal. Defendant argues that the trial court erred by: (A) denying defendant's motion to suppress where the facts demonstrated that Sergeant Dorthy did not have the reasonable articulable suspicion needed to justify an investigatory stop and (B) denying defendant's motion to suppress the breath test results where the seizure of defendant's cell phone prevented defendant from obtaining a witness in time to observe the test. Before we reach the merits of defendant's appeal, we first address a preliminary issue.

Notice of Appeal

[1] Defendant has filed a petition for writ of certiorari in which defendant concedes that while he intended to appeal "from all adverse decisions against him," through miscommunication or inadvertent error, his "trial counsel inadvertently failed to specifically state that the appeal was from both the denial of the suppression motions and also from the

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Judgment entered on October 15, 2014.” Accordingly, defendant requests that our Court issue a writ of certiorari pursuant to the North Carolina Rules of Appellate Procedure Rule 21(a)(1). Rule 21(a)(1) provides that:

[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C. R. App. P. Rule 21(a)(1) (2016). Our Court has previously ruled that “[a]ppropriate circumstances’ may include when a defendant’s right to appeal has been lost because of a failure of his or her trial counsel to give proper notice of appeal.” *State v. Gordon*, 228 N.C. App. 335, 337, 745 S.E.2d 361, 363 (2013). Because defendant’s right to appeal from the 15 October 2014 judgment was lost as a result of no fault of his own, we exercise our discretion and allow defendant’s petition for writ of certiorari pursuant to Rule 21(a)(1).

A. Motion to Suppress for Lack of Reasonable Suspicion

[2] In his first argument on appeal, defendant contends that the trial court erred in denying his motion to suppress where the facts demonstrated that Sergeant Dorty did not have the reasonable articulable suspicion necessary to justify an investigatory stop, thereby violating his rights under the Fourth Amendment to the United States Constitution and Article I, § 20 of the North Carolina Constitution to be free from unreasonable seizures. Defendant also argues that the trial court erred by applying the community caretaking doctrine as an exception to the warrant requirement of the Fourth Amendment. We disagree.

The Fourth Amendment protects individuals against unreasonable searches and seizures and the North Carolina Constitution provides similar protection. A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief. Traffic stops have been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed. 2d 889 (1968). Under *Terry* and subsequent cases, a traffic stop is permitted if the officer has a reasonable, articulable suspicion

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that criminal activity is afoot.

State v. Smith, 192 N.C. App. 690, 693, 666 S.E.2d 191, 193 (2008) (citations omitted). “Reasonable suspicion requires that the stop be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.” *State v. Lopez*, 219 N.C. App. 139, 145, 723 S.E.2d 164, 169 (2012) (citation omitted). “All the State is required to show is a minimal level of objective justification, something more than an unparticularized suspicion or hunch. A court must consider the totality of the circumstances in determining whether the officer possessed a reasonable and articulable suspicion to make an investigatory stop.” *State v. Brown*, 213 N.C. App. 617, 619, 713 S.E.2d 246, 248 (2011) (citations and quotation marks omitted).

After thoroughly reviewing the record, we hold that Sergeant Dorthy had specific and articulable facts sufficient to support an investigatory stop of defendant. Sergeant Dorthy testified that in the early morning hours of 12 November 2011 at 2:26 a.m., he was on patrol on Tryon Street in downtown Charlotte. He was sitting stationary in his vehicle at a stoplight when he observed defendant walking down the street with a slight limp. Sergeant Dorthy observed that directly behind defendant was another male, who appeared to be homeless, dragging an “either very intoxicated or drugged” female down the street. Defendant and the other male placed the female in defendant’s vehicle, defendant and the other male entered the vehicle, and defendant’s vehicle left the scene. Sergeant Dorthy testified that he was unsure whether the female “was being kidnapped, if she was in danger or what the situation was.” Sergeant Dorthy did not believe that the other male was with defendant and the female and wanted to investigate “to see if the female in the vehicle was okay, what was going on.” Considering the totality of the circumstances, we hold that defendant’s investigatory stop was justified by Sergeant Dorthy’s reasonable suspicion that defendant was involved in criminal activity. Therefore, we hold that the trial court did not err by denying defendant’s motion to suppress on this ground.

In addition to holding that there was reasonable articulable suspicion to conduct an investigatory stop of defendant, the trial court also held that the stop fell within the community caretaker exception to the Fourth Amendment. In *State v. Smathers*, 232 N.C. App. 120, 753 S.E.2d 380 (2014), our Court formally recognized the community caretaking doctrine as an exception to the warrant requirement under the Fourth Amendment to the United States Constitution. *Id.* at 122, 753 S.E.2d at

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382. In reference to a large majority of state courts recognizing this doctrine as an exception, our Court noted that:

[t]he overarching public policy behind this widespread adoption is the desire to give police officers the flexibility to help citizens in need or protect the public even if the prerequisite suspicion of criminal activity which would otherwise be necessary for a constitutional intrusion is nonexistent. The doctrine recognizes that, in our communities, law enforcement personnel are expected to engage in activities and interact with citizens in a number of ways beyond the investigation of criminal conduct. Such activities include a general safety and welfare role for police officers in helping citizens who may be in peril or who may otherwise be in need of some form of assistance.

Id. at 125, 753 S.E.2d at 384 (citation omitted). Our Court adopted a three-pronged test in applying the community caretaking exception:

the State has the burden of proving that: (1) a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, that under the totality of the circumstances an objectively reasonable basis for a community caretaking function is shown; and (3) if so, that the public need or interest outweighs the intrusion upon the privacy of the individual. Relevant considerations in assessing the weight of public need against the intrusion of privacy include, but are not limited to: (1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.

Id. at 128-29, 753 S.E.2d at 386 (citations omitted). “[T]his exception should be applied narrowly and carefully to mitigate the risk of abuse.”

Id. at 129, 753 S.E.2d at 386.

We must now apply the three-pronged test to the circumstances in our present case. First, it is undisputed that the traffic stop of defendant was a seizure under the Fourth Amendment of the United States Constitution. Second, given that Sergeant Dorty observed defendant and what appeared to be a homeless male dragging a female who seemed

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to “either be very intoxicated or drugged” into defendant’s vehicle, there was an objectively reasonable basis under the totality of the circumstances to conclude that the seizure was based on the community caretaking function of ensuring the safety of the female. Sergeant Dorty testified that he was unsure whether the female “was being kidnapped, if she was in danger or what the situation was.” Third, the public need or interest in having defendant seized outweighed his privacy interest in being free from the intrusion. Sergeant Dorty observed the female who was either intoxicated or drugged being put in the backseat of defendant’s vehicle by defendant and another male who “appeared to be homeless and didn’t appear to be with these two people that I saw him with.” Defendant and the other male entered the vehicle and began driving away from the scene. Therefore, the degree of public interest in ensuring the safety and well-being of the female was high and the fact that defendant was driving away in a vehicle with the female as a passenger contributed to the exigency of the situation. Furthermore, defendant was operating a vehicle when he was seized rather than enjoying the privacy of his own home, thereby lessening his expectation of privacy. *See Smathers*, 232 N.C. App. at 131, 753 S.E.2d at 387 (stating that “[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one’s residence or as the repository of personal effects. . . . It travels public thoroughfares where both its occupants and its contents are in plain view”) (citation omitted).

Based on the foregoing, we hold that the public need and interest outweighed defendant’s privacy interest in being free from government seizure and that defendant’s seizure fit within the community caretaking exception as set out in *Smathers*. Accordingly, we hold that the trial court did not err by applying the community caretaking exception and affirm the trial court’s order denying defendant’s motion to suppress.

B. Motion to Suppress Breath Test Results

[3] In his second argument on appeal, defendant asserts that the trial court erred by denying his motion to suppress the results of his breath test where he was deprived of a reasonable opportunity to arrange to have a witness observe his breath test. Specifically, defendant argues that officers deprived defendant access to his cell phone address book, which in turn impeded his ability to contact a witness in a timely manner.

Defendant directs our attention to North Carolina General Statutes section 20-16.2(a)(6) regarding his right to call a witness to view the administration of a chemical breath test. N.C. Gen. Stat. § 20-16.2(a)(6) provides as follows, in pertinent part:

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Any law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person.

Before any type of chemical analysis is administered the person charged shall be taken before a chemical analyst authorized to administer a test of a person's breath or a law enforcement officer who is authorized to administer chemical analysis of the breath, who shall inform the person orally and also give the person a notice in writing that:

. . . .

You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

N.C. Gen. Stat. § 20-16.2(a)(6) (2015).

After careful review, we hold that the record evidence supports the trial court's conclusion that police officers complied with the requirements set out in N.C. Gen. Stat. § 20-16.2(a)(6) as defendant's first breath test was not administered until more than thirty minutes after defendant was informed of his rights. Trooper Keller testified that defendant was arrested at 2:26 a.m. on 12 November 2011 for driving while impaired. Defendant was taken to "Mecklenburg County intake downtown" and entered the room containing the Intoximeter ECIR/II machines. Trooper Keller read defendant's rights to him at 3:45 a.m., however, defendant refused to sign the form acknowledging his rights. Trooper Keller testified that between 3:45 a.m. and 3:59 a.m., defendant was not prevented from using the telephone. Defendant called his mother using a landline provided by the sheriff's department at 3:59 a.m. Trooper Keller could not recall whether he heard defendant asking his mother to come down to the jail or whether he asked his mother to serve as a witness for the breath test. Defendant failed to indicate to Trooper Keller at 3:45 a.m. that he had a witness coming to view the testing procedures. Trooper Keller testified that if defendant had indicated to him that he had a witness on the way, Trooper Keller would have waited thirty minutes for the witness to arrive. Defendant provided two breath samples at 4:19 a.m. and 4:22 a.m. Trooper Keller testified that between 3:45 a.m.

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and 4:19 a.m., he was not notified that anyone had arrived to view the testing procedures.

Defendant's argument that he was denied access to his cell phone in order to retrieve numbers is without merit. The trial court adopted the findings of fact entered in the 15 October 2013 order denying defendant's motion to dismiss and defendant does not challenge any specific findings on appeal. Finding of fact number 8 indicates that defendant was "allowed to retrieve phone numbers from his phone and make phone calls." This finding is supported by the testimony of Deputy James Ingram, of the Mecklenburg County Sheriff's Office, at the hearing held on 27 September 2013:

Q. Looking towards the bottom of the page where the notes are listed, we've gone through some of these. It looks like at 3:18 the defendant retrieved numbers from his phone; is that correct?

A. Correct.

Accordingly, we hold that the trial court did not err by denying defendant's motion to suppress the results of his breath test.

IV. Conclusion

Based on the foregoing reasons, we affirm the order of the trial court denying defendant's motions to suppress.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

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[247 N.C. App. 864 (2016)]

TD BANK, N.A., PLAINTIFF
v.
RICKY NEAL WILLIAMS, DEFENDANT

No. COA 15-598

Filed 7 June 2016

1. Loans—foreclosure sale—proceeds—value

The trial court did not err in a foreclosure sale case by granting summary judgment in favor of plaintiff bank regarding sale proceeds. There was a lack of evidence to support defendant's claims that the property was worth more than the value obtained at the foreclosure sale. Defendant did not base the value of the property on his personal knowledge and there was no alleged value from defendant at the time of sale.

2. Appeal and Error—dismissal of appeal—proposed amended answer—no order in record allowing amended answer

The trial court did not err by dismissing defendant's proposed amended answer alleging negligence, negligent entrustment, and a Chapter 75 violation. There was no order in the record showing the trial court allowed defendant to amend his answer. If a necessary pleading is not contained in the record on appeal, the proper remedy is to dismiss the appeal.

Appeal by Defendant from an order entered 8 December 2014 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 18 November 2015.

Ward and Smith, P.A., by Lance P. Martin and Norman J. Leonard, for Plaintiff-Appellee.

David R. Payne, P.A., by David R. Payne, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Ricky Williams ("Williams") appeals from the trial court's grant of summary judgment in favor of TD Bank. Williams argues genuine issues of material fact existed relating to the proceeds from a foreclosure sale.

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He also contends the trial court erred by dismissing three counterclaims. We affirm in part and dismiss in part.

I. Factual and Procedural History

Williams, individually or as a Trustee, Steak House Inc., and Shuttle Services Inc. (business entities controlled by Williams), borrowed money from the Bank, guaranteed loans and secured the loans to the Bank in the following manner:

1. Williams Note:

On or about 5 March 2004, Williams signed an installment promissory note in the principal amount of \$160,000 bearing interest at the rate of five percent (5%) to Carolina First Bank (“the Williams Note”). Repayment was to be made in 60 installments of \$1,271.46, with a final payment of the remaining unpaid balance due 5 March 2009. The note reflects this loan was secured by an assignment of leases and rents, an assignment of investment property, and a deed of trust on property at Circle Street. The Assignment of Investment Property assigns Carolina First Bank a securities account held by UVEST Financial Services in the name of Williams to secure the Williams Note. The record does not contain a copy of the assignment of leases and rents or the deed of trust. The loan file for the Williams Note contained a Securities Entitlement Control Agreement dated 8 March 2004 naming Carolina First Bank as the secured party, Williams as the debtor, and UVEST as the securities intermediary. The property subject to the securities agreement included a securities account held by UVEST Financial Services in the name of Williams. Williams claims the Securities Entitlement Control Agreement is a product of forgery.

2. Steak House Note:

On or about 27 March 2007, The Steak House, Inc., a North Carolina corporation, signed an installment promissory note in the principal amount of \$850,000 bearing interest at the rate of seven and three-quarters percent (7¾%) to Carolina First Bank (“the Steak House Note”). The note was to be paid back in monthly installments of \$7,039.39 with a balloon payment of the remaining balance at the end of five years on 27 March 2012. Simultaneously, Williams executed a guaranty, promising to pay the Steak House Note in the event that Steak House, Inc. failed to pay the note. In addition, Williams, as Trustee of the Ricky Williams Revocable Trust, signed a deed of trust dated 27 March 2007 conveying property at Sterling Street in Morganton to MTNBK, Ltd. in

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trust for the benefit of Carolina First Bank to be sold to pay the Steak House Note upon default.

3. Shuttle Truck Note:

On or about 25 June 2007, Shuttle Truck Service, Inc., a North Carolina corporation, signed an installment promissory note in the principal amount of \$700,000 bearing interest at seven and three-quarters percent (7¾%) per annum (“the Shuttle Truck Note”). The note was to be repaid in 60 installments of \$5,805.54 with a balloon payment on 2 July 2012 of the remaining balance. According to the loan agreement, this loan is secured by the following property: an assignment of leases and rents and a deed of trust on property at US 221 North. The record does not contain a copy of these documents. Additionally, the loan was cross-collateralized with the Steak House Note. The Shuttle Truck Note was personally guaranteed by Williams on the date it was signed.

When the Williams Note matured on 5 March 2009, Williams was unable to pay the balance on the note, and he requested that the bank extend the maturity date. On 5 March 2009, Williams and Carolina First Bank agreed to extend the maturity date of the Williams note for 60 days. On 20 May 2009, the parties again extended the maturity date for an additional 60 days.

When the Williams Note matured again, Williams and Carolina First Bank agreed to enter into a new loan. At the request of Carolina First Bank, UVEST liquidated \$10,000 from Williams’s brokerage account on 21 August 2009 to pay delinquent property taxes. On 27 August 2009, Carolina First Bank closed on the loan renewal. The Williams Note was refinanced by a new loan evidenced by a new promissory note signed by Williams payable to Carolina First Bank in the principal amount of \$148,000 at an interest rate of seven and three-quarters percent (7¾%) per annum. The new loan paid off the 5 March 2004 loan, which had a remaining balance of \$137,387.42. In the second Williams Note, there are three recitals as follows:

9. LOAN PURPOSE. The purpose of this Loan is RENEW AND ADD ADDITIONAL COLLATERAL TO MATURED LOAN \$10M NEW MONEY TO COVER APPRAISAL COST ON THREE COMMERCIAL PROPERTIES.

10. ADDITIONAL TERMS. THIS LOAN IS CROSS COLLATERALIZED WITH LOAN —1911 IN THE NAME OF THE STEAK HOUSE, INC IN THE AMOUNT OF \$850,000.00, DATED MARCH 27, 2007 SECURED BY REAL ESTATE AND EQUIPMENT.

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11. SECURITY. The Loan is secured by separate security instruments prepared together with this Note as follows:

Document Name; Parties to Document

Leases And Rents Assignment – 1610 MAIN STREET;
J & R'S FOOD, INC.

Leases And Rents Assignment – 2115 S. STERLING
STREET; THE RICKY N. WILLIAMS REVOCABLE TRUST

Assignment of Investment Property/Securities – Account
Number ---7087; RICKY N. WILLIAMS

Deed of Trust – 2115 S. STERLING STREET; THE RICKY
N. WILLIAMS REVOCABLE TRUST

Deed of Trust – 1610 MAIN STREET; J & R'S FOOD, INC.

and by the following, previously executed, security instru-
ments or agreements: ASSIGNMENT OF INVESTMENT
PROPERTIES/SECURITIES HELD IN THE NAME OF
RICKY N. WILLIAMS ISSUED MARCH 5, 2004 SECURED
BY UVEST FINANCIAL SERVICES ACCOUNT # ---7087

On 17 November 2009, Shuttle Truck Service, Inc. and Carolina First Bank entered into an agreement modifying the Shuttle Truck Note. According to the bank, the modification agreement included an agreement that Williams would liquidate the balance of his UVEST brokerage account and apply the remaining balance to the Williams Note. However, the modification contract does not reflect that understanding. UVEST liquidated the remaining balance, \$94,058.76 from the account on 30 November 2009.

On 30 September 2010, Carolina First Bank merged into TD Bank, N.A.. The assets including the loans and the secured properties underlying these three notes were transferred to TD Bank as Carolina First Bank's successor in interest.

According to the complaint, The Steak House, Inc. defaulted on its loan. The record does not contain a payment history on the Steak House note, a date of default, or a demand letter requesting payment in full. On 12 October 2010, Williams failed to make a payment on the Williams Note, and was assessed a late fee of \$56.10. Williams was assessed four additional late fees and made no additional payments on his personal loan. The record does not contain a demand letter requesting payment in full of the Williams Note. According to the final report of sale, the Trustee foreclosed on the Williams Revocable Trust property by bidding

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in the amount of \$595,000. The final report states that of this sum \$591,850.40 went to pay the obligations owed on the Williams Note and the Steak House Note. TD Bank was the successful bidder at the sale of the property.

On 22 January 2013, TD Bank filed a verified complaint seeking monetary damages from Williams on the basis of his breach of guaranty of the Steak House Note and for his failure to pay the Williams Note. In addition to monetary damages, TD Bank sought attorneys fees of 15% of the amount of the outstanding indebtedness on the basis of N.C. Gen. Stat. § 6-21.2. The record contains no summons so we are unable to discern when service was returned.

On 13 May 2013, Williams responded to the complaint by filing a Rule 12(b)(6) motion to dismiss, an unverified answer containing general denials to some of the allegations in the complaint and defenses to liability under the Deficiency Judgment Act. Subsequently, Williams sought to amend his answer by filing a “Proposed Amended Answer” to add additional defenses and include a counterclaim for negligence, negligent entrustment, and a Chapter 75 violation for unfair and deceptive trade practices. However, there is no order allowing the proposed amendment to the complaint in our record.

On 30 October 2014, TD Bank filed an “amended” motion for summary judgment. With its motion, TD Bank filed four affidavits and the transcript from Williams’s deposition together with supporting documents. The affidavits and deposition are described below.

The affidavit of Elizabeth Walker, previously the Vice President and City Executive for TD Bank in Marion, North Carolina, establishes Walker was involved in Carolina First Bank’s relationship with Williams and his corporations. Walker stated that she “had many conversations with Williams and his accountant, Frank Biddix, concerning the loans because they were often past due or because the bank often received only partial payments on some of the loans.” She described all of the loans as “seriously delinquent.” Additionally, the closing on the renewal of the Williams Note was delayed when Carolina First Bank discovered Williams owed delinquent real property taxes. Walker sent UVEST a letter authorizing them to liquidate \$10,000 for the purpose of paying Williams’s delinquent taxes. Shuttle Truck defaulted on its note in 2009. On 17 November 2009, Williams requested the bank modify the Shuttle Truck Note rather than exercise the Bank’s rights of default under that note. Carolina First Bank agreed, allowing Shuttle Truck, Inc. to make interest-only payments for six months in return for Williams agreeing

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to liquidate the remaining balance of his brokerage account to reduce the amount owed on the Williams Note. Walker contacted UVEST on 24 November 2009, authorizing them to liquidate the remaining balance of the brokerage account. Until 11 July 2011, Williams continued to make monthly payments on the Williams Note. However, the attached payment history does not contain any records from 10 November 2010 through 8 November 2013.

The second affidavit, the affidavit of Shelley McTaggart, the Vice President of TD Bank, contained the following in support of the bank's motion for summary judgment. After default on the Steak House Note, TD Bank commenced foreclosure proceedings in Burke County. The bank's bid of \$595,000 was the only bid for the property. After applying the proceeds of the sale to expenses of the foreclosure proceeding and the Steak House Note, a balance of \$238,940.71 remained on the Steak House Note. She also explained the UVEST account securing the Williams Note was maintained by UVEST Financial Services, not Carolina First Bank. She admits a clerical error in some documents in the loan file which list Carolina First Bank as the holder of the account. UVEST has never been a subsidiary or affiliate of Carolina First Bank or TD Bank.

Terri Payne, the Vice President of Client Support Services of LPL Financial ("LPL"), a custodian of records for UVEST Financial Services, executed an affidavit for LPL. LPL is an affiliate of UVEST. In 2004, Williams registered an individual brokerage account with UVEST. The account was opened under the name Carolina First Collateral Account for Benefit of Ricky N. Williams. UVEST held the account as collateral for a loan with Carolina First Bank. The account was opened with the instruction that "it is acceptable to distribute cash and future dividends off this account to the customer. Trading, however, should be limited as to not drop below the value of the account at the time the loan was closed." In January 2006, Williams bought shares in Enterra Energy. Williams initiated the purchase. In January 2007, Williams sold his shares in Enterra as well as shares in Ford Motor Company. The trade confirmation represents the sale was solicited by a UVEST representative. The same month, Williams bought mutual funds in the amount of \$130,000. On 21 August 2009, UVEST liquidated securities in the account in the amount of \$10,000 and tendered a check in that amount to Carolina First Bank. At the request of Carolina First Bank, UVEST liquidated the remainder of the account on or about 30 November 2009, tendering a check to Carolina First Bank in the amount of \$94,058.76. She also noted the value of the brokerage account declined over time between 2004 and 2009 due to the stock market decline.

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Finally, TD Bank filed an affidavit of David Wooten, a former Market Executive for the Marion office of Carolina First Bank, in support of its motion for summary judgment. Wooten was involved in the bank's loan to Williams in his individual capacity. Wooten did not forge Williams's name on the loan documents, including the Assignment of Investment Properties, nor does he have reason to believe any other person at Carolina First Bank forged Williams's signature.

TD Bank also filed a deposition of Williams with its motion for summary judgment. In his deposition, Williams explained he was the president and sole shareholder of The Steak House, Inc. He bought a Western Sizzlin' and converted it into The Steak House. Since 2008, the restaurant has generated no revenue and has no employees. Williams is also the president of Shuttle Truck Service, Inc. Shuttle Truck Service is a truck stop that washes trailers and has a snack area. He bought the company from its previous owner.

In his deposition, Williams described his meeting at Carolina First Bank when he executed the Williams Note. He explained he discussed having an investment account as collateral for the loan with a man at the bank. Because of that conversation, he thought UVEST and Carolina First Bank were part of the same company. He did not, however, recognize the Securities Control Agreement dated 5 March 2004. The Agreement, which was part of the Williams Note file, was executed when Williams lived in Michigan. As a result, Williams contends the Agreement was forged, because he did not live at the address listed on the Agreement at that time. He also said "this definitely is not my signature."

In response to TD Bank's motion for summary judgment, Williams filed a verified response and a cross motion for partial summary judgment related to the deficiency claim on 2 November 2015. The response contained the following factual allegations:

14. In 2009 as a result of the banking crisis across America the Defendant struggled to make payments to Carolina First Bank but was assured by Beth Walker of Carolina First Bank that the bank would work with him related to his loans. The real estate which secured the Morganton Steak House was valuable and he felt as if in the event of a potential foreclosure that the property would more than cover the value of the loan. The value of the property located at 2115 South [Sterling] Street in June of 2009 was \$1,060,000.00.

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15. The Defendant listed the property for \$1,700,000.00 in 2009 and in August of 2011 he entered into a lease/option agreement with respect to the subject property in the amount of \$1,500,000.00.

Attached to the response, Williams provided an appraisal of the property for \$1,060,000 dated 16 June 2009, a listing agreement with a real estate agent listing the sale price at \$1,700,000 dated 16 March 2009, and a lease with purchase option in the amount of \$1,500,000 dated 20 June 2011.

On 8 December 2014, the trial court entered an order granting summary judgment in favor of TD Bank. The order decreed TD Bank recover \$296,402.27 in relief under the Steak House Note plus interest and reasonable attorneys fees as well as \$46,744.80 on the Williams Note plus interest and reasonable attorneys fees. The trial court also dismissed Williams's counterclaims. Williams timely entered a Notice of Appeal.

II. Jurisdiction

As an appeal from a final judgment of a superior court, jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b).

III. Standard of Review

On appeal, an order granting summary judgment is reviewed *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). Summary judgment is appropriate only when there is no genuine issue of material fact and any party is entitled to judgment as a matter of law. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

When reviewing the evidence on a motion for summary judgment, we review evidence presented in the light most favorable to the non-moving party. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). Moreover, "if the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Wells Fargo Bank, N.A. v. Arlington Hills of Mint Hill, LLC*, 226 N.C. App. 174, 176, 742 S.E.2d 201, 203 (2013) (quoting *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989)).

IV. Analysis**A. Summary Judgment**

[1] N.C. Gen. Stat. § 45-21.36 makes a statutory defense available to loan obligors in actions brought by a lender to recover the deficiency

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following a foreclosure sale of the collateral. *Branch Banking and Trust Co. v. Smith*, __ N.C. App. __, __, 769 S.E.2d 638, 641–642 (2015). A deficiency judgment is an imposition of personal liability on a mortgagor for the unpaid balance of the mortgage debt after proceeds from a foreclosure sale have been applied to the debt, and failed to satisfy the total debt due. *Hyde v. Taylor*, 70 N.C. App. 523, 526, 320 S.E.2d 904, 906 (1984). The statute reads:

When any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part[.]

N.C. Gen. Stat. § 45-21.36 (2015).

A guarantor is entitled to the statutory defense as well, even if the borrower has been dismissed from the action. *Branch Banking and Trust*, __ N.C. App. at __, 769 S.E.2d at 642 (citing *Virginia Trust Co. v. Dunlop*, 214 N.C. 196, 198 S.E. 645 (1938)). By allowing guarantors to exert a defense under the statute in addition to the mortgagor, the statute “establishes an equitable method of calculating the indebtedness.” *High Point Bank and Trust Co. v. Highmark Properties, LLC*, 368 N.C. 301, 305, 776 S.E.2d 838, 841 (2015).

In order to calculate the indebtedness, the statute requires the holder of the obligation to show “that the property sold was fairly worth the amount of the debt secured by at the time and place of sale or that the amount bid was substantially less than its true value.” N.C. Gen. Stat. § 45-21.36 (2015). The burden of proof lies with the mortgagor or guarantor to provide evidence that at the time of sale either the property

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was worth more than the debt or that the mortgagee's bid was substantially less than its true value. *Branch Banking and Trust*, __ N.C. App. at __, 769 S.E.2d at 641. Under N.C. Gen. Stat. § 45-21.36, Williams is entitled to benefit from the statutory defense because he is the mortgagor of the Williams Note and a guarantor of the Steak House Note.

Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, summary judgment shall be rendered "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 . . ." N.C. Gen. Stat. § 1A-1, Rule 56 (2015). A verified complaint or motion may be treated as an affidavit if it meets the above criteria. *See Wein II, LLC v. Porter*, 198 N.C. App. 472, 477, 683 S.E.2d 707, 711 (2009). At summary judgment, the non-moving party must set forth specific facts by affidavits, depositions, answers to interrogatories, and other means provided by Rule 56 to show a genuine issue of material fact exists. Any affidavit submitted at summary judgment must "be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 56 (2015). Unsworn letters and correspondence are not the type of evidence considered by the court at summary judgment, and should not be considered. *Duke Energy Carolinas, LLC v. Bruton Cable Serv., Inc.*, 233 N.C. App. 468, 473, 756 S.E.2d 863, 866 (2014).

The central issue of this appeal is whether Williams has presented a forecast of evidence sufficient to raise a question of material fact. Under the issue to be decided by the court, a property owner may testify to the value of his or her property. "Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value." *Goodson v. Goodson*, 145 N.C. App. 356, 361, 551 S.E.2d 200, 204 (2001) (quoting *N.C. Highway Comm. v. Helderman*, 285 N.C. 645, 652, 207 S.E.2d 720, 725 (1974)). This stems from the rule that lay persons may testify as to the value of real property "if the witness can show he has knowledge of the property and some basis for his opinion." *See Finney v. Finney*, 225 N.C. App. 13, 16, 736 S.E.2d 639, 642 (2013) (quoting *Whitman v. Forbes*, 55 N.C. App. 706, 711, 286 S.E.2d 889, 892 (1982)).

Here, Williams alleged TD Bank did not extract the full value of the property as a defense in his *unverified* answer filed 13 May 2013. He contends the value of the property was sufficient to pay the mortgage in full. Because the answer is unverified, it does not support a holding that

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Williams has forecast evidence that a genuine issue of material fact of value exists.

However Williams's motion for partial summary judgment was verified and contends that the Sterling Street property was fairly worth the amount of debt secured by it at the time and place of sale. At the time of the foreclosure sale, Williams owed \$830,800.11 on the Steak House Note and \$41,836.50 on the Williams Note, for a total of \$872,636.61. The evidence presented by Williams that the property was worth more than the indebtedness is contained within Williams's verified response to the motion for summary judgment. There he alleges the following facts:

14. In 2009 as a result of the banking crisis across America the Defendant struggled to make payments to Carolina First Bank but was assured by Beth Walker of Carolina First Bank that the bank would work with him related to his loans. The real estate which secured the Morganton Steak House was valuable and he felt as if in the event of a potential foreclosure that the property would more than cover the value of the loan. The value of the property located at 2115 South [Sterling] Street in June of 2009 was \$1,060,000.00.

15. The Defendant listed the property for \$1,700,000.00 in 2009 and in August of 2011 he entered into a lease/option agreement with respect to the subject property in the amount of \$1,500,000.00.

Attached to Fact 14, Williams provided one page of an appraisal by a commercial appraising company, Miller & Associates, stating that on 10 June 2009 the Sterling Street Property was worth \$1,060,000.00. With Fact 15, Williams provided a listing agreement, listing the sale price of the property at \$1,700,000.00 dated 16 March 2009 and a lease with purchase option in the amount of \$1,500,000.00 dated 29 June 2011. The attachments were not accompanied by supporting data or affidavits from the appraiser or the real estate professionals stating that on the date of the foreclosure the property was valued at these amounts. Furthermore, Williams himself does not aver that he has an opinion of the value of the property at the time of the foreclosure or that he relied on these documents in reaching this conclusion. Finding no other verified evidence in the record supporting Williams's property value claim, we hold Williams fails to forecast evidence sufficient to create a question of material fact. Because Williams did not base the value of the property on his personal knowledge and because we have no alleged value from Williams at the time of sale, there is a lack of evidence to

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support Williams's claims that the property was worth more than the value obtained at the foreclosure sale. We therefore affirm the trial court's grant of summary judgment.

B. Dismissed Claims

[2] Williams filed a Proposed Amended Answer alleging negligence, negligent entrustment, and a Chapter 75 violation. Williams argues the trial court erred by dismissing these three claims. Because we find no order in the record showing the trial court allowed Williams to amend his answer, we cannot consider a "proposed" amended answer. If a necessary pleading is not contained in the record on appeal, the proper remedy is to dismiss the appeal. *Washington County v. Norfolk Southern Land Co.*, 222 N.C. 637, 638, 24 S.E.2d 338, 339–340 (1943).

V. Conclusion

For the foregoing reasons, we affirm in part and dismiss in part.

AFFIRMED IN PART AND DISMISSED IN PART.

Judges STEPHENS and INMAN concur.

DAWN WEIDEMAN, PLAINTIFF
v.
ERIN ATALIE SHELTON, DEFENDANT
v.
ANNETTE WISE, INTERVENOR

No. COA15-772

Filed 7 June 2016

1. Child Custody and Support—child custody—protected parental status—former domestic partner of maternal grandmother—temporary custody order—clear and convincing evidence standard

The trial court did not err in a child custody case by concluding that intervenor, former domestic partner of plaintiff maternal grandmother, failed to establish by clear and convincing evidence that defendant mother acted inconsistently with her constitutionally protected parental status. The findings did not demonstrate that defendant intended for the 2012 custody order to be permanent.

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Intervenor failed to carry her burden of proving by clear and convincing evidence that defendant failed to shoulder the responsibilities attendant to rearing the minor child.

2. Child Custody and Support—child custody—notice—necessary party—no putative father contested notice

The trial court did not err by upholding the 1 March 2012 custody order. Assuming *arguendo* that the custody order was initially entered in error because intervenor Wise was not given proper notice of the initial custody hearing and was not joined as a necessary party, this error was resolved when the trial court allowed Wise to intervene and participate in the custody proceedings. Further, the record contained no evidence that any putative father contested notice of the initial custody hearing or of the subsequent custody proceedings, and thus, that issue was dismissed.

3. Child Visitation—failure to address—former domestic partner of maternal grandmother—protected parental status

The trial court did not err in a child custody case by failing to address visitation. The trial court concluded that intervenor, former domestic partner of plaintiff maternal grandmother, failed to establish that defendant mother acted inconsistently with her constitutionally protected parental status.

Appeal by intervenor from order entered 3 November 2014 by Judge Ward D. Scott in Buncombe County District Court. Heard in the Court of Appeals 2 December 2015.

Bidwell & Walters, PA, by Paul Louis Bidwell and Law Offices of Douglas A. Ruley, PLLC, by Douglas A. Ruley, for intervenor-appellant.

No brief for defendant-appellee.

No brief for plaintiff-appellee.

CALABRIA, Judge.

Annette Wise (“Wise”), intervenor, appeals from an amended custody order that recognized intervenor as a party, but dismissed intervenor’s motions for custody and visitation without prejudice. The trial court concluded that the initial custody order awarding Dawn Weideman (“Weideman”), plaintiff, the biological maternal grandmother, custody of

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Chris¹ remained in full force and effect. Erin Atalie Shelton (“Shelton”), defendant, is Weideman’s biological daughter and Chris’s biological mother. We affirm.

I. Background

Weideman and Wise were domestic partners beginning in 1991 when Shelton was approximately two years old. Wise, Weideman, and Shelton resided together in Wise’s house as a family unit. When Shelton was around ages thirteen or fourteen, she exhibited outbursts of anger and frustration, or symptoms of a mental health disorder, and was treated with various medications. Around the age of fourteen, Shelton began drinking alcohol and using drugs. At age seventeen, Shelton became pregnant while still using alcohol and drugs, was uncertain as to the father’s identity, and dropped out of high school.

In December 2006, Shelton gave birth to Chris. Wise and Weideman were excited to assist Shelton in her role as a new mother. For the first few weeks, Shelton actively cared for Chris by feeding and nurturing him, and Wise and Weideman assisted with routine care of Chris. A few weeks later, Shelton began to suffer from the emotional swings of her untreated mental health disorder and exhibited symptoms suggestive of postpartum depression. Subsequently, Shelton told Weideman that she needed help caring for Chris because she was depressed and struggling. Following this discussion, Weideman and Wise, rather than Shelton, spent more time caring for Chris.

In August 2007, without Shelton’s knowledge, Wise and Weideman approached an attorney and requested a document allowing them to care for Chris. Subsequently, Wise, Weideman, and Shelton executed an appointment of guardianship (“2007 guardianship appointment”) that purported to grant Weideman and Wise legal guardianship of Chris. Shelton requested an addendum to the 2007 guardianship appointment that stated “the parties agree that the appointment is temporary.”

After executing this document, Wise and Weideman continued caring for Chris just as they had done prior to signing the document. Shelton continued to live with Weideman and Wise on an ongoing basis and later lived with them with her boyfriend on a part-time basis until Wise demanded that Shelton leave the residence and not return. When Shelton returned, she drove her vehicle into the gate, and Wise called law enforcement. Subsequently, although Shelton spent some time in

1. A pseudonym is used to protect the minor’s identity.

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a rehabilitation center, her mental health issues continued for the next few years. Specifically, she exhibited erratic behaviors consistent with bipolar disorder, which remained untreated except through self-medication with prescription narcotics, drugs, and alcohol. Shelton continued to live part-time with Weideman and Wise, but sometime in 2009, Wise again banned Shelton from the residence.

In late 2009, although Wise and Weideman separated and Weideman relocated from Wise's home, Wise and Weideman continued to care for Chris, and Chris split time between the two residences. Following the separation, Shelton spent time at Weideman's new residence and continued to stay with Wise on a part-time basis, until Wise made Shelton relocate from her house in January 2010. Wise banned Shelton from returning to her house, even when Chris was staying there. Wise also attempted to prohibit Shelton from seeing Chris when he stayed at Weideman's residence. Wise told Shelton that she was not entitled to care for Chris and that she intended to supervise any contact between Shelton and Chris. However, Shelton was able to exercise visitation with Chris through Weideman. In May 2010, Shelton gave birth to another child, Charlie,² whose rights are not at issue in this appeal. Around August 2010, Shelton relapsed and was admitted into another rehabilitation center.

By the fall of 2011, Shelton's life improved. She secured her own housing and regularly attended therapy classes. She also discovered a medication regime that worked, and, except for one minor relapse in 2011 when she smoked marijuana, she remained sober. Following Weideman and Wise's separation, Chris began splitting time between the two, and Shelton exercised visitation with Chris through Weideman. During this time, Shelton attempted to assert parental control over Chris and act in the role of his parent.

In 2012, Shelton and Weideman agreed that Weideman should have custody of Chris. Subsequently, Weideman filed a complaint for custody of Chris, Shelton consented, and the trial court entered an initial child custody consent order on 1 March 2012 ("2012 custody order") granting Weideman custody of Chris. In June 2012, Weideman exercised her exclusive custody of Chris by prohibiting contact between Wise and Chris.

On 31 August 2012, Wise filed motions to intervene and to set aside the custody order, as well as a motion for custody and visitation and for breach of the 2007 guardianship appointment. Wise alleged, *inter alia*,

2. A pseudonym is used to protect the minor's identity.

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that Shelton had abdicated her protected parental status. Weideman filed a response and a motion to dismiss. After a hearing, the trial court denied Weideman's motion to dismiss, determined Wise's pleadings were sufficient to allege an action for abrogation of Shelton's protected parental status, and granted Wise's motion to intervene.

After additional motion hearings, the trial court entered an order on 15 August 2014 ("initial 2014 custody order") that was amended on 3 November 2014 ("amended 2014 custody order") to add, *inter alia*, findings that Shelton did not intend to abdicate complete responsibility for Chris or that the care Weideman or Wise provided for Chris was intended to be permanent. To the contrary, the court found that Shelton intended the care to be temporary. The trial court also amended its conclusions of law, stating that "[Wise] has a relationship with [Chris] in the nature of a parent-child relationship[]" and had standing to intervene. However, the trial court repeated its conclusion that Wise failed to meet her burden of proving by clear, cogent, and convincing evidence that Shelton had abdicated her constitutionally protected parental rights. In addition, although the trial court again dismissed Wise's motions for custody and visitation, it omitted the words "with prejudice" from the amended 2014 custody order. However, the decretal portion of the amended 2014 custody order similarly upheld the custodial arrangement outlined in the 2012 custody order, and similarly concluded that the 2012 custody order remained in full force and effect. Wise appeals the amended 2014 custody order.

II. Analysis

Wise's arguments on appeal can be consolidated into two issues: whether the trial court erred by (1) concluding Wise failed to establish by clear and convincing evidence that Shelton acted inconsistently with her constitutionally protected parental status; and (2) dismissing Wise's motions for custody of and visitation with Chris.

As an initial matter, we note that "in custody cases, the trial court sees the parties in person and listens to all the witnesses." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citation omitted). With this perspective, the trial court is able "to observe the demeanor of the witnesses and determine their credibility, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Yurek v. Shaffer*, 198 N.C. App. 67, 80, 678 S.E.2d 738, 747 (2009) (citation omitted). This opportunity of observation "allows the trial court to detect tenors, tones and flavors that are lost in the bare printed record

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read months later by appellate judges.” *Adams*, 354 N.C. at 63, 550 S.E.2d at 503 (citations and quotation marks omitted).

A. Conduct Inconsistent with Protected Parental Status

[1] Wise contends the trial court erred by concluding that Shelton did not act inconsistently with her constitutionally protected parental status. We disagree.

Parents have a fundamental right to make decisions concerning the care, custody, and control of their children. As long as a parent maintains his or her paramount interest, a custody dispute with a nonparent regarding those children may not be determined by the application of the ‘best interest of the child’ standard. However, the paramount status of parents may be lost . . . where the natural parent’s conduct is inconsistent with his or her constitutionally protected status.

Rodriguez v. Rodriguez, 211 N.C. App. 267, 276-77, 710 S.E.2d 235, 242 (2011) (internal citations and some quotation marks omitted).

Our review of “[w]hether . . . conduct constitutes conduct inconsistent with the parents’ protected status” is *de novo*. *Id.* at 276, 710 S.E.2d at 242 (citation omitted) (alteration in original). Under this review, we “consider[] the matter anew and freely substitute[] [our] own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citations and quotation marks omitted). Our analysis is a “fact-sensitive inquiry,” *Boseman v. Jarrell*, 364 N.C. 537, 550, 704 S.E.2d 494, 503 (2010), and this determination “must be viewed on a case-by-case basis.” *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003) (citation omitted). We are bound by the unchallenged findings of a trial court. *See, e.g., Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011) (“Unchallenged findings of fact are binding on appeal.”) (citation omitted). A trial court must determine by “clear and convincing evidence” that a parent’s conduct is inconsistent with his or her protected status. *Adams*, 354 N.C. at 63, 550 S.E.2d at 503 (citation omitted). Therefore, Wise’s burden on appeal is to establish by clear and convincing evidence that Shelton acted inconsistently with her protected parental status.

1. Custody Order

Wise first contends that Shelton’s consent to the 2012 custody order, which led to the trial court granting primary custody of Chris to

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Weideman, was clear and convincing evidence that Shelton acted inconsistently with her protected parental status. We disagree.

“[I]f a parent cedes paramount decision-making authority, then, so long as he or she creates no expectation that the arrangement is for only a temporary period, that parent has acted inconsistently with his or her paramount parental status.” *Boseman*, 364 N.C. at 552, 704 S.E.2d at 504 (citation omitted). In the instant case, Shelton, as Chris’s mother, made temporary arrangements for Chris’s care first when she executed the 2007 guardianship appointment, which stated explicitly that the appointment was temporary, and next when she consented to the 2012 custody order.

At the custody hearings, Shelton testified that she never told Wise that the 2007 guardianship appointment would be permanent or that Wise would be Chris’s parent, and that she never intended to mislead Weideman or Wise into thinking that they would parent Chris until he was an adult. Shelton testified that for a few months in 2007, she was not receiving treatment for her feelings of anxiety and depression, nor was she receiving prescription medications for other mental health issues. This struggle prompted her to seek help from Wise and Weideman to care for Chris, which triggered Wise and Weideman to discuss having an attorney draft the 2007 guardianship appointment. Shelton further testified that after the 2007 guardianship appointment was executed, she remained involved in Chris’s life. When Shelton was doing well, she would be involved in Chris’s life, holding him and playing with him and trying to help with caring for him. But when Shelton was not doing well, she would try to avoid Chris, so as to prevent Chris from seeing her under the influence of narcotics or exhibiting symptoms of her mental health issues. Weideman testified that Shelton agreed to sign the 2007 guardianship appointment “only if it were temporary because one day she hoped to be able to raise [Chris].” Indeed, Wise concedes that the 2007 guardianship appointment provided explicitly that “the parties agree that the appointment is temporary.”

Regarding the 2012 custody order, Wise contends that Shelton failed to indicate that she intended the custodial arrangement to be temporary. However, Wise is mistaken. The transcript of the custody hearings indicate that Shelton and Weideman intended a temporary arrangement. Shelton testified that she did not understand that the 2012 custody order would strip her of her right to parent Chris. Rather, Shelton understood that Weideman, unlike Wise, was willing to allow Shelton to undertake more of a parenting role for Chris at a time when she would be able to do so. Indeed, Weideman testified that “[Shelton] knew that [by] giving

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me legal custody [of Chris], [Shelton] would still be able to be a part of his life and hopefully some day be his parent[.]”

Shelton’s decision to consent to the 2012 custody order was based, in part, on her understanding that legally placing Chris in Weideman’s care would allow Shelton to continue to be an active participant in Chris’s life and provide her the opportunity to assert her role as Chris’s parent to a progressively greater degree. The trial court made the following unchallenged findings of fact, which are binding on appeal:

54. . . . This decision [to execute the 2012 custody order] was based in part upon the desire of [Shelton] to be actively involved in [Chris’s] life . . . , and that by legally placing [Chris] in the care of [Weideman,] [Shelton] would continue to have the opportunity to be an active participant in [Chris’s] life[.]

. . . .

58. . . . [Shelton’s] election to grant [Weideman] custody of [Chris] pursuant to the Order of 1 March 2012 was . . . not inconsistent with her parental role for the following reasons:

- a. Prior to this time, while [Chris] was in the care of [Wise], [Shelton] was unable to assert her rights as a parent and was unable to have any real interaction with [Chris];
- b. [Weideman] had not interfered with [Shelton]’s ability to see [Chris] and represented a safe place for [Chris] to live on an ongoing basis while [Shelton] attempted to place herself in the position where she was able to assert her rights as a parent;
- c. [U]nder [Weideman]’s care, [Chris] was able to maintain a relationship with [Shelton,] and [Shelton] was able to provide care for [Chris];
- d. [Weideman] has always allowed [Shelton] access to and the ability to care for [Chris] in the best interest of [Chris];
- e. [W]hen [Chris] was placed with [Weideman] on a primary basis, [Shelton] had access to and was able to provide care for [Chris], as well as providing a relationship for [Chris] with his sibling, including teaching

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[Chris] sign language in order to be able to communicate with his younger sibling.

The trial court's findings illustrate that Shelton's execution of the 2012 custody order was not conduct inconsistent with her protected parental status. Rather than demonstrate that Shelton intended the 2012 custody order to further relinquish her parental authority, the findings illustrate that Shelton intended for the 2012 custody order to enable her to assert her right to parent Chris and to assume her role as Chris's mother to a progressively greater degree. The findings demonstrate that Wise purposefully impeded Shelton from exercising her right to parent Chris, and that executing the 2012 custody order that granted Weideman sole custody of Chris was one of the very limited ways by which Shelton would be able to assert her role as Chris's parent. Therefore, the findings demonstrate not that Shelton intended for the 2012 custody order to grant Weideman permanent custody of Chris, but that she intended for the 2012 custody order to provide her with the opportunity to assume her role as Chris' mother in the future.

Wise has failed to establish by clear and convincing evidence that Shelton's execution of the 2007 guardianship appointment or the 2012 custody order conduct inconsistent with her protected parent status. Therefore, we overrule Wise's challenge.

2. Responsibilities Attendant to Rearing Chris

Wise next contends that the trial court erred by concluding Shelton did not act inconsistently with her protected status, because Wise presented clear and convincing evidence that Shelton failed to shoulder the responsibilities attendant to rearing a child. We disagree.

Although Wise cites to *Price v. Howard* for the proposition that "the parent may no longer enjoy a paramount status if . . . she fails to shoulder the responsibilities that are attendant to rearing a child," 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997), she has failed to apply that case or any other authority to the facts of this case. *Moss Creek Homeowners Ass'n, Inc. v. Bissette*, 202 N.C. App. 222, 231, 689 S.E.2d 180, 186 (2010) ("[T]he [party] appl[ied] no facts from the record to the case law cited. Accordingly, this argument is deemed abandoned. N.C. R. App. P. 28(b)(6) (2009)."). In support of her argument, Wise cited only to an unpublished opinion from this Court, but failed to apply facts from the record to the case cited. Moreover, she failed to include a copy of this opinion at the end of her brief. Rule 30 of the North Carolina Rules of Appellate Procedure provides:

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(3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to which the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum.

N.C.R. App. P. 30(3)(e)(3).

Nonetheless, we conclude that Wise has failed to carry her burden of proving by clear and convincing evidence that Shelton failed to shoulder the responsibilities attendant to rearing Chris. Wise contends that the 2007 guardianship appointment, Wise and Weideman co-parenting Chris for five-and-one-half years, and Shelton using drugs and disappearing for days, are clear and convincing evidence that Shelton failed to shoulder the responsibilities attendant to raising Chris. We disagree.

The trial court made the following unchallenged findings:

31. Based upon a reading of [the 2007 guardianship appointment] and all the competent evidence in this matter, the Court does not find that the intent of [Shelton] was to abdicate complete responsibility for her child, or that any intent to allow [Weideman] or [Wise] to provide care for her child was intended to be permanent. Rather, and to the contrary, the Court finds that this assignment by [Shelton] was intended by [Shelton] to be temporary in nature.

....

38. That [Shelton's] admittance into Copestone in 2005, relapse in 2007, and Neil Dobbins in 2010[, rehabilitation centers,] are all indicative of the struggles [Shelton] faced at the intersection of untreated mental health issues and self-medicating that turns into addiction. That given

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[Shelton's] long journey towards seeking professional help, and then subsequent journey of discovering a medication regiment that worked to treat these issues, and later behavioral therapies and remedies to assist [Shelton] realize that she has choices where before all of these treatments [Shelton] testified she would only feel trapped by her illness and react in anger, that given all of these journeys coupled with the fact that [Shelton] is a high school drop-out with very limited economical means, that temporary guardianship and custody must give a birth mother the time and space to learn how to take care of herself so that she can be a fully present mother for her son. The Court notes that [Shelton] has made and is making progress in this journey and that [Shelton's] progress can be tracked with her involvement and increased parenting role in [Chris's] life as described by [Weideman], [Shelton], and [Shelton's] biological grandmother[.]

39. [Wise] testified that [Shelton] did not take care of [Chris] and would often be upset with [Chris] if [he] cried or made noise at night. [Wise] further testified that she and [Weideman] would ask [Shelton] to leave the residence if it was upsetting [Chris]. The Court notes that on these occasions [Shelton] would leave the residence. The Court cannot find that the request to have [Shelton] leave the residence, or compliance by [Shelton] with this request, is an act contrary to the parental responsibility and rights of [Shelton] when the evidence supports that this was an appropriate decision.

40. While [Wise] testified that [Shelton] never took parenting responsibilities, the Court does not find this to be credible; when considering the competent testimony of [Weideman], [Shelton,] and [Wise], the Court finds that [Shelton] did assume certain parenting responsibilities for [Chris], [but] did also rely upon both [Weideman] and [Wise] to care for [Chris].

....

42. That [Shelton] never expressed any desire or intention for [Weideman] and [Wise] to provide for the sole and exclusive care for [Chris]; in fact, the Court finds [to] the contrary, that the guardianship papers and other statements

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made were raised initially by [Wise], and that [Shelton], in fact, objected to the supposition that [Weideman] and [Wise] would be awarded the care for [Chris].

. . . .

47. That [Wise] attempted to keep Shelton away from [Chris] when [he] was staying at [Wise's] respective residence; that the intent of [Wise] to prevent [Shelton] from staying at her residence when [Chris] was living in that home, and to even prevent [Shelton] from seeing [Chris] when [he] was at [Weideman's] residence. To which [Weideman] testified that she simply would not tell [Wise] when [Shelton] was present at her home with [Chris].

48. That the intentional acts of [Wise] to prevent [Shelton] from being in the presence of [Chris] was not the intent or desire of [Shelton], and that [Shelton] lacked the ability, self-esteem, and resources to undertake any real act or actions to establish her role as a parent in [Chris's] life. . . . Accordingly, the Court finds that [Wise] cannot simultaneously attempt to prevent [Shelton] from having a relationship with her child, and then hold this against [Shelton.]

. . . .

50. The Court further finds, based upon the testimony of [Wise] that [Wise] never agreed, and would not have agreed, to let [Shelton] take [Chris] or have a parental role over [Chris]. [Wise] further testified that she wanted [Chris] to view his own biological mother, [Shelton], as a big sister, and went further stating, "I believe [Chris] is mine. . . or at least half mine." The Court believes [Wise's] response when asked if between 2006 to 2012, at no time would [Wise] have allowed [Shelton] to take on a parenting role, to which [Wise] responded, "Correct."

These unchallenged findings demonstrate that Shelton was suffering from untreated mental health issues for the majority of Chris's life, but that she made qualitative progress toward resolving these issues that previously hindered her from asserting her role as Chris's parent. We agree with the trial court that Wise cannot simultaneously intentionally prevent Shelton from having a relationship with Chris, and then argue that Shelton has failed to shoulder her burden to care for Chris. The evidence indicates that Shelton recognized that she needed to relinquish

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some of her parental authority to Weideman and Wise while she sought treatment for her mental health issues and her problems of addiction, until she was able to care for Chris. Wise has failed to establish by clear and convincing evidence that Shelton failed to shoulder the responsibilities attendant to raising Chris, such that she has abdicated her protected parent status. Therefore, we overrule Wise's challenge.

B. Validity of Custody Order

[2] Wise contends the trial court erred by upholding the 1 March 2012 custody order, because it was entered in violation of N.C. Gen. Stat. §§ 50A-205(a) and 50A-209. Specifically, Wise contends the custody order was invalid and unenforceable, because the initial custody complaint failed to disclose Wise's custodial and parental relationship to Chris, Wise was not joined in the initial custody complaint as a necessary party under Rule 19 of the North Carolina Rules of Civil Procedure, and the initial complaint failed to disclose any potential putative fathers. We disagree.

"N.C. Gen. Stat. § 50A-205 provides that notice and an opportunity to be heard must be provided to all interested parties before a child custody determination can be made." *Mitchell v. Mitchell (now Norwich)*, 199 N.C. App. 392, 398, 681 S.E.2d 520, 525 (2009) (citation omitted). This includes "any person having physical custody of the child." N.C. Gen. Stat. § 50A-205(a) (2015). In this case, Wise had physical custody of Chris. Therefore, she had a right to notice of the initial custody hearing. Although Wise was not given notice of the initial custody hearing, the trial court granted her motion to intervene in the matter, and Wise was subsequently joined as a party to the custody proceedings. After multiple days of hearings, in which Wise participated, the trial court determined that, even though Wise had a relationship with Chris, the custodial arrangement of the initial custody order was appropriate. In addition, the trial court dismissed Wise's motions for custody and visitation without prejudice.

Assuming, *arguendo*, that the custody order was initially entered in error because Wise was not given proper notice of the initial custody hearing, this error was resolved when the trial court allowed Wise to intervene and participate in the custody proceedings. Although Wise appealed the amended custody order, not the initial custody order, the amended custody order not only references the initial custody order, but also incorporates the trial court's conclusion of law that the custodial arrangement outlined in the initial custody order awarding Weideman custody of Chris was a proper initial custody determination.

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This same rationale, that any error arising from Weideman and Shelton's failure to give Wise notice of the initial custody proceeding was resolved after Wise was joined as a party to the custody proceedings, also applies to Wise's challenge that initially she was not joined as a necessary party. Therefore, we overrule these challenges.

As to Wise's challenge that Weideman's "fraudulent exclusion of the likely biological fathers[] render[ed] the [consent order] invalid and unenforceable," we note that, once again, Wise has failed to apply any authority to the facts of this case. *See* N.C.R. App. P. 28(b)(6). Nonetheless, we note that the trial court found the following unchallenged facts:

8. . . . The father of [Chris], as of the date of the hearing, was not known; there was no service on the father or putative father at the time of the filing of the Complaint, nor was evidence presented by any person or party to this action during this trial that paternity had been established concerning [Chris].

. . . .

33. That [Chris's] father had yet to make an appearance or be present in the life of the child, in any way, shape or form [from Chris's birth until execution of the 2007 guardianship appointment].

We recognize that the record does contain an affidavit from Greg Clinkscales ("Clinkscales"), the father of Shelton's other minor child, Charlie, which was attached to Wise's Rule 59 and 60 motions after the trial court entered its custody order on 15 August 2014. The affidavit states in pertinent part:

3. [Shelton] and I have one child together, that I am certain of, [Charlie], born May 31, 2010. I have had physical custody of [Charlie] since two (2) months after he was born.

4. [Shelton] told me that [Chris] is my child and that there was no doubt about it; she told me this prior to May 2013.

However, the record contains no evidence that Clinkscales or any other putative father contested notice of the initial custody hearing or of the subsequent custody proceedings. Clinkscales was not joined as a party to this appeal pursuant to N.C.R. App. P. 5(a). Therefore, this issue is not properly before us, and we dismiss this challenge.

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C. Trial Court's Failure to Address Visitation

[3] Wise's next argument pertains to the trial court's failure to address visitation. Specifically, Wise contends: "The trial court's Order noted that visitation was an issue, but, failed to enter any findings or conclusions that addressed visitation, and the Order specifically failed to address whether visitation with Wise is in the child's best interests." However, "[a]s we have concluded that defendant did not act inconsistently with her status as a parent, and the trial court did not make a finding that defendant was unfit, there was no basis for the trial court to grant visitation to [Wise]." *Rodriguez*, 211 N.C. App. at 279, 710 S.E.2d at 244 (citation omitted). The trial court did not err by dismissing Wise's motion for visitation of Chris. We overrule this challenge.

Because the trial court concluded that Wise failed to establish that Shelton acted inconsistently with her constitutionally protected parental status, we do not address Wise's additional challenges on appeal.

III. Conclusion

Since the trial court did not err by concluding Wise failed to establish by clear and convincing evidence that Shelton had acted inconsistently with her constitutionally protected parental status, the trial court also did not err in dismissing Wise's motions for custody and visitation. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges ELMORE and ZACHARY concur.

WRAY v. CITY OF GREENSBORO

[247 N.C. App. 890 (2016)]

DAVID WRAY, PLAINTIFF
v.
CITY OF GREENSBORO, DEFENDANT

No. COA15-912

Filed 7 June 2016

Immunity—governmental immunity—police officer’s contractual claim—litigation expenses

The trial court erred by granting defendant City’s Rule 12(b) motion to dismiss plaintiff former police chief’s complaint seeking \$220,593.71 for the amount he paid defending lawsuits filed against him arising from his employment. The City was not shielded by the doctrine of governmental immunity to the extent that plaintiff’s action was based in contract. The order of the trial court was reversed and remanded for further proceedings.

Judge BRYANT dissenting.

Appeal by Plaintiff from order entered 8 May 2015 by Judge James C. Spencer, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 26 January 2016.

Carruthers & Roth, P.A., by Kenneth R. Keller and Mark K. York, for the Plaintiff-Appellant.

Smith Moore Leatherwood LLP, by Patrick M. Kane, and Mullins Duncan Harrell & Russell PLLC, by Alan W. Duncan and Stephen M. Russell, Jr., for the Defendant-Appellee.

Wilson, Helms & Cartledge, LLP, by Lorin J. Lapidus, and NCLM, by General Counsel Kimberly S. Hibbard and Associate General Counsel Gregory F. Schwitzgebel, III, for Amicus Curiae, North Carolina League of Municipalities.

DILLON, Judge.

David Wray (“Plaintiff”) brought suit against his former employer (Defendant City of Greensboro) to recover certain employee benefits he claims he was due. The trial court dismissed Plaintiff’s claim based on governmental immunity. For the following reasons, we reverse the order of dismissal and remand the matter for further proceedings.

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I. Background

In 1980, the City of Greensboro passed a resolution (the “City Policy”) stating that the City would pay for the legal defense and judgments on behalf of its officers and employees with respect to certain claims arising from their employment.

In 2003, Plaintiff became the Chief of Police for the City. In January 2006, Plaintiff resigned from his position as Chief of Police at the request of the City Manager, after alleged incidents within the Greensboro Police Department (the “Department”) resulted in state and federal investigations of Plaintiff and the Department.

After his resignation, Plaintiff was named as a defendant in actions filed by City police officers for Plaintiff’s alleged conduct occurring while he was serving as Chief of Police.¹ Plaintiff has incurred substantial litigation expenses in these actions and has requested reimbursement from the City under the City Policy. However, the City has declined Plaintiff’s request.

Plaintiff filed this present action against the City seeking \$220,593.71, the amount he paid defending the lawsuits filed against him. The City moved to dismiss the action pursuant to Rule 12(b)(1), (2) and (6) of the Rules of Civil Procedure. The trial court granted the City’s Rule 12(b) motion to dismiss Plaintiff’s complaint, concluding that the City was shielded by the doctrine of governmental immunity, holding that the City had not waived its immunity. Plaintiff timely appealed.

II. Summary of Holding

The City’s motion to dismiss was made pursuant to Rule 12(b)(1), (2) and (6). The trial court granted the City’s motion on the sole ground that the City was “shielded by the doctrine of governmental immunity, which immunity has not been waived.” The trial court based this holding on its conclusion that the City’s enactment of the City Policy pursuant to its authority granted under N.C. Gen. Stat. § 160A-167 was not an action which waives governmental immunity. However, we hold that Plaintiff has, in fact, set forth allegations that the City has waived governmental immunity, though *not* based on the City’s act of enacting the City Policy, *but rather* based on the City’s act of entering into an employment agreement with Plaintiff.

1. See *Fulmore v. City of Greensboro*, 834 F. Supp.2d 396 (M.D.N.C. 2011); *Hinson v. City of Greensboro*, 232 N.C. App. 204, 753 S.E.2d 822 (2014).

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Specifically, Plaintiff has made a breach of contract claim, essentially alleging that he had a contract with the City to work for the City *and* that pursuant to the City's contractual obligations, the City is required to pay for his litigation expenses. Importantly, the City is authorized to enter into employment contracts with its police officers, and the City is authorized by N.C. Gen. Stat. § 160A-167 to enact a policy by which it may contractually obligate itself to pay for certain legal expenses incurred by these officers.

Whether the City is, in fact, contractually obligated to pay for Plaintiff's litigation expenses as alleged in the present case (under a theory that the City Policy is part of his contract or based on some other theory) goes *to the merits* of Plaintiff's contract claim and is not relevant to our threshold review of whether the City *is immune* from having to defend against these contract claims in court. Rather, we merely hold that the trial court erred in dismissing Plaintiff's complaint *based on the doctrine of governmental immunity*, the only basis of its order. Accordingly, we reverse the order of the trial court.

III. Analysis

In general, the doctrine of sovereign/governmental immunity "provides the State, its counties, and its public officials with absolute and unqualified immunity from suits against them in their official capacity." *Hubbard v. County of Cumberland*, 143 N.C. App. 149, 151, 544 S.E.2d 587, 589 (2001). Under the doctrine of *sovereign* immunity, it is the State of North Carolina which "is immune from suit [in the absence of] waiver[.]" whereas under the doctrine of *governmental* immunity, counties and cities are "immune from suit for *negligence* of [their] employees in the exercise of governmental functions absent waiver of immunity." *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997) (emphasis added).

Our Supreme Court has instructed that when the State has the authority to enter into a contract and it does so voluntarily, "the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976). Likewise, a city or county waives immunity when it "*enters into a valid contract.*" *M Series Rebuild v. Town of Mt. Pleasant*, 222 N.C. App. 59, 65, 730 S.E.2d 254, 259 (2012) (citations omitted) (emphasis in original). However, a municipality waives governmental immunity only for those contracts into which it is authorized to enter. *See Smith*, 289 N.C. at 322, 222 S.E.2d at 425 ("The State is liable only upon contracts authorized by law.").

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The relationship between a municipality and its police officers is, indeed, contractual in nature. And a municipality is authorized to enter into employment contracts with individuals to serve as police officers. Further, relevant to this appeal, the General Assembly has authorized municipalities to provide for the defense of their officers and employees in any civil or criminal action brought against a member in the member's official or individual capacity. N.C. Gen. Stat. § 160A-167 (1980). We hold that under G.S. 160A-167, one way a municipality is authorized to provide such benefit is by contract. We note that N.C. Gen. Stat. § 160A-167 is permissive; the General Assembly does not require a city to make any provision for the defense of employees, contractual or otherwise, but if a municipality does so, "[t]he city council, authority governing board, or board of county commissioners . . . shall have adopted . . . uniform standards under which claims made or civil judgments entered against . . . employees or officers, or former employees or officers, shall be paid." N.C. Gen. Stat. § 160A-167(c).

In the present case, pursuant to its authority under N.C. Gen. Stat. § 160A-167, the City passed the City Policy, which provided as follows:

[It] is hereby declared to be the policy of the City of Greensboro to provide for the defense of its officers and employees against civil claims and judgments and to satisfy the same, either through insurance or otherwise, when resulting from any act done or omission made, or any act allegedly done or omission allegedly made, in the scope and course of their employment or duty as employees or officers of the City, except and unless it is determined that an officer or employee (1) acted or failed to act because of actual fraud, corruption or actual malice[,] or (2) acted or failed to act in a wanton or oppressive manner.

The City enacted the City Policy in 1980 and it remained in effect during the entire time Plaintiff was employed by the City. Whether the City Policy is, in fact, an element of Plaintiff's employment contract and whether Plaintiff's litigation expenses are covered thereunder go to the merits of Plaintiff's contract claim. However, in the present appeal, we are not concerned with the *merits* of Plaintiff's contract claims; rather, we only address whether the City is shielded from having to defend against those claims based on governmental immunity.

It appears that Plaintiff was an at-will employee of the City. North Carolina has traditionally embraced a strong presumption that employment is "at-will," that is, terminable at the will of either party.

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Soles v. City of Raleigh, 345 N.C. 443, 446, 480 S.E.2d 685, 687 (1997) (internal citation omitted). However, the relationship between an employer and an at-will employee is still contractual in nature. In terms of benefits earned during employment, our Court has consistently applied a unilateral contract theory to the at-will employment relationship. See *Roberts v. Mays Mills, Inc.*, 184 N.C. 406, 411-12, 114 S.E. 530, 533-34 (1922); *White v. Hugh Chatham Mem'l Hosp., Inc.*, 97 N.C. App. 130, 131-32, 387 S.E.2d 80, 81 (1990); *Brooks v. Carolina Telephone*, 56 N.C. App. 801, 804, 290 S.E.2d 370, 372 (1982). A unilateral contract is one where the offeror is the master of the offer and can withdraw it at any time before it is accepted by performance. *White*, 97 N.C. App. at 132, 387 S.E.2d at 81. While the offer is outstanding, the offeree can accept by meeting its conditions. *Id.*

In sum, Plaintiff has essentially pleaded that he had an employment relationship with the City and that the City has contractually obligated itself to pay for his defense as a benefit of his contract. Whether the City is, in fact, obligated to pay *contractually* by virtue of its passage of the City Policy goes to the merits and is not the subject of this appeal.

We are unpersuaded by the City's argument that this case is controlled by our Supreme Court's holding in *Blackwelder v. City of Winston-Salem*, in which that Court stated that "[a]ction by the City under N.C.G.S. § 160A-167 does not waive immunity." *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432, 436 (1992). The Supreme Court was referring to immunity from *tort* actions, stating in the previous sentence that the General Assembly has expressly prescribed in N.C. Gen. Stat. § 160A-485 that "the only way a city may waive its governmental immunity is by the purchase of liability insurance." *Id.* Extending the language in *Blackwelder* to contract claims would lead to bizarre results. For instance, an employee would have no remedy if his city-employer breached an express provision in his written employment contract which stated that the city would pay for any G.S. 160A-167-type litigation expenses he might incur defending a suit brought by a third party.

We are further unpersuaded by the City's argument that Plaintiff failed to "specifically allege a waiver of governmental immunity." *Fabrikant v. Currituck County*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005). We agree that "[a]bsent such an allegation, the complaint fails to state a cause of action." *Id.* However, we do not require *precise language* alleging that the City has waived the defense of governmental immunity – "consistent with the concept of notice pleading, a complaint need only allege facts that, if taken as true, are sufficient to establish a waiver[.]"

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Id.; see also *Sanders v. State Personnel Com'n*, 183 N.C. App. 15, 19, 644 S.E.2d 10, 13 (2007). Rather, we look to Plaintiff's amended complaint to determine whether Plaintiff has sufficiently alleged the City's waiver of governmental immunity. See *Sanders*, 183 N.C. App. at 19, 644 S.E.2d at 13. In the amended complaint, Plaintiff alleges that he was employed by the City's Police Department as the Chief of Police, that he was acting within the "course and scope of his employment" at all times material to his claim, that pursuant to the provisions of the City Policy he is entitled to reimbursement for his legal expenses and fees, and that the City failed to honor the City Policy. We believe that these allegations are sufficient to establish waiver through a breach of Plaintiff's contractual relationship as an employee of the City. Accordingly, this argument is overruled. In concluding as such, we take no position as to *the merits* of Plaintiff's contract action – "[t]oday we decide only that [P]laintiff is not to be denied his day in court because his contract was with the State." *Smith*, 289 N.C. at 322, 222 S.E.2d at 424.

IV. Conclusion

We hold that the City is not shielded by the doctrine of governmental immunity to the extent that Plaintiff's action is based in contract. We reverse the order of the trial court and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judge ZACHARY concurs.

Judge BRYANT dissents by separate opinion.

BRYANT, Judge, dissenting.

Because I believe the trial court properly granted defendant City of Greensboro's motion to dismiss plaintiff's complaint, I respectfully dissent.

In its 8 May 2015 order, the trial court concluded that defendant maintained its governmental immunity from suit: "Neither the institution of a plan adopted pursuant to N.C.G.S. § 160A-167, under which a city may pay all or part of some claims against employees of the city, nor action taken by the city under N.C.G.S. § 160A-167, waives governmental immunity. See *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 420 S.E.2d 432 (1992)." However, in reaching this conclusion, the trial court provided no findings of fact, and the record provides no indication that

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a request for findings was made by the parties. Thus, we must determine whether there was sufficient evidence to support the trial court's presumed finding that defendant City of Greensboro did not waive its governmental immunity by express waiver, purchase of liability insurance, or entry into a valid contract. *See Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 101, 545 S.E.2d 243, 246 (2001) ("In the absence of an express waiver of sovereign immunity by [defendant], we must determine whether there was sufficient evidence to support the presumed finding by the trial court that the county waived its sovereign immunity as to [plaintiff's] contract claims either by the purchase of liability insurance or by entering [into] a valid contract.")

In his complaint, plaintiff asserts in pertinent part that he began employment with the Police Department of the City of Greensboro as a police officer in March of 1981, after the Greensboro City Council's adoption of the resolution at the center of this dispute. Through the years, plaintiff was promoted through the ranks: Sergeant, Lieutenant, Assistant Chief, and in July 2003, Chief of Police. In January 2006, plaintiff resigned as Chief of Police. Following his resignation, investigations into alleged civil rights violations perpetrated by plaintiff were conducted by federal and state bureaus of investigation. Multiple lawsuits were filed against plaintiff in Guilford County Superior Court on the basis of conduct alleged to have occurred in his role as Chief of Police. Plaintiff requested that the City provide him with legal representation but was denied. Plaintiff alleged that "[a]s an employee of the City acting within the course and scope of his employment, and pursuant to the provision of the City Policy, [plaintiff] is entitled to indemnification and reimbursement of the expenses he has incurred . . . in connection with his defense [of lawsuits totaling \$220,593.71]."

In response to the allegations of the complaint, defendant City of Greensboro filed a motion to dismiss. In its motion, defendant requested that the trial court dismiss plaintiff's complaint for lack of personal and subject matter jurisdiction, and for failure to state a claim. Defendant does not contest any of the allegations asserted in plaintiff's complaint, but rather states the following:

4. Plaintiff contends that he is entitled to a declaratory judgment that the City should provide for a defense and indemnification under a 13 November 1980 Resolution (the "Resolution"). The Resolution addresses the provision to City Officers and employees of a defense against civil claims for acts alleged to have been performed in the scope and course of their employment "unless it is

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determined that an officer or employee (1) acted or failed to act because of actual fraud, corruption, or actual malice or (2) acted or failed to act in a wanton or oppressive manner.” A copy of that Resolution is attached as Exhibit A.

5. The Resolution vests the City Manager (or his designee) with the authority to “determine whether or not a claim or suit filed against an officer or employee . . . meets the standards . . . for providing a defense for such officer or employee.” (Ex. A. . . .).

The Resolution declares “the *policy* of the City of Greensboro to provide for the defense of its officers and employees against civil claims and judgments[.]” (emphasis added). This statement prescribes an *intent* to provide for the defense of officers and employees. *See generally* N.C. Gen. Stat. § 143-300.3 (2015) (“[T]he State *may* provide for the defense of any civil or criminal action or proceeding brought against him in his official or individual capacity . . .” (emphasis added)); *In re Annexation Ordinance*, 303 N.C. 220, 230, 278 S.E.2d 224, 231 (1981) (“We conclude that the provisions of G.S. 160A-45 [(entitled “Declaration of policy”)] are statements of policy and should not be treated as part of . . . [statutory] procedure”); *Paschal v. Myers*, 129 N.C. App. 23, 29, 497 S.E.2d 311, 315 (1998) (“Plaintiff maintains . . . the mere fact that the . . . Board of County Commissioners had adopted, as an ordinance, the County’s personnel policies contained in the Handbook demands that the Handbook’s personnel policies were a part of his [employment] contract. This argument is unpersuasive.”); *Lennon v. N.C. Dept. of Justice*, No. COA15-660, 2016 WL 1565892, at *4 (N.C. Ct. App. Apr. 19, 2016) (unpublished) (“Because petitioner cannot establish that the State was contractually bound to provide services for his legal defense in the underlying civil action, petitioner has consequently failed to establish a waiver of sovereign immunity by contract.”).

Furthermore, the Resolution does not provide substantive rights or procedural steps. *Contra Bailey v. State*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998) (Acknowledging that “the relationship between employees vested in the retirement system and the State [was] contractual in nature,” the Court found evidence in the record to support the trial court’s finding that “the tax exemption was a term of the retirement benefits offered in exchange for public service to state and local governments.”); *Pritchard v. Elizabeth City*, 81 N.C. App. 543, 545, 552, 344 S.E.2d 821, 822, 826 (1986) (acting under the authority of N.C. Gen. Stat. § 160A-162 (1982), authorizing municipal corporations to fix salaries or other compensation or to approve and adopt pay plans to compensate

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city employees, the City Council passed an ordinance wherein “[e]ach full-time employee shall earn vacation leave at the rate of five-sixths (5/6) workdays per calendar month of service”). Thus, I would hold that the Resolution is not a contractual provision upon which plaintiff can compel defendant’s performance.

While we acknowledge there is plenary support for the proposition that an employer-employee relationship is essentially contractual and such a relationship often waives immunity from suit on the contract, *see Sanders v. State Pers. Comm’n*, 183 N.C. App. 15, 21, 644 S.E.2d 10, 14 (2007) (“[T]he existence of the relation of employer and 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. Department of Conservation and Development*, 206 N.C. 206, 208, 173 S.E. 603, 604 (1934),” as quoted by *Archer v. Rockingham Cnty.*, 144 N.C.App. 550, 557, 548 S.E.2d 788, 792–93 (2001)); *Sanders*, 183 N.C. App. at 22, 644 S.E.2d at 14 (“Under [*Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 424 (1976)], because the State entered into a contract of employment with [the] plaintiffs, it now occupies the same position as any other litigant.” (citation omitted)), here, the Resolution central to this action is not a contractual provision.

Though the majority opinion frames the issue as purely a determination of whether the employee-employer relationship between plaintiff and defendant is a contractual one and reasons that that alone determines the waiver of defendant’s immunity, I believe that the record before the trial court was sufficient to determine that plaintiff could not establish a valid contractual agreement with defendant City of Greensboro on the issue central to this action, the provision of a legal defense as a condition of employment. Moreover, there is no indication of an express waiver or an applicable insurance provision. Thus, I would hold the trial court was correct in concluding that defendant City of Greensboro, a municipality, did not waive its governmental immunity to plaintiff’s suit. Therefore, I would affirm the order of the trial court granting defendant’s motion to dismiss plaintiff’s complaint. Accordingly, I dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 JUNE 2016)

ALLMOND v. GOODNIGHT No. 15-1139	Guilford (11CVS6901) (11CVS8578)	Affirmed
BIBBS v. BIBBS No. 15-1030	Wake (13CVD10578)	Reversed and Remanded
BIO-MED. APPLICATIONS OF N.C., INC. v. N.C. DEPT OF HEALTH & HUMAN SERVS. No. 15-815	Office of Admin. Hearings (14DHR5495)	Affirmed
DEPT OF TRANSP. v. ASHCROFT DEV., LLC No. 15-1080	Rockingham (10CVS1365)	Affirmed
DIAZ v. SPANISH CONTR'RS No. 15-764	N.C. Industrial Commission (13-712593) (PH-3437)	Affirmed
FRIDAY INVS., LLC v. BALLY TOTAL FITNESS OF MID-ATL., INC. No. 15-822	Mecklenburg (14CVS8495)	Dismissed
GRUBB v. PEAL No. 15-1109	Pitt (10CVD2687)	Affirmed
IN RE A.R. No. 15-1128	Brunswick (15JA24)	Affirmed
IN RE K.A.K. No. 15-1082	Davie (15JT2)	Affirmed
IN RE P.R. No. 15-552	Alamance (12JB154)	Affirmed
IN RE T.C.R. No. 15-1366	New Hanover (14JT82)	Affirmed
KEATON v. ERMIC III No. 15-1108	N.C. Industrial Commission (14-706944)	Affirmed
PHAETON AVIATION, INC. v. 360 AVIATION, LLC No. 15-564	Wake (13CVS16833)	Affirmed

PRYOR v. CITY OF RALEIGH No. 15-1403	Wake (15CVS2882)	Affirmed
REID v. STATE No. 15-1059	Anson (14CVS407)	Affirmed
STATE v. BUMPERS No. 16-1	Franklin (14CRS52561)	Reversed
STATE v. BYRD No. 15-478	Wake (13CRS229919)	No Error
STATE v. DOWELL No. 15-1158	Forsyth (13CRS59023) (13CRS61448-49)	No Error
STATE v. GANN No. 15-1344	Buncombe (14CRS311) (14CRS84454) (14CRS84455)	Vacated
STATE v. HINTON-DAVIS No. 15-1290	Granville (14CRS50995)	No Error in Part; Vacate and Remand in Part.
STATE v. JONES No. 15-1187	Davie (14CRS350) (14CRS50082) (14CRS50083)	No Error
STATE v. LEWIS No. 15-1182	Brunswick (15CRS50950-952)	Remanded
STATE v. MARISIC No. 15-1211	Onslow (13CRS55167)	No Error
STATE v. OAKLEY No. 15-1126	Iredell (13CRS55068) (13CRS55072) (14CRS454) (15CRS540)	No error in part; vacated and remanded in part

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Participation in meeting with attorney and party to litigation—attorney-client privilege—work product—The trial court erred by concluding that the attorney-client privilege did not apply. A party to litigation who engages a friend as an agent to participate in meetings with an attorney does not waive the protections of attorney-client communications and attorney work product for information arising from the meeting with the attorney and any work product created with the assistance of or shared with the agent as a result of those meetings. The case was remanded to the trial court to determine whether the attorney-client privilege applied to the requested communications, using the five-factor *Murvin* test and considering petitioner Adams as defendant's agent. **Berens v. Berens**, 12.

APPEAL AND ERROR

Appealability—interlocutory orders—denial of summary judgment—Woodson and Pleasant claims—substantial right affected—The Court of Appeals had jurisdiction over issues in an appeal arising from an industrial accident where the appeal was interlocutory but the issues involved the denial of summary judgment on *Woodson* and *Pleasant* claims. Denials of the dispositive motions involving those claims affected substantial rights and were immediately appealable. **Blue v. Mountaire Farms, Inc.**, 489.

Appealability—interlocutory order—temporary child support and custody order—subsequent permanent order—Although plaintiff argued that an interlocutory order concerning temporary child support and custody order was reviewable on appeal because the question was a matter of public interest, the matter did not, in fact, raise any issue of public interest. The temporary child support order and the interlocutory post-trial order were moot because of the subsequent entry of the permanent child support order. **Smith v. Smith**, 135.

Cross-appeal—notice untimely—appellant's brief required—A motion to dismiss defendant's cross-appeal was granted where the notice of cross appeal was untimely. Moreover, although defendant filed a petition for writ of certiorari, defendant did not file an appellant's brief and instead included its argument in its cross issues in its appellee brief, precluding full response by plaintiff. It is well established that a cross-appeal will not be considered when the cross-appellant fails to file an appellant's brief. **Daughtridge v. N.C. Zoological Soc'y, Inc.**, 33.

Directed verdict—failure to make argument before trial court—Where the trial court entered a directed verdict in favor of defendant, who admitted that he negligently caused the automobile collision that gave rise to the action, plaintiff waived her argument that she was entitled to nominal damages because she failed to object on this ground at trial. **Smith v. Herbin**, 309.

APPEAL AND ERROR—Continued

Dismissal of appeal—proposed amended answer—no order in record allowing amended answer—The trial court did not err by dismissing defendant's proposed amended answer alleging negligence, negligent entrustment, and a Chapter 75 violation. There was no order in the record showing the trial court allowed defendant to amend his answer. If a necessary pleading is not contained in the record on appeal, the proper remedy is to dismiss the appeal. **TD Bank, N.A. v. Williams, 864.**

Frivolous appeal—sanctions denied—appeal well grounded in existing law—A motion for sanctions for a frivolous appeal was denied where the appeal was well grounded in existing law. **McLennan v. Josey, 95.**

Granting of motions—order not included—The Court of Appeals did not have jurisdiction to address the issues raised by defendant on appeal regarding the granting of plaintiff's motion to amend an equitable distribution order pursuant to N.C.G.S. § 1A-1, Rules 52 and 59. Defendant clearly included the amended judgment and order regarding equitable distribution in her notice of appeal but failed to include the order granting plaintiff's Rule 52 and 59 motions. **Smith v. Smith, 135.**

Improper personal feelings—issue not addressed—not likely to happen at retrial—Although defendant asserted that the trial court erred during sentencing by allegedly making comments demonstrating that it improperly considered certain personal feelings when sentencing defendant, the issue was not addressed. The case was reversed and remanded for a new trial, and the trial court was not likely to repeat the comments. **State v. Holloman, 434.**

Interlocutory order—appeal from final order—Plaintiff's arguments were considered on appeal in a child support enforcement case where she appealed within 30 days of the final order (in November) and specifically appealed from the final order and an earlier, interlocutory order from June. While her arguments focused on the June order, she argued that the November order was based on the June order. **Guilford Cty. ex rel. St. Peter v. Lyon, 74.**

Interlocutory orders and appeals—alternative basis for appeal—Defendant's purported cross-appeal and petition for writ of certiorari seeking review of an interlocutory order was denied where defendant made no attempt to show that the order affected a substantial right. Any arguments concerning an alternative basis for upholding a prior order did not relate to the order from which plaintiff appealed. **Daughtridge v. N.C. Zoological Soc'y, Inc., 33.**

Interlocutory orders and appeals—discovery—privilege—immunity—substantial right—Orders compelling discovery where a party asserts a privilege or immunity that directly relates to the matter to be disclosed pursuant to the interlocutory discovery order and the assertion of the privilege or immunity affects a substantial right and is thus immediately appealable. **Berens v. Berens, 12.**

Interlocutory orders—An order permanently staying five claims but permitting a claim for breach of contract was interlocutory but was allowed to proceed where a substantial right existed which could be lost absent immediate appellate review. **Epic Games, Inc. v. Murphy-Johnson, 54.**

Interlocutory when appeal filed—final judgment subsequently entered—no longer interlocutory—This appeal was an improper interlocutory appeal when it was filed, but final judgment was subsequently entered, and the Court of Appeals had jurisdiction because the appeal was no longer interlocutory. **Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., 444.**

APPEAL AND ERROR—Continued

Issue not addressed—foreclosed elsewhere in opinion—An argument in a termination of parental rights case concerning the lack of appropriate findings was not addressed where it had already been determined that the trial court erred by concluding that there were grounds to terminate respondent's rights. **In re S.Z.H.**, 254.

Jurisdiction on appeal—final order—Where there were two trial court orders in the case—one in September and one in December—the September order was not final because it was an order awarding attorney fees that did not set the amount. Timely notice of appeal was given from the December order, which did set the amount, and the Court of Appeals had jurisdiction over the appeal. **In re Cranor**, 565.

Misdemeanor citation—jurisdiction—failure to object in district court—Where defendant was tried and convicted on a misdemeanor open container citation in district court and failed to object to that court's exercise of jurisdiction, he was no longer in a position to assert his statutory right to object to trial on citation. The Court of Appeals held that his appellate challenge to the trial court's jurisdiction was without merit. **State v. Allen**, 179.

Notice of appeal—motion to suppress—plea agreement—Defendant gave timely, proper notice of appeal where he gave notice of his intent to appeal the trial court's denial of his motion to suppress in his plea agreement. Moreover, at the conclusion of the plea hearing, defendant gave oral notice of appeal in open court. **State v. Crandell**, 771.

Notice of appeal—oral and written—The State's appeal was properly before the Court of Appeals pursuant to Rule 4 of the Rules of Appellate Procedure in a case involving a motion to suppress granted in district court, an appeal to superior court by the State, and the denial of a de novo hearing in superior court. The superior court orally affirmed the district court order, and the State entered oral and written notice of appeal; the written notice was superfluous following the State's oral notice. **State v. Miller**, 628.

Notice of appeal—untimely—treated as petition for certiorari—An appeal was treated as a petition for certiorari where the notice of appeal was untimely. **In re S.Z.H.**, 254.

Parties—different cases—Plaintiffs could not seek review of an order in another, similar case where they were not parties in that case. **Daughtridge v. N.C. Zoological Soc'y, Inc.**, 33.

Record—administrative record—CD—motion to strike denied—A CD that was part of an administrative record, which was filed by respondent-Board pursuant to N.C.G.S. § 150B-47 for review by the trial court and filed with the Court of Appeals pursuant to N.C. Rule of Appellate Procedure 9(d)(2), was properly a part of the record on appeal, and petitioner's motion to strike the CD video recording was denied. **Ragland v. Nash-Rocky Mount Bd. of Educ.**, 738.

Record—motion to squash subpoena—no ruling at trial indicated—Petitioner did not preserve for appeal an issue involving respondent's motion to quash a subpoena where the record did not indicate a ruling on the motion. **Ragland v. Nash-Rocky Mount Bd. of Educ.**, 738.

Writ of certiorari—appeal lost through no fault of own—Because defendant's right to appeal from the 15 October 2014 judgment was lost through no fault of his

APPEAL AND ERROR—Continued

own, the Court of Appeals exercised its discretion and allowed defendant's petition for writ of certiorari pursuant to Rule 21(a)(1). Trial counsel inadvertently failed to specifically state that the appeal was from both the denial of the suppression motions and also from the judgment entered on October 15, 2014. **State v. Sawyers, 852.**

ARBITRATION AND MEDIATION

State or federal law—no determination by court—determined by arbitrator—An arbitration case was not reversed where the trial court made no determination as to whether state or federal arbitration law governed. Under either law, the plain language of the arbitration clause, properly interpreted, delegates the threshold issue of substantive arbitrability to the arbitrator—not to the trial court. **Epic Games, Inc. v. Murphy-Johnson, 54.**

Substantive arbitrability—delegated to arbitrator—The trial court erred by enjoining certain disputes from proceeding to arbitration where, according to the plain language of the arbitration clause, the threshold issue of substantive arbitrability was delegated to an arbitrator. Both the plain language of the arbitration clause and its incorporation of the AAA rules demonstrate that the parties agreed the arbitrator should decide issues of substantive arbitrability. **Epic Games, Inc. v. Murphy-Johnson, 54.**

ATTORNEYS

Fees—appeal—award for additional case—Any attorney fees awarded under N.C.G.S. § 6-21.5 connected with an appeal were awarded erroneously. The portion of the award for another case was remanded because the record did not contain the final result in the case. The statute allowed an award of a reasonable attorney fee to the prevailing party. **McLennan v. Josey, 95.**

Fees—frivolous litigation—It was within the trial court's discretion to award attorney fees for frivolous litigation where a counterclaim lacked a justiciable issue. **McLennan v. Josey, 95.**

Sanctions—inherent authority of court—The undisturbed findings of the trial court did not support a sanction against an attorney in the exercise of its inherent authority. **In re Cranor, 565.**

Sanctions—Rule 11—The superior court erred in imposing Rule 11 sanctions on an attorney where the unchallenged findings and uncontroverted evidence supported a conclusion that the attorney acted in good faith. **In re Cranor, 565.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Abuse—findings—not sufficient—An adjudication that a child (the second of two) was abused was remanded for the trial court to make findings of fact addressing the directives of N.C.G.S. § 7B-101(1)(e) concerning the child's serious emotional damage based on the evidence presented. **In re A.M., 672.**

Abuse—findings—sufficient—In a case in which a child (the first of two) was adjudicated abused based on serious emotional damage, the findings were sufficient to sustain the adjudication even though they did not track the specific language used in N.C.G.S. § 7B-101(1)(e). **In re A.M., 672.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Abuse—neglect—indecent liberties—improper care—environment injurious to welfare—The trial court did not err by concluding that a minor child was an abused and neglected juvenile. Ample evidence supported the findings of fact which established that the stepfather committed indecent liberties upon the minor child and that she was an abused juvenile. The trial court's findings also established that the child did not receive proper care from respondent mother and her stepfather, and that she resided in an environment injurious to her welfare. **In re M.S., 89.**

Felonious—evidence of serious injury—sufficient—The trial court did not err in denying defendant's motion to dismiss a charge of felony child abuse inflicting serious bodily injury due to insufficient evidence. Significant, internal bleeding clearly had the potential to kill the child and that risk was created when the brain injury was inflicted. **State v. Bohannon, 756.**

Misdemeanor child abuse—sufficiency of evidence—The State's evidence was adequate to submit misdemeanor child abuse charges to the jury, and the trial court properly denied defendant's motions to dismiss, where the child was under two years old and was left alone in a vehicle for over six minutes, with a window rolled more than halfway down in 18-degree weather with sleet, snow, and wind. **State v. Watkins, 391.**

CHILD CUSTODY AND SUPPORT

Amount previously paid—The trial court did not err in a child support action by failing to credit to plaintiff an amount previously paid where plaintiff testified that the payment represented the computation of defendant's share of the October distribution of marital assets minus expenses. **Smith v. Smith, 135.**

Child custody—notice—necessary party—no putative father contested notice—The trial court did not err by upholding the 1 March 2012 custody order. Assuming *arguendo* that the custody order was initially entered in error because intervenor Wise was not given proper notice of the initial custody hearing and was not joined as a necessary party, this error was resolved when the trial court allowed Wise to intervene and participate in the custody proceedings. Further, the record contained no evidence that any putative father contested notice of the initial custody hearing or of the subsequent custody proceedings, and thus, that issue was dismissed. **Weideman v. Shelton, 875.**

Child custody—protected parental status—former domestic partner of maternal grandmother—temporary custody order—clear and convincing evidence standard—The trial court did not err in a child custody case by concluding that intervenor, former domestic partner of plaintiff maternal grandmother, failed to establish by clear and convincing evidence that defendant mother acted inconsistently with her constitutionally protected parental status. The findings did not demonstrate that defendant intended for the 2012 custody order to be permanent. Intervenor failed to carry her burden of proving by clear and convincing evidence that defendant failed to shoulder the responsibilities attendant to rearing the minor child. **Weideman v. Shelton, 875.**

Child in DSS custody—support—findings—not sufficient—The trial court erred by ordering a mother to pay child support where it failed to make the required findings as to a reasonable sum and the mother's ability to pay. **In re A.M., 672.**

CHILD CUSTODY AND SUPPORT—Continued

Child support order—cross-appeal by mother—enforceable—Where plaintiff-father requested emergency relief from a permanent child support order that required him to pay his children's private school tuition, the Court of Appeals rejected plaintiff's argument that defendant-mother's cross-appeal of that order precluded her from enforcing it. Defendant cross-appealed the order only with respect to the requirement that she reimburse plaintiff for 25 percent of the tuition after plaintiff paid it in full and on time. The Court of Appeals could conceive of no justification for precluding defendant from enforcing plaintiff's court-ordered obligation to pay his children's school tuition on time. **Smith v. Smith, 166.**

Child support order—enforceable during pendency of appeal—Where plaintiff-father requested emergency relief from a permanent child support order that required him to pay his children's private school tuition, the Court of Appeals rejected plaintiff's argument that the trial court was without jurisdiction to hold him in contempt for violating that order during the pendency of his appeal. Pursuant to N.C.G.S. § 50-13.4(f)(9), the order of child support requiring periodic payments toward his children's school tuition was enforceable during the pendency of the appeal. **Smith v. Smith, 166.**

Contempt order—bond to stay enforcement—Where the trial court denied plaintiff-father's motion to stay the execution of a permanent child support order requiring him to pay his children's private school tuition and held him in contempt for failing to pay the tuition pursuant to the order, the Court of Appeals rejected plaintiff's argument that the trial court erred in failing to set a bond to stay enforcement of the private school tuition directive pursuant to Rule 62(d) of the Rules of Civil Procedure and N.C.G.S. § 1-289. By acknowledging that child support was excepted from this process because the children affected had nothing to do with the disputes between the two parties, the trial court appropriately exercised its discretion in refusing to set a bond pending appeal of the order requiring plaintiff to pay child support. **Smith v. Smith, 166.**

Contempt order—findings and conclusions supported—purge condition—Where the trial court denied plaintiff-father's motion to stay the execution of a permanent child support order requiring him to pay his children's private school tuition and held him in contempt for failing to pay the tuition pursuant to the order, the Court of Appeals affirmed the contempt order. The trial court's conclusions of law were adequately supported by competent findings of fact, which were supported by competent evidence, and there was no merit to plaintiff's argument that the purge condition was erroneous. **Smith v. Smith, 166.**

Defendant's motion for modification—In a child support enforcement action reversed on other grounds, the trial court was ordered to base its ruling only on defendant's motion for modification. **Guilford Cty. ex rel. St. Peter v. Lyon, 74.**

Deviation from temporary order—change of circumstances not required—The trial court was not required to find changed circumstances in a child custody and support action in order to deviate from an earlier temporary order. **Smith v. Smith, 135.**

High income parent—private school tuition—In a case of first impression, the trial court did not err by concluding that a high income plaintiff should continue to pay his children's private school tuition where the children had been consistently enrolled in private school, the parties' continual desire was to educate their children in private schools, and the parties' income exceeded the level set by the Child

CHILD CUSTODY AND SUPPORT—Continued

Support Guidelines. A trial court can require a higher income parent to pay his children's private school tuition without a specific showing that his children needed the advantages offered by private schooling; a child's reasonable needs are not limited to absolutely necessary items if the parents can afford to pay more to maintain the accustomed standard of living of the child. **Smith v. Smith, 135.**

Inconsistent findings—remanded—A child support order was remanded where the trial court's intent, as suggested by one finding, was inconsistent with another finding that was reflected in the conclusion. **Smith v. Smith, 135.**

Increased visitation with father—best interests of child—Where plaintiff-mother appealed the order of the trial court granting defendant-father increased visitation with their daughter, the trial court correctly used the best interest of the child analysis, and substantial evidence supported the trial court's findings, which supported its conclusion that the daughter's best interests and welfare were best served with a permanent custodial arrangement that included substantial visitation with her father. **Dancy v. Dancy, 25.**

Infant left in care of aunt—no meaningful interaction or support from mother—behavior inconsistent with status as parent—substantial change in circumstances—best interest of child—Where respondent-mother had left her infant daughter "April" in the care of April's maternal aunt from May 2012 to December 2014 and made very little effort to have meaningful interaction with April or provide for her financially, the Court of Appeals affirmed the trial court's "Review Order" granting sole legal and physical custody of April to her aunt and scheduling a permanency planning hearing. The trial court did not err by considering facts at issue in light of prior events; by concluding that the mother had acted in a manner inconsistent with her constitutionally protected paramount status as a parent; by concluding that a substantial change of circumstances had occurred to warrant a modification of the earlier permanent custody order when the mother abruptly removed April from the care of her aunt; and by concluding that awarding the sole care, custody, and control of April to her aunt was in the best interest of the child. **In re A.C., 528.**

Motion to modify—changed circumstances converted sua sponte into fraud—insufficient notice—The trial court abused its discretion in a child support enforcement action by using a sua sponte motion to convert defendant's motion to modify child support due to changed circumstances into a Rule 60 motion for modification based on fraud. Plaintiff was entirely without notice that the issue of fraud would be addressed at the hearing. **Guilford Cty. ex rel. St. Peter v. Lyon, 74.**

Private school tuition—father capable of paying—Whether the parties had previously used defendant's inheritance to pay their children's private school tuition was irrelevant to their present ability to pay in a child support action where the father was ordered to continue paying private school tuition for his children. The trial court's findings, binding on appeal, were specific enough to support the conclusion that plaintiff was capable of paying his children's tuition. **Smith v. Smith, 135.**

Prospective support award—findings—no mention of defendant's inheritance—remanded—A prospective child support award was remanded where the trial court's findings lacked any mention of defendant's inheritance. Without specific findings of fact addressing this inheritance, the Court of Appeals could not determine whether the trial court gave due regard to the factors enumerated in N.C.G.S. § 50-13.4(c). **Smith v. Smith, 135.**

CHILD CUSTODY AND SUPPORT—Continued

Retroactive child support—change of custodial arrangement—corresponding findings of fact—The trial court did not err in a child support case in its award of retroactive child support where plaintiff argued that a change in the custodial arrangement meant that some of defendant's evidence about expenditures did not reflect amounts spent after that time, but defendant testified repeatedly to the static nature of the shared and individual expenses of her children and that she had taken into account any increase or decrease that may have occurred. The trial court made corresponding findings of fact. **Smith v. Smith, 135.**

Retroactive child support—partial payment—basis—The trial court erred in a child support action by ordering defendant to pay 25 percent of the children's school tuition without making findings explaining its basis for the 25 percent figure. **Smith v. Smith, 135.**

Retroactive private school tuition—UTMA accounts—The trial court did not err in a child support action by ordering plaintiff to pay retroactive private school tuition to defendant where at least some of the money was paid by defendant from the children's Uniform Transfers to Minors Act (UTMA) accounts. The trial court ordered that defendant reimburse the UTMA accounts upon receipt of the child support award from plaintiff. **Smith v. Smith, 135.**

Retroactive support—inconsistent testimony—other supporting evidence—The trial court did not err when ordering retroactive child support where plaintiff argued that defendant's testimony had been inconsistent and skewed, but the inconsistency went to credibility, and evidence before the trial court otherwise established the subject of the evidence. **Smith v. Smith, 135.**

Retroactive—findings—An order for retroactive child support was remanded for recalculation where there was an inconsistency in the trial court's findings. **Smith v. Smith, 135.**

Shared custody—evidence and findings—Challenged findings in a child support and custody case were supported by competent evidence, and the findings supported the conclusion that an equally shared custodial arrangement was in the best interest of the children. **Smith v. Smith, 135.**

Shared parenting—child psychologist—testimony relevant—A child psychologist's testimony in a child custody and support case on shared parenting arrangements was relevant to the custodial arrangement in the case, and the trial court did not abuse its discretion in admitting the testimony. **Smith v. Smith, 135.**

Support—plaintiff's contribution—religious contribution—loan repayment—no conclusion as to reasonableness—The trial court did not err in a child support case where there was no specific conclusion as to the reasonableness of plaintiff's religious contributions or a loan repayment, but the trial court's ultimate conclusion as to plaintiff's reasonable expenses were supported by its findings of fact. **Smith v. Smith, 135.**

CHILD VISITATION

Failure to address—former domestic partner of maternal grandmother—protected parental status—The trial court did not err in a child custody case by failing to address visitation. The trial court concluded that intervenor, former domestic partner of plaintiff maternal grandmother, failed to establish that defendant mother acted inconsistently with her constitutionally protected parental status. **Weideman v. Shelton, 875.**

CHURCHES AND RELIGION

Breach of contract—North Carolina Wage and Hour Act—ministerial exception—ecclesiastical abstention doctrine—The trial court erred by granting defendants' motion to dismiss for failure to state a claim upon which relief can be granted on claims by a former pastor for both breach of contract and violation of the North Carolina Wage and Hour Act. The "ministerial exception" and the "ecclesiastical abstention doctrine" does not bar courts from resolving contractual disputes not involving ecclesiastical issues and requiring only application of neutral principles of contract and statutory law. **Bigelow v. Sassafras Grove Baptist Church, 401.**

CITIES AND TOWNS

Land use—fair trial rights—approval of subdivision preliminary plat—street width modification—quasi-judicial—exercise of discretion required—due process—The trial court erred in a land use case by concluding that the City was not required to afford petitioners all fair trial rights before approving the Developer's subdivision preliminary plat. The approval of the street width modification required the Commission to exercise discretion, and therefore, rendered the Commission's approval process quasi-judicial in nature, depriving petitioners of certain due process rights in the approval process. **Butterworth v. City of Asheville, 508.**

CIVIL PROCEDURE

Motion for appropriate relief—failure to conduct evidentiary hearing—The trial court erred by failing to conduct an evidentiary hearing before granting defendant's motion for appropriate relief (MAR) in a double murder and arson case given the nature of defendant's post-conviction claims and the unusual collection of evidence offered in support of them. The case was remanded for an evidentiary hearing. **State v. Howard, 193.**

Rule 59 motion—extraordinary circumstances—substantial costs—The trial court did not abuse its discretion in a bond forfeiture case by denying surety's Rule 59 motion. The findings were both relevant to and determinative of the ultimate issue regarding extraordinary circumstances. The fact that surety incurred substantial costs to surrender defendant did not warrant relief from judgment. It could not be said that the court's decision to deny surety's motion was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision. **State v. Navarro, 823.**

Rule 60(b)—domestic violence protection order—not overruling prior order—The trial court did not abuse its discretion in a domestic violence protection order case by granting defendant wife's Rule 60(b) motion. Although plaintiff husband contended that the trial court improperly reconsidered another trial court's decision that plaintiff was a victim of domestic violence, a Rule 60(b) order does not overrule a prior order. Consistent with statutory authority, it relieves parties from the effect of an order. **Pope v. Pope, 587.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Custodial interrogation—right to counsel—alleged error not prejudicial—Where the Court of Appeals held that the trial court did not err by denying defendant's motion to suppress in his trial for first-degree murder, the State showed that, even assuming the trial court erred, the alleged constitutional error would have been harmless beyond a reasonable doubt. The overwhelming evidence, including

CONFESSIONS AND INCRIMINATING STATEMENTS—Continued

eyewitness testimony from three people, supported the jury's verdict that defendant killed the victim with premeditation and deliberation. **State v. Taylor, 221.**

Custodial interrogation—right to counsel—ambiguous question—asked during phone call with third party—Where, during a police interview, defendant asked a detective, "Can I speak to an attorney?" while having a phone conversation with his grandmother, it was ambiguous whether defendant was conveying his own desire to receive assistance of counsel or he was merely relaying a question from his grandmother. Because defendant did not unambiguously communicate that he desired to speak with counsel, the detective was not required to cease questioning. **State v. Taylor, 221.**

Custodial interrogation—no Miranda warning—The trial court erred in a prosecution for possession of drugs, drug paraphernalia, and other offenses, by concluding that defendant was not subject to custodial interrogation when he made a statement about having marijuana and by denying his motion to suppress. The need for answers to questions did not pose a threat to the public safety, outweighing the need for a rule protecting defendant's privilege against self-incrimination. **State v. Crook, 784.**

Custodial interview—motion to suppress—totality of circumstances—restraint—medication—officers' plans—The trial court did not err in a first-degree murder case by denying defendant's motion to suppress his 17 December statements to investigating officers. The totality of circumstances would not have caused a reasonable person to believe that there was a restriction on defendant's freedom of movement to indicate a formal arrest. Any restraint defendant may have experienced at the hospital was due to his medical treatment and not the actions of the police officers. The record did not support that defendant's medication had an adverse effect on his ability to think rationally. Finally, an officers' plans, when not made known to a defendant, have no bearing on whether an interview is custodial. **State v. Portillo, 834.**

Erroneous admission of statement—prejudicial—The defendant in a prosecution for drug offenses established that he was prejudiced by the trial court's error in refusing to exclude his custodial statement indicating possession of marijuana. The State did not present "overwhelming evidence," excluding defendant's statement, which linked him to the marijuana and drug paraphernalia, and there was a reasonable possibility that a different result would have been reached at the trial had the error not been committed. **State v. Crook, 784.**

Second confession—no Miranda violations for first confession—no statutory violations—The trial court did not err in a first-degree murder case by refusing to suppress defendant's 23 December statement. Even assuming that the investigating officers were required to advise defendant of his *Miranda* rights on 17 December and failed to do so, such a violation would not require suppression of defendant's 23 December statement because his 17 December statement was neither coerced nor made under circumstances calculated to undermine his free will. Further, the trial court properly concluded that the inculpatory statements did not result from substantial violations of Chapter 15A's provisions. **State v. Portillo, 834.**

Self-serving exculpatory statement—separate and apart from other statements—The trial court did not err in a first-degree murder case by excluding a statement defendant made to a bilingual officer. In order for the State to have opened the door to this testimony, defendant's exculpatory statement had to have

CONFESSIONS AND INCRIMINATING STATEMENTS—Continued

been made at the same time as other statements that had been introduced into evidence. Defendant's self-serving exculpatory statement to the officer was made on 19 December 2009, separate and apart from the statements he made on 17 and 23 December. **State v. Portillo, 834.**

Traffic stop questions—no questions post arrest—Miranda not applicable—*Miranda* was not applicable in a drug seizure case arising from a traffic stop where defendant was questioned during the traffic stop, the questions related for the most part to the traffic stop, and he was not asked any questions after his arrest. **State v. Castillo, 327.**

CONSPIRACY

Common law robbery—lack of agreement—Where defendant appealed from convictions arising from the theft of handbags from a Marshalls store, the Court of Appeals held that the trial court erred by denying defendant's motion to dismiss the charge of conspiracy to commit common law robbery. There was no evidence of an agreement between defendant and his co-perpetrator to use "means of violence or fear" to take the handbags. **State v. Fleming, 812.**

CONSTITUTIONAL LAW

Amendment of ordinance—mootness—"as applied" claim—The trial court did not err by entering a declaratory judgment that a town ordinance was unconstitutional in an action between the Town and Genesis Wildlife Refuge. Although the Town argued that the issue was moot because the ordinance was amended, Genesis had already incurred monetary damages resulting from the enactment and enforcement of the ordinance, and the elimination of the ordinance did not provide Genesis with the relief it sought, nor did it alter the fact that the ordinance was unconstitutional as applied to Genesis prior to its amendment. **Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., 444.**

Confrontation Clause—anonymous 911 call and call back—testimonial hearsay—The trial court erred in a possession of a firearm by a convicted felon case by denying defendant's motion to exclude evidence of an anonymous 911 call and the dispatcher's call back. Admission of the testimonial hearsay violated his rights under the Sixth Amendment's Confrontation Clause. It was not harmless error, and defendant was entitled to a new trial. **State v. McKiver, 614.**

Cruel and unusual punishment—sentencing—juvenile offender—N.C.G.S. § 15A-1340.19A *et seq.* does not violate the constitutional guarantees against cruel and unusual punishment. It is not inappropriate or unconstitutional for the sentencing analysis in N.C.G.S. § 15A-1340.19A *et seq.* to begin with a sentence of life without parole and require the sentencing court to consider mitigating factors to determine whether the circumstances are such that a juvenile offender should be sentenced to life with parole instead of life without parole. Life without parole as the starting point in the analysis does not guarantee it will be the norm. **State v. James, 350.**

Due process—sentencing guidelines—trial by jury—N.C.G.S. § 15A-1340.19A *et seq.* does not violate the right to due process of law. The discretion of the sentencing court is guided by *Miller* and the mitigating factors provided in N.C.G.S. § 15A-1340.19B(c). Although defendant contended that N.C.G.S. § 15A-1340.19A *et seq.* violated the right to trial by jury, no jury determination was required and thus defendant's argument was without merit. **State v. James, 350.**

CONSTITUTIONAL LAW—Continued

Due process—set-back ordinance—drinking water source—The trial court did not err by denying the Town's motions for directed verdict and JNOV in an action involving a wildlife refuge (Genesis), a nearby lake used as a drinking water source, and the Town. Although the Town argued that its adoption of a set-back ordinance was rationally related to a legitimate governmental interest, the Town failed to recognize that Genesis brought an "as applied" counterclaim rather than attacking the facial validity of the ordinance. The evidence presented at trial was sufficient to create genuine issues of fact as to whether the motives of the Town and the purposes behind the 200-foot buffer—that prohibited both outdoor and indoor animals—were related to the legitimate interest of protecting the Town's water supply or were to prevent Genesis from using its property for the purposes set forth in its 30-year lease with the Town. **Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., 444.**

Effective assistance of counsel—issues considered on appeal—Where defendant was convicted for multiple crimes related to break-ins at a shopping center and argued on appeal that his counsel's failure to raise fatal variances between the indictment and evidence at trial constituted ineffective assistance of counsel, the Court of Appeals' conclusion that his fatal variance claim concerning damage to property was meritless rendered that ineffective assistance claim meritless. As for his fatal variance claim related to the iPod and money, because the Court of Appeals agreed with his argument on the merits and vacated that count of larceny, there was no need to address counsel's performance on that issue. **State v. Hill, 342.**

Ex post facto laws—first-degree murder—resentencing guidelines—Defendant's resentencing for first-degree murder pursuant to N.C.G.S. § 15A-1340.19A *et seq.* did not violate the constitutional prohibitions on *ex post facto* laws. Because N.C.G.S. § 15A-1340.19A *et seq.* does not impose a more severe punishment than that originally mandated in N.C.G.S. § 14-17, but instead provides sentencing guidelines that comply with the United States Supreme Court's decision in *Miller* and allows the trial court discretion to impose a lesser punishment based on applicable mitigating factors, defendant could not be disadvantaged. **State v. James, 350.**

Substantive due process claim—not barred by possibility of state claim—Genesis Wildlife Sanctuary's 42 U.S.C. § 1983 counterclaim for violation of its substantive due process rights was not barred by Genesis's ability to bring an inverse condemnation action. A substantive due process violation is complete when the wrongful action is taken, rather than when the State failed to provide due process. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal remedy is invoked. **Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., 444.**

CONTEMPT

Confiscated cell phone—return—request and refusal required for appellate action—The Court of Appeals could not order returned a cell phone confiscated from a juror until the juror applied for his phone's release and was refused. **In re Korfmann, 703.**

Required notice—not given—The trial court erred by finding a juror in contempt for using his cell phone, contrary to instructions, where the court did not give the juror the required notice. **In re Korfmann, 703.**

CONTRACTS

Construction—no execution of proposed contract—no meeting of minds—venue selection clause—Where a subcontractor performed work for a contractor even though the written subcontract was never signed by either party, the Court of Appeals affirmed the trial court's order denying the contractor's motion for change of venue. The trial court correctly determined that there was no meeting of the minds on the proposed subcontract and that the parties did not intend to be bound by its terms, including its venue selection clause. The Court of Appeals rejected the contractor's argument that the trial court's order was fatally overbroad. **Se. Caissons, LLC v. Choate Constr. Co., 104.**

CORPORATIONS

Expert testimony—business valuation—In a lawsuit filed derivatively on behalf of the corporation (GEI) for which defendant was the President and CEO, the trial court erred by rejecting an expert witness's calculation of GEI's loss of value caused by defendant's actions. The trial court's finding that the expert "simply chose a convenient number to base his loss of value calculation on" was unsupported by the evidence. The expert chose one of three third-party offers to purchase GEI (\$6,000,000) because it was the lowest offer during the relevant time period and also occurred on the date closest to defendant's actions that gave rise to the lawsuit. **Seraph Garrison, LLC v. Garrison, 115.**

President and CEO—failure to pay taxes or make 401(k) contributions—breach of fiduciary duties—Where the President and CEO (defendant) of a corporation (GEI) had stopped paying state and federal payroll taxes and stopped making 401(k) contributions for several years, the trial court erred in a derivative action brought on behalf of GEI by concluding that these actions by defendant did not constitute a breach of his fiduciary duties. Defendant deliberately neglected two of his primary corporate responsibilities in violation of state and federal laws—a failure to act with due care and good faith—and he knowingly engaged in conduct that injured GEI—a breach of the duty of loyalty. **Seraph Garrison, LLC v. Garrison, 115.**

President and CEO—fraud and breach of fiduciary duty—punitive damages claim—In a lawsuit filed derivatively on behalf of the corporation (GEI) for which defendant was the President and CEO, where the trial court erroneously concluded that GEI was not injured by defendant's fraud and breach of fiduciary duty in misrepresenting a contract he negotiated with another company and therefore was not entitled to compensatory damages, the Court of Appeals ordered the court to consider the issue of punitive damages on remand. **Seraph Garrison, LLC v. Garrison, 115.**

President and CEO—misrepresentation of contract to board of directors—affirmative duty to disclose material facts—no requirement to prove reliance element of actual fraud—In a lawsuit filed derivatively on behalf of the corporation (GEI) for which defendant was the President and CEO, where defendant misrepresented the terms of a licensing contract he negotiated with another company (Ecolab) to GEI's board of directors, the trial court erred in its conclusion that plaintiff had failed to establish the board's reasonable reliance on defendant's misrepresentations and therefore could not be awarded damages on its fraud claim. As a corporate officer reporting to the board, defendant had an affirmative fiduciary duty to disclose all material facts related to the Ecolab contract negotiations. Because defendant breached this duty, plaintiff was not required to prove the reliance element of actual fraud. **Seraph Garrison, LLC v. Garrison, 115.**

CORPORATIONS—Continued

President and CEO—repaying self for loan rather than paying back taxes—constructive trust or unjust enrichment—Where the President and CEO (defendant) of a corporation had stopped paying state and federal payroll taxes and stopped making 401(k) contributions for several years—yet he continued to pay himself and also repaid himself for a loan using funds from an initial payment on a contract with another company—the trial court erred by refusing to grant plaintiff's claim under either a constructive trust or unjust enrichment theory based on the loan repayment. Defendant breached his fiduciary duty by directing the repayment to himself rather than making mandatory payments to the federal and state governments. As to whether plaintiff was entitled to recover defendant's salary and benefits, the issue was remanded to the trial court for consideration of whether plaintiff was entitled to recover any compensatory damages. **Seraph Garrison, LLC v. Garrison, 115.**

COSTS

Litigation expenses—insufficient explanation—remanded—In a boundary dispute, an order awarding as costs an amount for “reasonable and necessary litigation expenses” without explanation of what the total included was remanded for additional findings. **McLennan v. Josey, 95.**

CRIMINAL LAW

Instructions—self-defense—deviation from pattern instruction—The trial court erred in an assault with a deadly weapon inflicting serious injury case in its instruction on self-defense. The trial court's deviations from the pattern self-defense instruction, taken as a whole, misstated the law by suggesting that an aggressor could not under any circumstances regain justification for using defensive force. **State v. Holloman, 434.**

Prosecutor's closing argument—not grossly improper—The trial court did not err by not intervening ex mero motu to address the prosecutor's allegedly improper closing remarks in a prosecution for felony child abuse inflicting serious bodily injury. In light of the overall factual circumstances, the prosecutor's closing arguments were not so grossly improper as to infect the trial with unfairness and render the conviction fundamentally unfair. **State v. Bohannon, 756.**

Request for instruction denied—Intoximeter—no error—The trial court did not err in an impaired driving prosecution by not giving a requested instruction concerning the results of the Intoximeter. Defendant's argument had been previously rejected. **State v. Godwin, 184.**

DAMAGES

Set-back ordinance—enactment—enforcement—not a double recovery—The trial court did not err in denying the Town's Rule 59 motion to amend the amount of damages on account of a double recovery. Genesis Wildlife Sanctuary incurred different damages as a result of different effects produced by the Town's enactment and enforcement of the ordinance at issue. **Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., 444.**

Unclear method for jury verdict—evidence at trial not inconsistent—The trial court did not abuse its discretion in denying the Town's motion for an amended verdict based on the allegations that the jury's award exceeded the actual damages.

DAMAGES—Continued

Although it is unclear exactly how the jury reached its verdict, there was no indication that this amount was inconsistent with the evidence presented at trial. **Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., 444.**

DIVORCE

Equitable distribution—accounting partnership—valuation—The trial court did not err in an equitable distribution and child support case in the valuation methodology used for valuing plaintiff's PricewaterhouseCoopers, LLC partnership interest. The trial court's methodology applied sound techniques and relied upon competent evidence to reasonably approximate the value of plaintiff's partnership interest. **Smith v. Smith, 135.**

Equitable distribution—debt payments—status—stipulations—The trial court did not err in an equitable distribution order by not classifying two debt payments as divisible property. As to the debt incurred for expenses relating to the marital home, the parties' stipulations fully resolved any claims arising from divisible property interests in the marital home, and there was no divisible interest remaining after considering the value of the property and the debt. There was also no divisible property interest in dues or assessments plaintiff may have paid to a country club. Finally, the findings supported the trial court's conclusions of law. **Smith v. Smith, 135.**

Equitable distribution—inheritance—The trial court erred by making no mention of defendant's inheritance in the final equitable distribution order because the inheritance qualifies as property. **Smith v. Smith, 135.**

DOMESTIC VIOLENCE

Protection order—renewal order—no findings of fact—Where the trial court entered a domestic violence protection order (DVPO) renewal order, which was void ab initio because the court made no findings of fact, and the defendant thereafter filed notice of appeal, the trial court had no jurisdiction to enter a subsequent Supplemental Order renewing the DVPO and order awarding attorney fees to plaintiff. **Ponder v. Ponder, 301.**

Protection order—setting aside—Rule 60(b)(5)—sufficiency of findings of fact—The trial court did not abuse its discretion by setting aside a domestic violence protection order based on Rule 60(b)(5). The trial court properly made specific findings of fact that plaintiff-husband no longer feared defendant wife. **Pope v. Pope, 587.**

Unlawfully entering property operated as domestic violence safe house or haven—protective order—sufficiency of evidence—The trial court did not err in an unlawfully entering property operated as a domestic violence safe house or haven by a person subject to a protective order case by denying defendant's motions to dismiss. A violation of the statute occurred as soon as defendant set foot onto the real property upon which the shelter was situated and did not require him to physically enter the building. **State v. Williams, 239.**

DRUGS

Possession of drug paraphernalia—motion to dismiss—constructive possession—plain view—The trial court did not err by denying defendant's motion to dismiss the charge of possession of drug paraphernalia. Viewing the evidence in the

DRUGS—Continued

light most favorable to the State, the evidence supported an inference that the police found the drug paraphernalia in plain view in a common living area where defendant, as a resident of the house, exercised nonexclusive control. Further, the State proffered sufficient evidence to establish defendant's constructive possession of the drug paraphernalia seized from the house. **State v. Dulin, 799.**

Possession of marijuana with intent to sell or deliver—motion to dismiss—uncovered fishing boat in yard—The trial court erred by denying defendant's motion to dismiss the charge of possession of marijuana with intent to sell or deliver. The State failed to proffer sufficient evidence linking defendant to the marijuana found in an uncovered fishing boat in the yard. The case was remanded for resentencing. **State v. Dulin, 799.**

EASEMENTS

Prescriptive—road through property—Where defendants appealed from the trial court's grant of a perpetual prescriptive easement in favor of plaintiffs, the Court of Appeals held that plaintiffs presented sufficient evidence to show all requirements for a prescriptive easement of a road that plaintiffs and their predecessors had used for access to their own properties through defendants' properties. **Myers v. Clodfelter, 725.**

EMINENT DOMAIN

Calculation of compensation—bonus value method—The trial court erred in a condemnation case by holding that the "bonus value" method of calculating compensation interest was improper and excluding evidence of the "bonus value" method from the trier of fact under Rules 401 and 403, and allowing consideration of income attributable to a billboard and outdoor advertising. The trial court's classification of the billboard as a permanent leasehold improvement was erroneous, which error resulted in improper measure of compensation. **Dep't of Transp. v. Adams Outdoor Adver. of Charlotte Ltd. P'ship, 39.**

Subject matter jurisdiction—Section 108 hearing—The trial court's erroneous application of the Outdoor Advertising Control Act in Article 11 did not affect subject matter jurisdiction to conduct a Section 108 hearing in a condemnation case. **Dep't of Transp. v. Adams Outdoor Adver. of Charlotte Ltd. P'ship, 39.**

EMOTIONAL DISTRESS

Negligent and intentional—internal church disagreement—Where plaintiff was treasurer of his church and asserted claims against the church and two members of the church's board for claims arising from a disagreement over monetary issues, the trial court did not err by granting defendants' motions for summary judgment on plaintiff's negligent infliction of emotional distress (NIED) and intentional infliction of emotional distress (IIED) claims. On the NIED claim, plaintiff failed to identify defendants' negligent conduct, and on the IIED claim, plaintiff failed to allege or present evidence of defendants' conduct that rose to level of extreme and outrageous. **Glenn v. Johnson, 660.**

EMPLOYER AND EMPLOYEE

Breach of contract—North Carolina Wage and Hour Act—at will doctrine—Plaintiff adequately stated claims for breach of contract and violation of the North Carolina Wage and Hour Act. The “at will” doctrine does not preclude an at will employee from suing for breach of contract with respect to benefits or compensation to which the parties contractually agreed. Further, plaintiffs sufficiently alleged that the contractually promised salary constituted wages and that defendant wrongfully failed to pay that salary. **Bigelow v. Sassafras Grove Baptist Church, 401.**

Unpaid wages—employer—economic reality test—There was no genuine issue of fact for trial, and the trial court properly granted defendants’ motion for summary judgment in an action for unpaid wages. Although defendant Powell maintained financial control over the restaurant by virtue of his position as the sole Member of P2E (the LLC which owned the restaurant involved in this action), he did not have significant day-to-day, operational control over the restaurant’s employees. Plaintiff Robert’s (the other member of the LLC) operational control over the restaurant’s operations was substantial as well as consistently exercised. **Powell v. P2Enterp., LLC, 731.**

Whistleblower Act—autopsy report—On appeal from the final decision of a Senior Administrative Law Judge concluding that petitioner was not entitled to relief under the Whistleblower Act, the Court of Appeals affirmed the order, concluding that petitioner failed to establish that he reported protected activity. Petitioner, an autopsy technician, failed to follow protocol when he discovered evidence during clean-up after an autopsy, and the medical examiner’s decision not to mention the evidence in his report did not make the report fraudulent. **Gerity v. N.C. Dep’t of Health & Human Servs., 652.**

EVIDENCE

Discharge of State employee—political discrimination—relevance—prejudice—In an action by a discharged State employee who alleged political discrimination, testimony concerning statements made that the chief operating officer of the agency were relevant and not prejudicial. The challenged testimony was highly probative and its probative value was not substantially outweighed by the danger of unfair prejudice. **N.C. Dep’t of Pub. Safety v. Ledford, 266.**

Findings of fact—conclusions of law—sufficiency—billboard—outdoor advertising—The trial court erred in a condemnation case by finding and concluding that (1) defendant’s billboard was a permanent leasehold improvement and not personal property; (2) defendant’s alleged loss of business and outdoor advertising income were compensable property interests in an Article 9 proceeding; (3) the Department of Transportation permit granted to defendant under the Outdoor Advertising Control Act was a compensable property interest; and (4) the option to renew contained in defendant’s lease was a compensable real property interest. **Dep’t of Transp. v. Adams Outdoor Adver. of Charlotte Ltd. P’ship, 39.**

Findings of fact—sufficiency of evidence—The trial court erred in a bond forfeiture case by its finding of fact no. 15. Because it was not supported by competent evidence, it could not be used to support the conclusion of law that surety failed to demonstrate extraordinary circumstances. However, this error did not warrant reversal. **State v. Navarro, 823.**

HGN test—unqualified witness—prejudice—In an impaired driving prosecution, the erroneous admission of testimony about HGN test results from an officer who

EVIDENCE—Continued

was not qualified as an expert was prejudicial where there was a reasonable possibility of a different result without the testimony. **State v. Godwin, 184.**

Identification of defendant in surveillance video—special knowledge—helpful to jury—In defendant's trial for crimes based on multiple break-ins at a shopping center, the trial court did not abuse its discretion by allowing the testimony of two law enforcement officers who identified defendant in a surveillance video from the shopping center. The officers had interacted with defendant numerous times previously, and they were familiar with the distinctive features of his face, posture, and gait. Further, defendant's appearance had changed between the time the crimes were committed and the trial. The officers' testimony was rationally based on their special knowledge of defendant and was helpful to the jury's determination of whether defendant was the person in the video. **State v. Hill, 342.**

Motion to suppress—appeal from district to superior court—notice of appeal—The trial court erred in dismissing the State's notice of appeal under N.C.G.S. § 20-38.7(a) as insufficient. Neither the plain language of N.C.G.S. § 20-38.7(a) nor § 15A-1432(b) required the State to set forth the specific findings of fact to which it objected in its notice of appeal from district to superior court. **State v. Miller, 628.**

Other crimes—voir dire testimony—authentication—surveillance video—Where defendant appealed from convictions arising from the theft of handbags from a Marshalls store, the Court of Appeals rejected his argument that the trial court erred by allowing the State to introduce hearsay evidence of other crimes committed by defendant. The trial court was not bound by the Rules of Evidence when it admitted an investigator's testimony during voir dire, and the investigator's testimony adequately authenticated the surveillance video introduced for Rule 404(b) purposes. **State v. Fleming, 812.**

Privileged communications—tripartite attorney-client relationship—indemnification clause—asset purchase agreement—Where plaintiff lessor brought suit against defendants for payment of back rent and other claims under the lease, the trial court did not abuse its discretion when it compelled defendants to produce correspondence and documents exchanged between defendants and a third-party indemnitor, who had agreed in an asset purchase agreement to defend defendants. Defendants and the third-party indemnitor shared a common business interest as opposed to the common legal interest necessary to support a tripartite attorney-client relationship. **Friday Invs., LLC v. Bally Total Fitness of Mid-Atl., Inc., 641.**

Sewage overflows—relevance—other evidence admitted—The trial court did not err by admitting evidence of sewage spills by the Town in an action involving a wildlife refuge near a lake from which the Town drew its water. Other evidence about the sewage overflows was admitted without objection; moreover, the evidence was relevant to the issue of whether a new ordinance intended to eliminate the refuge was arbitrary or capricious. **Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., 444.**

State's dismissal of criminal DWI charge—not an admission—license revocation—The State's dismissal of an impaired driving charge and a handwritten entry by the prosecuting attorney that the dismissal was because all of the evidence would be suppressed was not a judicial admission that barred the Department of Motor Vehicles from pursuing a driver's license revocation under the implied consent laws. **Farrell v. Thomas, 64.**

EVIDENCE—Continued

Videotape of confession—illustrative purposes—Where defendant appealed from convictions arising from the theft of handbags from a Marshalls store, the Court of Appeals rejected his argument that the State failed to lay a proper foundation for admission of the videotape of his confession. The tape was admitted for illustrative purposes, and testimony asserted that the tape fairly and accurately illustrated the events filmed. **State v. Fleming, 812.**

FIREARMS AND OTHER WEAPONS

Possession of firearm by convicted felon—motion to dismiss—sufficiency of evidence—constructive possession—The trial court did not err by denying defendant's motion to dismiss the charge of possession of a firearm by a convicted felon. The evidence was sufficient to support a reasonable juror in concluding that additional incriminating circumstances existed beyond defendant's mere presence at the scene and proximity to where the firearm was found. Thus, constructive possession of the firearm could be inferred. **State v. McKiver, 614.**

IDENTITY THEFT

Driver's license—personal identifying information—The trial court's peremptory instruction on identity theft (that a driver's license would be personal identifying information) was not erroneous in light of the overwhelming evidence presented. **State v. Crook, 784.**

IMMUNITY

Governmental immunity—police officer's contractual claim—litigation expenses—The trial court erred by granting defendant City's Rule 12(b) motion to dismiss plaintiff former police chief's complaint seeking \$220,593.71 for the amount he paid defending lawsuits filed against him arising from his employment. The City was not shielded by the doctrine of governmental immunity to the extent that plaintiff's action was based in contract. The order of the trial court was reversed and remanded for further proceedings. **Wray v. City of Greensboro, 890.**

INDEMNITY

Contractual agreement—partial summary judgment—The trial court erred by denying plaintiff CSX's motion for partial summary judgment on its contractual indemnity claim. CenturyLink's equipment would not have been damaged as a result of CSX's crane colliding with PWC's power lines but for, or stemming from, defendant Power Work Commission's exercise of its privilege and license pursuant to the Crossings Agreement. **CSX Transp., Inc. v. City of Fayetteville, 517.**

Contractual agreement—summary judgment—admission of negligence not a bar to recovery—The trial court erred by granting summary judgment in favor of defendant Public Works Commission (PWC) on the issue of whether the parties' contractual agreement required PWC to indemnify CSX for its own negligence. The trial court erroneously concluded CSX was barred from recovering because of its admission of negligence. **CSX Transp., Inc. v. City of Fayetteville, 517.**

INDICTMENT AND INFORMATION

Fatal variance—owner of stolen property—lawful custody and possession—Where defendant argued on appeal that there was a fatal variance between the allegations in his indictment and the evidence at trial, but he failed to preserve the issue at trial, the Court of Appeals invoked Rule 2 of the Rules of Appellate Procedure to consider one of his arguments on the issue—that the indictment stated he stole an iPod and \$5.00 from Tutti Frutti, LLC, while the proof showed that the items belonged to the son of Tutti Frutti's owner. Reconciling two seemingly inconsistent decisions, the Court of Appeals held that there was a fatal variance between the indictment and the proof at trial because the State failed to establish that the alleged owner of the stolen property had lawful possession and custody of the property. **State v. Hill, 342.**

Habitual larceny—prior convictions—listed in single count—Where the sole indictment issued against defendant listed a single count of habitual misdemeanor larceny and alleged defendant's prior convictions thereafter, the Court of Appeals allowed defendant's petition for certiorari and held that the indictment failed to comply with N.C.G.S. § 15A-928 and was insufficient to confer jurisdiction upon the trial court. The conviction was vacated and remanded for entry of judgment and sentence on misdemeanor larceny. **State v. Brice, 766.**

JURISDICTION

Rule 59 motion—bond forfeiture proceeding—The Court of Appeals had jurisdiction in a bond forfeiture case over surety's appeal from the trial court's 23 January 2015 order. The surety filed a proper Rule 59 motion to toll the thirty-day period for appeal. **State v. Navarro, 823.**

Standing—grandparents in termination of parental rights—The mother in a termination of parental rights proceeding did not have standing to raise the contention that adoption should not have been the permanent plan because the maternal grandparents offered a safe and loving home. The maternal grandparents did not appeal the trial court's permanency plan, they did not complain of the court's findings of fact or conclusions of law, and they did not complain that they were injuriously affected by the trial court's decision to pursue adoption as the permanency plan. **In re C.A.D., 552.**

Standing—parent—stepfather—no record evidence became parent through adoption or otherwise qualified—A stepfather did not have standing to appeal in an abused and neglected juvenile case. N.C.G.S. § 7B-1002(4), which permits a "parent" to appeal from an order of adjudication and disposition, does not authorize an appeal by a stepparent in the absence of record evidence that the stepparent has become the child's parent through adoption or is otherwise qualified under the statute. **In re M.S., 89.**

Subject matter jurisdiction—motion for relief—post-conviction DNA statutes—The trial court did not have subject matter jurisdiction to rule on defendant's claim for relief under post-conviction DNA statutes in a double murder and arson case. Consequently, that portion of the trial court's order granting such relief was void. **State v. Howard, 193.**

Summary judgment—prior ruling by another judge—One judge could not quiet title in favor of defendant as a matter of law where another judge had previously denied defendant's motion for summary judgment on the same issue. **Daughtridge v. N.C. Zoological Soc'y, Inc., 33.**

JURY

Jurors' conversation with bailiff—judge's action—The trial judge did not abuse his discretion in refusing to grant a mistrial in an action involving an animal refuge, a lake used as a drinking water source, and a municipal set-back requirement where the judge learned of a conversation between jurors and a bailiff concerning animal waste in water. The trial judge took the appropriate actions to investigate the conversation between the jurors and bailiff, he received an assurance from each juror that he or she was not prejudiced by the conversation with the bailiff, he allowed each party's attorneys to question the jurors, and he explained orally that the conversation regarding sewage in bodies of water did not directly relate to jury's deliberations. **Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., 444.**

LANDLORD AND TENANT

Lease—repairs clause—debris—There was no genuine issue of fact regarding an alleged breach of the repairs clause in a lease between a town and a wildlife sanctuary (Genesis) involving natural and artificial debris on the leased premises. Genesis presented uncontroverted evidence that winter storms had produced tree damage and debris and that Genesis was actively engaged in removing the debris well before the Town provided notice of the potential default. The Town did not present any basis for concluding that the lease required that Genesis complete its cleanup efforts 10 days after receiving notice of the debris. **Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., 444.**

Lease between town and wildlife center—legality of use—There were no genuine issues of material fact regarding whether Genesis Wildlife Sanctuary (Genesis) was in breach of a lease with the Town by violating the use of property clause. The plain language of the clause only prohibited Genesis from using the leased property for an illegal purpose; Genesis's use was not illegal even if it violated an ordinance concerning a near-by lake. In fact, Genesis's use as a wildlife center was the precise use authorized by the lease. **Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., 444.**

LARCENY

Restitution—erroneously ordered—Where defendant argued, and the State conceded, that the trial court erred by ordering him to pay \$698.08 in restitution for items taken from a doctor's office where the jury acquitted him of the larceny charge concerning that office, the Court of Appeals vacated that award of restitution. **State v. Hill, 342.**

LIBEL AND SLANDER

Internal church disagreement—insufficient evidence—Where plaintiff was treasurer of his church and asserted claims against the church and two members of the church's board for claims arising from a disagreement over monetary issues, the trial court did not err by granting summary judgment in favor of defendants on plaintiff's claims for libel and slander per quod. There was no forecasted evidence that could be construed as libel or slander per quod. **Glenn v. Johnson, 660.**

LOANS

Foreclosure sale—proceeds—value—The trial court did not err in a foreclosure sale case by granting summary judgment in favor of plaintiff bank regarding sale

LOANS—Continued

proceeds. There was a lack of evidence to support defendant's claims that the property was worth more than the value obtained at the foreclosure sale. Defendant did not base the value of the property on his personal knowledge and there was no alleged value from defendant at the time of sale. **TD Bank, N.A. v. Williams, 864.**

MOTOR VEHICLES

Automobile accident—causation—neurological issues—Where plaintiff sued defendants for personal injuries resulting from an automobile accident, plaintiff's lay testimony that she experienced tingling and itching sensations immediately after the crash was not sufficient evidence of causation to send the case to the jury. The causes of such neurological issues are not readily understandable to the average person; furthermore, plaintiff failed to produce any evidence of the mechanics of the crash. **Smith v. Herbin, 309.**

Driving while impaired—motion to suppress—breath test—The trial court did not err in a driving while impaired driving case by denying defendant's motion to suppress the breath test results where defendant alleged the seizure of his cell phone prevented him from obtaining a witness in time to observe the test. Police officers complied with the requirements set out in N.C.G.S. § 20-16.2(a)(6) as defendant's first breath test was not administered until more than thirty minutes after defendant was informed of his rights. **State v. Sawyers, 852.**

Driving while impaired—officer testimony—expert testimony—impairment—alcohol concentration level—The trial court erred in a driving while impaired case by admitting an officer's testimony on the issue of impairment relating to the results of the HGN test without first determining if he was qualified to give expert testimony. The trial court also erred in admitting the officer's testimony on the specific alcohol concentration level relating to the results of the HGN test. Defendant was entitled to a new trial. **State v. Torrence, 232.**

Habitual impaired driving—driving while license revoked—suppression of blood evidence—warrantless search—reasonableness—no good faith exception—The trial court did not err in a habitual impaired driving and driving while license revoked after receiving a previous impaired driving revocation notice case by suppressing blood evidence an officer collected from a nurse who was treating defendant while he was unconscious. Under the totality of the circumstances, considering the alleged exigencies of the situation, the warrantless blood draw was not objectively reasonable. The officer never attempted to obtain a search warrant prior to the blood draw and could not objectively and reasonably rely on the good faith exception. **State v. Romano, 212.**

Impaired driving—probable cause—The superior court erred in an impaired driving prosecution where it reversed the Department of Motor Vehicles' conclusion that an officer had reasonable grounds to believe that petitioner was driving while impaired. The findings about petitioner at the scene of the stop were sufficient to establish probable cause. **Farrell v. Thomas, 64.**

PARTIES

Aggrieved party—no motion to intervene—The trial court did not err by denying Adams' petition to appeal its decision as an aggrieved party. Although Adams filed various pleadings in response to plaintiff's subpoenas in the trial court and was

PARTIES—Continued

represented by counsel during the hearing, she did not take any action to intervene or otherwise become a party in the underlying action. Rule 3 affords no avenue of appeal to either entities or persons who are nonparties to a civil action. **Berens v. Berens, 12.**

PENALTIES, FINES, AND FORFEITURES

Bond forfeiture—motion to remit—findings of fact—numerous tasks completed by surety not required—The trial court did not err by denying surety's motion to remit the bond forfeiture. The trial court was not required to make findings of fact specifying the numerous tasks completed by surety in its effort to surrender defendant. **State v. Navarro, 823.**

PUBLIC OFFICERS AND EMPLOYEES

Discharge—political discrimination—legitimate nondiscriminatory reason—An administrative law judge did not err by concluding that Ledford proved the legitimate nondiscriminatory reason the Department of Public Safety articulated for Ledford's termination was merely a pretext for political affiliation discrimination. The conclusion was strongly supported by the record. **N.C. Dep't of Pub. Safety v. Ledford, 266.**

Discharge—political discrimination—prima facie showing—discharge politically motivated—In an action by a discharged State employee who alleged political discrimination, the trial court did not err by admitting statements alleged to be hearsay on the issue of the third element of plaintiff's prima facie case, that the discharge was politically motivated. The statements were not offered to prove the truth of the matters asserted, but to show the mental states and motives of the speakers. Moreover, Administrative Law Judges have broad discretion to admit probative evidence, and admitting this testimony was not an abuse of discretion. **N.C. Dep't of Pub. Safety v. Ledford, 266.**

Discharge—political discrimination—prima facie showing—party affiliation—A discharged State employee who alleged political discrimination met the second element of the required prima facie showing, affiliation with a certain political party, where the record disclosed substantial evidence of the employee's affiliation with the Democratic Party. **N.C. Dep't of Pub. Safety v. Ledford, 266.**

Discharge—political discrimination—prima facie showing—working for public agency in non-policymaking position—In an action by a discharged State employee who alleged political discrimination, the employee met the first element of the required prima facie case by showing that he had worked for a public agency in a non-policymaking position at the time of his termination. He had been the Alcohol Law Enforcement (ALE) Director (a policymaking position) before requesting a return to the field as an ALE Special Agent ahead of the governor's office changing to a new party. He was discharged as a Special Agent. **N.C. Dep't of Pub. Safety v. Ledford, 266.**

Discharge—political discrimination—public policy—The State's argument that it would be bad policy to uphold an administrative law judge's decision that a state employee was discharged for political reasons because it would entrench partisan political employees was declined. **N.C. Dep't of Pub. Safety v. Ledford, 266.**

REAL ESTATE

Surveyor's duty—senior documents—no justiciable issue—The counterclaim lacked a justiciable issue pursuant to N.C.G.S. § 6-21.5 in a boundary line dispute. Although defendants argued that they were fee simple owners of the property in good faith, defendants' map of the property was based on their own survey. Surveyors have a duty to check the county records, and in this case a routine title search should have discovered senior documents. **McLennan v. Josey, 95.**

SCHOOLS AND EDUCATION

Dismissal of teacher—evidence proper—The evidence relied upon by respondent-Board in considering the dismissal of a teacher constituted the type of probative evidence to which respondent-Board was entitled to give consideration. **Ragland v. Nash-Rocky Mount Bd. of Educ., 738.**

Dismissal of teacher—not unconstitutional—Respondent-Board's decision to dismiss a teacher was not unconstitutional or otherwise made upon improper procedures or affected by error of law. Petitioner made a generalized argument that his constitutional rights were violated and his property taken without due process but did not cite any authority in support of those assertions. The record fully established that petitioner was afforded the process and procedure to which he was entitled pursuant to N.C.G.S. §§ 115C-325.4 through -325.8. **Ragland v. Nash-Rocky Mount Bd. of Educ., 738.**

Dismissal of teacher—specific findings and conclusions—not required—The procedures for a teacher dismissal hearing that governed petitioner's case did not require the Board to make specific findings of fact or conclusions of law. Respondent-Board provided the requisite notice to petitioner pursuant to N.C.G.S. § 115C-325.6, and petitioner's argument that respondent-Board was required to make findings of fact and conclusions of law was overruled. **Ragland v. Nash-Rocky Mount Bd. of Educ., 738.**

Dismissal of teacher—trial court review—proper—In a case in which a teacher challenged his dismissal, there was nothing in the record on appeal that would suggest the trial court neglected its duty and failed to perform the review required by law. **Ragland v. Nash-Rocky Mount Bd. of Educ., 738.**

Dismissed teacher—decision on administrative record—Assuming the issue was preserved for appellate review, petitioner could not have prevailed on the question of whether a subpoena should have been suppressed in a case involving a teacher's dismissal. N.C.G.S. § 115C-325.8 explicitly provided that a teacher's appeal of a dismissal shall be decided on the administrative record. Once the administrative record was closed, petitioner had no right to request additional discovery or to subpoena additional witnesses before the superior court. **Ragland v. Nash-Rocky Mount Bd. of Educ., 738.**

Teacher dismissal—appeal to superior court—pleading—not a civil action—Respondent-Board responded in a timely manner to a petition in an action by a teacher challenging his dismissal where petitioner assumed the status of one who had filed a complaint in the superior court, but what petitioner actually sought in the superior court was an administrative review of respondent-Board's decision. Respondent-Board was not required to respond in accordance with the Rule of Civil Procedure applicable to a party in a civil action. **Ragland v. Nash-Rocky Mount Bd. of Educ., 738.**

SCHOOLS AND EDUCATION—Continued

Teacher dismissal—change in attorneys—In an action by a teacher challenging his dismissal, the trial court did not err by allowing “impromptu” counsel for respondent-Board. The record, however, established that counsel filed a Notice of Appearance and properly served petitioner with the notice in advance of the hearing. Petitioner cited to no authority to support his argument that respondent-Board’s counsel was not properly before the court, nor did he put forth any basis for his claim of prejudice other than accusations that the change in attorneys was made in order to personally attack petitioner. **Ragland v. Nash-Rocky Mount Bd. of Educ.**, 738.

Teacher dismissal—not arbitrary or capricious—Respondent-Board’s decision to terminate a teacher was supported by substantial evidence in the record and was not arbitrary or capricious. Reviewing the entire record, there was substantial evidence to support respondent-Board’s decision to terminate petitioner’s employment for neglect of duty, inadequate performance, failure to fulfill the duties and responsibilities imposed upon teachers by state law, and failure to comply with reasonable requirements prescribed by the Board, any of which, standing alone, would be sufficient to support respondent-Board’s decision. **Ragland v. Nash-Rocky Mount Bd. of Educ.**, 738.

SEARCH AND SEIZURE

Investigatory stop—driving while impaired—motion to suppress evidence—community caretaking exception—The trial court did not err in a driving while impaired case by denying defendant’s motion to suppress the evidence. The officer had specific and articulable facts sufficient to support an investigatory stop of defendant. The public need and interest outweighed defendant’s privacy interest in being free from government seizure and defendant’s seizure fit within the community caretaking exception. **State v. Sawyers**, 852.

Prolonged traffic stop—motion to suppress evidence—reasonable suspicion—nervous behavior—associated with known drug dealer—The trial court erred in a possession of a schedule II controlled substance case by denying defendant’s motion to suppress evidence uncovered after she gave consent to search her car. The findings that defendant was engaging in nervous behavior and that she had associated with a known drug dealer were insufficient to support the conclusion that the officer had reasonable suspicion to prolong defendant’s detention once the purpose of the stop had concluded. **State v. Bedient**, 314.

Suppression order—conclusion of law—specific violation of traffic law—Where defendant was convicted of drug trafficking charges and challenged on appeal the trial court’s order denying his motion to suppress, the Court of Appeals held that the trial court’s order contained no adequate conclusion of law concerning the initial stop of defendant’s vehicle because it failed to state that the stop was justified based on any specific violation of a traffic law. The case was remanded for additional findings and conclusions. **State v. Baskins**, 603.

Suppression order—voluntary statement by defendant—Where defendant was convicted of drug trafficking charges and challenged on appeal the trial court’s order denying his motion to suppress, the Court of Appeals held that defendant’s statements concerning the heroin in his vehicle, made after hearing one officer tell another officer that he recovered heroin from a passenger, were voluntary and admissible. **State v. Baskins**, 603.

SEARCH AND SEIZURE—Continued

Totality of circumstances—area known for drugs and stolen property—The trial court did not err by denying defendant's motion to suppress in a prosecution for offenses including burglary, larceny, and possession of stolen goods. The prosecution arose from a deputy sheriff seeing defendant in a location known for the sale of drugs and stolen property, the deputy stopped defendant's car and found marijuana, the deputy also noticed a ring that matched the description of stolen property, and the police searched defendant's car the next day with consent and found the ring and other items. The totality of the circumstances gave rise to a reasonable, articulable suspicion that defendant was engaged in criminal activity, and the trial court did not err in holding that the deputy had reasonable suspicion to stop defendant's vehicle. **State v. Crandell, 771.**

Traffic stop—consent to search—voluntary—Defendant's consent to search his car following a traffic stop was voluntary and the trial court erred by suppressing evidence of cocaine and heroin. Although it appeared that the trial court believed that the officer lacked reasonable suspicion to extend the stop, and that the unlawful extension impinged on defendant's ability to consent, the trial court misunderstood the sequence of events. **State v. Castillo, 327.**

Traffic stop—extended—reasonable suspicion—The trial court erred by suppressing evidence of cocaine and heroin that resulted from a traffic stop where the officer had reasonable suspicion to extend the stop based on defendant's bizarre travel plans, his extreme nervousness, the use of masking odors, the smell of marijuana on his person, and the third-party registration of the vehicle. **State v. Castillo, 327.**

Traffic stop—registration and inspection status—Where defendant was convicted of drug trafficking charges and challenged on appeal the trial court's findings of fact related to his vehicle's registration and inspection status, the Court of Appeals concluded that the record did not contain substantial evidence that the vehicle was being operated with an expired inspection status. **State v. Baskins, 603.**

Traffic stop—unlawfully extended—The Court of Appeals reversed defendant's convictions for charges involving trafficking of heroin where the police officer unlawfully extended the traffic stop by causing defendant to be subjected to a frisk, sit in the officer's patrol car, and answer questions while the officer searched law enforcement databases for reasons unrelated to the mission of the stop and exceeding routine checks authorized by case law. **State v. Bullock, 412.**

SENTENCING

Life without parole—sufficiency of findings of fact—mitigating factors—The trial court abused its discretion in a first-degree murder case by resentencing defendant to life without parole under N.C.G.S. § 15A-1340.19A *et seq.* The trial court did not issue sufficient findings of fact on the absence or presence of mitigate factors. The case was reversed and remanded to the trial court for further sentencing proceedings. **State v. James, 350.**

Mitigating factors—sufficiency of findings of fact—The trial court erred in a first-degree murder case by failing to make adequate findings of fact to support its decision to impose a sentence of life without parole. Nowhere in the order did the resentencing court indicate which evidence demonstrated the absence or presence of any mitigating factors. **State v. James, 350.**

SENTENCING—Continued

Prior record level—probation point—The trial court erred by including a probation point when sentencing defendant as a prior record level II offender. The error was prejudicial because the additional point raised defendant's prior record level from I to II. The trial court did not determine that the State had provided the required notice. **State v. Crook, 784.**

Statutory sentencing provision—aggravated sentencing—no notice—finding by trial court—constitutionality—On appeal from defendant's trial for multiple sexual offenses committed against a child, in which he received an aggravated sentence pursuant to N.C.G.S. § 14-27.4A(c), the Court of Appeals held that N.C.G.S. § 14-27.4A(c) (subsequently codified at N.C.G.S. § 14-27.28(c)) was facially unconstitutional. Pursuant to that sentencing provision, defendant was given no advance notice of the State's intent to seek any aggravating factors, and the "egregious aggravation" factors were found solely by the trial court rather than by the jury beyond a reasonable doubt. Because the error was not harmless, the case was remanded for a new sentencing hearing. **State v. Singletary, 368.**

Trial court's comments—Where defendant appealed from convictions arising from the theft of handbags from a Marshalls store, he failed to show any reversible error resulting from the trial court's comments at sentencing. His sentence was imposed within the presumptive range and was presumed regular and valid. **State v. Fleming, 812.**

STATUTES OF LIMITATION AND REPOSE

Retroactive child support payments—payments after action filed—The three-year statute of limitations had no application to retroactive child support payments made after plaintiff filed her action in 2009. **Smith v. Smith, 135.**

TAXATION

Outdated industrial facility—valuation—blended sales approach—The Property Tax Commission did not err in a case challenging the tax valuation of an industrial property that had only one use by adopting a blended cost-sales approach. Although the County maintained that case law required special-purpose facilities to be valued at cost, North Carolina statutes required that property be assessed at its true value, N.C.G.S. § 105-283. While experts could opine that the cost approach was an appropriate method for assessing true value of a specialty property, N.C. case law did not necessarily demand the same. **In re Corning, Inc., 680.**

Property—outdated industrial facility—highest and best use—The highest and best use of property in a challenged tax valuation was future industrial use where there was no market for the current use, the manufacture of fiber optic cable. **In re Corning, Inc., 680.**

Property tax—industrial facility—valuation—The property owner (Corning) in a contested tax valuation met its initial burden of producing competent, material, and substantial evidence tending to show that the County used an arbitrary or illegal method of valuation and that the assessments substantially exceeded the true value of the property. **In re Corning, Inc., 680.**

Property tax—partially outdated industrial facility—continued use—no market—valuation—The County did not meet its subsequent burden of going forward in a disputed tax valuation case where the property owner (Corning) had met

TAXATION—Continued

its initial burden of showing that the County had used an erroneous method of valuation. The property had originally been built for the manufacture of fiber optic cable, it was shuttered due to market conditions, production resumed eight years later with Corning as the only major optical fiber producer, and technology had changed in the meantime so that the need for space was reduced and part of the multi-story building design was not needed. The County's position was that the property was being used for the purpose for which it was designed, the manufacture of fiber optic cable, and based its cost analysis on that use rather than its value to a willing buyer, which would involve adoptive reuse and a lower sales price. **In re Corning, Inc., 680.**

Property tax—partially outdated industrial facility—current use unique—no bearing on value—In a case challenging a tax valuation of an industrial property that had only one use, the overwhelming evidence showed that the property could not have been sold as a fiber optics manufacturing facility (the current use), and that use had no bearing on the property's value to a potential buyer. **In re Corning, Inc., 680.**

TERMINATION OF PARENTAL RIGHTS

Abandonment of child—finding—not sufficient—The trial court erred in concluding that respondent had willfully abandoned his child under N.C.G.S. § 7B-1111(a)(7). The findings did not demonstrate that respondent had a “purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims” to the child. Abandonment was the sole ground for termination found by the trial court and the order was reversed. **In re S.Z.H., 254.**

Entry of order—not timely—It was noted in a termination of parental rights case that the trial court violated N.C.G.S. § 7B-1109(e) and N.C.G.S. § 7B-1110(a) by entering its termination order roughly six months after the adjudicatory and dispositional hearing. **In re S.Z.H., 254.**

Neglect—abandonment—sufficiency of findings—The trial court erred by terminating respondent mother's parental rights on the grounds of neglect by abandonment. Respondent paid her court-ordered child support since petitioner gained sole custody of the minor child. Although respondent did not consistently attend all of her scheduled visitations, she still visited. The pertinent time period of lack of contact was not voluntary and therefore could not support a finding that respondent intended to abandon. **In re K.C., 84.**

Neglected children—consideration of all factors—The trial court did not abuse its discretion in terminating a mother's parental rights in the best interests of the children. The trial court's written findings showed careful reflection upon all of the N.C.G.S. § 7B-1100(a) factors, the possibility of placing the children with the maternal grandparents, and the history of neglect by the maternal grandparents. **In re C.A.D., 552.**

Not maintaining communications with child—evidence—not sufficient—A trial court's finding in a termination of parental rights case that respondent did not maintain communications with his child was not supported by clear, cogent, and convincing evidence. Moreover, the trial court conflated the separate stages of adjudication and disposition; it is imperative that the two inquiries be conducted separately, although they may be conducted in the same hearing. **In re S.Z.H., 254.**

TERMINATION OF PARENTAL RIGHTS—Continued

Oral statement of judgment—ground omitted—included in written order—Where the trial court's written order terminated respondent-father's parental rights based on the grounds of neglect and dependency, the Court of Appeals held that the trial court did not err even though it did not orally find the ground of dependency at the conclusion of the adjudication portion of the hearing. **In re O.D.S., 711.**

Permanency plan—adoption rather than placement with maternal grandparents—The trial court did not abuse its discretion in choosing adoption for the permanency plan. **In re C.A.D., 552.**

VENDOR AND PURCHASER

Realtor—action to collect commission—cancellation agreement—The trial court erred by granting summary judgment for the sellers of a house in an action by a realtor to collect a commission. Although the sellers and the realtor had agreed to cancel the listing, there was a dispute about when the Listing Agreement was actually terminated. Based on the parole evidence rule, an e-mail could not be considered because it contradicted the unambiguous language contained in the termination agreement. The sellers' execution of the Termination Agreement was an offer to terminate the listing agreement, which was not accepted until the termination agreement was executed by realtor. **Blondell v. Ahmed, 480.**

Realtor—action to collect commission—sellers' breach of good faith—In an action by a realtor to collect a commission from the sellers of a house, there was evidence that created a genuine issue of material fact as to whether the sellers breached their duty of good faith and fair dealing and summary judgment should not have been granted for them. Clearly, a jury could determine that the sellers breached their duty of good faith and fair dealing by failing to disclose to the realtor a pending offer when they asked realtor to accept their offer to terminate the listing agreement. **Blondell v. Ahmed, 480.**

WITNESSES

Child psychologist—qualified as an expert—child custody and support action—The trial court did not err in a child custody and support action by concluding that a child psychologist was qualified to testify as an expert witness. **Smith v. Smith, 135.**

Expert—qualification required—testimony about HGN test—The trial court erred in an impaired driving prosecution by admitting testimony from an officer about the results of a Horizontal Gaze Nystagmus (HGN) test. N.C.G.S. § 8C-1, Rule 702(a1) requires that a witness be qualified as an expert by knowledge, skill, experience, training, or education before testifying as to the results of an HGN test. **State v. Godwin, 184.**

Interested—jury instructions—In defendant's trial for multiple sexual offenses committed against a child, the trial court did not err by declining to give defendant's requested pattern jury instruction on the testimony of an interested witness. The trial court's jury instruction was sufficient to address defendant's concern, leaving no doubt that it was the jury's duty to determine whether the witness was interested or biased. **State v. Singletary, 368.**

State's expert—compensation—cross-examination—In defendant's trial for multiple sexual offenses committed against a child, the trial court erred by not

WITNESSES—Continued

allowing defendant to inquire into an expert witness's compensation during cross-examination. The error, however, was not prejudicial, because testimony regarding the source of the witness's compensation was heard by the jury, the payments were disclosed in defendant's criminal file, and there was overwhelming evidence of defendant's guilt. **State v. Singletary, 368.**

WORKERS' COMPENSATION

Attorney fees—grounds for award—partially improper—A workers' compensation award of attorney fees was vacated and remanded where there were grounds for imposing attorney fees for a discovery violation, but the Industrial Commission relied in part on two erroneous grounds. **Campbell v. Garda USA, Inc., 249.**

Findings of fact—sufficiency—The Industrial Commission did not err in a workers' compensation case by making its findings of fact 4, 6, and 7. Each of the challenged factual findings were supported by competent evidence in the record. **Barnette v. Lowe's Home Ctrs, Inc., 1.**

Injury by accident—fortuitous event—interruption of work routine—unusual task—The Industrial Commission erred in a workers' compensation case by concluding that plaintiff employee failed to establish that he sustained an injury by accident. Plaintiff employee showed that his injury resulted from a fortuitous event, an interruption of his work routine, or an unusual task. The matter was remanded for further proceedings to determine the benefits that plaintiff was entitled as a result of his compensable injury. **Barnette v. Lowe's Home Ctrs, Inc., 1.**

Occupational disease—untimely claim—The Industrial Commission did not err in a workers' compensation case by dismissing plaintiff worker's complaint seeking benefits for an occupational disease. Plaintiff failed to file his claim within the requisite time period of the two-year statute of limitations under N.C.G.S. § 97-58(c). **Rainey v. City of Charlotte, 594.**

Pleasant claims against individuals—summary judgment for defendants—erroneous—The trial court erred by denying the individual defendants' motion for summary judgment on plaintiff's *Pleasant* claims arising from an industrial accident. The individual defendants were not aware of the dangers involved; their decisions did not amount to willful, wanton and reckless conduct; and mistakes did not amount to the sort of willful, wanton, and reckless conduct between co-workers that lies at the heart of a *Pleasant* claim. **Blue v. Mountaire Farms, Inc., 489.**

Woodson claim—safety violations—not determinative—In a *Woodson* claim arising from an industrial accident, prior violations did not demonstrate egregious conduct by the corporate defendant in allowing a chicken processing plant to operate in noncompliance with applicable safety regulations. OSHA violations are not determinative, but they are a factor in determining whether a *Woodson* claim has been established. **Blue v. Mountaire Farms, Inc., 489.**

Woodson claim—willful and wanton negligence—not sufficient—The trial court erred in denying defendant's motion for summary judgment as to plaintiff's *Woodson* claim in an action arising from the release of ammonia at a poultry processing plant during the maintenance of equipment. Willful and wanton negligence alone is not enough to establish a *Woodson* claim. The conduct must be so egregious as to be tantamount to an intentional tort. The mere fact, seen in hindsight, that additional safety measures should have been implemented was not

WORKERS' COMPENSATION—Continued

enough to establish that the corporate defendants intentionally engaged in conduct that they knew was substantially certain to cause serious injury or death to their employees. **Blue v. Mountaire Farms, Inc., 489.**

ZONING

Set-back ordinance—considered to be zoning—In an action between the Town and Genesis Wildlife Sanctuary concerning a set-back ordinance around a lake that was a drinking water resource, the trial court did not err in its declaration that the ordinance was a zoning ordinance adopted pursuant to N.C. Gen. Stat. § 160A-381(a) (2015), as opposed to an ordinance derived from the Town's police power pursuant to N.C. Gen. Stat. § 160A-174 (2015). Zoning ordinances are specifically adopted for the promotion of the health and general welfare of the community, and the N.C. Supreme Court has traditionally considered "buffer" ordinances, such as the one at issue here, to be zoning ordinances. **Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., 444.**