# NORTH CAROLINA COURT OF APPEALS REPORTS

---

VOLUME 250

18 OCTOBER 2016

---

6 DECEMBER 2016

---

RALEIGH

2019

CITE THIS VOLUME

250 N.C. APP.

# TABLE OF CONTENTS


Judges of the Court of Appeals . . . . . . . . . . . . . . . . . . . . . . . . . . v

Table of Cases Reported . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . vii

Table of Cases Reported Without Published Opinions . . . . . . . viii

Opinions of the Court of Appeals . . . . . . . . . . . . . . . . . . . . . . . . 1-826

Headnote Index . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 827

**This volume is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.**

# THE COURT OF APPEALS
# OF
# NORTH CAROLINA

*Chief Judge*

LINDA M. McGEE

*Judges*

WANDA G. BRYANT
DONNA S. STROUD
ROBERT N. HUNTER, JR.
CHRIS DILLON
MARK DAVIS
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
VALERIE J. ZACHARY
PHIL BERGER, JR.[1]
HUNTER MURPHY[2]
JOHN S. ARROWOOD[3]
TOBIAS S. HAMPSON[4]
ALLEGRA K. COLLINS[5]

*Emergency Recall Judges*

GERALD ARNOLD
RALPH A. WALKER

*Former Chief Judges*

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN

*Former Judges*

WILLIAM E. GRAHAM, JR.
JAMES H. CARSON, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL. JR.
HARRY C. MARTIN
E. MAURICE BRASWELL
WILLIS P. WHICHARD
DONALD L. SMITH
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
SYDNOR THOMPSON
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
HUGH B. CAMPBELL, JR.
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS[6]
J. DOUGLAS McCULLOUGH[7]
WENDY M. ENOCHS[8]
ANN MARIE CALABRIA[9]
RICHARD A. ELMORE[10]

[1] Sworn in 1 January 2017. [2] Sworn in 1 January 2017. [3] Appointed 24 April 2017, elected 6 November 2018, and sworn in for full term 3 January 2019. [4] Sworn in 1 January 2019. [5] Sworn in 1 January 2019. [6] Retired 31 December 2016. [7] Retired 24 April 2017. [8] Appointed 1 August 2016. Term ended 31 December 2016. [9] Retired 31 December 2018. [10] Retired 31 December 2018.

*Clerk*
DANIEL M. HORNE, JR.

*Assistant Clerk*
Shelley Lucas Edwards

---

OFFICE OF STAFF COUNSEL

*Director*
Leslie Hollowell Davis[11]
Jaye E. Bingham-Hinch[12]

---

*Assistant Director*
David Alan Lagos

---

*Staff Attorneys*
John L. Kelly
Bryan A. Meer
Eugene H. Soar
Nikiann Tarantino Gray
Michael W. Rodgers
Lauren M. Tierney
Justice D. Warren

---

ADMINISTRATIVE OFFICE OF THE COURTS

*Director*
Marion R. Warren

---

*Assistant Director*
David F. Hoke

---

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Jennifer C. Peterson

[11]Retired 31 August 2018. [12]Began 13 August 2018.

# CASES REPORTED


| | Page |
|---|---|
| Abrons Family Practice & Urgent Care, PA v. N.C. Dep't of Health & Human Servs. | 1 |
| Alexander v. Alexander | 511 |
| Allied Spectrum, LLC v. German Auto Ctr., Inc. | 308 |
| Bishop v. Cty. of Macon | 519 |
| Bolier & Co., LLC v. DECCA Furniture (USA), Inc. | 323 |
| Chafin v. Chafin | 19 |
| Daisy v. Yost | 530 |
| Davis v. Davis | 185 |
| Eli Global, LLC v. Heavner | 534 |
| Flynn v. Schamens | 337 |
| Fullwood v. Barnes | 31 |
| Heard-Leak v. N.C. State Univ. Ctr. for Urban Affairs | 41 |
| Hedden v. Isbell | 189 |
| Hinton v. Hinton | 340 |
| Hirschman v. Chatham Cty. | 349 |
| In re A.H. | 546 |
| In re D.M.O. | 570 |
| In re D.T.N.A. | 582 |
| In re G.T. | 50 |
| In re Garrett | 358 |
| In re J.R. | 195 |
| In re J.S. | 370 |
| In re K.G.W. | 62 |
| In re P.T.W. | 589 |
| In re Patron | 375 |
| In re T.R. | 386 |
| In re T.W. | 68 |
| In re Timberlake | 80 |
| Jamestown Pender, L.P. v. N.C. Dep't of Transp. | 203 |
| Judith M. Daly Att'y at Law, P.A. v. McKenzie | 611 |
| Lewis v. Transit Mgmt. of Charlotte | 619 |
| Lockerman v. S. River Elec. Membership Corp. | 631 |
| N.C. State Bar v. Sutton | 85 |
| Norton v. Scotland Mem'l Hosp., Inc. | 392 |
| Scoggin v. Scoggin | 115 |
| SED Holdings, LLC v. 3 Star Props., LLC | 215 |
| Sergeef v. Sergeef | 404 |
| Settlers Edge Holding Co., LLC v. RES-NC Settlers Edge, LLC | 645 |
| State v. Adams | 664 |
| State v. Faulkner | 412 |
| State v. Godbey | 424 |
| State v. Hardy | 225 |
| State v. Holloway | 674 |
| State v. Howell | 686 |
| State v. Hunt | 238 |
| State v. Killian | 443 |
| State v. Ledbetter | 692 |
| State v. Loftis | 449 |
| State v. Lyons | 698 |
| State v. Mangum | 714 |
| State v. McGill | 121 |
| State v. Mendoza | 731 |
| State v. Moore | 136 |
| State v. Parson | 142 |
| State v. Revels | 754 |
| State v. Stroessenreuther | 772 |
| State v. Thompson | 158 |
| State v. Turner | 776 |
| State v. Ward | 254 |
| State v. Watson | 173 |
| State v. Watson | 455 |
| State v. Wilson | 781 |
| Swaps, LLC v. ASL Props., Inc. | 264 |
| Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC | 791 |
| Town of Belhaven, N.C. v. Pantego Creek, LLC | 459 |
| Vincoli v. State | 269 |

## CASES REPORTED

Page

Wells Fargo Bank, N.A. v. Am. Nat'l Bank & Tr. Co. . . . . . . . . . . . . 280
Williams v. Chaney . . . . . . . . . . . . . . . 476
Williams v. Woodmen Found. . . . . . . 482
Williford v. N.C. Dep't of Health & Human Servs. . . . . . . . . . . . . . . . 491
Willomere Cmty. Ass'n, Inc. v. City of Charlotte . . . . . . . . . . . . . . . . . . . 292

Zhu v. Deng . . . . . . . . . . . . . . . . . . . . . 803

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

Page

Boggs v. N.C. Dep't of Envtl. Quality . . . . . . . . . . . . . . . . . 183

Carolina Vision Invs. I, LLC v. Vaccaro . . . . . . . . . . . . . . . . . . . . 822
Click v. Leandro . . . . . . . . . . . . . . . . . 507

Darden v. Dep't of Pub. Safety . . . . . 507
Doss v. Adams . . . . . . . . . . . . . . . . . . 822

Gersing v. Accetturo . . . . . . . . . . . . . . 507
Goodwin v. City of Charlotte . . . . . . . 822
Grasinger v. Williams . . . . . . . . . . . . . 183
Guidotti v. Moore . . . . . . . . . . . . . . . . 507

Hartford v. Hartford . . . . . . . . . . . . . . 306
Hashemi v. Hashemi-Nejad . . . . . . . . 822
Hunter v. Niblack . . . . . . . . . . . . . . . . 507

In re A.G. . . . . . . . . . . . . . . . . . . . . . . 507
In re A.J.P. . . . . . . . . . . . . . . . . . . . . . 306
In re A.K. . . . . . . . . . . . . . . . . . . . . . . 306
In re A.M. . . . . . . . . . . . . . . . . . . . . . . 306
In re A.S. . . . . . . . . . . . . . . . . . . . . . . . 822
In re B.M.A. . . . . . . . . . . . . . . . . . . . . 822
In re B.S. . . . . . . . . . . . . . . . . . . . . . . . 822
In re C.W.G. . . . . . . . . . . . . . . . . . . . . 507
In re D.L.P. . . . . . . . . . . . . . . . . . . . . . 822
In re D.P. . . . . . . . . . . . . . . . . . . . . . . . 507
In re Estate of Lisk . . . . . . . . . . . . . . . 507
In re G.H.W. . . . . . . . . . . . . . . . . . . . . 507
In re H.B. . . . . . . . . . . . . . . . . . . . . . . 822
In re H.H. . . . . . . . . . . . . . . . . . . . . . . 822
In re J.B. . . . . . . . . . . . . . . . . . . . . . . . 507
In re J.J. . . . . . . . . . . . . . . . . . . . . . . . 183
In re J.M-C. . . . . . . . . . . . . . . . . . . . . . 507
In re J.T.O. . . . . . . . . . . . . . . . . . . . . . 822
In re K.D. . . . . . . . . . . . . . . . . . . . . . . 507
In re K.D.I. . . . . . . . . . . . . . . . . . . . . . 822
In re K.D.M.H. . . . . . . . . . . . . . . . . . . 507
In re K.R. . . . . . . . . . . . . . . . . . . . . . . 508
In re L.M.C. . . . . . . . . . . . . . . . . . . . . 822
In re L.S. . . . . . . . . . . . . . . . . . . . . . . . 508
In re M.C. . . . . . . . . . . . . . . . . . . . . . . 508
In re M.F.B. . . . . . . . . . . . . . . . . . . . . 508
In re M.J.H. . . . . . . . . . . . . . . . . . . . . 508
In re M.R. . . . . . . . . . . . . . . . . . . . . . . 183
In re R.G.B. . . . . . . . . . . . . . . . . . . . . 183
In re S.I.P. . . . . . . . . . . . . . . . . . . . . . . 508
In re T.A.T. . . . . . . . . . . . . . . . . . . . . . 822
In re T.H.H. . . . . . . . . . . . . . . . . . . . . . 183
In re T.S. . . . . . . . . . . . . . . . . . . . . . . . 508
In re W.C.D. . . . . . . . . . . . . . . . . . . . . 508

Johnson v. N.C. Veterinary Med. Bd. . . . . . . . . . . . . . . . . . . . . . 508

Kirkman v. N.C. Dep't of Pub. Safety . . . . . . . . . . . . . . . . . . . 183
Koehn v. Holley . . . . . . . . . . . . . . . . . . 823

Lee v. Moore . . . . . . . . . . . . . . . . . . . . 508
Lennon v. N.C. Judicial Dep't . . . . . . 823
Lenoir Cty. v. Davis . . . . . . . . . . . . . . . 823
Lewis-Solar v. Town of Beech Mountain . . . . . . . . . . . . . . . 508

McAdams v. N.C. Dep't of Commerce . . . . . . . . . . . . . . . . . 823
McKnight v. Lowe's Home Ctrs., LLC . . . . . . . . . . . . . . . . . . . . 823
McLean v. Baker Sand & Gravel . . . . 823

## CASES REPORTED WITHOUT PUBLISHED OPINIONS


| | Page |
|---|---|
| McLean v. Bank of Am., N.A. | 306 |
| McVicker v. Bogue Sound Yacht Club, Inc. | 823 |
| Merrill v. Winston-Salem Forsyth Cty. Bd. of Educ. | 183 |
| Parker v. W. Pharm. Servs. | 508 |
| Peoples v. Tuck | 183 |
| Randall v. Cloud & Williams, PLLC | 823 |
| Sandhill Amusements, Inc. v. Sheriff of Onslow Cty. | 508 |
| Scott v. Scott | 306 |
| Sec. Nat'l Invs., Inc. v. Rice | 508 |
| Spitzer-Tremblay v. Wells Fargo Bank, N.A. | 508 |
| Spruill v. Westfield Ins. Co. | 823 |
| State v. Allen | 823 |
| State v. Applewhite | 509 |
| State v. Bagley | 509 |
| State v. Bailey | 306 |
| State v. Banks | 306 |
| State v. Banks | 823 |
| State v. Banks | 823 |
| State v. Barrett | 306 |
| State v. Battle | 823 |
| State v. Beary | 823 |
| State v. Bishop | 183 |
| State v. Blake | 509 |
| State v. Bowser | 183 |
| State v. Brown | 306 |
| State v. Butler | 509 |
| State v. Bynes | 509 |
| State v. Cannon | 183 |
| State v. Carlisle | 509 |
| State v. Chiles | 823 |
| State v. Coker | 509 |
| State v. Coleman | 306 |
| State v. Coles | 306 |
| State v. Collins | 183 |
| State v. Courtney | 509 |
| State v. Crosby | 824 |
| State v. Curtis | 824 |
| State v. Davidson | 306 |
| State v. Eubanks | 509 |
| State v. Farrow | 509 |
| State v. Flood | 509 |
| State v. Frye | 306 |
| State v. Garrison | 824 |
| State v. Hammonds | 307 |
| State v. Hendricks | 184 |
| State v. Hines | 307 |
| State v. Hogg | 307 |
| State v. Hopkins | 184 |
| State v. Hunter | 307 |
| State v. Jeffreys | 509 |
| State v. Johnson | 824 |
| State v. Jones | 184 |
| State v. Jones | 307 |
| State v. King | 307 |
| State v. Laxton | 824 |
| State v. Lilly | 307 |
| State v. Locklear | 509 |
| State v. Logan | 824 |
| State v. Lunsford | 307 |
| State v. Manning | 824 |
| State v. Manno | 184 |
| State v. Marshall | 307 |
| State v. Meeker | 824 |
| State v. Melvin | 509 |
| State v. Mithamo | 824 |
| State v. Moore | 824 |
| State v. Neal | 824 |
| State v. Parker | 824 |
| State v. Powell | 509 |
| State v. Robinson | 824 |
| State v. Rousseau | 825 |
| State v. Sanchez | 184 |
| State v. Sellers | 825 |
| State v. Simmons | 825 |
| State v. Smith | 184 |
| State v. Solomon | 184 |
| State v. Spivey | 825 |
| State v. Stanley | 307 |
| State v. Stroessenreuther | 825 |
| State v. Stubbs | 825 |
| State v. Thompson | 307 |
| State v. Thompson | 825 |
| State v. Tolliver | 825 |
| State v. Turner | 510 |
| State v. Walker | 825 |
| State v. Wall | 184 |
| State v. Watkins | 825 |
| State v. Whatley | 825 |
| State v. Whitehead | 825 |

# CASES REPORTED WITHOUT PUBLISHED OPINIONS


| | Page |
|---|---|
| State v. Williams | 826 |
| State v. York | 826 |
| Stokes v. Drug Safety All., Inc. | 307 |
| Swofford, Inc. v. Fisher | 510 |
| Townsend v. N.C. Dep't of Transp. | 826 |
| Turnip Invs., LLC v. Deutsche Bank Tr. Co. Ams. | 826 |
| Utley v. Smith | 826 |
| Williams v. Perry | 826 |

CASES

ARGUED AND DETERMINED IN THE

# COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

---

ABRONS FAMILY PRACTICE AND URGENT CARE, PA; NASH OB-GYN ASSOCIATES, PA; HIGHLAND OBSTETRICAL-GYNECOLOGICAL CLINIC, PA; CHILDREN'S HEALTH OF CAROLINA, PA; CAPITAL NEPHROLOGY ASSOCIATES, PA; HICKORY ALLERGY & ASTHMA CLINIC, PA; HALIFAX MEDICAL SPECIALISTS, PA; AND WESTSIDE OB-GYN CENTER, PA; INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND COMPUTER SCIENCES CORPORATION, DEFENDANTS

No. COA15-1197

Filed 18 October 2016

**Administrative Law—exhaustion of administrative remedies—remittance statement—findings of fact**

The trial court erred by dismissing plaintiffs' complaint for unpaid Medicaid claims based on lack of subject matter jurisdiction for failure to exhaust the available administrative remedies prior to filing suit. The remittance statement was not the notice of a final agency decision that is required by N.C.G.S. § 150B-23(f). Further, the trial court also erred in findings nos. 32 and 33 by including a reconsideration review as a mandatory step in the process by which a provider seeks to exhaust administrative remedies prior to filing suit.

Judge McCULLOUGH dissenting.

Appeal by plaintiffs from order entered 12 June 2015 by Judge Gregory P. McGuire in Wake County Superior Court. Heard in the Court of Appeals 9 June 2016.

*Williams Mullen, by Camden R. Webb, Elizabeth C. Stone, and Mark S. Thomas, for plaintiffs-appellants.*

*Attorney General Roy Cooper, by Special Deputy Attorney General Olga Vysotskaya de Brito and Special Deputy Attorney General Amar Majmundar, for defendant-appellee North Carolina Department of Health and Human Services.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jennifer K. Van Zant, Charles F. Marshall, III, and Bryan Starrett, and Baker Botts L.L.P., by Bryan C. Boren, Jr., Van H. Beckwith, and Ryan L. Bangert, for defendant-appellee Computer Sciences Corporation.*

ZACHARY, Judge.

Abrons Family Practice and Urgent Care, PA; Nash OB-GYN Associates, PA; Highland Obstetrical-Gynecological Clinic, PA; Children's Health of Carolina, PA; Capital Nephrology Associates, PA; Hickory Allergy & Asthma Clinic, PA; Halifax Medical Specialists, PA; and Westside OB-GYN Center, PA ("plaintiffs") appeal from an order of the trial court granting a motion of the North Carolina Department of Health and Human Services ("DHHS") and Computer Sciences Corporation ("CSC") (collectively "defendants") to dismiss plaintiffs' complaint for lack of subject matter jurisdiction. For the reasons stated below, we reverse the order of the trial court.

I. Factual and Procedural Background

"Medicaid is a federal program that subsidizes the States' provision of medical services to . . . 'individuals, whose income and resources are insufficient to meet the costs of necessary medical services.' [42 U.S.C.A.] §1396-1." *Armstrong v. Exceptional Child Ctr., Inc.*, __ U.S. __, __, 191 L. Ed. 2d 471, 476 (2015). Plaintiffs are medical practices in North Carolina that provide care to Medicaid-eligible patients and that have Medicaid contracts with the State of North Carolina. DHHS is an administrative agency of the State of North Carolina and is the single state agency designated to administer and operate the North Carolina Medicaid plan. CSC is a Nevada corporation, with its principal office in Falls Church, Virginia.

In 2003, the federal Centers for Medicare and Medicaid Services ("CMS") required the State of North Carolina to replace its Medicaid

Management Information System ("MMIS"). In December 2008, the State awarded the MMIS contract to CSC. The contract required CSC to design and operate a new MMIS system. The new system, NCTracks, was implemented on 1 July 2013, and was intended to manage the enrollment of medical, dental, and other health care providers (hereafter "providers") and to process claims by providers for payment for services provided to North Carolina Medicaid recipients.

On 21 January 2014, plaintiffs filed a "First Amended Class Action Complaint" on behalf of themselves and all others similarly situated against defendants. Plaintiffs' complaint also named SLI Global Solutions, Inc. (SLI) as a defendant; however, SLI is not a party to this appeal. Plaintiffs alleged that the implementation of NCTracks had been a "disaster, inflicting millions of dollars in damages upon North Carolina's Medicaid providers." Plaintiffs asserted that CSC had breached its duty to develop software that complied with Medicaid reimbursement rules, allowed providers to enroll as Medicaid providers, and that processed and paid providers' claims, and had also been negligent in its design and implementation of NCTracks. Plaintiffs sought damages based on claims of negligence and unfair and deceptive trade practices ("UDTP") against CSC and SLI; and breach of contract and violations of Art. I, § 19 of the North Carolina Constitution against DHHS. Plaintiffs also sought a declaratory judgment that DHHS was in violation of the Medicaid reimbursement rules. In their complaint, plaintiffs alleged that it would be futile or impossible for them to attempt to exhaust the available administrative remedies for a variety of reasons, including the following:

> DHHS and CSC have also placed thousands of reimbursement claims in "limbo" by failing to issue decisions on reimbursement claims. The providers have been informed by DHHS and CSC that they must resubmit the claims, and providers' claims have been resubmitted as many as a dozen times, with no reimbursement and no final determination that the amount is or is not payable. The providers therefore have no administrative remedies available to them for such claims because they have no agency decision from which to appeal.

This matter was subsequently "designated a mandatory complex business case by Order of the Chief Justice of the North Carolina Supreme Court[.]" On 4 April 2014, DHHS and CSC each filed a motion to dismiss pursuant to Rule 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure. Following a hearing held on 15 April

2015, the trial court entered an "Amended Opinion and Order on Motions to Dismiss" on 12 June 2015. The trial court ruled that plaintiffs' "primary claim" was for unpaid Medicaid claims and that plaintiffs had failed to exhaust the available administrative remedies prior to filing their complaint. The court dismissed plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2015) for lack of subject matter jurisdiction, based upon plaintiffs' failure to exhaust the available administrative remedies prior to filing suit. The court dismissed as moot defendants' motions for dismissal pursuant to N.C. Gen. Stat. § 1A-1 Rule 12(b)(2) and 12(b)(6). Plaintiffs noted an appeal to this Court.

## II. Standard of Review

Our Court "review[s] Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction *de novo* and may consider matters outside the pleadings." *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007) (citations omitted).

## III. Discussion

### A. Introduction

The issue raised by this appeal is whether the trial court correctly determined that plaintiffs failed to show that it would have been futile or impossible for them to attempt to exhaust administrative remedies prior to filing suit. On appeal, plaintiffs argue that DHHS has a legal obligation to render a final decision on each Medicaid claim that it denies, to inform the provider of its final decision, and to notify the provider of the provider's right to seek a contested case hearing. Plaintiffs contend that "[a]t no time do DHHS or CSC issue a final decision on any claims" and assert that a provider cannot initiate the process of exhausting its administrative remedy until DHHS issues a final decision from which the provider can appeal. We conclude that plaintiffs' arguments on this issue have merit and that the trial court erred in its analysis of the issue of exhaustion of administrative remedies.

### B. Exhaustion of Administrative Remedies: General Rule

Judicial review of the final decision of a State agency is governed by the Administrative Procedure Act (APA), N.C. Gen. Stat. § 150B-1 *et seq.*, which applies to "both trial and appellate court review of administrative agency decisions." *N. C. Dept. of Correction v. Myers*, 120 N.C. App. 437, 440, 462 S.E.2d 824, 826 (1995). N.C. Gen. Stat. § 150B-43 (2015) states in relevant part that "[a]ny party or person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies

made available to the party or person aggrieved by statute or agency rule, is entitled to judicial review of the decision under this Article[.]" "An action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies." *Johnson v. Univ. of N.C.*, 202 N.C. App. 355, 357, 688 S.E.2d 546, 548 (2010) (internal quotations omitted). "[T]he exhaustion requirement may be excused if the administrative remedy would be futile or inadequate." *Justice for Animals, Inc. v. Robeson Cty.*, 164 N.C. App. 366, 372, 595 S.E.2d 773, 777 (2004) (citing *Huang v. N.C. State University*, 107 N.C. App. 710, 715, 421 S.E.2d 812, 815 (1992)).

N.C. Gen. Stat. § 150B-22 (2015) sets out the general policy for resolution of disputes between a State agency and another party:

> It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges . . . should be settled through informal procedures. In trying to reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross-examined. If the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case."

The APA applies to appeals by a Medicaid provider. N.C. Gen. Stat. § 108C-12 (2015) states that:

> (a) General Rule. Notwithstanding any provision of State law or rules to the contrary, this section shall govern the process used by a Medicaid provider or applicant to appeal an adverse determination made by the Department.
>
> (b) Appeals. Except as provided by this section, a request for a hearing to appeal an adverse determination of the Department under this section is a contested case subject to the provisions of Article 3 of Chapter 150B of the General Statutes.

Thus, pursuant to N.C. Gen. Stat. § 108C-12, a contested case hearing is the administrative remedy that a provider must pursue before filing a civil suit. N.C. Gen. Stat. § 108C-2(1) defines an "adverse determination"

as "[a] final decision by the Department to deny, terminate, suspend, reduce, or recoup a Medicaid payment[.]" N.C. Gen. Stat. § 150B-23(a) (2015) provides that a "contested case shall be commenced by . . . filing a petition with the Office of Administrative Hearings[.]" The time within which a party may petition for a contested case hearing is limited by N.C. Gen. Stat. § 150B-23(f), which provides in relevant part that:

> (f) Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, shall commence when notice is given of the agency decision to all persons aggrieved who are known to the agency[.] . . . The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition. . . . .

An appellant's compliance with the time limit of N.C. Gen. Stat. § 150B-23(f) is a jurisdictional requirement. "In order for the OAH to have jurisdiction over [a] petitioner's appeal . . . [a] petitioner is required to follow the statutory requirements . . . for commencing a contested case." *Nailing v. UNC-CH*, 117 N.C. App. 318, 324, 451 S.E.2d 351, 355 (1994). Thus, "timely filing of a petition is necessary to confer subject matter jurisdiction on the agencies as well as the courts[.]" *Gray v. N.C. Dep't of Env't, Health & Nat. Res.*, 149 N.C. App. 374, 378, 560 S.E.2d 394, 397 (2002).

In sum, the general rule, upon which the trial court and the parties are in apparent agreement, is as follows:

> 1. The APA applies to a provider who wants to challenge DHHS' denial of a claim for Medicaid payment.
>
> 2. Under the APA, a provider must exhaust administrative remedies, in this case by pursuing a contested case hearing, prior to filing a claim in superior court, unless the administrative remedy is inadequate or pursuing the remedy would be futile.
>
> 3. In order to pursue a contested case hearing, a provider must file a petition for a contested case hearing within

> 60 days of receiving notice, in writing, of DHHS' adverse determination of the provider's claim. An adverse determination is DHHS' final decision to "deny . . . a Medicaid payment" to a provider.

C. Administrative Appeal Process

Plaintiffs assert that, in response to the submission by a provider of a claim for a Medicaid payment, DHHS neither makes a final agency decision regarding the claim nor provides the notice of such decision required under N.C. Gen. Stat. § 150B-23(f). Plaintiffs argue that without a final agency decision from which to appeal, it is impossible for them to pursue a hearing before the OAH. Evaluation of the merits of plaintiffs' argument requires a review of the document issued by DHHS.

The parties agree that when a provider submits a claim for reimbursement, DHHS responds by sending the provider a document known as a Remittance Statement. The Remittance Statement notifies the provider of DHHS' initial disposition of the provider's claim. Claims are either paid, denied, or placed in "pending" status. In its appellee's brief, CSC describes the contents and legal significance of the Remittance Statement as follows:

> When faced with a denial of a reimbursement claim for Medicaid-covered services, a provider seeking relief may choose to do one of two things: (1) resubmit the claim, generally with new or updated information or (2) seek administrative review with the North Carolina Division of Medicaid Assistance ("DMA"). 10A NCAC 22J .0102(a). If the reconsideration review process proves unsuccessful, a provider may initiate a contested case proceeding before the Office of Administrative Hearings ("OAH"). . . . A provider's option to pursue resubmission or administrative remedies is triggered by the provider's receipt of a Remittance Statement. A Remittance Statement notifies a provider whether reimbursement claims have been approved and paid, denied, or placed in pending status.

The reconsideration review is an informal review process. Several provisions of the North Carolina Administrative Code (NCAC) that are cited by the trial court and by defendants address a provider's right to seek a reconsideration review:

1. 10A NCAC 22J .0101.

> The purpose of these regulations is to specify the rights of providers to appeal reimbursement rates, payment denials, disallowances, payment adjustments and cost settlement disallowances and adjustments. . . .

2. 10A NCAC 22J .0102.

> (a) A provider may request a reconsideration review within 30 calendar days from receipt of final notification of . . . payment denial[.] . . . Final notification of . . . payment denial . . . means that all administrative actions necessary to have a claim paid correctly have been taken by the provider and DMA or the fiscal agent has issued a final adjudication. If no request is received within . . . [the 30] day period[], the state agency's action shall become final. . . .

. . .

3. 10A NCAC 22J .0104.

> If the provider disagrees with the reconsideration review decision he may request a contested case hearing[.]

It is undisputed that if a provider does not seek a reconsideration review within 30 days of receiving the Remittance Statement, the interim decision stated in the Remittance Statement "shall become final." In the alternative, a provider may resubmit a denied claim to DHHS at any time within 18 months of receiving the Remittance Statement. The parties disagree sharply on the role played by the Remittance Statement in the appeals process and on whether the trial court properly concluded that the Remittance Statement met the definition of a final notice of an adverse determination by DHHS that is required by N.C. Gen. Stat. § 150B-23(f).

D. Remittance Statement

After a careful review of the record, briefs, and applicable law, we reach the following conclusions about the nature of the administrative remedy that plaintiffs must pursue before filing a claim in superior court, and about the role played by the Remittance Statement in the procedures with which a provider must comply in order to seek an administrative remedy for the denial of a Medicaid claim.

1. The administrative remedy that plaintiffs are required to exhaust prior to filing suit in superior court is a contested case hearing, there being no legal requirement that plaintiffs must pursue a reconsideration review before filing a petition for a contested case hearing.

N.C. Gen. Stat. § 150B-22 states that it is the policy of the State that disputes between an agency and a party should be resolved through informal means. However, neither § 150B-22 nor any other statute or regulation *requires* that a provider pursue the informal remedy of a reconsideration review. Moreover, 10A NCAC 22J .0102 expressly states that if a provider does not request a reconsideration review within 30 days of receiving a Remittance Statement, "the state agency's action shall become final." Thus, the pertinent NCAC regulation clearly anticipates that a provider may choose not to pursue a reconsideration review.

2. DHHS is the only entity that has the authority to render a final decision on a contested Medicaid claim. It is DHHS' responsibility to make the final decision and to furnish the provider with written notification of the decision and of the provider's appeal rights, as required by N.C. Gen. Stat. § 150B-23(f).

The issue addressed by the trial court in its order was whether plaintiffs had demonstrated that it would have been futile or impossible for them to seek the available administrative remedy of a contested case hearing. A provider cannot apply for a contested case hearing, however, until after (1) DHHS reaches its *final decision* on a given claim for Medicaid reimbursement, and (2) DHHS supplies the provider with written notice of its *final decision* and of the provider's appeal rights. The OAH does not obtain subject matter jurisdiction over a dispute between DHHS and a provider until the provider files a petition for a contested case hearing to review the agency's *final decision*. DHHS is the only entity involved in this matter that has the authority to reach a final decision.

The relevant statutes and NCAC regulations set out a clear schedule with deadlines that have been strictly enforced. N.C. Gen. Stat. § 150B-23(f) requires that when DHHS makes an adverse determination on a Medicaid claim, it must issue a notification to the provider that "shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition." The 60-day deadline within which a provider must petition for a contested case hearing is triggered by the provider's receipt of the required notice of the final decision.

As a result, it is clear that a provider initiates the process of seeking an administrative remedy for a denied Medicaid claim by filing a petition seeking a contested case hearing, and that the petition is the starting point for the provider's exhaustion of administrative remedies. There is no logical or legal basis to justify grafting onto the statutory scheme a requirement imposing upon providers a new, preliminary legal obligation to remind or "nudge" DHHS into complying with its duty to render a final decision in a timely manner and to communicate its final decision to providers.

3. The presence or absence of language stating that a document is the "final notice" of DHHS' "adverse determination" is not determinative of whether the contents of the document meet the requirements of N.C. Gen. Stat. § 150B-23(f).

There is no statutory or regulatory requirement that the written notice that an agency supplies to providers pursuant to N.C. Gen. Stat. § 150B-23(f) must bear the heading "Final Notice" or similar language. The proper inquiry is not whether the document declares itself to be the notice of a final agency decision, but whether its content establishes that it is in fact such a notice.

For example, in *Glorioso v. F.B.I.*, 901 F.Supp.2d 359, 362 (E.D.N.Y. 2012), the plaintiff received a letter from a federal agency stating that "if you are dissatisfied with our decision, suit may be filed against the United States in an appropriate United States District Court, not later than six (6) months after the date of this letter." On appeal, the Court held that the letter "unequivocally informs plaintiff that, if he is dissatisfied . . . he should file suit in federal court within six months" and that "[e]ven though the letter does not include the words 'final denial,' the letter constituted notice of a final denial of the plaintiff's claim." Similarly, in *W. M. Schlosser Co. v. Fairfax County*, 17 Va. Cir. 246 (1989), the Circuit Court reviewed the appeal of a contractor attempting to pursue litigation of a contract dispute with Fairfax County, Virginia. The plaintiff conceded that he was required to appeal within six months of the County's final decision, but contended that the letter he had received was not a "final decision." Plaintiff's argument was rejected:

> First, Plaintiff claims that the April 14, 1988, letter did not state on its face that it constituted the Director's final decision. The Court does not believe that the statutory scheme of the Virginia Public Procurement Act requires a public body to emblazon the words "FINAL DECISION" across the face of a letter decision to put a party on notice that the

> appeal period has begun to run. The Court believes that the content and character of the letter in question could leave no doubt in Plaintiff's mind that the letter embodied a final decision[.]

*W. M. Schlosser Co.*, 17 Va. Cir. at 247. In the instant case, however, the fact that the Remittance Statement does not expressly state that it is the notice of a "final agency decision" of DHHS' "adverse determination" on a Medicaid claim does not resolve the question of whether the content of the Remittance Statement establishes that it constitutes notice of a final agency decision.

4. The Remittance Statement informs a provider of DHHS' initial determination on a provider's Medicaid claim and gives a provider two options by which to challenge this initial decision. Given that DHHS' regulations expressly contemplate the possibility that DHHS may change its initial decision, the Remittance Statement cannot, as a matter of logic, itself constitute DHHS' final decision.

A provider may resubmit a denied claim within 18 months of receiving a Remittance Statement informing the provider that a claim has been denied. Defendants' Billing Guide includes detailed instructions for making suggested changes to a claim in order to correct errors in the original claim, and defendant CSC asserts in its appellee's brief that "the provider can often resolve the issue by resubmitting the claim with updated, corrected, or more complete information." Alternatively, a provider may submit a written request for an informal reconsideration review. In either case, DHHS may change its initial determination in response to the provider's argument or resubmission of the claim in dispute. Accordingly, the Remittance Statement sets forth a preliminary determination which is subject to subsequent revision. This being the case, the Remittance Statement itself cannot be DHHS' final decision on a Medicaid claim.

5. The provisions of 10A NCAC 22J .0102 are internally inconsistent and the two avenues for seeking review of a claim denial upon receipt of a Remittance Statement are legally and factually inconsistent.

10A NCAC 22J .0102(a) states in relevant part that:

> A provider may request a reconsideration review within 30 calendar days from receipt of final notification of . . . payment denial[.] . . . Final notification of payment [denial] . . . means that all administrative actions necessary to have a claim paid correctly have been taken by the provider and

> DMA or the fiscal agent has issued a final adjudication. If no request is received within the . . . [30] day period[], the state agency's action shall become final.

This regulation stipulates that a provider may seek a reconsideration review after receiving "final notification" of a DHHS action, but also that if the provider does not request a reconsideration review, then the action outlined in the Remittance Statement will at that time (30 days after the provider has received notice of the "final" decision) become final. These provisions are internally inconsistent and cannot both be accurate, because an agency decision cannot repeatedly become "final." In addition, the provider is given the option to resubmit a claim at any time within 18 months of receiving the Remittance Statement. These provisions are mutually exclusive and legally inconsistent. There is no logical way that a provider could resubmit a claim after 30 days, if the decision stated in the Remittance Statement has become final after 30 days.

6. DHHS' own procedures establish that DHHS makes its "adverse determination" or issues its "final agency action" after the earlier of (1) the expiration of 30 days after a provider's receipt of the Remittance Statement if the provider does not request a reconsideration review, at which point DHHS' initial determination becomes final, or (2) DHHS' decision about the provider's claim after a reconsideration review or resubmission of the claim. Upon making its final decision, DHHS must supply the provider with written notice of its final decision, from which a provider may seek administrative review within 60 days of receiving the written notification specified in N.C. Gen. Stat. § 150B-23(f).

For the reasons discussed above, we conclude that the Remittance Statement cannot be construed to be DHHS' final decision or adverse determination of a Medicaid claim, if for no other reason than the fact that it is expressly subject to revision. Because the Remittance Statement is sent *before* DHHS makes its final agency decision, the Remittance Statement *cannot* constitute the notice of a final decision that is required by N.C. Gen. Stat. § 150B-23(f).

7. Some of the alleged defects in the procedure by which a provider may seek review of a denied Medicaid claim might be corrected with relatively simple changes to the regulatory language and practice.

Plaintiffs' complaint alleges an array of deficiencies in the process by which a provider may challenge the denial of a Medicaid claim. Some

of the defects alleged by plaintiffs, such as problems with software, may prove difficult to resolve. Other assertions by plaintiffs, such as their allegation that Remittance Statement data is confusing, do not appear to be dispositive of the issue of plaintiffs' ability to pursue an administrative remedy. The APA, however, provides a straightforward path for review of final agency decisions. The following changes would clarify the procedures for appealing a Medicaid claim denial and bring DHHS into compliance with the APA:

> 1. The Remittance Statement, which informs providers of an interim determination that is expressly subject to revision, should state that it is an interim or tentative decision.
>
> 2. A provider who wishes to appeal the decision stated in the Remittance Statement should be required to either seek a reconsideration review within 30 days or to inform DHHS of an intention to resubmit the claim, at which point DHHS could suspend the automatic finalization of the Remittance Statement decision after 30 days.
>
> 3. Upon the earlier of (1) the expiration of 30 days during which the provider neither seeks a reconsideration review nor informs DHHS of its intention to resubmit a claim, or (2) the conclusion of the reconsideration review and/or the resubmission process, DHHS should send the provider the written notice of its final agency decision and of the provider's right to seek a contested case hearing, as required by N.C. Gen. Stat. § 150B-23(f).

E. Trial Court's Order

In its order, the trial court reviewed the law governing review of a final agency decision and made findings addressing plaintiffs' failure to exhaust administrative remedies and plaintiffs' contention that it would have been futile or impossible for them to do so. These findings, as relevant to the issues discussed herein, include the following:

. . .

> 32. Defendants contend that all of Plaintiffs' claims in this action could have been addressed and remedied through the relevant administrative procedures. These procedures provide, first, for "reconsideration review" within DHHS, followed by a contested case hearing before an administrative law judge at the Office of Administrative Hearings.

. . . Since Plaintiffs did not exhaust these administrative procedures, Defendants contend that their claims in this action must be dismissed.

33. The applicable regulations state that a "provider may request a reconsideration review within 30 calendar days from receipt of final notification of payment, payment denial, disallowances, payment adjustment, notice of program reimbursement. . . ." That section further states that "final notification . . . means that all administrative actions necessary to have a claim paid correctly have been taken by the provider and [the NC Division of Medicaid Assistance ('DMA'), a division of DHHS] or the fiscal agent has issued a final adjudication." *Id.* This process provides an opportunity for reconsideration review of any payment decision and states that "[i]f a provider disagrees with the reconsideration review decision he may request a contested case hearing." 10A NCAC 22J.0104.

. . .

36. Here, Plaintiffs admit that they did not exhaust the administrative remedies available under the DHHS regulations. . . . Instead, Plaintiffs allege that the administrative process would have been futile and inadequate to provide the relief they seek.

37. . . . Plaintiffs contend that DHHS, through its fiscal agent CSC, does not issue "final adjudications" or "final notices" that would trigger the reconsideration review and contested case processes and, consequently, Plaintiffs would be unable to obtain a "final agency decision" from which they might seek judicial review. . . .

38. Once Medicaid reimbursement claims have been submitted, providers receive Remittance Statements that notify them of Medicaid claims that have been paid and those that have been denied, and the amount for which the provider is being reimbursed for the claims submitted. . . . The Remittance Statements do not contain any language indicating that they are "final notices" or "final adjudications" of the claims. The statements themselves do not reference an appeal procedure. . . .

. . .

> 41. The Court has reviewed the Remittance Statements, regulations, and Billing Guide and concludes that they create a very confusing and difficult process for providers to determine why claims have been denied and how to appeal denials. The Remittance Statements are difficult to decipher. They do not contain any language indicating that the claims decisions contained in the statements are "final" adjudications or qualify as "final notifications," within the regulatory language set forth above. [The] regulatory language does not specify what actions are included in the phrase "all administrative actions," leaving at least some question as to whether telephone calls to the AVR and CSC Provider Services to seek assistance are "administrative actions" required before a claims decision becomes a "final adjudication." Similarly, the provision in the Billing Guide regarding certain types of appeals being excluded from the reconsideration review process is also confusing.
>
> 42. Nevertheless, at this stage Plaintiffs have only speculated that the process would be futile. Again, none of the Plaintiffs or the affiants appear to have attempted to initiate an appeal. While the regulations and Billing Guide are confusing, the regulations expressly explain an appeal process that can be initiated by making "a request for reconsideration review" within 30 days to DMA at the division's address. Even if the Remittance Statements do not clearly state that they are a "final adjudication" of the claims, at some point common sense would suggest that a provider would at least attempt to follow the appeal procedure provided for in the regulations and the Billing Code, even if simply to get a determination as to whether the Remittance Statements constituted a final adjudication.

In its order the trial court erred in several respects. For the reasons set out above, the trial court erred by treating the Remittance Statement as the notice of a final agency decision that is required by N.C. Gen. Stat. § 150B-23(f). The trial court also erred in Findings Nos. 32 and 33 by including a reconsideration review as a *mandatory* step in the process by which a provider seeks to exhaust administrative remedies prior to filing suit. The Remittance Statement acknowledges that a provider may choose to forego the reconsideration review and

resubmit a claim, or may allow the tentative determination stated in the Remittance Statement to become a final decision. In addition, the trial court made several reversible errors in Finding No. 42. The finding states that plaintiffs "have only speculated" that it would be futile for them to pursue an administrative remedy. To the contrary, plaintiffs assert that "at no time" does DHHS ever issue a final decision on a denied Medicaid claim. The trial court failed to address this issue or to determine the crucial question of fact regarding DHHS' compliance with N.C. Gen. Stat. § 150B-23(f). On remand, the trial court should make a finding as to whether DHHS ever makes a final agency decision on Medicaid claims and whether DHHS ever sends providers the notification that starts the 60-day limitation period. The trial court also erred in Finding No. 42 by suggesting that as part of exhausting administrative remedies, the plaintiffs are obligated to contact DHHS in order to urge it to comply with its own responsibilities and regulations. Finally, the court erred by ruling that plaintiffs were required to seek administrative review, in this case a contested case hearing, *not* within 60 days of receiving the notification required by N.C. Gen. Stat. § 150B-23(f) but, instead, at an undefined time when "sooner or later" plaintiffs should be guided by "common sense" to seek review.

For the reasons discussed above, we conclude that the trial court erred by failing to resolve the crucial issues of fact as to whether DHHS issues final agency decisions in Medicaid claim matters and whether DHHS supplies providers with written notice of its final agency decisions, by treating the Remittance Statement as notice of a final agency decision, by including a reconsideration review as a mandatory administrative review, by suggesting that a provider has the legal duty to ensure that DHHS complies with its own obligations, and by substituting an imprecise and subjective standard for the statutory and regulatory deadlines that apply to review of a final agency decision. The trial court's order is reversed and remanded for entry of additional findings and conclusions that apply the legal principles discussed herein. The trial court may take additional evidence if necessary. Because we are reversing the trial court's order, we do not reach plaintiffs' other arguments.

REVERSED AND REMANDED.

Judge STEPHENS concurs.

Judge McCULLOUGH dissents by separate opinion.

McCULLOUGH, Judge, dissents.

I believe that the trial court properly granted defendants' motion to dismiss based on lack of subject matter jurisdiction. I must, therefore, respectfully dissent.

As the majority stated, "[a]n action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies." *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 220, 517 S.E.2d 406, 410 (1999). It is well-established that "where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Brooks v. Southern Nat'l Corp.*, 131 N.C. App. 80, 83, 505 S.E.2d 306, 308 (1998) (citation omitted).

In the present case, it is undisputed that the NCMMIS Provider Claims and Billing Assistance Guide ("Billing Guide"), available to all Medicaid-eligible care providers, summarizes the appeal procedure set forth in 10A N.C.A.C. 22J.0102-0105. The Billing Guide also states that appeals should be directed to the DMA Appeals Unit, Clinic Policy and Programs, and provides a mailing address located in Raleigh, North Carolina. The trial court found and agreed with plaintiffs that the Remittance Statements, regulations, and Billing Guide "create a very confusing and difficult process for providers to determine why claims have been denied and how to appeal denials."

However, none of the plaintiffs has attempted to initiate an appeal and has only speculated that the administrative process would be futile and inadequate. The trial court discussed, and plaintiffs do not challenge the validity of its discussion, that while the regulations and Billing Guide may be confusing, they

> expressly explain an appeal process that can be initiated by making "a request for reconsideration review" within 30 days to DMA at the division's address. Even if the Remittance Statements do not clearly state that they are a "final adjudications" of the claims, at some point common sense would suggest that a provider would at least attempt to follow the appeal procedure provided for in the regulations and the Billing Guide, even if simply to get a determination as to whether the Remittance Statements constituted a final adjudication.

In addition, the trial court found that the process for seeking review of Medicaid claims decisions "did not change with the implementation of NCTracks, but, rather, has apparently been in place for some time." I agree with the trial court's discussion, and thus, would reject plaintiffs' arguments that because DHHS failed to follow the procedures set forth in the North Carolina Administrative Code for reconsideration review, plaintiffs were excused from exhausting their administrative remedies. Our Court has made it clear that "futility cannot be established by plaintiffs' prediction or anticipation that [DHHS] would again rule adversely to plaintiffs' interests." *Affordable Care, Inc. v. N.C. State Bd. of Dental Examiners.*, 153 N.C. App. 527, 534, 571 S.E.2d 52, 58 (2002).

Furthermore, I agree with the trial court that plaintiffs failed to satisfy their burden of proving that the administrative remedies were inadequate to resolve their claims. Our Court has previously held that "[w]here the remedy established by the APA is inadequate, exhaustion is not required. The remedy is considered inadequate unless it is calculated to give relief more or less commensurate with the claim." *Shell Island*, 134 N.C. App. at 222-23, 517 S.E.2d at 411 (citations and quotation marks omitted).

In accordance with the reasoning set forth in *Jackson v. N.C. Dep't of Human Resources*, 131 N.C. App. 179, 505 S.E.2d 899 (1998), I believe that a thorough review of the record reveals that plaintiffs' primary claim is for unpaid Medicaid reimbursement claims. This is the exact type of claim that should be determined by DHHS' administrative procedures. As to plaintiffs' claims for breach of contract and a violation of the North Carolina Constitution instituted against DHHS, in which plaintiffs seek damages for the payment of improperly denied Medicaid reimbursement claims, I believe that DHHS' administrative review and appeal process could have given plaintiffs relief "more or less commensurate with [plaintiffs'] claim" and that the trial court did not err by dismissing these claims. As to plaintiffs' claim for a declaratory judgment that DHHS' payment methodology, effective 1 July 2013, violated Medicaid reimbursement rules, plaintiffs were required to first seek a declaratory ruling from DHHS before bringing a claim to the courts. N.C. Gen. Stat. § 150B-4 provides a method for a party in plaintiffs' position seeking a declaratory ruling with the agency:

> On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency.

> Upon request, an agency shall also issue a declaratory ruling to resolve a conflict or inconsistency within the agency regarding an interpretation of the law or a rule adopted by the agency.

N.C. Gen. Stat. § 150B-4(a) (2015). Finally, as to plaintiffs' claims of negligence and UDTP against CSC, a review of plaintiffs' amended complaint demonstrates that plaintiffs seek reimbursement for Medicaid claims that were improperly denied because of CSC's alleged negligent design, implementation, and administration of NCTracks and for related business damages resulting from the improperly denied claims. The administrative remedies available to plaintiffs could have provided plaintiffs relief more or less commensurate with plaintiffs' claims. Accordingly, I believe that plaintiffs are not relieved from the requirement that they exhaust available administrative remedies before resorting to the courts.

Based on the foregoing reasons, I would affirm the 12 June 2015 order of the trial court, dismissing plaintiffs' complaint for lack of subject matter jurisdiction.

---

DENISE CHAFIN, Plaintiff
v.
STEPHEN CHAFIN, Defendant

No. COA15-1152

Filed 18 October 2016

**1. Appeal and Error—preservation of issues—equitable distribution**

Although defendant husband contended that the trial court lacked jurisdiction in an equitable distribution case to distribute the Bank of America checking account, vehicles, and cash on hand since Rush Auto held legal title to these assets and was not joined as a party to the action, this argument was not preserved. Defendant raised this argument for the first time on appeal and without evidentiary support.

**2. Divorce—equitable distribution—valuation—business interest —reasonable estimate**

The trial court did not err in an equitable distribution case by distributing Rush Auto to defendant husband without assigning a

value to the business interest. While the trial court distributed Rush Auto without explicitly valuing the company, the findings ultimately reflected a reasonable estimate of the parties' interest.

**3. Divorce—equitable distribution—marital property valuation —vehicles**

The trial court did not err in an equitable distribution case by finding that the vehicles were marital property worth $36,350.00. The record showed that the trial court allowed defendant's motion to preserve the record with excluded evidence and testimony, and that it ultimately considered the evidence.

**4. Divorce—equitable distribution—ability to pay**

The trial court did not abuse its discretion in an equitable distribution case by allegedly failing to consider defendant's ability to pay. The trial court specifically found that defendant was employed and had adequate assets and income from said employment to pay the distributive award.

**5. Divorce—equitable distribution—findings of fact—distribution of marital debt**

The trial court did not abuse its discretion in an equitable distribution case by making finding number 14. The evidence supported the trial court's finding that the parties stipulated to the distribution of the marital debt to plaintiff.

**6. Pleadings—Rule 11 sanctions—attempt to delay hearing**

A de novo review revealed that the trial court did not err in an equitable distribution case by ordering Rule 11 sanctions against defendant husband. There was sufficient evidence in the record to support the trial court's finding that defendant filed the challenged motions in an attempt to delay the hearing.

Appeal by defendant from judgment and orders entered 6 November 2014 by Judge Teresa H. Vincent in Guilford County District Court. Heard in the Court of Appeals 10 August 2016.

*Woodruff Family Law Group, by Jessica S. Bullock and Adam D. Furr, for plaintiff-appellee.*

*Barry Snyder for defendant-appellant.*

ELMORE, Judge.

After five years of litigation involving six different attorneys and abounding motions, the trial court ordered an equitable distribution of the parties' marital and divisible property. Defendant appeals, challenging the distribution of former company property and marital debt, his ability to pay a distributive award, and the trial court's order for sanctions. We affirm.

## I. Background

Denise Chafin (plaintiff) and Stephen Chafin (defendant) were married on 20 December 1988 and separated on 12 June 2008. During the marriage, defendant started a used car dealership, I Rush Auto Sales, LLC (Rush Auto), which sold mid- to low-end used cars purchased through a wholesaler known as Manheim. The Articles of Organization were filed 12 February 2007, naming defendant and his business partner, Peter Ault, as organizers. Their venture was short-lived. Mr. Ault was later removed as a member and replaced by defendant's father, Robert Chafin. The company continued to operate through the date of separation until it was administratively dissolved on 8 August 2008.

On 14 May 2009, plaintiff filed a complaint seeking, *inter alia*, an equitable distribution of the marital and divisible property. Pursuant to a pretrial scheduling order, plaintiff served her initial equitable distribution inventory affidavit on 29 July 2010, followed by a second inventory affidavit attached and incorporated into her proposed pretrial order on 24 October 2011. In both affidavits, plaintiff listed the business interest in Rush Auto, valued at $10,000.00, and its associated bank accounts as marital property to be distributed to defendant. She filed an amended preliminary equitable distribution affidavit on 7 March 2012, this time including an itemized list of nine vehicles which plaintiff claimed were owned by Rush Auto on the date of separation.

Upon additional discovery, plaintiff submitted her final inventory affidavit on 10 April 2013, listing the following in "Schedule C Business or Professional Interests":

| | | | |
|---|---|---|---|
| C1 | I Rush Auto Sales, LLC | . . . | [No Value] |
| C1(a) | I Rush Auto Sales, LLC<br>Bank of America Checking Account<br>Account Number ending in -3001 | . . . | $11,110.13 |
| C1(b) | I Rush Auto Sales, LLC<br>Inventory (Vehicles) | . . . | $50,825.00 |

. . . .

| | | | |
|---|---|---|---|
| C1(d) | I Rush Auto Sales, LLC<br>Cash on Hand | . . . | $4,218.16 |
| C1(e) | I Rush Auto Sales, LLC<br>SunTrust Checking Account<br>Account Number ending in -8407 | . . . | $1,782.56 |
| C1(f) | I Rush Auto Sales, LLC<br>SunTrust Checking Account<br>Account Number ending in -9050 | . . . | TBD |

Plaintiff alleged that each item was marital property, in possession of defendant, and should be distributed to defendant.

The trial court ordered defendant to serve his equitable distribution inventory affidavit and to fill in his contentions on the pretrial order, but he failed to do so. He did serve an "affidavit in response to the proposed pretrial order" on 30 May 2013, the day before the hearing on the pretrial order. As later described by the court, however, defendant's affidavit "utterly ignored the Guilford County Local Rules with regard to equitable distribution" and "[did] not comply with pretrial order form required by the Guilford County Local Rules."

At the hearing, the parties agreed to entry of the pretrial order with the understanding that plaintiff would amend the inventory schedules to reflect defendant's contentions. In his affidavit, defendant objected to plaintiff's classification of the business interests on the following grounds:

> Schedule C: Business or Professional Interests
>
> C1 Husband valued I Rush Auto Sales, LLC at -0- dollars.
>
> C1(a) Although bank account for Rush Auto may indicate deposits totaling $11,110.13 the debt service would at least equal this amount.
>
> C1(b) The inventory of vehicles amount [sic] does not take into account the value less any loans against the vehicles, that is, $50,825.00 does not represent the equity in the vehicles.
>
> . . . .
>
> C1(d) The amount of "cash on hand" represents the amount of money for which, at the point calculated, debts of the business had not been paid or taken into account.

> C1(e) The amount of funds in the Rush Auto banking account 8407 of $1,782.56 was owned by Pete Ault and is not part of the funds of Husband.
>
> C2(f) The amount of funds in the Rush Auto banking account 9050 which is "TBD" is not known nor recognized by Husband.

Defendant also agreed that "if anything new comes up at [plaintiff's] deposition," scheduled for June 2013, then "it will just be added onto whatever that file [sic] pretrial order may be."

After several continuances, the trial was peremptorily set for 9 and 10 January 2014. On 13 January 2014, after the trial had begun, defendant filed a series of motions, including a motion to amend the pretrial order, a motion to preserve the record with excluded evidence and testimony, a motion to continue the trial, and three months later, a motion to set aside the pretrial order. The trial court denied defendant's motions, but did eventually allow his motion to preserve the record in which defendant offered evidence to show that not all vehicles listed in the pretrial order were on the Rush Auto lot on the date of separation.

On 6 November 2014, the trial court entered its equitable distribution order, in which it made the following findings and conclusions relevant to defendant's appeal:

> 8. With regard to the items on Schedule C, the Court finds and orders the following:
>
> a. Item Cl, I Rush Auto Sales, LLC, is a marital asset distributed to the Defendant, but due to insufficient evidence, the Court cannot make a determination as to value.
>
> b. Item CI(a), I Rush Auto Sales, LLC Bank of America Checking Account, account number ending in -3001, is a marital asset distributed to the Defendant at a value of $11,110.13. Defendant failed to provide sufficient proof that the funds in the account were encumbered.
>
> c. Item C1(b), I Rush Auto Sales, LLC Inventory (Vehicles), is a marital asset distributed to the Defendant at a value of $36,350.00. This amount reflects the price Defendant paid for the vehicles that were on the car lot on the date of separation. Plaintiff completed an inventory of the vehicles on the car lot on the date of separation. Defendant's Manheim registry, which is a list of the vehicles purchased

via the Manheim Finance Company, dated on or about the date of separation, is consistent with the models described by Plaintiff. However, there was insufficient evidence that Defendant was able to sell the vehicles for a profit. In fact, Defendant's business was unprofitable and therefore closed down.

. . . .

e. Item CI(d), I Rush Auto Sales, LLC Cash on Hand, is a marital asset distributed to the Defendant at a value of $4,218.16.

f. Item Cl(e), I Rush Auto Sales, LLC SunTrust Checking Account, account number ending in -8407, had a date of separation value of $1,782.56, but when the Defendant and his partner dissolved the business, Defendant left the funds in the account and Defendant's partner took possession of the funds.

. . . .

14. With regard to the items on Schedule H, the Court finds and orders the following:

h. Item H8, HFC Judgment (formerly Household Realty), is a marital debt distributed to the Plaintiff at a value of ($19,419.92). This amount represented a civil judgment that appeared as a lien on the marital home and had to be paid at closing in order to sell the marital home. Although, this debt is associated with the mortgage and the Court would normally distribute it to the same party being distributed the marital home, the parties stipulated that it would be distributed to Plaintiff.

. . . .

23. In order to effectuate the equitable distribution of the marital estate ordered herein, the Defendant shall pay a distributive award to the Plaintiff in the amount of $89,385.44 at the rate of $550.00 per month beginning November 1, 2014 and continuing on the first of each month thereafter until the balance is paid in full. The above distributive award is related to the cessation of the marriage.

24. The Court finds that Defendant is presently employed and has adequate assets and income from said employment

> such that Defendant has the ability to pay the distributive award as set forth herein.

The trial court also allowed plaintiff's motion for sanctions pursuant to Rule 11 and N.C. Gen. Stat. § 50-21(e). The court ordered defendant to pay $10,000.00 in attorney's fees based on its conclusions that defendant and his counsel unreasonably delayed the proceedings through "defendant's numerous and frivolous motions, defendant's discovery 'tactics,' and most recently defendant's abuse of the pretrial order process." Defendant filed notice of appeal on 5 December 2014 from the judgment and order of equitable distribution and the order for sanctions.

## II. Discussion

Our review is governed by the following principles of equitable distribution:

> Upon application of a party for an equitable distribution, the trial court "shall determine what is the marital property and shall provide for an equitable distribution of the marital property . . . in accordance with the provisions of [N.C. Gen. Stat. § 50-20]." In so doing, the court must conduct a three-step analysis. First, the court must identify and classify all property as marital or separate based upon the evidence presented regarding the nature of the asset. Second, the court must determine the net value of the marital property as of the date of the parties' separation, with net value being market value, if any, less the amount of any encumbrances. Third, the court must distribute the marital property in an equitable manner.

*Smith v. Smith*, 111 N.C. App. 460, 470, 433 S.E.2d 196, 202–03 (1993) (citations omitted) (quoting N.C. Gen. Stat. § 50-20), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).

> Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute, will establish an abuse of discretion.

*Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted).

A. Distribution of Checking Account, Vehicles, and Cash on Hand

**[1]** Defendant first argues that the trial court lacked jurisdiction to distribute the Bank of America checking account, vehicles, and cash on hand, because Rush Auto held legal title to these assets and was not joined as a party to the action.

Defendant raises this argument for the first time on appeal and without evidentiary support. At no point during this action did he object to plaintiff's classification of these items as marital property: In his responsive affidavit, he contests only the value of each of these items. In his motions to amend and to preserve the record, he challenges plaintiff's evidence as to which vehicles were on the Rush Auto lot on the date of separation. And in his motion to set aside the pretrial order, he actually concedes that any vehicle on the Rush Auto lot on the date of separation would be marital property. Defendant has therefore failed to preserve this argument for appellate review. *See Quesinberry v. Quesinberry*, 210 N.C. App. 578, 581–83, 709 S.E.2d 367, 371–72 (2011) (rejecting husband's argument that the trial court lacked jurisdiction to distribute assets he claimed belonged to business where he made no prior objection and stipulated that assets were marital property); *see also Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("[T]he law does not permit parties to swap horses between courts in order to get a better mount . . . ."); N.C. R. App. P. 10(a)(1) (2016) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion . . . ."). And as discussed in Part B, *infra*, the evidence ultimately supports the trial court's findings that the business interest, checking account, vehicles, and cash on hand, are marital property.

B. Business Interest in Rush Auto

**[2]** In the alternative, defendant argues that if the trial court had jurisdiction, it nevertheless erred in distributing Rush Auto to defendant without assigning a value to the business interest.

"In an equitable distribution proceeding, the trial court is to determine the net fair market value of the property based on the evidence offered by the parties." *Walter v. Walter*, 149 N.C. App. 723, 733, 561 S.E.2d 571, 577 (2002) (footnote and citations omitted); *see also* N.C. Gen. Stat. § 50-20(c) (2015) ("There shall be an equal division by using net value of marital property and net value of divisible property . . . ."). "In valuing a marital interest in a business, the task of the trial court is to arrive at a date of separation value which 'reasonably approximates' the net value of the business interest." *Offerman v. Offerman*, 137 N.C. App.

289, 292, 527 S.E.2d 684, 686 (2000) (quoting *Poore v. Poore*, 75 N.C. App. 414, 422, 331 S.E.2d 266, 272 (1985)).

Rush Auto was organized during the marriage and still operating on the date of separation, making any business interest in the company marital property—as found by the trial court. *See* N.C. Gen. Stat. § 50-20(b)(1) (2015); *see also* N.C. Gen. Stat. § 57D-5-01 (2015) ("An ownership interest is personal property."); *Hill v. Hill*, 229 N.C. App. 511, 518, 748 S.E.2d 352, 358 (2013) ("If the corporation was created during the marriage, and it was owned and operated by the parties, it is a marital asset regardless of the stock ownership." (citation omitted)). Specific assets of an LLC, on the other hand, are owned by the entity and are not the property of the interest owners. *See* N.C. Gen. Stat. § 57D-2-01(a) (2015) ("An LLC is an entity distinct from its interest owners"); *see also* N.C. Gen. Stat. §§ 57D-4-01, -5-05, -6-04(c)(1), -6-08 (2015). Although Rush Auto was dissolved after the date of separation, defendant correctly notes that dissolution alone does not transfer title to the company's assets. N.C. Gen. Stat. § 57D-6-07(e) (2015).

By virtue of the business interest, however, defendant was entitled to a distribution of the remaining assets after dissolution and during the winding up of the company's affairs. *See* N.C. Gen. Stat. § 57D-4-03 (2015) (describing manner of "[d]istributions to interest owners before the dissolution and winding up of the LLC or, as provided in G.S. 57D-6-08(2), after the dissolution of the LLC"); N.C. Gen. Stat. § 57D-6-08 ("During the winding up of an LLC, the LLC's assets are to be applied . . . [f]irst to creditors, . . . [t]he balance to interest owners as distributions . . . ."); *see also Hill*, 229 N.C. App. at 518–19, 748 S.E.2d at 358 (holding that to the extent corporation was marital asset, post-separation distributions were marital property). This much is reflected in the trial court's equitable distribution order: In particular, the court found that the Bank of America checking account, vehicles, and cash on hand, were marital property; Rush Auto was unprofitable and therefore closed down; after dissolving the company, defendant's business partner took possession of the funds in the SunTrust account; and defendant failed to prove that the Bank of America checking account was encumbered.

While the trial court distributed Rush Auto without explicitly valuing the company, the findings ultimately reflect a reasonable estimate of the parties' interest. In plaintiff's initial inventory affidavits, she assigned a $10,000.00 valuation to the business based primarily on its inventory. As additional assets were revealed through discovery, she listed them separately under the Rush Auto business interest, valuing each item individually and leaving blank the value of the company. The record

shows no other former company property at stake, leading further to the conclusion that any interest in the dissolved company is represented by the aggregate value of the checking account, inventory, cash on hand, accounts payable, and accounts receivable—all of which were distributed to defendant. *See Poore*, 75 N.C. App. at 419, 331 S.E.2d at 270 (instructing courts to consider the following components in valuation of a business: "(a) its fixed assets including cash, furniture, equipment, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities"). If there was an error in the distribution of Rush Auto, therefore, it was the trial court's decision to itemize the assets separately from the interest in the company. *See* 1 Brett R. Turner, *Equitable Distribution of Property* § 5:16, at 311 (3d ed. 2005) ("[T]he value of the corporate assets is included in the value of the corporation's stock, and any stock owned by the parties would of course be marital property."). Accordingly, we see no reason to remand and extend this action any longer.

C. Classification and Value of Vehicles

**[3]** Next, defendant challenges the trial court's finding that the vehicles are marital property worth $36,350.00. Specifically, defendant contends that there is no competent evidence that the nine vehicles listed in plaintiff's affidavit were "presently owned" on the date of separation.

"In appellate review of a bench equitable distribution trial, the findings of fact regarding value are conclusive if there is evidence to support them." *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 197, 511 S.E.2d 31, 34 (1999) (citing *Chandler v. Chandler*, 108 N.C. App. 66, 73, 422 S.E.2d 587, 592 (1992)). " 'This Court is not here to second-guess values of marital and separate property where there is evidence to support the trial court's figures.' " *Id.* (quoting *Mishler v. Mishler*, 90 N.C. App. 72, 74, 367 S.E.2d 385, 386 (1988)).

In plaintiff's amended preliminary equitable distribution affidavit, she listed the make, model, year, and value for each of the nine vehicles claimed to be marital property. Plaintiff testified during a deposition that she visited the Rush Auto lot with defendant on the date of separation and took note of which vehicles had not been sold. Upon comparison with Rush Auto's vehicle registry, the vehicles listed by plaintiff are consistent with those purchased by the company from Manheim before the date of separation.

Plaintiff also testified that she valued each of the vehicles by consulting the National Automobile Dealers Association. She arrived at a total date of separation value of $52,825.00, as shown in the inventory

affidavit submitted with her proposed pretrial order and the schedules attached to the pretrial order. In the trial court's equitable distribution order, however, it valued the vehicles at $36,350.00 to reflect the price paid by Rush Auto for the vehicles, evidenced by checks written to Manheim, because "there was insufficient evidence that Defendant was able to sell the vehicles for a profit." Based on the foregoing, the trial court's classification and valuation of the vehicles are supported by competent evidence.

Relatedly, defendant argues that the court improperly denied him the opportunity to offer evidence of which vehicles were on the Rush Auto lot on the date of separation. In defendant's response to the pretrial order, he raised only one objection to the vehicles: "The inventory of vehicles amount [sic] does not take into account the value less any loans against the vehicles, that is, $50,825.00 does not represent the equity in the vehicles." Because defendant had an opportunity to contest the accuracy of the inventory but failed to do so until after the trial had begun, the court did not abuse its discretion in denying defendant's request to offer evidence. In any event, the record shows the trial court allowed defendant's motion to preserve the record with excluded evidence and testimony, and that it ultimately considered the evidence in its order for equitable distribution.

D. Ability to Pay Distributive Award

**[4]** Next, defendant argues that the trial court abused its discretion by ordering a distributive award without considering defendant's ability to pay. In its equitable distribution order, the trial court specifically found "that Defendant is presently employed and has adequate assets and income from said employment such that Defendant has the ability to pay the distributive award as set forth herein." Because this finding is also supported by competent evidence showing that defendant has sufficient liquid assets to pay the award, we reject defendant's argument. *See Allen v. Allen*, 168 N.C. App. 368, 376–77, 607 S.E.2d 331, 336–37 (2005).

E. Stipulation as to HFC Judgment

**[5]** Next, defendant argues that there is no evidence to support the trial court's Finding of Fact No. 14(h), in which the court found that the parties stipulated to the distribution of the HFC Judgment to plaintiff.

Along with plaintiff's contentions for an unequal division, the HFC Judgment appears in plaintiff's final equitable distribution inventory affidavit and the schedules to the pretrial order. In defendant's response to the proposed pretrial order, he appears to contest plaintiff's

accusation that the $19,000.00 debt was attributable to necessary repairs to the marital home after defendant allowed the home to deteriorate. But apart from shifting blame for the debt or vaguely objecting to its value, defendant did not contest that the HFC Judgment was a marital debt that should be distributed to plaintiff. In light of this evidence and defendant's "abuse of the pretrial order process," we cannot accept defendant's argument that the stipulation resulted in an admission of a fact which clearly was intended to be controverted. *See Rickert v. Rickert*, 282 N.C. 373, 380, 193 S.E.2d 79, 83 (1972) (citations omitted). The evidence supports the trial court's finding that the parties stipulated to the distribution of the marital debt to plaintiff.

F. Rule 11 Sanctions

**[6]** Finally, defendant challenges the trial court's order for Rule 11 sanctions. In cursory fashion, defendant contends that "not every finding of fact and law can be addressed in this brief but all are contested and denied." Because he offers no reason or argument to support his broad contentions, they are deemed abandoned. N.C. R. App. P. 28(b)(6) (2016). In defendant's only developed argument, he defends his decision to file motions to amend and to set aside the pretrial order, which were a fraction of the grounds supporting the trial court's nine-page order for sanctions. Defendant nevertheless maintains that these motions were filed in good faith and "to prevent manifest injustice."

We review *de novo* the trial court's decision to impose mandatory sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11(a) (2015).

> 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).

There is sufficient evidence in the record to support the trial court's finding that defendant filed the challenged motions in an attempt to delay the hearing of this equitable distribution matter. Contrary to defendant's assertion, he had more than ample opportunity to refute

plaintiff's evidence concerning the inventory of the vehicles. He failed to do so during the pretrial order process, at the pretrial order hearing, or within a reasonable time after plaintiff's deposition. Instead, defendant elected to file his motions after the equitable distribution hearing had begun and without prior notice to plaintiff. Because the sufficiency of the evidence supports the findings, the findings the conclusions, and the conclusions the judgment, the trial court properly ordered Rule 11 sanctions against defendant.

## III. Conclusion

Based on the foregoing, we affirm the trial court's judgment and order of equitable distribution and its order for sanctions.

AFFIRMED.

Judges DAVIS and DIETZ concur.

---

JASON FULLWOOD, Plaintiff
v.
SHON F. BARNES, Individually and in his Official Capacity, Defendant

No. COA16-357

Filed 18 October 2016

**1. Appeal and Error—interlocutory orders and appeals—denial of motion for summary judgment—substantial right—governmental and public official immunity**

Although the denial of a motion for summary judgment is generally a nonappealable interlocutory order, orders denying dispositive motions based on the defenses of governmental and public official immunity affect a substantial right and are immediately appealable.

**2. Immunity—governmental immunity—official capacity—failure to allege waiver**

The trial court erred by denying defendant police officer's motion for summary judgment on the affirmative defense of governmental immunity for plaintiff's claims in his official capacity. Plaintiff failed to allege waiver of this affirmative defense.

**3. Immunity—public official immunity—individual capacity—malice**

The trial court did not err by denying defendant police officer's motion for summary judgment on the affirmative defense of public official immunity concerning plaintiff's tort claims against defendant in his individual capacity. Plaintiff's complaint and affidavit forecasted triable issues of fact that existed on whether defendant's actions were improperly motivated by malice.

Appeal by defendant from order entered 9 October 2015 by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 21 September 2016.

*Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for plaintiff-appellee.*

*Office of the City Attorney, by James A. Clark and Marion J. Williams, certified legal intern pursuant to 27 N.C.A.C. 1C.0207, for defendant-appellant.*

TYSON, Judge.

Shon F. Barnes (Shawn F. Barnes) ("Defendant") appeals from order denying his motion for summary judgment. We affirm in part, reverse in part, and remand.

## I. Factual Background

Greensboro Police Department Captain Shon F. Barnes arrested Plaintiff on 31 January 2014 for felony possession and intent to sell and deliver cocaine, maintaining dwelling for controlled substances, and possession of drug paraphernalia. Plaintiff's arrest occurred after a raid of premises located at 310 West Meadowview Street ("Heritage House"), a privately-owned, multi-unit apartment building. More than thirty individuals owned, maintained, and rented their respective apartments in Heritage House. The common areas were maintained by a homeowner's association ("HOA"). Plaintiff's father owned twenty units located within Heritage House, which Plaintiff managed. Plaintiff maintained an office on the third floor of Heritage House and visited the property on a regular basis.

The Greensboro Police Department ("GDP") designated the neighborhood surrounding Heritage House to be a "district crime priority, with

drug sales and social disorder as the underlying cause of the problem." This designation was implemented after 865 calls for police response concerning incidents occurring near Heritage House were received within one year. Many of these calls involved illegal drug sales.

GDP officers met with Heritage House unit owners upon multiple occasions and requested the owners consider changing their rental policies to reduce crime. Landlords were asked to submit a list of their tenants to the HOA. The GDP also requested that homeowners require all adult guests and visitors to present photo identification at the front desk or when they were approached by a police officer on the grounds. Plaintiff was present for at least one of these meetings.

On 31 January 2014, the GDP conducted a raid on Heritage House involving approximately 65 law enforcement officers and executed search warrants on five different units, including unit 308 managed by Plaintiff. Plaintiff arrived at the unit shortly after the raid began. The search of unit 308 yielded 25 dosage units of crack cocaine, various drug paraphernalia, and a significant quantity of cash found inside a hat. None of these items were tied or connected directly to Plaintiff.

No one was present inside unit 308 at the time the search occurred and the unit was found to be in uninhabitable condition. Another officer informed Defendant the unit was vacant. Defendant questioned Plaintiff about unit 308 prior to arresting him. Defendant's affidavit stated Plaintiff never informed Defendant that documents showing the identity of the renter of unit 308 were available and Plaintiff was unable to name any tenant or occupant living there.

A. Defendant's Affidavit

Defendant's affidavit stated he was aware of Plaintiff's previous convictions for drug related offenses, and that Plaintiff had failed to make good faith efforts to stop the use of his father's units for drug dealing and prostitution. Defendant also believed Plaintiff was personally engaged in drug activity and was a member of the Bloods criminal gang. Defendant alleged his belief upon Plaintiff's tendency to wear red and black clothing, indicative of membership in the Bloods. Defendant also alleged that North Carolina Department of Corrections ("DOC") records indicated DOC personnel had confirmed Plaintiff's membership in the Bloods gang, while Defendant was incarcerated. Defendant also asserted Plaintiff had previously impeded police officers by intervening on behalf of tenants occupying his units, and by refusing to cooperate with officers or by providing information concerning criminal investigations.

Based upon his previous knowledge of Plaintiff and the results of the search and seizure of contraband from unit 308, Defendant instructed an officer to call the magistrate and request a finding of probable cause to arrest Plaintiff. The magistrate found probable cause and issued an order for Plaintiff's arrest. Plaintiff was handcuffed and transported to the Guilford County Jail. Defendant's affidavit claims Plaintiff was cooperative and no force was needed to detain or arrest him.

B. Plaintiff's Affidavit

Plaintiff denies many of the statements contained in Defendant's affidavits. Plaintiff submitted an affidavit to deny Defendant's allegations and to "correct some of the false statements" made in the Defendant's affidavits. In particular, Plaintiff alleges he possessed lease records for unit 308 and offered to retrieve them for Defendant when he was questioned about tenants of the unit, but Defendant had refused Plaintiff's request to retrieve that information.

Plaintiff also denied statements in both the HOA's president's and landlord's affidavits, which asserted Plaintiff was "always in a hurry to go upstairs" and appeared to be sneaking into the building. Plaintiff counters he had no reason to sneak into the building and was present at Heritage House between four and five times a week to manage the twenty units his father owned.

Plaintiff's affidavit claims he cooperated with the HOA's requests to provide a complete tenant list, and had worked to make Heritage House "a better place." Plaintiff felt harassed by police officers, who patrolled Heritage House. Plaintiff was constantly required to present photo identification, even though the officers knew his identity and that he managed several of the Heritage House units. Plaintiff asserted he was not concerned about being searched by officers patrolling Heritage House, but believed on several occasions the officers would have attempted to search him in violation of his rights. He tried to limit his engagements with the officers.

Plaintiff denies any affiliation with gang activity. Plaintiff states he never wore gang colors or insignias. While incarcerated by the DOC, he never was accused of or participated in any gang activity.

Plaintiff also asserts the magistrate appeared unwilling to issue a criminal warrant when Plaintiff was brought before him for the criminal charges at issue. The magistrate questioned the GPD officers on "whether this was the right thing to do" since Plaintiff only managed the apartment and was not either the owner or the tenant of unit 308.

The charges against Plaintiff were ultimately dismissed by the Guilford County District Attorney on 16 September 2014. On 21 January 2015, Plaintiff filed this complaint against Defendant. Plaintiff asserted claims against Defendant, in both his official and individual capacities, for the following: (1) assault and battery, (2) false arrest and false imprisonment, and (3) malicious prosecution. Plaintiff sought punitive damages for all three claims "[b]ecause defendant acted with actual malice in the sense of personal ill will, and acted with conscious and intentional disregard to plaintiff's rights, which he knew was reasonably likely to result in injury."

On 24 February 2015, Defendant answered Plaintiff's complaint and filed a Rule 12(b)(6) motion to dismiss. Defendant alleged he was entitled to the defenses of governmental immunity, public official immunity, necessity, and probable cause. Defendant filed a subsequent motion for summary judgment on 8 September 2015.

The trial court heard Defendant's motion for summary judgment in October 2015. Prior to ruling, the trial court considered six affidavits, the pleadings, legal authority submitted by each party, and arguments of counsel. The trial court concluded Defendant's motion for summary judgment "should be denied as there are genuine issues of material fact and [defendant is] not entitled to judgment as a matter of law." Defendant appeals.

## II. Issues

Defendant argues the trial court erred by denying his motion for summary judgment asserting affirmative defenses of governmental immunity and public official immunity.

## 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 curium*, 358 N.C. 131, 591 S.E.2d 521 (2004).

In reviewing a motion for summary judgment, the trial court must "view the pleadings and all other evidence in the record in the light most favorable to the nonmovant and draw all reasonable inferences in that party's favor." *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 117 (2011) (citation omitted).

> An issue is "genuine" if it can be proven by substantial evidence and a fact is "material" if it would constitute or irrevocably establish any material element of a claim or a defense.
>
> A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. Generally this means that on undisputed aspects of the opposing evidential forecast, where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.

*Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations and internal quotation marks omitted). This Court reviews a trial court's summary judgment order *de novo*. *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

## IV. Analysis

### A. Jurisdiction

**[1]** Generally, "the denial of a motion for summary judgment is a non-appealable interlocutory order." *Northwestern Fin. Grp. v. Cnty. of Gaston*, 110 N.C. App. 531, 535, 430 S.E.2d 689, 692 (citation omitted), *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993). This Court will only address the merits of such an appeal if "a substantial right of one of the parties would be lost if the appeal were not heard prior to the final judgment." *Id.*

Well-settled precedents hold "[o]rders denying dispositive motions based on the defenses of governmental and public official's immunity affect a substantial right and are immediately appealable." *Thompson v. Town of Dallas*, 142 N.C. App. 651, 653, 543 S.E.2d 901, 903 (2001) (citing *Corum v. Univ. of North Carolina*, 97 N.C. App. 527, 389 S.E.2d 596 (1990)), *aff'd in part, reversed in part, and remanded*, 330 N.C. 761, 413 S.E.2d 276, *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664 (1992). This Court allows interlocutory appeals of orders denying motions based on these defenses because "the essence of absolute immunity is its possessor's

entitlement not to have to answer for his conduct in a civil damages action." *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 201, 468 S.E.2d 846, 849 (citations and internal quotation marks omitted), *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996). Defendant's appeal is properly before this Court. *Id.*

B. Governmental Immunity

**[2]** "In North Carolina, governmental immunity serves to protect a municipality, as well as its *officers or employees who are sued in their official capacity*, from suits arising from torts committed while the officers or employees are performing a governmental function." *Schlossberg v. Goins*, 141 N.C. App. 436, 439, 540 S.E.2d 49, 52 (2000) (emphasis supplied). Governmental immunity is "absolute unless the City has consented to [suit] or otherwise waived its right to immunity." *Id.* at 440, 540 S.E.2d at 52.

In order to "overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action." *Paquette v. Cnty. of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (internal citations omitted), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). No particular language is required to allege a waiver of governmental immunity, but the complaint must "allege facts that, if taken as true, are sufficient to establish a waiver by the State of [governmental] immunity." *Green v. Kearney*, 203 N.C. App. 260, 268, 690 S.E.2d 755, 762 (2010) (internal quotation marks and citation omitted).

Here, Plaintiff questions why Defendant raises governmental immunity in its brief "since neither the City of Greensboro nor any other governmental unit was sued in this case, and no issue of governmental immunity arises." A defendant's assertion of governmental immunity not only protects a municipality, but also "its officers or employees who are sued in their official capacity." *See Schlossberg*, 141 N.C. App. at 439, 540 S.E.2d at 52.

Plaintiff may have intended to sue Defendant only in his individual capacity, but Plaintiff's complaint sues Defendant both "[i]ndividually and in his Official Capacity as Captain of the Greensboro Police Department." Regarding the claim against Defendant in his official capacity, Plaintiff's complaint failed to specifically allege any waiver of governmental immunity. Defendant was entitled to entry of summary judgment on his affirmative defense of governmental immunity for Plaintiff's claims in his official capacity. In the absence of Plaintiff's allegation of waiver, the trial court should have granted Defendant's

motion on this ground. That portion of the trial court's order judgment is reversed.

C. Public Official Immunity

**[3]** The defense of public official immunity is a "derivative form" of governmental immunity. *Epps*, 122 N.C. App. at 203, 468 S.E.2d at 850. Public official immunity precludes suits against public officials in their individual capacities and protects them from liability "[a]s long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption[.]" *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976) (citation omitted). "Actions that are malicious, corrupt or outside of the scope of official duties will pierce the cloak of official immunity[.]" *Moore v. Evans*, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996) (citations omitted).

A malicious act is one which is: "(1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another." *Wilcox v. City of Asheville*, 222 N.C. App. 285, 289, 730 S.E.2d 226, 230 (2012), *disc. review denied and appeal dismissed*, 366 N.C. 574, 738 S.E.2d 363 (2013); *see In re Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984) ("A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another.").

Absent evidence to the contrary, this Court presumes public officials "discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law." *Strickland v. Hedrick*, 194 N.C. App. 1, 10, 669 S.E.2d 61, 68 (2008) (quoting *Leete v. County of Warren*, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995)). Any evidence presented to rebut this presumption "must be sufficient by virtue of its reasonableness, not by mere supposition. It must be factual, not hypothetical; supported by fact, not by surmise." *Id.* at 11, 669 S.E.2d at 68 (quoting *Dobson v. Harris*, 352 N.C. 77, 85, 530 S.E.2d 829, 836 (2000); *see Vest v. Easley*, 145 N.C. App. 70, 75, 549 S.E.2d 568, 573 (2001) ("A mere allegation is not sufficient to overcome summary judgment.").

In *Strickland*, this Court held where public officers adequately produced evidence of good faith supporting their motion for summary judgment, it "trigger[ed] the opposing party's responsibility to come forward with facts, as distinguished from allegations, sufficient to indicate he will be able to sustain his claim at trial." *Strickland*, 194 N.C. App. at 14, 669 S.E.2d at 70 (internal quotation marks and citations omitted). The plaintiff in *Strickland* failed to produce such evidence. *Id.* Rather, the

plaintiff's testimony "largely corroborated that of the [d]efendants" and "proffered no evidence of actions by these officers outside the scope of their employment, no evidence of corruption, and no evidence supporting their contention that the warrants were issued upon false testimony." *Id.* at 15, 669 S.E.2d at 70. This Court emphasized the officers never met the plaintiffs and their interactions with the plaintiffs were limited to the night the incident occurred and routine police procedures following the incident. *Id.* at 13, 669 S.E.2d at 69.

Unlike in *Strickland*, Plaintiff's complaint and affidavit raise a genuine issue of material fact regarding whether Defendant acted with malice toward Plaintiff. Plaintiff's affidavit largely contradicts, not corroborates, the statements asserted in the affidavits produced by Defendant. *See id.* at 14, 669 S.E.2d at 70. Plaintiff denies Defendant's statements that he refused to present Defendant with information regarding the lease for unit 308. He denies any allegation of gang-related activity and asserts Defendant produced no documentation from DOC tending to show Plaintiff's involvement in such activity.

Plaintiff also denies not cooperating with and impeding the officers' investigations. He claims he had previously been harassed by officers and had simply made other tenants aware of their rights. Furthermore, Plaintiff asserts the magistrate questioned the officers' arrest and pursuit of charges against Plaintiff and who seemed unwilling to issue the warrant, and that all the charges were dismissed by the District Attorney. These sworn assertions almost wholly contradict statements in the affidavits produced by Defendant. While not determinative, and viewed in the light of the non-moving party, these assertions raise genuine issues of material fact and tend to show Defendant's actions against Plaintiff may have been improperly motivated.

Also unlike in *Strickland*, Defendant and the other officers involved had previously interacted with Plaintiff on many occasions. *Id.* at 13, 669 S.E.2d at 69. Defendant relied on his prior knowledge and reputation of Plaintiff, most of which Plaintiff asserts to be incorrect, to make the arrest. Again, this evidence tends to raise genuine issues of material fact regarding whether Defendant's actions against Plaintiff were improperly motivated by malice due to his previous interactions with Plaintiff.

After considering the evidence presented in the pleadings, affidavits, and hearing arguments of counsel, the trial court found genuine issues of material fact existed regarding Plaintiff's tort claims against Defendant. Based upon our *de novo* review of the record and Defendant's burden on appeal to show error, the trial court properly denied Defendant's motion

for summary judgment concerning Plaintiff's claims against Defendant in his individual capacity.

## V. Conclusion

The trial court erred in denying Defendant's motion for summary judgment on the ground of governmental immunity. Plaintiff sued Defendant in his official capacity and failed to meet the pleading requirements of alleging waiver to overcome Defendant's claim of governmental immunity.

The trial court did not err by denying Defendant's motion for summary judgment concerning Plaintiff's tort claims against Defendant in his individual capacity. Plaintiff's complaint and affidavit forecast triable issues of fact that exist on whether Defendant's actions were improperly motivated by malice.

The order denying summary judgment appealed from is reversed in part, as it concerns Defendant's affirmative defense of governmental immunity. The order is affirmed in part, as it concerns Defendant's affirmative defense of public official immunity. This case is remanded for entry of judgment of dismissal on Defendant's affirmative defense of governmental immunity in his official capacity, and for further proceedings on Plaintiff's claims against Defendant in his individual capacity.

AFFIRMED IN PART; REVERSED IN PART, AND REMANDED.

Judges CALABRIA and DAVIS concur.

JoEVELYN HEARD-LEAK, Petitioner
v.
N.C. STATE UNIVERSITY CENTER FOR URBAN AFFAIRS, Respondent

No. COA15-1300

Filed 18 October 2016

**Public Officers and Employees—career state employee—procedural requirements for dismissal**

The administrative law judge (ALJ) erred by granting petitioner career state employee's motion for summary judgment since respondent met the procedural requirements of N.C.G.S. § 126-35 prior to dismissing petitioner. The case was remanded to the ALJ pursuant to N.C.G.S. § 150B-51(d) with instructions to recommence proceedings in order for respondent to complete its case-in-chief regarding petitioner's dismissal for just cause.

Appeal by respondent from order entered 31 August 2015 by Judge Donald W. Overby in the Office of Administrative Hearings. Heard in the Court of Appeals 8 August 2016.

*Hilliard & Jones Attorneys at Law, by Thomas Hilliard III, for petitioner-appellee.*

*Attorney General Roy Cooper, by Assistant Attorney General Matthew Tulchin, for respondent-appellant.*

CALABRIA, Judge.

North Carolina State University Center for Urban Affairs and Community Services ("respondent") appeals from an order granting summary judgment in favor of JoEvelyn Heard-Leak ("petitioner"). We reverse and remand.

## *I. Background*

Petitioner, a career State employee, was employed by respondent as an educational consultant. Respondent has a contract with the North Carolina Department of Public Instruction to review statewide testing and develop and implement new and improved testing based on the statewide curriculum. Petitioner's primary duties included developing polished and error-free items for science tests. In addition, petitioner was responsible for managing teacher item writing, reviewing contracts

with teachers, and assisting with any other test development projects as directed. In order for respondent to meet client deadlines, it was necessary for petitioner to complete assigned work in a timely manner.

From November 2008, when petitioner was hired, until April 2013, petitioner's supervisor was Yevonne Brannon ("Brannon"), the Director for Research and Evaluation at the Center. In April 2013, petitioner's office was moved to a different facility because of the Center's changing needs, and Sheila Brown ("Brown"), the Program Manager, became petitioner's new direct supervisor. On 10 April 2013, Brown met with petitioner to discuss her new workplace expectations. Although Brown quickly grew concerned about petitioner's work performance and unexplained absences, she waited to address these concerns until petitioner's interim performance appraisal meeting in December 2013. Brown did not include her concerns on petitioner's interim appraisal form, but instead, decreased petitioner's work assignments to 20-24 items per day in order to help her meet expectations. Even though petitioner's performance target was already reduced compared to the other writers in her department, on 9 January 2014, her assignments were further decreased to 16-24 items per day.

From January to April 2014, petitioner completed 41 items, an average of less than 1 item per day. On 29 April 2014, respondent issued petitioner a Written Warning for Unsatisfactory Job Performance ("the 29 April 2014 warning letter") that included the dates on which petitioner completed tasks or failed to do so. According to the 29 April 2014 warning letter, petitioner not only failed to perform her writing requirements but also left work early, was absent without any notice or reason, and was warned that she could be dismissed if she failed to improve. Brown placed petitioner on a Performance Improvement Plan ("PIP") to address the issues outlined in this warning. The PIP required bi-weekly meetings to provide petitioner with guidance, feedback, and support. On 16 May 2014, petitioner claimed that the work expectations were unreasonable. Brannon asked petitioner to explain what she thought was reasonable to enable her to establish new goals. Despite the PIP, petitioner continued to fail to meet productivity expectations.

On 15 July 2014, respondent issued petitioner a Final Written Warning for Unsatisfactory Job Performance ("15 July 2014 warning letter"), notifying petitioner that she "ha[d] failed to conform to the performance items and [that] there ha[d] been little to no improvement in [her] work." In addition, the 15 July 2014 warning letter notified petitioner that if she failed to demonstrate "immediate, significant, and sustained improvement," it could result in disciplinary action "up to and including dismissal."

Petitioner failed to improve her performance. On 11 September 2014, respondent issued a Notice of Pre-Dismissal Conference for Unsatisfactory Job Performance ("11 September 2014 pre-dismissal letter"). Respondent stated that between 1 May and 22 August 2014, petitioner only worked 46 of 80 workdays and wrote just 63 items, instead of the expected 230. According to the 11 September 2014 pre-dismissal letter, "there continu[ed] to be no significant and sustained improvement in [petitioner's] work performance and production[;]" petitioner was "performing at levels far below positional expectations and for someone with [her] level of experience and content knowledge[;]" and "[d]espite continued coaching, mentoring, feedback, multiple disciplinary actions and an unsatisfactory performance review for the 2013-2014 cycle, [petitioner] continued to fail to increase [her] productivity and complete the minimal item writing and reviewing expectations of a content specialist."

At the pre-dismissal conference held on 15 September 2014, petitioner was asked whether she had complied with expectations and she responded, "no." When petitioner was asked if she completed 5 items on any day, she responded, "no." Although petitioner was given the opportunity to present evidence rebutting the recommendation for dismissal for unsatisfactory work performance, she failed to present any evidence and failed to indicate that her performance would improve in the future.

On 17 September 2014, petitioner received a Notice of Dismissal for Unsatisfactory Job Performance ("17 September 2014 dismissal letter"), which detailed the issues and actions that led to the termination of her employment with respondent. The 17 September 2014 dismissal letter specifically referenced the two warning letters, the bi-weekly progress meetings, the 11 September 2014 pre-dismissal letter, and the pre-dismissal conference.

On 19 November 2014, petitioner filed a grievance pursuant to the University of North Carolina System SPA Employee Grievance Policy, alleging that her dismissal lacked just cause and was due to discrimination. On 30 January 2015, petitioner was informed of the final decision upholding her dismissal because respondent "met both the procedural and substantive requirements to dismiss [petitioner] for unsatisfactory job performance" and petitioner did not meet her burden of showing that her dismissal was based on discrimination. The final decision included everything that was in her notice of dismissal, as well as performance and attendance warnings from April 2013 and petitioner's performance appraisal from 12 December 2013.

Since petitioner believed she was dismissed without just cause, she filed a Petition for a Contested Case Hearing on 16 February 2015. At the hearing, respondent presented evidence through Brown and Brannon. Brown testified that in making the decision to discipline petitioner, they considered all of the written warnings issued, as well as documentation showing "that we had concerns with [petitioner's] productivity for several months and actually about a year prior." Both Brannon and Brown testified that since they viewed the interim meeting as an opportunity to discuss methods to help petitioner improve, they did not want to document concerns that they felt could be resolved through a discussion.

Because of scheduling conflicts, the hearing was recessed and rescheduled. Petitioner filed a Motion for Summary Judgment on 7 August 2015, asserting that she was entitled to judgment as a matter of law since respondent failed to comply with N.C. Gen. Stat. § 126-35 because it "failed to provide petitioner with a statement . . . describing in numerical order all specific acts or omissions that were the reasons for her dismissal" based on Brown's 16 June 2015 testimony. The ALJ concluded that because "considerable information concerning petitioner's work history, which was beyond the notice given petitioner as to the reasons for her termination, was considered by respondent," respondent "exceeded authority, acted erroneously, failed to use proper procedure and failed to act as required by law" in dismissing petitioner. As a result, the ALJ granted petitioner's motion for summary judgment and ordered retroactive reinstatement, back pay, and attorney's fees. The ALJ made no written findings of fact or additional conclusions of law. Respondent appeals.

## *II. Notice of Reasons for Dismissal*

Respondent argues that the ALJ erred by granting petitioner's motion for summary judgment since respondent met the procedural requirements of N.C. Gen. Stat. § 126-35 prior to dismissing petitioner. We agree.

### A. Standard of Review

Judicial review of an agency's summary judgment ruling is governed by N.C. Gen. Stat. § 150B-51(d) (2015):

> In reviewing a final decision allowing . . . summary judgment, the court may enter any order allowed by G.S. 1A-1, Rule 12(c) or Rule 56. If the order of the court does not fully adjudicate the case, the court shall remand the case to the administrative law judge for such further proceedings as are just.

We apply the same review standard established by Rule 56 of the North Carolina Rules of Civil Procedure when reviewing an agency's summary judgment ruling, and our scope of review is *de novo*. *See Krueger v. N.C. Criminal Justice Educ. & Training Standards Comm'n*, 198 N.C. App. 569, 576, 680 S.E.2d 216, 221 (2009).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). "[W]hen considering a summary judgment motion, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 353-54 (2009) (citations and additional quotation marks omitted). Whether notice is adequate is a question of law; however, "[t]he legal question of whether a dismissal letter is *sufficiently* particular has always been fact-specific." *Barron v. Eastpointe Human Servs. LME*, __ N.C. App. __, __, 786 S.E.2d 304, 314 (2016) (internal citation and quotation marks omitted).

**B. Analysis**

N.C. Gen. Stat. § 126-35(a) provides in pertinent part that, before a career State employee may be terminated for disciplinary reasons, "the employee shall . . . be furnished with a statement in writing setting forth the specific acts or omissions that are the reasons for the [termination]." In interpreting the notice requirement of this statute, this Court has explained that the purpose of N.C. Gen. Stat. § 126-35 "is to provide the employee with a written statement of the reasons for his discharge so that the employee may effectively appeal his discharge." *Leiphart v. N.C. Sch. of the Arts*, 80 N.C. App. 339, 350-51, 342 S.E.2d 914, 922 (1986); *see also Emp't Sec. Comm'n v. Wells*, 50 N.C. App. 389, 393, 274 S.E.2d 256, 259 (1981) ("An employee wishing to appeal his dismissal must be able to respond to agency charges and be able to prepare an effective representation."). Accordingly, "[t]he written notice must be stated 'with sufficient particularity so that the discharged employee will know precisely what acts or omissions were the basis of his [or her] discharge.' " *Barron*, __ N.C. App. at __, 786 S.E.2d at 314 (quoting *Wells*, 50 N.C. App. at 393, 274 S.E.2d at 259). Nonetheless, although an employee is entitled to notice of the acts and omissions underlying the disciplinary action, he or she is not entitled to "notice of every item of evidence pertaining to [the employee's] acts and omissions." *Blackburn v. N.C. Dep't*

*of Pub. Safety*, __ N.C. App. __, __, 784 S.E.2d 509, 519, *disc. review denied*, __ N.C. __, 786 S.E.2d 915 (2016).

In *Nix v. Dep't of Admin.*, 106 N.C. App. 664, 417 S.E.2d 823 (1992), the employee's dismissal letter stated that he "was being terminated because he 'had not been performing at the level expected by [his] position classification,' and because there had been no 'marked improvement' since the oral and the written warnings of earlier that year." *Id.* at 667, 417 S.E.2d at 826. The referenced warning letter stated that the employee "had been 'unable to satisfactorily fulfill the overall responsibilities required in [his] current position.' " *Id.* Accordingly, this Court held that the dismissal letter provided a "sufficiently specific statement of reasons under *Leiphart*, particularly since petitioner was already on notice due to the previous two warnings that he was not performing at the expected level." *Id.*

In *Skinner v. N.C. Dep't of Corr.*, 154 N.C. App. 270, 572 S.E.2d 184 (2002), this Court affirmed an employee's demotion based on unsatisfactory job performance where "he received two detailed written warning letters, as well as a notice of the pre-demotion conference outlining the specific grounds for the proposed disciplinary action." *Id.* at 280, 572 S.E.2d at 191. In reaching this decision, the Court noted that "[p]etitioner received two written warnings concerning his poor job performance, detailing petitioner's failure to follow proper procedure and failure to maintain sanitary conditions in the kitchen." *Id.* at 281, 572 S.E.2d at 192.

In the instant case, respondent's 17 September 2014 dismissal letter described in sufficient detail petitioner's acts and omissions underlying the reasons for her dismissal. According to the 17 September 2014 dismissal letter, petitioner's termination was due to unsatisfactory job performance on the basis that, *inter alia*, she had been provided numerous written warnings, yet "had not conformed to the performance items/expectations" and had shown "little to no improvement in [her] work or output." Respondent explained that petitioner's productivity and work output was considered and tracked beginning in January 2014, when she was informed that respondent expected 16-24 written items per day. According to the 29 April 2014 warning letter, petitioner had "demonstrated a consistent pattern of failing to engage in a productive and efficient manner, [and] failed to follow directives and complete work assignments in a timely and accurate manner[,]" as evidenced by specific instances of conduct on 11, 14, 15, 18, 22, 23, 24, 25, 28, and 29 April 2014. Although petitioner "ha[d] been given specific daily item targets, and provided specific timelines/targets to complete minimal item work, as well as again being provided specific item writing guidelines

that [she] ha[d] used since [she was] first employed [t]here[,]" she still "failed to complete the minimal item writing and reviewing expectations of a content specialist."

According to the 17 September 2014 dismissal letter, petitioner received the 15 July 2014 warning letter because she had not "demonstrat[ed] the improvement . . . needed to remain a contributor to the department." The 15 July 2014 warning letter detailed specific, ongoing problems with petitioner's work performance:

> As [Brown] advised at our previous meetings, your performance has not improved and continues to be unsatisfactory. The quality of your work is not at the level expected for someone with your level of experience and content knowledge. Many items do not follow our set item guidelines and have numerous grammatical and formatting errors. Your quantity of work is at a minimal level and insufficient for us to meet our deadlines for our client. Your production is lower than any other content specialist on our team, including those who are not, full-time, weekly employees. You continue to reject high numbers of items from our database, while failing to write items as requested.
>
> You have been provided with a very specific set of goals to improve your work production and have failed to meet those benchmarks on any day since May 1, 2014. Since our meeting on June 2, 2014, you have completed only 125 item reviews over 7 days (average of 17.85 daily). You failed to create and input items into our TDS as requested. You have continued to fail to increase your productivity and complete the minimal item writing and reviewing expectations of a content specialist.

Prior to the 17 September 2014 dismissal letter, petitioner received a pre-dismissal letter on 11 September 2014 stating that she had not shown any "significant and sustained improvement in work performance and production" and was "performing at levels far below positional expectations and for someone with [her] level of experience and content knowledge." As of that date, "[d]espite continued coaching, mentoring, feedback, multiple disciplinary actions and an unsatisfactory performance review for the 2013-2014 cycle," petitioner had failed "to increase [her] productivity and complete the minimal item writing and reviewing expectations of a content specialist." Finally, respondent's 17 September

2014 dismissal letter stated that at the pre-dismissal conference, petitioner "did not present information that would justify retaining [her] as an employee" and admitted that she had failed to comply with writing and performance expectations.

Considering the notice this Court held adequate in *Nix* and *Skinner*, we conclude the trial court erred by prematurely granting summary judgment on the "fact-specific" legal question of whether petitioner was provided sufficient notice prior to her termination. The 17 September 2014 dismissal letter described petitioner's acts and omissions with sufficient particularity to notify her "precisely what acts or omissions were the basis of [her] discharge." *Wells*, 50 N.C. App. at 393, 274 S.E.2d at 259. The evidence at this stage of the proceedings, taken in the light most favorable to respondent, indicates that petitioner: (1) had notice of her unsatisfactory performance review for the 2013-2014 cycle; (2) was put on a PIP that specifically outlined what she needed to do to improve her job performance and avoid disciplinary action; (3) participated in ongoing progress meetings where she received feedback, guidance, and counseling; (4) was given two detailed written warnings describing her specific failures to meet work expectations; (5) received a pre-disciplinary conference letter informing her that "dismissal [wa]s being considered due to [he]r ongoing unsatisfactory job performance"; and (6) participated in the pre-disciplinary conference that was held prior to her dismissal. Based on this evidence, petitioner was not deprived of her ability to "prepare an effective representation" or "effectively appeal h[er] discharge." *See Leiphart*, 80 N.C. App. at 350-51, 342 S.E.2d at 922-23. Petitioner received repeated notice that she was not performing at the expected level. More importantly, she received more specific notice than the employees in *Nix* and *Skinner*.

As a secondary matter, regarding the ALJ's reason, in part, for granting summary judgment on the basis that "[c]onsiderable information concerning [p]etitioner's work history with [r]espondent . . . was considered by [r]espondent in making the decision to terminate [p]etitioner," we emphasize that our Supreme Court recently listed an employee's "work history" as one of multiple factors of consideration deemed an "appropriate and necessary component of a decision to impose discipline [for just cause] upon a career State employee . . . ." *See Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583, 592, 780 S.E.2d 543, 546 (2015). Furthermore, although a career State employee is entitled to adequate notice of the rationale underlying a disciplinary action, he or she is not entitled to notice of every single piece of evidence supporting the decision. *See Blackburn*, __ N.C. App. at __, 784 S.E.2d at 519 (rejecting the

petitioner-employee's argument "that he is entitled to notice, not only of the acts and omissions that were the basis of his termination, but also to notice of every item of evidence pertaining to these acts and omissions" because no authority supported "his vastly expanded view of 'notice' "). Therefore, respondent acted well within its authority to consider petitioner's work history when determining whether just cause existed to terminate her employment.

### *III. Conclusion*

The trial court erred by granting summary judgment as a matter of law on the basis that respondent failed to comply with the procedural requirements of N.C. Gen. Stat. § 126-35(a). Additionally, our careful review of the record, transcripts, exhibits, and briefs in this case reveals no other justification for this Court to affirm the ALJ's summary judgment order. *See Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) ("If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal."). Therefore, the ALJ's order granting petitioner's motion for summary judgment must be reversed. In light of our disposition, we need not address respondent's remaining arguments on appeal.

Because our decision addresses only whether summary judgment was proper based on a threshold issue of procedure and "does not fully adjudicate the case, [we] shall remand the case to the administrative law judge," pursuant to N.C. Gen. Stat. § 150B-51(d), with instructions to recommence proceedings in order for respondent to complete its case-in-chief regarding petitioner's dismissal for just cause.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge STROUD concur.

IN THE MATTER OF G.T.

No. COA16-353

Filed 18 October 2016

**1. Child Abuse, Dependency, and Neglect—neglect—sufficiency of findings of fact**

The trial court did not err by adjudicating a minor child as neglected. The findings were sufficient for the trial court to conclude that the child did not receive proper care, supervision, or discipline from respondent mother and that he lived in an environment injurious to his welfare. It is proper for a trial court to adjudicate a juvenile neglected, even if the juvenile never actually resided in the parent's home.

**2. Child Abuse, Dependency, and Neglect—neglect—chronic or toxic exposure to alcohol or controlled substances—required findings at disposition**

The trial court erred in a child neglect case by ceasing reasonable reunification efforts based on respondent mother's chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile. N.C.G.S. § 7B-901(c)(1)(e) required the trial court to make findings at disposition that a court of competent jurisdiction had already determined that the parent allowed the continuation of chronic or toxic exposure. This portion of the trial court's disposition order was reversed.

**3. Appeal and Error—mootness—motion to continue**

Although respondent mother contended that the trial court erred by denying her a continuance to prepare for a hearing on the issue of whether the trial court was required to cease reasonable reunification efforts, this argument was moot since the trial court's dispositional determination ceasing reunification efforts was reversed.

Judge DILLON concurring in part and dissenting in part.

Appeal by respondent-mother from orders entered 3 and 26 February 2016 by Judge Ward D. Scott in Buncombe County District Court. Heard in the Court of Appeals 19 September 2016.

*Matthew J. Putnam for petitioner-appellee Buncombe County Department of Social Services.*

*Joyce L. Terres for respondent-appellant mother.*

*Michael N. Tousey for guardian ad litem.*

McCULLOUGH, Judge.

Respondent-mother appeals from: (1) an adjudication order concluding that G.T. ("Gavin")[1] was a neglected and dependent juvenile; and (2) a disposition order concluding that it was in the juvenile's best interest to remain in the custody of the Buncombe County Department of Health and Human Services ("DHHS") and that reasonable reunification efforts with respondent-mother shall cease. After careful review, we affirm the trial court's adjudication order, but reverse the disposition order in part.

## I. Background

In early July 2015, DHHS obtained non-secure custody of Gavin and filed a petition alleging that he was a neglected and dependent juvenile. Gavin was a newborn at the time, and both he and his mother were still in the hospital. The petition alleged that respondent-mother used marijuana, methamphetamine, and cocaine during her pregnancy, and that Gavin had a rapid heartbeat and was showing signs of withdrawal. Gavin's toxicology results were still pending at the time of the petition. The petition also alleged that respondent-mother was belligerent and combative with hospital staff, refused to take her psychiatric medication, and was being held on an involuntary commitment. During one instance, respondent-mother had to be restrained and Gavin removed from her arms. Further, the petition alleged that respondent-mother had a domestic violence protective order ("DVPO") against Gavin's father. He allegedly stabbed respondent-mother and dislocated her jaw, had several criminal charges pending as a result, and had a concerning criminal history.

The trial court held a hearing on 12 November 2015 and subsequently entered an adjudication and interim disposition order. Respondent-mother stipulated that the allegations contained in the petition, with some modifications, could be found as fact by the trial court by clear and convincing evidence. Based on the stipulated findings of fact, the trial court concluded that Gavin was a neglected and dependent juvenile. In

---

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

the interim disposition portion of the order, the trial court concluded that it was in Gavin's best interest to remain in DHHS custody.

The trial court held a disposition hearing on 3 December 2015 and subsequently entered a disposition order. The trial court concluded that it was in Gavin's best interest to remain in DHHS custody. The trial court also directed that, pursuant to N.C. Gen. Stat. § 7B-901(c) (2015), reasonable reunification efforts with respondent-mother shall cease. This conclusion was based upon the trial court's finding that Gavin was subjected to chronic or toxic exposure to controlled substances that resulted in impairment of and addiction in Gavin at birth. Respondent-mother timely appeals.[2]

## II. Discussion

### A. Adjudication of Neglect

**[1]** On appeal, respondent-mother first challenges the trial court's adjudication of neglect. Review of a trial court's adjudication of neglect requires a determination as to (1) whether clear and convincing evidence supports the findings of fact, and (2) whether the findings of fact support the legal conclusions. *In re Pittman*, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566 (2002) (citation omitted). "In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (citations omitted). If competent evidence supports the findings, they are "binding on appeal." *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003) (citations omitted). Here, respondent-mother does not dispute the fact that her stipulation to the findings of fact was proper. As a result, the findings of fact are presumed to be supported by competent evidence and are binding on appeal. *See In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009).

Respondent-mother, however, argues that the trial court's findings of fact are not sufficient to support the trial court's conclusion that Gavin was a neglected juvenile. She contends that none of the trial court's findings of fact relate to her care of Gavin, show that Gavin suffered an impairment, or prove a nexus between her drug use and any harm to Gavin. We disagree.

---

2. The father was a party to the trial court proceedings but does not appeal.

A neglected juvenile is defined as:

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

N.C. Gen. Stat. § 7B-101(15) (2015). Additionally, this Court has consistently required that "there be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide proper care, supervision, or discipline in order to adjudicate a juvenile neglected." *In re McLean*, 135 N.C. App. 387, 390, 521 S.E.2d 121, 123 (1999) (internal quotations omitted) (emphasis in original).

In arguing that the findings do not support an adjudication of neglect, respondent-mother focuses largely on the findings of fact regarding her drug use while pregnant. However, she overlooks the fact that the trial court made findings regarding the father's domestic violence towards her and took judicial notice of respondent-mother's DVPO, both of which support the adjudication of neglect. In the DVPO, a district court found as follows: the father placed respondent-mother in the fear of imminent serious bodily injury; he placed her in the fear of continued harassment that rises to such a level as to inflict substantial emotional distress; he inflicted serious injury upon respondent-mother in that he dislocated her jaw and stabbed her; and he made threats to kill or seriously injure respondent-mother. As a result of these findings, the district court entered a no-contact order against the father. Furthermore, the stipulated findings show that the father was charged criminally based on his actions, that he held a gun to respondent-mother's head, and that he threatened to kill her. Despite the no-contact order, the father was at the hospital following Gavin's birth.

Respondent-mother's erratic behavior in the hospital also supports the adjudication of neglect. The findings demonstrate that respondent-mother was being held on an involuntary commitment, that she was belligerent towards hospital staff, and that the hospital staff would not permit respondent-mother to be alone with Gavin.

Lastly, the findings clearly show that respondent-mother used controlled substances during her pregnancy. She originally admitted to using marijuana, cocaine, and methamphetamine. She later altered her story,

claiming that the father laced her marijuana with cocaine and denying the use of methamphetamine. It was well within the trial court's discretion to believe her original admission. However, even if respondent-mother's story is believed, she still admitted to using illegal drugs while pregnant. Therefore, contrary to respondent-mother's assertion, the findings of fact sufficiently establish that Gavin suffered actual exposure to controlled substances while in utero.

We therefore conclude that the findings were sufficient for the trial court to conclude that Gavin did not receive proper care, supervision, or discipline from his parent and that he lived in an environment injurious to his welfare. Gavin suffered an actual impairment due to his exposure to controlled substances, and respondent-mother's erratic behavior and disregard for the DVPO exposed him to a substantial risk of impairment. Additionally, we have repeatedly held that it is proper for a trial court to adjudicate a juvenile neglected, even if the juvenile never actually resided in the parent's home, as is the case here. *See, e.g.*, *In re B.M.*, 183 N.C. App. 84, 89, 643 S.E.2d 644, 647 (2007) (affirming an adjudication of neglect where a nine-day-old was removed from the mother's custody after testing positive for cocaine, the mother admitted to using cocaine prior to the juvenile's birth, there was domestic violence between the parents, and the mother refused to sign a safety agreement); *see also In re A.S.*, 190 N.C. App. 679, 690, 661 S.E.2d 313, 320 (2008), *aff'd.*, 363 N.C. 254, 675 S.E.2d 361 (2009) ("When . . . the juvenile being adjudicated has never resided in the parent's home, the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.") (internal quotation marks and citation omitted). Accordingly, we conclude that the trial court did not err in concluding that Gavin was a neglected juvenile.

B. Dispositional Determination

**[2]** Next, respondent-mother challenges the trial court's dispositional determination to cease reasonable reunification efforts pursuant to N.C. Gen. Stat. § 7B-901(c) (2015).

In 2015, the North Carolina General Assembly made amendments to our Juvenile Code, specifically to those sections pertaining to permanency planning hearings and orders, the implementation of permanent plans, and the cessation of reunification efforts with a parent. *See* N.C. Sess. L. 2015-136. Because the amendments apply to all actions filed or pending on or after 1 October 2015, they are applicable to the instant case. As part of the amendments, the General Assembly added

subsection (c) to N.C. Gen. Stat. § 7B-901, the section governing a trial court's initial disposition hearing. The new subsection (c) permits the trial court to cease reunification efforts at an initial disposition hearing under certain circumstances. This section provides, in pertinent part, as follows:

> (c) If the disposition order places a juvenile in the custody of a county department of social services, the court shall direct that reasonable efforts for reunification as defined in G.S. 7B-101 shall not be required if the court makes written findings of fact pertaining to any of the following:
>
> (1) A court of competent jurisdiction has determined that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of, any of the following upon the juvenile:
>
> a. Sexual abuse.
>
> b. Chronic physical or emotional abuse.
>
> c. Torture.
>
> d. Abandonment.
>
> e. Chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile.
>
> f. Any other act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse or neglect.
>
> (2) A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent.
>
> (3) A court of competent jurisdiction has determined that (i) the parent has committed murder or voluntary manslaughter of another child of the parent; (ii) has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; (iii) has committed a felony assault resulting in serious bodily injury to the child or another child

> of the parent; (iv) has committed sexual abuse against the child or another child of the parent; or (v) has been required to register as a sex offender on any government-administered registry.

N.C. Gen. Stat. § 7B-901(c)(1)-(3) (2015).

In the instant case, the trial court concluded that reasonable reunification efforts with respondent-mother were not required. This conclusion was based upon the following ultimate finding:

> Pursuant to N.C.G.S. § 7B-901(c), the Court hereby directs that reasonable reunification efforts with the respondent mother are not required as a result of:
>
> a. The respondent mother's admission of continued substance abuse resulting in impairment of, and addiction in, the juvenile at birth.
>
> b. Respondent mother's apparent lack of understanding or concern about the toxic effect of chronic substance abuse on the minor child.

Thus, the trial court's determination to cease reunification efforts was based on subsection (c)(1)(e): chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile.

Respondent-mother challenges the trial court's determination based on several grounds. She first argues the statute's use of the term "has determined" must reference a prior adjudication hearing. Therefore, she argues, the statute directs the trial court to make the determination regarding chronic or toxic exposure to controlled substances in a prior adjudication order. Respondent-mother argues that because the trial court here made the determination in a disposition order, it is erroneous. For the reasons that follow, we agree.

The issue raised by respondent-mother is one of statutory interpretation. Our Supreme Court has repeatedly held that "[s]tatutory interpretation properly begins with an examination of the plain words of the statute." *Lanvale Properties, LLC v. Cty. of Cabarrus*, 366 N.C. 142, 154, 731 S.E.2d 800, 809 (2012) (internal quotation marks and citations omitted). " 'Questions of statutory interpretation are questions of law[.] . . . The primary objective of statutory interpretation is to give effect to the intent of the legislature. The plain language of a statute is the primary indicator of legislative intent.' " *Purcell v. Friday Staffing*, 235 N.C. App.

342, 346-47, 761 S.E.2d 694, 698 (2014) (quoting *First Bank v. S & R Grandview, L.L.C.*, 232 N.C. App. 544, 546, 755 S.E.2d 393, 394 (2014) (internal citations omitted)). "If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *Lanvale Properties*, 366 N.C. at 154, 731 S.E.2d at 809 (quotation marks and citations omitted).

Section 7B-901(c)(1), in pertinent part, states that the trial court shall direct reasonable reunification efforts to cease *if the trial court makes a finding* that:

> (1) *A court of competent jurisdiction* ***has determined*** that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of, any of the following upon the juvenile:
>
> . . . .
>
> e. Chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile.

N.C. Gen. Stat. § 7B-901(c)(1)(e) (emphasis added). Thus, the dispositional court must make a finding that "[a] court of competent jurisdiction has determined" that the parent allowed one of the aggravating circumstances to occur. We conclude that the language at issue is clear and unambiguous and that in order to give effect to the term "has determined," it must refer to a prior court order. The legislature specifically used the present perfect tense in subsections (c)(1) through (c)(3) to define the determination necessary. Use of this tense indicates that the determination must have already been made by a trial court—either at a previously-held adjudication hearing or some other hearing in the same juvenile case, or at a collateral proceeding in the trial court. The legislature's use of the term "court of competent jurisdiction" also supports this position. Use of this term implies that another tribunal in a collateral proceeding could have made the necessary determination, so long as it is a court of competent jurisdiction.

We further find that the legislature's use of a contrasting verb tense in the main body of Section 7B-901(c) supports our statutory interpretation. Rather than using the present perfect tense, the main body states that the trial court "shall *direct*" reunification efforts to cease if the court "*makes* written findings of fact." N.C. Gen. Stat. § 7B-901(c) (emphasis

added). Had the legislature intended for the trial court to make the determination at a disposition proceeding, the verb tense used in subsection (1) would have mirrored that of the main body of Section 7B-901(c). Thus, by our plain reading of the statute, if a trial court wishes to cease reunification efforts pursuant to N.C. Gen. Stat. § 7B-901(c)(1)(e), it must make findings at disposition that a court of competent jurisdiction has already determined that the parent allowed the continuation of chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile.

Here, the trial court made no such finding. The adjudication order contains no ultimate finding of fact that respondent-mother allowed the continuation of chronic or toxic exposure to controlled substances that caused impairment of or addiction in Gavin. Although the trial court's adjudication order contains anecdotal evidence regarding respondent-mother's drug use while pregnant, the findings state that the toxicology results were still pending, and the findings regarding Gavin's withdrawal and impairment were framed in terms of allegations received by DHHS, not in terms of conclusive findings of fact. Therefore, while the overall findings of fact were sufficient to sustain an adjudication of neglect, the specific findings related to Gavin's exposure to controlled substances were not sufficient to sustain an ultimate finding pursuant to N.C. Gen. Stat. § 7B-901(c)(1)(e).

Because the trial court erroneously concluded that reasonable reunification efforts must cease pursuant to N.C. Gen. Stat. § 7B-901(c)(1)(e), we reverse that portion of the trial court's disposition order.

C. Denial of Respondent-Mother's Continuance

**[3]** In her final argument, respondent-mother essentially contends that the trial court erred by denying her a continuance to prepare for a hearing on the issue of whether the trial court was required to cease reasonable reunification efforts pursuant to N.C. Gen. Stat. § 7B-901(c). Respondent-mother argues that she did not have notice of the guardian ad litem's intent to raise the issue at the disposition hearing, and that she has a right to notice and effective representation. She further contends that by denying a continuance of the matter, the trial court denied her effective assistance of counsel. However, because we have reversed the trial court's dispositional determination ceasing reunification efforts pursuant to N.C. Gen. Stat. § 7B-901(c), her argument is mooted. Accordingly, we need not address respondent-mother's final argument on appeal.

AFFIRMED AS TO ADJUDICATION ORDER; REVERSED IN PART AS TO DISPOSITION ORDER.

Judge DILLON concurs in part and dissents in part in a separate opinion.

Judge ENOCHS concurs.

DILLON, Judge, concurring in part and dissenting in part.

## I. Discussion

### A. Adjudication of Neglect

I concur with the majority that the trial court did not err in concluding that Gavin was a neglected juvenile at the adjudication phase of the proceeding.

### B. Dispositional Determination

I dissent from the majority's conclusion that the trial court erred by directing that reasonable reunification efforts must cease pursuant to N.C. Gen. Stat. § 7B-901(c)(1)e. in its Initial Dispositional Order.[1]

The version of N.C. Gen. Stat. § 7B-901(c)(1)e. applicable to this proceeding provides that *if* the trial court finds that "[a] court of competent jurisdiction has determined that" one of the aggravated circumstances enumerated in the statute exists, *then* the trial court must "direct that reasonable efforts for reunification . . . shall not be required[.]" N.C. Gen. Stat. § 7B-901(c)(1)e. (2013).[2]

In the present case, the court determined itself that one of the enumerated, aggravated circumstances did exist; namely, that Mother has "allowed the continuation" of "[c]hronic or toxic exposure to alcohol or controlled substances that causes impairment of [Gavin]." *Id.* The

---

1. The trial court did not demand that the county reunification efforts *cease*. Rather, the court simply stated that the county was "not required" to use reasonable efforts for reunification, tracking the language of N.C. Gen Stat. § 7B-901(c).

2. This statute has since been amended (during the 2016 short session) to provide the trial court more discretion. Specifically, under the statute's current version, even where the trial court makes a finding concerning the existence of an aggravated circumstance, the trial court may, nonetheless, direct that reasonable efforts for reunification continue *if* the trial court "concludes that there is compelling evidence warranting continued reunification efforts[.]" 2016 Appropriations Act, § 12C.1.(g), Session Law 2016-94 (codified as amended at N.C. Gen. Stat. § 7B-901(c)(2016)).

court's determination was based on its findings that Mother had used controlled substances while she was pregnant with Gavin, that Gavin was currently impaired and was undergoing treatment due to his exposure to these drugs, and that Mother still used and intended to continue using illegal drugs. Specifically, the trial court found that: (1) Mother "tested positive for benzos"; (2) Mother admitted that she was currently using marijuana; (3) Gavin "has withdrawal symptoms and has been on methadone for months, which shows the toxic effects of chronic exposure to [Mother's] use of controlled substances during pregnancy"; and (4) Mother "intends to continue to use marijuana despite the impact her illegal drug use has had on her ability to parent." Accordingly, the trial court concluded that reasonable efforts for reunification were not required pursuant to N.C. Gen. Stat. § 7B-901(c)(1)e.

The majority concludes that the trial court erred in directing that reasonable efforts for reunification were not required. The majority reaches this conclusion based on its reading of a portion of N.C. Gen. Stat. § 7B-901(c), which provides that the trial court (at the initial dispositional hearing stage) shall direct that reunification efforts no longer be required if that court finds that "*[a] court of competent jurisdiction has determined that*" an aggravated circumstance exists. N.C. Gen. Stat. § 7B-901(c). The majority reads this language to mean that the trial court cannot direct that reunification efforts are no longer required based on *its own* determination that an aggravated circumstance exists. Rather, the majority reads the statutory language to mean that the determination regarding the existence of an aggravated circumstance must be made in some *prior* order by a court of competent jurisdiction, either in the same cause or in some other proceeding.

I disagree with the majority's restrictive reading of N.C. Gen. Stat. § 7B-901(c). I agree with the majority that the statutory language provides that the trial court at the initial dispositional hearing stage *may* rely on a determination made in some *prior* order. But I also believe that the General Assembly intended that the court at that stage could *itself* consider evidence and determine the existence of an aggravated circumstance, and, based on its own determination, conclude that "a court of competent jurisdiction" has made the determination sufficient to relieve DSS from having to pursue reunification. Certainly, the Buncombe County District Court is "a court of competent jurisdiction," whether at the initial dispositional hearing phase or at some prior stage of the proceeding. And, here, that court at the initial dispositional phase "has determined" that an aggravated circumstance exists.

Under the majority's interpretation of the statute, the trial court here would not have committed error if it had simply entered *two* separate orders, instead of one; namely, an order determining the existence of the aggravated circumstance *and then* an initial dispositional order based on the first order's determination. However, under the majority's interpretation, the trial court here committed error simply by issuing a single order combining these two steps. I do not think this result was intended by the General Assembly, and this result is certainly not compelled by the phrase "has determined" in the statute. Rather, I believe that the General Assembly intended that a trial court, even at the initial dispositional hearing phase, continued to have authority to consider any reliable evidence and make any determination(s) based on that evidence as to the presence of an aggravated circumstance in its effort to determine the appropriate plan for the juvenile. *See In re Vinson*, 298 N.C. 640, 666, 260 S.E.2d 591, 607 (1979) (discussing the broad powers of the district court to consider evidence and matters at the dispositional phase).

C. Denial of Mother's Continuance

Mother argues that the trial court erred in denying her a continuance to prepare for a hearing, contending that she was not aware that the issue regarding reunification efforts would be raised. The majority held that this issue was moot based on its reversal of the dispositional order. I would reach this third issue.

Based on my review of the record, I conclude that the trial court did not err in proceeding with the hearing. Here, competent evidence demonstrates that Gavin was exposed to toxic substances during the pregnancy and that he was required to receive treatment from birth for many months. Mother stipulated that she used cocaine, methamphetamines, and marijuana during the pregnancy. There were undisputed reports that Gavin was receiving methadone to treat his addiction and that he was suffering from tremors. *See In re L.G.I.*, 227 N.C. App. 512, 515-16, 742 S.E.2d 832, 835 (2013) (determining that evidence of illegal drugs in a newborn's system coupled with the mother's admission that she used illegal drugs during the pregnancy is sufficient to support a conclusion that the mother's drug use caused the presence of illegal drugs in her newborn). This evidence was sufficient to sustain the trial court's determination that Gavin was impaired due to his exposure to illegal drugs consumed by Mother during the pregnancy; and the trial court did not err in proceeding with the hearing. *See In re Vinson*, 298 N.C. at 669, 260 S.E.2d at 608 (stating that a trial court may consider matters not raised

in the petition during a dispositional hearing, so long as the information is reliable, accurate, and competently obtained).

## II. Conclusion

My vote is to affirm Judge Scott's orders.

---

IN THE MATTER OF K.G.W.

No. COA16-247

Filed 18 October 2016

**Termination of Parental Rights—psychologist testimony—weight of evidence**

The trial court did not err by terminating respondent mother's parental rights. The trial judge was the trier of fact and determined that under the unique circumstances of this case and the characteristics of this juvenile, an expert evaluation by a psychologist who had not worked with the juvenile and who lacked experience in juvenile court matters was not helpful.

Appeal by respondent-mother from orders entered 5 November 2015 by Judge Monica H. Leslie and 3 December 2015 by Judge Roy T. Wijewickrama in District Court, Haywood County. Heard in the Court of Appeals 26 September 2016.

*Rachael J. Hawes, for petitioner-appellee Haywood County Health and Human Services Agency.*

*Leslie Rawls, for respondent-appellant.*

*Parker Poe Adams & Bernstein LLP, by Michael J. Crook, for guardian ad litem.*

STROUD, Judge.

Respondent appeals from the trial court's orders terminating her parental rights to her minor child, Ginny.[1] For the following reasons, we affirm.

---

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

## I. Background

On 4 January 2013, the Haywood County Department of Social Services[2] ("DSS") filed a petition alleging Ginny was an abused, neglected, and dependent juvenile because two days earlier Ginny arrived at school with injuries she said were from her "father" spanking her and "accidentally" punching her in the nose; this same date the trial court ordered DSS receive non-secure custody of Ginny. On 4 March 2013, the trial court entered an order adjudicating Ginny to be an abused and neglected juvenile.

On 12 December 2014, the trial court entered an order changing the permanent plan for Ginny to adoption and directing DSS to file a petition to terminate parental rights to Ginny. On 17 February 2015, DSS filed a petition for termination of respondent's parental rights to Ginny alleging grounds of abuse, neglect, failure to make reasonable progress to correct the conditions that led to Ginny's removal from her home, failure to pay a reasonable portion of the cost of Ginny's care while she was in DSS custody, and dependency. On 5 November 2015, the trial court entered an order concluding that grounds exist to terminate respondent's parental rights pursuant to neglect, failure to make reasonable progress to correct the conditions that led to Ginny's removal from her home, and failure to pay a reasonable portion of the cost of Ginny's care while she was in foster care. Thereafter, the trial court held a disposition hearing,

The trial court held a disposition hearing on 9 November 2015, wherein respondent attempted to offer Dr. Sandra Newes as an expert witness in clinical psychology. Upon objection from both DSS and the guardian ad litem, the trial court allowed a *voir dire* examination of Dr. Newes to determine if she qualified to testify as an expert witness in this particular case. After the *voir dire*, the trial court sustained DSS's and the guardian ad litem's objection and did not allow her to testify as an expert witness. However, the trial court did allow respondent to elicit testimony from Dr. Newes as an offer of proof. Ultimately, the trial court concluded that termination of respondent's parental rights was in Ginny's best interests, and on 3 December 2015 it entered an order terminating respondent's parental rights to Ginny.[3] Respondent appeals.

---

2. Now called the Haywood County Health and Human Services Agency.

3. The order also terminated the parental rights of Ginny's father, but he is not a party to this appeal.

## II. Expert Witness

The only issues respondent raises on appeal are regarding Dr. Newes. Respondent argues that "(1) Dr. Newes qualified as an expert; (2) the testimony satisfied the requirements of N.C. R. Ev. 702(2); and (3) the testimony was relevant, reliable, and necessary to determine the child's best interest" because

> 3. Even under the more stringent Rules of Evidence Dr. Sandra Newes' expert testimony was admissible, because she qualified as an expert witness; her expert opinion was based on sufficient facts and data; and her opinion resulted from reliable principles and methods applied to the facts.
>
> 4. In excluding Dr. Newes testimony, the trial court improperly applied the Rules of Evidence instead of the statutory best interest hearing procedures, under which the rules of Evidence do not apply[.]
>
> 5. The trial court wrongfully excluded Dr. Newes' testimony based on matters that go to the weight of the evidence not its admissibility.
>
> 6. The trial court improperly limited Mother's offer of proof, saying "this is an offer of proof, not testimony."
>
> 7. The trial court's erroneous exclusion of Dr. Newes' expert testimony deprived Mother of a fundamental right and resulted in harm.

But we need not determine whether the trial court was required to consider Dr. Newes as an "expert witness" under Rule of Evidence 702 as defendant argues, since as a practical matter, the trial court found that Dr. Newes's testimony would not be helpful due to her lack of contact with the child and her lack of experience in juvenile neglect and dependency cases.

> Where scientific, technical, or other specialized knowledge *will assist the fact finder* in determining a fact in issue or in understanding the evidence, an expert witness may testify in the form of an opinion, N.C.R. Evid. 702, and the expert may testify as to the facts or data forming the basis of her opinion, N.C.R. Evid. 703.

*State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987) (emphasis added). Here, the trier of fact was the trial judge, not a jury.

The trial court found:

> 106. Dr. Sandra Newes was tendered to Court as an expert witness in the field of Clinical Psychology by Counsel for the Respondent Mother. The Court finds that Dr. Newes has never met with, observed, or tested the minor child. She has never had involvement in a Department of Social Services' case. There is insufficient evidence to show that any opinion Dr. Newes would provide to the Court in this case would be based on sufficient, reliable data in regard to this juvenile. The Court sustains the Agency and Guardian ad Litem Program's objection to Dr. Sandra Newes testifying as an expert witness in this case. *The Court specifically finds that Dr. Newes' [proffered] testimony will not assist the trier of fact to understand the evidence or determine any facts in issue.*

(Emphasis added.)

Thus, the trial court did not really determine that Dr. Newes did not meet the qualifications of professional education and experience to testify as an expert witness under Rule 702 but rather determined due to her unfamiliarity with the child, she simply had no testimony to offer which the trial judge as the trier of fact would deem to be persuasive. As the trier of fact, the trial judge was free to determine the credibility of the evidence and weigh it as he saw fit. *See Riley v. Ken Wilson Ford, Inc.*, 109 N.C. App. 163, 168, 426 S.E.2d 717, 720 (1993) ("When the trial judge sits as trier of fact she has the duty to determine the credibility of the witnesses and weigh the evidence; her findings of fact are conclusive on appeal if supported by competent evidence.") The trial court was under no obligation to consider Dr. Newes's testimony as credible or of substantial weight even if the trial court allowed her to testify as an expert witness. *See generally id.* Therefore, we need not address respondent's numerous issues on appeal regarding Rule 702 or other Rules of Evidence regarding expert testimony as this was not the basis of the trial court's sustaining the objection to Dr. Newes's testimony.

Respondent also argues that the trial court improperly limited her offer of proof regarding Dr. Newes. But the trial court allowed defendant and Dr. Newes to provide an offer of proof for approximately 14 pages of the transcript. The offer of proof sets forth the opinions which Dr. Newes would have presumably described in greater detail, if allowed to testify as an expert. As the trial court noted, "[t]his is an offer of proof[,]" and it was not testimony. The proffer was sufficient for the trial court

to understand Dr. Newes's evaluation of the case and opinions, but also sufficient for the trial court to determine that her lack of a personal evaluation of the child and her lack of juvenile court experience rendered her testimony of no use to the trial court.

Furthermore, the trial court did not, as respondent argues, "deprive[ ] Mother of a fundamental right [which] resulted in harm" by not permitting testimony from Dr. Newes as an expert witness, because again, the trier of fact's ability to weigh the evidence is paramount with any witness testimony, lay or expert. *See generally id.* Certainly it would have been helpful to respondent had the trial court weighed her evidence differently throughout this case, but as the trier of fact on this issue, the trial court was not bound to find respondent's evidence to be credible or give it more weight than any other evidence, so the trial court did not deny respondent's rights.

Respondent also argues that "[t]he trial court's findings of fact excluding Dr. Newes's expert testimony are not supported by the evidence[.]" Here too, respondent has numerous sub-points:

> 1. The evidence established that Dr. Newes' expert opinion was based on sufficiently reliable data regarding Ginny based on the standards in the psychology profession.
>
> 2. Dr. Newes' expert opinion related to Ginny's best interest and would assist an impartial trier of fact to understand the evidence and determine the primary fact at issue.
>
> 3. The trial court's unsupported findings of fact and order excluding Dr. Newes' testimony deprived Mother of her right to present evidence and receive a fair trial.

While respondent's argument is framed as a challenge to the findings of fact, she is really challenging the trial court's determination, in its discretion, *see generally id.*, that Dr. Newes's testimony would not be helpful based upon her lack of contact with the child and her lack of experience in juvenile matters. The trial court did not allow Dr. Newes to testify as an expert because he did not find her testimony persuasive due to the fact that she had "never met with, observed, or tested the minor child[, and s]he has never had involvement in a Department of Social Services' case." The "reliable data" respondent notes is Dr. Newes's expertise in her field, which is not at issue on appeal. Essentially, the trial court determined Dr. Newes did not have expertise "in regard to this juvenile" which was supported by the evidence.

Respondent also notes that it is not always necessary that an expert witness such as a psychologist or physician personally examine a person before they are permitted to testify as an expert witness about that person's condition. That is true but irrelevant to this case. This trial judge, who was also the trier of fact, determined that under the unique circumstances of this case and the characteristics of this juvenile, an expert evaluation by a psychologist who had not worked with the juvenile and who lacked experience in juvenile court matters was not helpful to the trier of fact. Another trial judge may have made a different discretionary determination and weighed the evidence differently and thus allowed Dr. Newes's testimony because it would be helpful to that trial judge, but as an appellate court, it is not our role to determine the weight to give to the evidence in either event. *See Kelly v. Duke Univ.*, 190 N.C. App. 733, 738–39, 661 S.E.2d 745, 748 (2008) ("On appeal, this Court may not reweigh the evidence or assess credibility.").

In summary, the trial court actually did not directly rule on respondent's request to allow Dr. Newes to testify *as an expert witness*; rather, the trial court determined that even if Dr. Newes was an expert in the field of clinical psychology, she simply did not have any evidence to offer to him as the trier of fact that he would deem to be credible and persuasive. The trial court allowed respondent to present a lengthy offer of proof, all of which the trial court heard. In actuality, respondent is asking this Court to weigh the evidence differently, in her favor, and conclude that Dr. Newes's opinion *should have been* useful to the trier of fact. We are not the fact finder; this we cannot do. *See id.* These arguments are overruled.

## III. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges CALABRIA and INMAN concur.

IN THE MATTER OF T.W.

No. COA16-399

Filed 18 October 2016

**1. Child Abuse, Dependency, and Neglect—ceasing reunification efforts—sufficiency of findings of fact**

The trial court erred in a child neglect and dependency case by ceasing reunification efforts under N.C.G.S. § 7B-901(c) at a permanency planning hearing subsequent to the initial dispositional hearing. Further, the trial court's additional findings failed to support the decision. The permanency planning order was vacated insofar as it provided that reunification efforts were not required and remanded for further proceedings.

**2. Child Abuse, Dependency, and Neglect—legal custody of aunt—failure to verify adequate resources for care**

The trial court violated N.C.G.S. § 7B-906.1(j) (2015) in a child neglect and dependency case by placing a minor child in the legal custody of his maternal aunt without verifying she would have adequate resources to care appropriately for the juvenile. This issue was remanded for further proceedings.

**3. Child Visitation—denial—sufficiency of findings of fact**

The trial court did not abuse its discretion in a child neglect and dependency case by denying visitation to a respondent mother. The court made the necessary findings to deny visitation.

**4. Child Abuse, Dependency, and Neglect—waiver of further review hearings—required findings of fact**

Although defendant mother claimed in a child neglect and dependency case that the trial court erred by waiving further review hearings without making the findings of fact required by N.C.G.S. § 7B-906.1(n), it was undisputed that the trial court did not make these findings. If on remand the court chooses to waive subsequent permanency planning hearings, it must comply with this requirement.

Appeal by Mother from order entered 11 January 2016 by Judge Rickye McKoy-Mitchell in Mecklenburg County District Court. Heard in the Court of Appeals 26 September 2016.

*Associate Attorney Christopher C. Peace for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.*

*The Opoku-Mensah Law Firm, by Gertrude Opoku-Mensah, for guardian ad litem.*

*Appellate Defender Glenn Gerding by Assistant Appellate Defender Joyce L. Terres for respondent-appellant mother.*

INMAN, Judge.

Mother appeals from an order of the trial court which, *inter alia*, appointed her sister ("Aunt") as custodian of her minor child, Thomas,[1] born in February 2009. We affirm the order in part, vacate in part, and remand for further proceedings.

On 23 November 2014, Mecklenburg County Youth and Family Services ("YFS") received a report that Mother had exposed Thomas to inappropriate sexual activity and had licked his penis. A social worker interviewed Thomas, who confirmed that Mother licked his penis "on one occasion." Mother denied touching her son inappropriately but signed a safety assessment agreeing to have no contact with Thomas and allowing him to reside with his maternal great-grandmother ("Great-Grandmother"). Great-Grandmother later contacted YFS to report that Mother had come to her residence and taken Thomas. YFS returned to Mother's home and found the child. The police were called after Mother refused to allow YFS into her home. YFS took Thomas into non-secure custody and filed a juvenile petition alleging neglect and dependency on 24 November 2014.[2]

Mother was criminally charged with taking indecent liberties with a minor and sexual offense in a parental role on 3 January 2015. YFS transferred Thomas from foster care into the home of his maternal aunt ("Aunt") on the weekend of 31 January 2015.

At a hearing on 31 March 2015, Mother stipulated to the allegations in the petition filed by YFS. The trial court adjudicated Thomas a neglected and dependent juvenile by order entered 13 May 2015. At disposition, the court found that the barriers to reunification "include but are not necessarily limited to the inappropriate sexual contact of the juvenile by the mother, and exposure of the juvenile to inappropriate

---

1. The parties have adopted this pseudonym to protect the juvenile's privacy.

2. The petition alleged that Thomas' biological father was "on house arrest in Asheville, [North Carolina,] and there was no information provided about any additional paternal relatives [who] could care for the child."

sexual matters by the mother." The court denied Mother visitation and delayed requiring her to obtain a parenting capacity evaluation, because she was prohibited from having any contact with Thomas as a condition of pretrial release in her criminal case. The court ordered Mother to comply with all conditions of her family services agreement "that do not conflict with the criminal matter." It established a plan of care of reunification with a concurrent plan of guardianship or adoption.

In a review order entered 19 October 2015, the trial court found that Mother had obtained housing and employment "but is not complying with any treatment recommendations currently." Mother refused to participate in recommended substance abuse treatment. She participated only intermittently in mental health treatment and had rejected a recommended medication evaluation, "stating [that] it is not needed." The court noted that Mother's "therapist believes the mother has psychosis that requires further evaluation." As her criminal charges remained pending, Mother was allowed no visitation with Thomas.

The trial court held a permanency planning hearing on 2 December 2015. By order entered 11 January 2016, it changed Thomas' permanent plan to custody with a relative or other suitable person and transferred legal custody of the child from YFS to Aunt.[3] The court suspended further reunification efforts and released Thomas' guardian ad litem ("GAL") and the parents' attorneys. Mother filed timely notice of appeal from the permanency planning order.

## I. Ceasing Reunification Efforts

**[1]** Mother first claims the trial court erred in ceasing reunification efforts based on its finding, "[p]ursuant to" N.C. Gen. Stat. § 7B-901(c)(1) (2015), that

> [a] court of competent jurisdiction has determined that aggravated circumstances exist because the parent has committed . . . any of the following upon the juvenile: [ s]exual abuse[; c]hronic physical or emotional abuse[;] . . . [or a]ny other act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse or neglect.

3. Effective 1 July 2016, N.C. Gen. Stat. § 7B-906.2 has been amended to provide that "[c]oncurrent planning shall continue until a permanent plan has been achieved." 2016 N.C. Sess. Laws 94, §§ 12C.1.(h), 39.8 (July 14, 2016) (adding new subsection (a1) to section 7B-906.2).

She further contends that the court failed to make the finding required to cease reunification efforts under N.C. Gen. Stat. § 7B-906.1(d)(3) (2015) and that such efforts "clearly would be futile or inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time." *Id.*

YFS concedes the trial court was not authorized to cease reunification efforts under N.C. Gen. Stat. § 7B-901(c) at a permanency planning hearing subsequent to the initial dispositional hearing. *See* N.C. Gen. Stat. § 7B-901 (2015) ("Initial dispositional hearing"). It argues that the court's erroneous finding under subsection 7B-901(c) is harmless, however, because its other uncontested findings support its decision to cease reunification efforts pursuant to N.C. Gen. Stat. § 7B-906.2 (2015). We will address each of the parties' arguments in turn.

"It is clear from the statutory framework of the Juvenile Code that one of the essential aims, if not the essential aim, of the dispositional hearing and the review hearing is to reunite the parent(s) and the child, after the child has been taken from the custody of the parent(s)." *In re Shue*, 311 N.C. 586, 596, 319 S.E.2d 567, 573 (1984) (interpreting prior Juvenile Code); *see also* N.C. Gen. Stat. § 7B-100(4) (2015) (announcing general policy in favor of "the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents"). To that end, N.C. Gen. Stat. § 7B-901(c) prescribes a narrow set of circumstances in which the trial court "shall direct that reasonable efforts for reunification . . . shall not be required" as part of its initial disposition order. *Id.* We agree with the parties that, by its placement in N.C. Gen. Stat. § 7B-901, subsection (c) has no application beyond the "[i]nitial dispositional hearing." N.C. Gen. Stat. § 7B-901.

The trial court erred by purporting to cease reunification efforts by making a finding under N.C. Gen. Stat. § 7B-901(c) at the permanency planning hearing. We note the court utilized a pre-printed form order and simply marked the boxes beside the form's language referencing N.C. Gen. Stat. § 7B-901(c). The court entered no evidentiary findings that reveal the basis for its determination. YFS adduced no evidence at the hearing that a court of competent jurisdiction had previously determined that Mother committed the acts specified in N.C. Gen. Stat. § 7B-901(c). The parties advised the court that Mother's criminal trial had not yet occurred.

Mother suggests the trial court may not cease reunification efforts without making a finding under N.C. Gen. Stat. § 7B-906.1(d)(3). Subsection 7B-906.1(d) requires the trial court to "consider" certain factors at each review hearing and permanency planning hearing after the initial disposition and to "make written findings regarding those that are relevant[.]" N.C. Gen. Stat. § 7B-906.1(d). Among these statutory factors is "[w]hether efforts to reunite the juvenile with either parent clearly would be futile or inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time." N.C. Gen. Stat. § 7B-906.1(d)(3).[4] Subdivision (d)(3) further provides that "[i]f the court determines efforts would be futile or inconsistent, the court shall consider a permanent plan of care for the juvenile." *Id.*

As YFS observes, N.C. Gen. Stat. § 7B-906.1(d)(3) does not expressly authorize the ceasing of reunification efforts. Rather, upon making a finding of futility or inconsistency under the subdivision, the trial court is instructed to "consider a permanent plan of care for the juvenile." *Id.* Obviously, a court presiding at a permanency planning hearing will always consider a permanent plan of care for the juvenile and, indeed, must "adopt concurrent permanent plans and . . . identify the primary plan and secondary plan." N.C. Gen. Stat. § 7B-906.2(b) (2015); *see also* N.C. Gen. Stat. § 7B-906.1(a), (g) (2015). We interpret N.C. Gen. Stat. § 7B-906.1(d)(3) as triggering the court's duty to commence the permanent planning process as early as the initial 90-day review hearing, *see* N.C. Gen. Stat. § 7B-906.1(a) (2015), if the court is able to determine that reunification efforts "clearly would be futile or inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time." N.C. Gen. Stat. § 7B-906.1(d)(3). Absent this provision, permanency planning might be needlessly delayed to the detriment of the juvenile.[5]

---

4. Effective 1 July 2016, N.C. Gen. Stat. § 7B-906.1(d)(3) is amended to provide as follows:

> Whether efforts to reunite the juvenile with either parent clearly would be *unsuccessful* or inconsistent with the juvenile's *health or* safety and need for a safe, permanent home within a reasonable time. . . . If the court determines efforts would be *unsuccessful* or inconsistent, the court shall consider *other permanent plans of care for the juvenile pursuant to G.S. 7B-906.2.*

2016 N.C. Sess. Laws 94, §§ 12C.1.(g1), 39.8 (July 14, 2016) (emphasis added). The amended language more consistently tracks the standard for discontinuing reunification as a permanent plan in N.C. Gen. Stat. § 7B-906.2(b).

5. Similarly, where the court makes a finding under N.C. Gen. Stat. § 7B-901(c) at the initial dispositional hearing that reunification efforts are not required, the court must "order a permanent plan as soon as possible, after providing each party with a reasonable opportunity to prepare and present evidence." N.C. Gen. Stat. § 7B-901(d).

*See generally* N.C. Gen. Stat. § 7B-906.1(a) (requiring first permanency planning hearing to be held "[w]ithin 12 months of the date of the initial order removing custody").

Where reunification efforts are not preempted as part of the initial disposition pursuant to N.C. Gen. Stat. § 7B-901(c), the trial court may cease reunification efforts at the permanency planning stage pursuant to N.C. Gen. Stat. § 7B-906.2(b), which provides as follows:

> At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. Reunification shall remain a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or *makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety*. The court shall order the county department of social services to make efforts toward finalizing the primary and secondary permanent plans and may specify efforts that are reasonable to timely achieve permanence for the juvenile.

*Id.* (emphasis added); *see also* N.C. Gen. Stat. § 7B-906.2(c) (2015) ("At the first permanency planning hearing held pursuant to G.S. 7B-906.1, the court shall make a finding about whether the efforts of the county department of social services toward reunification were reasonable, unless reunification efforts were ceased in accordance with G.S. 7B-901(c) or this section."). Thus, if reunification efforts are not foreclosed as part of the initial disposition pursuant to N.C. Gen. Stat. § 7B-901(c), the court may eliminate reunification as a goal of the permanent plan *only* upon a finding made under N.C. Gen. Stat. § 7B-906.2(b). *Cf.* N.C. Gen. Stat. § 7B-1001(a)(5) (2015) (providing a right of appeal from an order "eliminating reunification as a permanent plan" pursuant to "G.S. 7B-906.2(b)"). Only when reunification is eliminated from the permanent plan is the department of social services relieved from undertaking reasonable efforts to reunify the parent and child. *See* N.C. Gen. Stat. § 7B-906.2(c).

In the case *sub judice*, the trial court marked two boxes on the order form indicating its ceasing of reunification efforts pursuant to N.C. Gen. Stat. § 7B-901(c). Conspicuously left blank is the following pre-printed provision: "16. Pursuant to NCGS §7B-906.2(b), reunification efforts with ___________ clearly would be unsuccessful or would be inconsistent

with the juvenile's health and safety."[6] As discussed above, the court had no authority to cease reunification efforts by making a finding under N.C. Gen. Stat. § 7B-901(c) at the permanency planning hearing.

We are not persuaded by YFS's suggestion that the trial court's additional findings support a ceasing of reunification efforts pursuant to N.C. Gen. Stat. § 7B-906.2(b). It is true that the order includes findings about the four factors set forth in N.C. Gen. Stat. § 7B-906.2(d) (2015), to wit:

> (d) At any permanency planning hearing under subsections (b) and (c) of this section, the court shall make written findings as to each of the following, which shall demonstrate lack of success:
>
> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

*Id.* Specifically, the court noted (1) Mother's refusal to engage in substance abuse or mental health treatment, as well as the ongoing pendency of her criminal charges, more than one year after Thomas' removal from her home; (2) her failure to attend the permanency planning hearing because she "overslept[;]" (3) her attempt to "attack" Aunt and Thomas' maternal grandmother ("Grandmother") after a Child and Family Team ("CFT") meeting on 16 November 2015; and (4) the court's belief that both "parents are acting in a manner inconsistent with the health or safety of the juvenile." "None of these findings address the ultimate finding of fact required of the trial court," under N.C. Gen. Stat. § 7B-906.2(b), *i.e.*, whether further efforts to reunify Thomas with his mother clearly would be unsuccessful or would be inconsistent with his health or safety. *In re A.E.C.*, __ N.C. App. __, __, 768 S.E.2d 166,

6. It appears the blank space on the order form allows the court to specify the parent or parents for whom reunification efforts are ceased.

171 (construing former N.C. Gen. Stat. § 7B-507(b)(1)[7]), *disc. review denied*, 368 N.C. 264, 772 S.E.2d 711 (2015). " 'This Court cannot simply infer from the findings that reunification efforts would be futile or inconsistent with the juvenile's health[ or] safety . . . where the trial court was required to make *ultimate* findings specially based on a process[] of logical reasoning.' " *Id.* (second alteration in original) (emphasis in original) (quoting *In re I.R.C.*, 214 N.C. App. 358, 363-64, 714 S.E.2d 495, 499 (2011)).

In *In re L.M.T.*, 367 N.C. 165, 752 S.E.2d 453 (2013), our Supreme Court addressed the fact-finding requirement of former N.C. Gen. Stat. § 7B-507(b)(1), which allowed the trial court to cease reunification efforts if it made "written findings of fact that . . . [s]uch efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]" *Id.* at 167, 752 S.E.2d at 455. While noting that "[s]trict adherence" to the statutory standard furthered "the Juvenile Code's dual purpose of protecting parental rights and promoting the best interests of the child," the Court held that such adherence did not require the trial court to quote the statute directly:

> While trial courts are advised that use of the actual statutory language would be the best practice, the statute does not demand a verbatim recitation of its language . . . . Put differently, *the order must make clear that the trial court considered the evidence in light of whether reunification "would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time."* The trial court's written findings must address the statute's concerns, but need not quote its exact language.

*Id.* at 167-68, 752 S.E.2d at 455 (emphasis added).

We cannot determine that the trial court in fact "considered the evidence in light of" the appropriate statutory standard, given (1) its erroneous finding under N.C. Gen. Stat. 7B-901(c) that reunification efforts were not required and (2) its failure to mark the requisite finding on the pre-printed order form that, "[p]ursuant to NCGS §7B-906.2(b),

7. Effective 1 October 2015, N.C. Gen. Stat. § 7B-507 was amended to apply only to nonsecure custody orders entered prior to an adjudication of abuse, neglect, or dependency. 2015 N.C. Sess. Laws 136, §§ 7, 18 (July 2, 2015). Among other changes, 2015 N.C. Sess. Laws 136 deleted subsections (b)-(d) from the statute. *Id.* § 7.

reunification efforts with [Mother] clearly would be unsuccessful or would be inconsistent with [Thomas'] health and safety." *Id.* While the court's evidentiary findings may support an ultimate finding under N.C. Gen. Stat. § 7B-906.2(b), it is not the role of the reviewing court to draw inferences or make ultimate findings on the trial court's behalf. *See, e.g., Quick v. Quick*, 305 N.C. 446, 451-52, 290 S.E.2d 653, 657-58 (1982). Therefore, we vacate the permanency planning order insofar as it provides that reunification efforts are not required and remand for further proceedings. *In re A.E.C.*, __ N.C. App. at __, 768 S.E.2d at 172.

II. Verification of Custodian

**[2]** Mother next contends the trial court violated N.C. Gen. Stat. § 7B-906.1(j) (2015) by placing Thomas in the legal custody of Aunt without verifying that she "understands the legal significance of the placement . . . and will have adequate resources to care appropriately for the juvenile." *Id.* "We have held that the trial court need not 'make any specific findings in order to make the verification' under" subsection (j). *In re J.H.*, __ N.C. App. __, __, 780 S.E.2d 228, 240 (2015) (quoting *In re J.E., B.E.*, 182 N.C. App. 612, 616-17, 643 S.E.2d 70, 73 (2007)). "But the record must contain competent evidence of the [custo]dians' financial resources and their awareness of their legal obligations." *Id.*

The trial court received competent evidence that Aunt understood the legal significance of Thomas' placement in her custody. YFS submitted a written report conveying Aunt's "desire to provide permanence for her nephew until he [is] able to be reunited with his mother" and recommending that Aunt be granted custody of Thomas. The GAL recommended awarding guardianship to Aunt and reported that "Aunt expressed interest in permanent guardianship." The court confirmed that the YFS social worker had "talked with [Aunt] in detail about" the alternative recommendations of custody and guardianship. The social worker explained YFS's rationale for recommending an award of custody to Aunt rather than guardianship, in that "when [Mother's] criminal matter is resolved . . . , if she done everything that she needs to do, it's possible that she can maintain custody of [Thomas]. And her family was in agreement if she was at a place where she could get custody back of her son, when the criminal matter is taken care of." Aunt affirmed to the court that she understood Mother might be able to regain custody of Thomas if warranted by future circumstances. The court entered findings consistent with this evidence. While it did not expressly find that Aunt "understands the legal significance" of having legal custody of Thomas, we hold the court properly verified her understanding for purposes of N.C. Gen. Stat. § 7B-906.1(j). *See In re J.E., B.E.*, 182 N.C.

App. at 617, 643 S.E.2d at 73; *see also In re L.M.*, 238 N.C. App. 345, 347, 767 S.E.2d 430, 432 (2014) ("It is sufficient that the court receives and considers evidence that the guardians understand the legal significance of the guardianship.").

We agree with Mother that the court did not receive sufficient evidence to verify the adequacy of Aunt's resources under N.C. Gen. Stat. § 7B-906.1(j). YFS reported that Thomas had "been successfully maintained in the home of [Aunt] for the past ten months." However, this fact alone is insufficient to support a verification under subsection (j). *See In re J.H.*, __ N.C. App. at __, 780 S.E.2d at 240 (deeming ten-month "successful kinship placement" with grandparents insufficient to demonstrate adequacy of grandparents' resources). The GAL described Aunt's home as "very clean" and reported that Thomas "has his own room" but further reported that Aunt was unemployed and "stated that she needs more financial support for [Thomas]." Although Aunt had been awarded unemployment compensation benefits at the time of the hearing, she told the court that she had yet to find employment and was "just continuously looking for jobs." She credited Grandmother and Great-Grandmother for providing "additional support" and "assistance" in caring for Thomas. Such vague assurances do not suffice to allow an "independent determination" by the court, "based upon the facts in the particular case, that the resources available to the potential [custodian] are in fact 'adequate' " for purposes of N.C. Gen. Stat. § 7B-906.1(j). *See In re P.A.*, __ N.C. App. __, __, 772 S.E.2d 240, 248 (2015). Accordingly, we vacate the award of legal custody to Aunt and remand for further proceedings. *Id.*

## III. Visitation

**[3]** Mother also challenges the trial court's order that she have no contact with Thomas. She contends the court failed to make the necessary findings of fact required to deprive a parent of her right to visitation under N.C. Gen. Stat. § 7B-905.1(c) (2015). We find no merit to this claim.

"An order that . . . continues the juvenile's placement outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905.1(a) (2015). The order must establish an adequate visitation plan for the parent " '[i]n the absence of findings that the parent has forfeited their right to visitation *or that it is in the child's best interest to deny visitation*[.]' " *In re T.H.*, 232 N.C. App. 16, 34, 753 S.E.2d 207, 219 (2014) (quoting *In re E.C.*, 174 N.C. App. 517, 522-23, 621 S.E.2d 647, 652 (2005) (emphasis added)). We review an order denying

visitation to a respondent-parent only for abuse of discretion. *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007).

The permanency planning order includes findings of fact, made "upon clear, cogent and convincing evidence" and in light of "the best interest of the child," that both supervised and unsupervised visitation between Mother and Thomas are "not desirable." The court made additional findings that Mother was awaiting trial on criminal charges for her alleged sexual abuse of Thomas, that she was "noncompliant with mental health treatment and substance abuse treatment services," and that she was "acting in a manner inconsistent with the health and safety of the juvenile." The court received evidence that Mother remained subject to a no contact order in her criminal case and had disrupted YFS's attempt to develop a visitation plan for her, subject to the resolution of her criminal case, at the most recent CFT meeting. We hold that the court made the necessary findings to deny visitation to Mother and that it acted well within its discretion in doing so.

Mother also objects to the trial court's decree that "[a]ny future contact allowed by [Aunt] shall be therapeutically guided." Because we affirm the trial court's denial of visitation by Mother, any condition for future visitation is merely hypothetical until such time the court removes the no contact order. Therefore we find Mother's argument that the court improperly delegated its judicial function to Thomas' Aunt is moot.

IV. Waiver of Review Hearings

**[4]** Finally, Mother claims the trial court erred by waiving further review hearings without making the findings of fact required by N.C. Gen. Stat. § 7B-906.1(n) (2015), to wit:

> (1) The juvenile has resided in the placement for a period of at least one year.
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.

> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

*Id.* Absent a waiver under subsection (n), N.C. Gen. Stat. § 7B-906.1(a) requires that "subsequent permanency planning hearings shall be held at least every six months [after the initial permanency planning hearing] . . . to review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile."[8] *Id.* If the trial court waives these hearings, it "must make written findings of fact satisfying each of the enumerated criteria listed in N.C. Gen. Stat. § 7B-906.1(n), and its failure to do so constitutes reversible error." *In re P.A.*, __ N.C. App. at __, 772 S.E.2d at 249.

It is undisputed the court did not make findings under N.C. Gen. Stat. § 7B-906.1(n). If on remand the court chooses to waive subsequent permanency planning hearings, it must comply with this requirement. *See In re R.A.H.*, 182 N.C. App. 52, 62, 641 S.E.2d 404, 410 (2007).

## V. Conclusion

We vacate the provisions of the permanency planning order ceasing reunification efforts, eliminating reunification as a permanent plan, and placing Thomas in the legal custody of Aunt. We remand for further proceedings consistent with N.C. Gen. Stat. § 7B-906.2(b) and (j). The order is affirmed insofar as it denies visitation to Mother.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges CALABRIA and STROUD concur.

---

8. "Review hearings after the initial permanency planning hearing [are] designated as subsequent permanency planning hearings." N.C. Gen. Stat. § 7B-906.1(a).

IN THE MATTER OF WESLEY MARSHALL TIMBERLAKE

No. COA15-1202

Filed 18 October 2016

**Sexual Offenders—sex offender registration—improper reconsideration**

The trial court erred by reconsidering the termination of defendant's sex offender registration and in entering an amended order. The trial court lacked jurisdiction to reconsider petitioner's request to terminate his registration requirement after the State did not oppose termination during the initial hearing and did not appeal the initial order.

Appeal by petitioner from order entered 8 May 2015 by Judge R. Allen Baddour, Jr., in Franklin County Superior Court. Heard in the Court of Appeals 13 April 2016.

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for petitioner-appellant.*

*Attorney General Roy Cooper, by Assistant Attorney General William P. Hart, Jr., for the State.*

McCULLOUGH, Judge.

Wesley Marshall Timberlake ("petitioner") appeals from an amended order denying his petition to terminate sex offender registration. For the following reasons, we vacate the amended order.

I. Background

Petitioner was convicted of assault with intent to commit second-degree criminal sexual conduct in South Carolina on 16 November 1995. Upon his release from prison, petitioner moved to North Carolina and first registered as a sex offender on 2 March 2004.

On 10 June 2014, petitioner filed a petition for termination of his sex offender registration in Franklin County. The matter first came on for hearing in Franklin County Superior Court before the Honorable R. Allen Baddour, Jr., on 6 October 2014. Defendant appeared *pro se* and presented affidavits in support of his petition. When the court inquired if the State would like to say anything, an Assistant District Attorney

("ADA") simply replied, "[n]othing from the State, Judge." The judge then informed petitioner that his motion would be allowed and entered an order terminating petitioner's sex offender registration. Among the findings in the order, the judge checked box seven, indicating "[t]he relief requested by the petitioner complies with the provisions of the federal Jacob Wetterling Act, 42 U.S.C. § 14071, as amended, and any other federal standards applicable to the termination of a registration requirement . . . ."

On 16 October 2014, an Assistant Attorney General ("AAG") representing the North Carolina Division of Criminal Information ("DCI"), which is tasked with removing registered sex offenders from the State registry, wrote to the trial judge concerning the termination of petitioner's sex offender registration. The AAG explained that "[p]etitioner's conviction for assault with intent to commit second-degree criminal sexual conduct might be a tier III offense as defined by federal law[]" and "[t]ier III offenders must register for life." Thus, the AAG specifically requested that the court review finding number seven. The AAG further indicated that "[i]f [DCI did] not receive any response by 1 November 2014, DCI shall proceed with termination of the petitioner's registration as directed by the 6 October 2014 order."

On 8 May 2015, the matter came back on for hearing before the Honorable R. Allen Baddour, Jr. At the hearing, an ADA, but not the same ADA that appeared at the initial hearing, reiterated the AAG's concerns and petitioner, again appearing *pro se*, expressed his frustration with the registration requirements. Upon hearing from both sides, the judge explained to petitioner that "it would not comply with federal law to allow you to come off the registry because of the nature of the offense for which you were convicted." The trial judge then entered an "Amended-Corrected" order denying petitioner's petition for termination of sex offender registration. The judge noted on the order that "[t]his order corrects a prior erroneous conclusion of law regarding compliance with the federal Jacob Wetterling Act."

Defendant gave notice of appeal in open court and indicated he wanted an attorney assigned. The judge noted the appeal and appointed the Appellate Defender, who later assigned counsel on 4 June 2015.

On 6 November 2015, petitioner's appellate counsel filed a petition for writ of certiorari noting petitioner's failure to file written notice of appeal and requesting that this Court review the matter despite the error. By a 23 March 2016 order, this Court granted certiorari.

## II. Discussion

On appeal, petitioner argues the trial court erred in reconsidering the termination of his sex offender registration and in entering the amended order. In support of his argument, defendant asserts that (1) the State waived review by failing to appeal the initial order, (2) the doctrines of res judicata and collateral estoppel prohibit reconsideration of the matter, (3) the trial court lacked subject matter jurisdiction to conduct the 8 May 2015 hearing and to enter the amended order, and (4) the entry of the amended order violated his rights to procedural due process. Defendant's contentions raise issues of law, which this Court reviews *de novo*.

Upon review, we agree that the trial court lacked jurisdiction to reconsider petitioner's request to terminate his registration requirement after the State did not oppose termination during the initial hearing and did not appeal the initial order.

We begin our analysis with the pertinent law. N.C. Gen. Stat. § 14-208.12A concerns a registered sex offender's request for termination of a registration requirement and provides, in pertinent part, as follows:

> (a) Ten years from the date of initial county registration, a person required to register . . . may petition the superior court to terminate the 30-year registration requirement if the person has not been convicted of a subsequent offense requiring registration . . . .
>
> . . . .
>
> (a1) The court may grant the relief if:
>
> (1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,
>
> (2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and
>
> (3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

> (a2) The district attorney in the district in which the petition is filed shall be given notice of the petition at least three weeks before the hearing on the matter. The petitioner may present evidence in support of the petition and the district attorney may present evidence in opposition to the requested relief or may otherwise demonstrate the reasons why the petition should be denied.

N.C. Gen. Stat. § 14-208.12A (2015).

In the present case, it appears petitioner followed the statutory procedure to initiate the termination proceedings and demonstrated to the trial court's satisfaction during the 6 October 2014 hearing that he met the requirements to have his sex offender registration terminated. When the trial court inquired whether the State had anything to say in response to the petition, the ADA chose not to put on any evidence or argue in opposition to termination, simply stating, "[n]othing from the State, Judge."

Petitioner now equates the State's failure to argue against the termination with consent to the termination of his sex offender registration and contends the State waived review by failing to exercise its statutory right to contest the petition and by failing to appeal. While we do not agree with petitioner's characterization of the State's failure to object as consent resulting in invited error, upon review of the record, it is clear to this Court that the State failed to take advantage of the statutorily prescribed processes for challenging the termination of petitioner's sex offender registration – both by failing to "present evidence in opposition to the requested relief or . . . demonstrate the reasons why the petition should be denied[,]" as provided in N.C. Gen. Stat. § 14-208.12A(a2), and by failing to appeal from the trial court's order, as allowed in N.C. Gen. Stat. § 7A-27.

As detailed above, the AAG instead wrote a letter to the trial judge asking him to review the termination of petitioner's sex offender registration. As petitioner points out, that letter failed to meet the requirements of a notice of appeal, *see* N.C. R. App. P. 3, or a motion for reconsideration pursuant to N.C. Gen. Stat. § 1A-1, Rules 59(a)(8) or 60(b). *See Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 431, 391 S.E.2d 211, 216 (1990) ("Erroneous judgments may be corrected only by appeal, and a motion under [Rule 60] cannot be used as a substitute for appellate review."), *Davis v. Davis*, 360 N.C. 518, 522, 631 S.E.2d 114, 118 (2006) ("In order to obtain relief under Rule 59(a)(8), a defendant must show a proper objection at trial to the alleged error of law giving

rise to the Rule 59(a)(8) motion."). While it is likely the State was hesitant to appeal the termination order because appeals in similar termination of sex offender registration cases have been dismissed for failure of the State to preserve the issue by contesting termination below, *see In re Hutchinson*, 218 N.C. App. 443, 445-46, 723 S.E.2d 131, 132-33, *disc. rev. denied*, __ N.C. __, 724 S.E.2d 910 (2012), *In re Bunch*, 227 N.C. App. 258, 261-62, 742 S.E.2d 596, 598-99, *disc. rev. denied*, 367 N.C. 224, 747 S.E.2d 541 (2013), the State may not circumvent those holdings by seeking review by the trial court in a process not authorized by statute.

The State argues the trial court's review of the termination of defendant's sex offender registration was appropriate in this case, likening it to expunction cases in which this Court has overruled the trial court's initial expunction of criminal records after the State's motions for reconsideration were denied by the trial court. *See In re Expungement for Kearney*, 174 N.C. App. 213, 620 S.E.2d 276 (2005) (holding the trial court, notwithstanding the absence of the judge authoring the expungement order from the bench due to retirement, had jurisdiction to consider a motion for reconsideration of an order for expungement), *State v. Frazier*, 206 N.C. App. 306, 697 S.E.2d 467 (2010) (holding the trial court erred in ordering expunction, but did not otherwise address whether the trial court properly considered the motion for reconsideration). The State contends that this Court impliedly determined in those cases that there were no jurisdictional limits which would preclude the trial court from reconsidering the prior expungement orders.

While that may be the case in expungement cases, expungement is not directly analogous to termination of sex offender registration. Moreover, those cases are distinguishable from the present case in one key respect – in both *Kearny* and *Frazier*, the State filed motions for reconsideration. There was no such motion in the present case, but instead the extrajudicial letter from the AAG tasked with removing petitioner from the sex offender registry for the DCI to the trial judge requesting review. We hold such letter does not comply with the processes provided in our general statutes and did not vest the trial court with jurisdiction to review the termination order for errors of law.

## III. Conclusion

For the reasons, discussed, we vacate the trial court's "Amended-Corrected" order entered 8 May 2015.

VACATED.

Judges ELMORE and INMAN concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF
v.
DAVID C. SUTTON, ATTORNEY, DEFENDANT

No. COA15-1198

Filed 18 October 2016

**1. Attorneys—discipline by the State Bar—suspension of law license—constitutional and procedural challenges**

Where the Disciplinary Hearing Commission (DHC) of the North Carolina State Bar entered an order of discipline suspending defendant's law license for a period of five years after determining that he had committed numerous violations of the North Carolina Rules of Professional Conduct, the Court of Appeals rejected various constitutional and procedural arguments made by defendant on appeal, relating to the constitutionality of the DHC's disciplinary authority, due process, freedom of speech, the right to counsel, an amendment to the complaint by the State Bar, the signatures on the complaints, the notice of factors to be considered at the dispositional phase, the adequacy of the findings and conclusions at the dispositional phase, and the assessment of fees and costs.

**2. Attorneys—discipline by the State Bar—suspension of law license—challenges to findings and conclusions**

Where the Disciplinary Hearing Commission (DHC) of the North Carolina State Bar entered an order of discipline suspending defendant's law license for a period of five years after determining that he had committed numerous violations of the North Carolina Rules of Professional Conduct, the Court of Appeals rejected various challenges by defendant to the validity of certain findings of fact and conclusions of law made by the DHC.

Appeal by defendant from order entered 13 November 2014 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 25 April 2016.

*The North Carolina State Bar, by Deputy Counsel Carmen Hoyme Bannon and Deputy Counsel David R. Johnson, for plaintiff-appellee.*

*David C. Sutton, pro se, for defendant-appellant.*

DAVIS, Judge.

David C. Sutton ("Defendant") appeals from an order of discipline entered by the Disciplinary Hearing Commission (the "DHC") of the North Carolina State Bar suspending his law license for a period of five years after determining that he had committed numerous violations of the North Carolina Rules of Professional Conduct. In addition to asserting challenges to various constitutional and procedural aspects of his disciplinary proceeding, Defendant argues on appeal that a number of the DHC's findings of fact were not supported by evidence in the record and that several of its legal conclusions were incorrect. After careful review, we affirm.

## Factual Background

The State Bar initiated this disciplinary proceeding by filing a complaint on 3 April 2013. At all relevant times, Defendant, who was admitted to the North Carolina Bar in 2001, was engaged in the practice of law and maintained an office in Greenville, North Carolina. Defendant's disciplinary proceeding concerned allegations of misconduct by him that spanned multiple years and involved his representation of clients in a number of different cases.

The matter was assigned to a hearing panel of the DHC on 23 April 2013. After an earlier amended complaint was filed, the DHC permitted the State Bar to file its second amended complaint on 4 December 2014.

Disciplinary proceedings are divided into two phases: (1) the adjudicatory phase, during which the DHC determines whether the defendant has committed misconduct; and (2) the dispositional phase, during which the DHC determines the appropriate sanction for any misconduct that was found to exist. *N.C. State Bar v. Talford*, 356 N.C. 626, 636, 576 S.E.2d 305, 312 (2003). The DHC received evidence and heard arguments in connection with the adjudicatory phase of the proceeding from 5–9 May and 9–11 June 2014. On 8 August 2014, the DHC issued its final findings and conclusions relating to the adjudicatory phase in which it determined that Defendant had committed 28 separate violations of the Rules of Professional Conduct.[1]

The allegations against Defendant stemmed from his actions in seven specific matters during the course of his practice of law. The

---

1. The DHC had issued an initial version of its findings and conclusions regarding the adjudicatory phase on 18 July 2014. The DHC subsequently released a corrected version of these findings and conclusions on 8 August 2014.

following is an overview of the facts relating to these matters and the accompanying findings of misconduct made by the DHC in connection with each of them.

## I. The Pollard Matter

Defendant represented Barbara Pollard in a wrongful death lawsuit against her daughter-in-law in connection with the 2005 death of Pollard's son, Stacey Pollard. During Pollard's May 2011 deposition, which was taken by attorney Kathryn Fagan, Defendant repeatedly interjected his own questions and commentary, made sarcastic remarks, coached Pollard on how to respond to particular questions, and answered questions for Pollard. After the deposition had concluded, Defendant stated — in the presence of his client, the court reporter, and a law student in attendance — "Fagan, you know what your problem is? Your problem is that you need a boyfriend or a husband or something. . . . I understand your client goes both ways so . . . maybe you could have a little lickety-lick with her."[2]

In connection with Defendant's representation of Pollard, a website (justice4stacey.com) was created in July 2007 to solicit information from members of the public who may have had knowledge relating to the death of Pollard's son. News articles were also posted on the website, and there was a section where members of the public could post public comments.

In August 2011, Fagan filed a motion for a change of venue based on what she characterized as the "vilification" of her client resulting from the website, which she asserted was "sponsored" by Defendant. In response, Defendant filed an affidavit in which he falsely stated that he "did not 'sponsor' any website[.]" Defendant made this representation despite the fact that he (1) had taken part in discussions with Pollard's family regarding setting up the website; (2) was the initial registrant and administrator of the website and paid the web hosting fees; (3) possessed the password necessary to post materials on the website and did, in fact, post certain items; and (4) was listed as the website's contact person along with his email address and phone number.[3]

---

2. The DHC concluded that these actions violated Rule 3.5(a)(4) (conduct intended to disrupt a tribunal), Rule 8.4(d) (conduct prejudicial to the administration of justice), and Rule 4.4(a) (using means that have no substantial purpose other than to embarrass or burden a third person).

3. The DHC concluded that Defendant's misrepresentation regarding his sponsorship of the website violated Rule 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) and Rule 8.4(d) (conduct prejudicial to the administration of justice).

## II. The Langston Matter

In 2011, Defendant represented Rita Langston in a family law case in which the opposing counsel was Brantley Peck, Jr. During Langston's May 2011 deposition, Defendant repeatedly interrupted Peck's questioning, provided testimony for Langston, and interjected his own questions. Defendant also accused Peck during the deposition of being "complicit" with theft and referred to one of Peck's statements as "a damn lie." Shortly after this attack, Defendant abruptly terminated the deposition and refused to allow Peck to complete his deposition of Langston.[4]

Approximately one year later, Defendant made two false statements in connection with the Langston Matter. First, Defendant informed the court that a corporation formed by the parties in the case had been "annulled" by North Carolina's Secretary of State because the opposing party had forged corporate documents. In reality, Defendant knew that the corporation had been administratively dissolved by the Secretary of State rather than dissolved because of fraud. Second, Defendant accused opposing counsel in open court of "slipping" a handwritten provision into a settlement agreement without Defendant's knowledge or approval when, in fact, Defendant knew about — and had actually agreed to — the added provision.[5]

## III. The Gorham Matter

During a trial in Greene County Superior Court in 2012 at which Defendant was representing a defendant charged with murder, Judge Phyllis Gorham admonished Defendant for repeatedly failing to display respect for the court and to yield to its rulings. Later in the trial, with the jury present in the courtroom, Defendant approached the bench without having received permission and in a "loud and argumentative" tone accused the prosecutor of attempting to offer inadmissible evidence. He then noticeably grimaced at Judge Gorham. This behavior necessitated Judge Gorham calling a recess in order to address Defendant's behavior.[6]

---

4. The DHC concluded that Defendant's actions during this deposition violated Rule 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal), Rule 3.5(a)(4) (conduct intended to disrupt a tribunal), and Rule 8.4(d) (conduct prejudicial to the administration of justice).

5. The DHC concluded that these misrepresentations violated Rule 8.4(c) (conduct involving dishonesty, deceit or misrepresentation), Rule 8.4(d) (conduct prejudicial to the administration of justice), and Rule 3.3(a)(1) (making a false statement of material fact to a tribunal).

6. The DHC concluded that Defendant's behavior before Judge Gorham violated Rule 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal), Rule 8.4(d)

## IV. The Davenport Matter

In 2012, Defendant represented Jonathan Davenport in a dispute arising from a previous business relationship between Davenport and Billy Roughton. Davenport was ultimately charged by state and federal authorities with crimes arising from this business relationship. Defendant recorded, and then uploaded to YouTube, a video of an incident in which he confronted Pasquotank County Sheriff's Office Investigator Sam Keith, the investigating officer in Davenport's case, and accused the Sheriff's Office of engaging in criminal conduct by not handing over certain property to Davenport. Defendant later admitted that his purpose in uploading the video to YouTube was not to further his representation of Davenport but rather to be a "smart aleck."[7]

The following day, Defendant sent a letter on behalf of Davenport directly to Roughton and the Sheriff of Pasquotank County accusing them of conspiring to violate Davenport's rights and engaging in malicious prosecution. At the time Defendant sent this letter — in which he demanded $3 million to settle the matter — he knew that both Roughton and the sheriff were represented by counsel.[8]

## V. The Shackley Matter

In 2013, Defendant represented Norman Shackley on a charge of impersonating a law enforcement officer. In connection with the case, Defendant obtained by subpoena phone records from one of the State's witnesses, Jimmy Hughes. At 10:00 p.m. one evening, Defendant called a phone number listed in these records and told the person who answered the phone, Jean Sugg (whom Defendant did not know), that Hughes had "hit on" Shackley's wife, who had "big boobs" and ran a prostitute website.[9]

---

(conduct prejudicial to the administration of justice), and Rule 3.5(a)(4)(B) (conduct intended to disrupt a tribunal).

7. The DHC concluded that these actions violated Rule 4.4(a) (using means in representing a client that have no substantial purpose other than to embarrass or burden a third person).

8. The DHC concluded that Defendant's actions in sending the letter violated Rule 4.2 (communicating with persons known to be represented by counsel).

9. The DHC concluded that this conduct violated Rule 4.4(a) (using means in representing a client that have no substantial purpose other than to embarrass or burden a third person).

## VI. The Dolenti Matter

Defendant defended a client charged with child abuse in 2013. Upon learning that the district attorney had refused to drop the charges against his client, Defendant left a voicemail for Detective Nikki Dolenti, the investigating officer in the case, in which he made the following statement in a harsh and threatening tone: "You obviously don't know what the hell you're doing. So I'm just gonna whoop your ass real bad next week unless you get your ass down there and get this case dismissed. And do your job and have some sense."[10]

## VII. The Deans Matter

Defendant was arrested by the Pitt County Sheriff's Office as a result of his voicemail to Detective Dolenti. At the time, Defendant was representing the Pitt County Sheriff's daughter, Laura Deans, and son-in-law in an adoption proceeding that was set to be finalized within the month. Defendant, who was "mad as hell" and "wanted to get back at the [Sheriff]," left a voicemail with Deans stating that he had been handling her case "as a favor to your dad when I thought that he wasn't trying to f*** me too, but I can't do that anymore, and I don't know that you need to be in my office or I need to have y'all around." Defendant also made explicit and crude comments during the voicemail regarding the sheriff, his wife, and the Pitt County district attorney.[11]

During a subsequent phone call with Deans, Defendant demanded immediate payment of his fee — despite the lack of a prior agreement as to when his fee would be due — and refused to respond to Deans' questions regarding the status of the adoption or the steps she needed to take to finalize the adoption. Defendant ceased work on the case and did not have any further interaction with Deans.[12]

---

10. The DHC concluded that this conduct violated Rule 4.4(a) (using means in representing a client that have no substantial purpose other than to embarrass or burden a third person) and Rule 8.4(d) (conduct prejudicial to the administration of justice).

11. The DHC concluded that Defendant's statements on the voicemail violated Rule 4.4(a) (using means in representing a client that have no substantial purpose other than to embarrass or burden a third person).

12. The DHC concluded that by virtue of his actions with regard to Deans' case, Defendant violated Rules 8.4(a) and (g) (attempting to intentionally prejudice a client during the course of the professional relationship), Rule 1.16(d) (failing to take reasonably practicable steps to protect a client's interests upon termination of the representation), Rule 1.4(a) (failing to comply with a reasonable request for information), and Rule 1.4(b) (failing to explain a matter to the extent reasonably necessary to permit a client to make informed decisions about the representation).

* * * *

After determining in its 8 August 2014 order that Defendant had violated the Rules of Professional Conduct in connection with the seven matters summarized above, the DHC held hearings from 16–18 September and 22–23 October 2014 for the dispositional phase of the proceeding during which it received additional evidence and heard arguments. On 13 November 2014, the DHC issued its Order of Discipline — upon which the present appeal is based — in which it (1) recited the violations of the Rules of Professional Conduct it had found in its 8 August 2014 order; (2) made additional findings of fact relating to the dispositional phase; and (3) imposed a five-year suspension of Defendant's law license.

The extensive additional findings of fact in the Order of Discipline relating to the dispositional stage described numerous other instances of abusive, belligerent, threatening, and profane communications and conduct by Defendant — both inside and outside of the courtroom — that occurred between 2008 and 2014.[13] The Order of Discipline also noted numerous examples of

> a recurrent pattern in Defendant's practice of law. When Defendant believes someone with whom he interacts professionally is wrong about the facts, the law, procedure, or a matter of judgment, he demands instant redress. If the person with whom he disagrees does not immediately capitulate, Defendant threatens to harm that individual in some way.

The Order of Discipline further noted numerous incidents demonstrating Defendant's penchant for "us[ing] graphic sexual commentary to embarrass and/or demean others in professional contexts." It also cited numerous instances showing that "in retaliation for perceived

---

13. These additional incidents included, without limitation, Defendant referring to the Pasquotank County Attorney as an "idiot" who made "asinine" assertions and "should be ashamed of himself"; accusing attorney Shearin of engaging in "Gestapo tactics"; acting "disruptive and disrespectful" to a Superior Court judge in Hertford County and accusing the district attorney in that case — in front of a jury — of lying; accusing another assistant district attorney of being "mentally ill" and a "f***ing Nazi" and stating to him, "I am telling you this son, and I can call you son because that's what you deserve to be called, if I didn't have a bar license, you would be a greasy spot on that table"; referring to the Greensboro Police Chief alternatively as "Mohammed," "Sahheb," and "Ahmed" when his name was actually Hassan Aden; and ordering a Superior Court judge — in open court and in the presence of the public — to "wipe the smirk off [his] face."

wrongs, [Defendant] is willing to breach his duty of loyalty to clients and former clients by disclosing confidential information and/or attempting to prejudice their interests." Finally, the Order of Discipline stated that

> [t]here is no indication that Defendant has taken ownership of his misconduct or its consequences. He has not acknowledged violating the Rules of Professional Conduct, expressed remorse, or shown any insight regarding his lack of professionalism. In his testimony during the discipline phase of this case, Defendant maintained that he didn't do anything wrong, has nothing to apologize for, and will continue to conduct himself in the same manner if permitted to continue practicing law.

Defendant filed a timely notice of appeal on 10 December 2014.

**Analysis**

Defendant raises a variety of arguments on appeal, which can be organized into two general categories. First, he makes several constitutional and procedural arguments in connection with his disciplinary proceeding and the Order of Discipline. Second, he challenges the validity of certain findings of fact and conclusions of law made by the DHC in determining that he had violated the Rules of Professional Conduct. We address each category below.

**I. Standard of Review**

Pursuant to N.C. Gen. Stat. § 84-28, the DHC has the power to discipline any attorney admitted to practice law in the State of North Carolina upon determining that the attorney has violated the North Carolina Rules of Professional Conduct. N.C. Gen. Stat. § 84-28(b)(2) (2015). A party may appeal to this Court from a final order of the DHC. N.C. Gen. Stat. § 84-28(h).

We review disciplinary orders of the DHC under the whole record test, which

> requires the reviewing court to determine if the DHC's findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusions of law[.] Such supporting evidence is substantial if a reasonable person might accept it as adequate backing for a conclusion.

*Talford*, 356 N.C. at 632, 576 S.E.2d at 309-10 (internal citation and quotation marks omitted). "Moreover, in order to satisfy the evidentiary

requirements of the whole-record test in an attorney disciplinary action, the evidence used by the DHC to support its findings and conclusions must rise to the standard of clear, cogent, and convincing." *Id.* at 632, 576 S.E.2d at 310 (citation, quotation marks, and brackets omitted).

The whole record test also mandates that "the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn." *Id.* However, "[t]he mere presence of contradictory evidence does not eviscerate challenged findings, and the reviewing court may not substitute its judgment for that of the DHC. The DHC determines the credibility of the witnesses and the weight of the evidence." *N.C. State Bar v. Adams*, __ N.C. App. __, __, 769 S.E.2d 406, 411 (2015) (internal citation, quotation marks, and brackets omitted). Thus, "[t]he whole record test does not allow the reviewing court to replace the [DHC'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*." *N.C. State Bar v. Nelson*, 107 N.C. App. 543, 550, 421 S.E.2d 163, 166 (1992) (citation and quotation marks omitted), *aff'd per curiam*, 333 N.C. 786, 429 S.E.2d 716 (1993).

## II. Constitutional and Procedural Arguments

### A. Constitutionality of the DHC's Disciplinary Authority

**[1]** Defendant asserts that the Order of Discipline is null and void because the "DHC encroaches on the judiciary and violates separation of powers" principles. In making this argument, Defendant directs our attention to Article III, Section 11 of the North Carolina Constitution, which states that

> all administrative departments, agencies, and offices of the State and their respective functions, powers, and duties shall be allocated by law among and within not more than 25 principal administrative departments so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department.

N.C. Const. art. III, § 11. He then points to Article IV, Section 3, which provides that the "General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created." N.C. Const. art. IV, § 3.

Defendant contends that the State Bar — through the DHC — may not constitutionally exercise judicial power because it is not housed in

one of the 25 principal departments referenced in Article III, Section 11. However, Defendant provides no authority for this assertion, and we fail to see how it *could* be supported, given that the same constitutional language he relies upon specifically states that "[r]egulatory [and] quasi-judicial . . . agencies may, *but need not*, be allocated within a principal department."[14] N.C. Const. art. III, § 11 (emphasis added).

We also find meritless Defendant's contention that the State Bar impermissibly encroaches on the power of North Carolina's Judicial Branch to impose discipline in cases involving attorney misconduct. Our Supreme Court has specifically held that the State Bar and the courts of North Carolina "share concurrent jurisdiction over matters of attorney discipline" and that "questions relating to the propriety and ethics of an attorney are ordinarily for the consideration of the North Carolina State Bar." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (citation omitted). That concurrent jurisdiction does not undermine the "inherent powers of a court to deal with its attorneys." *Id.* (citation omitted). This Court has explained that

> under the system of concurrent jurisdiction over attorney conduct and discipline in effect in North Carolina, both the State Bar and the courts have an important role to play in assuring that attorneys conduct themselves properly, with the courts focusing on protecting themselves from fraud and impropriety and serving the ends of the administration of justice, while the State Bar has responsibility for the broad range of questions relating to the propriety and ethics of an attorney, and with neither to act in such a manner as to disable or abridge the powers of the other.

*Cunningham v. Selman*, 201 N.C. App. 270, 284, 689 S.E.2d 517, 526 (2009) (internal citations, quotation marks, and brackets omitted).

Defendant provides no basis for his assertion that the State Bar's actions in the present case usurped the role of North Carolina's judiciary in regulating attorney misconduct. Accordingly, we overrule Defendant's argument on this issue.

---

14. In his brief, Defendant cites to *N.C. State Bd. of Dental Examiners v. F.T.C.*, __ U.S. __, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015), a case considering whether the North Carolina Board of Dental Examiners was entitled to immunity from suit under federal antitrust law. However, he fails to demonstrate how that case is relevant to the present action.

### B. Due Process

In his brief, Defendant makes the sweeping assertion that the entire disciplinary "process was biased and void of fairness and due process and must be vacated." In support of this contention, Defendant expresses his disagreement with various witnesses' testimony, actions of the State Bar, statements of DHC members, and rulings of the DHC.

However, because Defendant fails to provide any substantive arguments or legal authority supporting his contention that the proceeding as a whole violated his right to due process on account of bias or unfairness, we deem this issue abandoned pursuant to Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."); *N.C. State Bar v. Ethridge*, 188 N.C. App. 653, 668, 657 S.E.2d 378, 387 (2008) ("[D]efendant fails to cite any authority for his assignments of error regarding DHC's failure to properly weigh the aggravating and mitigating factors. As such, these assignments of error are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6)[.]").

Moreover, based on our own thorough review of the extensive record in this case, we are satisfied that the DHC conducted a fair and unbiased process that fully comported with principles of due process. Defendant was given proper notice of the allegations against him; he was allowed access to the evidence supporting these allegations; he was permitted to call his own witnesses, introduce evidence, and cross-examine opposing witnesses; and he was able to file motions and make legal arguments. This disciplinary action spanned one-and-a-half years and produced a record exceeding 10,000 pages. The DHC ruled on numerous motions filed by Defendant and issued orders containing extensive and detailed findings of fact and conclusions of law. Therefore, the record belies Defendant's assertion that he was denied due process in connection with his disciplinary proceeding.

### C. Freedom of Speech

Defendant next makes the broad assertion that the Rules of Professional Conduct are unconstitutional — either facially or as applied to him — to the extent that they allowed him to be punished for speech that is protected by the First Amendment to the United States Constitution.[15] However, Defendant fails to make any particularized

---

15. We note that while this case was pending before the DHC, Defendant asserted several First Amendment claims arising from this disciplinary proceeding in a lawsuit against

arguments as to which rules he specifically believes are either facially unconstitutional or have been unconstitutionally applied to him. As such, he has waived his right to appellate review of this issue by failing to satisfy his burden as the appellant in this appeal to show a specific deprivation of his legal rights. *See State v. Billups*, 301 N.C. 607, 616, 272 S.E.2d 842, 849 (1981) ("[T]he appellant must show error positive and tangible, that has affected his rights substantially and not merely theoretically, and that a different result would have likely ensued." (citation and quotation marks omitted)).

Nevertheless, we take this opportunity to reject Defendant's categorical assertion that the First Amendment provides attorneys with blanket immunity from facing disciplinary sanctions for violating the ethical rules applicable to lawyers in North Carolina simply because those violations involve some form of speech. As a general proposition, the First Amendment does not immunize an attorney from being disciplined for violating the Rules of Professional conduct simply because the attorney employs "speech" in committing the violations. As with all constitutional rights, the right to free speech is not absolute.

As our Supreme Court has stated,

> [f]reedom of speech is not an unlimited, unqualified right. Speech may be subordinated to other values and considerations, and may be reasonably restrained as to time and place. It is well settled that, within proper limits, the right of free speech is subject to legislative restriction when such restriction is in the public interest. . . . The constitutional right of freedom of speech does not extend . . . to every use and abuse of the spoken and written word.

*State v. Leigh*, 278 N.C. 243, 250, 179 S.E.2d 708, 712 (1971) (internal citation omitted).

Indeed, the United States Supreme Court has recognized that certain restrictions on speech apply uniquely to attorneys.

> It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for

---

the State Bar filed in Wake County Superior Court. That complaint was dismissed, and Defendant did not appeal the decision.

> appeal. *Even outside the courtroom, a majority of the Court in two separate opinions [has] observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be.*

*Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071, 115 L. Ed. 2d 888, 921 (1991); *see, e.g.*, *id.* at 1073, 115 L. Ed. 2d at 922 (noting that in cases relating to regulation of advertising the Supreme Court has "not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses"); *Sheppard v. Maxwell*, 384 U.S. 333, 363, 16 L. Ed. 2d 600, 620 (1966) (explaining that "[c]ollaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures").

In balancing the First Amendment rights of attorneys against the ability of states to discipline attorneys for unethical conduct, courts are to "engage[ ] in a balancing process, weighing the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue." *Gentile*, 501 U.S. at 1073, 115 L. Ed. 2d at 922. The Supreme Court has explained that "[s]tates have a compelling interest in the practice of professions within their boundaries, and as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 625, 132 L. Ed. 2d 541, 550 (1995) (citation, quotation marks, and ellipses omitted).

Moreover, "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' " *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792, 44 L. Ed. 2d 572, 588 (1975) (citation omitted). As such, the Supreme Court has recognized the substantial interest possessed by states both in "protect[ing] the integrity and fairness of a State's judicial system," *Gentile*, 501 U.S. at 1075, 115 L. Ed. 2d at 923, and in "protect[ing] the flagging reputations of . . . lawyers by preventing them from engaging in conduct that . . . is universally regarded as deplorable and beneath common decency . . . [,]" *Went For It*, 515 U.S. at 625, 132 L. Ed. 2d at 550 (quotation marks omitted).

We recognize that the precise contours of the restrictions that the First Amendment imposes on the power of states to regulate attorney speech are not always clear. However, judicial resolution of such

questions may only occur in cases where, unlike here, the issues have been properly presented to the court.

**D. Assistance of Co-counsel**

Defendant next contends that the DHC violated his right to counsel by granting the State Bar's motion that he be required to choose between either representing himself or being represented by counsel. At the beginning of his disciplinary proceeding, Defendant attempted to simultaneously represent himself *and* employ the assistance of co-counsel. The DHC ruled that Defendant would have to choose between proceeding *pro se* or, alternatively, being represented by counsel.

According to N.C. Gen. Stat. § 1-11, "[a] party may appear either in person or by attorney in actions or proceedings in which he is interested." N.C. Gen. Stat. § 1-11 (2015). Our Supreme Court has construed this provision to mean that a litigant "has no right to 'appear' both by himself and by counsel." *Hamlin v. Hamlin*, 302 N.C. 478, 482, 276 S.E.2d 381, 384-85 (1981). While Defendant argues that this general rule should be modified when the party is an attorney, he cites no legal authority for this position, and we have been unable to locate any caselaw that would support his argument. Accordingly, we conclude that the DHC's ruling on this issue was proper.

**E. Amendment to Complaint**

Defendant also contends that the DHC improperly allowed the State Bar to file a second amended complaint containing additional allegations that were not sufficiently related to the allegations in the original complaint. The motion seeking leave to file the second amended complaint was filed on 4 November 2013, and it was granted on 3 December 2013 without any response from Defendant having been filed. The DHC heard evidence relating to the new allegations during the hearings for the adjudicatory phase, which concluded on 11 June 2014. Defendant did not raise any challenge to this amendment until 6 August 2014 — approximately eight months after the motion to amend was granted and almost two months after the DHC concluded its evidentiary hearings on all of the allegations, including those contained in the second amended complaint.

Unless an issue is automatically preserved by law, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a *timely* request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (emphasis added). Defendant has presented no legal authority

supporting the proposition that this issue was automatically preserved or was preserved by his untimely objection filed months after the motion to amend was filed and granted. Accordingly, we hold that due to his failure to raise a timely objection to the filing of the second amended complaint, Defendant has waived his right to appellate review of this issue. *See N.C. State Bar v. Beaman*, 100 N.C. App. 677, 684, 398 S.E.2d 68, 72 (1990) (because "no objection to the State Bar's motion to amend its complaint to include [the defendant]'s alleged violation of Rule 1.2(D) was made and . . . his alleged violation of this rule was argued before the Committee . . . [,] the issue will be treated as being properly pled").

**F. Signatures on Complaints**

Defendant next argues that the DHC lacked subject matter jurisdiction because the chairperson of the State Bar's Grievance Committee did not physically sign the original complaint or the second amended complaint. According to the State Bar Discipline and Disability Rules, once the Grievance Committee has determined that probable cause exists to believe that a violation of the Rules of Professional Conduct has occurred, a formal complaint is filed. 27 N.C. Admin Code 1B.0113(a). "Formal complaints will be issued in the name of the North Carolina State Bar as plaintiff and signed by the chairperson of the Grievance Committee. Amendments to complaints may be signed by the counsel alone, with the approval of the chairperson of the Grievance Committee." 27 N.C. Admin Code 1B.0113(n).

Here, the original complaint contained a digital image of the signature of the then-chairperson of the Grievance Committee, Margaret M. Hunt. That complaint, as well as the second amended complaint, also bore the signatures of counsel for the State Bar.[16] Defendant has cited to no legal authority providing that it was impermissible for the Grievance Committee chairperson to use an electronic reproduction of her signature on the initial complaint.

Indeed, our Supreme Court has explained that "public documents may be authenticated by mechanical reproduction of the signature of the authorized officer when he intends to adopt the mechanical reproduction as his signature." *State v. Watts*, 289 N.C. 445, 449, 222 S.E.2d 389, 392 (1976); *see id.* at 448, 222 S.E.2d at 391 ("[I]n legal contemplation

16. After Defendant challenged the lack of an original signature on the initial complaint, the DHC allowed the State Bar to retroactively file versions of the complaints containing Hunt's original ink signature.

'to sign' means to attach a name or cause it to be attached by any of the known methods of impressing the name on paper with the intention of signing it."). Accordingly, we reject Defendant's argument that subject matter jurisdiction was lacking simply because Hunt signed the original complaint by means of an electronic signature.[17]

### G. Notice of Factors to be Considered at Dispositional Phase

Defendant also argues that he was not provided advance "notice of the aggravating factors that the [State] Bar intended to use against him" during the dispositional phase of the proceeding. Pursuant to the Discipline and Disability Rules, "[i]f the charges of misconduct are established, the hearing panel will then consider any evidence relevant to the discipline to be imposed." 27 N.C. Admin. Code 1B.0114(w). These rules, in turn, list factors that the DHC is to consider in all cases, *see* 27 N.C. Admin. Code 1B.0114(w)(3), as well as additional factors to be considered in cases where the DHC imposes a sanction of disbarment or suspension, *see* 27 N.C. Admin. Code 1B.0114(w)(1).

Defendant provides no authority — nor have we found any — in support of his contention that the State Bar was required to notify him in advance of which *particular* factors in 27 N.C. Admin. Code 1B.0114(w) it planned to argue were relevant at the dispositional phase. Moreover, the statute itself gave Defendant notice of the list of factors that the State Bar could rely upon. We note that Defendant does not dispute that he received in discovery notice of all the facts the State Bar sought to establish in both the adjudicatory and dispositional phases of the proceedings. Accordingly, we do not find merit in Defendant's argument on this issue.

### H. Adequacy of Findings and Conclusions at Dispositional Phase

In addition, Defendant contends that the DHC never provided him with adequate reasons for the sanction it imposed against him and that the DHC acted improperly in largely adopting the proposed findings and conclusions submitted by the State Bar.

In imposing a disciplinary sanction, the DHC must support its "choice with written findings that . . . are consistent with the statutory scheme of N.C.G.S. § 84-28[.]" *Talford*, 356 N.C. at 638, 576 S.E.2d at 313. N.C. Gen. Stat. § 84-28 provides five levels of punishment for attorney

---

17. We note that pursuant to 27 N.C. Admin Code 1B.0113(n), the Grievance Committee chairperson was only required to approve, rather than sign, the amended complaints.

misconduct: disbarment, suspension, censure, reprimand, and admonition. N.C. Gen. Stat. § 84-28(c). Our Supreme Court has explained that the statutory scheme set out in N.C. Gen. Stat. § 84-28 "clearly evidences an intent to punish attorneys in an escalating fashion keyed to: (1) the harm or potential harm created by the attorney's misconduct, and (2) a demonstrable need to protect the public." *Talford*, 356 N.C. at 637-38, 576 S.E.2d at 313 (emphasis omitted). Furthermore,

> in order to merit the imposition of suspension or disbarment, there must be a clear showing of how the attorney's actions resulted in significant harm or potential significant harm to [a client, the administration of justice, the profession, or members of the public], and there must be a clear showing of why suspension and disbarment are the only sanction options that can adequately serve to protect the public from future transgressions by the attorney in question. . . . Thus, upon imposing a given sanction against an offending attorney, the DHC must provide support for its decision by including adequate and specific findings that address these two key statutory considerations.

*Id.* at 638, 576 S.E.2d at 313 (quotation marks and emphasis omitted).

Here, the dispositional portion of the Order of Discipline included (1) extensive factual findings as to Defendant's actions that clearly caused significant — or potentially significant — harm to clients, the administration of justice, the profession, and members of the public;[18] (2) conclusions of law regarding the specific factors set forth in 27 N.C. Admin. Code 1B.0114(w) relevant to this case; and (3) an explanation as to why a five-year suspension was the least severe sanction necessary to protect the public from future transgressions by Defendant.

---

18. The DHC dedicated 13 single-spaced pages of the dispositional portion of its Order of Discipline to describe numerous incidents involving actual or potential harm caused by Defendant's actions. Defendant does not make any specific challenges to these findings. Rather, he asserts that (1) the DHC did not tie the incidents described in those findings to specific violations of the Rules of Professional Conduct; and (2) some of those incidents occurred outside of the six-year statute of limitations that generally applies to the filing of attorney misconduct grievances, *see* 27 N.C. Admin. Code 1B.0111(f)(4). However, Defendant fails to point to any authority mandating that facts relevant at the *dispositional* phase — as opposed to facts underlying a particular *adjudication* of misconduct — must be specifically tied to a particular disciplinary rule or have occurred within six years of the filing of a grievance. In fact, "[i]f the charges of misconduct are established, the hearing panel will then consider *any* evidence relevant to the discipline to be imposed." 27 N.C. Admin. Code 1B.0114(w) (emphasis added).

On this last point, the DHC stated the following in its Order of Discipline:

> 7. Defendant's persistent pattern of misconduct up through and including his actions in this disciplinary proceeding indicate that Defendant is either unwilling or unable to conform his behavior to the requirements of the Rules of Professional Conduct. Defendant refuses to acknowledge the wrongfulness of his conduct and stated that he does not intend to modify his behavior. Accordingly, if Defendant were permitted to continue practicing law, he would pose a significant risk of continued harm to clients, the profession, the public, and the administration of justice.
>
> 8. The Hearing Panel finds that admonition, reprimand, or censure would not be sufficient discipline because of the gravity of the harm to the administration of justice and to the legal profession in the present case. Furthermore, the Panel finds that any sanction less than suspension would fail to acknowledge the seriousness of the offenses committed by Defendant, would not adequately protect the public, and would send the wrong message to attorneys and the public regarding the conduct expected of members of the Bar in this State.
>
> 9. Notwithstanding repeated prior warnings about the impropriety of his conduct and an attempt to reform his behavior through mentoring, Defendant exhibits escalating misconduct and a wholly unrepentant attitude. Accordingly, the protection of the public requires that Defendant be required to demonstrate rehabilitation and reformation before he may be permitted to resume practicing law.
>
> 10. The Hearing Panel finds and concludes that the public can only be adequately protected by an active suspension of Defendant's law license, with reinstatement to the practice of law conditioned upon a showing of reformation and other reasonable conditions precedent to reinstatement.

Defendant also asserts that the Order of Discipline is deficient because many of its findings were taken verbatim from the proposed order of discipline submitted by the State Bar. Defendant asserts that

such action amounts to an abdication of the DHC's authority. We are not persuaded.

It is the accepted practice in North Carolina for the prevailing party to draft and submit a proposed order that the decision-making body may then issue as its own — with or without amendments. *See, e.g.*, *In re J.B.*, 172 N.C. App. 1, 25, 616 S.E.2d 264, 279 (2005) ("Nothing in the statute or common practice precludes the trial court from directing the prevailing party to draft an order on its behalf."); *Farris v. Burke Cty. Bd. of Educ.*, 355 N.C. 225, 242, 559 S.E.2d 774, 784 (2002) (upholding propriety of school superintendent's counsel preparing findings of fact to be adopted by board of education and noting that "[s]imilar procedures are routine in civil cases, where a judge is permitted to ask the prevailing party to draft a judgment"); *Johnson v. Johnson*, 67 N.C. App. 250, 257, 313 S.E.2d 162, 166 (1984) ("The trial judge properly directed the attorney for the [prevailing party] to prepare proposed findings and conclusions and draft the judgment, and adopted the judgment as his own when tendered and signed.").

Here, Defendant has not directed our attention to any applicable statute or regulation prohibiting the DHC from adopting the proposed findings and conclusions submitted by the State Bar. Accordingly, he has failed to show error. Moreover, we conclude that the DHC fully complied with the requirements of N.C. Gen. Stat. § 84-28 in imposing its sanction in this case.

### I. Assessment of Fees and Costs

Defendant next asserts that the DHC erred in assessing fees and costs against him in the amount of $35,315.95. However, because Defendant neither cites to any legal authority in support of this argument nor explains why he believes the amount of fees and costs assessed was unreasonable, we deem this issue waived pursuant to Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure. *See Ethridge*, 188 N.C. App. at 668, 657 S.E.2d at 387 (holding that because "defendant fail[ed] to cite any authority" for certain assignments of error, those "assignments of error are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6)").[19]

---

19. Moreover, we note that N.C. Gen. Stat. § 84-34.2 expressly permits the State Bar to impose certain types of fees, including an "administrative fee for any attorney against whom discipline has been imposed." N.C. Gen. Stat. § 84-34.2 (2015). In its brief, the State Bar has represented to this Court that "[i]n April 2010, the [State Bar] Council adopted a schedule of administrative fees for the disciplinary program that included a fee of $1,500.00 per day for each day spent in a contested DHC hearing that resulted in the imposition of discipline."

## III. Challenges to Factual Findings and Conclusions of Law

**[2]** Having rejected all of Defendant's constitutional and procedural arguments, we next turn our attention to Defendant's specific challenges to the DHC's findings of fact and conclusions of law as to each of the seven matters summarized earlier in this opinion that formed the basis for his disciplinary proceeding. We address in turn each of Defendant's arguments regarding these seven matters.

### A. The Pollard Matter

Defendant contends that the DHC's findings of fact do not support its conclusion of law that his behavior during the deposition of Pollard constituted "conduct intended to disrupt a tribunal" in violation of Rule 3.5(a)(4) because the deposition did not constitute a "tribunal." Defendant asserts that depositions were only included within the meaning of the term "tribunal" by virtue of a 2015 amendment to the Rules of Professional Conduct such that a deposition could not properly have been considered a "tribunal" at the time of Pollard's 2011 deposition.

However, at the time of Pollard's deposition, the official commentary to the Rules of Professional Conduct stated, in pertinent part, that "[t]he duty to refrain from disruptive conduct applies to any proceeding of a tribunal, *including a deposition*." N.C. Rev. R. Prof. Conduct 3.5, cmt. 10 (2011) (emphasis added). "The Comment accompanying each Rule [of Professional Conduct] explains and illustrates the meaning and purpose of the Rule." N.C. Rev. R. Prof. Conduct 0.2[8]. As such, the official commentary does "not add obligations to the Rules but provide[s] guidance for practicing in compliance with the Rules." N.C. Rev. R. Prof. Conduct 0.2[1].

This Court has previously utilized the commentary to the Rules of Professional Conduct in construing their meaning. *See, e.g.*, *N.C. State Bar v. Merrell*, __ N.C. App. __, __, 777 S.E.2d 103, 114 (2015) (scope of Rule 1.7(a) regarding representation involving conflict of interest); *N.C. State Bar v. Simmons*, __ N.C. App. __, __, 757 S.E.2d 357, 363-64 (meaning of "criminal act" under Rule 8.4(b)), *disc. review denied*, 367 N.C. 791, 766 S.E.2d 848 (2014); *N.C. State Bar v. Key*, 189 N.C. App. 80, 91-92, 658 S.E.2d 493, 501 (2008) (scope of "conduct prejudicial to the administration of justice" under Rule 8.4). Therefore, we dismiss Defendant's argument that the DHC erred in treating a deposition as a "tribunal" for purposes of Rule 3.5.[20]

---

20. Our holding on this issue applies equally to Defendant's challenges to Conclusions Nos. 2(d)-(e) of the DHC's conclusions of law from the adjudicatory phase in which he makes the same argument with respect to his conduct during the Langston deposition.

Defendant also argues that the DHC did not make sufficient findings to support its conclusion that his comments during the Pollard deposition constituted "conduct prejudicial to the administration of justice in violation of Rule 8.4(d)." The Comment to Rule 8.4 states that

> [a] showing of actual prejudice to the administration of justice is not required to establish a violation of Paragraph (d). Rather, it must only be shown that the act had a *reasonable likelihood of prejudicing the administration of justice*. . . . The phrase "conduct prejudicial to the administration of justice" in paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings.

N.C. Rev. R. Prof. Conduct 8.4, cmt. 4 (emphasis added). We have previously adopted the standard set forth in this Comment in construing Rule 8.4. *See Key*, 189 N.C. App. at 91-92, 658 S.E.2d at 501 (applying "reasonable likelihood of prejudicing the administration of justice" standard contained in Comment to Rule 8.4).

Here, we are satisfied that the DHC's findings — which showed that Defendant repeatedly interjected his own questions and commentary, made sarcastic remarks, coached Pollard on how to respond to particular questions, and answered questions for Pollard — supported its conclusion that Defendant violated Rule 8.4(d) as it was reasonable to conclude that such disruptive and improper tactics "had a reasonable likelihood of prejudicing the administration of justice." N.C. Rev. R. Prof. Conduct 8.4, cmt. 4.

Defendant also contests several of the DHC's findings of fact relating to his statement in an affidavit that he did not sponsor the justice4stacey.com website. Defendant specifically challenges Finding No. 31, which states that "Defendant never specifically billed Barbara Pollard to be reimbursed for the website expenses." He argues that "Barbara Pollard and [Defendant] testified that she reimbursed all website expenses and no one testified otherwise." However, the fact that Pollard may at some point have reimbursed Defendant for the website costs does not undermine Finding No. 31, which simply states that he never specifically billed her for these expenses.

Defendant next challenges Finding No. 32, which states that

> [a]lthough Defendant has contended that he was reimbursed by his client for the cost of registering the website,

> he did not produce any documents in response to a request for production of all documents reflecting payments by him in connection with the justice4stacey website and his efforts to obtain reimbursement from Ms. Pollard. At this hearing, Defendant testified that he did not produce the documents because he did not have them.

Defendant asserts that he attempted to enter such documentation into evidence during the hearing but the DHC denied his request. Our review of the hearing transcript reveals that based upon the State Bar's objection, the DHC denied Defendant's attempt to enter the receipts into evidence because he had failed to provide them in discovery despite the State Bar's unambiguous request for him to do so. Defendant has not presented any argument that this evidentiary ruling was erroneous. Accordingly, we find no merit to Defendant's challenge to Finding No. 32.

Defendant also challenges Conclusion No. 2(c), which states as follows:

> By swearing in an affidavit submitted to the court that he did not sponsor the website and that another person was responsible for the expenses of the website when in fact he was the initial registrant and administrator of the website and paid for the registration, Defendant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c), and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d)[.]

Defendant contends that "[t]here is no supportive finding that [Defendant] was the 'sponsor' of the website . . . ." However, the DHC made the following findings regarding the website:

> 24. Defendant was involved in discussions and meetings about setting up the website.
>
> . . . .
>
> 26. Defendant was the initial registrant and administrator of the website which was registered on July 11, 2007.
>
> 27. Defendant paid the domain registrar for the website to be registered.
>
> 28. Defendant was identified as the contact person on the website and his name, address, telephone number, and email address were listed. As a result, Defendant

received numerous phone calls and correspondence from visitors to the website.

29. A passcode was required to post material to the website. Defendant had the passcode and posted some documents on the website.

30. Defendant was involved in the decision to take the website down.

31. Defendant never specifically billed Barbara Pollard to be reimbursed for the website expenses.

These findings describe Defendant's role in planning, registering, paying to set up, controlling access to, and providing content for the website. Therefore, we conclude the DHC's determination that Defendant was the sponsor of the justice4stacey.com website is sufficiently supported by the DHC's findings of fact.

Defendant also argues that the DHC erred in Conclusion No. 2(c) in determining that his misstatement regarding his sponsorship of the website was "conduct prejudicial to the administration of justice[.]" However, we believe that the DHC's findings did, in fact, demonstrate that Defendant's actions "had a reasonable likelihood of prejudicing the administration of justice" as they showed that Defendant made a false representation about a matter material to Fagan's motion to change venue that was pending before the court.

## B. The Langston Matter

Defendant challenges the DHC's conclusion that "[b]y abruptly leaving Ms. Langston's deposition with the deponent prior to the completion of opposing counsel's questioning without filing a motion to terminate the deposition, Defendant knowingly disobeyed an obligation under the rules of the tribunal in violation of Rule 3.4(c)[.]" He argues that this conclusion is unsupported because the DHC never specifically named the rule that Defendant disobeyed. However, it is clear that the DHC's conclusion was a reference to Rule 30(d) of the North Carolina Rules of Civil Procedure,[21] which is titled "Motion to terminate or limit examination" and explains that a *judge* — as opposed to counsel for a party

---

21. N.C. R. Civ. P. 30(d) provides as follows:

> (d) Motion to terminate or limit examination. — At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith

— may "cease" or "limit" a deposition "on motion of a party . . . ." The fact that the DHC was referring to Rule 30(d) is apparent because the DHC specifically discussed Defendant ending the deposition without "filing a motion to terminate the deposition[.]" Accordingly, this argument is without merit.

Defendant also challenges the following findings of fact with respect to one of his misstatements during the Langston Matter:

> 55. On May 2, 2012, in a hearing on the plaintiff's motion to prevent waste of marital and separate property pending equitable distribution, Defendant represented to the presiding judge that R & L Investment Homes, LLC had been dissolved by the North Carolina Secretary of State because Mr. Langston[, the ex-husband of Defendant's client,] had forged documents, stating, "Yes, your Honor, and the Secretary of State just annulled the entity because he forged three of 'em that say something different."
>
> 56. At the time Defendant made this statement to the court, Defendant knew the North Carolina Secretary of State had issued a Certificate of Administrative Dissolution of R & L Investment Homes, LLC for failure to file an annual report.

Defendant asserts that these findings "do not say that [he] knew the statement at issue was false as required by RPC 8.4 and it [sic] omits undisputed testimony from [him] and Ms. Lee that they both believed the statement to be true." However, the record shows that Defendant himself admitted that he knew the corporation had been administratively dissolved rather than having been dissolved due to fraud. Defendant further acknowledged that at the time he made the statement that the corporation had been "annulled" because of fraud, he "knew there was

---

or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, a judge of the court in which the action is pending or any judge in the county where the deposition is being taken may order before whom the examination is being taken to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of a judge of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

a letter stating that it was administratively dissolved." Accordingly, Findings Nos. 55 and 56 are adequately supported by the evidence.

For similar reasons, we reject Defendant's challenge to Conclusion No. 2(g), which states, in pertinent part, that

> [b]y falsely representing to the court that the Secretary of State had dissolved the LLC because of forgery, Defendant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c), and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d)[.]

Defendant argues that the DHC did not make a specific finding that he *knowingly* made the false statement. However, as explained above, both the DHC's findings and the supporting evidence show that Defendant was indeed aware of the falsity of his statement.

Defendant also contends that the DHC's findings do not support its conclusion that Defendant's misstatement had a prejudicial impact on the administration of justice. This assertion is meritless as the DHC could reasonably have determined that the misrepresentation "had a reasonable likelihood of prejudicing the administration of justice" in that it would have caused the trial court to labor under the false notion that a party in the case had committed forgery.

Defendant next challenges Finding No. 62, which states that

> Defendant's statement accusing Mr. Miller[, Defendant's opposing counsel in the Langston Matter,] of slipping the handwritten provision into the mediated settlement agreement after Defendant had signed it and without Defendant's knowledge or approval was false and Defendant knew at the time he made the statement that it was false.

In his brief, Defendant states that "Finding #62 that [Defendant] *knew* . . . the statement was false is not supported by the record. [W]here the Bar's own witness contradicted the allegation and 2 witnesses said [Defendant] did not make the statement." (Internal citations omitted.)

We are satisfied that the record contains sufficient evidence from which the DHC could have found that Defendant did, in fact, knowingly make a false statement regarding Miller "slipping" a provision into the settlement agreement without Defendant's knowledge. Miller testified before the DHC that "[Defendant] accused me of slipping [the provision]

in before he signed the document and without his knowledge. And that statement was made to Judge Paul."

Judge Paul confirmed in his testimony before the DHC that Defendant made such an accusation in his presence. In addition, the mediator who oversaw the settlement negotiations testified that he had "a specific recollection of pointing out [the added provision] to [Defendant]" and then asking Defendant and his client if "either of you have any problem" with the additional provision at which point the mediator "showed them the provision" and "[t]hey both said they had no problem with it." This testimony is reflected in the DHC's Finding No. 61, which states that "[p]rior to Defendant signing the mediated settlement agreement, the mediator had pointed out the handwritten provision to Defendant and Defendant agreed to the provision."

We note that Defendant correctly points out that Finding No. 62 incorrectly states that Defendant accused Miller of slipping in the provision *after* Defendant signed the settlement agreement rather than *before* he signed it. However, we find this discrepancy immaterial to the overall finding — which, as shown above, is supported by the evidence — that Defendant falsely accused Miller of adding a provision to the settlement agreement without Defendant's knowledge or approval. That finding, in turn, supports the DHC's conclusion of law that Defendant "knowingly made a false statement of material fact to a tribunal in violation of Rule 3.3(a)(1), engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c), and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d)."

Therefore, even though Finding No. 62 — as written — is partially unsupported by the evidence of record, the remaining portion of Finding No. 62, in conjunction with Finding No. 61, adequately supports the DHC's legal conclusion. *See, e.g.*, *Meadows v. Meadows*, __ N.C. App. __, __, 782 S.E.2d 561, 566 (2016) ("[E]ven assuming, *arguendo*, that both findings are not supported by competent evidence, it is of no consequence to the instant case. The remaining binding findings of fact, cited above, are sufficient to support the trial court's judgment . . . ."); *Estate of Gainey v. S. Flooring & Acoustical Co.*, 184 N.C. App. 497, 503, 646 S.E.2d 604, 608 (2007) ("[W]here there are sufficient findings of fact based on competent evidence to support the tribunal's conclusions of law, the decision will not be disturbed because of other erroneous findings which do not affect the conclusions." (citation, quotation marks, and brackets omitted)). Accordingly, we find Defendant's argument on this issue to be without merit.

### C. The Gorham Matter

Defendant next challenges the following conclusion of law with regard to Defendant's conduct toward Judge Gorham:

> By being disrespectful to the judge during a jury trial after having been warned by the Court about his conduct, Defendant knowingly disobeyed an obligation under the rules of the tribunal in violation of Rule 3.4(c), engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d), and engaged in conduct intended to disrupt a tribunal by engaging in undignified or discourteous conduct that is degrading to a tribunal in violation of Rule 3.5(a)(4)(B)[.]

Defendant contends that there is no finding or evidence indicating that he "knowingly disobeyed an obligation under the rules of the tribunal" or engaged in conduct "degrading to a tribunal." Rather, he asserts that the record shows that nothing happened "more than the morning recess in a murder trial."

The DHC made the following findings with regard to this incident:

> 64. During the course of the trial Defendant spoke disrespectfully to the judge at a bench conference and Judge Gorham admonished Defendant about engaging in disrespectful behavior toward the court.
>
> 65. Subsequently, at another bench conference on August 1, 2012, while the jury was present in the courtroom, Defendant grimaced at Judge Gorham and in an angry tone of voice accused Judge Gorham of allowing the prosecutor to get inadmissible evidence to the jury.
>
> 66. Defendant's conduct prompted Judge Gorham to declare a recess in the trial and give the jury a break so that she could address Defendant's conduct.
>
> 67. During the in-chambers discussion about Defendant's conduct, Defendant stated: a) "And I do think if I was angry, I am sorry that I was angry and I expressed it. I'm not going to deny that I was." and b) "you said that I appeared disrespectful and I had a grimace and I am trying to explain that I was upset and the reasons that have gone into my [being] upset."

> 68. Rule 12 of the North Carolina General Rules of Practice for the Superior and District Courts provides: "Counsel are at all times to conduct themselves with dignity and propriety … Counsel should yield gracefully to rulings of the court and avoid detrimental remarks both in court and out. He should at all times promote respect for the court."

These findings — which are supported in the record by the testimony of Assistant District Attorney Mike Muskus, who was the prosecutor present during these events — clearly support the DHC's conclusions. To the extent Defendant argues there is no evidence that he *knew* he was violating a rule or causing a disruption, it is axiomatic that one's state of mind is rarely shown by direct evidence and must often be inferred from the circumstances. *See Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 260, 266 S.E.2d 610, 619 (1980) ("A litigant's state of mind is seldom provable by direct evidence but must ordinarily be proven by circumstances from which it may be inferred."). Here, it was eminently reasonable for the DHC to conclude that Defendant understood he was not conducting himself "with dignity and propriety," "yield[ing] gracefully to rulings of the court," "avoid[ing] detrimental remarks both in court and out[,]" and "promot[ing] respect for the court."

**D. The Davenport Matter**

With respect to his representation of Davenport, Defendant first challenges the DHC's finding that he "sent a demand letter" to Roughton and the Sheriff of Pasquotank County. However, Defendant admitted in his answer filed with the DHC that he sent the demand letter. Accordingly, he may not challenge on appeal the DHC's finding as to that fact. *See Baker v. Mauldin*, 82 N.C. App. 404, 406, 346 S.E.2d 240, 241 (1986) (holding that a defendant is bound by admissions in his answer).

Defendant also challenges Finding No. 84, which states, in relevant part, that Defendant "was aware that [Norman] Shearin represented Roughton in the dispute with Davenport . . . ." However, among other evidence establishing that Defendant knew Roughton was represented by counsel, the record shows that (1) Roughton's attorney, Shearin, testified that he had conversations with Phillip Hayes, Defendant's co-counsel, regarding the dispute between Roughton and Davenport; and (2) within a month prior to sending the demand letter, Defendant contacted Shearin's office about taking Roughton's deposition. Accordingly, this evidence supports the DHC's finding that Defendant did indeed know Roughton was represented by counsel at the time he sent the demand letter.

Defendant next challenges the DHC's Conclusion No. 2(j), which states that

> [b]y impugning the integrity of the investigating officer in Davenport's pending criminal cases and accusing the Sheriff's Department of a criminal act in a video posted online, Defendant used means in representing a client that had no substantial purpose other than to embarrass or burden a third person in violation of Rule 4.4(a)[.]

Specifically, Defendant contends that "[t]here is no finding or fact in the record which shows that [he] accused [Investigator] Keith of being dishonest or lacking in integrity nor even that Keith was 'the investigating officer.' "

However, the Pasquotank County Attorney, Mike Cox, testified that Investigator Keith was indeed the officer investigating Davenport. Moreover, both the DHC's findings of fact and the video evidence of the encounter, which is in the record, establish that when Investigator Keith refused to release certain property to Defendant, Defendant referenced North Carolina's embezzlement statute and stated that it was a "class C felony by the sheriff" for him not to return to the proper owner property obtained under color of law.

Given the contents of the video and Defendant's admission that he put the video on the Internet to be "a smart aleck" rather than to further his representation of Davenport, we are satisfied that there is support in the record for the DHC's conclusion that Defendant "used means in representing a client that had no substantial purpose other than to embarrass or burden a third person in violation of Rule 4.4(a)."

**E. The Shackley Matter**

Defendant challenges Findings Nos. 95 and 97 in connection with the Shackley Matter, which state as follows:

> 95. Thereafter during the phone conversation, Defendant made a number of assertions about Hughes, including that Hughes had "hit on" Shackley's wife, who "had big boobs" and ran a prostitution website.
>
> . . . .
>
> 97. Immediately after the phone conversation, Hughes's acquaintance called Hughes and reported — among other things — that Defendant had referenced

> Hughes'[s] preference for bigbreasted women, and his interest in a "prostitute."

While Defendant contends that these findings are "misleading to a fraudulent degree," he fails to explain how this is so. Moreover, these findings are largely supported both by Sugg's testimony and the handwritten notes she made on the evening of the call.

## F. The Dolenti Matter

Defendant argues that the characterization in Finding No. 103 of the tone of the voicemail he left for Dolenti as "threatening, insulting, and intimidating" is unsupported because Detective Dolenti never testified at the disciplinary proceeding. However, based on our consideration of the voicemail — which is contained in the record on appeal as an audio recording — we believe that the evidence fully supported the DHC's finding that Defendant's tone was "threatening, insulting, and intimidating."

## G. The Deans Matter

We also find no merit in Defendant's challenge to Finding No. 110, which states that "Defendant's comments to Mrs. Deans about her father and stepmother and the Pitt County District Attorney were malicious and vindictive." Defendant's sole ground for challenging this finding is that neither the complaint nor the Order of Discipline included the actual words used in the voicemail. However, the voicemail was entered into evidence during the proceeding and is part of the record on appeal. The recording supports the DHC's determination that the comments made about Deans' father and stepmother and the district attorney were "malicious and vindictive." Nor are we persuaded by Defendant's argument that the DHC was required to quote verbatim the inappropriate comments he made.

## Conclusion

For the reasons stated above, we affirm the DHC's 13 November 2014 Order of Discipline.

AFFIRMED.

Chief Judge McGEE and Judge STEPHENS concur.

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

CHRISTOPHER SCOGGIN, Plaintiff
v.
FELICITAS B. SCOGGIN (now HAYES), Defendant

No. COA16-311

Filed 18 October 2016

**1. Child Custody and Support—custody modification—written judgment different from oral pronouncement**

The court did not err in a child custody modification case by entering an order that reached a conclusion that differed from its oral pronouncement. Entry of judgment based upon oral rendition of judgments is no longer allowed in civil matters. Judgments and orders are only entered when they are reduced to writing, signed by the judge, and filed with the clerk of court.

**2. Child Custody and Support—custody modification—primary physical custody—best interest of child**

The trial court did not err in a child custody modification case by awarding primary physical custody of the children to plaintiff father. Defendant mother failed to make a persuasive argument that it was not in the best interest of the children.

Appeal by defendant from order entered 8 September 2015 by Judge William B. Sutton, Jr. in Onslow County District Court. Heard in the Court of Appeals 21 September 2016.

*The Armstrong Law Firm, P.A., by Eason Armstrong Keeney and L. Lamar Armstrong, Jr., for plaintiff-appellee.*

*The Lea/Schultz Law Firm, P.C., by James W. Lea, III, for defendant-appellant.*

ZACHARY, Judge.

Felicitas Hayes, formerly Felicitas Scoggin, (defendant), appeals from an order that awarded Christopher Scoggin (plaintiff) primary custody of the parties' four children. On appeal, defendant argues that the trial court erred by entering a child custody order that conflicted with oral statements that the court made during the custody hearing, and that the trial court erred by finding that it was in the best interest of the children for plaintiff to have their primary physical custody. We conclude

that the trial court had the authority to enter an order that was different from the court's oral statements during the hearing, and that the trial court did not err by awarding primary physical custody of the children to plaintiff.

## I. Factual and Procedural Background

The parties were married on 12 May 2003, separated on 6 March 2013, divorced on 17 September 2013, and are the parents of four children, born in 2002, 2003, 2009, and 2010. At the time of their divorce, plaintiff and defendant were living in California and were both serving in the United States Marine Corps. On 10 May 2013, the parties executed a settlement agreement providing that plaintiff and defendant would share joint legal and physical custody of the children, with the children alternating residence with each parent every other week. In June 2013, plaintiff received military orders to report to Jacksonville, North Carolina, and on 21 June 2013, the parties modified their agreement in order to allow plaintiff to take the children with him to North Carolina. During the following year, the children spent periods of time with plaintiff, defendant, and with plaintiff's parents.

On 22 May 2014, plaintiff filed a motion for modification of child custody. Plaintiff alleged that there had been a substantial change of circumstances in that plaintiff and defendant had moved to North Carolina and Indiana, respectively, and therefore could no longer adhere to the existing custody arrangement pursuant to the terms of which the children spent alternate weeks with each parent. Plaintiff also alleged that defendant had failed to comply with the parties' agreement regarding child custody, and sought primary physical custody of the children. On 10 July 2014, defendant filed a response and countermotion for primary physical custody of the children, in which defendant alleged that plaintiff had failed to abide by the requirements of the parties' custody agreement.

On 10 June 2015, the trial court conducted a hearing on the parties' motions for custody of the children. The trial court heard conflicting testimony from each party regarding the other party's lack of cooperation with their custody agreement. At the close of the hearing, the trial judge spoke for several minutes about the considerations that the court deemed important to the custody determination, and stated that either party would be a fit and proper person to have custody of the children. After reviewing in detail the facts that tended to support each party's claim for primary physical custody of the children, the trial court stated that the parties would share joint legal custody of the children, with defendant having primary physical custody and plaintiff having

visitation rights. The court ended the hearing by stating that "[t]his is a really hard decision" and that "I just hope and pray that I've done the right thing." The trial court did not ask counsel for either party to draft an order reflecting the court's decision.

On 8 September 2015, the trial court entered an order for child custody. The court awarded primary physical custody of the children to plaintiff, with defendant to have "liberal visitation privileges," and made findings that supported the court's decision. The trial court's findings also addressed the fact that its decision was different from what the court had orally stated during the hearing:

> 15. That the Court immediately following the closing arguments of counsel stated that this was a very close call in deciding custody and then rendered an oral pronouncement awarding the defendant primary custody with secondary custody being granted to the plaintiff.
>
> 16. That the Court, following the trial after further deliberation and consideration, decided based on the facts contained in this order that it was in the best interests of the minor children to change and reverse the Custody pronouncement previously stated in Court and instead to direct custody as shown in this written order.
>
> 17. That the Court notified counsel for both parties that it wanted to meet with them on the Monday following the trial and met with both counsel in Chambers, telephonically or in person on the following Wednesday, at which time the new and amended Order was pronounced by the Court.
>
> 18. That no Order had been signed or rendered prior to the final pronouncement by the Court to the parties' counsel in Chambers and this Order is the only written signed Order rendered in this case.

Defendant appealed to this Court from the trial court's order for child custody.

## II. Standard of Review

The standard of review in child custody cases may be summarized as follows:

> The standard of review "when the trial court sits without a jury 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." "In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. . . . Unchallenged findings of fact are binding on appeal." "Whether [the trial court's] findings of fact support [its] conclusions of law is reviewable *de novo*." "If the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order."

*Burger v. Smith*, __ N.C. App. __, __, 776 S.E.2d 886, 888-89 (2015) (quoting *Barker v. Barker*, 228 N.C. App. 362, 364, 745 S.E.2d 910, 912 (2013), *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011), *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008), and *Respess v. Respess*, 232 N.C. App. 611, 614, 754 S.E.2d 691, 695 (2014) (internal quotation omitted)).

In addition, "[i]t is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody." *Pulliam v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998) (citation omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason[.]" *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citation omitted). The rationale for this rule has been explained as follows:

> "[The trial court] has the opportunity to see the parties in person and to hear the witnesses, and [its] decision ought not be upset on appeal absent a clear showing of abuse of discretion." "[The trial court] can detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges."

*Surles v. Surles*, 113 N.C. App. 32, 36-37, 437 S.E.2d 661, 663 (1993) (quoting *Falls v. Falls*, 52 N.C. App. 203, 209, 278 S.E.2d 546, 551 (1981), *superseded in part by statute on other grounds as noted in Smith v. Smith*, __ N.C. App. __, __, 786 S.E.2d 12, 22 (2016), and *Newsome v. Newsome*, 42 N.C. App. 416, 426, 256 S.E.2d 849, 855 (1979)).

## III. Trial Court's Authority to Enter an Order that Differs from the Decision Orally Pronounced by the Court at Trial

**[1]** At the end of the hearing on this matter, the trial court announced its intention to award primary physical custody of the children to defendant. Upon further consideration, the trial court reached a contrary

conclusion and determined that it would be in the best interest of the children if primary physical custody of the children was granted to plaintiff. Within a week of the hearing, the trial court informed the parties of this change and of its intention to award primary physical custody of the children to plaintiff. Approximately three months later, the trial court entered a written order placing the children in the primary physical custody of plaintiff. On appeal, defendant argues that the trial court lacked the authority to enter an order that did not correspond to its oral statements in court. Simply put, defendant asserts that, as a matter of law, the trial court may not change its mind between the end of a trial or hearing and entry of the order determining the issues raised in that proceeding. In the alternative, defendant contends that the trial court's power to enter an order that differs from its statements in court depends upon the existence of a substantial change of circumstances occurring between the date of the trial court's oral statements and the date that the court enters an order in a case. Defendant's arguments lacks merit.

In support of her position, defendant cites this Court's opinion in *Edwards v. Taylor*, 182 N.C. App. 722, 727, 643 S.E.2d 51, 54 (2007), in which this Court noted that a trial court has the authority to enter a written judgment that "conforms generally" with its oral pronouncement. Defendant contends that this statement necessarily implies its opposite - that the trial court *does not* have authority to enter a written judgment that *does not* generally conform with its statements in court.

Defendant does not cite any authority for this proposition. This issue was recently addressed in *In re O.D.S.*, __ N.C. App. __, 786 S.E.2d 410, *disc. review denied*, __ N.C. __, __ S.E.2d __ (2016 N.C. LEXIS 691), in which this Court expressly rejected the same argument made by defendant in the instant case. In *O.D.S.*, a petition was filed seeking to terminate the respondent's parental rights on grounds of neglect and dependency. At the end of the hearing on the petition, the trial court stated that it found the existence of neglect as a ground for termination, and did not discuss the issue of dependency. The trial court later entered a written order finding the existence of both neglect and dependency as grounds for termination. On appeal, the respondent argued that "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 [after the hearing.]" *O.D.S.*, __ N.C. App. at __, 786 S.E.2d at 412.

The opinion issued by this Court in *O.D.S.* carefully reviewed the evolution of our Rules of Civil Procedure regarding entry of judgment, noting that:

> 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[.]

*O.D.S.* at __, 786 S.E.2d at 413. "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)." *Id.* The Court observed that the statement in *Edwards* upon which the instant defendant relies was based upon language in *Morris v. Bailey*, 86 N.C. App. 378, 389, 358 S.E.2d 120, 127 (1987), and stated that "*Morris* [was] discussing a situation when an order was entered orally in open court, then subsequently reduced to writing and filed. . . . Judgments and orders in civil cases can no longer be entered in open court and, therefore, this portion of *Morris* is no longer relevant." *O.D.S.* at __, 786 S.E.2d at 417. In O.D.S., this Court held expressly that:

> 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 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.

*Id.* (emphasis added). We conclude that *O.D.S.* is controlling on the issue of the trial court's authority to enter an order that conflicts with its oral statements in court, that the court did not err by entering an order that reached a conclusion that differed from its oral pronouncement, and that defendant's arguments for a contrary result lack merit.

IV. Trial Court's Determination of the Best Interests of the Children

**[2]** Defendant also argues that the trial court erred by awarding primary physical custody of the children to plaintiff. Defendant concedes that there had been a substantial change of circumstances, but contends that there was "a mountain of evidence" that made it "appropriate for the trial court to enter an order granting primary physical custody to [defendant]." However, as discussed above, "[i]f the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order." *Respess*, 232 N.C. App. at 614-15, 754 S.E.2d at 694 (quoting *Mussa v. Palmer-Mussa*, 366 N.C. 185, 191, 731 S.E.2d 404, 409 (2012)). In this case defendant neither challenges the evidentiary support for the trial court's findings of fact nor argues that the court's findings do not support its conclusions of law. We conclude that defendant has failed to make a persuasive argument that the trial court erred by determining that it was in the best interest of the children for plaintiff to be granted their primary physical custody.

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

AFFIRMED

Judges ELMORE and ENOCHS concur.

---

STATE OF NORTH CAROLINA
v.
OTTIS McGILL, Defendant

No. COA16-296

Filed 18 October 2016

**1. Appeal and Error—notice of appeal not timely—petition for writ of certiorari granted**

Where defendant stated during his sentencing hearing that he did not want to appeal his convictions and where he did not file written notice of appeal within 14 days after his sentence was imposed in accordance with Rule of Appellate Procedure 4, defendant's notice of appeal was not timely and the Court of Appeals granted the State's motion to dismiss the appeal. The Court did, however, elect to grant defendant's petition for writ of certiorari in order to reach the merits of his appeal.

**2. Criminal Law—motion to withdraw guilty plea—denied**

On appeal from the trial court's order denying his motion to withdraw his guilty plea and his convictions for two counts of common law robbery and attaining habitual felon status, the Court of Appeals held that defendant failed to establish any of the factors from *State v. Meyer*, 330 N.C. 738 (1992) as weighing in his favor, and so the trial court did not err by denying his motion to withdraw his guilty plea.

**3. Criminal Law—guilty plea—factual basis**

On appeal from the trial court's order denying his motion to withdraw his guilty plea and his convictions for two counts of common law robbery and attaining habitual felon status, the Court of Appeals rejected defendant's argument that the trial court erred by accepting his guilty plea. There was sufficient factual basis to support his convictions.

Appeal by defendant from order and judgments entered 6 October 2015 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 7 September 2016.

*Attorney General Roy Cooper, by Special Deputy Attorney General Melody R. Hairston and Assistant Attorney General Teresa M. Postell, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.*

ENOCHS, Judge.

Ottis McGill ("Defendant") appeals from the trial court's order denying his motion to withdraw his guilty plea and his convictions for two counts of common law robbery and attaining the status of an habitual felon. On appeal, he contends that the trial court erred in denying his motion to withdraw his guilty plea and erred in finding that a sufficient factual basis existed for accepting his guilty plea. After careful review, we affirm the trial court's order denying Defendant's motion to withdraw his guilty plea and find no error.

Factual Background

On 21 August 2013, Defendant entered a Western Union in Wilmington, North Carolina and demanded money from Calethea Smith ("Smith") who was working at the front counter. Smith gave Defendant

approximately $6,403.00 and Defendant fled the premises. The entire exchange between Defendant and Smith was captured on audio and video surveillance.

Several days later on 6 September 2013, Defendant entered New Bridge Bank in Wilmington and demanded that James Taylor ("Taylor") and Lynn Creech ("Creech") — who were working as tellers at the bank at the time — give him all of the money in their cash drawers. Taylor and Creech complied and gave Defendant approximately $2,250.00. Defendant then fled.

Detectives David Timken ("Detective Timken") and K.J. Tully ("Detective Tully") with the Wilmington Police Department were assigned to investigate the robberies. They consulted with Jeff Martens with the U.S. Marshal Task Force, who informed them that he had been looking for Defendant whom he believed was in the Wilmington area and could have perpetrated the robberies. The detectives obtained a photograph of Defendant, and Detective Timken included Defendant's picture in photographic lineups he administered to Smith, Taylor, and Creech, all of whom positively identified Defendant as the man who had committed the robberies. Defendant was subsequently located and arrested.

On 23 June 2014, Defendant was indicted on two counts of common law robbery and obtaining the status of an habitual felon. Shortly thereafter, the State offered him a plea agreement that would have required him to plead guilty to these charges in exchange for concurrent — as opposed to consecutive — prison sentences.

Defendant declined this plea agreement and trial was scheduled for 30 March 2015. Prior to trial, Defendant moved to suppress the results of the photographic lineups. The trial court denied this motion.

On 30 March 2015, Defendant's case was called for trial before the Honorable Phyllis M. Gorham in New Hanover County Superior Court. Shortly after the jury was empaneled, however, Defendant informed the trial court that he did, in fact, want to enter into a plea deal with the State.

After a discussion with his attorney and the State during a recess in the proceedings, Defendant informed the trial court that he wished to plead guilty to the charges against him and proceeded to do so, signing a transcript of plea. In exchange for his guilty plea, Defendant received a prayer for judgment continued — seemingly so he could provide the State with information he possessed concerning an unrelated criminal case in exchange for a potentially more lenient prison sentence.

During the time period following the entry of his guilty plea and prior to sentencing, Defendant engaged in several interviews with the State concerning the unrelated criminal matter. The State ultimately determined not to use Defendant as a witness in that case, however, and declined to recommend a reduction of his sentence to the trial court.

On 9 April 2015, Defendant filed a *pro se* motion for appropriate relief wherein he requested to withdraw his guilty plea on the ground that his trial counsel had erroneously informed him that if he entered into the guilty plea his sentence would run concurrently with sentences he was set to receive in connection with unrelated criminal convictions in Robeson and Bladen Counties. He further alleged the existence of an undefined conspiracy amongst court appointed attorneys generally to trick their clients into taking unfavorable plea bargains, stating that "[t]his manner of dispensing with criminal cases has become so profound that many lawyers of the Public Defenders [sic] Office and Court appointed Attorney's [sic] have little to no actual trial experience. Rather, these lawyers trick, manipulate and threateningly coerce defendants to enter guilty plea [sic]. Such a conspiracy has taken place in this case."

On 20 April 2015, Defendant was appointed counsel to represent him regarding his motion for appropriate relief. On 24 August 2015, Defendant's newly appointed counsel filed an amended motion for appropriate relief stating that "Defendant asserts his intention to withdraw his plea, but under a Motion to Withdraw a Guilty Plea and not under a Motion for Appropriate Relief."

On 17 and 22 September 2015, an evidentiary hearing was held on Defendant's motion before the Honorable W. Allen Cobb, Jr. in New Hanover County Superior Court. On 6 October 2015, Judge Cobb entered an order concluding that based on the evidence presented, Defendant's motion to withdraw his guilty plea should be denied.

That same day, a sentencing hearing was held before Judge Cobb who sentenced Defendant to two consecutive sentences of 117 to 153 months imprisonment. At the conclusion of the hearing, Defendant's trial counsel attempted to enter oral notice of appeal on Defendant's behalf but was repeatedly interrupted by Defendant in the following exchange:

> THE COURT: Anything further, Mr. Moore?
>
> MR. MOORE: Judge, Mr. McGill would give notice -
>
> THE DEFENDANT: No, no, I would like to file a motion for appropriate relief.

> MR. MOORE: Okay. He would like to give --
>
> THE DEFENDANT: No, no, no, Your Honor, excuse me. I would like to file these motions for appropriate relief. I have already wrote the State Bar on Mr. Moore and that was a couple -- that was a while back, you know, and I already done wrote another letter, you know, I've been writing Mr. Moore constantly.
>
> THE COURT: Let the record reflect that the Court, based on the representations of his lawyer, enters notice of appeal to the North Carolina Court of Appeals. The Court appoints the Appellate Defender to perfect his appeal. There will be no appeal bond and if in fact the Court of Appeals affirms anything that may have been done here, then he is free to file any appropriate motion for appropriate relief.
>
> He'll be in your custody, Mr. Sheriff.
>
> THE DEFENDANT: Your Honor, I would like to file this motion for appropriate relief, sir. So you're denying me the right to file the motion?
>
> THE COURT: I don't have the jurisdiction over it. He's in your custody, Mr. Sheriff.
>
> THE DEFENDANT: Okay, is this being documented?
>
> Just deny me a right, my constitutional right to file this motion and you told them to put me down for appeal when I didn't want an appeal at this point in time. I ask you to take the motion.

On 30 March 2016 and 2 May 2016, Defendant filed petitions for writ of *certiorari* with this Court due to his failure to adequately provide notice of his intent to appeal pursuant to Rule 4 of the North Carolina Rules of Appellate Procedure. On 1 June 2016, the State filed a motion to dismiss Defendant's appeal.

## Analysis

### I. Appellate Jurisdiction

**[1]** As an initial matter, we must address the issue of whether appellate jurisdiction exists over Defendant's appeal.

> Rule 4 of the North Carolina Rules of Appellate Procedure provides that a defendant may appeal from an order or judgment in a criminal action by (1) "giving oral notice of appeal at trial," or (2) "filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]"

*State v. Holanek*, ___ N.C. App. ___, ___, 776 S.E.2d 225, 231 (quoting N.C.R. App. P. 4), *disc. review denied*, 368 N.C. 429, 778 S.E.2d 95 (2015), *cert. denied*, __ U.S. __, 136 S. Ct. 2493, ___ L. Ed. 2d ___ (2016). Where a defendant fails to adequately provide notice of appeal, his appeal is subject to dismissal. However, we may still address the merits of a defective appeal pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure where the defendant files a petition for writ of *certiorari*. *See* 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, Defendant stated during the sentencing hearing that he did not want to appeal his convictions. Nor did he file written notice of appeal within 14 days after his sentence was imposed in accordance with Rule 4. Consequently, we agree with the State that Defendant's notice of appeal is not timely and grant its motion to dismiss Defendant's appeal. *See State v. Cottrell*, 234 N.C. App. 736, 740, 760 S.E.2d 274, 277-78 (2014) (granting state's motion to dismiss defendant's appeal due to improper notice of appeal, but nevertheless reaching merits of appeal pursuant to Rule 21 upon defendant's filing of petition for writ of *certiorari*).

However, on 30 March 2016 and 2 May 2016, Defendant filed petitions for writ of *certiorari* with this Court seeking appellate review of (1) the denial of his motion to withdraw his guilty plea; and (2) whether a sufficient factual basis existed to allow the trial court to accept his guilty plea. The State has failed to cite any cases precluding our issuing of a writ of *certiorari* under the circumstances of this case, and we are not aware of any.

Indeed, to the contrary, N.C. Gen. Stat. § 15A-1444(e) (2015) states, in pertinent part, that

> [e]xcept as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and *except when a motion to withdraw a plea of guilty or no contest has been denied*, the defendant is not entitled to appellate review as a

> matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

(Emphasis added). Therefore, it is within our discretionary authority under the factual circumstances of the present case as to whether a writ of *certiorari* as to Defendant's petitions should issue. We elect to do so here and grant Defendant's petitions in order to reach the merits of his appeal.[1]

II. Motion to Withdraw Guilty Plea

**[2]** Defendant first argues on appeal that the trial court erred by denying his motion to withdraw his guilty plea. Specifically, he contends that his trial counsel provided incomplete or erroneous advice concerning habitual felon sentencing which resulted in his misunderstanding the consequences of his guilty plea and also conspired with the State for the purpose of "tricking" him into pleading guilty. We disagree.

> In reviewing a decision of the trial court to deny defendant's motion to withdraw, the appellate court does not apply an abuse of discretion standard, but instead makes an independent review of the record. That is, the appellate court must itself determine, considering the reasons given by the defendant and any prejudice to the State, if it would be fair and just to allow the motion to withdraw.

*State v. Marshburn*, 109 N.C. App. 105, 108, 425 S.E.2d 715, 718 (1993) (internal citation and quotation marks omitted).

Our Supreme Court has held that "a presentence motion to withdraw a plea of guilty should be allowed for any fair and just reason." *State v. Handy*, 326 N.C. 532, 539, 391 S.E.2d 159, 162 (1990); *State v. Meyer*, 330 N.C. 738, 742-43, 412 S.E.2d 339, 342 (1992) ("Although there is no absolute right to withdraw a guilty plea, withdrawal motions made prior to sentencing, and especially at a very early stage of the proceedings, should be granted with liberality." (internal quotation marks omitted)).

---

1. Moreover, though unnecessary to our determination on this jurisdictional issue, we note that despite the State's contentions to the contrary, we are inclined to agree with Defendant that a contextual reading of the transcript more accurately reflects that he was upset with the trial court's refusal to allow his motion for appropriate relief, as opposed to knowingly and intentionally abandoning any and all future right to appeal the denial of his motion to withdraw his guilty plea.

It is well settled that

> [t]he defendant has the burden of showing that his motion to withdraw is supported by some fair and just reason. Whether the reason is fair and just requires a consideration of a variety of factors. Factors which support a determination that the reason is fair and just include: [1] the defendant's assertion of legal innocence; [2] the weakness of the State's case; [3] a short length of time between the entry of the guilty plea and the motion to withdraw; [4] that the defendant did not have competent counsel at all times; [5] that the defendant did not understand the consequences of the guilty plea; and [6] that the plea was entered in haste, under coercion or at a time when the defendant was confused. If the defendant meets his burden, the court must then consider any substantial prejudice to the State caused by the withdrawal of the plea.

*Marshburn*, 109 N.C. App. at 108, 425 S.E.2d at 717-18 (internal citations and quotation marks omitted). These factors were first enumerated in *Meyer* and have subsequently been applied by our appellate courts in determining whether the denial of a defendant's motion to withdraw his guilty plea was proper. However, our Supreme Court in *Meyer* also emphasized that the State need not even demonstrate on appeal that a reversal of the trial court's denial of a defendant's motion to withdraw his guilty plea would cause it to suffer substantial prejudice "until the defendant has asserted a fair and just reason why he should be permitted to withdraw his guilty pleas." 330 N.C. at 744, 412 S.E.2d at 343. We address each of the *Meyer* factors in turn.

A. <u>Defendant's Assertion of Legal Innocence</u>

In the present case, Defendant's motion to withdraw his guilty plea was not based upon his assertion of legal innocence. Instead, as noted above, Defendant merely alleged that his attorney misled him by incorrectly explaining the law to him as it pertains to habitual felon sentencing and that she conspired with the State to "trick" him into accepting a guilty plea.

Significantly, our research has failed to produce a single case in which our appellate courts have found that the trial court erred in denying a defendant's motion to withdraw his guilty plea where the defendant did not, as a ground for his motion, assert his legal innocence. *See, e.g.*, *State v. Chery*, 203 N.C. App. 310, 691 S.E.2d 40 (2010); *State v. Watkins*, 195 N.C. App. 215, 672 S.E.2d 43 (2009); *State v. Villatoro*, 193 N.C. App.

65, 666 S.E.2d 838 (2008); *State v. Graham*, 122 N.C. App. 635, 471 S.E.2d 100 (1996).

Indeed, our Supreme Court expressly addressed the significant weight accorded this factor in *Meyer*:

> Perhaps most importantly, defendant in this case, unlike the defendant in *Handy*, has not asserted his "legal innocence." In *Handy*, the defendant pleaded guilty to felony murder based on the underlying charge of armed robbery. The following morning, the defendant told the trial judge that he had felt "under pressure" to plead guilty, and that after praying about it overnight and talking with his mother and attorneys, he believed he was not actually guilty of first-degree murder. In this case, defendant sought to withdraw his guilty pleas not because he believed he was innocent of the crimes charged, but because of the extensive media coverage generated by his escape.

330 N.C. at 744, 412 S.E.2d at 343 (internal citation omitted); *see also Chery*, 203 N.C. App. at 319, 691 S.E.2d at 47 (holding where defendant did not assert his innocence and "[o]ur independent review of the record in this case reveal[ed] that the reason for defendant's motion to withdraw his plea was that his co-defendant . . . was found not guilty of all charges" that "[t]he trial court properly denied defendant's motion to withdraw his plea"). Therefore, Defendant's failure to establish this factor as a reason why his motion to withdraw his guilty plea should have been granted weighs heavily against him under the *Meyer* analysis.

B. Strength of the State's Case

Defendant next argues that the State's case was weak and that, as a result, we should find the second *Meyer* factor weighs in his favor. Specifically, Defendant contends that the photographic lineup evidence forecast by the State was tainted pursuant to N.C. Gen. Stat. § 15A-284.52(a)(3) and (b)(1) (2015) given that Detective Timken — the officer who first interviewed the bank tellers — also administered the photographic lineups to them. Subsection (b)(1) of N.C. Gen. Stat. § 15A-284.52 provides that

> [l]ineups conducted by State, county, and other local law enforcement officers shall meet all of the following requirements:
>
> (1) A lineup shall be conducted by an independent administrator or by an alternative method as provided by subsection (c) of this section.

Subsection (a)(3) defines an independent administrator as "[a] lineup administrator who is not participating in the investigation of the criminal offense and is unaware of which person in the lineup is the suspect."

We first note that Defendant moved to suppress the photographic lineups evidence pursuant to the above statute during a pretrial motion. The motion was denied by the trial court and Defendant has not appealed the trial court's decision to allow the photographic lineups into evidence. Therefore, any argument as to its admissibility on appeal is deemed abandoned. *See State v. Brown*, 217 N.C. App. 566, 569, 720 S.E.2d 446, 449 (2011) ("If a defendant does not give specific notice of his intent to appeal a motion to suppress, then the defendant has waived the right to appellate review.").

Even assuming *arguendo*, however, that the photographic lineups had been suppressed and excluded from the State's evidence, we are still not convinced that the State's case would have been considered "weak." The State's forecast of evidence also included audio and video recordings of the Western Union robbery and additional witnesses present during the robberies who were prepared to testify that Defendant had been the perpetrator. As a result, we hold that Defendant has failed to sufficiently establish the second factor of the *Meyer* test.

C. Timeliness of Motion

Defendant next argues that his motion was filed within a short time after the entry of his guilty plea weighing in favor of a finding that he had had a "sudden change of heart" as to his guilty plea. We disagree.

> Our appellate courts have placed heavy reliance on the length of time between a defendant's entry of the guilty plea and motion to withdraw the plea. The reasoning behind this reliance was articulated in *Handy*:
>
> > A swift change of heart is itself strong indication that the plea was entered in haste and confusion; furthermore, withdrawal shortly after the event will rarely prejudice the Government's legitimate interests. By contrast, if the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force.

*Chery*, 203 N.C. App. at 317, 691 S.E.2d at 46 (internal citation and quotation marks omitted) (quoting *Handy*, 326 N.C. at 539, 391 S.E.2d at 163).

It is undisputed that Defendant waited nine days to file his *pro se* motion to withdraw his guilty plea during which time he provided details to the State concerning an unrelated case in an attempt to obtain a reduction in his sentence. It was only after the State ultimately declined to offer him a reduction that he resolved to withdraw his guilty plea.

This does not represent the type of sudden change of heart necessary to establish a fair and just reason that he should be allowed to withdraw his guilty plea. Nor does it reflect that Defendant was confused or entered his guilty plea in haste. Instead, it reflects a well thought out and calculated tactical decision on Defendant's part to attempt to obtain a more lenient sentence after his endeavor to receive a sentence reduction by cooperating with the State did not bear fruit. *See id.* at 318, 691 S.E.2d at 46 ("Although defendant's letter seeking to withdraw his plea was sent to Judge Jenkins only nine days after its entry, the facts of this case do not show that this desire was based upon a swift change of heart as contemplated by *Handy*. Defendant executed the plea transcript approximately three and a half months prior to the plea hearing. There is no indication in the record that during this time defendant wavered on this decision. It was only after [his co-defendant] was found not guilty of all charges did defendant decide that he wished to withdraw his plea." (internal quotation marks and brackets omitted)).

Moreover, the terms of the plea deal itself were unambiguous. This Court has held that " '[i]n analyzing plea agreements, contract principles will be wholly dispositive because neither side should be able . . . unilaterally to renege or seek modification simply because of uninduced mistake or change of mind.' " *State v. Robinson*, 177 N.C. App. 225, 231, 628 S.E.2d 252, 256 (2006) (quoting *State v. Lacey*, 175 N.C. App. 370, 372, 623 S.E.2d 351, 352-53 (2006)). Defendant cannot, therefore, unilaterally undo the plea agreement because he no longer deems it advantageous based upon collateral matters. *See Marshburn*, 109 N.C. App. at 109, 425 S.E.2d at 718 ("To be relevant, defendant must show that the misunderstanding related to the *direct consequences* of his plea, not a misunderstanding regarding the effect of the plea on some collateral matter.").

Consequently, Defendant's deliberate tactical decision to wait to withdraw his guilty plea until after the State determined not to offer him a reduction in his sentence due to his cooperation in the unrelated criminal matter belies his assertion that he had a sudden change of heart of the type we have held to weigh in a defendant's favor under *Meyer*. As a result, we find this factor also does not weigh in his favor.

D. Comprehension of Guilty Plea's Terms

Defendant next contends that he was operating under a misapprehension of the law as it related to habitual felon sentencing due to his trial counsel's incorrect legal advice which he claims was intentionally provided pursuant to a broad, yet undefined, conspiracy that court appointed attorneys in North Carolina have entered into with the State in order to trick criminal defendants into entering into unfavorable guilty pleas. We find this assertion in Defendant's motion to withdraw his guilty plea inherently absurd, but nevertheless proceed to address whether he did, in fact, comprehend the terms of his guilty plea.

Perhaps most fundamentally, we observe that despite Defendant's insistence that he was misled and misinformed in entering into his guilty plea, Defendant's trial counsel testified that prior to his doing so she fully informed him of the following:

> Q. Did you ever discuss with Mr. McGill the plea for 25 to 39 months to run consecutive if he gave information on the murder?
>
> A. I don't recall that. I know at some point there was discussion about getting his other charges in the other counties to run concurrent with this, and then I researched it and found out that you can't do that, because nothing can run concurrent, and other charges can't, if it's habitual, and relayed that to him.
>
> Q. So at some point, though, you told him that you thought they could run concurrent?
>
> A. Right. We talked about it and I researched it and told him that can't happen.

Defendant also unequivocally stated during a colloquy with the trial court the following prior to entering into his guilty plea:

> THE COURT: Have the charges been explained to you by your lawyer?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Do you understand the nature of the charges?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Have you and your lawyer discussed the possible defenses to the charges?

THE DEFENDANT: Yes, ma'am.

THE COURT: Are you satisfied with your lawyer's services?

THE DEFENDANT: Yes, ma'am.

. . . .

THE COURT: Do you understand that you are pleading guilty to two counts of common law robbery, each count being a Class C felony, each count punishable by up to 231 months, and habitual felon status for a total maximum punishment of 462 months in the custody of the North Carolina Department of Corrections?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you now personally plead guilty?

THE DEFENDANT: Yes, ma'am.

THE COURT: Are you in fact guilty?

THE DEFENDANT: Yes, ma'am.

THE COURT: Have you agreed to plead guilty as a part of a plea arrangement?

THE DEFENDANT: Yes, ma'am.

THE COURT: The prosecutor and your lawyer have informed the Court of the following terms and conditions of your plea. That you will plead guilty to the charges listed above and receive a prayer for judgment continued.

Is this correct as being your full plea arrangement?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you now personally accept this arrangement?

THE DEFENDANT: Yes, ma'am.

THE COURT: Other than the plea arrangement between you and the prosecutor, has anyone promised you anything or threatened you in any way to cause you to enter this plea against your wishes?

THE DEFENDANT: No, ma'am.

> THE COURT: Do you enter this plea of your own free will?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Do you have any questions about what has just been said to you?
>
> THE DEFENDANT: No, ma'am.

Based on the above-quoted exchanges, we are satisfied that the record plainly and unambiguously shows that Defendant was fully informed of the consequences of accepting his plea deal and did so both knowingly and voluntarily. Therefore, he has failed to establish this factor of the *Meyer* test as weighing in his favor as well.

E. Ineffective Assistance of Counsel

We next consider whether Defendant received effective assistance of counsel. As noted above, Defendant's trial counsel was fully prepared for trial and had fully advised and informed Defendant of the terms of the State's plea deal. She had also fully and accurately informed Defendant of the law as it pertained to habitual felon sentencing and the impossibility of receiving concurrent sentences with his convictions in other counties.

Moreover, it was *Defendant himself* who insisted on entering into a guilty plea with the State after he was dissatisfied with the jurors who were selected to try him. This was evidenced through his trial counsel's testimony at the hearing on his motion to withdraw his guilty plea:

> Q. Did you feel that Mr. McGill was under pressure when he accepted the plea?
>
> A. I'm sure everyone who takes a plea is under pressure, but that was his decision. We talked about it thoroughly. I did not want him to take a plea, and that's what he wanted to do.

Defendant's trial counsel was optimistic about trying the case and fully prepared to do so. Nevertheless, Defendant insisted on entering into a plea deal, most likely due to his belief that he could receive a sentence reduction if he cooperated with the State by providing information about the unrelated criminal matter. As a result, Defendant's trial counsel had no choice but to acquiesce to his desire to enter a plea of guilty. *See State v. Grooms*, 353 N.C. 50, 85, 540 S.E.2d 713, 735 (2000) (" '[W]hen counsel and a fully informed criminal defendant client reach

an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship.' " (quoting *State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991))). Consequently, Defendant cannot demonstrate based on the record that he received ineffective assistance of counsel.

F. Coercion, Haste, or Confusion

Based on our above analysis, we are satisfied that Defendant was fully informed of the consequences of his decision to plead guilty and did so knowingly and voluntarily free from any coercive influence or material misrepresentation. There is also no evidence whatsoever of Defendant being forced into entering into the guilty plea in haste. Moreover, there is no evidence in the record that Defendant received ineffective assistance of counsel. Consequently, we hold that Defendant has failed to establish this *Meyer* factor as weighing in his favor as well.

In summary, because Defendant has failed to establish any of the *Meyer* factors as weighing in his favor, we hold that the trial court did not err in denying his motion to withdraw his guilty plea. Defendant's arguments on this issue are overruled.

III. Trial Court's Acceptance of Guilty Plea

**[3]** Defendant's final argument on appeal is that the trial court erred in accepting his guilty plea because there was not a sufficient factual basis to support his convictions. We disagree.

> Pursuant to N.C. Gen. Stat. § 15A-1022(c) (2011), a trial court may not accept a plea of guilty without first determining that there is a factual basis for the plea. This determination may be based upon information including, but not limited to, a statement of the facts by the prosecutor, a written statement of the defendant, an examination of the presentence report, sworn testimony, which may include reliable hearsay, or a statement of facts by the defense counsel. The five sources listed in the statute are not exclusive, and therefore the trial judge may consider any information properly brought to his attention.

*State v. Collins*, 221 N.C. App. 604, 606, 727 S.E.2d 922, 924 (2012) (internal citation, quotation marks, and ellipses omitted).

Here, Defendant stipulated that a factual basis existed to support his guilty plea. He then stipulated to the State's summary of the factual basis which it proceeded to provide. After the State had entered its summary

into the record at trial, the trial court asked Defendant if there were any additions or corrections to the account that he would like to make. Defendant responded in the negative.

This procedure is sufficient to enable the trial court to find that a factual basis exists for Defendant's guilty plea. *See id.* at 607, 727 S.E.2d at 925 ("We conclude that the summary of the facts presented by the prosecutor and [d]efendant's stipulations are sufficient to establish a factual basis for [d]efendant's guilty plea."). Consequently, Defendant's argument on this issue is without merit.

## Conclusion

For the reasons stated above, we affirm the trial court's order denying Defendant's motion to withdraw his guilty plea and find no error.

AFFIRMED.

Judges ELMORE and ZACHARY concur.

---

STATE OF NORTH CAROLINA
v.
ERIC MOORE

No. COA16-377

Filed 18 October 2016

**Satellite-Based Monitoring—no evidence of prior offenses**

Where the trial court ordered that defendant be subject to satellite-based monitoring for the remainder of his natural life, the Court of Appeals vacated the order and remanded for an evidentiary hearing because no evidence was presented to the trial court that defendant had obtained the required prior sexual offense convictions to be classified as a recidivist, and defense counsel's statements and arguments did not stipulate to the prior convictions.

Appeal by defendant from order entered 27 October 2015 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 21 September 2016.

*Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.*

*William D. Spence for defendant-appellant.*

TYSON, Judge.

Eric Moore ("Defendant") appeals from the trial court's order, which imposed satellite-based monitoring ("SBM") for the remainder of Defendant's natural life. We reverse the SBM order, and remand.

## I. Background

On 27 October 2015, Defendant appeared before the trial court for a determination of whether he should be required to enroll in the SBM program pursuant to N.C. Gen. Stat. § 14-208.40(a). The prosecutor orally informed the court that Defendant had two relevant prior convictions. According to the prosecutor's statement, Defendant was convicted of second-degree sexual offense in 1989. In 2006, Defendant was convicted of attempted second-degree sexual offense. The trial court found Defendant is a recidivist, and ordered him to enroll in SBM for the remainder of his natural life.

## II. Issues

Defendant argues the trial court erred by: (1) finding that Defendant obtained two prior convictions and he is a recidivist, where the findings are not supported by competent evidence; and (2) finding both of Defendant's prior convictions are "reportable convictions" under N.C. Gen. Stat. § 208.6(4) where both offenses occurred prior to 1 December 2006.

## III. Standard of Review

"[W]e review the trial court's findings of fact [of an order on SBM] to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (citation and quotation marks omitted). This Court reviews the trial court's interpretation and application of the statutory procedure to impose SBM *de novo*. *State v. Davison*, 201 N.C. App. 354, 357, 689 S.E.2d 510, 513 (2009), *disc. review denied*, 364 N.C. 599, 703 S.E.2d 738 (2010).

## IV. Evidence of Defendant's Prior Convictions

Defendant argues the trial court erred by finding he is a recidivist, where the only evidence the State presented to the court was the oral statement of the prosecutor that Defendant had obtained reportable offenses in 1989 and 2006. We agree.

If an individual has been convicted of certain "reportable" offenses as defined by N.C. Gen. Stat. § 14-208.6(4) and no prior court has determined whether he is required to enroll in SBM, the Department of Adult Corrections is required to make an initial determination of whether the offender falls into one of the three alternate categories set forth in N.C. Gen. Stat. § 14-208.40(a). N.C. Gen. Stat. § 14-208.40B(a) (2015).

If the Department of Adult Corrections preliminarily determines the individual meets the criteria for SBM enrollment, prior notice is provided, and the matter is scheduled to be heard before the superior court. N.C. Gen. Stat. § 14-208.40B(b). "At the hearing, the court shall determine if the offender falls into one of the categories described in [N.C. Gen. Stat. §] 14-208.40(a). The court shall hold the hearing and make findings of fact pursuant to [N.C. Gen. Stat. §] 14-208.40A." N.C. Gen. Stat. § 14-208.40B(c) (2015).

N.C. Gen. Stat. § 14-208.40A sets forth the procedures the trial court must follow to determine whether the offender meets the requirements for the court to order SBM. The statute provides the "district attorney shall present to the court any *evidence*" that the offender falls into one of the enumerated categories. N.C. Gen. Stat. § 14-208.40A(a) (2015) (emphasis supplied). "After receipt of the *evidence* from the parties, the court shall determine whether the offender's conviction places the offender in one of the categories described in [N.C. Gen. Stat. §] 14-208.40(a)." N.C. Gen. Stat. § 14-208.40A(b) (emphasis supplied).

Neither the Judgment and Commitment for Defendant's 1989 conviction, nor his 2006 conviction, or any certified transcript of Defendant's prior offenses, were offered into evidence at the SBM hearing. These records were also not contained in the Pitt County Clerk of Court's file for this hearing. Defendant's "Computerized Criminal History," contained in the record on appeal, was also not offered into evidence.

The State concedes neither witness testimony nor documentary "evidence" was presented to establish Defendant's prior criminal history, and that statements made to the court by the prosecutor and defense counsel constituted the only basis to find Defendant had been convicted of two qualifying sexual offenses.

When the State called the case before the court, the following exchange occurred:

> PROSECUTOR: I have verified his complete criminal history and I've verified the GPS arrangement with him.

> THE COURT: All right. I'll be happy to hear you ma'am.
>
> PROSECUTOR: Your Honor, he qualified for lifetime satellite-based monitoring based on the fact that he is a recidivist. He has two convictions. One 2006 for sexual offense secondary attempted, and in 1989 he was convicted of sexual offense again again [sic], second degree and served a sentence . . . .
>
> THE COURT: So you're asking me to [impose] lifetime satellite based monitoring?
>
> PROSECUTOR: Yes, we are.

An unnamed probation officer was present "just to answer questions" and responded to the court that Defendant was a "high risk of rearrest, level 2, [and], the Static 99 was moderate to low risk with a score of 3." Defense counsel then addressed the court and argued the imposition of lifetime SBM on Defendant is unreasonable and unconstitutional, and also argued Defendant is not a recidivist as defined by the statute.

Defense counsel stated during his argument to the court:

> I would submit to the Court that it an (inaudible) factor and especially in this case where he got two convictions, one conviction that he required to register and the second conviction that didn't, would not had [sic] been based on offense date or conviction date (inaudible) prior to have satellite-based monitoring. He calls in (inaudible) released from prison on or after the effective date of the new law or portion of that.

Defense counsel later stated:

> [G]iven the totality of circumstances as it applies to, [Defendant] that it's unreasonable, sir. He has two (inaudible) some years apart, one that didn't even require him to register. He served a period of time . . . in prison for that, got out, and obviously, and Your Honor, can tell he was not required to register for the first one and I have a registration printout off . . . the website, doesn't require him to register for the first one. You can tell he didn't spend a tremendous amount of time in prison (inaudible). Then fast forward to 2006 . . . and he's convicted of attempted second degree rape in Lenoir County, serves several years in prison, gets out (inaudible), he's on what I presume is

> five years (inaudible). He's being supervised. They know where he is . . . . [W]hen you look at Static 99 he comes back as a (inaudible). This is not someone who comes in with Static 99 who is at high risk for re-offending. . . . Your Honor, . . . you can see in 1999 [sic] he was only 19 years old at the time. Very, very young.

The State argues Defendant's counsel identified and discussed the prior convictions at the SBM hearing in the course of his argument to the court. The State asserts defense counsel's argument was a stipulation and furnished the trial court with sufficient "evidence" to conclude Defendant is a recidivist as defined by the statute.

A. Required Proof

"An unilateral statement by the solicitor may not be considered as evidence." *State v. Powell*, 254 N.C. 231, 235, 118 S.E.2d 617, 620 (1961); *see also State v. Wilson*, 340 N.C. 720, 727, 459 S.E.2d 192, 196 (1995) (unsworn statement of the prosecutor insufficient to support an award of restitution). Something more than unsworn statements, which are unsupported by any documentation, is required as evidence under the statute to allow the trial court to impose lifetime SBM on an individual. The State concedes no "evidence" was presented by the prosecutor to the trial court of Defendant's prior convictions.

The Supreme Court of the United States has recently reviewed and discussed the search and seizure implications of North Carolina's SBM program on an individual's freedom under the Fourth Amendment. *Grady v. North Carolina*, __ U.S. __, __ 191 L. Ed. 2d 459, 461-62 (2015) ("The State's [SBM] 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.")

This Court has previously explained: "A stipulation to prior convictions has been held as sufficient for purposes of determining prior record level in felony sentencing, which is a criminal proceeding; we believe that if this proof is sufficient for sentencing purposes, it is also sufficient for purposes of SBM, which is a civil regulatory proceeding." *State v. Arrington*, 226 N.C. App. 311, 316, 741 S.E.2d 453, 457 (2013) (citing *State v. Powell*, 223 N.C. App. 77, 80, 732 S.E.2d 491, 494 (2012)). The question before us is whether defense counsel's statements to the court constituted a stipulation to Defendant's two prior convictions to allow the trial court to impose lifetime SBM.

B. Defendant's Stipulations

Our Supreme Court has held that a mere prior record level worksheet submitted to the trial court by the State, is insufficient, standing alone, to establish a defendant's prior record level. *State v. Alexander*, 359 N.C. 824, 827, 616 S.E.2d 914, 917 (2005). In numerous cases, this Court has addressed whether oral statements of defense counsel constituted a stipulation to the defendant's prior convictions, which supports the defendant's prior record level. An oral exchange between defense counsel and the court following presentation of the prior record level worksheet may constitute a stipulation the defendant obtained the prior convictions as shown on the worksheet. *Id.* at 828-29, 616 S.E.2d at 917.

" 'While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them. Silence, under some circumstances, may be deemed assent . . . .' " *Id.* (quoting *Powell*, 254 N.C. at 234, 118 S.E.2d at 619).

In *Alexander*, the Court held that defense counsel's statements to the court demonstrated he "was cognizant of the contents of the worksheet, but also that he had no objections to it." *Id.* at 830, 616 S.E.2d at 918. *See also State v. Eubanks*, 151 N.C. App. 499, 506, 565 S.E.2d 738, 743 (2002) ("[T]he statements made by the attorney representing defendant in the present case may reasonably be construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet."); *State v. Hanton*, 140 N.C. App. 679, 690, 540 S.E.2d 376, 383 (2000) (defense counsel's statement that there was no disagreement about the defendant's prior convictions "might reasonably be construed as an admission by defendant that he had been convicted of the other charges appearing on the prosecutor's work sheet").

In all the aforementioned cases, the State had presented the court with a prior record level worksheet, which contained the date and a description of the prior convictions, the classes of offense, the file numbers, and the county where each conviction was obtained. Here, the State produced and presented nothing but a bare oral assertion of Defendant's prior convictions.

A statement by defense counsel may constitute a stipulation where it is "definite and certain." *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010). The State is statutorily required to "present to the court any evidence" that the offender falls into one of the enumerated categories to impose SBM. N.C. Gen. Stat. § 14-208.40A(a). Here,

the State failed to present "evidence" or sufficient information to allow Defendant to enter a "definite and certain" stipulation. *Mumford*, 364 N.C. at 403, 699 S.E.2d at 917.

No evidence was presented to the trial court, upon which the court could have determined Defendant had obtained the required prior sexual offense convictions to be classified as a recidivist, and defense counsel's statements and arguments did not stipulate to the prior convictions. We vacate the trial court's lifetime SBM order, and remand for a proper evidentiary hearing, required by law. N.C. Gen. Stat. § 14-208.40A(a)-(b).

## V. Conclusion

The State presented no evidence to support the trial court's finding and conclusion Defendant had two prior sexual offense convictions, which classifies him as a recidivist, nor did Defendant enter a "definite and certain" stipulation on this issue. *Mumford*, 364 N.C. at 403, 699 S.E.2d at 917. The trial court's order is vacated and this matter is remanded. In light of our holding, we do not address Defendant's remaining argument.

VACATED AND REMANDED.

Judges CALABRIA and DAVIS concur.

---

STATE OF NORTH CAROLINA
v.
MARCUS ALAN PARSON

No. COA16-502

Filed 18 October 2016

**1. Search and Seizure—affidavit—good faith of affiant**

Where the trial court denied defendant's motion to suppress evidence seized during the execution of a search warrant, the Court of Appeals rejected his argument on appeal that the affidavit attached to the application for the search warrant contained material omissions and statements made in reckless disregard for the truth. The officer relied in good faith on information that other officers provided to her.

**2. Search and Seizure—affidavit—nexus between objects sought and place to be searched**

Where the trial court denied defendant's motion to suppress evidence seized during the execution of a search warrant, the Court of Appeals held that the affidavit attached to the application for the search warrant failed to include facts or circumstances to sufficiently connect the address to be searched with any illegal activity or Defendant's purported operation of a clandestine methamphetamine laboratory.

**3. Search and Seizure—good faith exception to exclusionary rule—not applicable to violations of N.C. Constitution**

Where the trial court denied defendant's motion to suppress evidence seized during the execution of a search warrant and the search warrant was invalid due to lack of probable cause, the good faith exception to the exclusionary rule did not apply for the violation to the N.C. Constitution.

Appeal by defendant from judgment entered 5 January 2016 by Judge Mark E. Powell in Haywood County Superior Court. Heard in the Court of Appeals 21 September 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Ashish K. Sharda, for the State.*

*Meghan Adelle Jones for defendant-appellant.*

TYSON, Judge.

Marcus Alan Parson ("Defendant") appeals from judgment entered after the trial court denied his motion to suppress. Defendant pled guilty to trafficking methamphetamine by manufacturing, possession of methamphetamine precursor chemicals, and manufacturing methamphetamine, subject to and preserving his right to appeal the trial court's denial of his motion to suppress. We reverse and remand.

## I. Factual Background

On 28 October 2014, Defendant was indicted for trafficking methamphetamine by manufacturing, trafficking methamphetamine by possession, manufacturing methamphetamine, felony conspiracy to manufacture methamphetamine, maintaining a vehicle/dwelling/place

for controlled substances, and possession of methamphetamine precursor chemicals.

Defendant filed a motion to suppress the evidence seized during execution of the search warrant. Defendant argued the affidavit attached to the application for the search warrant did not show probable cause linking the property located at 394 Low Gap Road to the evidence being sought. Defendant also argued the affiant acted in bad faith or reckless disregard of the facts when preparing and presenting the application and affidavit for the search warrant.

A. Affidavit

State Bureau of Investigation ("SBI") Special Agent Casey Drake prepared the application for the search warrant and the accompanying affidavit. This case was her first occasion to draft an application for a search warrant for a suspected methamphetamine laboratory. She consulted with other investigating officers to prepare the application and form her statement to show probable cause. Her statement in support of probable cause outlined the following facts.

On 10 September 2014 at 3:30 p.m., Defendant purchased "Decongestant 12hr Max" from a local Wal-Mart store. Fifteen minutes later, Julie Brown ("Brown") purchased the same product at the same location. Officers with several different law enforcement agencies established surveillance of Defendant and Brown.

The officers observed Defendant and Brown being picked up by a vehicle driven by James Stratton, the registered owner, with one other person. Defendant and his companions travelled to several stores, including an ABC Store, a dollar store, and a convenience store. Defendant purchased dog food at the dollar store, but the officers did not observe what was purchased at the convenience store.

The four briefly returned to Stratton's residence at 59 Fie Top Road and removed items from the trunk. Stratton and Defendant left again to purchase drinks at a gas station. Brown remained at 59 Fie Top Road.

The affidavit states that prior to returning to 59 Fie Top Road, "Stratton dropped [Defendant] at the burned [sic] residence and blue recreational vehicle/motor home located at 394 Low Gap Road, Maggie Valley, North Carolina." At 6:25 p.m. Haywood County Sheriff's Sergeant Mease and another detective established surveillance at 394 Low Gap Road. Approximately thirty minutes later, they observed Defendant exit the recreational vehicle and walk in the direction towards 59 Fie Top Road. Two other officers approached Defendant as he was walking and

informed him they had information that Defendant was "cooking methamphetamine." Defendant denied this allegation and refused to allow the officers to search the "burned" house or the recreational vehicle.

Around the same time the officers were questioning Defendant, Haywood County Sheriff's Detective McAbee and SBI Special Agent Drake conducted a "knock and talk" conversation with the occupants of 59 Fie Top Road, including Brown and Stratton. Brown acknowledged she had purchased pseudoephedrine earlier that day with Defendant, and that she buys pseudoephedrine to treat her allergies on a regular basis.

Brown stated Defendant had "went home," but she did not know what he was doing there. Although Brown did not know where the pseudoephedrine she had purchased was located, she "presumed" it was with Defendant inside the grocery bags. Brown also admitted that she had used methamphetamine in the past. Stratton allowed the officers to walk around the home located at 59 Fie Top Road with him, but refused to consent to a full search.

The affidavit also contains allegations asserting Defendant and Brown had previously purchased similar products at similar times in the past. Both Defendant and Brown had previously been "blocked" from purchasing pseudoephedrine in the past, indicating they had each exceeded the maximum amount of pseudoephedrine allowed to be purchased within a thirty-day time period. The affidavit further alleges that Brown, not Defendant, had previously purchased other items "consistent with the manufacturing of methamphetamine."

The affidavit briefly addresses the criminal histories of Defendant and Brown. It stated that Defendant and Brown each had previous charges for methamphetamine in Holmes County, Florida. Brown had been convicted and sentenced to three years of probation. Defendant had no previous convictions. Finally, the affiant makes a general statement regarding her knowledge and experience of clandestine methamphetamine laboratories.

Judge Letts signed the search warrant at 10:32 p.m. on 10 September 2014 and it was executed at 11:37 p.m. The search recovered components consistent with a clandestine methamphetamine laboratory.

B. Additional Testimony Presented at Suppression Hearing

The trial court received additional testimony during the suppression hearing from Sergeant Mease and SBI Special Agent Drake. The court acknowledged much of this testimony pertained to information

outside the "four-corners of the search warrant." As a result, the court only relied on this additional information "to the extent that it bears upon any issues of good or bad faith on the part of the applicant, Special Agent Drake."

Sergeant Mease testified he received an email alert from the National Precurser Log Exchange ("NPLEx"), which reported Defendant had legally purchased a pseudoephedrine product at a Wal-Mart pharmacy in Waynesville. Fifteen minutes later, another detective received a similar NPLEx email that Brown had legally purchased a similar pseudoephedrine product at the same location. Defendant and Brown's addresses were both listed as 394 Low Gap Road on these alerts. Sergeant Mease testified he was familiar with both Defendant and Brown and had been "investigating" them for approximately four years prior to 10 September 2014.

Law enforcement officers have access to the records of pseudoephedrine purchases collected by NPLEx and can create "watches" to alert them when a particular individual purchases a pseudoephedrine product. SBI Special Agent Tritt created the NPLEx alert for Defendant. To create the NPLEx email "watch," Special Agent Tritt entered Defendant's full name, approximate age, and address. Sergeant Mease testified the address that appears on the left side of the alerts is the address entered by the officer who created the "watch."

Both Sergeant Mease and Special Agent Drake were questioned at the suppression hearing regarding the assertion in the affidavit that Stratton had dropped Defendant off at 394 Low Gap Road. Sergeant Mease testified he only suspected Defendant had been dropped off at 394 Low Gap Road. Sergeant Mease based this suspicion on the return time of the vehicle and his knowledge that Defendant lived "up at that area." None of the officers followed Stratton's vehicle up the mountain or personally observed Stratton drop Defendant off at 394 Low Gap Road or anywhere else. Agent Drake confirmed other residences are located on Low Gap Road in addition to 394 Low Gap Road. Sergeant Mease conveyed much of the information used in the application for the search warrant to Special Agent Drake.

C. Trial Court's Order Denying Motion to Suppress

The trial court denied Defendant's motion to suppress and made several findings of fact to support its conclusion that the affidavit was based upon probable cause. The relevant portions of the trial court's order are as follows:

10c. That on September 10, 2014 at approximately 3 30 [sic] pm, Sergeant Meese received an email from NPLEx that Marcus Alan Parson of 394 Low Gap Road in Maggie Valley, North Carolina had purchased a pseudoephedrine product at Wal-Mart Pharmacy #1663 in Waynesville, North Carolina.

10d. That on September 10, 2014 at approximately 3 45 [sic] pm, Detective Jeff Mackey with the Maggie Valley Police Department received an email from NPLEx that Julie Anne Brown of 394 Low Gap Road in Maggie Valley, North Carolina had purchased a pseudoephedrine product at Wal-Mart Pharmacy #1663 in Waynesville, North Carolina. . . .

. . .

10g. . . . At 540 [sic] pm, Stratton's vehicle returned to 59 Fie Top Road but Defendant was no longer in the vehicle. *Neither Drake nor any other law enforcement officer saw Stratton drop off Defendant at the residence at 394 Low Gap Road.* (emphasis supplied)

10h. That at approximately 6:25 pm, Sergeant Mease and his partner, Detective Micah Phillips, set up surveillance upon the residence located at 394 Low Gap Road. Sergeant Mease knew that residence to be Defendant's. . . .

10i. . . . Brown admitted to Special Agent Drake that she purchased pseudoephedrine with Defendant that day and that she takes it on a regular basis for her allergies Brown said she did not know where the pseudoephedrine was but she presumed that it must be with the groceries with Defendant Brown stated that she and Defendant had gotten into an argument, and that he had gone home She did not know what he was doing. . . .

. . .

10n. That prior to Special Agent Drake's return to the residence with the search warrant, Defendant overheard that she was on the way over the officers' radio transmission. . . .

. . .

> 13d. That with respect to the issue of a nexus between the property to be searched, to wit. 394 Low Gap Road, and the fair probability that evidence related to the manufacture of methamphetamine would be located there, the Court finds that there is a sufficient connection. The search warrant states that Julie Brown told Special Agent Drake that Defendant had "went home", presumably with the pseudoephedrine products Defendant left the 59 Fie Top Road residence in Stratton's vehicle and went in the direction of the 394 Low Gap Road evidence [sic] The vehicle returned to 59 Fie Top Road and Defendant was no longer in the vehicle. Law enforcement believed that Defendant went to that residence and, in fact, set up surveillance and actually saw him there in a short timeframe. And finally, Defendant exercised control and dominion over the residence at 394 Low Gap Road by refusing law enforcement's request to conduct a warrantless search there. The Court finds, that in the totality of the circumstances, there is a sufficient connection between the property to be searched and a fair probability that evidence of a crime would be found there.
>
> Conclusions of Law
>
> . . .
>
> 3. That the search warrant application complied in all respects with N.C. Gen. Stat § 15A-244 Specifically, the Court finds that the affidavit of probable cause contained sufficient facts to support a fair probability that evidence of the crimes of manufacturing methamphetamine and possessing methamphetamine precursor chemicals would be found at the property located at 394 Low Gap Road in the Town of Maggie Valley, Haywood County, North Carolina. The information contained in the affidavit was timely and provided ample-connection between the property, Defendant's possessory interest of the same, and evidence of contraband and criminal activity.

After the trial court denied his motion to suppress, Defendant pled guilty to trafficking in methamphetamine by manufacturing, possession of precursor chemicals, and manufacturing methamphetamine, preserving his right to appeal the denial of his motion to suppress. The trial court sentenced Defendant to a minimum of 225 months and a maximum of 282 months of active imprisonment and imposed a $250,000.00

fine. Defendant appeals from the trial court's order denying his motion to suppress.

## II. Issues

Defendant argues the trial court erred in denying his motion to suppress because: (1) the affidavit contained material omissions and statements made in reckless disregard for the truth; and, (2) the affiant failed to implicate 394 Low Gap Road with the crime alleged and objects sought.

## III. Good Faith of Affiant

### A. Standard of Review

**[1]** "A factual showing sufficient to support probable cause requires a truthful showing of facts." *State v. Severn*, 130 N.C. App. 319, 322, 502 S.E.2d 882, 884 (1998) (citing *Franks v. Delaware*, 438 U.S. 154, 164-65, 57 L.Ed.2d 667, 678 (1978)). N.C. Gen. Stat. § 15A-978(a) provides:

> A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance. . . . For the purposes of this section, truthful testimony is testimony which reports in good faith the circumstances relied on to establish probable cause.

N.C. Gen. Stat. § 15A-978(a) (2015).

### B. Analysis

This Court has clarified that a "truthful showing of facts" does not require " 'that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily.' " *State v. Fernandez*, 346 N.C. 1, 13, 484 S.E.2d 350, 358 (1997) (quoting *Franks*, 438 U.S. at 165, 57 L.Ed.2d at 678)). This Court has also recognized an affiant officer's ability to rely upon information reported to her by other officers in the performance of their duties. *See State v. Horner*, 310 N.C. 274, 280, 311 S.E.2d 281, 286 (1984).

"Instead, truthful means that the information put forth is believed or appropriately accepted by the affiant as true." *Severn*, 130 N.C. App. at 322, 502 S.E.2d at 884 (internal quotation marks and citation omitted). This Court has further held that "every false statement in an affidavit

is not necessarily made in bad faith. An affiant may be unaware that a statement is false and therefore include the statement in the affidavit based on a good faith belief of its veracity." *Id.* at 323, 502 S.E.2d at 885.

Prior to a hearing to determine the veracity of the facts contained within the affidavit, a defendant "must make a preliminary showing that the affiant knowingly, or with reckless disregard for the truth, made a false statement in the affidavit." *Fernandez*, 346 N.C. at 14, 484 S.E.2d at 358. If a further evidentiary hearing is held, only the affiant's veracity is at issue at that hearing. *Id.* A defendant's claim asserting the affidavit contained false statements made knowingly or in reckless disregard for the truth, "is not established merely by evidence that contradicts assertions contained in the affidavit, or even that shows the affidavit contains false statements. Rather, the evidence must establish facts from which the finder of fact might conclude that *the affiant alleged the facts in bad faith*." *Id.* (emphasis supplied).

If a defendant establishes by a preponderance of the evidence that such statements were made in bad faith by the affiant in order to obtain a search warrant, the false information contained in the affidavit must be set aside. *Severn*, 130 N.C. App. at 322-23, 502 S.E.2d at 884 (citing *Franks*, 438 U.S. at 155-56, 57 L.Ed.2d at 672). Once these statements are omitted, " '[i]f the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.' " *Severn*, 130 N.C. App. at 323, 502 S.E.2d at 884 (quoting *Franks*, 438 U.S. at 156, 57 L.Ed.2d at 672).

In the affidavit at bar, SBI Special Agent Drake stated "Stratton dropped [Defendant] at the burned [sic] residence and blue recreational vehicle/motor home located at 394 Low Gap Road, Maggie Valley, North Carolina." Defendant argues this statement must be excised from the court's probable cause determination as it was made in reckless disregard for the truth. We disagree.

Although the trial court found that "[n]either Drake nor any other law enforcement officer saw Stratton drop off Defendant at the residence at 394 Low Gap Road," the trial court also recognized that it does not necessarily follow that Special Agent Drake made this statement in bad faith. *See Severn*, 130 N.C. App. at 323, 502 S.E.2d at 885. Special Agent Drake's testimony during the suppression hearing, used to determine whether she had acted in good faith, clarified she received much of the information to draft the application for the search warrant from other officers participating in the surveillance of Defendant.

Special Agent Drake testified she never observed Defendant being dropped off at 394 Low Gap Road, but had received this information via radio from another officer. Defendant presents no additional evidence and there is nothing in Special Agent Drake's testimony to indicate she made the contested statement in bad faith or that she did not believe this information to be true at the time she wrote the affidavit.

Defendant has the initial burden of showing that Special Agent Drake's statement was made in reckless disregard for the truth. *See Fernandez*, 346 N.C. at 14, 484 S.E.2d at 358. The trial court found and the record evidence indicates Special Agent Drake relied in good faith on the information the other officers provided to her. *See Horner*, 310 N.C. at 280, 311 S.E.2d at 286. Defendant failed to meet his burden to show otherwise. Defendant's arguments are overruled.

## IV. Trial Court's Order Denying the Motion to Suppress

### A. Standard of Review

**[2]** This Court's 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). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Chukwu*, 230 N.C. App. 553, 561, 749 S.E.2d 910, 916 (2013) (internal quotation marks and citation omitted). The trial court's "conclusions of law are reviewed *de novo* and are subject to a full review, under which this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *State v. Knudsen*, 229 N.C. App. 271, 281, 747 S.E.2d 641, 649, *disc. review denied*, 367 N.C. 258, 749 S.E.2d 865 (2013).

Our Supreme Court adopted the "totality of the circumstances" test for determining whether information properly before the magistrate provided a sufficient basis for finding probable cause to issue a search warrant. *State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 259 (1984). "When reviewing a magistrate's determination of probable cause, this Court must pay great deference and sustain the magistrate's determination if there existed a substantial basis for the magistrate to conclude that articles searched for were probably present." *State v. Hunt*, 150 N.C. App. 101, 105, 562 S.E.2d 597, 600 (2002) (citations omitted). This deference "is not without limitation. A reviewing court has the duty to ensure that a magistrate does not abdicate his or her duty by 'mere[ly]

ratif[ying] . . . the bare conclusions of [affiants].' " *State v. Benters*, 367 N.C. 660, 665, 766 S.E.2d 593, 598 (2014) (quoting *Illinois v. Gates*, 462 U.S 213, 239, 76 L.Ed.2d 527, 549).

B. Analysis

Article 1, Section 20 of the North Carolina Constitution provides that "[g]eneral warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, . . . are dangerous to liberty and shall not be granted." N.C. Const. art. I, sec. 20.

A search warrant application "must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched." N.C. Gen. Stat. § 15A-244(3) (2015). Probable cause for a search may exist where the stated facts in a search warrant "establish reasonable grounds to believe a search of the premises will reveal the items sought and that the items will aid in the apprehension or conviction of the offender." *Fernandez*, 346 N.C. at 13, 484 S.E.2d at 358 (citations omitted). Probable cause requires "more than bare suspicion." *Brinegar v. United States*, 338 U.S. 160, 175, 93 L. Ed. 1879 (1949).

The affidavit "must establish a nexus between the objects sought and the place to be searched." *State v. Oates*, 224 N.C. App. 634, 644, 736 S.E.2d 228, 235 (2012) (citation omitted), *appeal dismissed and disc. review denied*, 366 N.C. 585, 740 S.E.2d 473 (2013); *see State v. Allma*n, __ N.C. App. __, 781 S.E.2d 311 (2016). Generally, "this connection is made by showing that criminal activity actually occurred at the location to be searched or that the fruits of a crime that occurred elsewhere are observed at a certain place." *Oates*, 224 N.C. App. at 644, 736 S.E.2d at 235 (citation omitted). "Nowhere has either this Court or the United States Supreme Court approved an affidavit for the issuance of a search warrant that failed to implicate the premises to be searched." *Campbell*, 282 N.C. at 131-32, 191 S.E.2d at 757; *see e.g., United States v. Harris*, 403 U.S. 573, 29 L.Ed.2d 723 (1971); *Rugendorf v. United States*, 376 U.S. 528, 11 L.Ed.2d 887 (1964); *State v. Bullard*, 267 N.C. 599, 148 S.E.2d 565 (1966), *cert. denied*, 386 U.S. 917, 17 L.Ed.2d 789 (1967).

When making a determination of probable cause, the magistrate may not consider evidence outside the four corners of the affidavit, unless "the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official." N.C. Gen. Stat. § 15A-245(a) (2015). Our Supreme Court has stated

it was error for a reviewing court to "rely upon facts elicited at the [suppression] hearing that [go] beyond 'the four corners of [the] warrant.'" *Benters*, 367 N.C. at 673-74, 766 S.E.2d at 603.

i. Challenged Findings of Fact

Defendant argues Findings of Fact 10(c), 10(d), 10(h), and 10(n) were not supported by competent evidence. In Findings of Fact 10(c) and 10(d), Defendant challenges the trial court's finding that the NPLEx emails listed Defendant and Brown's address as 394 Low Gap Road. Defendant argues the testimony shows the officers, not NPLEx, enter the address information in the alerts and this information is not independently verified by NPLEx.

Whether the addresses listed in the NPLEx records were provided or independently verified by NPLEx or individually entered by the officers is unclear from our review of the record. However, these findings of fact clearly do not support the trial court's conclusion that the affidavit showed probable cause to search 394 Low Gap Road. Our case law does not allow the trial court to rely on facts outside "the four corners of the warrant" in making its probable cause determination. *See Benters*, 367 N.C. at 673-74, 766 S.E.2d at 603. The affidavit in this case only indicated both Defendant and Brown legally purchased decongestant from a Wal-Mart store on 10 September 2014. The affidavit never mentioned that this information was received via the NPLEx alerts or that any specific address was connected with these purchases.

In Finding of Fact 10(h), Defendant contends the statement that "Sergeant Mease knew that residence to be Defendant's" was critical in establishing a required nexus between the objects sought and the place to be searched, but that this finding was not supported by competent evidence. Evidence in the record is conflicting regarding Sergeant Mease's knowledge that the address 394 Low Gap Road was, in fact, Defendant's residence. Sergeant Mease testified at one point that the vehicle continued up the mountain "toward [Defendant's] residence at 394 Low Gap Road," but later testified he only suspected that Defendant was dropped off at 394 Low Gap Road, because he knew Defendant lived "up at that area." While a "reasonable mind" could have concluded Sergeant Mease knew this was Defendant's address, *see Chukwu*, 230 N.C. App. at 561, 749 S.E.2d at 916, this testimony could not be used by the trial court to find the affidavit established probable cause. *See Benters*, 367 N.C. at 674, 766 S.E.2d at 603. Nothing in Special Agent Drake's affidavit mentioned Sergeant Mease's knowledge of Defendant's address. *See id.*

We do not address Finding of Fact 10(n), as the State notes this finding relates to an action made by Defendant after the search warrant had been issued and is immaterial to this Court's determination of whether probable cause existed at the time to support the issuance of the search warrant. Ultimately, the findings of fact challenged by Defendant were based upon evidence outside the four corners of the warrant and could not be used by the trial court in making its probable cause determination. *See Benters*, 367 N.C. at 673-74, 766 S.E.2d at 603.

ii. Affidavit Does Not Support Probable Cause

Second, Defendant argues the application for the search warrant and attached affidavit failed to sufficiently connect the property located at 394 Low Gap Road to the objects sought. We agree.

This case is similar to *State v. Campbell*, wherein the Supreme Court observed that "[n]owhere in the affidavit is there any statement that narcotic drugs were ever possessed or sold in or about the dwelling to be searched" and that "[n]owhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling." *Campbell*, 282 N.C. at 131, 191 S.E.2d at 757. As such, the Court in *Campbell*, concluded that the facts alleged did not support an inference that narcotic drugs were illegally possessed on the premises. *Id. Campbell* controls where "the affidavit . . . included no information indicating that drugs had been possessed in or sold from the dwelling to be searched." *State v. McKinney*, 368 N.C. 161, 166, 775 S.E.2d 821, 826 (2015); *see Allman*, __ N.C. App. at __, 781 S.E.2d at 316-17 (affirming the trial court's order granting a defendant's motion to suppress where the affidavit contained no allegations evidencing the probable presence of drugs or observations of activity suggestive of drug trafficking or usage at the place to be searched).

Here, Sergeant Mease initiated surveillance based upon NPLEx email alerts he and another officer had received, which alerted them that both Defendant and Brown had legally purchased pseudoephedrine at the same location within 15 minutes of one another. The affidavit and probable cause determination heavily relied on the information gleaned from that surveillance. However, only four allegations in the affidavit specifically refer to 394 Low Gap Road and none of these allegations establish the required nexus between the objects sought, i.e., evidence of a clandestine methamphetamine laboratory, and the place to be searched, i.e., the property located at 394 Low Gap Road. *See Oates*, 224 N.C. App. at 644, 736 S.E.2d at 235.

The affidavit alleged "Stratton dropped [Defendant] at the burned [sic] residence and blue recreational vehicle/motor home located at 394 Low Gap Road, Maggie Valley, North Carolina." The affidavit then alleged that officers "established surveillance in the wooded area across the road from the 394 Low Gap Road residence . . . [and] saw [Defendant] exit the recreational vehicle and start walking down the road toward Fie Top Road," and that "SA M.L. Tritt and Detective Michael Whitley simultaneously approached [Defendant] walking away from 394 Low Gap Road." Finally, the affidavit alleged that "[d]uring the encounter with [Defendant] on the roadside near 394 Low Gap Road . . . SA Tritt asked for consent to search his house and recreational vehicle and [Defendant] refused consent."

These allegations were not sufficient for either the magistrate or the trial court to find probable cause existed to search the residence or recreational vehicle located at 394 Low Gap Road. While Special Agent Drake testified that the affidavit references 394 Low Gap Road as Defendant's residence, this simply is not the case. The affidavit states that during Special Agent Drake's conversation with Brown, Brown informed her that Defendant "went home." Nothing in the affidavit provides context to where Defendant's "home" was or that his "home" was 394 Low Gap Road, which is where the affidavit claims he was dropped off. However, even taken from the view of the magistrate, the simple fact that an individual is dropped off at a particular address does not establish probable cause to search that address in the absence of other allegations of criminal activity.

The fact that Defendant left the recreational vehicle and began walking away from property located at that address fails to provide reasonable suspicion of any criminal activity or evidence subject to seizure. Although the affidavit alleged that Brown presumed the purchased pseudoephedrine was with Defendant in the grocery bags, Brown admitted that she did not actually know where the pseudoephedrine was located. The affidavit never asserts the officers observed anything in Defendant's behavior or possession—such as drug paraphernalia, grocery bags, receipts for cold medicine purchases, or any precursors or contraband—which would cause them to suspect Defendant was operating a clandestine methamphetamine laboratory or conducting any other illegal activity on property located at 394 Low Gap Road.

While Defendant's refusal of the officer's request to search the property may tend to show Defendant's ownership or control over the property, an individual's refusal to provide consent to search a property does not establish probable cause to search. *See Florida v. Bostick*,

501 U.S. 429, 437, 115 L. Ed. 2d 389, 400 (1991) (A "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or a seizure."). None of these four allegations, standing alone or taken under the "totality of the circumstances," specifically allege a sufficient connection to the property located at 394 Low Gap Road to provide the issuing official with probable cause to issue a warrant to search the premises. *See Arrington*, 311 N.C. at 641, 319 S.E.2d at 259.

Further, even the additional allegations contained within the affidavit regarding Defendant and Brown's criminal histories and previous purchases of pseudoephedrine and other related products do not support any inference that illegal activity had occurred or was happening on the property at 394 Low Gap Road. *See Oates*, 224 N.C. App. at 644, 736 S.E.2d at 235.

The affidavit attached to the application for the search warrant failed to include "facts or circumstances" to sufficiently connect the property located at 394 Low Gap Road with any illegal activity or Defendant's purported operation of a clandestine methamphetamine laboratory. *See* N.C. Gen. Stat. § 15A-244(3). Prior precedents never validated an affidavit for the issuance of a search warrant that failed to implicate the premises to be searched with criminal activity. *Campbell*, 282 N.C. at 131-32, 191 S.E.2d at 757; *see* N.C. Const. art. I, sec. 20. We cannot do so here.

V. Good Faith Exception to the Exclusionary Rule

**[3]** Under the "good faith" exception to exclusionary rule, a search warrant ultimately determined to be invalid due to a lack of probable cause will be upheld when "officers acted in objectively reasonable reliance on a warrant issued by a detached and neutral [judge][.]" *State v. Witherspoon*, 110 N.C. App. 413, 421, 429 S.E.2d 783, 788 (1993) (citation and quotation marks omitted). The good faith exception to the exclusionary rule applies where evidence is suppressed pursuant to a provision of the federal Constitution. *State v. McHone*, 158 N.C. App. 117, 122-23, 580 S.E.2d 80, 84 (2003) (citing *United States v. Leon*, 468 U.S. 897, 82 L.Ed.2d 677, reh'g denied, 468 U.S. 1250, 82 L.Ed.2d 942 (1984); *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986)).

Our Supreme Court has held that no good faith exception exists to the exclusionary rule for violations of the North Carolina Constitution, stating:

> North Carolina, however, justifies its exclusionary rule not only on deterrence but upon the preservation of the

> integrity of the judicial branch of government and its tradition based upon fifty years' experience in following the expressed public policy of the state. Under the judicial integrity theory, our constitution demands the exclusion of illegally seized evidence. The courts cannot condone or participate in the protection of those who violate the constitutional rights of others.

*State v. Carter*, 322 N.C. 709, 723, 370 S.E.2d 553, 561 (1988). The Supreme Court has also declined to extend this "good faith" exception to cases involving violations of N.C. Gen. Stat. § 15A. *McHone*, 158 N.C. App. at 123, 580 S.E.2d at 84; *see State v. Hyleman*, 324 N.C. 506, 510-11, 379 S.E.2d 830, 833 (1989) (holding that failure of the affidavit to comply with N.C. Gen. Stat. §15A-244(3) was a substantial violation and the good faith exception to the exclusionary rule did not apply).

Here, the affidavit failed to properly set forth "facts and circumstances establishing probable cause" as required under N.C. Gen. Stat. §15A-244(3) and the North Carolina Constitution. As noted in *Hyleman*, "[t]he exclusion of illegally seized evidence is the greatest deterrent to similar violations in the future." *Hyleman*, 324 N.C. at 510, 379 S.E.2d at 833 (citation omitted). The good faith exception to the exclusionary rule does not apply in this case. *See id.*

## VI. Conclusion

Special Agent Drake did not act in bad faith when she submitted her application for a search warrant and attached the affidavit for determination of probable cause. The affidavit failed to establish the required nexus between the objects sought, evidence of a clandestine methamphetamine laboratory, and the place to be searched, the property located at 394 Low Gap Road. *See Oates*, 224 N.C. App. at 644, 736 S.E.2d at 235. The issuing judge erred in his determination that the application and affidavit provided probable cause to issue the search warrant.

The trial court should have granted Defendant's motion to suppress. The judgment Defendant appeals from is reversed. This cause is remanded to the trial court for entry of an order allowing Defendant's motion to suppress. *It is so ordered.*

REVERSED AND REMANDED.

Judges CALABRIA and DAVIS concur.

STATE OF NORTH CAROLINA, Plaintiff
v.
DRAYTON LAMAR THOMPSON, Defendant

No. COA16-94

Filed 18 October 2016

**1. Evidence—deceased victims—statements to medical personnel—corroborated by statements to police officer**

Where defendant was convicted in 2015 of sexual offenses committed in 1991 against three women—two of whom (Alice and Patricia) had died of natural causes in the intervening time—the trial court did not err by admitting the statements made by Alice and Patricia to a police officer to corroborate the women's statements to medical personnel who treated them at the time of the assaults. The statements were admissible for corroboration purposes, and there was sufficient evidence to support submission of the various charges to the jury based on the witnesses' statements to medical personnel and on the overwhelming statistical likelihood that defendant's DNA matched that found on the victims.

**2. Criminal Law—motion seeking funds to hire expert to retest DNA samples**

Where defendant was convicted in 2015 of sexual offenses committed in 1991 against three women, the trial court did not abuse its discretion by denying defendant's motion seeking funds with which to hire an expert to retest the DNA samples.

**3. Criminal Law—jury instructions—acting alone or in together with another**

Where defendant was convicted in 2015 of sexual offenses committed in 1991 against three women, the trial court did not commit plain error by instructing the jury in such a manner that defendant could be found guilty either by acting by himself or acting together with another.

Appeal by defendant from judgments entered 11 September 2015 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 August 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.*

*Massengale & Ozer, by Marilyn G. Ozer, for defendant-appellant.*

ZACHARY, Judge.

Defendant appeals from judgments entered upon the following convictions: (1) two counts of first-degree rape, one count of first-degree sex offense, and one count of second-degree kidnapping committed against "Alice"; (2) two counts of first-degree rape and one count of first-degree kidnapping committed against "Patricia"; and (3) two counts of first-degree sex offense, one count of first-degree kidnapping, one count of first-degree rape, and one count of conspiracy to commit first-degree kidnapping and first-degree rape, committed against "Louise".[1] The offenses were committed by two men in 1991. Defendant was charged in 2012, after forensic testing revealed a match between defendant's DNA profile and DNA evidence collected at the time of the offenses. On appeal, defendant argues that the trial court erred by admitting the statements given by Patricia and Alice to a law enforcement officer and by denying his request for funds with which to retain an expert in order to retest the DNA samples. Defendant also asserts that the trial court committed plain error in its instructions to the jury. We conclude that the trial court did not err by admitting the witnesses' statements or by denying defendant's motion seeking funds with which to retain an expert to retest the DNA evidence, and did not commit error or plain error in its instructions to the jury.

## I. Factual and Procedural Background

In 1991, Alice, Patricia, and Louise were kidnapped and subjected to sexual assault in separate incidents. On 17 December 2012, defendant was indicted for the following offenses:

> 1. Three counts of first-degree rape, two counts of first-degree sex offense, and one count of first-degree kidnapping, committed against Patricia.
>
> 2. Three counts of first-degree rape, one count of first-degree sex offense, and one count of second-degree kidnapping, committed against Alice.
>
> 3. One count of first-degree rape, three counts of first-degree sex offense, one count of first-degree kidnapping,

1. To preserve the privacy of the victims, we will use pseudonyms in this opinion.

and one count of conspiracy to commit first-degree kidnapping and first-degree rape, committed against Louise.

Defendant was tried before a jury beginning on 26 August 2015. Prior to trial, three different attorneys were appointed to represent defendant. The first two were removed at defendant's request. When defendant expressed dissatisfaction with his third appointed counsel, the trial court ruled that defendant had forfeited his right to be represented by appointed counsel. Defendant represented himself at trial, with his third appointed attorney serving as standby counsel. Defendant does not raise any appellate issue regarding his *pro se* representation.

At the outset of trial, the State sought to join for trial the charges pertaining to Alice, Patricia, and Louise. Although defendant opposed joinder of the charges, he has not challenged the joinder on appeal. The trial took place twenty-four years after the offenses were committed, during which time Alice and Patricia had died of natural causes. Louise testified at trial about the offenses committed against her. The evidence establishing the commission of criminal offenses against Alice and Patricia came from statements they made to medical personnel at the time of the assaults. The trial court also admitted as corroborative evidence the statements made by Alice and Patricia to Charlotte Police Major LaFreda Lester.

The trial evidence established factual similarities among the cases. All of the charged offenses occurred in Charlotte between May and August, 1991. In each case, an African-American woman in her twenties was walking in Charlotte late at night, and was kidnapped by two African-American men driving a car. In each instance, after the victim was in the car she was blindfolded, attacked, and threatened. The two men drove each of the women to a house in an unknown location, where both men sexually assaulted the victim. All three women were subjected to both forced vaginal intercourse and forced oral sex. Following the assaults, the men allowed the victims to get dressed, drove them to a different location, and let them out of the car. In each case, the victim did not recognize either of the attackers, and no suspects were arrested in 1991. Forensic examination later revealed a statistically significant match between defendant's DNA profile and DNA evidence collected from each victim in 1991. Finally, in each case, the victim gave statements to medical personnel describing the kidnapping and sexual assaults. Additional factual details about the offenses are discussed below, as relevant to the issues raised on appeal.

Prior to submitting the charges to the jury, the prosecutor dismissed one charge of first-degree rape committed against Alice, and the trial court dismissed one charge of first-degree rape and one charge of first-degree sex offense committed against Patricia, as well as one charge of first-degree sex offense committed against Louise. On 11 September 2015, the jury found defendant guilty of: (1) one count of first-degree kidnapping and two counts of first-degree rape of Patricia; (2) one count of first-degree sex offense, one count of second-degree kidnapping, and two counts of first-degree rape of Alice; and (3) one count of conspiracy to commit first-degree kidnapping and first-degree rape, two counts of first-degree sex offense, one count of first-degree kidnapping, and one count of first-degree rape of Louise. The jury found defendant not guilty of one count of first-degree sex offense of Patricia.

Because the offenses were committed in 1991, defendant was sentenced under the Fair Sentencing Act. The trial court imposed three consecutive sentences of life imprisonment: a consolidated sentence in cases Nos. 12 CRS 55384-85 and 12 CRS 55391; a second consolidated sentence of life imprisonment in cases Nos. 12 CRS 55383, 12 CRS 253233, 12 CRS 25324, 12 CRS 253235, and 12 CRS 253237; and a third consolidated life sentence in cases Nos. 12 CRS 55387-89, and 12 CRS 55394. The court also ordered defendant to register as a sex offender for the remainder of his life and to enroll in satellite-based monitoring if he were released from prison. Defendant gave notice of appeal in open court.

## II. Admission of Statements by Deceased Witnesses to Major Lester

**[1]** Defendant argues first that the trial court erred by admitting the statements made by Alice and Patricia to Major Lester to corroborate the women's statements to medical personnel. Defendant contends that the statements were "not corroborative as they were used by the State and the court for the truth of the matter asserted in the statements" and that the admission of these statements "violated [defendant's] constitutional guarantee to confrontation" under the North Carolina and United States Constitutions. Defendant does not challenge the admission of Louise's statement to Major Lester, as Louise was available for cross-examination at trial. Therefore, this issue pertains only to defendant's convictions for offenses committed against Alice and Patricia. We conclude that the trial court did not err by admitting the witnesses' statements as corroboration of their statements to medical personnel.

### A. Preservation of Constitutional Issue

We first address the State's argument that defendant failed to preserve for appellate review his argument that admission of these statements violated his rights under the Sixth Amendment to the United States Constitution. When Major Lester was asked to read Patricia's statement, defendant objected to the introduction of Patricia's statement and asked to be heard outside the presence of the jury. The trial court overruled defendant's objection and denied his request to be heard. After Major Lester read the statement, defendant addressed the trial court outside of the jury's presence and moved for a mistrial on the grounds that he was unable to cross-examine Patricia. Defendant read aloud from the discussion in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), concerning the constitutional right to cross-examine the declarant of a statement introduced for substantive purposes. The trial court ruled that Patricia's statement to Major Lester was admissible to corroborate her statements to medical personnel and denied defendant's motions for a mistrial and to exclude the statement. Defendant also objected to the introduction of Alice's statement to Major Lester. We conclude that defendant properly preserved this issue for our review.

### B. Standard of Review

"When a defendant objects to the admission of evidence, we consider, whether the evidence was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence." *State v. Blackwel*l, 207 N.C. App. 255, 257, 699 S.E.2d 474, 475 (2010). "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), *disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010).

### C. Discussion

Defendant argues that the trial court erred by admitting the statements of Alice and Patricia to Major Lester, on the grounds that the statements were not admitted as corroborative evidence. Defendant contends that the admission of these statements violated his right to confront the witnesses against him as guaranteed by the Sixth Amendment to the United States Constitution. We disagree.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2015). "As a general rule, hearsay is inadmissible at trial." *State v. Morgan*, 359 N.C. 131, 154, 604 S.E.2d 886, 900 (2004). In *Crawford v. Washington*,

541 U.S. 36, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that the admission of an out-of-court testimonial statement made by an unavailable declarant who did not testify at trial and who was not previously available for cross-examination by the defendant is barred by the Confrontation Clause of the Sixth Amendment. However:

> "[If] evidence is admitted for a purpose other than the truth of the matter asserted," such as when evidence is admitted solely for purposes of corroboration, then "the protection afforded by the Confrontation Clause against testimonial statements is not at issue." . . . According to our Supreme Court, North Carolina case law establishes "the rule that prior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness' in-court testimony."

*State v. Ross*, 216 N.C. App. 337, 346-47, 720 S.E.2d 403, 409 (2011) (quoting *State v. Walker*, 170 N.C. App. 632, 635, 613 S.E.2d 330, 333 (2005), and *State v. Williamson*, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992)), *disc. rev. denied*, 366 N.C. 400, 735 S.E.2d 174 (2012). "Prior statements admitted for corroborative purposes are not to be received as substantive evidence." *State v. Harrison*, 328 N.C. 678, 681, 403 S.E.2d 301, 303-04 (1991) (citation omitted). "[A]dmission of nonhearsay raises no Confrontation Clause concerns.' *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002).

The trial court admitted statements by Alice and Patricia to the health care personnel who treated them at the time of the assaults, under the exception to the hearsay rule contained in Rule 803(4), for statements given for purposes of medical diagnosis or treatment. Defendant does not challenge the admission of these statements, and the witnesses' statements to Major Lester were admitted to corroborate their statements to medical personnel. We conclude that the challenged statements meet the requirements for admission as corroborative evidence.

Patricia was treated by Nurse Janet Gillespie, who testified at trial. Nurse Gillespie testified that Patricia told her that at around 2:30 a.m. on 7 May 1991, she was walking near a location in Charlotte known as The Plaza, when she accepted a ride with two African-American men whom Patricia did not know. When Patricia got into the front seat of the car, the man in the back seat put a towel over her head and an iron bar against her neck. The men drove to a house where they led Patricia inside with the towel over her head. The men forced her to engage in

vaginal intercourse and fellatio. Patricia was also treated by Dr. David Maxwell Gray, who testified as an expert in emergency medicine. Dr. Gray's testimony included the following summary of Patricia's statements to him:

> Dr. Gray: She says she was walking home and accepted a ride in a car that had two men in it. One moved to the backseat when she got in the front seat, and she was attacked from behind with a crowbar across her neck. That part I remember. And she had a towel put over her head and was driven -- actually, I'll read it word for word, I'm sorry.
>
> . . .
>
> Dr. Gray: Was attacked from behind with a crowbar in front of neck. Attackers put a towel over patient's head and took patient to house. . . . One placed a penis in her mouth and then had vaginal intercourse, and the second attacker repeated the same things as the first attacker but with the addition of attempting anal intercourse.

Major Lester testified that on 7 May 1991, she took a statement from Patricia, who told Major Lester that she had accepted a ride with two unknown African-American men. After Patricia got into the car, the men put a towel over her head and choked her with an iron bar. The men took Patricia to a house where they forced her to engage in vaginal intercourse and fellatio. Patricia's statement to Major Lester included additional details about the incident, but was substantially similar to her statements to medical personnel.

Alice was treated by Nurse Gillespie and Dr. Russell Howard Greenfield. On 19 July 1991, Alice told Nurse Gillespie that she had been sexually assaulted by two unknown African-American men a few hours earlier. The men had threatened her with a knife, choked and blindfolded her, and subjected her to forcible vaginal intercourse, anal intercourse, and fellatio. Dr. Greenfield testified as an expert in emergency medicine. Alice told Dr. Greenfield that she and her sister had voluntarily gotten into a car with two men. When Alice's sister got out of the car at a convenience store, the passenger in the car covered Alice's head, choked her, and threatened to stab her. The men took Alice to a house and raped her. Dr. Greenfield testified that the results of his pelvic examination of Alice were consistent with her having been sexually assaulted by two men.

Major Lester took a statement from Alice on 16 July 1991. Alice told Major Lester that earlier that night she and her sister got into a car with

two unknown African-American men. After a short drive, Alice's sister got out of the car. A man in the car then covered Alice's head, choked her, hit her with his fist, and threatened to stab her. They drove her to a house where both men forced her to engage in vaginal intercourse. One man also attempted to have anal intercourse and placed his penis in her mouth. We conclude that Alice's statement to Major Lester was substantially similar to her statements to health care personnel.

Based upon our review of the transcript of this case, we conclude that the statements by Patricia and Alice to Major Lester were properly admitted to corroborate their statements to the medical personnel who treated them shortly after each witness was sexually assaulted. In reaching this conclusion, we have carefully considered defendant's arguments for a contrary result.

On appeal, defendant does not argue that the statements of Patricia and Alice to Major Lester were inadmissible as corroborative evidence because the statements contradicted, rather than corroborated, the witnesses' statements to medical personnel. Defendant contends, however, that the trial court "must not consider the corroborative nature of the statement when determining whether it qualifies as an exception to hearsay." Defendant cites *State v. Champion*, 171 N.C. App. 716, 722, 615 S.E.2d 366, 371 (2005), in support of this position. In *Champion*, however, the issue was whether a statement qualified under the residual hearsay exception in N.C. Gen. Stat. § 8C-1, Rule 804(b)(5). *Champion* does not hold that the trial court should not consider the corroborative nature of a statement in determining whether it falls within the exception for *corroborative* statements.

Defendant's primary argument is that the statements contained additional information not included in the witnesses' statements to health care workers and that the statements were admitted as substantive evidence for the truth of these additional details, rather than as corroborative evidence. However, the mere fact that a corroborative statement contains additional facts not included in the statement that is being corroborated does not render the corroborative statement inadmissible:

> "In order to be admissible as corroborative evidence, a witness' prior consistent statements merely must tend to add weight or credibility to the witness' testimony. Further, it is well established that such corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates." Moreover, "if the previous statements

> are generally consistent with the witness' testimony, slight variations will not render the statements inadmissible, but such variations . . . affect [only] the credibility of the statement."

*State v. Walters*, 357 N.C. 68, 88-89, 588 S.E.2d 344, 356-57 (2003) (quoting *State v. Farmer*, 333 N.C. 172, 192, 424 S.E.2d 120, 131 (1993), and *State v. Martin*, 309 N.C. 465, 476, 308 S.E.2d 277, 284 (1983)).

Defendant contends that the statements to Nurse Gillespie and the treating physicians were "bare-bones," but that Patricia's statement to Major Lester "provided the State with evidence, not available from the medical records, which was necessary to convict [defendant] of many counts." Defendant does not identify any specific charge for which the evidence was insufficient without information in the statements to Major Lester, and our review of the evidence establishes that the statements of Patricia and Alice to health care personnel, in combination with the DNA evidence discussed below, provided sufficient evidentiary support for all of the charges that were submitted to the jury.

When Patricia spoke with the health care professionals who treated her shortly after she was assaulted, she described being kidnapped and subjected to forcible sexual intercourse and forcible oral sex with two men. The charges pertaining to Patricia that were submitted to the jury were two charges of first-degree rape, one charge of first-degree sex offense, and one charge of first-degree kidnapping. These charges were adequately supported by Patricia's statements to medical personnel. The charges submitted to the jury in which Alice was the alleged victim were two charges of first-degree rape, one charge of first-degree sex offense, and one charge of second-degree kidnapping. These charges were supported by the statements that Alice gave to medical personnel. Defendant does not specify which convictions required evidence contained only in the witnesses' statements to Major Lester and does not argue that the State's evidence was insufficient as to any element of any charged offense in the absence of Patricia's or Alice's statement to Major Lester. We conclude that this argument lacks merit.

Defendant also argues that the "State's dependence on the statements for substantive evidence is shown in the State's . . . closing argument." Defendant cites no authority, and we know of none, holding that the State's reference in a closing argument to arguably inadmissible evidence establishes that the State had offered insufficient evidence to convict a defendant without the challenged evidence.

Defendant additionally asserts that the trial court "used the police statements in charging the jury," citing a quote from the transcript in which defendant contends that the trial court was discussing information that "was only available in [Patricia's] statement to the police." However, the quote identified by defendant came not from the trial court's charge to the jury, but from a discussion between the trial court, the prosecutor, and defendant concerning which charges could properly be submitted to the jury. In fact, the prosecutor and the trial court dismissed those charges that were not adequately supported by the witnesses' statements in the hospital. Defendant also argues that the introduction of the witnesses' statements for substantive purposes is demonstrated by the fact that in the prosecutor's argument for the joinder of offenses for trial, he referred to information from these statements:

> The court also depended on the testimonial statements to grant the State's motion for joinder and for admission of 404(b) evidence, by finding the State had established sufficient facts relating to mode of operation, similar scheme and location, based on the State's list of similarities which was derived from the testimonial statements.

N.C. Gen. Stat. § 15A-926(a) (2015) provides in relevant part that two or more offenses may be joined for trial when the offenses are based "on a series of acts or transactions connected together or constituting parts of a single scheme or plan." In this case, the State's motion for joinder included the following circumstances that were not, as contended by defendant, "derived from the testimonial statements."

> 1. Location – All offenses were committed in Charlotte.
>
> 2. Date and Time – All offenses occurred late at night between May and August, 1991.
>
> 3. Victims - All of the victims were African-American females in their 20s who had been drinking.
>
> 4. Modus Operendi - In each case:
>
> a. The victim was walking before getting into a car with the assailants.
>
> b. The victim was physically assaulted in the car, and something was put on her head.
>
> c. Similar sexual assaults were perpetrated against each victim.

d. All of the victims were taken by car to an unknown location where the sexual assaults occurred.

5. DNA - In each case, defendant's DNA matched the DNA taken from evidence collected at the time of the assaults.

The circumstances noted above were sufficient to support the trial court's decision to allow joinder of the offenses, notwithstanding the fact that the State's motion for joinder also included the following circumstances included in the victims' statements to Major Lester, but not in their statements to medical personnel: (1) all of the victims were released at a location different from where they were abducted, and (2) the victims' descriptions to Major Lester of the car and the assailants' appearance were similar.

The record does not contain a formal written order allowing joinder, and "[t]he rule is that a trial judge sitting without a jury is presumed to have considered only the competent, admissible evidence and to have disregarded any inadmissible evidence that may have been admitted." *Woncik v. Woncik*, 82 N.C. App. 244, 249, 346 S.E.2d 277, 280 (1986) (citing *City of Statesville v. Bowles*, 278 N.C. 497, 180 S.E. 2d 111 (1971)). We conclude that the trial court's ruling allowing joinder was supported by the circumstances established from sources other than Patricia's and Alice's statements to Major Lester, and that the record contains no basis on which to assume that the trial court relied upon other factors.

Defendant further contends that the admission of the testimony of Ms. Eva Fernandez pursuant to North Carolina Rule of Evidence 404(b) was dependent upon details found only in Patricia's and Alice's statements to Major Lester. Defendant argues that in the State's argument to the trial court for admission of this evidence, the State referred to the specific location in Charlotte where Ms. Fernandez was picked up, and linked it to the location where Patricia had been dropped off, and that this information was only found in Patricia's statement to Major Lester. However, there were significant similarities between the charged offenses and Ms. Fernandez's experience. In 1991, Ms. Fernandez, like the other victims, was walking in Charlotte at night, was intoxicated, and accepted a ride from two unknown African-American men. Once she was in the car, the men hit her on the head with "something silver" and put a cloth over her head. Fortunately, Ms. Fernandez was able to escape from the car. We conclude that these similarities, not derived from Patricia's statement to Major Lester, were sufficient to support the trial court's admission of the evidence. The record does not contain a written or oral order indicating that the trial court relied upon

inadmissible evidence, and we presume that the trial court based its ruling on admissible evidence. Therefore, even if the prosecutor improperly referred to the location where Patricia was released in his argument for admission of Ms. Fernandez's testimony, there is no basis upon which to conclude that the trial court based its ruling in part upon this information. We also note that defendant did not object in the presence of the jury to Ms. Fernandez's testimony, and does not argue on appeal that it was inadmissible.

Defendant also argues that the statements given by Patricia and Alice to Major Lester provided the only evidence to support certain "indicted" charges. However, at the close of all the evidence the trial court, the prosecutor, and defendant reviewed the evidence and dismissed charges that were not supported by Patricia's and Alice's statements to health care personnel. Defendant specifically limits his argument to "indicted" offenses and does not challenge the evidentiary support for the charges that were actually submitted to the jury.

The only basis for defendant's argument that the statements were inadmissible is that they were admitted for the truth of the matters asserted. We have rejected this argument and conclude that (1) the statements were admissible to corroborate the witnesses' statements to medical personnel, and (2) there was sufficient evidence to support submission of the various charges to the jury based on the witnesses' statements to medical personnel and on the overwhelming statistical likelihood that defendant's DNA matched that found on the victims.

Finally, defendant argues that the details in the statements increased the likelihood of a verdict based on emotion. We have concluded that it was not error to admit the witnesses' statements. Accordingly, we do not reach defendant's argument that the alleged error was a constitutional violation. N.C. Gen. Stat. § 15A-1443(a) provides that a criminal defendant is prejudiced by non-constitutional errors only if "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant." In this case, defendant has failed to establish that there is a reasonable possibility that he would have been acquitted if the statements had been excluded.

For the reasons discussed above, we conclude that the trial court did not err by admitting the statements given by Patricia and Alice to Major Lester to corroborate the witnesses' statements to the medical personnel who treated them at the time of the assaults. Defendant's arguments to the contrary do not have merit.

III. Denial of Defendant's Motion for Retesting of DNA Samples

**[2]** Defendant argues next that the trial court erred by denying his motion seeking funds with which to hire an expert to retest the DNA samples. We disagree.

In October 2009, Charlotte Mecklenburg Police Department DNA team leader Eve Rossi, who testified at trial as an expert in forensic DNA analysis, conducted DNA testing of evidence obtained in the assault cases of Patricia, Alice, and Louise, and found an unknown DNA profile that was common to all three cases. In March 2011, defendant voluntarily provided a buccal swab from which a DNA profile could be established. In April 2011, Ms. Rossi conducted a DNA analysis of the sample obtained from defendant and found that it matched the DNA profile of the unknown subject identified in the three cases.

When Ms. Rossi was asked to quantify the statistical probability that the DNA obtained from evidence collected in Alice's case had originated from someone other than defendant, she testified that the "probability of selecting an unrelated person at random who could be the source of that major DNA profile within the vaginal swabs is approximately 1 in 60.6 trillion." Ms. Rossi explained that this probability meant that she "would need to look at or do DNA typing on 60.6 trillion individuals to find somebody else who would have a DNA profile that also matched that DNA profile from the vaginal swabs." Regarding the match between defendant's DNA profile and the DNA samples obtained from Patricia, Ms. Rossi testified that the probability of selecting an unrelated person at random who could be the source of the major DNA profile obtained in that case was approximately 1 in 1.62 quadrillion. For Louise's case, Ms. Rossi testified that the statistical probability of selecting an unrelated person at random who could be the source of that DNA profile was approximately 1 in 323 billion. Ms. Rossi also testified that the earth's population was approximately 7.2 billion.

Prior to trial, defendant retained Dr. Maher Noureddine to perform a review of Ms. Rossi's analysis of the DNA samples and prepare a report summarizing the results of his examination. In his report, Dr. Noureddine criticized certain procedures used in the DNA analysis and took issue with some of Ms. Rossi's characterizations of the degree of similarity between various DNA samples. However, Dr. Noureddine did not dispute the ultimate results of the DNA analysis. After Dr. Noureddine submitted his report, defendant filed a *pro se* motion for funding with which to hire another expert to retest the DNA samples. The trial court denied defendant's motion in an order finding in relevant part that:

> 1. The Defendant is charged with multiple felonies related to alleged sexual assaults that took place with three alleged victims in 1991.
>
> 2. There is DNA evidence in all three cases which has been tested by the State and purports to link the Defendant to the alleged crimes.
>
> 3. Defendant seeks to have the DNA evidence retested by a defense expert.
>
> 4. Previously appointed counsel for the Defendant retained the services of a DNA expert, Dr. Noureddine.
>
> 5. Dr. Noureddine reviewed the DNA analysis performed by the State and took exception to the some of the procedures followed by the State, but did not conclude that the DNA analysis, had it been performed differently, would have reached a different result.
>
> 6. Dr. Noureddine did not recommend the use of a new, more accurate testing procedure that was not available at the time of the State's DNA test.

A trial court's determination as to whether to provide funding for expert evaluation of evidence rests within the trial court's discretion and will not be disturbed absent a showing of abuse of that discretion. *State v. Gardner*, 311 N.C. 489, 498-99, 319 S.E.2d 591, 598 (1984). Defendant argues that the trial court abused its discretion and challenges the evidentiary support for the trial court's statements in Findings Nos. 5 and 6, that Dr. Noureddine "did not conclude that the DNA analysis, had it been performed differently, would have reached a different result" and that Dr. Noureddine "did not recommend the use of a new, more accurate testing procedure that was not available at the time of the State's DNA test." Defendant argues that because "Dr. Noureddine's report finds procedures, analysis and conclusions of the CMPD crime laboratory to be contrary to accepted scientific practice, suggests re-testing evidence and finds one conclusion to be overreaching and absurd, the court's findings of fact and conclusions of law are incorrect." However, the criticisms that defendant notes from Dr. Noureddine's report do not identify any statement or conclusion by Dr. Noureddine either that "the DNA analysis, had it been performed differently, would have reached a different result," or that there currently exists "a new, more accurate testing procedure that was not available at the time of the State's DNA test." As a result, defendant's contentions do not establish that the trial court's findings were not supported by the evidence.

Dr. Noureddine had several criticisms of the procedures and methodology employed by the State's analysts, including the following:

> 1. Dr. Noureddine criticized the lab for performing the analysis of two cases at the same time, because this might increase the chance of contamination.
>
> 2. Dr. Noureddine criticized the quality of the DNA sample obtained from Patricia and suggested that the lab should have "considered" repeating the analysis of the cheek swab from Patricia.
>
> 3. Dr. Noureddine criticized the terminology used by the State lab in characterizing a particular DNA profile as a "major contributor" instead of a "partially predominant" contributor and in using the term "match" to describe the relationship between Louise's DNA and that found in the evidence from Louise's case.
>
> 4. In Patricia's case, Dr. Noureddine was concerned about whether the samples had been properly sealed.

In Dr. Noureddine's report, he summarized the procedures used to conduct the DNA analysis and noted that in each case the State had made statistical calculations regarding the match between defendant's DNA and that obtained from the evidence collected in 1991. Significantly, in his report Dr. Noureddine does not express any doubt or concern regarding the statistical conclusions reached by the State. In other words, Dr. Noureddine's report does not dispute the ultimate conclusion reached in each case that it was statistically all but impossible for anyone other than defendant to have been the source of the DNA profiles obtained from the evidence. Instead, Dr. Noureddine's "Final Conclusion" is that "[b]ased on the forensic DNA and serology evidence that was developed by the CMPD Lab for case #s 1991-0507-040800, 1991-0716-000400, and 1991-0812-042601, it is my conclusion that Mr. Thompson cannot be excluded as a potential contributor of DNA in all three cases."

We conclude that the trial court accurately summarized the results of Dr. Noureddine's analysis and did not abuse its discretion by denying defendant's motion seeking funds with which to hire an expert to retest the DNA samples.

## IV. Instruction on Acting in Concert

**[3]** Finally, defendant argues that the trial court committed plain error by instructing the jury in such a manner that defendant "could be found

guilty either by acting by himself or acting together with another in violation of the prohibition against double jeopardy." Defendant cites *State v. Graham*, 145 N.C. App. 483, 549 S.E.2d 908 (2001), in support of his contention. However, in *Graham*, the verdict sheets submitted to the jury included one verdict sheet asking the jury to determine whether the defendant was guilty of committing a particular offense alone and another, separate, sheet asking the jury to decide whether the defendant was guilty of the same offense, either acting alone or with another. On the facts of *Graham*, the jury might have convicted the defendant twice for the same offense, once for acting alone and once for acting either alone or with another. No such circumstance is present in this case.

For the reasons discussed above, we conclude that defendant had a fair trial, free of reversible error.

NO ERROR.

Judges STEPHENS and McCULLOUGH concur.

---

STATE OF NORTH CAROLINA
v.
TYRONE TY WATSON, Defendant

No. COA15-1360

Filed 18 October 2016

**Juveniles—waiver of right to have parent present during interrogation—wrong box initialed on form**

Where the trial court found that juvenile defendant initialed the box on the Juvenile Waiver of Rights form indicating that his mother was present and he wished to answer questions, that the indication of the mother's presence was an error on the part of both the officer and defendant, and that defendant did not request the presence of his mother, there was sufficient support for the conclusion that defendant did not invoke his right to have his mother present and validly waived his right to have a parent present during the interrogation.

Appeal by Defendant from order entered 28 May 2015 by Judge Carla N. Archie and judgment entered 8 July 2015 by Judge Yvonne

Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 April 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Scott A. Conklin, for the State.*

*Appellate Defender G. Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for Defendant-Appellant.*

INMAN, Judge.

Tyrone Ty Watson ("Defendant") appeals from an order entered 28 May 2015 denying his motion to suppress and a judgment entered 8 July 2015 following his guilty plea to a charge of attempted robbery with a dangerous weapon. On appeal, Defendant contends that the trial court erred in denying his motion to suppress statements made to a police officer during an interrogation outside of the presence of Defendant's parent. After careful review, we hold that Defendant was advised of his right to have a parent present pursuant to N.C. Gen. Stat. § 7B-2101, that Defendant failed to invoke this right, and that Defendant therefore waived this right. Accordingly, we hold that the trial court did not err in denying Defendant's motion to suppress his statements to the officer.

**Factual & Procedural History**

On 8 July 2014, Officers Jeffrey King and Roman McNeil of the Charlotte-Mecklenburg Police Department ("CMPD") went to Defendant's home to serve an arrest warrant. Defendant's mother told the officers that Defendant was on his way home on a city bus. The officers subsequently stopped the bus, removed Defendant, and arrested him. CMPD Officers Mathew Daly and Jacob Powell transported Defendant to the Providence Divisional Team Office. Defendant was placed in an interview room, handcuffed, and shackled to the floor.

Approximately twenty minutes from the time Defendant arrived at the precinct, CMPD Crime Scene Detective Thomas Grosse ("Detective Grosse") entered the room where Defendant was handcuffed and shackled, and initiated an audio-recorded interrogation. Defendant stated that he was sixteen years old, that his birthday was 3 October 1997, and that he was about to re-enter the tenth grade. He also stated that he resided with his mother, Rhonda Stevenson, at an apartment on Marvin Road. Detective Grosse and Defendant then engaged in the following colloquy:

> Detective Grosse: Do you have any idea why you are here?
>
> Defendant: They say that I got a warrant.
>
> Detective Grosse: Okay. Well, before I can go in and explain it. You know you've seen the movies so I just got to go through all of this. You got the right to remain silent. That means you don't have to say or do anything or answer questions. Anything I say can be used against me. You have the right to have a parent, guardian or custodian here with you now during questioning. Parent means your mother, father, stepmother, stepfather. Guardian means person responsible for you or taking care of you. Custodian means the person that is the charge where you are staying – that is like a foster home, doesn't really apply to you. You have the right to speak to an attorney before questioning. You have a right to have an attorney present during question[ing]. If you want to have a lawyer during questioning, one will be provided to you at no cost before you're questioned. Okay. And your mother would be Rhonda Stevenson, if you wanted her to be here. You can read?
>
> Defendant: Yeah.
>
> Detective Grosse: Basically, this is the form [the Juvenile Waiver of Rights form]. I need you to initial here that I read it. That way I don't get in trouble. You can read over it—it's basically everything I just said to you.

Detective Grosse filled in Defendant's name, age, birthdate, address, and school year in the bank spaces at the top of the Juvenile Waiver of Rights form. Detective Grosse also filled in his own name, indicating that he had informed Defendant of his rights, including his *Miranda* rights and the right to have a parent present when questioned. At the bottom of the form, the juvenile suspect is instructed to select one of two boxes specifying either that he/she is electing to answer questions: (1) in the presence of a "lawyer, parent, guardian, and/or custodian" or (2) without a "lawyer, parent, guardian, and/or custodian" present. Before handing the form to Defendant, Detective Grosse filled in two blank spaces in the first box so that it read as follows:

> My lawyer, parent, guardian, and/or custodian is/are here with me now. The name(s) of the person(s) here with me is/are: *Ronda [sic] Stevenson*. I understand my rights as explained by Officer/Detective *Grosse*, and I DO wish to

> answer questions at this time. My decision to answer questions now is made freely and is my own choice. No one has threatened me in any way or promised me special treatment. Because I have decided to answer questions now, I am signing my name below.

After filling in the blanks, Detective Grosse gave Defendant the Juvenile Waiver of Rights Form. Defendant initialed each of the five rights listed on the form, indicating that Detective Grosse had explained each right and that Defendant understood each right. At the bottom of the form, Defendant also wrote his initials next to the first box, erroneously indicating that his mother was present with Defendant at that time. Defendant did not initial the second box, which Detective Grosse had not filled in or asked Defendant to review and initial. The second box stated:

> I am 14 years old or more and I understand my rights as explained by Officer/Detective ____________. I DO wish to answer questions now, WITHOUT a lawyer, parent, guardian, or custodian here with me. My decision to answer questions now is made freely and is my own choice. No one has threatened me in any way or promised me special treatment. Because I have decided to answer questions now, I am signing my name below.

Both Defendant and Detective Grosse signed the Juvenile Waiver of Rights Form. Detective Grosse then proceeded to interrogate Defendant and Defendant made statements incriminating himself in an attempted robbery.

On 28 July 2014, Defendant was indicted on a charge of attempted robbery with a dangerous weapon in violation of N.C. Gen. Stat. § 14-87. On 8 April 2015, Defendant moved to suppress his statement to Detective Grosse on the grounds that it was obtained in violation of the United States Constitution, the North Carolina Constitution, and N.C. Gen. Stat. § 14-87.

On 28 May 2015, Defendant's motion came on for hearing during the Criminal Session of Mecklenburg County Superior Court, Judge Carla N. Archie presiding. On the same day, Judge Archie orally denied Defendant's motion to suppress, making the following findings of fact and conclusions of law:

> On July 8th, 2014, officers went to the home of the defendant, Tyrone Watson, in order to serve an arrest

warrant, that the defendant was not present, and the officers returned sometime later. On their second visit, the defendant's mother informed the officers that he was on a city bus on his way home. Officers stopped a city bus on or about Randolph Road in Charlotte, Mecklenburg County.

Officers executed the arrest warrant, placing him under arrest and transferring him to the custody of different officers to transport him to the Providence divisional precinct.

At the precinct the defendant was placed into an interview room, he was shackled to the floor and handcuffed at the wrist and later interviewed by Detective Thomas Grosse.

Prior to the interview, Detective Grosse reviewed the juvenile waiver of rights form with the defendant. At the time of the interview the defendant was 16 years of age and had partially completed the tenth grade. Detective Grosse read each of the rights to the defendant numbered one through five, and Detective Grosse filled in Checkbox Number 1 indicating that Rhonda Stevenson, the defendant's mother, was present at the time. Detective Grosse also filled in the blank indicating that he had explained the rights to the defendant. Defendant Grosse asked the defendant to initial each of the rights indicating that he understood each of the numbered rights one through five, that the defendant did initial each of those rights.

The defendant also initialed the first check box, which on its face indicates that the defendant's mother, Rhonda Stevenson, is here with me now, that he understood the rights as explained by Officer Grosse, and did wish to answer questions.

The defendant then signed the bottom of the form and proceeded to answer Officer Grosse's questions and otherwise participate in the conversation and ultimately made incriminating statements.

Having considered the testimony and having reviewed the video, the Court finds that the defendant's mother was not present, that the defendant did not request the presence of his mother, and that the indication on the

> juvenile waiver of rights form, which says that Rhonda Stevenson is here now, was both an error on the part of the officer and the defendant. However, the Court finds that the defendant was advised of his rights, that there is no credible evidence of a request for his mother, and that the waiver of his rights was knowing, voluntary, and intelligent.
>
> The Court, therefore, concludes as a matter of law that any statements made thereafter are admissible, and the defendant's motion to suppress is denied.

On 8 July 2015, before Judge Yvonne Mims Evans in Mecklenburg County Superior Court, Defendant pleaded guilty to attempted robbery with a dangerous weapon and was sentenced as a prior record Level I Offender to an active term of 42 to 63 months imprisonment. Defendant gave notice of appeal in open court.

**Analysis**

In reviewing an order denying a motion to suppress, this Court determines "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. Johnson*, 98 N.C. App. 290, 294, 390 S.E.2d 707, 709 (1990) (internal quotation marks and citation omitted). "We review the trial court's conclusions of law *de novo*." *State v. Brown*, 217 N.C. App. 566, 571, 720 S.E.2d 446, 450 (2011) (citations omitted). "To determine whether the interrogation has violated defendant's rights, we review the findings and conclusions of the trial court." *State v. Branham*, 153 N.C. App. 91, 95, 569 S.E.2d 24, 27 (2002).

Defendant contends that his statutory right to have a parent present during questioning was violated when Detective Grosse continued to question Defendant after he invoked his right to have his mother present. Specifically, Defendant argues that by declining to initial the box stating that he was waiving his right to have his parent or lawyer present during questioning, he "expressly elected not to waive his right to counsel or the presence of his parent[,]" and that by initialing the box stating that his mother was present, he "unambiguously indicated that he wanted his mother present during his questioning." Defendant further asserts that if even if his invocation of his right to have a parent present was ambiguous, Detective Grosse's failure to clarify whether Defendant wanted his mother present during the questioning constituted error sufficient to

warrant the suppression of Defendant's statement to Detective Grosse. In light of the trial court's findings of fact, we disagree.

Section 7B-2101 of the North Carolina General Statutes sets out the provisions governing juvenile interrogations. The statute mandates that prior to questioning a juvenile in custody, an officer must advise the juvenile of the following:

> (1) That the juvenile has a right to remain silent;
>
> (2) That any statement the juvenile does make can be and may be used against the juvenile;
>
> (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
>
> (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

N.C. Gen. Stat. § 7B-2101(a) (2015). Section 7B-2101 further provides that "[b]efore admitting into evidence any statement resulting from custodial interrogation, the court shall find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights." N.C. Gen. Stat. § 7B-2101(d). "The burden rests on the State to show the juvenile defendant made a knowing and intelligent waiver of his rights." *State v. Johnson*, 136 N.C. App. 683, 693, 525 S.E.2d 830, 836 (2000). A juvenile is defined as a person younger than eighteen who is not married, emancipated, or a member of the armed forces of the United States. N.C. Gen. Stat. § 7B-101(14) (2015).

During a police interrogation, "[o]nce a juvenile defendant has requested the presence of a parent, or any one of the parties listed in the statute, defendant may not be interrogated further 'until counsel, parent, guardian, or custodian has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' " *Branham*, 153 N.C. App. at 95, 569 S.E.2d at 27 (alteration omitted) (quoting *Michigan v. Jackson*, 475 U.S. 625, 626, 89 L.Ed.2d 631, 636 (1986)).

In this case, the trial court classifies its statement that "[D]efendant did not request the presence of his mother" as a finding of fact. Defendant asserts that whether Defendant invoked his right to have a parent present during questioning is a question of law, not fact, and therefore warrants a *de novo* review. The State analyzes the determination as a finding of fact, subject to the more deferential standard.

"The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, . . . or the application of legal principles, . . . is more properly classified a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations omitted). The trial court's classification of a determination as one of fact or law "is not determinative, and, when necessary, the appellate court can reclassify an item before applying the appropriate standard of review." *N.C. State Bar v. Key*, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008) (citation omitted).

The trial court's determination that "[D]efendant did not request the presence of his mother" is best considered a mixed question of fact (whether Defendant indicated that he wanted his mother to be present) and law (whether Defendant's indication was sufficient to invoke his legal right to have his mother present before the interrogation could continue).

> With regard to mixed questions of law and fact, the factual findings . . . are conclusive on appeal if supported by any competent evidence. As with separate findings of fact and conclusions of law, the factual elements of a mixed finding must be supported by competent evidence, and the legal elements must, in turn, be supported by the facts.

*Rolan v. N.C. Dep't of Agric. & Consumer Servs.*, 233 N.C. App. 371, 379-80, 756 S.E.2d 788, 794 (2014) (citations omitted); *see also Beach v. McLean*, 219 N.C. 521, 525, 14 S.E.2d 515, 518 (1941) (holding that a trial court's determination of a mixed question of fact and law is conclusive "provided there is sufficient evidence to sustain the element of fact involved[]").

The trial court's purely factual findings independent of the one challenged on appeal included: (1) a finding that Defendant "initialed the first check box [on the Juvenile Waiver of Rights form], which on its face indicates that[ D]efendant's mother, Rhonda Stevenson, is here with me now, that he understood the rights as explained by Officer Grosse, and did wish to answer questions[;]" and (2) a finding that "the indication on the [J]uvenile [W]aiver of [R]ights form, which says that Rhonda Stevenson is here now, was both an error on the part of the officer and[ D]efendant." The finding that Defendant's initial next to the first box was merely an error is consistent with the factual finding that Defendant did not indicate that he wanted his mother present. In making these two findings, the trial court resolved conflicts in evidence, a role exclusive

to the trier of fact. *State v. Overocker*, 236 N.C. App. 423, 428, 762 S.E.2d 921, 925, *writ denied*, *review denied*, 367 N.C. 802, 766 S.E.2d 846 (2014) (holding that "deference is afforded the trial judge because he is in the best position to weigh the evidence, given that he has heard all of the testimony and observed the demeanor of the witnesses") (internal quotation marks and citation omitted). That the evidence could have been interpreted differently, as Defendant argues, is not a basis to reverse the trial court. *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994) ("A trial court's findings of fact following a hearing on the admissibility of a defendant's statements are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.").

Considering the separate factual findings as well as the factual element of the finding challenged by Defendant, and assuming that the issue of whether Defendant effectively invoked his right to have his mother present during the interrogation or refused to waive that right presents a question of law subject to *de novo* review, we hold that the factual findings support the conclusion that Defendant did not invoke his right to have his mother present and validly waived his right to have parent present during the interrogation.

Defendant contends that assuming the record is ambiguous as to whether he invoked his right to have his parent present, the trial court still erred in denying his motion to suppress because Detective Grosse failed to clarify whether Defendant intended to waive his statutory right to have a parent present. In *State v. Saldierna*, __ N.C. App. __, __, 775 S.E.2d 326, 327, *review allowed*, *writ allowed*, 368 N.C. 356, 776 S.E.2d 846 (2015), this Court concluded that a juvenile's ambiguous statement regarding his/her right to have a parent present "triggers a requirement for the interviewing officer to clarify the juvenile's meaning." *Id.* at __, 775 S.E.2d at 334.

The North Carolina Supreme Court has allowed the State's petition for Writ of Supersedeas and petition for discretionary review and has not yet issued a decision. *Saldierna*, 368 N.C. 356, 776 S.E.2d 846. Therefore, the issue of whether an officer is required to clarify a juvenile's ambiguous statement regarding his/her right to have a parent present for questioning is still unsettled. However, for purposes of this opinion, we need not address the applicability of *Saldierna* because the trial court in this case found that Defendant did not make a statement, ambiguous or otherwise, invoking his right to have a parent present during the interrogation. The trial court did not find that by initialing the first box on the Juvenile Waiver of Rights Form, Defendant ambiguously invoked his

right to have his mother present for questioning. Rather, the trial court found that Defendant's initialing of the box was an error.

Considering evidence supporting the trial court's finding that Defendant's initialing of the line next to the first box on the Juvenile Waiver of Rights form was an error, and considering evidence supporting the trial court's finding that Defendant did not request the presence of his mother or ask to contact her, we hold that Defendant never invoked his right to have his mother present for questioning.

## Conclusion

For the aforementioned reasons, we hold that although Defendant was advised of his statutory right to have a parent present during police questioning, Defendant never invoked, either ambiguously or unambiguously, this right. As such, we affirm the trial court's denial of Defendant's motion to suppress his statement to police.

AFFIRMED.

Judges ELMORE and McCULLOUGH concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 18 October 2016)

| | | |
|---|---|---|
| BOGGS v. N.C. DEP'T OF ENVTL. QUALITY<br>No. 16-188 | Office of Admin. Hearings<br>(15OSP3279) | Affirmed |
| GRASINGER v. WILLIAMS<br>No. 15-518 | Wake<br>(13CVS13297) | Affirmed |
| IN RE J.J.<br>No. 16-225 | Orange<br>(14JT28) | Affirmed |
| IN RE J.J.<br>No. 16-281 | Orange<br>(14JT28) | Affirmed |
| IN RE M.R.<br>No. 16-192 | Rowan<br>(14JA226-230) | Affirmed in part; vacated and remanded in part |
| IN RE R.G.B.<br>No. 16-328 | Sampson<br>(15JA49-50) | Affirmed |
| IN RE T.H.H.<br>No. 16-301 | New Hanover<br>(14JT243) | Affirmed |
| KIRKMAN v. N.C. DEP'T OF PUB. SAFETY<br>No. 16-119 | N.C. Industrial Commission<br>(13-731311) | Affirmed |
| MERRILL v. WINSTON-SALEM FORSYTH CTY. BD. OF EDUC.<br>No. 16-232 | Forsyth<br>(15CVS5553) | Affirmed |
| PEOPLES v. TUCK<br>No. 16-293 | Vance<br>(15CVS12) | Reversed |
| STATE v. BISHOP<br>No. 16-276 | Mecklenburg<br>(13CRS230122) | No Error |
| STATE v. BOWSER<br>No. 15-1232 | Camden<br>(13CRS50019)<br>(13CRS50026) | No Error in part; Vacated and Remanded in part. |
| STATE v. CANNON<br>No. 15-1272 | Pitt<br>(14CRS55689) | No Error |
| STATE v. COLLINS<br>No. 16-60 | Wake<br>(10CRS226107)<br>(11CRS7962) | No Error |

| | | |
|---|---|---|
| STATE v. HENDRICKS<br>No. 16-367 | Mecklenburg<br>(14CRS208667)<br>(14CRS208668) | Dismissed |
| STATE v. HOPKINS<br>No. 15-941 | Nash<br>(09CRS57101-02) | Reversed and Remanded for New trial |
| STATE v. JONES<br>No. 16-290 | Guilford<br>(14CRS24373)<br>(14CRS24375)<br>(14CRS75911)<br>(14CRS75913)<br>(14CRS75914)<br>(14CRS77247) | No Error |
| STATE v. MANNO<br>No. 16-361 | Cleveland<br>(12CRS3538-40) | Affirmed |
| STATE v. SANCHEZ<br>No. 15-1401 | Wake<br>(13CRS230214-215) | New Trial |
| STATE v. SMITH<br>No. 16-236 | Forsyth<br>(14CRS060384)<br>(14CRS735784) | No Error |
| STATE v. SOLOMON<br>No. 16-2 | Johnston<br>(13CRS2646)<br>(13CRS55281) | No error in part; No plain error in part. |
| STATE v. WALL<br>No. 15-1235 | Davie<br>(13CRS51357)<br>(13CRS51359)<br>(14CRS7) | No Error |

MELVIN L. DAVIS, JR. and J. REX DAVIS, Plaintiffs
v.
DOROTHY C. DAVIS and MKR DEVELOPMENT, LLC,
a Virginia Limited Liability Company, Defendants

No. COA16-400

Filed 1 November 2016

**Deeds—beach property—unreasonable restraint on alienation of life estate**

The trial court did not err in a family dispute over beach property by granting summary judgment in favor of defendant mother. The deed language preventing the mother from renting out the property during her life tenancy created an unreasonable restraint on the alienation of defendant's life estate and was therefore void.

Appeal by Plaintiffs from judgment entered 21 October 2015 by Judge Gregory P. McGuire in Dare County Superior Court. Heard in the Court of Appeals 20 September 2016.

*Williams Mullen, by Camden R. Webb and Elizabeth C. Stone, for the Plaintiffs-Appellants.*

*Vandeventer Black LLP, by Ashley P. Holmes and Norman W. Shearin, and LeClairRyan, by Thomas M. Wolf and Gretchen C. Byrd, for Defendant-Appellee.*

DILLON, Judge.

This matter involves a family dispute over a beach property in Dare County (the "Property"). Defendant Dorothy C. Davis owns a life estate in the Property. The remainder interest is held by nominal Defendant MKR Development, LLC (the "LLC"), a limited liability company owned by and benefitting three of Mrs. Davis's children – Kaye Davis and Plaintiffs Melvin L. Davis, Jr., ("Mel") and J. Rex Davis ("Rex"). Plaintiffs commenced this suit to enjoin Mrs. Davis from renting the Property during her lifetime to vacationers, contending that certain language in the deed conveying Mrs. Davis her life estate interest (the "Deed") restricts her from renting out the Property.

This matter was designated a mandatory complex business case by Chief Justice of our Supreme Court Mark D. Martin and assigned to

Judge Gregory P. McGuire, a Special Superior Court Judge for Complex Business Cases.

The parties filed cross motions for summary judgment. Judge McGuire granted Mrs. Davis summary judgment, holding that the restrictive language in the Deed - to the extent that it could be construed to restrict Mrs. Davis's ability to rent the Property - was void. We affirm Judge McGuire's order.

## I. Background[1]

Sometime in the 1980s, Mrs. Davis and her husband ("Mr. Davis") purchased the Property. In order to help pay for Property expenses, Mr. and Mrs. Davis occasionally rented the Property to vacationers through a real estate agency.

In 2009, Mr. and Mrs. Davis decided to transfer a remainder interest in the Property to three of their children (including Plaintiffs). Accordingly, Mr. and Mrs. Davis executed the Deed and conveyed a remainder interest in the Property to the LLC, reserving for themselves (Mr. and Mrs. Davis) a life estate.[2]

In July 2012, Mr. Davis died, leaving Mrs. Davis as the Property's sole life tenant. Less than two weeks later, Plaintiffs prepared a letter advising their mother that the Deed required that the Property "remain available for [her] personal use and [could] not be used to provide income to [her]."

Notwithstanding this letter, Mrs. Davis entered into an agreement with a real estate agency in 2013 to rent the Property to vacationers, just as she and her husband had done in years past.

In July 2013, Plaintiffs filed this declaratory judgment action to enjoin their mother from renting the Property without the express permission of the LLC.

In May 2015, both parties filed summary judgment motions. Judge McGuire granted Mrs. Davis's summary judgment motion. Plaintiffs timely appealed.

---

1. Judge McGuire's order contains a more comprehensive factual background and can be found at *Davis v. Davis*, No. 13 CVS 288, 2015 WL 6180969 (N.C. Super. Oct. 21, 2015).

2. Mr. and Mrs. Davis's other child Tommy had no role in LLC. In lieu of granting Tommy a position or interest in LLC, Mr. and Mrs. Davis instead paid off a debt secured by Tommy's home.

## II. Analysis

On appeal, Plaintiffs argue that the Deed contains a restriction which prevents their mother from renting out the Property during her life tenancy. Specifically, they point to the following language in the Deed:

> The Grantors [Mr. and Mrs. Davis] hereby reserve unto themselves, a life estate in the Property, said life estate to be personal to the use of the Grantors, or the survivor thereof, and may not be utilized by any other person, nor may it be reduced to a cash value for the benefit of the Grantors, or the survivor thereof, but must remain always during the lifetime of said Grantors, or the survivor thereof, available for their individual and personal use without interference from either the remaindermen or any other person.

We disagree. We hold that the Deed language creates an unreasonable restraint on the alienation of Mrs. Davis's life estate and is therefore void. Accordingly, we affirm Judge McGuire's summary judgment order.

Restraints on alienation are generally disfavored in North Carolina due to the "necessity of maintaining a society controlled primarily by its living members and the desirability of facilitating the utilization of wealth." *Smith v. Mitchell*, 301 N.C. 58, 62, 269 S.E.2d 608, 611 (1980). Nevertheless, it is fundamentally important that a property owner "should be able to convey [property] subject to whatever condition he or she may desire to impose on the conveyance." *Id.*

To balance these competing policy interests, our Supreme Court has held that any *unlimited* restraint on alienation "is *per se* invalid." *Id.* However, restrictions which "provide only that someone's estate may be forfeited or be terminated if he alienates, or that provides damages must be paid if he alienates, may be upheld *if reasonable*." *Id.* (emphasis added). That is, our courts will generally uphold any reasonable restraints on alienation except unlimited restraints, which are *per se* unreasonable.

Our Supreme Court has applied this restraints doctrine to life estates. *Lee v. Oates*, 171 N.C. 717, 721, 88 S.E. 889, 891 (1916). ("[T]his Court has for many years consistently held that the doctrine as to restraints of alienation applies as well to estates for life as to estates in fee simple[.]"). S*ee also Crockett v. First Fed. Sav. & Loan Assoc. of Charlotte*, 289 N.C. 620, 624, 224 S.E.2d 580, 583 (1976) (reaffirming caselaw that applies restraints doctrine to life estates); *Pilley v. Sullivan*,

182 N.C. 493, 496, 109 S.E. 359, 360 (1921) ("The clause which purports to ingraft upon the devise an unlimited restraint on alienation is not only repugnant to the [life] estate devised, but is in contravention of public policy, and therefore void."); *Wool v. Fleetwood*, 136 N.C. 460, 465-66, 48 S.E. 785, 787 (1904) (voiding a will provision prohibiting the life tenant from selling the life estate).

In the present case, Plaintiffs concede that the Deed creates an unlimited restraint on Mrs. Davis's ability to alienate her life estate. Indeed, as noted in the summary judgment order, "[P]laintiffs contend that not only is [Mrs. Davis] prohibited from selling the life estate, she cannot rent or even permit others to use the Property." To justify this position, Plaintiffs aver that the caselaw prohibiting unlimited restraints does not apply as Mrs. Davis is *both* the grantor who created the restraint *and* the life tenant who is subject to the restraint. Plaintiffs contend that *Lee* is distinguishable as the restraint at issue attached to a conveyance between a grantor and a life tenant, whereas here, Mrs. Davis reserved a life estate for *herself* and therefore *voluntarily* restricted that interest.

We hold that whether the life estate was created by conveyance by a third party or by reservation by the life tenant herself is irrelevant. An unlimited restraint is *against public policy*; it makes no difference if the restraint is self-imposed. Plaintiffs have failed to cite precedent, either from North Carolina or from another jurisdiction, that would recognize this distinction. Indeed, the adverse party in *Lee* argued that the conveyance restraint should nonetheless be upheld as the life tenant *herself* signed the deed, "thereby agree[ing] . . . not to alien her estate[.]" *Lee*, 171 N.C. at 724, 88 S.E. at 892. Our Supreme Court, however, rejected this argument, holding that an otherwise invalid restraint on alienation is not validated merely because the life tenant assented to the restraint by signing the instrument: "[To conclude otherwise] would enforce a restriction by estoppel[,] which the law declares void. The covenant was a 'dead letter' when it was entered into, and we do not think it can be vitalized in this way." *Id.* Based on our Supreme Court's reasoning in *Lee*, we conclude that the restraint on Mrs. Davis's ability to rent her Property is *per se* void even though Mrs. Davis was also the person who created the restraint. We therefore affirm Judge McGuire's order granting summary judgment to Mrs. Davis.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

SUSAN HEDDEN, Plaintiff
v.
ANN ISBELL, Defendant

No. COA16-406

Filed 1 November 2016

**1. Appeal and Error—interlocutory orders and appeals—denial of motion to dismiss—personal jurisdiction—subject matter jurisdiction**

Although a party challenging a trial court's order as to personal jurisdiction under Rule 12(b)(2) has the right of immediate appeal from an adverse ruling, the denial of a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is not immediately appealable.

**2. Jurisdiction—personal jurisdiction—personally served in North Carolina**

The trial court did not err in an alienation of affections and criminal conversation case by denying defendant's motion to dismiss based on lack of personal jurisdiction. Defendant was personally served while physically present in North Carolina. The trial court acquired *in personam* jurisdiction over defendant and the need for a minimum contacts analysis was rendered unnecessary.

Appeal by defendant from order entered 17 December 2015 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 21 September 2016.

*Steven Kropelnicki, PC, by Steven Kropelnicki, for plaintiff-appellee.*

*Morrow, Porter, Vermitsky, Fowler & Taylor PLLC, by John C. Vermitsky, for defendant-appellant.*

ENOCHS, Judge.

Ann Isbell ("Defendant") appeals from the trial court's order denying her motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure and for failure to state a claim upon which relief can be granted under Rule 12(b)(6). After careful review, we affirm the trial court's order.

Factual Background

Plaintiff married Michael Hedden ("Hedden") on 5 November 1977. Both Plaintiff and Hedden reside in Orange County, Florida. Defendant is a resident of Virginia.

In the Summer of 2014, Defendant and Hedden engaged in an extra-marital affair in Buncombe County, North Carolina. Among the various acts and conduct alleged to have occurred, was the assertion that "Plaintiff's husband would drive to North Carolina to meet the Defendant for their sexual relations."

Defendant was aware that Hedden was married to Plaintiff, however "actively participated in, initiated and encouraged conduct which resulted in the alienation of the genuine love and affection existing between Plaintiff and Plaintiff's husband prior to the conduct of the Defendant." On 3 February 2015, Plaintiff separated from Hedden as a result of his and Defendant's adulterous relations.

On 2 June 2015, Plaintiff filed a verified complaint in Buncombe County Superior Court asserting claims for alienation of affection and criminal conversation against Defendant. On 15 June 2015, Defendant filed a motion to dismiss pursuant to Rules 12(b)(2) and (6). On 28 August 2015, Plaintiff was deposed.

A hearing was held on Defendant's motion to dismiss before the Honorable Alan Z. Thornburg in Buncombe County Superior Court on 8 December 2015. At the hearing, for the first time, Defendant's trial counsel stated that she would additionally be moving to dismiss Plaintiff's complaint pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure.

On 17 December 2015, the trial court entered an order finding that "[Defendant] was served with process personally at on [sic] 3 June 2015 by a Buncombe County sheriff's deputy at 1691 Pisgah Highway, Buncombe County, NC." The trial court then concluded as a matter of law that "Defendant was served with process as provided by NCRCP Rule 4(j)(1),a [sic]" and that "[t]he court has grounds for jurisdiction under G.S. 1-75.4." The court then ruled that "defendant's motion to dismiss for lack of personal jurisdiction is hereby denied." Defendant filed a timely notice of appeal of the trial court's order on 28 December 2015.

## Analysis

On appeal, Defendant argues that the trial court erred in denying her motion to dismiss pursuant to Rules (12)(b)(1) and (2).[1] Specifically, she contends that the trial court lacked subject matter jurisdiction over Plaintiff's claims because neither of the parties were North Carolina residents, and also lacked personal jurisdiction over Defendant because she did not have sufficient minimum contacts with North Carolina.

### I. Appellate Jurisdiction

**[1]** Initially, we note that it is undisputed that the present appeal is interlocutory. "Generally, there is no right of immediate appeal from an interlocutory order." *Blue v. Mountaire Farms, Inc.*, ___ N.C. App. ___, ___, 786 S.E.2d 393, 397 (2016).

Where a party challenges a trial court's order as to personal jurisdiction under Rule 12(b)(2), however, "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause." N.C. Gen. Stat. § 1-277(b) (2015). "On the other hand, the denial of a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is not immediately appealable." *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 246 (2001).

> "The distinction is important because the denial of a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) is not immediately appealable, but the denial of a motion challenging the jurisdiction of the court over the person of the defendant pursuant to Rule 12(b)(2) is immediately appealable."

*Green v. Kearney*, 203 N.C. App. 260, 264-65, 690 S.E.2d 755, 760 (2010) (internal brackets and ellipses omitted) (quoting *Zimmer v. N.C. Dep't of Transp.*, 87 N.C. App. 132, 133-34, 360 S.E.2d 115, 116 (1987)).

---

1. Defendant also moved to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. However, she does not contend that the trial court erred in failing to dismiss Plaintiff's claims on this ground on appeal. Consequently, any arguments regarding the trial court's ruling on Defendant's Rule 12(b)(6) motion are deemed abandoned. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

Therefore, to the extent Defendant argues that the trial court erred in denying her motion to dismiss under Rule 12(b)(1), that portion of her appeal is dismissed as interlocutory. We therefore only need to address the merits of Defendant's argument that the trial court lacked personal jurisdiction over her pursuant to Rule 12(b)(2). *See Hale v. Hale*, 73 N.C. App. 639, 640-41, 327 S.E.2d 252, 253 (1985) ("[N.C. Gen. Stat. § 1-277(b)] does not apply to orders denying motions made pursuant to . . . Rule 12(b)(1) seeking dismissal for lack of subject matter jurisdiction. Therefore, we need only decide whether our courts can properly assert personal jurisdiction over defendant." (internal citation omitted)).

II. Personal Jurisdiction

**[2]** Defendant asserts that the trial court erred in denying her motion to dismiss pursuant to Rule 12(b)(2). Specifically, she contends that she did not have sufficient minimum contacts with North Carolina for the trial court to exercise personal jurisdiction over her, thereby violating her due process rights under the Fourteenth Amendment of the United States Constitution. We disagree.

"When this Court reviews a decision as to personal jurisdiction, it considers only 'whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.' " *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005) (quoting *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999)).

> "The determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum is a question of fact." To resolve a question of personal jurisdiction, the court must engage in a two step analysis. First, the court must determine if the North Carolina long-arm statute's (N.C. Gen. Stat. § 1-75.4) requirements are met. If so, the court must then determine whether such an exercise of jurisdiction comports with due process.

*Cooper v. Shealy*, 140 N.C. App. 729, 732, 537 S.E.2d 854, 856 (2000) (quoting *Hiwassee Stables, Inc. v. Cunningham*, 135 N.C. App. 24, 27, 519 S.E.2d 317, 320 (1999)).

In the present case, Defendant was personally served with Plaintiff's complaint while she was physically present in the State of North Carolina in conformity with Rule 4(j)(1)(a) of the North Carolina Rules of Civil Procedure, which provides, in pertinent part, as follows:

> (j) **Process -- Manner of service to exercise personal jurisdiction.** -- In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:
>
> (1) **Natural Person.** -- Except as provided in subdivision (2) below, upon a natural person by one of the following:
>
> a. By delivering a copy of the summons and of the complaint to the natural person . . . .

This manner of service of process satisfies both requirements for establishing personal jurisdiction over Defendant. It is well established that

> N.C.G.S. § 1-75.4(1)(a) allows the courts of this State to exercise *in personam* jurisdiction over a person served pursuant to Rule 4(j) or Rule 4(j1) of the North Carolina Rules of Civil Procedure "[i]n any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party . . . [i]s a natural person present within this State . . . ."

*Lockert v. Breedlove*, 321 N.C. 66, 68, 361 S.E.2d 581, 583 (1987) (quoting N.C. Gen. Stat. § 1-75.4(1)(a) (1983)).

In *Lockert*, the defendant moved to dismiss the plaintiff's claims on the ground that the trial court lacked personal jurisdiction over him because there were insufficient minimum contacts between him and North Carolina. *Id.* at 67, 361 S.E.2d at 582. The trial court denied his motion and this Court affirmed the trial court's order. *Id.*

On appeal to our Supreme Court, the Court stated the following:

> This Court has consistently applied the minimum contacts analysis articulated in *International Shoe* [*Co. v. Washington*, 326 U.S. 310, 90 L. Ed. 95 (1945)] to cases in which nonresident defendants were served with process outside the forum state. *We conclude that such minimum contacts analysis is not necessary, however, when the defendant is personally served while present within the forum state.*

*Id.* at 68, 361 S.E.2d at 583 (emphasis added) (internal citations omitted). Indeed, the Supreme Court went on to emphasize that

> [t]he defendant would have us hold that the presence of a person in the forum state is not sufficient to confer jurisdiction upon its courts. We are aware that some courts have made sweeping pronouncements to the effect that minimum contacts analysis is required in all cases in which the defendant is a nonresident of the forum state. We conclude, however, that such cases are contrary to the Supreme Court's holdings in *International Shoe* and its progeny. We hold that the minimum contacts test is inapplicable to cases in which the defendant is personally served within the forum state.

*Id.* at 68-69, 361 S.E.2d at 583 (internal citations omitted). The Supreme Court concluded that "[f]or the foregoing reasons, we hold that the rule continues to be that personal service on a nonresident party, at a time when that party is present in the forum state, suffices *in and of itself* to confer personal jurisdiction over that party." *Id.* at 72, 361 S.E.2d at 585 (emphasis added).

We find that *Lockert* is controlling and dispositive as to the present appeal. Here, the trial court found that Defendant was personally served while physically present in the State of North Carolina. Indeed, this fact is undisputed by Defendant. Consequently, when the sheriff's deputy personally served her, the trial court acquired *in personam* jurisdiction over Defendant and the need for a minimum contacts analysis was rendered unnecessary. As a result, we affirm the trial court's order denying Defendant's motion to dismiss.[2]

## Conclusion

For the reasons stated above, the trial court's order is affirmed.

AFFIRMED.

Judges ELMORE and ZACHARY concur.

---

2. We also note that Defendant makes a policy argument urging us to hold that service of process upon a nonresident defendant who is physically present in the State of North Carolina can no longer be deemed sufficient to confer personal jurisdiction upon trial courts and alternatively invites us moving forward to always require a minimum contacts analysis be performed in determining whether *in personam* jurisdiction exists. We decline Defendant's invitation to do so and, in any event, are bound by *Lockert's* holding in direct opposition to Defendant's position maintaining that "[t]he language of *International Shoe* did not sound a death knell for the transient rule of jurisdiction; rather, it set out an alternative means of establishing personal jurisdiction when the defendant is not present within the territory of the forum." *Id.* at 70, 361 S.E.2d at 584 (internal quotation marks omitted).

[250 N.C. App. 195 (2016)]

IN THE MATTER OF J.R., A.R., K.R.

No. COA16-384

Filed 1 November 2016

**Child Abuse, Dependency, and Neglect—motion to proceed pro se —likelihood of criminal charges and coercive influence**

Where the Rutherford County Department of Social Services filed juvenile petitions alleging that respondent-mother's children were abused, neglected, and dependent based on repeated physical abuse by respondent-mother's boyfriend, the trial court did not abuse its discretion by denying respondent-mother's requests to proceed pro se. The trial court was not required, either by statute or the Constitution, to allow respondent-mother to proceed pro se, and the trial court clearly considered her situation—including the likelihood of criminal charges and the boyfriend's coercive influence—in determining that self-representation was not in her best interest.

Appeal by respondent-mother from orders entered 4 January 2016 by Judge Randy Pool in District Court, Rutherford County. Heard in the Court of Appeals 10 October 2016.

*Joshua G. Howell for petitioner-appellee Rutherford County Department of Social Services.*

*The Tanner Law Firm PLLC, by James E. Tanner III, for respondent-appellant mother.*

*Stephen M. Schoeberle for guardian ad litem.*

STROUD, Judge.

Respondent-mother appeals from orders adjudicating her minor children "Joe," "Amy," and "Karl"[1] (collectively "the children") abused and neglected juveniles. Respondent-mother argues that the trial court improperly denied her attempt to waive representation by counsel and represent herself. We affirm the orders.

On 18 June 2015, the Rutherford County Department of Social Services ("DSS") filed juvenile petitions alleging that the children were

1. Pseudonyms are used to protect the identity of the minor children and for ease of reading.

abused, neglected, and dependent. The petitions detailed significant and repeated physical abuse by respondent-mother's boyfriend ("the caretaker").[2] Whenever the caretaker was drunk, he would punch the children, hit them with wooden objects, or choke them. At the time the petition was filed, Joe and Karl had visible injuries. The petition alleged that respondent-mother did not stop the abuse because the caretaker hit her as well, and she was scared of him. The trial court placed the children in nonsecure custody with DSS the same day.

The matter was called for an adjudication hearing on 26 October 2015. Prior to the hearing, respondent-mother and the caretaker made a joint motion to dismiss their court-appointed counsel and represent themselves. The caretaker informed the court that respondent-mother had filed a complaint against her counsel with the North Carolina State Bar. Respondent-mother also told the court that she had not seen the discovery in the case, making it impossible for her to rebut DSS's case. The caretaker then stated, "[t]he base fact of it, Your Honor, is that we choose to represent ourselves." He continued:

> She said that she was -- we both said to our attorneys when we got them that -- we give each other full disclosure to this case so that we can -- because I've done a little bit of -- I was pre-law in college, I ended up going into other things. But I was going to help her prepare, you know, to do research on the computer, look up statute 7B and get all the information.
>
> We don't want these attorneys, your Honor. We shouldn't be stuck with them.

The trial court then denied both motions, stating, "I think you both need representation. You have adequate representation."

The hearing was not completed, and the case was continued until 9 November 2015. Prior to resuming the hearing, both the caretaker and respondent-mother's respective attorneys moved to withdraw from representation. Respondent-mother's attorney pointed out that she was respondent-mother's second attorney: "She had a prior attorney who then filed a motion to withdraw and then I was appointed I think it was in August. But she will not talk to me without her boyfriend [the caretaker], you know, being present. And that creates obviously some issues with us."

---

2. The caretaker was made a party to the adjudication due to the allegations made against him in the petition. *See* N.C. Gen. Stat. § 7B-401.1 (e) (2015).

In addition, the caretaker and respondent-mother each presented the court with signed waivers of their right to counsel. Respondent-mother addressed the court as follows:

> Yes. Well, I had asked when we began this in October that I could waive my right to counsel because that's what I was told by Steve up in your clerk's office.
>
> You said that I needed this attorney when I asked you for dismissal of my attorney for a waive of right. You said no, that I needed that. And since then I've found the North Carolina Statute 7B-1101.1(a), please see case number In the Matter of JKP, Court of Appeals 14-756, citation number 767 S.E.2d 119 (2014).
>
> For the record, Your Honor, I believe that my right was overridden by your statement and we had to proceed at that time. I ask for a dismissal of counsel, I waive my right to him. I don't want him to represent me or speak for me.

The court again denied both motions from the bench:

> The motions of [the caretaker] and the respondent mother to be relieved -- have their counsel relieved and to be allowed to proceed representing themselves, self representation, is denied.
>
> The Court would make findings of fact the allegations in this case of abuse and neglect involve allegations of serious assault on the children that could and may very well give rise to criminal proceedings being brought against one or both of these individuals -- the respondent mother and [the caretaker].
>
> That if they were allowed to proceed without counsel, they may choose to testify themselves, which they have the right to do if they wish to, and any statements that they make could be used against them in criminal prosecution.
>
> And they do have the right, of course, the rights associated with any kind of criminal prosecution including rights to remain silent if they wish to exercise those.
>
> But pursuant to the statute the Court would find that the respondents have asked that they be allowed to represent themselves and that their attorneys be released. And the Court -- if the Court finds the person -- 7B-602(a)(1)

> states a parent qualifying for appointed counsel may be permitted to proceed without the assistance of counsel only after the Court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary. The Court's examination shall be reported as provided in 7B-806.
>
> The Court would find that the parents have made a request to be allowed to proceed on their own without counsel and be self represented. The Court would find that with pending criminal charges possible and maybe even likely that it would not be in their best interest to proceed without counsel.
>
> And the Court would find that there would not be a knowing and voluntary waiver since they're not attorneys and are lay people and would not fully understand even the Court's directive as to what their rights may or may not be if they're proceeding representing themselves.
>
> So, the Court will deny the request to release counsel.

The hearing then continued with both respondent-mother and the caretaker represented by their respective counsel.

On 4 January 2016, the trial court entered orders concluding that the children were abused and neglected. The court left the children in the custody of DSS, removed the caretaker as a party to the case, relieved DSS of its obligation to pursue reunification efforts with respondent-mother, and denied respondent-mother visitation. Respondent-mother filed a timely notice of appeal.[3]

Respondent-mother argues that the trial court erred by denying her request to waive counsel and represent herself. We disagree.

N.C. Gen. Stat. § 7B-602(a) provides that "[i]n cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right." N.C. Gen. Stat. § 7B-602(a) (2015). The statute further provides that "[a] parent qualifying for appointed counsel may be permitted to proceed without the assistance of counsel only after the court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary."

---

3. The trial court permitted respondent-mother's counsel to withdraw on 10 December 2015, and respondent-mother filed the notice of appeal *pro se.*

N.C. Gen. Stat. § 7B-602(a1). Respondent-mother contends that these statutory provisions create both a right to counsel and a "correlative . . . right to self-representation." According to respondent-mother, when a parent asserts his or her right to self-representation, the trial court is required to examine the parent and also required to allow the parent to proceed *pro se* so long as the record reflects that the parent "was literate and competent, that she understood the consequences of the waiver, and that such waiver was a voluntary exercise of her own free will."

But respondent-mother's interpretation cannot be reconciled with the plain language of N.C. Gen. Stat. § 7B-602(a1). That subsection clearly states that the trial court *may* allow the parent to proceed *pro se*, and it is well established that the use of the word "may" in a statute implies the use of discretion. *See In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) ("Ordinarily when the word 'may' is used in a statute, it will be construed as permissive and not mandatory."). The discretionary nature of the trial court's decision is further supported by the history of Chapter 7B. Prior to 1 July 1998, adjudication hearings in abuse, neglect, and dependency cases were governed by N.C. Gen. Stat. § 7A-631, which stated:

> "The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition. In the adjudicatory hearing, the judge shall protect the following rights of the juvenile and his parent to assure due process of law: the right to written notice of the facts alleged in the petition, the right to counsel, the right to confront and cross-examine witnesses, the privilege against self-incrimination, the right of discovery and all rights afforded adult offenders except the right to bail, *the right of self-representation*, and the right of trial by jury."

*Thrift v. Buncombe County DSS*, 137 N.C. App. 559, 561, 528 S.E.2d 394, 395 (2000) (quoting N.C. Gen. Stat. § 7A-631) (emphasis added). This statute was repealed, *see* 1998 N.C. Sess. Laws ch. 202, § 5, and replaced by N.C. Gen. Stat. § 7B-802, which provides: "The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition. In the adjudicatory hearing, the court shall protect the rights of the juvenile and the juvenile's parent to assure due process of law." N.C. Gen. Stat. § 7B-802 (2015). This Court previously concluded that the removal of the reference to the "privilege against self-incrimination" defeated a respondent's contention that the privilege was protected by the statute.

*In re Pittman*, 149 N.C. App. 756, 761, 561 S.E.2d 560, 565 (2002). Using that same logic, by removing the language specifically requiring the trial court to protect the right of self-representation, the General Assembly also eliminated any statutory right to self-representation. Thus, we conclude that, contrary to respondent-mother's argument, N.C. Gen. Stat. § 7B-602(a1) does not require the trial court to allow parents to waive counsel and represent themselves, but rather gives the court the *discretion* to do so.

Respondent-mother also asserts that she has a right to self-representation protected by the Sixth Amendment of the United States Constitution and Article I, Section 23 of the North Carolina Constitution, but the only cases cited by respondent-mother in support of her assertion discuss the right to self-representation in *criminal* cases.[4] Respondent-mother cites no cases, and we have found none, that suggest a parent has a constitutional right to self-representation in the context of an abuse, neglect, and dependency proceeding. In *In re Lassiter*, 43 N.C. App. 525, 259 S.E.2d 336 (1979), this Court held that parents do not have a constitutional right to counsel in termination proceedings:

> The termination of parental rights by the State invokes no criminal sanctions against the parent whose rights are so terminated. While this State action does invade a protected area of individual privacy, the invasion is not so serious or unreasonable as to compel us to hold that appointment of counsel for indigent parents is constitutionally mandated.

*Id.* at 527, 259 S.E.2d at 337. That decision was appealed to the United States Supreme Court, which left "the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings" for the trial court and held that "the trial court did not err in failing to appoint counsel for Ms. Lassiter." *Lassiter v. Department of Social Services*, 452 U.S. 18, 32, 33, 68 L. Ed. 2d 640, 652, 653 (1981). Since there is no per se constitutional right to counsel for parents, there can be no correlative constitutional right to self-representation. Indeed, the few courts in other jurisdictions that have considered the question of a parent's right to self-representation have concluded that such a right

---

4. Respondent-mother cites *In re J.K.P.*, 238 N.C. App. 334, 336, 767 S.E.2d 119, 121 (2014), *disc. review denied*, __ N.C. __, 771 S.E.2d 314 (2015), in an attempt to support her argument, but that case dealt with whether the trial court properly allowed the respondent to proceed *pro se* in a termination proceeding in accordance with N.C. Gen. Stat. § 7B-1101.1 (a1) (2015), the companion statute to N.C. Gen. Stat. § 7B-602(a1). The *J.K.P.* Court never asserted there was a constitutional or statutory right to self-representation.

does not exist under the United States Constitution. *See In re A.H.L., III*, 214 S.W.3d 45, 52 (Tex. App. 2006) ("We likewise find that a right of self-representation is not a necessary component of a fair parental rights termination proceeding."); *In re Angel W.*, 113 Cal. Rptr. 2d 659, 665 (Cal. Ct. App. 2001) ("The Sixth Amendment does not apply in dependency proceedings so its structure cannot provide a basis for finding a correlative constitutional right of self-representation."). *But see Dane Cnty. Dep't of Human Servs. v. Susan P.S. (In re Sophia S.)*, 715 N.W.2d 692, 697 (Wis. Ct. App. 2006) (concluding that parents in termination proceedings have a right to self-representation under a provision of the Wisconsin Constitution which states that " '[i]n any court of this state, any suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor's choice.' " (quoting Wis. Const. art. I, § 21(2)). We find the reasoning of these cases persuasive and similarly conclude that there is no constitutional right to self-representation for a parent in an abuse, neglect, and dependency proceeding.

Having determined that the trial court was not required, either by statute or the Constitution, to allow respondent-mother to proceed *pro se*, we must still consider whether the court abused its discretion by denying respondent-mother's request. "Absent an abuse of discretion, we will not disturb the trial court's choice. 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 Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002) (citations and quotation marks omitted). In this case, the court considered respondent-mother and the caretaker's motions to proceed *pro se* twice, once prior to the beginning of the hearing and a second time prior to the presentation of evidence on the second day of the hearing. The trial court denied the first motion by stating, "I think you both need representation. You have adequate representation." After the second motion, the trial court made more detailed findings in support of its decision. Specifically, the court found that respondent-mother was potentially facing criminal charges due to the abuse suffered by her children and that she would be unlikely to be able to protect her rights with regard to those criminal charges if she represented herself.

In addition, although the trial court did not explicitly say so, it is clear from the transcript that the court found respondent-mother's waiver was not knowing and voluntary because she was highly influenced – if not coerced -- by the caretaker, with whom she continued to live and whom the trial court determined was physically abusive to the juveniles as well as respondent-mother. Respondent-mother's attorney

pointed out to the court that respondent-mother would not speak with him "without her boyfriend . . . being present. And that creates obviously some issues with us." Each time the waiver was brought up in court, the caretaker argued first as to why the court should grant both his request *and* respondent-mother's request to waive their right to a court-appointed attorney. The caretaker often spoke on behalf of both himself and respondent-mother, constantly using the pronoun "we." He noted, for example, that respondent mother filed a grievance against one of her prior attorneys where she wrote "six to seven pages of narrative . . . about reasons why she does not want to be represented by this man." Respondent-mother then followed the caretaker each time he brought up their request to waive the right to an attorney, making nearly identical arguments for waiving her right.

The trial court also had evidence of the extent of the caretaker's control over respondent-mother from her own submissions to the trial court. Respondent mother filed a long written statement with the trial court in which she described her history with her husband and the father of the juveniles, whom she alleges was physically abusive and addicted to alcohol and drugs. They and their extended families lived in the state of Washington. They separated in about 2012, and she claims that she had been attempting to legally divorce him ever since but had been unable to because she could not find him to serve him.[5] Apparently at about the same time as the separation from her husband, she met the caretaker and shortly after, alleging fear for the children's safety, she decided to have the caretaker home-school three of her children. She, the caretaker, and the children then moved to North Carolina in 2013 to assist the caretaker's ailing father. She had become estranged from her parents and extended family in Washington. She repeatedly states her fervent desire to marry the caretaker, noting that "[e]ver since we first started texting scripture over 3 and a half years ago, he has been my best friend, my Love, and my strength in all situations." She describes how poorly behaved the children have been; explains away each of their injuries from the alleged physical abuse; and laments their lack of appreciation for being provided with "3+ meals a day, movies on the weekends, sweets once a week (only because they blew that themselves), time to 'play', and to enjoy living on top of a hill . . . in a beautiful home!" Of course, the children were also required to help maintain the "over 30 acres of [caretaker's] family land that needs attending to[.]" She

5. DSS did find and serve respondent-father in this case and he participated in the case to some extent, although he is not a party to this appeal.

notes that since the children pay no bills, it is "more than reasonable for them to live the life of a farmer, and to work hard."

Considering respondent-mother's written statements as well as the statements and behavior of both her and the caretaker in court, it is apparent that respondent-mother was entirely under the control of caretaker and incapable of understanding the effect his behavior has had on her children. The court's findings from the bench reflect that it considered respondent-mother's situation and determined that self-representation was not in her best interests. We cannot say that this ruling was "so arbitrary that it could not have been the result of a reasoned decision," and accordingly, we do not disturb it. The adjudication and disposition orders are affirmed.

AFFIRMED.

Judges CALABRIA and INMAN concur.

---

JAMESTOWN PENDER, L.P., Plaintiff

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION and WILMINGTON URBAN AREA METROPOLITAN PLANNING ORGANIZATION, Defendants

No. COA15-925

Filed 1 November 2016

1. **Appeal and Error—interlocutory orders and appeals—denial of motion to dismiss—no substantial right—certified order**

Defendants' appeal from the denial of their motions to dismiss were from interlocutory orders and dismissed for failure to demonstrate the existence of a substantial right. However, the trial court's certified order on plaintiff's motion for partial judgment on the pleadings was immediately appealable.

2. **Indemnity—motion for partial judgment on pleadings—taking of property**

The trial court did not err by granting plaintiff's motion for partial judgment on the pleadings. Based upon the pleadings and the precedent established in *Kirby I* and *Kirby II*, plaintiff's complaint and defendants' answers established that a taking had occurred.

Appeal by defendants from orders entered 28 January 2015 by Judge Jay D. Hockenbury and 22 April 2015 by Judge Gary E. Trawick in Pender County Superior Court. Heard in the Court of Appeals 10 February 2016.

*Ward and Smith, P.A., by Ryal W. Tayloe, Alexander C. Dale, and Jeremy M. Wilson, and Hendrick Bryant Nerhood & Otis, LLP, by Matthew H. Bryant, for plaintiff-appellee.*

*Attorney General Roy Cooper, by Special Deputy Attorney General James M. Stanley, Jr., for defendant-appellant North Carolina Department of Transportation.*

*Shanklin & Nichols, LLP, by Kenneth A. Shanklin, and Smith Moore Leatherwood LLP, by Matthew A. Nichols and James "Jay" R. Holland, for defendant-appellant Wilmington Urban Area Metropolitan Planning Organization.*

CALABRIA, Judge.

Jamestown Pender, L.P. ("plaintiff") brought the underlying action against the North Carolina Department of Transportation ("NCDOT") and Wilmington Urban Area Metropolitan Planning Organization ("WMPO") (collectively, "defendants") concerning the putative taking of plaintiff's property. The trial court denied defendants' motions to dismiss, and entered an order granting partial judgment on the pleadings, finding that the recording of a transportation corridor official map for the Hampstead Bypass pursuant to the Transportation Corridor Official Map Act, N.C. Gen. Stat. § 136-44.50 *et seq.* ("the Map Act"), by WMPO constituted a taking of plaintiff's property. Defendants appeal.

## I. Factual and Procedural Background

The Map Act authorizes several entities, including NCDOT and WMPO, to file a "transportation corridor official map" with a county's register of deeds, creating a protected corridor in the future location of a planned roadway project. N.C. Gen. Stat. § 136-44.50 (2015). Filing the map effectuates restrictions on the demarcated land, so that "no building permit shall be issued for any building or structure or part hereof located within the transportation corridor, nor shall approval of a subdivision, as defined in G.S. 153A-335 and G.S. 160A-376, be granted with respect to property within the transportation corridor." N.C. Gen. Stat. § 136-44.51(a). Pursuant to the Map Act, as it stood during the time in which the events of this case transpired, these restrictions were to last

"for an indefinite period of time." *Kirby v. N.C. Dep't of Transp.*, ___ N.C. ___, ___, 786 S.E.2d 919, 921 (2016) (citing N.C. Gen. Stat. § 136-44.51). After the map is filed, NCDOT is not obligated to build or complete the highway project. *Id.*

In November of 2011, WMPO filed a transportation corridor official map. Plaintiff, a Delaware limited partnership, owned property which fell within the boundary of the transportation corridor. Prior to 2011, plaintiff was in the process of developing the property as a mixed-use commercial and residential development. Plaintiff sought administrative remedies, the adequacy and futility of which were a subject of dispute.

On 27 June 2014, plaintiff brought the underlying action against defendants in Pender County Superior Court. Plaintiff's complaint alleged inverse condemnation, unconstitutional taking, negative easement, violations of substantive and procedural due process, and violations of equal protection, and sought a declaratory judgment requiring defendants to compensate plaintiff for the taking of property and holding the Map Act unconstitutional.[1]

On 3 September 2014, NCDOT filed an answer, motion to dismiss, and motion for hearing. Its motion to dismiss was made pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure, based upon failure to state a claim upon which relief can be granted, lack of jurisdiction, sovereign and official immunities, N.C. Gen. Stat. § 136-111, lack of standing and ripeness, statutes of limitation and repose, failure to exhaust administrative remedies, and failure to join necessary parties. On 30 September 2014, WMPO filed a motion to dismiss pursuant Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure, alleging failure to exhaust administrative remedies, lack of standing, lack of subject matter jurisdiction, and failure to state a claim. These motions were heard on 17 December 2014, at which time the trial court, in open court, denied them in part and granted them in part. On 7 January 2015, WMPO filed an answer to the complaint. On 14 January 2015, WMPO gave notice of appeal from the trial court's oral partial denial of its motion to dismiss.

On 28 January 2015, the trial court entered a written order on defendants' motions to dismiss. The trial court allowed dismissal of plaintiff's

---

1. Plaintiff sought no remedy against WMPO except to have WMPO bound by the judgment. Plaintiff explicitly noted in its complaint that "No monetary relief is sought from WMPO in this action. WMPO is named as a nominal party for notice purposes as a result of its recording of . . . that certain Transportation Corridor Official Map . . . as more fully described herein."

equal protection claims for failure to state a claim, and plaintiff's second and third claims for being duplicative, and denied the remainder of defendants' motions. On 5 February 2015, NCDOT gave notice of appeal. On 10 February 2015, WMPO gave supplemental notice of appeal.

On 17 February 2015, this Court entered its unanimous opinion in the case of *Kirby v. N.C. Dep't. of Transp.*, ___ N.C. App. ___, 769 S.E.2d 218 (2015) (hereinafter *Kirby I*), *aff'd*, ___ N.C. ___, 786 S.E.2d 919 (2016). In *Kirby I*, this Court considered a similar action against NCDOT, alleging a taking pursuant to the Map Act, in which the trial court granted NCDOT's motion to dismiss plaintiffs' complaints. This Court reversed and remanded the matter for consideration of the damages suffered by plaintiffs, and declined to address several of the issues raised. *Id.* at ___, 769 S.E.2d at 236.

On 23 February 2015, plaintiff moved for partial judgment on the pleadings, seeking that the trial court determine that NCDOT executed a taking of plaintiff's property pursuant its power of eminent domain, and that the trial court order a jury trial on the issue of compensation. On 22 April 2015, the trial court entered an order on this motion. This order cited *Kirby I* as part of its reasoning. In its order, the trial court held that WMPO was acting as an agent of NCDOT, that NCDOT had appealed *Kirby* to the Supreme Court of North Carolina, and that a determination of the facts in the instant case would better be delayed until after the Supreme Court's decision in *Kirby*. The trial court declined to address the nature and extent of the taking of plaintiff's property, but allowed plaintiff's motion for partial judgment on the pleadings, holding that NCDOT had executed its power of eminent domain, that this constituted a taking and inverse condemnation of plaintiff's property, and that a jury trial would be scheduled to determine the amount of compensation due plaintiff. The trial court further certified this order for appeal to this Court pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Defendants gave notice of appeal.

From the trial court's order dated 28 January 2015, partially denying their motions to dismiss, and the trial court's order dated 22 April 2015, granting plaintiff's motion for partial judgment on the pleadings, defendants appeal.

On 10 June 2016, our Supreme Court issued its opinion in *Kirby*, affirming the decision of this Court. *Kirby v. N.C. Dep't. of Transp.*, ___ N.C. ___, 786 S.E.2d 919 (2016) (hereinafter *Kirby II*). On 11 July 2016, the North Carolina General Assembly approved House Bill 959 ("H.B. 959"). This bill, *inter alia*, rescinded all transportation corridor official

maps filed pursuant to the Map Act, and imposed a moratorium on the filing of new maps, effective 1 July 2016 until 1 July 2017. N.C. Sess. Laws 2016-90 §§ 16, 17(a); *see also* N.C. Gen. Stat. § 136-44.50(h) (2016).

On 9 August 2016, this Court entered an order directing the parties to file supplemental briefs addressing the Supreme Court's decision in *Kirby II* and the impact of H.B. 959. All parties did so.

II. Interlocutory Appeal

**[1]** As a preliminary matter, we note that the instant appeal is from the partial grant of a motion to dismiss, and the grant of a partial motion for judgment on the pleadings. These orders, which do not dispose of the entirety of the case but leave matters for further action by the trial court, are interlocutory. *See Royal Oak Concerned Citizens Ass'n v. Brunswick Cty.*, 233 N.C. App. 145, 148, 756 S.E.2d 833, 835 (2014).

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "[W]hen an appeal is interlocutory, the appellant must include in its statement of grounds for appellate review 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (quoting N.C.R. App. P. 28(b)(4)), *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005).

> [I]mmediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay. . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a substantial right.

*Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (citations omitted).

A. Motions to Dismiss

"An order . . . granting a motion to dismiss certain claims in an action, while leaving other claims in the action to go forward, is plainly an interlocutory order." *Pratt v. Staton*, 147 N.C. App. 771, 773, 556 S.E.2d 621, 623 (2001). However, sovereign immunity raises a jurisdictional issue that is immediately appealable because it affects a substantial right. *Arrington v. Martinez*, 215 N.C. App. 252, 256, 716 S.E.2d 410, 413

(2011). NCDOT asserts that its sovereign immunity insulates it from suit, and allows immediate appeal from the denial of its motion to dismiss.

We note, however, that NCDOT explicitly declined to pursue immunity at the hearing. The trial court found this fact in its order on the motions to dismiss. We hold, therefore, that because NCDOT waived its sovereign immunity, no jurisdictional issue exists that would affect a substantial right.

WMPO contends that the dismissal order impacts a substantial right, in that plaintiff failed to exhaust administrative remedies, and in that the denial of its motion subjected WMPO to legal liability for performing its governmental duties.

A plaintiff's failure to exhaust administrative remedies is grounds for dismissal because it deprives the court of subject matter jurisdiction. *Steward v. Green*, 189 N.C. App. 131, 133, 657 S.E.2d 719, 721 (2008). Thus, a motion to dismiss for failure to exhaust administrative remedies is equivalent to a motion to dismiss for lack of subject matter jurisdiction. However, "[a] trial judge's order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and not immediately appealable." *Shaver v. N.C. Monroe Constr. Co.*, 54 N.C. App. 486, 487, 283 S.E.2d 526, 527 (1981). As such, an interlocutory appeal based on failure to exhaust administrative remedies is not immediately appealable.

Similarly, being subjected to legal liability is not a substantial right that is immediately appealable. "Avoidance of trial is not a substantial right entitling a party to immediate appellate review." *Anderson v. Atlantic Cas. Ins. Co.*, 134 N.C. App. 724, 727, 518 S.E.2d 786, 789 (1999). Additionally, the speculative threat of future trials does not qualify as a substantial right entitling a party to an immediate appeal. *Builders Mut. Ins. Co. v. Meeting St. Builders, LLC*, 222 N.C. App. 646, 651, 736 S.E.2d 197, 200 (2012). In the instant case, avoiding the current action is not a substantial right of WMPO, and concerns about the "potentially dozens of more" trials are mere speculation. Thus, this argument also fails to demonstrate that WMPO is entitled to immediate appeal.

Because neither NCDOT nor WMPO has demonstrated the existence of a substantial right with respect to the denial of their motions to dismiss, we hold that those motions are interlocutory, and dismiss this appeal with respect to those motions.

B. Partial Judgment on the Pleadings

"When the trial court certifies its order for immediate appeal under Rule 54(b), appellate review is mandatory. Nonetheless, the trial court

may not, by certification, render its decree immediately appealable if [it] is not a final judgment." *Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579 (citations and quotations omitted). In the instant case, the trial court certified its order on plaintiff's motion for partial judgment on the pleadings pursuant to Rule 54(b). Although the order leaves open the issue of damages, it is final with respect to defendants' liability, and we therefore hold that this order, as certified, is immediately appealable.

## III. Partial Judgment on the Pleadings

**[2]** In various arguments, defendants contend that the trial court erred in granting plaintiff's motion for partial judgment on the pleadings. We disagree.

### A. Standard of Review

This Court reviews a motion for judgment on the pleadings *de novo*. *Odell v. Legal Bucks, LLC*, 192 N.C. App. 298, 305, 665 S.E.2d 767, 772 (2008).

"In deciding [a motion for judgment on the pleadings], the trial court looks solely to the pleadings. The trial court can only consider facts properly pleaded and documents referred to or attached to the pleadings." *N.C. Concrete Finishers v. N.C. Farm Bureau Mut. Ins. Co.*, 202 N.C. App. 334, 336, 688 S.E.2d 534, 535 (2010) (quoting *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 37-38 (2009)). A judgment on the pleadings is properly entered only if " 'all the material allegations of fact are admitted[,] . . . only questions of law remain[,]' and no question of fact is left for jury determination." *Id.* (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)).

### B. Analysis

First, defendants contend that the trial court was divested of authority to rule on plaintiff's motion for partial judgment on the pleadings after defendants filed their notices of appeal from the trial court's order denying their motions to dismiss.

"As a general rule, once a party gives notice of appeal, such appeal divests the trial court of its jurisdiction, and the trial judge becomes *functus officio*." *RPR & Assocs., Inc. v. Univ. of N.C.-Chapel Hill*, 153 N.C. App. 342, 346, 570 S.E.2d 510, 513 (2002). "Where a party appeals from a *non*appealable interlocutory order, however, such appeal does not deprive the trial court of jurisdiction, and thus the court may properly proceed with the case." *Id.* at 347, 570 S.E.2d at 514. As we have held, above, that defendants' appeals from the trial court's denial of their

motions to dismiss were interlocutory, those appeals did not divest the trial court of its jurisdiction. We hold that the trial court had jurisdiction to hear plaintiff's motion for partial judgment on the pleadings.

Defendants next raise several arguments challenging the merits of plaintiff's motion for partial judgment on the pleadings, and the trial court's reliance upon *Kirby I* in reaching its decision. Ultimately, these arguments can be condensed to a single issue: whether the trial court erred in granting plaintiff's motion for partial judgment on the pleadings.

In its complaint, plaintiff alleged, *inter alia*, the following relevant facts:

> 20. For all purposes under the Act, WMPO acts on behalf of NCDOT and is an agent of NCDOT.
>
> 21. The Hampstead Bypass is an NCDOT project.
>
> 22. The Map was filed with the coordination, oversight, and approval of NCDOT.
>
> 23. WMPO does not have the power of eminent domain.
>
> 24. The recorded documents for the Hampstead Bypass associated with the Map set forth the list of properties and property owners whose real property purportedly is located within the mapped protected corridor pursuant to N.C. Gen. Stat. § 136-44.51 ("Protected Corridor").
>
> 25. The Property is within the Protected Corridor.
>
> 26. The Map is cross-indexed under Jamestown's name in the Pender County Register of Deeds. Pender County tax maps also depict the route of the Hampstead Bypass across the Property.
>
> 27. The Hampstead Bypass has not been completed.
>
> 28. NCDOT plans to purchase or condemn properties located within the Hampstead Bypass in order to allow NCDOT to construct and develop the Hampstead Bypass.
>
> 29. Prior to the recording of the Map and at all times thereafter, NCDOT did not have, and has not had, the funds available to acquire the properties necessary for the Hampstead Bypass or for its construction.
>
> 30. Despite these plans to purchase or condemn the properties, NCDOT has informed Jamestown that it will be

> ten (10) years or more—perhaps thirty (30) years—before NCDOT actually purchases or condemns the properties.
>
> . . .
>
> 31. The Property is located within the Hampstead Bypass project.
>
> 32. The Property is heavily impacted by the Hampstead Bypass.
>
> 33. The Hampstead Bypass, when developed, will divide the Property into two pieces. It also will result in the taking of all of that portion of the Property previously approved for commercial development.

In its answer to plaintiff's complaint, NCDOT denied allegations 20, 22, 29, and 30; in short, NCDOT denied that WMPO was its agent, that it had oversight over WMPO's filing, that it lacked the funds to acquire the property at issue, and that it would be ten or thirty years before NCDOT condemned or purchased the property. With respect to allegation 24, NCDOT contended that it did not draft or file the corridor map, and that it therefore lacked knowledge of the allegations. The remaining relevant allegations were admitted. More specifically, in its answer, NCDOT admitted the following:

> 31. It is admitted that a portion of Plaintiff's property lies within the protected corridor. Except as herein admitted, the remaining allegations are denied.
>
> 32. It is admitted that the proposed project is anticipated to impact plaintiff's property and areas that plaintiff's [sic] intended for commercial development. Plaintiff will be justly compensated once right of way acquisition authorization has been approved for the project. Except as herein admitted, the remaining allegations are denied.
>
> 33. It is admitted that the proposed project is anticipated to impact plaintiff's property and that Plaintiff will be justly compensated once right of way acquisition authorization has been approved for the project. Except as herein admitted, the remaining allegations are denied.

NCDOT made additional admissions, each acknowledging that "plaintiff will be justly compensated for any taking of property rights[.]"

In its answer to plaintiff's complaint, WMPO denied allegation 20, and alleged that it was without knowledge with respect to allegations 29 and 30. The remainder of the relevant allegations were admitted.

At a minimum, defendants admitted that plaintiff's property was within the transportation corridor, and that plaintiff's property would be impacted as a result. NCDOT explicitly admitted that plaintiff should and would be compensated for any taking that occurred. Given that the material facts were admitted, the only question remaining was one of law, namely whether the impact on plaintiff's property constituted a taking, requiring defendants, or more specifically NCDOT, to compensate plaintiff.

Defendants contend that a taking did not occur. NCDOT alleges that this is due to the fact that WMPO, not NCDOT, filed the map at issue. However, NCDOT fails to offer statutory citations or other authority to explain why this precludes plaintiff from suffering a taking.

H.B. 959 contains language relevant to this issue. Specifically, it provides that:

> Notwithstanding any provision of law to the contrary, damages, right-of-way costs, and planning and design costs related to litigation concerning the adoption of a transportation corridor official map under Article 2E of Chapter 136 of the General Statutes shall be paid from the tier under Article 14B of Chapter 136 of the General Statutes in which the project covered by the transportation corridor official map was funded under or is programmed to be funded under. For projects covered by a transportation corridor official map that were not funded, or are not programmed to be funded, under Article 14B of Chapter 136 of the General Statutes, damages, right-of-way costs, and planning and design costs related to litigation concerning the adoption of the transportation corridor official map shall be paid from the regional allocation of funds under Article 14B of Chapter 136 of the General Statutes for the region covered by the transportation corridor official map.

N.C. Sess. Laws 2016-90 § 15.

If the words of a statute "are clear and unambiguous, they are to be given their plain and ordinary meanings." *Savage v. Zelent*, ___ N.C. App. ___, ___, 777 S.E.2d 801, 804 (2015) (citations and quotations omitted). "Where the legislature has made no exceptions to the positive terms of

a statute, the presumption is that it intended to make none, and it is a general rule of construction that the courts have no authority to create, and will not create, exceptions to the provisions of a statute not made by the act itself." *Sara Lee Corp. v. Carter*, 351 N.C. 27, 36, 519 S.E.2d 308, 313 (1999) (quoting *Upchurch v. Hudson Funeral Home, Inc.*, 263 N.C. 560, 565, 140 S.E.2d 17, 21 (1965)).

In the instant case, the language of H.B. 959 is clear and unambiguous. H.B. 959 specifies that the costs resulting from litigation surrounding the filing of maps pursuant to the Map Act are to be paid from funds set up by NCDOT's Transportation Investment Strategy Formula, N.C. Gen. Stat. § 136-189.11 (2015). Section 15 does not mention any distinctions between maps recorded by NCDOT and those recorded by other organizations in terms of liability. Rather, according to the "plain and ordinary meaning" of the statute, the costs associated with litigation over the filing of a map are paid by a predetermined fund, and exactly which fund is used to pay these costs is determined by which project is covered by the Map Act. *Savage*, ___ N.C. App. at ___, 777 S.E.2d at 804.

The General Assembly did not include an exception to this rule for maps recorded by agencies other than NCDOT, for sovereign immunity reasons or otherwise, so we must presume that the General Assembly did not intend for there to be such an exception. *Sara Lee Corp.*, 351 N.C. at 36, 519 S.E.2d at 313. Because we must carry out the General Assembly's intent "to the fullest extent," we cannot read such an exception into the statute. *Savage*, ___ N.C. App. at ___, 777 S.E.2d at 804. We decline to hold that NCDOT is exempt from liability simply on the basis of another agency filing the map.

NCDOT further contends that the trial court erred in relying on *Kirby I* to support the theory that a taking occurred, arguing that our holding in *Kirby I* did not in fact demonstrate a taking in contexts like this one.

In *Kirby I*, we held explicitly that "the Map Act empowers NCDOT with the right to exercise the State's power of eminent domain to take private property of property owners affected by, and properly noticed of, a transportation corridor official map . . . which power, when exercised, requires the payment of just compensation." *Kirby I*, ___ N.C. App. at ___, 769 S.E.2d at 232. We further held that, "[u]pon the filing with the register of deeds of a permanent, certified copy of the transportation corridor official map . . . the statutory restrictions of [the Map Act] are applicable to each 'affected' owner[.]" *Id.* at ___, 769 S.E.2d at 234. We concluded that NCDOT had not merely made plans to acquire

property, but had exercised its power of eminent domain. *Id.* at ___, 769 S.E.2d at 235. While we noted that this determination required a fact-specific inquiry, we held that the demands of such an inquiry were met.

As an additional matter, we note that in *Kirby II*, our Supreme Court further held that "the Map Act restricted plaintiffs' fundamental rights to improve, develop, and subdivide their property for an unlimited period of time. These restraints, coupled with their indefinite nature, constitute a taking of plaintiff's elemental property rights by eminent domain." *Kirby II*, ___ N.C. at ___, 786 S.E.2d at 921.

NCDOT contends that the trial court erred in relying upon *Kirby I* because that case did not involve a putative agency relationship, as is the case before us, but rather direct action by NCDOT. As we noted above, however, direct action by NCDOT is not required for a taking to occur under statute, requiring payment from funds set aside for that purpose. NCDOT further contends that liability for a taking requires a fact-specific inquiry into the values of properties and the degree of impact upon them. However, this matter is still before the trial court; plaintiff's partial motion for judgment on the pleadings left open the degree to which a taking occurred, and the just compensation for the taking. The only issue disposed of was the legal question of *whether* a taking had occurred. NCDOT's argument does not truly challenge that ruling.

We hold that, based upon the pleadings and the precedent established in *Kirby I* and *Kirby II*, plaintiff's complaint and defendants' answers established that a taking had occurred. The trial court did not err in granting plaintiff's motion for partial judgment on the pleadings on that limited issue.

This argument is without merit.

## IV. Conclusion

Because defendants fail to show that the denial of their motions to dismiss impacted a substantial right, those arguments are dismissed as interlocutory. Because the pleadings, taken as a whole and considering defendants' admissions, demonstrated no genuine issue of whether a taking had occurred, the trial court did not err in granting plaintiff's motion for partial judgment on the pleadings on that issue.

DISMISSED IN PART, AFFIRMED IN PART.

Judge TYSON concurs.

Judge DAVIS concurs in the result only.

SED HOLDINGS, LLC, Plaintiff
v.
3 STAR PROPERTIES, LLC, JAMES JOHNSON, TMPS LLC, MARK HYLAND, AND HOME SERVICING, LLC, Defendants

No. COA16-385

Filed 1 November 2016

**Appeal and Error—interlocutory orders and appeals—appeal of injunction—contempt orders—jurisdiction**

Given these particular facts and the procedural context in which the contempt orders were entered, the trial court acted reasonably in continuing to exercise jurisdiction over the case while defendants' appeal of the injunction was pending in the Court of Appeals. Because the injunction was ultimately upheld, the contempt orders entered to enforce it did not prejudice defendants.

Appeal by defendants from orders entered between 24 September 2015 and 5 January 2016 by Judge G. Wayne Abernathy in Durham County Superior Court. Heard in the Court of Appeals 21 September 2016.

*Graebe Hanna & Sullivan, PLLC, by Douglas W. Hanna, for plaintiff-appellee.*

*Law Offices of Hayes Hofler, P.A., by R. Hayes Hofler, III, for defendants-appellants.*

ZACHARY, Judge.

Generally, when a party gives notice of appeal from a trial court order, that appeal deprives the trial court of jurisdiction to proceed on any matter embraced by the challenged order. But this general rule is subject to exceptions, one of which applies in the instant case. Here, a preliminary injunction was granted against defendants, and they appealed that interlocutory order to this Court. While the appeal was pending, the trial court held contempt proceedings and entered several show cause orders to enforce the terms of its injunction. The trial court ultimately held defendants in civil contempt. After determining that the injunction was subject to immediate review, this Court held that the injunction order was properly entered. Defendants now appeal the entry of the contempt orders, and they argue that their notice of appeal from the injunction deprived the trial court of jurisdiction, rendering

the contempt orders null and void. For the reasons that follow, we conclude that the trial court retained jurisdiction to enter contempt orders pending defendants' first appeal and, accordingly, we affirm the entry of those orders.

## I. Background

The factual genesis of this case was the execution of a "Non-Performing Note and Mortgage Loan Sale Agreement" (Agreement) between plaintiff SED Holdings, LLC (SED) and defendant 3 Star Properties, LLC (3 Star). Both SED and 3 Star are in the business of buying and selling pools of residential mortgage loans. Defendant Mark Hyland (Hyland) is the managing member of defendant TMPS LLC (TMPS), a Texas-based limited liability company. 3 Star had previously purchased the loan pool at issue in this case from TMPS. Defendant James Johnson is a managing member of 3 Star, and he negotiated the terms of the Agreement with SED.

Pursuant to the Agreement, which was executed on 20 June 2014, SED agreed to purchase 1,235 mortgages—with a total outstanding value of $71,180,364.00—from 3 Star for $13,880,171.00. SED agreed to pay $2,000,000.00[1] of the purchase price in cash at closing, and to pay the remaining principal balance of $11,880,171.00 pursuant to the terms of a promissory note (the Note). A Security Agreement was also executed by the parties. The Agreement required SED to use the following third parties to hold, inspect, cure, and process the loans until the Note was paid off: (1) Brown and Associates, a Texas law firm, acted as custodian of the records; and (2) defendant Home Servicing, LLC (Home Servicing) was responsible for servicing the loan files. This requirement stemmed from Hyland and TMPS's pre-existing relationship with Brown & Associates and Home Servicing.

The Agreement also contained a "put back" provision that allowed SED to return to 3 Star any loan or asset that either suffered from an "incurable documentary defect" or was unsecured by a valid first mortgage. The put back provision had to be invoked within 45 days of closing. Critically, the Security Agreement provided that if SED defaulted on the terms of the sale, 3 Star had the right to take possession of all assets and attempt to sell them on behalf of SED.

Problems arose after SED inspected the mortgage pool in July 2014. According to SED, the entire deal rested on certain representations

---

1. $300,000.00 of the initial payment was the earnest money deposit.

made by Johnson and 3 Star, most notably that each mortgage was secured by real property and that 3 Star owned all loans contained in the pool. Taking the position that these representations were materially false, SED claimed that 3 Star owned only a few of the loans, many of which were unsecured and essentially worthless. SED attempted to return 605 loans for a refund, but 3 Star did not respond to the "put back" notice.

Instead, 3 Star claimed that SED had defaulted on the Agreement's terms and had not made a good-faith attempt to sell the non-performing mortgages it acquired from 3 Star. As a result, 3 Star served SED with a notice of default on 17 October 2014 and expressed an intention to exercise its right to sell assets from the loan pool on behalf of SED. In response, SED filed a verified complaint[2] against defendants in Durham County Superior Court on 1 December 2014. The complaint alleged claims for, *inter alia*, breach of contract, fraud, negligent misrepresentation, and civil conspiracy, and also contained a motion asking for preliminary injunctive relief. Defendants then filed a motion to dismiss the complaint for lack of subject matter jurisdiction and improper venue based on a forum selection clause in the Security Agreement and a choice of law provision in the Agreement, which provided, respectively, that any actions would be filed in Harris County, Texas, and that Texas law would govern.

After the trial court heard defendants' motion to dismiss and SED's motion for injunctive relief, it entered two orders on 13 February 2015. One order denied defendants' motion to dismiss, and the other order granted SED's motion for injunctive relief. The injunction prohibited defendants from "selling . . . or otherwise making any dispositions of any of the loans sold to SED[,]" and it instructed defendants to place any monies they collected from transactions related to the loan sale in escrow pending the case's resolution. SED was instructed to post a $100,000.00 bond to protect and secure defendants' rights. On 19 February 2015, defendants gave notice of appeal from both of the trial court's orders. *See SED Holdings, LLC v. 3 Star Properties, LLC*, __ N.C. App. __, 784 S.E.2d 627 (2016) ("*SED I*").

Although the denial of defendants' motion to dismiss and the granting of SED's motion for a preliminary injunction were interlocutory orders, this Court addressed the merits of defendants' arguments concerning each order. *Id.* at __, 784 S.E.2d at 630-31. Because the preliminary injunction froze monies related to the mortgage pool sale, the

---

2. We note that the essence of the complaint was that defendants acted in concert to defraud SED under the Agreement.

*SED I* Court held that it affected defendants' substantial "right to use and control [their] assets." *Id.* at __, 784 S.E.2d at 630. However, the trial court's injunction was ultimately upheld. *Id.* at __, 784 S.E.2d at 632. This Court's mandate in *SED I* was issued on 25 April 2016.

While the appeal in *SED I* was pending, the trial court conducted a series of contempt proceedings and issued several orders ("the contempt orders") between September 2015 and January 2016. Those proceedings were prompted by SED's motion to show cause why defendants should not be held in civil contempt for failure to comply with the injunction. SED's motion to show cause contained allegations that defendants had violated the injunction by selling loans related to the Agreement and disbursing funds that were required to be held in escrow. On 24 September 2015, the trial court entered an order that commanded defendants to show cause why they should not be held in civil contempt. The show cause order contained the following pertinent findings of fact:

> 12. On . . . 28 [July] 2015, SED sent an email to Home Servicing . . . requesting the following information on the assets: (1) Payoff date; (2) Next due date; (3) Acquired UPB; (4) Beginning UPB; and (5) Ending UPB. This information is necessary in order to properly market the assets and obtain the maximum value in a potential sale. . . .
>
> 13. The affidavit submitted by SED, and the evidence attached to the Motion to Show Cause, support the fact that Home Servicing . . . refused to provide the requested information based on instructions given to it by [d]efendants 3 Star, Johnson, TMPS[,] . . . and . . . Hyland. . . .
>
> 14. The affidavit submitted by SED, and the evidence attached to the Motion to Show Cause, support the fact that . . . Home Servicing . . . has refused to provide a disclosure of all monies [it has] collected . . . and/or held in escrow regarding the assets at issue.

Based on these findings, the trial court concluded as a matter of law that: (1) the injunction did not affect a substantial right of defendants and was thus not immediately appealable, and (2) the trial court retained jurisdiction to enforce the terms of its injunction while defendants' appeal was pending in this Court. The parties eventually agreed to a consent order that required Home Servicing to produce servicing data on the loan pool; however, the information that was produced indicated that loans covered by the injunction had been sold and that Home Servicing had failed to deposit service fees it collected from those transactions

in escrow. Consequently, the trial court entered additional show cause orders to enforce the injunction. The trial court ultimately entered a 5 January 2016 order that held defendants in civil contempt. Defendants now appeal the entry of the contempt orders.

## II. Standard of Review

Appellate review of a contempt order is ordinarily "limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Middleton v. Middleton*, 159 N.C. App. 224, 226, 583 S.E.2d 48, 49 (2003) (citation omitted). Yet in this case, defendants do not directly attack the contempt orders; instead, they challenge the trial court's subject matter jurisdiction to enter those orders. "The standard of review for lack of subject matter jurisdiction is *de novo*." *Keith v. Wallerich*, 201 N.C. App. 550, 554, 687 S.E.2d 299, 302 (2009) (citation omitted).

## III. Analysis

Defendants' sole argument on appeal is that that the trial court lacked jurisdiction to enter any of its contempt orders. According to defendants, the trial court had no jurisdiction over the case following their 19 February 2015 notice of appeal from the injunction. The gravamen of defendants' argument is that the orders entered while the appeal was pending are nullities and should be vacated. We disagree.

The longstanding, general rule in North Carolina is that when a party gives notice of appeal, the trial court is divested of jurisdiction until the appellate court returns a mandate in the case. *E.g.*, *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 580, 273 S.E.2d 247, 258 (1981) ("The well-established rule of law is that 'an appeal from a judgment rendered in the Superior Court suspends all further proceedings in the cause in that court, pending the appeal.' ") (quoting *Harris v. Fairley*, 232 N.C. 555, 556, 61 S.E.2d 619, 620 (1950)); *Hoke v. Atl. Greyhound Corp.*, 227 N.C. 374, 375, 42 S.E.2d 407, 408 (1947). To that end, our General Assembly has provided that an appeal from a trial court order or judgment automatically "stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein[.]" N.C. Gen. Stat. § 1-294 (2015). Pending the appeal, the trial judge is generally *functus officio*, *France v. France*, 209 N.C. App. 406, 410, 705 S.E.2d 399, 404 (2011), Latin for "having performed his or her office," which is defined as being "without further authority or legal competence because the duties and functions of the original commission have been fully accomplished." Black's Law Dictionary 743 (9th ed. 2009). The principle behind the common law doctrine of *functus officio*, which safeguards

the rule codified in section 1-294, "stems from the general rule that two courts cannot ordinarily have jurisdiction of the same case at the same time." *RPR & Assocs., Inc. v. Univ. of N. Carolina-Chapel Hill*, 153 N.C. App. 342, 347, 570 S.E.2d 510, 513 (2002), *cert. denied and disc. review denied*, 357 N.C. 166, 579 S.E.2d 882 (2003).

Even so, the rule codified at section 1-294 and, by extension, the *functus officio* doctrine, are not without exceptions. For instance, even when a party has noted an appeal, the trial court "retains jurisdiction to take action which aids the appeal, . . . and to hear motions and grant orders," when those matters are " 'not affected by the judgment appealed from.' " *Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N. Carolina*, 108 N.C. App. 357, 364, 424 S.E.2d 420, 422 (quoting N.C. Gen. Stat. § 1-294), *aff'd per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993). Section 1-294's automatic stay is easily applied in the context of a final judgment, "one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). A final judgment "is always appealable," for the trial court has completed its duties. *Embler v. Embler*, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001). Yet an interlocutory order, one that "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[,]" is generally not appealable. *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. North Carolina law therefore recognizes that merely giving notice of appeal from an interlocutory order does not automatically deprive the trial court of jurisdiction. Instead, the scope of a trial court's continuing jurisdiction—if jurisdiction continues at all—largely depends upon whether the interlocutory order being challenged is eligible for immediate review.

If a party appeals from an interlocutory order that is immediately appealable, the trial court's jurisdiction is removed and it may not proceed on any matters embraced by the order. *Patrick v. Hurdle*, 7 N.C. App. 44, 45, 171 S.E.2d 58, 59 (1969); *see also* N.C. Gen. Stat. § 1-294. "Where a party appeals from a nonappealable interlocutory order, however, such appeal does not deprive the trial court of jurisdiction and thus the court may properly proceed with the case." *RPR & Assocs.*, 153 N.C. App. at 347, 570 S.E.2d at 514 (citation omitted). The latter rule serves to prevent litigants from delaying "the administration of justice [by] bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." *Veazey*, 231 N.C. at 363, 57 S.E.2d at 382.

Immediate review is available where an interlocutory order "affects a substantial right that 'will clearly be lost or irremediably adversely affected if the order is not review[ed] before final judgment.' " *Edmondson v. Macclesfield L-P Gas Co.*, 182 N.C. App. 381, 391, 642 S.E.2d 265, 272 (2007) (quoting *Blackwelder v. Dept. of Human Res.*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780 (1983)); *see also* N.C. Gen. Stat. § 1-277(a) (2015) ("An appeal may be taken from every judicial order or determination of a [trial] judge . . . which affects a substantial right claimed in any action or proceeding[.]"); N.C. Gen. Stat. § 7A-27(b)(3) (2015) (providing a right of appeal from any interlocutory order that, *inter alia*, affects a substantial right). As our Supreme Court has acknowledged, this determination must be made on a case-by-case basis: "[T]he 'substantial right' test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). Despite the muddy waters of the substantial right test, it is clear that a trial court need not await the appellate court's decision as to whether an appeal has been attempted from a nonappealable interlocutory order. Indeed, because "a litigant cannot deprive the trial court of jurisdiction to determine a case on its merits by appealing from a nonappealable interlocutory order[,]" *Velez v. Dick Keffer Pontiac-GMC Truck, Inc.*, 144 N.C App. 589, 591, 551 S.E.2d 873, 875 (2001), "[t]he trial court has the authority . . . to determine whether or not its order affects a substantial right of the parties or is otherwise immediately appealable." *RPR & Assocs.*, 153 N.C. App. at 348, 570 S.E.2d at 514 (citations omitted).

In the instant case, the trial court determined that its injunction did not affect a substantial right and thus was not immediately appealable. As a result, the court found that it retained jurisdiction to hold contempt proceedings and enforce its injunction order. SED contends that the facts related to jurisdiction in *RPR Assocs.* are indistinguishable from those in the present case. After careful review, we agree.

In *RPR Assocs.*, the defendant appealed from an interlocutory order denying its motion to dismiss based on sovereign immunity. 153 N.C. App. at 344, 570 S.E.2d at 512. Despite the appeal, the plaintiff continued to pursue its claims at the trial level and argued that the interlocutory order was not immediately appealable. *Id.* at 344-45, 570 S.E.2d at 512. In response, the defendant moved the trial court on two occasions to stay proceedings pending the appeal, but both motions were denied. *Id.* at 345, 570 S.E.2d at 512-13. This Court initially granted the defendant's

motion for a temporary stay pending the appeal and then later dissolved it. *Id.* at 345, 570 S.E.2d at 512. Our Supreme Court also denied the defendants' petitions for certain extraordinary writs. *Id.*

Upon consideration of the defendant's appeal from the denial of its motion to dismiss, this Court determined that the interlocutory order affected a substantial right, but ultimately held that the motion to dismiss was properly denied because sovereign immunity had been waived. *RPR & Assocs. v. State*, 139 N.C. App. 525, 527, 534 S.E.2d 247, 250 (2000), *affirmed per curiam*, 353 N.C. 362, 543 S.E.2d 480 (2001) ("*RPR I*"). However, after the interlocutory appeal was heard by this Court in *RPR I*, but before the decision was filed, the trial court proceeded to the case's merits, heard evidence, and entered a final judgment. *RPR & Assocs.*, 153 N.C. App. at 346, 570 S.E.2d at 513. Both parties appealed from that judgment, and the defendant argued that the trial court's jurisdiction over the case was terminated once the defendant's interlocutory notice of appeal was entered in *RPR I*. *Id.* After explaining that the *functus officio* doctrine does not apply to nonappealable interlocutory orders, this Court rejected the defendant's argument, reasoning that

> [b]ecause the trial court had the authority to determine whether its order affected [the] defendant's substantial rights or was otherwise immediately appealable, the trial court did not err in continuing to exercise jurisdiction over this case after [the] defendant filed its notice of appeal. The trial court's determination that the order was nonappealable was reasonable in light of established precedent and the repeated denials by the appellate courts of this State to stay proceedings. Although this Court ultimately held that [the] defendant's appeal affected a substantial right, it also held that defendant was not immune to suit. [The d]efendant states no grounds, nor has it produced any evidence to demonstrate how it was prejudiced by the trial court's exercise of jurisdiction over this case.

*Id.* at 349, 570 S.E.2d at 515.

At the very least, *RPR & Assocs.* stands for two general propositions: (1) a trial court properly retains jurisdiction over a case if it acts reasonably in determining that an interlocutory order is not immediately appealable, and (2) that determination may be considered reasonable even if the appellate court ultimately holds that the challenged order is subject to immediate review.

Given this backdrop, we conclude that both the procedural posture of this case, and the jurisdictional issues it presents, are substantially similar to the situation in *RPR & Assocs.* Defendants filed notice of appeal on 19 February 2015 from the trial court's order granting SED's motion for preliminary injunctive relief. Meanwhile, the trial court proceeded with contempt proceedings to enforce the order. As with the motion to dismiss based upon sovereign immunity in *RPR & Assocs.*, this Court held that defendants' interlocutory appeal of the injunction affected a substantial right and was immediately appealable. *SED I*, __ N.C. App. ___, 784 S.E.2d at 630. But "such a holding was not a foregone conclusion." *RPR & Assocs.*, 153 N.C. App. at 348, 570 S.E.2d at 514.

It is clear that injunctive orders entered only to maintain the status quo pending trial are not immediately appealable. *Barnes v. St. Rose Church of Christ, Disciples of Christ*, 160 N.C. App. 590, 592, 586 S.E.2d 548, 550 (2003); *Stancil v. Stancil*, 94 N.C. App. 760, 763-64, 381 S.E.2d 720, 722-23 (1989); *Dixon v. Dixon*, 62 N.C. App. 744, 745, 303 S.E.2d 606, 607 (1983). Then again, reasonable minds may disagree as to whether a particular injunction simply maintains the status quo. Beyond that, our courts have taken a flexible approach with respect to the appealability of orders granting injunctive relief. Most relevant to this case, orders affecting a party's ability to conduct business or control its assets may or may not implicate a substantial right.

In *Barnes*, after the plaintiff alleged that a pastor had improperly converted the legal status of a church from an unincorporated religious association to a non-profit corporation and breached his fiduciary duties by transferring the church's assets to corporate accounts, the trial court enjoined the transfer of assets and appointed a receiver to manage the church's finances and assets pending a resolution on the merits. 160 N.C. App. at 591, 586 S.E.2d at 549. On appeal, the defendants argued that the injunction and appointment of a receiver prevented the church from conducting its own business. *Id.* at 592, 586 S.E.2d at 550. This Court disagreed, noting that because the injunctive relief did not halt the church's day-to-day operations and was designed to maintain the status quo of the church's finances during the litigation, no substantial right had been affected, and thus the challenged orders were not immediately appealable. *Id.*

By contrast, in *Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co.*, which involved a high-stakes dispute over reinsurance contracts, the preliminary injunction was subject to immediate review: "Given the large amount of money at issue in this case [($30,000,000.00)],

the fact that the trial court impinged appellant's right to the use and control of those assets, and the unavoidable and lengthy delays [of planned arbitration proceedings in the matter,] . . . we hold that appellant must be granted its appeal to preserve a substantial right." 184 N.C. App. 292, 294-95, 647 S.E.2d 102, 104 (2007).

Here, the trial court adopted *Barnes*' reasoning to support its determination that the preliminary injunction was not immediately appealable, while this Court in SED I cited *Scottish Re Life Corp.* to support its determination that the preliminary injunction was immediately appealable. *SED I*, __ N.C. App. __,784 S.E.2d at 630. The decisions in *Barnes* and *Scottish Re Life Corp.* underscore the fact that there are "[n]o hard and fast rules . . . for determining which appeals affect a substantial right." *Cagle v. Teachy*, 111 N.C. App. 244, 246, 431 S.E.2d 801, 802 (1993). Furthermore, this Court clearly explained the injunction's purpose in *SED I*:

> [SED] claims it would incur irreparable harm if [d]efendants were able to liquidate the monies or mortgages arising from the mortgage sale. Prohibiting [d]efendants from moving these assets for the pendency of litigation maintains the status quo and protects the monetary and injunctive relief [SED] seeks. Moreover, [d]efendants' rights are protected by the $100,000.00 bond posted by [SED].

__ N.C. App. at __, 784 S.E.2d at 632.

Because the injunctive relief was designed to maintain the status quo, and given that established precedent regarding the appealability of such orders is equivocal, the trial court reasonably concluded that its injunction was not immediately appealable. While this Court eventually held in *SED I* that defendants' appeal affected a substantial right, that decision was not dispositive of whether the trial court acted reasonably in determining that the appeal had not divested it of jurisdiction. *RPR & Assocs.*, 153 N.C. App. at 348, 570 S.E.2d at 514. As such, the trial court was not *functus officio*. This Court also held that the trial court's ruling on SED's motion for injunctive relief was not erroneous. Defendants therefore cannot demonstrate how they were "prejudiced by the trial court's [decision to continue to] exercise . . . jurisdiction over this case" by enforcing its injunction. *Id.* Accordingly, pursuant to the principles announced in *RPR & Assocs.*, we conclude that the trial court retained jurisdiction to enter orders related to the contempt proceedings in this case while defendants' interlocutory appeal was pending in this Court.

## IV. Conclusion

Given the particular facts at issue and the procedural context in which the contempt orders were entered, the trial court acted reasonably in continuing to exercise jurisdiction over the case while defendants' appeal of the injunction was pending in this Court. Furthermore, because the injunction was ultimately upheld, the contempt orders entered to enforce it did not prejudice defendants. Consequently, the trial court retained jurisdiction to enter the contempt orders and we affirm the entry of each order.

AFFIRMED.

Judges ELMORE and ENOCHS concur.

---

STATE OF NORTH CAROLINA
v.
LEONARD HARDY, DEFENDANT

No. COA16-506

Filed 1 November 2016

**1. Sentencing—de novo hearing—resentencing—independent evaluation of evidence**

The trial court did not err in a larceny after breaking and entering and injury to real property case by allegedly depriving defendant of his right to a de novo sentencing hearing. A second judge conducted his own independent evaluation of the evidence and did not merely defer to the prior judge's original sentence. Further, defendant did not present any new evidence at resentencing.

**2. Damages and Remedies—restitution—issue foreclosed on remand**

The trial court did not err in a larceny after breaking and entering and injury to real property case by failing to find a restitution award should be reduced in light of the new evidence defendant introduced at the resentencing hearing. *Hardy I* resolved and foreclosed any reconsideration by the trial court of the restitution award entered against defendant on remand.

Appeal by defendant from judgment entered 30 November 2015 by Judge Paul L. Jones in Wayne County Superior Court. Heard in the Court of Appeals 21 September 2016.

*Attorney General Roy Cooper, by Solicitor General John F. Maddrey for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for defendant-appellant.*

ENOCHS, Judge.

Leonard Hardy ("Defendant") appeals from the trial court's judgment re-sentencing him to 77 to 102 months imprisonment and ordering him to pay $7,408.91 in restitution. On appeal, he contends that the trial court deprived him of his right to a *de novo* sentencing hearing and erred by failing to reconsider its prior restitution award. After careful review, we affirm.

Factual Background

This case is before us for the second time. The underlying facts are set out more fully in *State v. Hardy*, ___ N.C. App. ___, ___, 774 S.E.2d 410, 412-13 (2015) ("*Hardy I*"), and are quoted, in pertinent part, as follows:

> On 25 July 2011, Zulema Bass ("Ms. Bass") arrived home and noticed that her mobile home was hot inside even though the air-conditioner was on. After hearing a loud noise outside, she asked her fifteen-year-old son Brendell Bass ("Brendell") to investigate. Brendell went to the back door and began screaming that a man [later identified as Defendant] was out there. Ms. Bass ran to the door and saw a man riding away on a bicycle; she only saw half of the man's face and was unable to identify him. Ms. Bass went outside and saw that the air-conditioning unit was "demolished" and noticed a twisted pipe on the ground beside the unit. She also noticed that there was extensive water damage under her home from "pipes leaking everywhere." Ms. Bass called 911. . . .
>
> . . . .
>
> Jack Gregory ("Mr. Gregory"), a handyman with 40 years of experience, testified that he went to Ms. Bass's

> mobile home to inspect and attempt to repair the air-conditioner. Mr. Gregory explained that Ms. Bass's air-conditioner was a two-piece unit. The outside unit was a condensing unit, which sat on the ground outside the mobile home and is connected to a second unit. The second unit, known as the A-coil, was located on the inside of the home and sat on the top of the home's heater. A high pressure copper pipe beneath the mobile home connected the outside unit to the indoor A-coil. Mr. Gregory testified that Ms. Bass's outside condensing unit had been completely "gutted." The compressor had been completely removed, and the wiring in the control box had been pulled out. Almost the entire high pressure copper piping that ran beneath the home had been removed. Mr. Gregory also noted some water line damage in the crawl-space of the mobile home; the water lines were broken so extensively that the entire back side of the brick wall on the underpinning was "soaked through." The air-conditioner was inoperable and beyond repair.
>
> Dale Davis ("Mr. Davis") testified that he owned the mobile home but used it as a rental property. He testified that he had received an estimate of over $6,000 to repair "just the AC" from Jackson & Sons.

On 7 November 2011, Defendant was indicted for (1) breaking and entering; (2) larceny after breaking and entering; (3) possession of stolen goods; (4) injury to real property; and (5) attaining the status of an habitual felon. Beginning on 13 February 2012, a jury trial was held before the Honorable W. Allen Cobb, Jr., in Wayne County Superior Court.

Defendant was found guilty of all charges. In exchange for the State's recommendation of a mitigated sentence, Defendant pled guilty to attaining habitual felon status. *Id.* at ___, 774 S.E.2d at 413.

On 14 February 2012, the trial court sentenced Defendant to 77 to 102 months imprisonment and ordered Defendant to pay $7,408.91 in restitution. *Id.* at ___, 774 S.E.2d at 413. After sentencing Defendant, the trial court arrested judgment on Defendant's conviction for possession of stolen goods. However, the trial court did not modify Defendant's sentence and he appealed. *Id.* at ___, 774 S.E.2d at 414.

Defendant raised multiple issues on his initial appeal, including an argument that the trial court erred during sentencing. We held as follows as to that issue:

Finally, defendant argues that the trial court erred by sentencing him for both felony larceny and felony possession of stolen goods and that the trial court's order arresting judgment for felony possession of stolen goods did not cure the error. We agree and remand for resentencing.

When the trial court consolidates multiple convictions into a single judgment but one of the convictions was entered in error, the proper remedy is to remand for resentencing when the appellate courts "are unable to determine what weight, if any, the trial court gave each of the separate convictions . . . in calculating the sentences imposed upon the defendant." *State v. Moore*, 327 N.C. 378, 383, 395 S.E.2d 124, 127-28 (1990).

Here, defendant was indicted for and convicted of felony larceny and felonious possession of stolen goods ("felony possession"). After the jury returned its verdict, based on the State's agreement to a mitigated sentence, defendant pled guilty to attaining habitual felon status pursuant to N.C. Gen. Stat. § 14-7.6. After determining that defendant had a prior record level of IV, the trial court consolidated the offenses for judgment and sentenced him to 77 months to 102 months imprisonment. Under the version of N.C. Gen. Stat. § 14-7.6 that was in effect at the time defendant committed the offenses, defendant was automatically sentenced as a Class C felon. Although the State requested a sentence at the high end of the mitigated range, the trial court imposed a sentence in the midpoint of the mitigated range. Defendant was sentenced to 77 to 102 months imprisonment. The allowable mitigated sentence for these offenses committed by a defendant with a class IV prior record level ranges from a minimum of 66 to a maximum of 166 months imprisonment.

Later the same day, following the sentencing hearing, likely based on the trial court's recognition that a defendant may be [sic] not be convicted of both larceny and possession of stolen property based on the same conduct, *State v. Perry*, 305 N.C. 225, 237, 287 S.E.2d 810, 817 (1982)[,] *overruled on other grounds by State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010), the trial court arrested judgment on the felony possession conviction but did not modify defendant's sentence.

> Despite the trial court's subsequent order arresting the entry of judgment for felony possession, we are unable to determine whether the trial court gave any weight to that conviction when it sentenced defendant in the middle of the mitigated range instead of at a lower point in that range, especially since the trial court found the mitigating factor that defendant accepted responsibility for his criminal conduct and found no factors in aggravation. Therefore, we must remand this matter back to the trial court for resentencing. *See Moore*, 327 N.C. at 383, 395 S.E.2d at 128. Sentencing within the mitigated range remains within the trial court's discretion.
>
> . . . .
>
> In sum, we conclude that the trial court did not commit prejudicial error when it overruled defense counsel's objection and refused to strike hearsay testimony. We further conclude that, given the evidence in this case, the trial court did not err in denying defendant's motion to dismiss the charge of injury to real property and did not err in instructing the jury that the air-conditioner was real property. Because the amount of restitution was supported by evidence at trial, the trial court's order of restitution was without error. Finally, because we are unable to determine what weight, if any, the trial court gave to the erroneous entry of judgment on felony possession despite the fact that the trial court later arrested that judgment, we must remand for resentencing.

*Id.* at ___, 774 S.E.2d at 420-21 (internal footnote omitted).

On remand, the trial court conducted a new sentencing hearing on 30 November 2015 before the Honorable Paul L. Jones in Wayne County Superior Court which is the subject of the present appeal. At the hearing, Defendant introduced new evidence as to the amount of restitution that should be awarded. He then requested that he be resentenced at the low end of the mitigated range based on the following representation made by his trial counsel:

> [Defendant is] 55 years old. He's at Caledonia Work Farm, which is where he's spent the last two or three years, and he's not gotten in any trouble, he tells me -- and he works with chickens; and his sister lives in Wayne County, and he

> feels like, and I feel like, once he gets out he can get a job in Wayne County or Lenoir County working with chickens.

After considering the parties' arguments and evidence, the trial court sentenced Defendant to 77 to 102 months imprisonment which is within the mitigated range and was the same term imposed by Judge Cobb at Defendant's original sentencing hearing. The trial court left the $7,408.91 restitution award in place after examining the State's exhibits concerning restitution which were re-admitted at the re-sentencing hearing. Defendant gave oral notice of appeal in open court.

## Analysis

### I. Re-Sentencing Hearing

**[1]** Defendant's first argument on appeal is that the trial court deprived him of his right to a *de novo* sentencing hearing. Specifically, he contends that the trial court merely deferred to Judge Cobb's judgment and left his prior sentence in place without considering the matter anew and conducting an independent review of the evidence presented at the re-sentencing hearing. We disagree.

> "For all intents and purposes the resentencing hearing is *de novo* as to the appropriate sentence. On resentencing the judge makes a new and fresh determination of the presence in the evidence of aggravating and mitigating factors. The judge has discretion to accord to a given factor either more or less weight than a judge, or the same judge, may have given at the first hearing. However, in the process of weighing and balancing the factors found on rehearing the judge cannot impose a sentence greater than the original sentence."

*State v. Morston*, 221 N.C. App. 464, 469, 728 S.E.2d 400, 405 (2012) (internal citations omitted) (quoting *State v. Mitchell*, 67 N.C. App. 549, 551, 313 S.E.2d 201, 202 (1984)). "[W]hen a trial court relies on a previous court's sentence determination and fails to conduct its own independent review of the evidence, a defendant is deprived of a *de novo* sentencing hearing." *State v. Watkins*, ___ N.C. App. ___, ___, 783 S.E.2d 279, 284 (2016). Significantly, however, "[a] trial court's resentencing of a defendant to the same sentence as a prior sentencing court is not *ipso facto* evidence of any failure to exercise independent decision-making or conduct a *de novo* review." *Morston*, 221 N.C. App. at 470, 728 S.E.2d at 406.

Here, Defendant argues that the re-sentencing transcript suggests that the trial court did not conduct a *de novo* review, but rather simply relied upon and re-implemented Judge Cobb's original determination of Defendant's sentence. Specifically, Defendant points to the following statement of Judge Jones:

> Well, I don't think it would be appropriate for the Court to basically overrule Judge Cobb. He heard the evidence, he arrested judgment, and he still considered that the sentence did not need to be disturbed.
>
> Based upon that, Judge Cobb being aware of all the facts, the Court resentences him to a term of 77 to 102 months in the North Carolina Department of Corrections. Thank you.

However, a broader reading of the re-sentencing hearing transcript does not, as Defendant posits, tend to show that Judge Jones was merely deferring to and adopting Judge Cobb's findings and ruling. Rather, it reveals that after allowing both Defendant and the State the opportunity to present new evidence at the hearing, Judge Jones reviewed the evidence and made his own determination as to Defendant's sentence in accordance with *Morston*. We read Judge Jones' above-quoted statement at the conclusion of the hearing as simply reflecting his agreement with Judge Cobb's ruling based on his own independent assessment. It does not, upon an examination of the entirety of the proceedings, indicate that Judge Jones was operating under a misapprehension of the law in that he believed he was obligated to take Judge Cobb's ruling into consideration in reaching his ultimate determination.

Defendant's citation to *State v. Abbott*, 90 N.C. App. 749, 370 S.E.2d 68 (1988), is thus inapposite to the facts of the present case. In *Abbott*, at the defendant's re-sentencing hearing, the trial judge expressly stated " '*I've tried to be consistent with* [*the original sentencing judge*]' " and then "perused defendant's file before finding the identical aggravating factor." *Id.* at 751, 370 S.E.2d at 69.

In the present case, Judge Jones allowed Defendant the opportunity to put on additional evidence concerning why he should be sentenced at the low end of the mitigated range. Instead of doing so, Defendant chose to only introduce new evidence as to why the amount of the restitution award should be reduced. In fact, all that Defendant's trial counsel presented to the trial court as to why Defendant's prison sentence should be reduced was his own argument — unsupported by any evidence — that

> [Defendant is] 55 years old. He's at Caledonia Work Farm, which is where he's spent the last two or three years, and he's not gotten in any trouble, he tells me -- and he works with chickens; and his sister lives in Wayne County, and he feels like, and I feel like, once he gets out he can get a job in Wayne County or Lenoir County working with chickens.

"[I]t is axiomatic that the arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996). Therefore, the above-quoted statement of Defendant's attorney does not constitute competent evidence as to why Defendant's prison sentence should have been reduced.

Consequently, because we find that Judge Jones did, in fact, undertake his own independent evaluation of the evidence and did not operate under any misapprehension of the law that he was obligated to defer to Judge Cobb's original sentence, and because Defendant did not present any new evidence at the re-sentencing hearing as to why he should be given a lesser sentence at the low end of the mitigated range, we hold that the trial court did not err in re-sentencing Defendant to 77 to 102 months imprisonment. Defendant's argument on this issue is overruled.

II. Law of the Case Doctrine

**[2]** Defendant's final argument on appeal is that the trial court erred in failing to find that the restitution award entered against Defendant should be reduced in light of the new evidence he introduced at the resentencing hearing as to the valuation of the cost to fix the damage to the mobile home. Once again, we disagree.

> [T]his Court's interpretation of its own mandate is properly considered an issue of law reviewable *de novo*. On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court. It is well-established that in discerning a mandate's intent, the plain language of the mandate controls.

*Watkins*, ___ N.C. App. at ___, 783 S.E.2d at 282-83 (internal citations, quotation marks, and brackets omitted).

We have recently emphasized that "remands may be general or limited in scope. . . . [I]n the context of resentencing remands, a limited remand must convey clearly the intent to limit the scope of the district court's review." *Id.* at ___, 783 S.E.2d at 283-84 (internal quotation marks

and brackets omitted). It is also the case that "the mandate must be construed in the context of the entire opinion and reasoning underlying the remand." *Id.* at ___, 783 S.E.2d at 285.

Defendant asserts that our remand of the case in *Hardy I* was a general, as opposed to a limited, remand. However, a plain reading of *Hardy I* clearly indicates that our remand was limited in nature and only applicable to the length of Defendant's prison sentence and whether or not it should have been at the lower end — as opposed to the middle — of the mitigated range. As we unambiguously stated in *Hardy I*,

> [b]ecause the amount of restitution was supported by evidence at trial, the trial court's order of restitution was without error. Finally, because we are unable to determine what weight, if any, the trial court gave to the erroneous entry of judgment on felony possession despite the fact that the trial court later arrested that judgment, we must remand for resentencing.

___ N.C. App. at ___, 774 S.E.2d at 421.

*Hardy I* clearly resolved and foreclosed any reconsideration by the trial court of the restitution award entered against Defendant on remand. Our mandate plainly limited the re-sentencing proceedings to a determination of where in the mitigated range the term of Defendant's prison sentence should fall. Consequently, the trial court did not err in declining to reconsider the restitution award during re-sentencing. Indeed, had it done so, it would have violated our mandate. As a result, Defendant's argument on this issue is without merit.

## Conclusion

For the reasons stated above, Defendant's sentence is affirmed.

AFFIRMED.

Judge ELMORE concurs.

Judge ZACHARY concurs in part and dissents in part in a separate opinion.

ZACHARY, Judge, concurring in part and dissenting in part.

I concur with the majority that, on the facts of this case, the trial court did not err by declining to enter a new order for restitution. I

cannot agree, however, with the majority's conclusion that the trial court afforded defendant the *de novo* sentencing hearing to which he was entitled. The trial court explicitly stated that if, in resentencing defendant, the court were to impose a sentence that differed from that of the original sentencing judge, such a sentence would be "inappropriate" and would constitute "overruling" the original sentencing judge. Moreover, review of the resentencing transcript reveals no countervailing statements by the trial court suggesting that the court based its resentencing decision upon an independent review of the evidence. For this reason, I would hold that the trial court deprived defendant of his right to a *de novo* sentencing hearing, and respectfully dissent from the majority's holding on this issue.

It is long "established that each sentencing hearing in a particular case is a *de novo* proceeding." *State v. Abbott*, 90 N.C. App. 749, 751, 370 S.E.2d 68, 69 (1988) (citing *State v. Jones*, 314 N.C. 644, 336 S.E.2d 385 (1985)). " '[*D*]*e novo* means fresh or anew; for a second time;' and a *de novo* hearing in a reviewing court is a new hearing, as if no action had been taken in the court below." *State v. Watkins*, __ N.C. App. __, __, 783 S.E.2d 279, 283 (2016) (quoting *In re Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964)).

In *State v. Daye*, 78 N.C. App. 753, 755, 338 S.E.2d 557, 559 (1986), this Court noted that a "new and fresh determination" on resentencing "may require no more than a review of the record and transcript of the trial or original sentencing hearing, at least when no additional evidence is offered at the resentencing hearing." On the other hand, " 'the trial court must consider evidence of aggravating and mitigating factors' offered by the parties, even if a presumptive sentence is ultimately imposed." *State v. Knott*, 164 N.C. App. 212, 217, 595 S.E.2d 172, 176 (2004) (quoting *State v. Kemp*, 153 N.C. App. 231, 239, 569 S.E.2d 717, 722, *disc. review denied*, 356 N.C. 441, 573 S.E.2d 158 (2002)). Thus the admission of new evidence is not dispositive on the issue of whether the trial court properly afforded a defendant a *de novo* sentencing hearing. Instead, the critical inquiry is whether the trial court's "consideration of and reliance upon the previous court's determination denied defendant his right to a *de novo* hearing." *Abbott*, 90 N.C. App. at 751, 370 S.E.2d at 69.

In examining a defendant's contention that on resentencing the trial court improperly relied upon the previous judge's sentence, we consider the trial court's statements in the context of the entire proceeding. For example, in *State v. Morston*, 221 N.C. App. 464, 728 S.E.2d 400 (2012), the defendant argued that he had not received a *de novo*

sentencing hearing because the trial court had characterized the purpose of the resentencing as being "to rectify the paperwork more than anything else." *Morston*, 221 N.C. App. at 468, 728 S.E.2d at 405. This Court acknowledged the trial court's statement, but held that a review of the proceeding indicated that the trial court did not simply rely on its prior ruling:

> . . . [T]he trial court made more than just the statement that it was correcting previous clerical errors, but in fact stated, "[h]aving heard testimony— new testimony today and also having received the transcript of the trial, based on all of that, I will render my judgments now, so, Mr. Morston, if you would stand up." Three of the six mitigating factors found by the trial court at the 2011 hearing were not found at the prior sentencing hearings. Moreover, defendant testified at the 2011 hearing after not testifying in either of the previous hearings. Clearly, the trial court considered new evidence and made new determinations regarding the mitigating factors in hearing defendant's testimony.

*Morston* at 470, 728 S.E.2d at 405-06.

However, where a review of the resentencing hearing shows that "the resentencing court improperly considered the judgment of the original sentencing court," the resentencing judge's "consideration of and reliance upon the previous court's determination denie[s] defendant his right to a *de novo* hearing." *Abbott*, 90 N.C. App. at 750-51, 370 S.E.2d at 69. In *Abbott*, the trial court stated that:

> COURT: . . . [T]he Presiding Judge, Claude Sitton, heard this case from the beginning to the end; and he felt it necessary based upon his perception of the evidence in the case to enter the sentence that he did; and *I've tried to be consistent with Judge Sitton* and also my individual consideration of the factors that you have offered me and have, therefore, imposed the sentences that I have imposed.

*Abbott* at 750-51, 370 S.E.2d at 69 (emphasis in original). On these facts we held that:

> In the case *sub judice*, the trial court's statement that it was trying to be consistent with Judge Sitton, while not intimating that the previous findings were the law of the case, indicates to us that its decision was not independent.

> We agree with defendant that it appears that the resentencing court based its decision in part upon the trial court's perception of the evidence and judgment at the prior sentencing hearing. In having made the aforementioned statement, the trial court created an ambiguity as to its reasoning for imposing the sentence that it did. . . . Thus, the apparent consideration of the trial court's judgment upon resentencing violated the defendant's right to a hearing *de novo*.

*Abbott* at 752, 370 S.E.2d at 69-70.

A review of the transcript of the resentencing hearing in this case reveals that each and every statement of the trial court regarding the court's role in resentencing reflected the court's misapprehension of the *de novo* nature of the proceeding. Judge W. Allen Cobb, Jr. presided over defendant's original sentencing hearing. When the prosecutor summarized the procedural history of the case and explained that this Court had remanded it for a new sentencing hearing, the trial court responded by asking, "So I'm supposed to get in Judge Cobb's head?" This comment shows that the trial court was approaching the resentencing as a referendum on Judge Cobb's original sentence, and not as a fresh look at the evidence. The prosecutor did not discourage this reasoning and argued to the court that "Judge Cobb heard the trial, heard the evidence" and that "the State's position" was that Judge Cobb had imposed a fair sentence. Following the presentation of evidence and arguments of counsel, the trial court stated that:

> THE COURT: Well, *I don't think it would be appropriate for the Court to basically overrule Judge Cobb*. He heard the evidence, he arrested judgment, and he still considered that the sentence did not need to be disturbed. *Based upon that, Judge Cobb being aware of all the facts*, the Court resentences him to a term of 77 to 102 months in the North Carolina Department of Corrections.

I find *Abbott* to be functionally indistinguishable from the present case, and to be controlling on the issue of whether defendant was afforded a *de novo* resentencing hearing. Indeed, a review of the transcript of the resentencing hearing in this case reveals that the trial court's reliance upon the original sentencing judge's sentence was more explicit than that of *Abbott*, in that (1) unlike the trial judge in *Abbott*, the

court in the present case did not mention its "individual consideration of the factors that you have offered me," or make any other statement indicating that it had made an independent review of the evidence, and (2) while the trial judge in *Abbott* stated that it had "tried to be consistent" with the original sentencing court, in this case the trial court expressly stated that it would be "inappropriate" and would constitute "overruling" Judge Cobb to impose a different sentence. It is hard to imagine how the court could have been more straightforward about its misapprehension of the nature of a resentencing hearing.

The majority acknowledges the trial court's statements, but holds that "a broader reading of the resentencing transcript" establishes that the trial court's comments were "simply reflecting his agreement with Judge Cobb's ruling based on his own independent assessment." The majority opinion does not identify any excerpts from the resentencing transcript that demonstrate an "independent assessment" by the trial court, and my own review fails to reveal any statements by the trial court suggesting that it took a fresh look at the evidence. Moreover, regardless of the trial court's internal reasoning as regards defendant's sentence, "having made the aforementioned statement, the trial court created an ambiguity as to its reasoning for imposing the sentence that it did. . . . [T]he apparent consideration of the trial court's judgment upon resentencing violated the defendant's right to a hearing *de novo*." *Abbott* at 752, 370 S.E.2d at 70.

I believe that the record in this case establishes beyond dispute that the trial court explicitly considered the sentence imposed by the original sentencing judge in resentencing defendant, thereby depriving defendant of a *de novo* sentencing proceeding. I would reverse and remand for a new sentencing proceeding. For this reason, I respectfully dissent from the majority opinion.

STATE OF NORTH CAROLINA
v.
C.D. HUNT

No. COA15-1289

Filed 1 November 2016

**1. Arson—indictment language—"willfully"**

Where defendant was convicted of burning certain buildings in violation of N.C.G.S. § 14-62, the Court of Appeals rejected his argument that the indictment was fatally defective for failure to contain the essential element that he "wantonly" set fire to burn. "Willfully" and "wantonly" are essentially the same, so the indictment charged the essential elements of the offense in words that are substantially equivalent to those used in section 14-62 with sufficient particularity to apprise defendant of the specific accusations against him.

**2. Evidence—non-expert opinion testimony—proving fire was intentionally set—plain error review**

Where defendant was convicted of burning certain buildings in violation of N.C.G.S. § 14-62, the Court of Appeals rejected his argument that the trial court committed plain error by allowing non-expert opinion testimony into evidence to prove the fire at issue was intentionally set. Given the unchallenged evidence in the form of direct testimony and video recordings depicting that an accelerant was used to start or accelerate the fire, defendant failed to demonstrate that any presumed error in the trial court's performance of its gatekeeping function would have had a probable impact on the jury's guilty verdict.

**3. Constitutional Law—effective assistance of counsel—failure to object and to renew motion to dismiss**

Where defendant was convicted of burning certain buildings in violation of N.C.G.S. § 14-62, the Court of Appeals rejected his argument that he received ineffective assistance of counsel because his attorney did not object to the investigator's testimony and failed to renew the motion to dismiss at the close of all the evidence. There was nothing to suggest that the decision not to object was erroneous such that defense counsel provided unconstitutionally deficient performance. Further, defendant could not establish prejudice in trial counsel's failure to move to dismiss the charge at the close of all evidence.

**4. Criminal Law—restitution—unsworn statement of prosecutor**

Where defendant was convicted of burning certain buildings in violation of N.C.G.S. § 14-62, the Court of Appeals held that the trial court erred by ordering defendant to pay $5,000 in restitution to the apartment complex he set on fire based on the unsworn statement by the prosecutor that the apartment complex had to pay an insurance deductible of $5,000. Unsworn statements of a prosecutor cannot support an order of restitution.

Appeal by defendant from judgment entered 29 April 2015 by Judge James K. Roberson in Durham County Superior Court. Heard in the Court of Appeals 24 May 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.*

*Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant-appellant.*

BRYANT, Judge.

Where the language of the indictment was sufficient to charge defendant with burning certain buildings, the trial court properly exercised jurisdiction over the matter. Where defendant cannot establish plain error, his challenge that the trial court abandoned its gatekeeping function must fail. Likewise, where defendant cannot establish prejudice, his ineffective assistance of counsel claim must also fail. However, where the amount of restitution awarded was not supported by the evidence, we remand to the trial court for further proceedings.

On 6 January 2014, a Durham County grand jury indicted defendant C.D. Hunt on the charge of burning certain buildings, in violation of General Statutes, section 14-62. The matter came on for trial during the 23 March 2015 criminal session of Durham County Superior Court, the Honorable James Roberson, Judge presiding.

The evidence presented at trial tended to show that on 29 May 2013, Diane Stallworth, apartment complex property manager for Lynnhaven Apartments located in Durham, North Carolina, reported a break-in of apartment 7C. In addition to the Durham Police Department, Stallworth contacted the apartment resident, LaTresha Harwell, and requested that she return to the complex. At 1:00 p.m. that afternoon, Stallworth was in apartment 7C when defendant C.D. Hunt arrived. "[H]e came driving

his vehicle. He came across the property, drove the vehicle right up into the front door of the apartment and came inside the apartment." Stallworth described defendant's mood as "angry or upset." Stallworth asked defendant to remove his car, a gray four-door Nissan, from the grass and take it back to the parking lot, but defendant refused to talk with her. Defendant was not a resident of the apartment complex, but was listed as the emergency contact for Harwell, and had been observed with Harwell on a near-daily basis. When Stallworth returned to the apartment complex office, she observed defendant drive his car to the parking lot in front of the office and begin throwing trash from his car onto the grass in front of the building. Stallworth asked defendant to stop and he replied.

> He said somebody broke in to my apartment. All you care about is me throwing trash. . . .
>
> We continued to go back and forth. It was, "You got the right one", you know, and he kind of lunged at me like he was going to hit me, so I was like, "Come on. Hit me".
>
> . . .
>
> . . . It was not a friendly exchange of words.

Following this interaction, a law enforcement officer arrived in response to an apartment break-in report. While he was still there, Stallworth issued defendant a "trespassing letter" informing him he was not welcome back on the property. Early the next morning, on 30 May 2013, Stallworth received a call notifying her of a fire reported at the Lynnhaven Apartments complex office building.

After the fire was extinguished, Investigator Joel Gullie, with the Fire Prevention Bureau, Fire Marshal's Office, City of Durham Fire Department, arrived on the scene. He had been called to the scene by the battalion chief in command on the basis that the fire was "suspicious." Investigator Gullie testified that he was the lead investigator, and his observations led him to conclude that an accelerant had been used.

On 3 June 2014, the investigation of the fire was assigned to Durham Police Department Officer James Barr, Jr., who was working in the criminal investigation, homicide division. Stallworth provided Officer Barr with video surveillance recorded around the time of the fire which showed "a small lighter-colored four-door sedan," which had been parked in a dead end with no parking spaces, leaving the apartment complex at a high rate of speed just before an explosion was recorded. No other vehicles were recorded leaving the lot at that time. Officer Barr

testified that during his conversation with Stallworth, she informed him that on the day of the break-in and trash-throwing incident, defendant was driving a charcoal-colored Nissan Altima. Officer Barr also reviewed the 9-1-1 call reporting the fire made by Delanem Makara. Officer Barr spoke with Makara, who informed him that she was outside of her apartment on the night of the fire. That night, she noticed a dark gray vehicle parked "all the way down at the end." "[S]he noticed the smell of gasoline; [t]hen, there was an explosion."

At trial, Makara read the handwritten statement she gave to a Durham Police Officer at 2:30 a.m. on 30 May 2013:

> A. "About 2:30 a.m. May 30, I seen a gray or black car Nissan pulled in, went to the other end of the parking lot, and I did not see the car leave. Around 3:20, the fire happened", and my signature.
>
> Q. And there is a notation off to the side in the margin?
>
> A. Yes.
>
> Q. And what does that say?
>
> A. [Defendant] is the driver.
>
> Q. There's an arrow there?
>
> A. It's a Nissan.

Following the close of the State's evidence, defendant proffered the testimony of his grandmother, also a Durham resident, who testified in substance that defendant stayed with her the evening of 29–30 May 2013 and that he did not leave.

> Q. And how do you know that he didn't leave?
>
> A. Because I've been sleeping on my sofa, and that's between my living room and my side door . . . so anybody come in the house and go out the house, I would know about it.

Following the close of all of the evidence, the jury returned a guilty verdict against defendant for burning certain buildings. The trial court entered judgment in accordance with the jury verdict and sentenced defendant to an active term of 16 to 29 months, then suspended the sentence and imposed supervised probation for a period of 36 months. Defendant was ordered to pay $5,000 in restitution to Lynnhaven Apartments. Defendant appeals.

On appeal, defendant raises the following issues: whether (I) the indictment against defendant was fatally defective; (II) the trial court committed plain error by admitting testimonial evidence regarding how the fire started; (III) defendant had ineffective assistance of counsel; and (IV) the trial court erred in ordering restitution.

*I*

**[1]** Defendant argues the trial court lacked jurisdiction to try him for a violation of General Statutes, section 14-62 where the indictment charging him was fatally defective. Defendant contends that the indictment charging a violation of section 14-62 failed to contain an essential element that defendant "wantonly" set fire to burn, and therefore, the indictment is fatally defective. We disagree.

"On appeal, we review the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009) (citation omitted).

"An indictment is sufficient if it charges all essential elements of the offense with sufficient particularity to apprise the defendant of the specific accusations against him and (1) will enable him to prepare his defense and (2) will protect him against another prosecution for that same offense." *State v. Bowden*, 272 N.C. 481, 483, 158 S.E.2d 493, 495 (1968); *see also* N.C.G.S §§ 15-153 ("Bill or warrant not quashed for informality") and 15A-924(a)(5) (2015) ("Contents of pleadings . . . ."). "The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words." *State v. Simpson*, 235 N.C. App. 398, 400–01, 763 S.E.2d 1, 3 (2014) (quoting *State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953)). "A facially invalid indictment deprives the trial court of jurisdiction to enter judgment in a criminal case." *State v. Haddock*, 191 N.C. App. 474, 476, 664 S.E.2d 339, 342 (2008) (citing *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208 (2001)). But "[t]he trial court need not subject the indictment to hyper technical scrutiny with respect to form." *Simpson*, 235 N.C. App. at 400, 763 S.E.2d at 3 (citation and quotation marks omitted).

Pursuant to North Carolina General Statutes, section 14-62, "[i]f any person shall *wantonly* and *willfully* set fire to or burn . . . any . . . warehouse, office, shop . . . [or other specified building] whether the same or any of them respectively shall then be in the possession of the offender,

or in the possession of any other person, he shall be punished as a Class F felon." N.C. Gen. Stat. § 14-62 (2015).

> "Willfulness" means the wrongful doing of an act without justification or excuse. *State v. Arnold*, 264 N.C. 348, 141 S.E.2d 473 (1965); *State v. Williams*, 284 N.C. 67, 199 S.E.2d 409 (1973). "Wantonness" means the doing of an act in conscious and intentional disregard of and indifference to the rights and safety of others. *Hinson v. Dawson*, 244 N.C. 23, 92 S.E.2d 393 (1956). "The attempt to draw a sharp line between a 'willful' act and a 'wanton' act . . . would be futile. The elements of each are substantially the same." *State v. Williams*, *supra*, 284 N.C. at 73, 199 S.E.2d at 412.

*State v. Oxendine*, 64 N.C. App. 559, 561, 307 S.E.2d 583, 584–85 (1983); *see also State v. Tew*, 62 N.C. App. 190, 193, 302 S.E.2d 633, 635 (1983) ("The essential elements of the crime . . . are that: (1) The building was used in trade; (2) a fire occurred in it; (3) the fire was of incendiary origin; and (4) the defendants unlawfully and wilfully started or were responsible for it. G.S. 14-62.").

In the instant case, the indictment alleged that "defendant . . . unlawfully, willfully and feloniously did set fire to, burn, cause to be burned and aid the burning of an office and utility building located at 917 Wadesboro Street, Durham, North Carolina 27703." Defendant asserts that while the indictment alleges he acted "willfully," the failure to also allege he acted "wantonly" in setting fire to a building, renders the indictment facially invalid and fatally defective.

As noted herein, our courts have held that "willfully" and "wantonly" are essentially the same, and any attempt to distinguish them would be futile. *See Oxendine*, 64 N.C. App. at 561, 307 S.E.2d at 584–85. Therefore, we hold the indictment in the instant case charges the essential elements of the offense in words that are substantially equivalent to those used in General Statutes, section 14-62, with sufficient particularity to apprise defendant of the specific accusations against him. *See Bowden*, 272 N.C. at 483, 158 S.E.2d at 495; *Simpson*, 235 N.C. App. at 400–01, 763 S.E.2d at 3. As the indictment is sufficient, defendant's argument is overruled.

*II*

**[2]** Next, defendant argues that the trial court committed plain error by allowing non-expert opinion testimony into evidence to prove the fire at issue was intentionally set. More specifically, defendant contends that Investigator Gullie's testimony should have been evaluated under

the standard set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993), as that standard has been implemented in amended Rule of Evidence 702 ("Testimony by experts"), as acknowledged in *State v. McGrady*, 368 N.C. 880, 884, ___ S.E.2d ___, ___ (2016). Defendant contends that where the trial court admitted Investigator Gullie's opinion testimony without examining him under the *Daubert* standard, the court committed plain error. We disagree.

In 2011, our General Assembly amended Rule 702(a) of North Carolina's Rules of Evidence, which governs the admissibility of testimony by an expert, to mirror Rule 702(a) of the Federal Rules of Evidence as that rule was amended in 2000. "It follows that the meaning of North Carolina's Rule 702(a) now mirrors that of the amended federal rule." *McGrady*, 368 N.C. at 884, ___ S.E.2d at ___. "And when the General Assembly adopts language or statutes from another jurisdiction, 'constructions placed on such language or statutes are presumed to be adopted as well.' " *Id.* at 887, ___ S.E.2d at ___ (quoting *Sheffield v. Consol. Foods Corp.*, 302 N.C. 403, 427, 276 S.E.2d 422, 437 (1981)). Thus, "the 2011 amendment [of Rule 702(a)] adopts the federal standard for the admission of expert witness testimony articulated in the *Daubert* line of cases." *Id.* at 884, ___ S.E.2d at ___.[1,2]

But though Rule 702 was amended, our Supreme Court reasoned that the precedent established by our State appellate courts prior to the 2011 amendment should not be completely abandoned. The previous three-step inquiry established for evaluating the admissibility of expert testimony, as set out in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004), while " 'decidedly less mechanistic and rigorous than the "exacting standards of reliability" demanded by the federal approach[,]' " " 'share[s] obvious similarities with the principles underlying *Daubert*[.]' " *McGrady*, 368 N.C. at 886, ___ S.E.2d at ___ (quoting *Howerton*, 358 N.C. at 464, 597 S.E.2d at 690). "The proper

1. The *McGrady* Court specifically acknowledged the following United States Supreme Court opinions as describing the exacting standards of reliability expert opinion testimony must meet under Federal Rule 702(a): *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136, 139 L. Ed. 2d 508 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238 (1999). McGrady, 368 N.C. at 884–85, ___ S.E.2d at ___ (citing *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000)).

2. "Federal courts traditionally grant a great deal of discretion to the trial court in determining the admissibility of expert testimony under *Daubert*." *State v. Turbyfill*, ___ N.C. App. ____, ____, 776 S.E.2d 249, 253 (citations and quotation marks omitted), *review denied*, ___ N.C. ___, 780 S.E.2d 560 (2015).

interpretation of Rule 702(a) remains an issue of state law[,]" and "[o]ur previous cases are still good law if they do not conflict with the *Daubert* standard." *Id.* at 888, ___ S.E.2d at ___.

"The qualification of a witness to give an opinion as one skilled, or, as it is usually termed, *an expert*, depends on matters of fact[,] and the question is addressed to the trial judge, with opportunity to the objector to test the experience of the witness by appropriate examination." *State v. Smith*, 221 N.C. 278, 288–89, 20 S.E.2d 313, 319–20 (1942) (emphasis added) (citations omitted). "In *Daubert*, [the United States Supreme Court] held that . . . [Rule] 702 imposes a special obligation upon a trial judge to 'ensure that any and all scientific testimony . . . is not only relevant, but reliable.' " *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147, 143 L. Ed. 2d 238, 249 (1999) (quoting *Daubert*, 509 U.S. at 589, 125 L. Ed. 2d 469).[3] This *gatekeeper* role also applies where an expert relies "on skill- or experienced-based observation" *Id.* at 151, 143 L. Ed. 2d at 252 (citation omitted). In his concurring opinion, Justice Scalia wrote, "[the] trial-court discretion in choosing the manner of testing expert reliability—is not discretion to abandon the gatekeeping function." *Id.* at 158–59, 143 L. Ed. 2d at 256 (Scalia, J., concurring). "[Yet,] the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id.* at 152, 143 L. Ed. 2d at 252.

---

3. A previous panel of this Court set out the *Daubert* factors a trial court may consider in determining whether scientific testimony was reliable, as follows:

> In the context of scientific testimony, *Daubert* articulated five factors from a nonexhaustive list that can have a bearing on reliability: (1) "whether a theory or technique . . . can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) the theory or technique's "known or potential rate of error"; (4) "the existence and maintenance of standards controlling the technique's operation"; and (5) whether the theory or technique has achieved "general acceptance" in its field. *Daubert*, 509 U.S. at 593–94, 113 S.Ct. 2786. When a trial court considers testimony based on "technical or other specialized knowledge," N.C. R. Evid. 702(a), it should likewise focus on the reliability of that testimony, *Kumho*, 526 U.S. at 147–49, 119 S.Ct. 1167. The trial court should consider the factors articulated in *Daubert* when "they are reasonable measures of the reliability of expert testimony." *Id.* at 152, 119 S.Ct. 1167. Those factors are part of a "flexible" inquiry, *Daubert*, 509 U.S. at 594, 113 S.Ct. 2786, so they do not form "a definitive checklist or test," *id.* at 593, 113 S.Ct. 2786. And the trial court is free to consider other factors that may help assess reliability given "the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho*, 526 U.S. at 150, 119 S.Ct. 1167.

*State v. Abrams*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2016) (No. COA15-1144).

> Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.

*Id.* at 152, 143 L. Ed. 2d at 253.

We now consider whether an unpreserved challenge to the performance of a trial court's gatekeeping function is subject to plain error review in North Carolina.

Pursuant to our Rules of Appellate Procedure,

> [i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4) (2016); *see also State v. Lawrence*, 365 N.C. 506, 515, 723 S.E.2d 326, 332 (2012) ("Federal plain error review is applied to criminal cases in 'exceptional circumstances.' " (citing *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392 (1936)). "Furthermore, plain error review in North Carolina is normally limited to instructional and evidentiary error." *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333 (citation omitted); *see also id.* ("Like federal plain error review, the North Carolina plain error standard of review applies only when the alleged error is unpreserved, and it requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error."). In both federal court and North Carolina state court, the unchallenged admission of opinion testimony on a subject requiring specialized knowledge by persons not admitted as experts may be reviewed for plain error. *See United States v. Diaz*, 300 F.3d 66, 74 (1st Cir. 2002) ("The consequence of a party's failure to make a timely objection to the admission of expert testimony is plain error review . . . ."); *State v. Maready*, 205 N.C. App. 1, 17, 695 S.E.2d 771, 782 (2010) (reviewing for plain error the unchallenged admission of opinion testimony regarding the cause of an accident by persons not admitted as experts in accident reconstruction). Thus, an unpreserved challenge to the performance of a trial court's gatekeeping function in admitting opinion testimony in a criminal trial is subject to plain error review in North Carolina state courts.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

*Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citations and quotation marks omitted).

Here, defendant contends that the trial court committed plain error by failing to perform its gatekeeping function in accordance with the *Daubert* standard to determine if Investigator Gullie was qualified to provide opinion testimony as an expert in fire investigation before allowing Investigator Gullie to testify to his opinion that the fire was intentionally set. But before we further address defendant's argument, we note defendant's challenge raises some interesting issues.

In challenging the trial court's performance of its gatekeeping function for plain error, defendant implicitly asks this Court to hold the trial court's failure to *sua sponte* render a ruling that Investigator Gullie was qualified to testify as an expert pursuant to Rule 702 amounted to error. And to accept defendant's premise would impose upon this Court the task of determining from a cold record whether Investigator Gullie's opinion testimony *required* that he be qualified as an expert in fire investigation, where neither the State nor defendant respectively sought to proffer Investigator Gullie as an expert or challenge his opinion before the trial court.

"[W]e can envision few, if any, cases in which an appellate court would venture to superimpose a *Daubert* ruling on a cold, poorly developed record when neither the parties nor the nisi prius court has had a meaningful opportunity to mull the question." *Cortés-Irizarry v. Corporación Insular de Seguros*, 111 F.3d 184, 189 (1st Cir. 1997) (as quoted by *Diaz*, 300 F.3d at 74). While "[Rule] 702 imposes a special obligation upon a trial judge to ensure that any and all scientific testimony . . . is not only relevant, but reliable," *Kumho Tire Co.*, 526 U.S. at 147, 143 L. Ed. 2d at 249 (citation and quotation marks omitted), "*Daubert* did not work a seachange [sic] over . . . evidence law, and the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary

system." Fed. R. Evid. 702 (2012) (Advisory Committee notes) (citation and quotation marks omitted).

> [As to expert testimony governed by Rule 702,] [t]he trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether* that expert's relevant testimony is reliable. . . . Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases . . . .

*Kumho Tire Co.*, 526 U.S. at 152, 143 L. Ed. 2d at 253.

The record before us reflects that Investigator Gullie introduced himself as employed by the Fire Prevention Bureau, Fire Marshal's Office in the City of Durham Fire Department. "I have to do fire inspections as it relates to construction or fire inspection for safety inspections, and then I have to do fire investigations as well." Investigator Gullie further testified that he was the lead fire investigator at the scene on 30 May 2013. Following his introduction, Investigator Gullie testified without objection to his observations of the scene on 30 May 2013, as follows: that the fire appeared to have multiple points of origin; that shallow "crocodiling" of the wood suggested the wood burned fast and hot; and that there was an odor of a flammable liquid. Investigator Gullie testified that "[t]hat's typically a sign that accelerants were used to accelerate the fire." Investigator Gullie was neither tendered nor admitted as an expert in the field of fire investigation.

It may be that the trial court acted within the latitude afforded by its discretionary authority to determine that Investigator Gullie's testimony was of an ordinary type and a reliability proceeding was not necessary, as, by virtue of his position as a fire investigator, the reliability of his testimony that accelerants were used to accelerate the fire was properly taken for granted. *See id.* But even if we presumed for the sake of argument that defendant established error, defendant cannot establish *plain* error.

Aside from the testimony of Investigator Gullie, there was other direct and circumstantial evidence that an accelerant was used to start

the fire. Officer Barr gave the following testimony while video surveillance recordings made around the time of the fire were played for the jury:

> A. . . . You'll see a shadowy figure coming right here walking, a short stature; looks like a little something in the left hand, a little shiny and disappears, and it'll be three or four minutes; and then, you'll see the figure walk off, and then you'll see a flash of light after that . . . .
>
> . . .
>
> You'll see a flash that is consistent with what I know to be fire.
>
> . . .
>
> That's consistent with a rapid expansion of a flammable liquid or something like that, and now you have active burning going on.
>
> . . .
>
> Q. Now, Investigator Barr, I'm going to turn your attention to yet a third camera angle. . . .
>
> . . .
>
> Q. And what is that flashed light we just saw?
>
> A. That would be the ignition of the fire on that building. It indicates that it was just a rapid acceleration of a fire indicating that an accelerant was used.

Later, Officer Barr testified that prior to working for the Durham Police Department, he was employed by the Durham City Fire Department. "I worked there for 18 years, so I have multiple certifications in the investigation of fires, hazardous material, technician specialists; hundreds and hundreds of hours of training, and hands-on and life experience in fire training, and some college in the background of fire investigations."

Officer Barr also testified without objection about his interview with Makara, who had called 9-1-1 on 30 May 2013 to report the fire.

> A. She said she was outside her apartment that morning.
>
> . . .

> Q. Did she say what else she noticed about that time?
>
> A. She said while they were outside, she noticed a smell of gasoline. Then, there was an explosion, and then the fire consumed the building and she called 911.

Thus, given the unchallenged evidence in the form of direct testimony and video recordings depicting that an accelerant was used to start or accelerate the fire, we hold defendant has failed to demonstrate that any presumed error in the trial court's performance of its gatekeeping function would have had a probable impact on the jury's guilty verdict. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334; *see generally Maready*, 205 N.C. App. at 17, 695 S.E.2d at 782. Accordingly, defendant has failed to demonstrate plain error, and this argument is overruled.

*III*

**[3]** Defendant argues he received ineffective assistance of counsel because his attorney (1) did not object to Investigator Gullie's testimony and (2) failed to renew the motion to dismiss at the close of all the evidence. Defendant argues those decisions were not strategic decisions but instead were errors that amounted to constitutionally deficient performance. Defendant then argues that if counsel had objected to the testimony and renewed the motion to dismiss, he would have either been acquitted or had a better case on appeal. We disagree.

Defense counsel is given wide latitude in matters of strategy, so "the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Campbell*, 359 N.C. 644, 690, 617 S.E.2d 1, 30 (2005) (citation and quotation marks omitted). There is a two-part test for succeeding on an ineffective counsel challenge:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Prejudice is established by showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*Id.* at 690, 617 S.E.2d at 29–30 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)) (quotation marks omitted). Courts generally do not second-guess trial counsel unless the counsel's actions were unreasonable "considering the totality of the circumstances at the time of performance." *See State v. Hill*, 179 N.C. App. 1, 27, 632 S.E.2d 777, 793 (2006). "[J]udicial review of counsel's performance must be highly deferential." *Id.* (citation and quotation marks omitted). There is a strong presumption that counsel's performance was reasonable and acceptable. *Campbell*, 359 N.C. at 690, 617 S.E.2d at 30.

*Failure to object to Investigator Gullie's testimony*

Defendant's first contention is that his counsel provided deficient performance when it failed to object to the expert opinion testimony of Investigator Gullie. Defendant argues its counsel made a critical error by not objecting and moving the trial court to examine Investigator Gullie under Rule 702, pursuant to the *Daubert* standard. This argument fails the test set out in *Strickland* and adopted in *Campbell*.

First, defendant's theory at trial did not challenge whether the fire was intentionally set but rather whether the State proved beyond a reasonable doubt that defendant was the perpetrator. Thus, the identity of the perpetrator was defendant's main defense. This is evidenced by defendant's closing argument, which is almost exclusively about the identity of the offender. It appears trial counsel made a reasonable, strategic decision to not object to Investigator Gullie's testimony while advocating that defendant was not the perpetrator. Further, the substantial evidence that an accelerant was used to accelerate the spread of the fire could have reasonably been seen as a greater legal challenge to overcome than the identity of the perpetrator. Judicial review is highly deferential to trial counsel's strategic decisions, and we presume such decisions were reasonable. *See State v. Allen*, 233 N.C. App. 507, 510, 756 S.E.2d 852, 856 (2014) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, *a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance* . . . ." (quoting *Strickland*, 466 U.S. at 689, 80 L.Ed.2d at 689) (emphasis added). There is nothing to suggest this decision was erroneous such that defendant's counsel provided unconstitutionally deficient performance. Thus, this argument is overruled.

*Failure to move to dismiss the charge at the close of all evidence*

Defendant's second contention is that his trial counsel provided deficient performance when she failed to move to dismiss the charge against defendant at the close of all of the evidence. Defendant argues there is no legitimate reason for failing to move to dismiss at that time, and had counsel made the motion, defendant could have preserved a sufficiency of the evidence issue for appeal.

A properly preserved appeal of a denial of a motion to dismiss for insufficient evidence is reviewed *de novo*. *State v. Curry*, 203 N.C. App. 375, 392, 692 S.E.2d 129, 142 (2010). If substantial evidence supports a finding that the defendant committed the offense, the motion to dismiss should be denied so that the case can go before a jury. *Id.* Evidence is viewed in the light most favorable to the State, and the State is given the benefit of every reasonable inference. *Id.* at 391–92, 692 S.E.2d at 141; *see also State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) ("[T]he defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence." (citation omitted)).

However, again, defendant cannot establish prejudice. Had defense counsel presented a motion to dismiss at the close of all evidence, the trial court could have considered the evidence in the light most favorable to the State, leaving any contradictions in the evidence for the jury. *State v. Allen*, 233 N.C. App. 507, 512, 756 S.E.2d 852, 857–58 (2014) ("In weighing the sufficiency of the evidence, the trial court considers all evidence admitted at trial, whether competent or incompetent: . . . in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. Any contradictions or discrepancies in the evidence are for resolution by the jury." (citation omitted)). The only evidence defendant proffered after the close of the State's evidence was the testimony of defendant's grandmother, who testified that defendant spent the night of 29 to 30 May with her. This evidence stood in near direct contradiction to Makara's testimony that defendant was driving the vehicle seen leaving the scene shortly after the fire started in the early morning hours of 30 May 2013. And because the court would have been required to leave contradictions and discrepancies in the evidence for the jury to resolve, a motion to dismiss following the close of the evidence would have been denied. *See id.* Therefore, defendant cannot establish prejudice in trial counsel's failure to move to dismiss the charge of burning certain buildings at the close of all the evidence. Accordingly, defendant's ineffective assistance of counsel argument is overruled.

*IV*

**[4]** In his final issue on appeal, defendant argues the trial court erred by ordering him to pay $5,000 in restitution to Lynnhaven Apartments. Defendant argues there was no evidence to support the award. We agree; therefore, we vacate and remand the restitution order.

Even absent an objection, awards of restitution are reviewed *de novo*. *State v. McNeil*, 209 N.C. App. 654, 667, 707 S.E.2d 674, 684 (2011). A trial court can "require that the defendant make restitution to the victim or the victim's estate for any injuries or damages arising directly and proximately out of the offense committed by the defendant." N.C. Gen. Stat. § 15A-1340.34(b) (2015). The amount of restitution awarded "must be supported by evidence adduced at trial or at sentencing." *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011) (citation and quotation marks omitted). "[A] restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution." *Id.* Unsworn statements of a prosecutor also cannot support an order of restitution. *McNeil*, 209 N.C. App. at 668, 707 S.E.2d at 684. When no evidence supports the award, the award of restitution will be vacated. *Moore*, 365 N.C. at 285, 715 S.E.2d at 849. If there is specific testimony or documentation to support the award, the award will be affirmed. *Id.* "[T]he quantum of evidence needed to support a restitution award is not high." *Id.* When a restitution award is vacated, the typical remedy is to remand the restitution portion of the sentence for a new sentencing hearing. *See McNeil*, 209 N.C. App. at 668, 707 S.E.2d at 684–85 (remanding when there was evidence of physical damage to a victim's property but no evidence as to the appropriate amount of restitution).

The trial court awarded restitution of $5,000 because the State prosecutor told the trial court that is how much Lynnhaven Apartments had to pay as an insurance deductible. This is an unsworn statement by the prosecutor that cannot support an award of restitution. The State concedes there is no other specific detail in the record supporting the $5,000 award. There is evidence of substantial damage to the office building, but like the evidence in *McNeil*, that does not speak to the appropriate amount of restitution. Accordingly, we find the restitution awarded is not supported by the evidence adduced at trial or sentencing. We vacate the $5,000 award and, accordingly, remand for a new restitution hearing.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges TYSON and INMAN concur.

STATE OF NORTH CAROLINA
v.
STEPHEN LAMONT WARD

No. COA16-52

Filed 1 November 2016

**1. Constitutional Law—right to counsel—trial strategy—impasse**

The trial court did not err in a statutory rape and indecent liberties with a child case by settling an impasse between defendant and defense counsel. Defense counsel's trial strategy determined whether a witness would be cross-examined despite defendant's objection to counsel's strategy.

**2. Rape—statutory rape—requested jury instructions—mistake of age—consent**

The trial court did not err in a statutory rape and indecent liberties with a child case by denying defendant's request for a jury instruction for mistake of age or consent as defenses. Neither instruction is a defense to statutory rape.

Appeal by defendant from judgment entered 29 April 2015 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 August 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Jill A. Bryan, for the State.*

*Tarlton Law PLLC, by Raymond C. Tarlton, for defendant-appellant.*

BRYANT, Judge.

Where defendant and defense counsel reached an impasse as to whether to cross-examine the State's witness on an issue of sample contamination, we affirm the trial court's ruling that it would be improper for the attorney to pursue a frivolous line of questioning. And where, as defendant concedes, our laws do not support a jury instruction for mistake of age or consent on facts such as these, we overrule defendant's argument.

On 15 July 2013, a Mecklenburg County grand jury indicted defendant Stephen Lamont Ward on two counts of statutory rape of a person thirteen, fourteen, or fifteen years old and two counts of taking indecent

liberties with a child. These matters were brought to trial during the 28 April 2015 Criminal Session of Mecklenburg County Superior Court, the Honorable Robert T. Sumner, Judge presiding.

At trial, the evidence tended to show that in June 2013, fourteen-year-old Rebecca[1,2] a Mecklenburg County resident, received a message via the social networking site Facebook inviting her to apply for a modeling opportunity with Fourth Ward Foto. At trial, Rebecca identified defendant as the person in the profile picture for the webpage. Rebecca corresponded with defendant by messages sent via Facebook and by phone for two days, and then agreed to meet him. On 28 June 2013, after her stepfather dropped her off at a library, Rebecca walked to meet defendant at a local pizzeria.

> Q. What did you think you were meeting him to do?
>
> A. Just take pictures, you know, what models do, just things like that. Like, you know, face shots and all that kind of stuff.

Rebecca got into defendant's black Durango SUV and traveled with him to a motel on Nations Ford Road. Defendant had not previously told Rebecca he was taking her to a motel. Rebecca testified that *en route*, defendant stopped at a gas station and purchased two cigars and a grape juice drink. Once in his motel room, Rebecca and defendant talked while she drank grape juice, which defendant later told her contained vodka. Defendant undressed Rebecca, kissed and fondled her body, then performed cunnilingus and twice engaged her in sexual intercourse. Afterwards, defendant directed her to pose in various positions for photographs. Rebecca was in defendant's motel room for three to four hours. During that time, her parents' numerous calls to her cellphone went unanswered.

When defendant returned Rebecca to the library, she contacted her parents and, over the course of the night, eventually disclosed where she had been. The next day, Rebecca directed her parents to the motel where defendant had taken her, and there, Rebecca's mother and step father confronted defendant. Rebecca was then taken to Novant Health, a hospital, and her parents reported to law enforcement officers in the Charlotte Mecklenburg County Police Department that their daughter

---

1. Rebecca was sixteen at the time of trial.

2. A pseudonym has been used to protect the juvenile's identity.

had been kidnapped and sexually assaulted. Officer David Wright was among the officers that arrived at the motel to investigate.

Officer Wright testified that a search warrant was issued for the room to which Rebecca was taken, as well as for the black Durango SUV in the motel parking lot. In the vehicle, officers found a vehicle registration card, a visa card with defendant's picture on it, and a bottle of Smirnoff Vodka. It was also confirmed that the room Rebecca had been taken to had been rented by defendant.

Following his arrest, defendant was transported to the Charlotte Mecklenburg Police Department. There, he waived his *Miranda* rights and agreed to speak with Officer Wright. Defendant gave his date of birth as 12 October 1972, making him forty years old at the time of his arrest. Defendant stated that he made contact with Rebecca on 28 June 2016 by "face messaging" her through Facebook for the purpose of making arrangements to take her photograph. He met Rebecca at a local restaurant and then drove her to the motel on Nations Ford Road. Defendant stated that Rebecca agreed to take nude pictures for him, and he took fifteen nude or partially nude photographs. But after the confrontation with Rebecca's mother and step-father, he deleted the photos. Defendant denied having sex with Rebecca. After the interview, defendant submitted to a cheek scraping for the collection of his DNA.

At trial, a certified Sexual Assault Nurse Examiner (SANE) with Novant Health testified about her examination of Rebecca. On 29 June 2013, the nurse collected specimen samples from Rebecca for a rape kit and recorded Rebecca's medical history. In testimony admitted for the purpose of corroboration, the SANE nurse testified to the statement Rebecca gave in her medical history regarding the events which brought her to the motel room on 28 June and the conduct that occurred inside. The testimony was substantially similar to Rebecca's trial testimony.

The last witness the State called was a DNA analyst working with the Charlotte Mecklenburg Police Crime Lab. Prior to her testimony, the trial court heard *ex parte* arguments, out of the presence of the jury and the prosecutor, from defendant and his trial counsel to resolve an impasse regarding a proposed line of questioning intended for cross-examination. The trial court ruled in favor of defendant's trial counsel, and the trial resumed.

DNA analyst Aby Moeykens, with the Charlotte Mecklenburg Police Crime Lab, had been a DNA analyst for twelve years and after stating her credentials was accepted without objection as an expert in DNA analysis and forensic DNA analysis. Moeykens testified that she "was asked to

analyze a buccal standard from [defendant] and . . . [a] buccal standard from [Rebecca], vaginal swabs, external genitalia swabs, crotch with stains from the underpants, . . . [as well as] fingernail swabs." "[T]he DNA profile obtained from [defendant] matched the major DNA profile obtained from the vaginal swabs." Moeykins testified that the probability of selecting another individual who would match the DNA profile was "approximately 1 in 2.54 quadrillion." Moeykens further testified that defendant's DNA profile matched the DNA profile obtained from sperm cell fractions taken from Rebecca's external genitalia, as well as her underwear.

Defendant did not present any evidence.

The jury returned guilty verdicts against defendant as charged: two counts of statutory rape; and two counts of indecent liberties with a child. In accordance with the jury verdicts, the trial court entered a consolidated judgment against defendant on the charges of one count of statutory rape and one count of indecent liberties with a child, imposing an active sentence of 240 to 348 months and a second consolidated judgment reflecting the remaining counts of those charges, imposing a sentence of 150 to 240 months, to be served consecutively. Defendant appeals.

---

On appeal, defendant raises two issues: whether the trial court erred by (I) settling an impasse between defendant and defense counsel in favor of defense counsel; and (II) denying defendant's request for an instruction on mistake of age as well as consent.

*I*

**[1]** Defendant first argues the trial court erred by ruling that defense counsel's trial strategy determined whether a witness would be cross-examined despite defendant's objection to counsel's strategy. Defendant contends that the trial court's ruling violated his Sixth Amendment right to assistance of counsel and on the evidence presented before the trial court, entitles defendant to a new trial. We disagree.

*Standard of review*

We note defendant contends that our standard of review is de novo, while the State seems to argue the standard is abuse of discretion. As defendant raises a constitutional issue, we will review the matter *de novo*. *State v. Whitaker*, 201 N.C. App. 190, 192, 689 S.E.2d 395, 396 (2009) ("The standard of review for questions concerning constitutional rights is de novo." (citation and quotation marks omitted)), *aff'd*, 364 N.C. 404, 700 S.E.2d 215 (2010).

*Analysis*

In our review of the issue, we find guidance from our Supreme Court in *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991). At trial, the defendant and his trial counsel reached an impasse during jury voir dire. Namely, the defendant wanted to accept a juror that counsel recommended be excused. *Ali*, 329 N.C. at 402, 407 S.E.2d at 188–89. Out of the presence of the jury and for the record, trial counsel noted his exception to the juror, but speaking for the defendant, accepted the juror. *Id.* at 402, 407 S.E.2d at 188–89. Following his conviction, the defendant appealed, arguing that his trial counsel should have made the final determination as to whether the juror would be accepted, and that trial counsel's failure to make that determination deprived the defendant of his Sixth Amendment right to counsel. *Id.* Our Supreme Court noted that "[t]he attorney-client relationship 'rests on principles of agency, and not guardian and ward.' " *Id.* at 403, 407 S.E.2d at 189 (quoting *State v. Barley*, 240 N.C. 253, 255, 81 S.E.2d 772, 773 (1954)). The *Ali* Court acknowledged the prior holding of this Court while clarifying the duty of an attorney who reaches an impasse with the client, as to tactical trial strategy.

> [T]actical decisions, such as which witnesses to call, "whether and how to conduct cross-examinations, what jurors to accept or strike, and what trial motions to make are ultimately the province of the lawyer . . . ." *State v. Luker*, 65 N.C. App. 644, 649, 310 S.E.2d 63, 66 (1983), *aff'd as to error*, *rev'd as to harmlessness of error*, 311 N.C. 301, 316 S.E.2d 309 (1984). However, when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship.

*Id.* at 404, 407 S.E.2d at 189 (alteration in original). In such a conflict, the *Ali* Court recommended that the attorney make a record of the circumstances, her advice to the defendant, her reasons for the advice, the defendant's decision, and the conclusion reached. *Id.*; *accord State v. Floyd*, 238 N.C. App. 110, 125-26, 766 S.E.2d 361, 372–73 (2014) (holding the defendant was entitled to a new trial where an impasse was reached between the defendant and his trial counsel as to the extent of cross-examination, the trial court failed to inquire into the nature of the impasse or rule on the dispute, and on appeal, the State failed to assert that the violation was harmless error), *review allowed*, *writ allowed*, ___ N.C. ___, 771 S.E.2d 295 (2015).

Given this procedure, we note that this Court has held that despite a conflict, trial counsel is *not compelled* to pursue strategy or tactical decisions based on frivolous or unsupported claims.

> [The] [d]efendant in this case sought to have his attorneys follow instructions to present claims that they felt "ha[d] no merit." Thus, the impasse was not over "tactical decisions," but rather over whether [the] Defendant could compel his counsel to file frivolous motions and assert theories that lacked any basis in fact. Nothing in *Ali* or our Sixth Amendment jurisprudence requires an attorney to comply with a client's request to assert frivolous or unsupported claims. In fact, to do so would be a violation of an attorney's professional ethics: "A lawyer *shall not* bring or defend a proceeding, or assert or controvert an issue therein, *unless* there is a *basis in law or fact* for doing so that is *not frivolous* . . . [.]" N.C. St. B. Rev. R. Prof. Conduct 3.1 (emphasis added).

*State v. Jones*, 220 N.C. App. 392, 395, 725 S.E.2d 415, 417 (2012) (alteration in original).

Here, we consider whether defendant's direction to his trial counsel to cross-examine the State's DNA expert on the extent of a mold contamination in the testing laboratory amounted to a tactical decision or a frivolous act.

> [Defense Counsel]: What the issue is in this case, the State is going to be calling a DNA expert on this matter and that expert's going to be testifying to the results of some laboratory tests that were performed in the Charlotte Mecklenburg Police Department laboratory. As part of the Discovery, the State disclosed that there had been contamination of a freezer in the laboratory with mold and that mold was found in the vicinity of and apparently on some DNA samples. They took quality control steps to determine whether there was actual contamination and they did not find any and they informed the effected [sic] parties, the defense counsel, of the contamination issue.
>
> . . .
>
> Normally saying that there could be errors is not relevant unless you have evidence of errors. Now, in this case something did happen, but it is my concern that there is

> nothing from what I see of the DNA electropherogram, the actual results, to indicate that there was any damage in this case. And by the way, if DNA is degraded there is a characteristic pattern that appears, it's called a ski slope, and [I] did not see that. The larger pieces of DNA are going to get damaged first, we don't see that in this case. So it's not just that the results were there, the normal signs of degradation aren't even there. . . .
>
> . . .
>
> THE COURT: . . . Now, does your client care to be heard with regard to this?
>
> THE DEFENDANT: Your Honor, my question was basically surrounding the fact that they had to prove their case beyond a reasonable doubt and I feel like if there is any doubt surrounding the DNA then that should be heard by the jury. . . .

Denying defendant's request to compel his trial counsel to examine the State's DNA expert regarding the contamination reported in the lab's freezer, the trial court made the following remark: "[Defense counsel] has an obligation not to -- as he indicated, I think I've alluded to and I certainly agree with him, that raising an issue that is not an issue just when you know it's not an issue is improper." This reasoning and ruling by the trial court in the instant case is in line with the Court's reasoning in *Jones*. 220 N.C. App. at 395, 725 S.E.2d at 417 ("Nothing in *Ali* or our Sixth Amendment jurisprudence requires an attorney to comply with a client's request to assert frivolous or unsupported claims. In fact, to do so would be a violation of an attorney's professional ethics[.]").

On the record before us, it appears that the proposed challenge to the DNA analysis performed by the Charlotte Mecklenburg Police Crime Lab on the basis of contamination was not a challenge rooted in relevant facts. Rather, the matter was properly considered one which is governed by rules of professional ethics for attorneys. The trial court properly denied defendant's request to compel trial counsel to pursue a line of questioning to elicit irrelevant facts. *See id.* Accordingly, defendant's argument is overruled.

Moreover, even were we to presume the trial court erred by failing to instruct defense counsel to cross-examine the State's forensic DNA expert in the manner directed by defendant, such error would be harmless in light of the other overwhelming evidence of defendant's guilt.

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2015). "This Court has previously applied harmless error analysis to constitutional errors arising under Article I, Section 24[, Right of jury trial in criminal cases]." *State v. Bunch*, 363 N.C. 841, 845, 689 S.E.2d 866, 869 (2010). "On a general level, an error is harmless beyond a reasonable doubt if it did not contribute to the defendant's conviction. The presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." *Id.* at 845–46, 689 S.E.2d at 869 (citation, quotation marks, and brackets omitted).

In its brief to this Court, the State argues there was overwhelming evidence of defendant's guilt on the charges of indecent liberties and statutory rape sufficient to render harmless beyond a reasonable doubt any potential violation of defendant's right to counsel. We agree.

The evidence presented at trial included defendant's handwritten statement to a Charlotte Mecklenburg Police Officer admitting that he was born in 1972; that, on 28 June 2016, he met Rebecca at a local restaurant, then drove her to a motel on Nations Ford Road; and that he took at least fifteen nude and partially nude pictures of Rebecca. Rebecca was born in 1998 and was fourteen years of age on 28 June 2016. Her testimony, describing how she met defendant and many of the events occurring on 28 June, was consistent with defendant's statement. Additionally, Rebecca testified that defendant provided her with grape juice mixed with vodka. A bottle of Smirnoff Vodka was recovered from defendant's black Durango SUV, parked in the motel parking lot on Nations Ford Road. Rebecca testified that after providing her with the grape juice and vodka, defendant undressed her, kissed and fondled her body, performed cunnilingus, and had sexual intercourse with her two times. Rebecca testified that defendant told her he ejaculated during sexual intercourse.

Q. Did you -- when you were 14, did you know what ejaculated meant?

A. No.

. . .

Q. Did you use that green washcloth to wash yourself?

A. I did.

Q. Did you see anything on the washcloth?

A. It was like a little bit of blood and some white, whitish clearish stuff on there.

Rebecca testified that she was in defendant's motel room for three to four hours. The next day, Rebecca was taken to Novant Health where her clothes were collected and specimen swabs were taken from her body. The SANE nurse, who collected evidence from Rebecca took a history from Rebecca during the examination. The nurse testified to the history Rebecca provided detailing the events which had occurred, including two separate acts of sexual intercourse, cunnilingus, and having nude photographs taken. The nurse corroborated that Rebecca's underwear were collected and that the nurse took external and internal swabs of Rebecca's vagina for the rape kit. A criminalist with the Charlotte Mecklenburg Police Department testified extensively regarding the scientific testing she performed on physical evidence collected in the rape kit from which she found the presence of sperm and saliva on vaginal swabs taken from Rebecca's body.

The DNA analyst compared the DNA profile from Rebecca to defendant's DNA profile and determined that the DNA profile obtained from defendant matched the DNA profile obtained from the vaginal swabs, as well as external genitalia swabs, taken from Rebecca. The analyst further testified that the statistical calculation on the match from the vaginal swab and from the external genitalia swabs was the same—1 in 2.54 quadrillion.

We note that even if on cross-examination of the forensic DNA expert, defense counsel had challenged the integrity of the DNA sample on the basis of contamination, the DNA evidence would have still been admissible, as such challenges go to the weight, not the admissibility, of the evidence. *See State v. Pennington*, 327 N.C. 89, 101, 393 S.E.2d 847, 854 (1990) ("The admissibility of any such [DNA] evidence remains subject to attack. . . . [T]raditional challenges to the admissibility of evidence such as the contamination of the sample . . . may be presented. These issues relate to the weight of the evidence."). Defendant did not present any evidence that the DNA samples tested in his case were contaminated.

Even presuming the trial court's failure to resolve the impasse between trial counsel and defendant in defendant's favor amounted to a violation of defendant's Sixth Amendment right to counsel, the other

overwhelming evidence of defendant's guilt on the two counts of statutory rape of a person thirteen, fourteen, or fifteen years old and two counts of taking indecent liberties with a child would render even the constitutional error harmless beyond a reasonable doubt. *See Bunch*, 363 N.C. at 845–46, 689 S.E.2d at 869 ("[T]he presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." (citation and quotation marks omitted)). Accordingly, defendant's argument is overruled.

*II*

**[2]** Next, defendant argues that the trial court erred by denying his request for instructions on "mistake of age" and consent as defenses. Despite this argument, defendant acknowledges the precedent of this Court to the contrary, *see State v. Anthony*, 351 N.C. 611, 616, 528 S.E.2d 321, 323 (2000) ("Where the age of the victim is an essential element of the crime of rape, as in N.C.G.S. § 14–27.2(a)(1) and its predecessor statute N.C.G.S. § 14–21, the result is a strict liability offense . . . [:] Consent is no defense[.]" (citation and quotation marks omitted)); *State v. Browning*, 177 N.C. App. 487, 491–92, 629 S.E.2d 299, 303 (2006) ("Statutory rape, under N.C.G.S. § 14–27.7A is a strict liability crime. Criminal *mens rea* is not an element of statutory rape. . . . [A] mistake of fact is no defense to statutory rape." (citations and quotation marks omitted)); *State v. Sines*, 158 N.C. App. 79, 86, 579 S.E.2d 895, 900 (2003) ("The defendant was not required to have knowledge that the victim was under the age of consent in order to be convicted of attempted rape of a child." (citation omitted)). Defendant submits this argument simply to preserve the argument should the law allow for such defenses in the future. Accordingly, we do not further consider this argument.

NO ERROR.

Judges TYSON and INMAN concur.

SWAPS, LLC, Plaintiff
v.
ASL PROPERTIES, INC., THE HEYWARD GROUP D/B/A THE HEYWARD COMPANIES and VIRGINIA E. FAVREAU, Defendants

No. COA16-443

Filed 1 November 2016

**Declaratory Judgments—North Carolina Uniform Declaratory Judgment Act—no award of attorney fees**

The trial court's order awarding attorney fees under the Declaratory Judgment Act was vacated. The North Carolina Uniform Declaratory Judgment Act does not permit a trial court to award attorney fees.

Appeal by defendants from order entered 11 December 2015 by Judge W. Erwin Spainhour in Union County Superior Court. Heard in the Court of Appeals 22 September 2016.

*Koy E. Dawkins for plaintiff-appellee.*

*Raynor Law Firm, PLLC, by Kenneth R. Raynor, for defendants-appellants.*

DIETZ, Judge.

The issue presented in this appeal is whether the North Carolina Uniform Declaratory Judgment Act permits a trial court to award attorneys' fees. We hold that it does not.

The act states that "the court may make such award of costs as may seem equitable and just." N.C. Gen. Stat. § 1–263. Our Supreme Court has held that costs are a creature of statute and are governed solely by statute, not common law.

In the General Statutes, costs and attorneys' fees are separate categories and attorneys' fees may be awarded as part of an award of "costs" only where the authorizing statute expressly permits it. The Declaratory Judgment Act does not. Accordingly, we vacate the trial court's order awarding attorneys' fees under the Declaratory Judgment Act.

**Facts and Procedural History**

Plaintiff Swaps, LLC prevailed on a claim under the North Carolina Uniform Declaratory Judgment Act, N.C. Gen. Stat. § 1–253 *et seq.* Swaps

later moved for an award of attorneys' fees and costs under N.C. Gen. Stat. § 1–263. The trial court granted the motion and awarded Swaps $37,300.91 in attorneys' fees and $677.61 in court costs. Defendants timely appealed.

## Analysis

The sole issue in this appeal is whether the Uniform Declaratory Judgment Act permits a trial court to award attorneys' fees. In a section titled "Costs," the act provides that "[i]n any proceeding under this article the court may make such award of costs as may seem equitable and just." N.C. Gen. Stat. § 1–263. The parties dispute whether the term "costs" in Section 1–263 includes attorneys' fees.

"At common law, neither party recovered costs in a civil action and each party paid his own witnesses." *Lassiter ex. rel. Baize v. N.C. Baptist Hosps. Inc.*, 368 N.C. 367, 375, 778 S.E.2d 68, 73 (2015) (quoting *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972)). "Today in this State, all costs are given in a court of law by virtue of some statute." *Id.* (brackets omitted). As a result, awards of "costs" to litigants in civil actions "are entirely creatures of legislation, and without this they do not exist." *Id.*

For more than a century, the statutes governing costs generally have excluded attorneys' fees, and our Supreme Court has acknowledged that this was "deliberately adopted as the policy" by our legislature. *Wachovia Bank & Trust Co. v. Schneider*, 235 N.C. 446, 454, 70 S.E.2d 578, 584 (1952). As a result "attorneys' fees are not now regarded as a part of the court costs in this jurisdiction." *Id.*

When the General Assembly intends to depart from this general rule, it always has done so expressly. For example, N.C. Gen. Stat. § 6–21 governs costs in certain civil proceedings and states that "[t]he word 'costs' as the same appears and is used in this section shall be construed to include reasonable attorneys' fees." *See also* N.C. Gen. Stat. §§ 6–21.1 to 6–21.7.

Here, the General Assembly chose only to refer to "costs" in Section 1–263 and not to specify that the term costs includes attorneys' fees. Thus, we hold that N.C. Gen. Stat. § 1–263 does not permit the trial court to award attorneys' fees.

Swaps does not dispute this reasoning or assert any textual argument for why Section 1–263 should be interpreted to include attorneys' fees. But Swaps argues that this Court approved an award of attorneys' fees under Section 1–263 in *Phillips v. Orange Cty. Health Dep't*,

237 N.C. App. 249, 765 S.E.2d 811 (2014) and that this Court is bound to follow *Phillips*. We disagree.

In *Phillips*, this Court never stated that the word "costs" in Section 1–263 authorized an award of attorneys' fees, nor did we engage in the analysis that we do here. More importantly, *Phillips* involved a suit against a county, and in this Court's discussion of attorneys' fees, we quoted N.C. Gen. Stat. § 6–21.7, which provides that "[i]n any action in which a . . . county is a party, upon a finding by the court that the . . . county acted outside the scope of its legal authority, the court may award reasonable attorneys' fees and costs to the party who successfully challenged the . . . county's action." *Phillips*, 237 N.C. App. at 261, 765 S.E.2d at 820. Thus, *Phillips* involved a case in which a different statute (not N.C. Gen. Stat. § 1–263) expressly authorized the award of attorneys' fees. Swaps does not identify a similar statute that expressly authorizes attorneys' fees in this case, and there is none.

Swaps also cites *Heatherly v. State*, 189 N.C. App. 213, 658 S.E.2d 11 (2008), in which the Court affirmed an award of "the costs of this litigation" under Section 1–263. But as in *Phillips*, in *Heatherly* this Court did not analyze the language of Section 1–263 or hold that the word "costs" in Section 1–263 authorized an award of attorneys' fees. Indeed, the majority opinion does not even mention attorneys' fees. And, in any event, *Heatherly* later was affirmed by an equally divided Supreme Court in a *per curiam* opinion holding that "the decision of the Court of Appeals is left undistributed without precedential value." *Heatherly v. State*, 363 N.C. 115, 115, 678 S.E.2d 656, 657 (2009). Thus, we would not be bound by *Heatherly* even if that decision had addressed the issue (which it did not).

Our holding today also aligns our interpretation of the Uniform Declaratory Judgment Act with the overwhelming majority of other jurisdictions to address this issue under their versions of the act. As with other uniform laws, the Uniform Declaratory Judgment Act "shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." N.C. Gen. Stat. § 1–266.

Other states interpreting this same provision in their own versions of this uniform law have held that the term "costs" does not include attorneys' fees. *See Nat'l Union Fire Ins. Co. of Pittsburgh, P.A. v. Dixon*, 112 P.3d 825, 830 (Idaho 2005) (holding Idaho UDJA "does not provide authority to award attorney fees in a declaratory action"); *Trs. of Ind. Univ. v. Buxbaum*, 69 P.3d 663, 670 (Mont. 2003) (holding Montana UDJA provision allowing court to make award of costs "does not authorize

an award of attorney fees"); *Pub. Entity Pool v. Score*, 658 N.W.2d 64, 68 (S.D. 2003) ("No provision in the [*sic*] South Dakota's Declaratory Judgment Act allows for an award of attorney's fees to the prevailing party."); *Soundgarden v. Eikenberry*, 871 P.2d 1050, 1064 (Wash. 1994) ("[The Uniform Declaratory Judgment Act] provides that '[i]n any proceeding under this chapter, the court may make such award of costs as may seem equitable and just.' But the term 'costs' does not include 'attorney fees'." (second alteration in original)); *Kremers-Urban Co. v. Am. Emp'rs Ins. Co.*, 351 N.W.2d 156, 168 (Wis. 1984) ("We decline to expand or enlarge the 'costs' available in declaratory judgment actions to include attorney's fees."). Our interpretation of Section 1–263 aligns our state's law with these other states' interpretation of this uniform act.

Finally, Swaps makes a policy argument for the award of attorneys' fees under N.C. Gen. Stat. § 1–263, asserting that the "recovery of cost and attorney's fees is of utmost importance to the litigants in a Declaratory Judgment Action" and that, if the trial court has no authority to grant attorneys' fees under the Declaratory Judgment Act, "why bring the action under the Declaratory Judgment Act?"

The answer, of course, is that the Uniform Declaratory Judgment Act provides a mechanism for parties to have their respective rights and obligations adjudicated where there is a justiciable controversy but no affirmative claim ripe for litigation:

> The Act recognizes the need of society for officially stabilizing legal relations by adjudicating disputes before they have ripened into violence and destruction of the status quo. It satisfies this social want by conferring on courts of record authority to enter judgments declaring and establishing the respective rights and obligations of adversary parties in cases of actual controversies without either of the litigants being first compelled to assume the hazard of acting upon his own view of the matter by violating what may afterwards be held to be the other party's rights or by repudiating what may be subsequently adjudged to be his own obligations.

*Lide v. Mears*, 231 N.C. 111, 117–18, 56 S.E.2d 404, 409 (1949).

Indeed, Swaps's policy argument cuts the other way. If litigants could recover attorneys' fees in declaratory judgment actions, it would create incentives to frame legal disputes in terms of declaratory relief. Particularly in contract or property disputes where the cost of litigation might exceed any monetary recovery, enterprising litigants would

have tremendous incentives to race to the courthouse with a request for declaratory relief rather than pursuing a traditional, affirmative claim for relief. Nothing in the text of the Uniform Declaratory Judgment Act suggests that the General Assembly wanted to encourage these types of preemptive lawsuits.

In sum, we hold that, because N.C. Gen. Stat. § 1–263 does not expressly include attorneys' fees within the definition of the term "costs," the statute does not permit an award of attorneys' fees.[1]

## Conclusion

We vacate the trial court's order awarding attorneys' fees under N.C. Gen. Stat. § 1–263.

VACATED.

Judges HUNTER, JR. and McCULLOUGH concur.

---

1. We also note, to avoid any confusion, that where another statute authorizes an award of attorneys' fees, nothing in N.C. Gen. Stat. § 1–263 prohibits a trial court from awarding those fees in an action brought under the Uniform Declaratory Judgment Act.

JOSEPH VINCOLI, Plaintiff
v.
STATE OF NORTH CAROLINA, Defendant

No. COA15-1013

Filed 1 November 2016

**Public Officers and Employees—career status achieved—position declared managerial exempt from N.C. Human Resources Act—statutory right to hearing before Office of Administrative Hearings**

Where plaintiff was employed by the N.C. Department of Public Safety as a Special Assistant to the Secretary for Inmate Services, attained career status, was notified that the Governor had declared his position as managerial exempt from the provisions of the N.C. Human Resources Act, and two months later received a letter terminating him from employment, the plain language of N.C.G.S. § 126-5(h) provided plaintiff with a statutory right to a hearing before OAH as to whether he was subject to the Act and whether his exempt designation was proper.

Judge DIETZ concurring in a separate opinion.

Appeal by defendant from order entered 9 June 2015 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 9 March 2016.

*Law Offices of Michael C. Byrne, by Michael C. Byrne, for plaintiff-appellee.*

*Attorney General Roy Cooper, by Assistant Attorney General Tamika L. Henderson and Special Deputy Attorney General Joseph Finarelli, for the State.*

*The McGuinness Law Firm, by J. Michael McGuinness, filed a brief as amicus curiae for the State Employees Association of North Carolina.*

CALABRIA, Judge.

Defendant State of North Carolina ("the State") appeals from an order denying its motion for summary judgment and granting Plaintiff

Joseph Vincoli's ("Vincoli") motion for summary judgment in a declaratory judgment action initiated by Vincoli. In its order, the trial court declared that the enactment of N.C. Gen. Stat. § 126-34.02, a provision of the North Carolina Human Resources Act ("NCHRA"),[1] was unconstitutional as applied to Vincoli because it did not provide him the right to a contested case hearing before the Office of Administrative Hearings ("OAH") to challenge the designation of his position as "exempt" from the NCHRA. In addition, the trial court's order permanently enjoined the State from enforcing the statute against Vincoli and ordered that the State provide Vincoli with an OAH hearing to review the designation of his position as exempt. Because we conclude that N.C. Gen. Stat. § 126-5(h) does provide for the right to such a hearing, we reverse.

## *I. Background*

In 2010, Vincoli was hired by the North Carolina Department of Public Safety ("DPS") into a position subject to the NCHRA[2] and subsequently attained the status of a "career State employee." A "career State employee" is afforded certain protections provided by the NCHRA, such as the right not to be disciplined except for just cause. However, the NCHRA also grants the Governor the authority to designate positions within departments of state government, including DPS, as "policymaking" or "managerial" exempt from the provisions of the NCHRA.

Until 2013, a career State employee whose non-exempt position was subsequently designated as exempt was entitled by N.C. Gen. Stat. § 126-34.1(c) to a contested case hearing before OAH to challenge the propriety of the designation. Regarding the process afforded a career state employee aggrieved by an exempt declaration, our Supreme Court has explained:

> Contested case hearings are conducted by the Office of Administrative Hearings (OAH) and are heard by an Administrative Law Judge (ALJ). The ALJ makes a recommendation to the Commission, N.C.G.S. § 150B-34 (1995), and the Commission then makes a final decision based upon the record from the OAH, N.C.G.S. § 150B-36 (1995). If the employee or state agency is aggrieved by the Commission's final decision, either party may petition the superior court for judicial review, N.C.G.S. § 150B-43

---

1. Formerly the State Personnel Act.

2. We recognize that the NCHRA has since been amended but construe the relevant provisions as they existed.

> (1995), as petitioner Powell did in this case. Review is then conducted in accordance with N.C.G.S. § 150B-51(b).

*Powell v. N.C. Dep't of Transp.*, 347 N.C. 614, 616-17, 499 S.E.2d 180, 181 (1998).

On 21 August 2013, the Governor signed into law House Bill 834, which substantially revised the NCHRA. A career state employee's ability to challenge an exempt designation pursuant to the previous process changed with the passage of "An Act Enhancing the Effectiveness and Efficiency of State Government by Modernizing the State's System of Human Resource Management and By Providing Flexibility for Executive Branch Reorganization and Restructuring . . ." 2013 N.C. Sess. Laws, c. 382 ("the Act"). The Act, *inter alia*, amended the "Employee Grievance" section of the NCHRA by repealing N.C. Gen. Stat. § 126-34.1 and replacing it with N.C. Gen. Stat. § 126-34.02, which omitted an employee's action to challenge an exempt designation as grounds for a contested case hearing and, in effect, eliminated a career state employee's opportunity to a contested case hearing before OAH on this issue.

On 1 October 2013, Vincoli, who was employed by DPS as a Special Assistant to the Secretary for Inmate Services and who had attained career status, was notified that the Governor had declared his position as "managerial exempt." Approximately two months later, on 6 December 2013, Vincoli received a letter terminating him from employment on the stated grounds that "a change in agency staff is appropriate at this time[.]"

According to the pleadings in Vincoli's OAH proceeding,[3] Vincoli filed an internal grievance with DPS challenging the designation of his position as exempt. In response, Vincoli received a letter from DPS refusing to entertain his grievance on the basis that "he was not eligible for the internal appeal process as a 'managerial exempt' employee." Subsequently, Vincoli filed a grievance in the North Carolina Office of State Human Resources ("OSHR"), which refused to entertain Vincoli's grievance, concluding that: "In this particular case and on these particular facts, OSHR believes that there is no personal or subject matter jurisdiction for any claim by [Vincoli] for a just cause claim against DPS in either the agency grievance process or OAH." As a result, neither DPS nor OSHR issued a final agency decision on the matter.

---

3. Although the pleadings associated with Vincoli's petition for a contested case hearing before OAH were initially omitted from the record on appeal, we have granted the State's motion to take judicial notice of OAH proceedings.

On 16 January 2014, Vincoli filed a petition for a contested case hearing with OAH, challenging his exemption and subsequent termination without just cause. Specifically, Vincoli asserted that

> his designation as "managerial exempt" was in fact used to disguise a disciplinary dismissal without just cause that would fall within the scope of the State Personnel Act's protections against dismissal without just cause. [DPS'] action was a sham, pretext exemption designation . . . and constituted a de facto dismissal[.]

In addition, Vincoli asserted that he was entitled to a contested case hearing based on N.C. Gen. Stat. § 126-5(h), which provides: "In case of dispute as to whether an employee is subject to the provisions of this Chapter, [the State Personnel Act,] the dispute shall be resolved as provided in Article 3 of Chapter 150B." In response, DPS filed a motion to dismiss, asserting that since Vincoli's position was designated as exempt, he was not entitled to challenge DPS' decision to terminate him. Additionally, DPS asserted that OAH lacked jurisdiction to determine whether the classification of Vincoli's position as managerial exempt was proper, on the basis that this issue was not included in N.C. Gen. Stat. § 126-34.02, and "[a]ny issue for which an appeal to OAH has not been specifically authorized cannot be grounds for a contested case hearing." Vincoli filed a response to DPS' motion to dismiss, asserting, in pertinent part:

> [DPS] takes several pages to state what should be a fairly concise argument: The OAH lacks subject matter jurisdiction because the General Assembly repealed the portion of N.C.G.S. 126-34.1 listing improper exempt designation as appealable. The response is equally concise: while that provision was repealed, 126-5(h), mandating that disputes on whether one is subject to the State Personnel Act "shall be resolved as provided in Article 3 of Chapter 150B," was not. And, as shown below, it is 126-5, not 126-34.1, which controls whether a state employee is subject to the State Personnel Act. Accordingly, given the appeal right arises under 126-5, and that appeal right remains in force, the OAH has jurisdiction over [] Vincoli's appeal. . . .

Vincoli asserted that he had

> properly invoked the subject matter jurisdiction of the OAH in two separate and specific manners. He has alleged dismissal without just cause under 126-35(a), and has

> likewise alleged a dispute about whether he is subject to the State Personnel Act under N.C.G.S. 126-5(h).

After a hearing, OAH entered an order on 10 April 2014 granting DPS' motion to dismiss for lack of subject matter jurisdiction. In its order, OAH made the following conclusions of law:

> 1. Effective August 21, 2013, the law changed controlling the matters over which the OAH has original jurisdiction, and the General Assembly repealed the right to appeal an exempt designation. This statutory change removes the rights of a state employee to challenge an exempt designation; therefore, the merits of this contested case will not be addressed.
>
> 2. As a managerial exempt employee, [Vincoli] is not subject to the provisions of Chapter 126. Therefore, G.S. 126-5(h) does not grant [Vincoli] the right to appeal his exempt designation or ultimate dismissal under G.S. 126-5(h) and Chapter 150B.
>
> 3. Only those grievance listed in G.S. 126-34.02 may be heard as contested cases in the OAH and only after review by the [OSHR]. [Vincoli's] exempt designation is no longer among the grievances listed; therefore, the OAH has no subject matter jurisdiction, which is the predicate authority for a contested case to proceed. The lack of subject matter jurisdiction requires that [Vincoli's] contested case be dismissed.

Vincoli had thirty days to appeal OAH's decision to the Court of Appeals of North Carolina. Vincoli did not timely appeal this order to our Court.

On 29 August 2014, Vincoli filed a complaint and petition for a declaratory judgment action under the North Carolina Uniform Declaratory Judgment Act ("NCUDJA"), N.C. Gen. Stat. § 1-253 to -267, in Wake County Superior Court, challenging the constitutionality of the Act and specifically the enactment of N.C. Gen. Stat. § 126-34.02 as applied to him. In his complaint, Vincoli asserted that the enactment of the challenged statute deprived him of his previously vested property interest in continued employment with the State without any due process or compensation. Specifically, Vincoli asserted that:

> [U]pon reaching "career' status, [Vincoli] had a constitutionally protected, fully vested property interest

> with respect to his employment with the State of North Carolina that created a reasonable expectation of continued employment with the State of North Carolina. Prior to the passage of [the Act] and codification of N.C.G.S. § 126-34.02, neither the Governor nor any State agency could have terminated or deprived Plaintiff of his property interest through an "exempt" designation without providing Plaintiff due process of law in the form of a contested case proceedings[.]

Vincoli requested declaratory relief, seeking a declaration that N.C. Gen. Stat. § 126-34.02 is unconstitutional and "such additional and further relief as [the court] deems appropriate."

On 7 October 2014, the State moved to dismiss Vincoli's claims, asserting, *inter alia*, that: (1) a career state employee may no longer challenge the designation of his position as exempt in OAH; (2) OAH lacked jurisdiction to entertain Vincoli's petition for a contested case hearing on the issue of whether his position was properly declared exempt; (3) due to the enactment of N.C. Gen. Stat. § 126-34.02, plaintiff has no cause of action in OAH to determine the propriety of the designation of his previous position as managerial exempt; and (4) OAH issued a decision concluding that, under N.C. Gen. Stat. § 126-34.02, plaintiff had no right to appeal the designation of his former position as managerial exempt. Accordingly, the State requested that the superior court deny Vincoli's complaint and petition for declaratory judgment as well as all relief sought by Vincoli.

Subsequently, Vincoli and the State filed cross-motions for summary judgment. After a hearing, by order entered 9 June 2015, the trial court granted Vincoli's summary judgment motion and denied the State's motion, declaring that N.C. Gen. Stat. § 126-34.02 was an unconstitutional violation of Article I, Section 19 of the North Carolina Constitution as applied to Vincoli. In addition, the trial court permanently enjoined the State from enforcing N.C. Gen. Stat. § 126-34.02 against Vincoli and ordered that Vincoli be provided with a contested case hearing before OAH regarding whether the exempt designation was proper, in accordance with the repealed N.C. Gen. Stat. § 126-34.1(c). The State appeals.[4]

---

4. In our discretion, we have taken judicial notice of two other OAH proceedings initiated by Vincoli, 14 OSP 00389 and 15 OSP 07944.

## *II. Issues*

On appeal, the State asserts that the trial court erred by granting summary judgment in favor of Vincoli for three reasons. First, the State contends that the Act did not violate Vincoli's due process rights under Article I, Section 19 of the North Carolina Constitution because (a) the scope of Vincoli's protected property interest in continued employment did not include a right to grieve an exempt designation; and (b) the legislative process satisfied any process that was due as a result of the repeal of N.C. Gen. Stat. § 126-34.1(c). Second, the State contends that repeal of a career state employee's ability to appeal an exempt designation does not give rise to a taking claim pursuant to Article I, Section 19 of the North Carolina Constitution, because (a) Vincoli did not establish a contractual obligation to provide him a hearing to challenge the designation of his position as exempt from the NCHRA; and (b) if the repeal of N.C. Gen. Stat. § 126-34.1(c) is an uncompensated taking, the State has provided just compensation. And third, the State contends that the trial court's order to provide appellee a contested case hearing in OAH violates the separation of powers. Because the dispositive issue in this case renders addressing these issues unnecessary, we decline to address them.

## *III. Standard of Review*

> Summary judgment may be granted in a declaratory judgment proceeding, *N.C. Farm Bureau Mut. Ins. Co. v. Briley*, 127 N.C. App. 442, 444, 491 S.E.2d 656, 657 (1997), *disc. rev. denied*, 347 N.C. 577, 500 S.E.2d 82 (1998), 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.G.S. § 1A-1, Rule 56(c) (2001).

*Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 178, 581 S.E.2d 415, 422 (2003). "Because the parties do not dispute any material facts, [w]e review [the] trial court's order for summary judgment de novo to determine . . . whether either party is entitled to judgment as a matter of law." *Lanvale Props., LLC v. Cty. of Cabarrus*, 366 N.C. 142, 149, 731 S.E.2d 800, 806 (2012) (citations and quotations omitted). "When applying de novo review, we consider[ ] the case anew and may freely substitute our own ruling for the lower court's decision." *Id.* at 149, 731 S.E.2d at 806-07 (citations and quotations omitted).

### *IV. Right to Appeal Pursuant to N.C. Gen. Stat. § 126-5(h)*

The State contends that the trial court erred by granting summary judgment in favor of Vincoli. We agree.

The Declaratory Judgment Act provides: "Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." N.C. Gen. Stat. § 1-254 (2013).

Chapter 126 of the North Carolina General Statutes governs the State Personnel System. N.C. Gen. Stat. § 126-5(a) (2013) states that Chapter 126 applies to "[a]ll State employees not herein exempt[.] N.C. Gen. Stat. § 126-5(d)(1)(d) grants the Governor the authority to designate up to 1,500 "exempt positions" throughout various state departments, including DPS. N.C. Gen. Stat. § 126-5(b) defines "exempt positions" as "an exempt managerial position or an exempt policymaking position." N.C. Gen. Stat. § 126-5(b), at the time, defined an "exempt managerial position" as

> a position delegated with significant managerial or programmatic responsibility that is essential to the successful operation of a State department, agency, or division, so that the application of G.S. 126-35 to an employee in the position would cause undue disruption to the operations of the agency, department, institution, or division.

N.C. Gen. Stat. § 126-5(b)(2) (2013).

The repealed statute, N.C. Gen. Stat. § 126-34.1, provided in pertinent part:

> (c) In the case of a dispute as to whether a State employee's position is properly exempted from the State Personnel Act under G.S. 126-5, the employee may file in the Office of Administrative Hearings a contested case under Article 3 of Chapter 150B of the General Statues.
>
> . . . .
>
> (e) Any issue for which appeal to the State Personnel Commission through the filing of a contested case under Article 3 of Chapter 150B of the General Statutes has not been specifically authorized by this section shall not be grounds for a contested case under Chapter 126.

N.C. Gen. Stat. § 126-34.1 (2011).

This statute was replaced by N.C. Gen. Stat. § 126-34.02 (2013). N.C. Gen. Stat. § 126-34.02(c) contains a similar contested case exclusion provision to that in N.C. Gen. Stat. § 126-34.1(e) and provides: "Any issue for which an appeal to the Office of Administrative Hearings has not been specifically authorized by this section shall not be grounds for a contested case hearing." Our Supreme Court has explained:

> There is no inherent right of appeal from an administrative decision to either the OAH or the courts. "No appeal lies from an order or decision of an administrative agency of the State or from judgments of special statutory tribunals whose proceedings are not according to the course of the common law, unless the right is granted by statute." *In re Assessment of Sales Tax*, 259 N.C. 589, 592, 131 S.E.2d 441, 444 (1963).

*Empire Power Co. v. N.C. Dep't of Env't, Health & Nat. Res.*, 337 N.C. 569, 586, 447 S.E.2d 768, 778 (1994).

However, N.C. Gen. Stat. § 126-5(h) provides: "In case of dispute as to whether an employee is subject to the provisions of this Chapter, the dispute shall be resolved as provided in Article 3 of Chapter 150B." Article 3 governs the procedure for contested case hearings. North Carolina courts have recognized that N.C. Gen. Stat. § 126-5(h) provides an avenue for employees to challenge exempt designations. *See Batten v. N.C. Dep't of Correction*, 326 N.C. 338, 345 n.3, 389 S.E.2d 35, 40 n.3 (1990), (noting § 126-5(h) as an example of a section in the Act describing employment-related grounds for a "contested case" arising under the State Personnel Act, interpreting that statute as providing grounds for a "dispute between employer and employee as to whether latter non-exempt"), *disapproved of on other grounds by Empire Power Co.*, 337 N.C. 569, 447 S.E.2d 768; *see also Jordan v. N.C. Dep't of Transp.*, 140 N.C. App. 771, 774, 538 S.E.2d 623, 625 (2000) (holding that "[o]nce a position is designated as 'exempt policymaking,' whether or not the designation is correct, an employee wishing to contest such designation must do so according to N.C. Gen. Stat. § 150B" and citing N.C. Gen. Stat. § 126-5(h) (1999)).[5]

---

5. This is not a novel interpretation of N.C. Gen. Stat. § 126-5(h). Although its opinion is not binding upon us, the Fourth Circuit Court of Appeals of the United States has recognized that N.C. Gen. Stat. § 126-5(h) gives a State employee an avenue to challenge the re-designation of his position by the Governor to exempt status. *See Carrington v. Hunt*, 105 F.3d 646 (4th Cir. 1997) (unpublished). *In Carrington*, the Court stated that "a state employee has no property interest in continued non-exempt status if state law gives the executive discretion to determine which positions are exempt and to change such

Although Article I of Chapter 150B expressly exempts DPS from the contested case provisions of Article III of Chapter 150B, *see* N.C. Gen. Stat. § 150B-1(e)(7), our Supreme Court has held that "the detailed provisions of Chapter 126, which govern the appeal of personnel actions affecting state employees, prevail with respect to [State] employees over the general departmental exclusion stated in the Administrative Procedure Act." *Batten*, 326 N.C. at 344, 389 S.E.2d at 39. In *Empire Power Co.*, our Supreme Court clarified *Batten*'s holding as follows:

> *Batten* involved the appeal of a grievance of an employee of an agency expressly exempted from the administrative hearing provisions of the [Administrative Procedure Act]; thus, under the plain meaning of the [Administrative Procedure Act], that employee can be entitled to an administrative hearing to appeal his grievance to the OAH only by virtue of another statute.

337 N.C. at 579, 447 S.E.2d at 774.

In the instant case, Vincoli is an aggrieved employee of DPS, an agency expressly exempted from the administrative hearing provisions of the Administrative Procedure Act. Although N.C. Gen. Stat. § 126-34.02(c) provides that "[a]ny issue for which an appeal . . . has not been specifically authorized by this section shall not be grounds for a contested case hearing[,]" the plain language of N.C. Gen. Stat. § 126-5(h) provides Vincoli with a statutory right to a hearing before OAH as to whether he is subject to the Act, which would implicate addressing whether his exempt designation was proper. Accordingly, based on this avenue of appeal, the trial court erred by granting summary judgment in favor of Vincoli.

## *V. Conclusion*

Because we hold that Vincoli is entitled to a contested case hearing before OAH pursuant to N.C. Gen. Stat. § 126-5(h), we need not address his claims based upon his right to due process under Article I, Section 19 of the North Carolina Constitution. *See State v. Crabtree*, 286 N.C. 541, 543, 212 S.E.2d 103, 105 (1975) (holding that appellate courts will not pass upon constitutional questions if some other ground exists

---

designations." *Id.* The Court, however, further stated that even if there is a property interest, "North Carolina law provides sufficient process to guard against its erroneous deprivation. The affected employee is entitled to ten working days' notice before the change in status, N.C. Gen. Stat. § 126-5(g), *and he may appeal to the State Personnel Office if he believes that the designation is illegal or error.*" *Id.* (emphasis added).

upon which the case may be decided). We reverse the trial court's order denying the State's motion for summary judgment and granting Vincoli's motion for summary judgment. Nothing in this opinion shall be construed to prejudice any right Vincoli may have to seek a contested case hearing under N.C. Gen. Stat. § 126-5(h).

REVERSED.

Judge DILLON concurs.

Judge DIETZ concurs in a separate opinion.

DIETZ, Judge, concurring.

I agree with the majority that the plain language of N.C. Gen. Stat. § 126–5 permits Vincoli to contest whether his position properly could be designated exempt under the State Personnel Act. Indeed, the statutory language hardly could be clearer. The title of Section 126–5 is "Employees subject to Chapter; exemptions." The statute then states precisely which positions can, and cannot, be designated as exempt positions that are not subject to the provisions of the chapter. Then, in subsection (h), the statute provides that "[i]n case of dispute as to whether an employee is subject to the provisions of this Chapter, the dispute shall be resolved as provided in Article 3 of Chapter 150B," which is the portion of the General Statutes governing contested cases filed in OAH.

The rub, of course, is that the General Assembly recently repealed N.C. Gen. Stat. § 126–34.1(c), a more specific statutory provision authorizing employees to challenge their exempt designation in OAH. If the general language of Section 126–5(h) already permits employees to challenge their exempt designation in OAH, then the repeal of the more specific language in Section 126–34.1(c) was meaningless. Ordinarily, we do not interpret the law in a way that renders actions of the General Assembly meaningless. *See Town of Pine Knoll Shores v. Evans*, 331 N.C. 361, 366, 416 S.E.2d 4, 7 (1992).

But this is not an ordinary case. Vincoli argues that, if we interpret the repeal of Section 126–34.1(c) as depriving him of any opportunity to contest his exempt designation in OAH, it would violate his constitutional rights. Whether meritorious or not, his argument certainly is not frivolous. And it is a long-standing principle of statutory construction that courts should "avoid an interpretation of a . . . statute that engenders constitutional issues if a reasonable alternative interpretation

poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989).

Interpreting N.C. Gen. Stat. § 126–5(h) according to its plain meaning, notwithstanding the repeal of N.C. Gen. Stat. § 126–34.1(c), is a "reasonable alternative interpretation" of the statute. I therefore join the majority in reversing the trial court's judgment. Under the plain language of N.C. Gen. Stat. § 126–5(h), Vincoli and other employees like him can challenge their exempt designations in a contested case at OAH. As a result, Vincoli's constitutional challenge, premised on his inability to contest his exempt designation, is meritless.

---

WELLS FARGO BANK, N.A. a/k/a Wachovia Mortgage, a division of Wells Fargo Bank, N.A., and f/k/a Wachovia Mortgage, FSB f/k/a World Savings Bank, FSB, Plaintiff
v.
AMERICAN NATIONAL BANK AND TRUST COMPANY, successor by merger to MidCarolina Bank, Defendant

No. COA15-689

Filed 1 November 2016

**1. Accord and Satisfaction—rescission of notice of satisfaction—for any reason**

In a case of first impression involving N.C.G.S. § 45-36.6(b)—a statute that permits rescission of a notice of satisfaction for a security instrument if that instrument was "erroneously satisfied"—the Court of Appeals held that an instrument "erroneously satisfied of record" is one for which the certificate of satisfaction was erroneously or mistakenly filed for *any* reason, even a unilateral mistake having nothing to do with whether the underlying obligation actually was fully paid off.

**2. Accord and Satisfaction—rescission of notice of satisfaction—summary judgment improper**

In a case involving rescission of a notice of satisfaction for a security instrument, the trial court erroneously granted summary judgment in favor of plaintiff bank where plaintiff bank forecast evidence that its filing of the satisfaction was a mistake but defendant bank forecast other, conflicting evidence suggesting that plaintiff bank intended to file the satisfaction because it believed the underlying loan had been paid off. This conflict in the forecasted evidence created a genuine issue of material fact for a jury to resolve.

Judge STROUD dissenting.

Appeal by defendant from order entered 27 August 2014 by Judge Michael R. Morgan in Alamance County Superior Court. Heard in the Court of Appeals 19 November 2015.

*Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell, Christopher C. Finan, and Matthew A.L. Anderson, for plaintiff-appellee.*

*Clement Wheatley, by Darren W. Bentley, for defendant-appellant.*

DIETZ, Judge.

This case presents an issue of first impression involving N.C. Gen. Stat. § 45–36.6(b), a statute that permits rescission of a notice of satisfaction for a security instrument if that instrument was "erroneously satisfied."

The parties have two competing interpretations of the phrase "erroneously satisfied." Wells Fargo argues that "erroneously" means precisely what it says—any error or mistake of any kind. American National argues that the statute applies only if the error was believing that the underlying secured obligation had been paid off when in fact it had not.

The legislature may have intended for American National's interpretation to apply but, as explained below, the plain language of the statute and long-standing canons of statutory construction compel us to accept Wells Fargo's interpretation. Of particular importance, this statute originally was taken directly from a model uniform law and formerly said precisely what American National claims it ought to mean here. But several years after adopting that uniform law, the legislature amended the statute and removed the language supporting the interpretation urged by American National. Under well-settled canons of statutory construction, we must conclude that this change had meaning. *Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 484 (1968).

Accordingly, we are constrained to hold that an instrument "erroneously satisfied of record" under N.C. Gen. Stat. § 45–36.6(b) is one for which the certificate of satisfaction was erroneously or mistakenly filed for *any* reason, even a unilateral mistake having nothing to do with whether the underlying obligation actually was fully paid off.

Although we agree with Wells Fargo's interpretation of the statute, we do not agree that the record therefore supports entry of summary

judgment in Wells Fargo's favor. Wells Fargo forecast evidence proving that its filing of the satisfaction was a mistake, including testimony from its Rule 30(b)(6) deponent. But American National forecast other, conflicting testimony and evidence which suggests Wells Fargo intended to file the satisfaction because it believed the underlying loan had been paid off. A jury must resolve this fact dispute. We thus reverse the entry of summary judgment and remand for further proceedings.

## Facts and Procedural History

On 6 July 1999, homeowners Theodore and Chryssoula Bakatsias obtained financing and bought a home in Burlington. On 17 March 2004, the homeowners obtained an $88,000 home equity line of credit from American National Bank[1] secured by a deed of trust on the property.

On 30 August 2004, the homeowners refinanced their original loan on the property with a $350,000 loan from Wells Fargo secured by a deed of trust. Shortly after recording that 2004 deed of trust, the homeowners and Wells Fargo entered into a subordination agreement with American National providing that the 2004 loan would have priority over the home equity loan.

On 20 November 2006, the homeowners again refinanced their home loan through Wells Fargo. The parties prepared and executed a new deed of trust that secured this new loan. Neither the note nor the new deed of trust referenced the existing 2004 deed of trust. The homeowners used a portion of the 2006 loan sum to immediately pay off the remaining balance of the 2004 loan. Wells Fargo did not obtain a subordination agreement with American National with respect to the 2006 refinancing, as it did in 2004.

On 27 December 2006, Wells Fargo recorded a certificate of satisfaction, which certified that the debt secured by the 2004 deed of trust was fully satisfied and that the 2004 deed of trust was accordingly cancelled. Because Wells Fargo never obtained a subordination agreement with American National concerning the 2006 loan, the effect of cancelling the 2004 deed of trust was to elevate the home equity line of credit from American National to first priority, ahead of Wells Fargo's 2006 home loan. Wells Fargo contends that it erroneously filed its certificate of satisfaction and that it never intended to elevate American National's home equity line of credit to first priority position. Thus, roughly six

1. For ease of reading, this opinion will refer exclusively to American National and Wells Fargo, although some of the financing was done by their respective predecessors-in-interest.

years later, on 27 August 2013, when Wells Fargo discovered the certificate of satisfaction and recognized its unintended effect, it recorded a document of rescission under N.C. Gen. Stat. § 45–36.6 to rescind the certificate of satisfaction and reinstate Wells Fargo's 2004 deed of trust to first priority.

Wells Fargo later sought a declaratory judgment that its rescission was effective and that it therefore "holds a valid and enforceable, first-priority lien" on the property. American National counterclaimed, alleging that "but for the wrongfully filed Rescission, American National holds a valid enforceable first-priority lien" on the property, and sought a declaration that the rescission was ineffective.

Wells Fargo moved for judgment on the pleadings and American National moved for summary judgment. On 27 August 2014, following a hearing, the trial court filed an order granting summary judgment for Wells Fargo, declaring that it held "a valid and enforceable, first-priority lien upon the entire fee simple interest" in the subject property, and dismissing American National's counterclaim. American National timely appealed.[2]

**Analysis**

**I. The meaning of "erroneously satisfied"**

**[1]** The crux of this case is the meaning of the phrase "[i]f . . . a security instrument is erroneously satisfied of record" in Section 45–36.6(b) of the General Statutes. That statutory provision, originally taken from a portion of the Uniform Residential Mortgage Satisfaction Act, allows a lender to undo the filing of a satisfaction for a security instrument and reinstate the cancelled security instrument with its original priority intact.

The parties assert two competing interpretations of the statute. Wells Fargo argues that "[t]he statute makes it clear that when a secured creditor determines that a unilateral mistake (of any kind) has resulted in the erroneous cancellation of a security instrument (for any reason and at any time), that secured creditor may file a verified document of rescission to remedy that mistake." Under this interpretation, Wells Fargo need only establish that it filed the certificate of satisfaction and that the filing was, for any reason, a mistake. If so, then it may rescind the filing under the statute's plain language.

---

2. The trial court substituted DR Acquisitions, LLC—the successor-in-interest to American National Bank—as the defendant in this action on 18 December 2014.

American National, by contrast, argues that the statute does not permit rescission for *any* mistake, but only the erroneous recording of satisfaction for an obligation that was not actually satisfied. Under this interpretation, Wells Fargo properly could rescind its certificate of satisfaction only if it could show that, after the homeowners paid off the 2004 loan with the 2006 refinancing, there was still some outstanding debt secured by the 2004 deed of trust.

The legislature may have intended for American National's interpretation to apply, but the plain language of the statute and long-standing canons of statutory construction compel us to accept Wells Fargo's interpretation.

As with all questions of statutory construction, we begin with the statute's plain language. The relevant statutory language is as follows:

> If a release is recorded in error or a security instrument is erroneously satisfied of record, then the secured creditor or the person who caused the release to be recorded in error or the security instrument to be erroneously satisfied of record may execute and record a document of rescission. The document of rescission must be duly acknowledged before an officer authorized to make acknowledgments. Upon recording, the document of rescission either (i) rescinds a release that was recorded in error and deprives the release of any effect or (ii) rescinds the erroneous satisfaction of record of the security instrument and reinstates the security instrument.

N.C. Gen. Stat. § 45–36.6(b).

The disputed language is the phrase "if . . . a security instrument is erroneously satisfied of record" and, in particular, the meaning of the word "erroneously." That term is not defined anywhere in the statute and thus is interpreted according to its ordinary meaning. *Morris Commc'ns Corp. v. City of Bessemer City*, 365 N.C. 152, 158, 712 S.E.2d 868, 872 (2011). The ordinary meaning of "erroneous" is "not correct" or "mistaken." *Merriam-Webster* (new ed. 2016). Thus, an instrument "erroneously satisfied of record" is one that is incorrectly or mistakenly satisfied. This supports Wells Fargo's interpretation, because there is no textual limit on what *type* of mistake is necessary.

The legislative history of section 45–36.6 supports this conclusion. The statute is part of the Uniform Residential Mortgage Satisfaction Act that was adopted in North Carolina and a number of other states. The

original version of the statute, enacted by our General Assembly in 2005, unquestionably limited rescission to circumstances in which the underlying obligation was not actually satisfied—or, put another way, unquestionably adopted American National's interpretation:

> In this section, "document of rescission" means a document stating that an identified satisfaction or affidavit of satisfaction of a security instrument was recorded erroneously or that a security instrument was satisfied of record erroneously, *the secured obligation remains unsatisfied*, and the security instrument remains in force.

N.C. Gen. Stat. § 45–36.6(a) (2005) (now repealed); *see also* Unif. Residential Mortg. Satis. Act § 104(a) (Nat'l Conf. Comm'rs Unif. State Laws 2015).

In 2011, in a bill intended to "modernize" many provisions concerning deeds of trust and other instruments, the General Assembly deleted subsection (a), quoted above, and replaced it with the current version of the statute, which no longer requires that "the secured obligation remain unsatisfied" in order to file a document of rescission. 2011 N.C. Sess. Laws 312, § 4 (S.B. 679).

It is a longstanding principle of statutory construction that "an amendment to an unambiguous statute indicates the intent to change the law." *Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 484 (1968). Here, the original statute was taken directly from a carefully vetted uniform law developed under the auspices of the National Conference of Commissioners on Uniform State Laws. That provision was not ambiguous. Then, several years later, the General Assembly amended the statute and departed from the language in the model uniform law. We must presume that by changing the law—and in particular by departing from the language of a Uniform Act—the General Assembly intended for the new law to have a different meaning. *See id.*

Simply put, when we examine both the plain language and legislative history of this statute, it used to say what American National claims the statute means now. But then the legislature changed the law and it now says, and means, what Wells Fargo claims. *See id.*

American National argues that this interpretation of "erroneously satisfied" renders another section of the statute meaningless and thus should be rejected under a separate, longstanding principle of statutory construction. *See generally Lunsford v. Mills*, 367 N.C. 618, 628, 766 S.E.2d 297, 304 (2014). Specifically, American National points to the

provision permitting damages against a person who "wrongfully" files a document of rescission. American National contends that if any unilateral mistake allows a party to rescind a certificate of satisfaction, a party could never "wrongfully" record a document of rescission under N.C. Gen. Stat. § 45–36.6(d), thus rendering that section meaningless.

We disagree. Even under Wells Fargo's interpretation of the statute, there are countless ways in which a person could wrongfully file a document of rescission. For example, someone with no connection to the underlying obligation, and thus without statutory standing to file the rescission document, might do so, which is plainly "wrongful." *See* N.C. Gen. Stat. § 45–36.6(b), (e)(5). Or a person with authority to file the document of rescission might do so not because they made some mistake but for some other, "wrongful" reason, such as to harass the debtor or secure leverage in negotiations with other parties who have issued secured loans to the same debtor. Thus, our interpretation of subsection (b) of the statute does not render subsection (d) superfluous.

The dissent also raises several points not raised by American National. First, the dissent expresses concern that "the briefs in this case did not really address legislative history or statutory construction" and therefore "the Court does not have the benefit of full briefing and argument of this rationale."

To be sure, the parties could have more fully addressed the proper construction of this statute. But there is no question that the meaning of the statute is an issue preserved for appellate review—indeed, it is the primary issue in this case both at the trial level and on appeal. When this Court is called upon to interpret a statute, we must examine the text, consult the canons of statutory construction, and consider any relevant legislative history, regardless of whether the parties adequately referenced these sources of statutory construction in their briefs. To do otherwise would permit the parties, through omission in their briefs, to steer our interpretation of the law in violation of the axiomatic rule that while litigants can stipulate to the facts in a case, no party can stipulate to what the law is. That is for the court to decide.

The dissent next points to the title of the bill enacting the 2011 amendments, which indicates that it is an act to "modernize" various aspects of secured transactions, including "equity line liens." The dissent speculates that the removal of the phrase "the secured obligation remains unsatisfied" may have been meant only to address an issue in which "a home equity line of credit with a zero balance outstanding" is mistakenly canceled because it reached a zero balance, despite the parties intending for the credit line to remain open.

It is certainly possible that this legislative change was intended solely for the purpose the dissent identifies. But there are several reasons for doubt. First, the bill also separately amended several statutes dealing exclusively with equity line security instruments—statutes that have nothing to do with rescission. *See*, *e.g.*, 2011 Sess. Laws 312, §§ 21, 23 (S.B. 679), *amending* N.C. Gen. Stat. §§ 45–82, 45-82.2. The reference to "equity lien lines" in the title of the bill might be a reference to these provisions, not to the changes in the rescission statute. Second, Chapter 45 of the General Statutes already contains a section addressing the additional steps that must be taken to cancel an instrument securing a home equity line of credit or similar loan that can have a zero balance yet not be subject to cancelation. *See* N.C. Gen. Stat. § 45–36.9. In other words, by law, a home equity line of credit does not become "satisfied" simply by reaching a zero balance. This, in turn, means there was no pressing need to amend the uniform act to ensure that it applied to home equity lines of credit.

All of this means (as the dissent observes) that this "equity line liens" interpretation is but one of several "equally possible" legislative intents about which we can only speculate. And, more fundamentally, this speculation about the intent of the 2011 amendment has no effect on our initial observation that the plain language of "erroneously satisfied of record" supports Wells Fargo's interpretation.

In sum, this Court has two choices: (1) we can apply the plain language and settled canons of statutory construction, which results in a statutory interpretation that the legislature may not have intended; or (2) we can interpret the statute in the way we, as judges, *think* the legislature intended, which may also result in a statutory interpretation that the legislature may not have intended. The choice is obvious. We will not speculate about what we think the legislature intended; we will apply the plain language and applicable statutory canons and, if the result is unintended, the legislature will clarify the statute.

Accordingly, we hold that an instrument "erroneously satisfied of record" under N.C. Gen. Stat. § 45–36.6 is one for which the certificate of satisfaction was erroneously or mistakenly filed for *any* reason, even a unilateral mistake not apparent to anyone except the party who mistakenly filed it.

## II. Material dispute of fact concerning the erroneous filing

**[2]** Although we accept Wells Fargo's interpretation of the statute, that is not the end of this appeal. The trial court entered summary judgment in favor of Wells Fargo. Summary judgment is appropriate only if "there

is no genuine issue as to any material fact" in the case. N.C. R. Civ. P. 56(c). Under the statutory construction of N.C. Gen. Stat. § 45–36.6 described above, there are genuine issues of material fact that preclude summary judgment.

To be sure, Wells Fargo forecast evidence showing that its filing of the certificate of satisfaction was a mistake. For example, Wells Fargo's Rule 30(b)(6) deponent stated that the company's records indicated that the 2004 loan "was never paid off" and that he knew this to be true because the 2004 loan "still exists within our systems of records. The—the mortgager is still due and owing on the note for this property." According to Wells Fargo, this evidence shows that the company believed the 2004 deed of trust still secured some outstanding obligation and thus it was a mistake to file the certificate of satisfaction.[3]

But there is at least some evidence that discredits this testimony and creates a genuine issue of material fact. For example, American National points to the 2006 deed of trust, which was prepared at the same time as the 2006 note. That deed of trust secured the 2006 note and described itself as the "first deed of trust" with respect to the 2006 loan. None of the paperwork concerning the 2006 refinancing mentions the 2004 deed of trust. American National also points to testimony from Wells Fargo's 30(b)(6) deponent acknowledging that, as a matter of company practice, if a loan is paid off in full, the company would prepare and file a certificate of satisfaction for the corresponding deed of trust. Thus, there is at least some evidence indicating that Wells Fargo's filing of the certificate of satisfaction was not a mistake; rather, this evidence suggests that, for whatever reason, Wells Fargo chose not to have the 2006 loan secured by the 2004 deed of trust. This, in turn, would mean that Wells Fargo filed the certificate of satisfaction on purpose, not by mistake.

---

3. Wells Fargo also argues that, regardless of its subjective intent, rescission was appropriate because the 2004 deed of trust automatically secured the 2006 loan because the deed of trust contained "future advances/obligations" language. We disagree. The deed of trust unquestionably secured "future advances," as indicated by a section in the deed of trust titled "Future Advances." Future advances are additional disbursements of funds that increase the "outstanding principal balance owing on an obligation." N.C. Gen. Stat. § 45–67(1). The 2006 loan did not increase the "outstanding principal balance" owed under the 2004 loan. It was an entirely new loan, with its own deed of trust (which described itself as the "first deed of trust" with respect to the 2006 loan), and which never referenced the 2004 loan or the 2004 deed of trust. At best, the 2006 loan was a "future obligation" under N.C. Gen. Stat. § 45–67(2), not a future advance, and the 2004 deed of trust does not contain sufficient language to automatically secure "future obligations" having no connection to the original 2004 loan. *See* N.C. Gen. Stat. § 45–68(1b).

Simply put, under the statutory analysis of N.C. Gen. Stat. § 45–36.6 discussed above, this case cannot be resolved on summary judgment. Genuine issues of material fact exist concerning whether Wells Fargo filed the certificate of satisfaction by mistake or on purpose. We therefore reverse the trial court's entry of summary judgment and remand for further proceedings.

**Conclusion**

We reverse the trial court's entry of summary judgment and remand for further proceedings.

REVERSED AND REMANDED.

Judge TYSON concurs.

Judge STROUD dissents with separate opinion.

STROUD, Judge, dissenting.

Because I do not believe that the 2011 amendments to N.C. Gen. Stat. § 45-36.6 (2015)[1] would allow the type of mistake that Wells Fargo made in this case to be corrected by rescinding the cancellation of the deed of trust, I dissent from the majority. While I would also reverse the trial court's order, I would hold -- unlike the majority -- that the trial court should have granted summary judgment in favor of defendant and declared American National, not Wells Fargo, as the first priority lienholder.

The majority correctly states that the "crux of this case" is the meaning of the phrase "[i]f . . . a security instrument is erroneously satisfied of record" contained in N.C. Gen. Stat. § 45-36.6. However, I disagree with the majority's contention that Wells Fargo's error was its act of cancelling the 2004 deed of trust of record. Wells Fargo was required by law to cancel the 2004 deed of trust. Indeed, the undisputed evidence shows that the loan secured by the 2004 deed of trust was, in fact, satisfied and terminated with the proceeds from the subsequent 2006 note secured by the 2006 deed of trust. Rather, Wells Fargo's "error" was failing to obtain an agreement from American National to subordinate American

---

1. As the statute has not been amended since 2011, we refer to the 2015 version, which accurately reflects the statute as it stood at the time the document of rescission was recorded in this case, on 27 August 2013.

National's lien to Wells Fargo's 2006 deed of trust. When the 2004 note was satisfied and terminated, the 2004 deed of trust was no longer of any effect. *See Walston v. Twiford*, 248 N.C. 691, 693, 105 S.E.2d 62, 64 (1958) (" 'A mortgage which purports to secure the payment of a debt has no validity if the debt has no existence.' " (quoting *Bradham v. Robinson*, 236 N.C. 589, 594, 73 S.E.2d 555, 558 (1952)). At that point, it was Wells Fargo's obligation to cancel the 2004 deed of trust. *See* N.C. Gen. Stat. § 45-36.9(a) (2015) ("A secured creditor shall submit for recording a satisfaction of a security instrument within 30 days after the creditor receives full payment or performance of the secured obligation.").

Much of the majority's analysis is based upon legislative history and canons of statutory construction, although the briefs in this case did not really address legislative history or statutory construction. So my first concern is that the Court does not have the benefit of full briefing and argument of this rationale, although this is the first published opinion interpreting the 2011 amendments to Article 45.

It is true that the amendments were apparently intended to "modernize" the law regarding deeds of trust, as indicated by the bill's subtitle, which in full is "AN ACT TO MODERNIZE AND ENACT CERTAIN PROVISIONS REGARDING DEEDS OF TRUST, INCLUDING RELEASES, SHORT SALES, FUTURE ADVANCE PROVISION TERMINATIONS AND SATISFACTIONS, TERMINATIONS AND SATISFACTIONS FOR EQUITY LINE LIENS, RELEASE OF ANCILLARY DOCUMENTS, ELIMINATING TRUSTEE OF DEED OF TRUST AS NECESSARY PARTY FOR CERTAIN TRANSACTIONS AND LITIGATION, AND INDEXING OF SUBSEQUENT INSTRUMENTS RELATED THERETO." 2011 N.C. Sess. Laws 2011-312. On the other hand, as an act to "MODERNIZE . . . TERMINATIONS AND SATISFACTIONS FOR EQUITY LINE LIENS," *id.*, the bill could also be understood as intending to address mistakes where a home equity line of credit has been mistakenly cancelled when the balance was paid off, although the line of credit remains open, or a bank cancels the wrong deed of trust when a loan is paid off.

Under the original version of N.C. Gen. Stat. § 45-36.6 (2005), the erroneous cancellation of an equity line could only be rescinded if there was a balance owing on the line of credit when the erroneous cancellation occurred. That is, under the former statute, a " 'document of rescission' " could only be used to correct an error where "the secured obligation remains unsatisfied." N.C. Gen. Stat. § 45-36.6(a) (2005). But it is a modern reality that equity lines at times have balances owing and then are paid to zero, yet remain open and available to be drawn upon again. I believe that the deletion of the phrase "the secured obligation

remains unsatisfied" was merely intended to "modernize" the statute to allow the erroneous cancellation of an equity line to be rescinded, even if the line had a zero balance at the time of the error.

I do not believe that the deletion was intended to apply in the situation in the present case where a deed of trust was cancelled because the loan it secured was paid off by a new loan secured by a different deed of trust. Wells Fargo *intended* to cancel the deed of trust in this case. The "error" was not based upon the homeowner's ability to borrow again on the note that had been paid off. Instead, that note had been satisfied, never to be drawn upon again, and replaced by a new note secured by a new deed of trust. The "error" was Wells Fargo's failure to do a title search when first filing the new deed of trust and then failing to obtain a subordination agreement. Wells Fargo did not "erroneously" cancel the 2004 deed of trust; it failed to get a subordination agreement from American National. This type of error was not correctable under the original version of N.C. Gen. Stat. § 45-36.6, and I do not believe that the 2011 amendment changes this outcome.

An equally possible legislative intent for this amendment was to address a situation where a home equity line of credit is mistakenly cancelled when no balance is owing although the credit line remains open. Under the law before the 2011 amendment, a wrongly cancelled deed of trust securing a home equity line of credit with no balance owing could not be revived, because at the time of the cancellation, the secured obligation was in fact satisfied. With the 2011 amendment, a home equity line of credit with a zero balance outstanding but which remains open and available to draw upon which is wrongfully cancelled can be revived simply by rescission of the cancellation.

Even accepting Wells Fargo's evidence as true and construing it in the light most favorable to Wells Fargo, under my interpretation of the statute, Wells Fargo cannot demonstrate any genuine issue of material fact, since the "error" it alleges is not the type of "error" which allows rescission under N.C. Gen. Stat. § 45-36.6(b). I would therefore reverse the trial court's order and remand for entry of an order granting summary judgment in favor of defendant and declaring that Wells Fargo's attempted rescission was ineffective and thus defendant holds a valid, enforceable first priority lien upon the real property.

[250 N.C. App. 292 (2016)]

WILLOWMERE COMMUNITY ASSOCIATION, INC., a North Carolina non-profit corporation, and NOTTINGHAM OWNERS ASSOCIATION, INC., a North Carolina non-profit corporation, Plaintiffs
v.
CITY OF CHARLOTTE, a North Carolina body politic and corporate, and CHARLOTTE-MECKLENBURG HOUSING PARTNERSHIP, INC., a North Carolina non-profit corporation, Defendants

No. COA15-977

Filed 1 November 2016

**Jurisdiction—standing—homeowners associations—compliance with bylaws**

Where the plaintiff homeowners associations (HOAs) filed a lawsuit challenging the validity of a zoning ordinance that permitted multifamily housing on parcels of land abutting property owned by plaintiffs, the Court of Appeals held that plaintiff HOAs' failure to comply with various provisions in their corporate bylaws when their respective boards of directors initiated litigation prevented them from having standing to bring the lawsuit.

Judge DIETZ concurring in a separate opinion.

Appeal by plaintiffs from order entered 14 April 2015 by Judge Forrest D. Bridges in Superior Court, Mecklenburg County. Heard in the Court of Appeals 27 January 2016.

*Kenneth T. Davies, for plaintiff-appellants.*

*Assistant City Attorney Thomas E. Powers III and Senior Assistant City Attorney Terrie Hagler-Gray, for defendant-appellee City of Charlotte.*

*Moore & Van Allen, PLLC, by Anthony T. Lathrop and Glenn E. Ketner, III, for defendant-appellee Charlotte-Mecklenburg Housing Partnership, Inc.*

STROUD, Judge.

Plaintiffs appeal the trial court's order allowing defendants' motion for summary judgment. The trial court correctly granted summary judgment dismissing plaintiffs' lawsuit based upon lack of standing to file the

suit because neither plaintiff complied with their respective bylaws to authorize initiating litigation.

I. Background

In September of 2013, defendant Charlotte-Mecklenburg Housing Partnership, Inc. ("CMHP") sought and obtained rezoning of about 7.23 acres abutting portions of the residential subdivisions represented by plaintiffs Willowmere Community Association, Inc. ("Willowmere") and Nottingham Owners Association, Inc. ("Nottingham") (collectively "plaintiff HOAs"). Defendant CMHP planned to develop up to 70 multifamily housing units on the property which had been previously approved for development as a child care center. The rezoning was hotly contested by local residents and plaintiffs at the public hearing in December of 2013, but ultimately the City Council approved the rezoning application. Plaintiffs then filed this lawsuit challenging the rezoning. This appeal does not involve the substance of plaintiffs' challenges to the propriety of the rezoning but only plaintiffs' legal standing to bring the claim, so we will address only the relevant background regarding the issues before this Court.

In October of 2014, plaintiff HOAs requested summary judgment in the action they had brought against defendants. Later in October, defendant CMHP filed a cross-motion for summary judgment. In November of 2014, defendant City also filed a cross-motion for summary judgment.

After a two-day hearing on the summary judgment motions, the trial court entered an order in April of 2015 agreeing with all the parties "that there is no genuine issue of material fact" and ultimately resolving the legal issue of standing in favor of defendants, determining that plaintiffs did not have standing to bring the action because "they failed to follow the requirements in their respective bylaws with regard to their decisions to initiate this litigation." Though findings of fact are not required in a summary judgment order, *see generally* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013), the trial court made 14 findings of fact "[i]n order to explain the Court's reasoning in reaching its conclusion[.]" The trial court noted the findings it had made were uncontested, including:

> 2. Willowmere admitted, in the deposition of its corporate representative, Michael J. Kelley, that its Board of Directors decided to initiate the lawsuit without a formal meeting. Willowmere produced an email string among the directors that it claimed was sufficient to serve as written consent to action outside a meeting under Article III, Section 18 of its bylaws.

3. An email consent of this type is not expressly authorized by Willowmere's bylaws to satisfy the requirement of written consent, signed by all of the Directors of Willowmere.

4. Although N.C.G.S. § 55A-1-70 permits North Carolina non-profit corporations to agree to conduct transactions through electronic means, the undisputed evidence is that Willowmere has not taken any action permitting it to invoke this statute. Consequently, there is no authorization for the email string to serve as a written consent to action without a formal meeting.

5. It follows that Willowmere did not act in accordance with its bylaws with regard to its decision to initiate this litigation. Therefore, Willowmere lacks standing.

6. To establish the propriety of the decision by Nottingham to initiate this lawsuit, Nottingham relies on the deposition testimony of its representative, Mr. Kenneth S. Anthonis, who testified that he had a telephone conversation with at least one other director. The record does not reveal a meeting with a quorum of directors present either in person or by phone at which the filing of the litigation was authorized. The record also does not reveal that the Board filed written consents or minutes reflecting the proceedings of the Board, nor that the Board posted the explanation of the action taken within three (3) days after the written consents of the Board were obtained, as required under Article 5, Section 5 of Nottingham's Bylaws.

7. Mr. Anthonis testified in his deposition, as the corporate representative of Nottingham, that there had been no formal meeting of the Nottingham Board of Directors at any time to decide to file this lawsuit. In his deposition transcript, Mr. Anthonis stated affirmatively that there were no written consents or minutes memorializing the decision to proceed with the lawsuit.

8. The failure to comply with Article 5, Section 5 of Nottingham's bylaws concerning action by directors taken without a meeting, discussed above with respect to Willowmere, is also present for Nottingham, which, therefore, also lacks standing.

> 9. While Plaintiffs' bylaws each permit their directors to sue regarding matters affecting their planned communities, the directors can only act through a meeting or a consent action without a meeting. Neither Willowmere nor Nottingham has met their burden to show that their directors acted to initiate this litigation through one of these means in this case.
>
> 10. Defendants' arguments regarding Plaintiffs' standing present a challenge to the jurisdiction of the Court. Under N.C. Rule 12(h)(3), a challenge to jurisdiction may be brought at any time.
>
> 11. For the reasons discussed above, the Court concludes that Plaintiffs lack standing, and consequently that the Court lacks jurisdiction to hear their challenge to Ordinance 5289-Z adopted by the City.

Plaintiffs appeal.

## II. Standing

The only issue before this Court on appeal is regarding whether plaintiffs have standing to bring this action; none of the underlying issues which led to this action are before this Court. Plaintiffs make three arguments regarding standing: (1) defendants do not have standing to challenge plaintiffs' standing on the basis asserted; (2) plaintiffs have standing because they complied with their bylaws in approving filing the lawsuit; and (3) even if they failed to comply with their bylaws, these violations are non-jurisdictional, and thus they still have standing.

### A. Raising the Issue of Standing

Plaintiffs first contend that "defendants lack both statutory standing to challenge the validity of the associations' actions, and contractual standing to enforce the associations' bylaws." (Original in all caps.) Essentially plaintiffs contend that since defendants are not parties to the bylaws, they do not have standing to raise a standing issue based upon any alleged violation of plaintiffs' bylaws.

> Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction. As the party invoking jurisdiction, plaintiffs have the burden of establishing standing. . . .
>
> . . . .

> Our standard of review on appeal of a trial court's dismissal on the grounds of lack of standing is *de novo*.

*Marriott v. Chatham Cty.*, 187 N.C. App. 491, 494, 654 S.E.2d 13, 16 (2007) (citation and quotation marks omitted).

Although defendants do argue in support of the trial court's conclusion that plaintiffs lack standing, defendants did not initially raise standing as a defense; standing was not raised in defendants' motions to dismiss, answers, or motions for summary judgment. Unfortunately, the second day of the hearing on 12 March 2015 was not recorded, but by plaintiffs' own characterization,

> [f]ollowing a hearing on the parties' cross-Motions for Summary Judgment on 14 January 2014, the Honorable Forrest D. Bridges took the matter under advisement. The parties reconvened before Judge Bridges on 12 March 2015 to receive his decision, *at which time Judge Bridges unexpectedly requested further argument on the issue of the Associations' standing.*

(Emphasis added).

As neither defendant had raised the issue of standing in the answers or substantive motions and as "Judge Bridges unexpectedly requested further argument on the issue of the Associations' standing[,]" it appears that the trial court raised the issue of standing *ex mero motu*. Since "[s]tanding is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction[,] *id.*, "a court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action ex mero motu when subject matter jurisdiction is lacking." *Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882 (2000). Furthermore, even assuming *arguendo* that defendants did raise the issue of standing, once the issue was raised and appeared to have merit it was appropriate for the trial court to consider the issue on its own motion.[1] *See generally Fort v. Cnty. of Cumberland*, 218 N.C. App. 401, 404, 721 S.E.2d 350, 353 (2012) ("Whether a party has standing to maintain an action implicates a court's subject matter jurisdiction and may be raised at any time, even on appeal." (citation and quotation marks omitted)). Therefore, whether

---

1. The trial court found "[d]efendants' arguments regarding [p]laintiffs' standing present a challenge to the jurisdiction of the Court." It is unclear from this sentence whether defendants initially raised the issue of standing, but even if they did not, they obviously argued that plaintiffs did not have standing once the trial court raised and requested argument on the issue.

raised by defendants or by the trial court's own motion, the trial court properly considered plaintiffs' standing to bring this action, and we likewise must consider the issue.

B. Plaintiffs' Compliance with Bylaws

Plaintiffs next contend that they had standing to bring this action because "the associations did, in fact, each comply with the requirements of their respective bylaws to initiate litigation." (Original in all caps.)

1. Plaintiff Willowmere

Plaintiff Willowmere argues that "Willowmere's Board, acting without a meeting, unanimously authorized litigation through a chain of emails." Plaintiff Willowmere notes that its bylaws provide:

> Section 18. Action Without a Formal Meeting. Any action to be taken at a meeting of the Directors or any action that may be taken at a meeting of the Directors may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all the Directors. An explanation of the action taken shall be posted at a prominent place or places within the Common Area within three (3) days after the written consents of all the Board members have been obtained.

Plaintiff Willowmere argues that its emails "comply with the requirements of [its] bylaws to initiate litigation." (Original in all caps.)

But even if we assume that plaintiff Willowmere's interpretation of its bylaws is correct *and* it could use email in compliance with North Carolina statutes, those emails are not part of our record on appeal. "As the party invoking jurisdiction, plaintiffs have the burden of establishing standing." *Marriott*, 187 N.C. App. at 494, 654 S.E.2d at 16. Without the emails which plaintiff Willowmere claims establish its compliance with its bylaws to initiate litigation, plaintiff Willowmere has not carried its burden. In addition, even if the emails did authorize the filing of the action, there is no evidence that "an explanation of the action taken" was "posted at a prominent place or places within the Common Area within three (3) days after the written consents of all the Board members" were obtained by email. Plaintiff Willowmere's board's action was not taken in compliance with its bylaws.

2. Plaintiff Nottingham

Plaintiff Nottingham argues that its board "authorized litigation via a telephone conversation" so it was not required that the board hold an

actual meeting to authorize initiation of litigation. Plaintiff Nottingham argues that telephone conversations qualified as the board's meeting and argues that defendants "misconstru[ed]" their president's statements made during his deposition that there was no meeting held. Plaintiff Nottingham then quotes the president's deposition with the following bold, italics, and underlining emphasis inserted by plaintiffs:

> Q. Was there an official meeting of the board at which the decision was taken?
>
> A. It was ***phone conversation***, so not an official board meeting.
>
> . . .
>
> Q. Did you have a three-way telephone conversation between – or maybe a four-way between the members of the board who participated *and* the management company?
>
> A. No. I talked with the management company ***and then talked separately with the board***.

Turning to the actual deposition though, and not merely plaintiff's quoted portions, it is clear that plaintiff Nottingham's president did not consult the relevant bylaws:

> Q. And was input on that decision sought from the members of the association?
>
> A. No.
>
> . . . .
>
> Q. Was there a formal board meeting of Nottingham at any time at which the decision to initiate this lawsuit was discussed?
>
> A. No.
>
> Q. Did you and Ms. Tomljanovic and possibly Mr. Viscount refer to any specific provisions in the governing documents of Nottingham to determine whether you had the power to make that decision?
>
> A. We sought advice from the management company.
>
> Q. So you did not refer to the documents?

A. We did not refer to the documents, no.

. . . .

Q. All right. Did the management company identify any specific provision in the bylaws or any other governing document to grant the board the power to make those two decisions we were just talking about?

A. Not that I recall, no.

Q. Let me refer you back to Exhibit 10-B, which is the bylaws. After the decision that you talked about – or the two decisions that you talked about to initiate the lawsuit and to pay for counsel, did the board or the management company produce written consents memorializing that decision?

A. No.

Q. Is there any provision that you're aware of in this bylaws document, Exhibit 10-B, that grants either the association or the board of the association the power to initiate lawsuits?

A. Not that I'm aware of, no. I'll clarify that and say there may be, but I don't know off the top of my head that there is.

Q. One of the topics for your deposition today that you were to be prepared for was to talk about the governing documents of the organization, correct?

A. Yes.

Q. And you're not aware of any provision in there that permits the organization or the board acting for the organization to initiate a lawsuit, correct?

A. Correct.

Based upon plaintiff Nottingham's president's deposition, the trial court correctly noted as an undisputed fact that plaintiff Nottingham's board did not hold a meeting open to members, as contemplated by the bylaws, at which they approved initiation of the lawsuit.

Defendants contend that the trial court correctly determined that plaintiff Nottingham did not hold a meeting either pursuant to article 7,

section 1 of plaintiff Nottingham's bylaws for "Regular Meetings" or pursuant to article 7, section 2 for "Special Meetings[,]" both of which by the plain language of the provisions require prior written notice. Defendants argue that the only way for plaintiffs to properly take action without a meeting is pursuant to article 5, section 5 of plaintiff Nottingham's bylaws entitled "Action Taken Without a Meeting." However, article 5, section 5 requires "written consent of all of the Directors[,]" and it is uncontested that there was no written memorialization, so this section cannot apply. Nonetheless, plaintiff Nottingham contends that its bylaws do not prohibit holding a meeting of the board by teleconference and that "Board was permitted to hold a *regular* meeting through a simultaneous teleconference." (Emphasis added.) Plaintiff Nottingham also argues that this type of meeting is permissible under North Carolina General Statute § 55A-8-20, which provides:

> (a) The board of directors may hold regular or special meetings in or out of this State.
>
> (b) Unless otherwise provided by the articles of incorporation, the bylaws, or the board of directors, any or all directors may participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.
>
> (c) Unless the bylaws provide otherwise, special meetings of the board of directors may be called by the president or any two directors.

N.C. Gen. Stat. § 55-8-20 (2013).

But even if plaintiff Nottingham's board could hold a teleconference meeting under the bylaws and North Carolina General Statute § 55-8-20, the bylaws require more than simply a conversation among some of the directors, whether in person or by telephone. For example, both "Regular Meetings[,]" the type plaintiff Nottingham argues was conducted, and "Special Meetings" have specific requirements regarding advance notice of the time and location of the meeting. In addition, all meetings, regular and special, "shall be open to all members of the Association; provided, however, that Members who are not Directors may not participate in any deliberation or discussion unless expressly so authorized by the vote of a majority of a quorum of the Board." The Board is also required to "[c]ause to be kept a complete record of all its acts and corporate affairs"

pursuant to article 8, section 3, and the secretary is to "keep minutes of all meetings of the Board" pursuant to article 9, section 8(c), so there should be a written memorialization for any meeting, whether in person or by phone. It is undisputed that there was no written advance notice of the place or time of the alleged phone meeting and there are no minutes from the alleged phone meeting. Thus, even if the Board could have held a meeting by telephone, it would still have to comply with the other requirements of the bylaws for meetings, particularly notice, so that members would at least have the opportunity to be aware of the board's actions. In summary, plaintiff Nottingham's evidence shows, at most, that the president and some directors discussed initiating this lawsuit by phone, without prior notice to anyone of the time or place, and no written memorialization of either the meeting or the decision to initiate litigation were kept. Nottingham has failed to show that it held a regular meeting or a special meeting in accordance with its bylaws at which the directors could authorize initiating litigation.

C. Non-Jurisdictional Violations

Lastly, plaintiffs argue that even if they did violate their own bylaws in filing their lawsuits without first obtaining proper authorization, these violations are merely technical, non-jurisdictional violations and would not affect their standing to bring this action. Plaintiffs make two specific arguments regarding why they should still have standing even without compliance with their bylaws.

First, plaintiffs contend that "[t]he plain language of the Bylaws do not evidence any jurisdictional limitations or a prelitigation requirement[.]" But plaintiffs misapprehend the meaning of jurisdiction. Jurisdiction is neither granted nor taken away by private bylaws since parties themselves cannot confer subject matter jurisdiction upon a court, even by consent:

> Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question and is conferred upon the courts by either the North Carolina Constitution or by statute. Subject matter jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties. Specifically, subject matter jurisdiction cannot be conferred by waiver or consent of the parties.

*Mosler v. Druid Hills Land Co.*, 199 N.C. App. 293, 295, 681 S.E.2d 456, 458 (2009) (citations, quotation marks, and brackets omitted).

The trial court granted summary judgment in favor of defendants not due to general subject matter jurisdiction but due to a lack of plaintiffs' standing.

> Parties without standing to bring a claim, cannot invoke the subject matter jurisdiction of the North Carolina courts to hear their claims.
>
> . . . The Courts in our state use the term 'standing' to refer generally to a party's right to have a court decide the merits of a dispute. A court may not properly exercise subject matter jurisdiction over the parties to an action unless the standing requirements are satisfied.

*Teague v. Bayer AG*, 195 N.C. App. 18, 22-23, 671 S.E.2d 550, 554 (2009) (citations and quotation marks omitted).

In *Laurel Park Villas Homeowners Assoc. v. Hodges*, property owners sued under the name of their homeowners association, and this Court affirmed the decision to dismiss the suit for lack of standing:

> Plaintiff argues that the corporate bylaws expressly give it the power to bring this action. We agree that there is a provision in plaintiff's Articles of Incorporation that purports to give the corporation that power. However, a provision of the bylaws indicates that all powers of the corporation shall be exercised by the board of directors, and allows the board to designate officers. There is nothing in the articles or the bylaws authorizing persons other than the board, its officers, or the membership to act on behalf of the corporation, and nothing in the record suggesting that any of these authorized this action. In any event, the bylaws also provide that they are established in accordance with G.S. Chapter 47A, and that in case of conflict the statute shall control. Since the statute specifically designates who may sue to enforce the restrictions, it controls. We therefore hold that the court correctly determined that plaintiff lacked standing to prosecute this action.

82 N.C. App. 141, 143–44, 345 S.E.2d 464, 466 (1986). Here too plaintiffs failed to comply with their own bylaws in bringing this action. *See id.*

Plaintiffs' final argument is that "[a]dministrative and procedural provisions, such as those contained in the Bylaws of the Associations, are nonjurisdictional, and do not bear upon the authority of the courts

to hear and adjudicate [p]laintiff's claims." Plaintiffs contend that requiring compliance with bylaws is a "mere techincalit[y]" that "elevat[es] form over substance[.]" Although plaintiffs' boards of directors have more power to make decisions on behalf of the associations than just a general member, the members and the bylaws confer that power of each board of directors. The very purpose of plaintiffs' boards is to act on behalf of its members; a rogue board of directors taking actions outside of its bylaws is no more representative of the entity than a rogue member who has taken the same actions. For example, in *Beech Mountain Property Owners' Assoc v. Current*, property owners sued under the name of their homeowners association to enforce restrictive covenants. 35 N.C. App. 135, 135, 240 S.E.2d 503, 505 (1978). This Court addressed other matters unrelated to the issues in this case but also ultimately determined that

> [w]e are of the opinion that a strict construction of the provisions in the present case compels the conclusion that the plaintiff lacks the capacity to raise the issues in this suit. The plaintiff is a corporation and, as such, must be viewed as an entity distinct from its individual members.

*Id.* at 139, 240 S.E.2d at 507. The Court determined that the property owners had the right to sue, *not* the association, because the covenants in that case granted

> the right of enforcement of the restrictions to the owners of lots or any of them jointly or severally[.] And we must assume that if the grantor had intended to authorize the plaintiff [association] to enforce the provisions as an agent of the property owners, it would have expressed such intent.

*Id.* (quotation marks and ellipses omitted).

Here, plaintiffs failed to hold a meeting or take other action in accordance with their bylaws to authorize the filing of this lawsuit. In *Beech Mountain Property Owners' Assoc.*, and *Laurel Park Villas Homeowners Assoc.*, property owners sued on behalf of an association without the proper authorization of that association to take that action. *See Beech Mountain Property Owners' Assoc.*, 35 N.C. App. at 135, 240 S.E.2d at 505; *Laurel Park Villas Homeowners Assoc.*, 82 N.C. App. at 143-44, 345 S.E.2d at 466. Here, two boards sued on behalf of the associations also without the proper authorization to take that action. Such actions go far beyond "mere technicalities" and "elevating form over substance" as essentially a small portion of the association has taken

the steps to speak for the whole. Both plaintiffs had specific bylaw provisions for how to handle issues such as this, and both ignored those provisions. In addition, plaintiffs have not presented any evidence that the boards took action in accord with their bylaws to ratify the filing of the lawsuit after the issue of standing was raised. This Court has no way of knowing the position the members of the homeowners' associations would actually take in this case as their representatives acted beyond the scope of their authority in disregarding their bylaws. Therefore, we affirm the trial court's decision to dismiss for lack of standing.

III. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judge ELMORE concurs.

Judge DIETZ concurs in a separate opinion.

DIETZ, Judge, concurring.

I am not persuaded that an association's failure to comply with the authorization steps in its bylaws before bringing suit should be treated as a jurisdictional defect that can be raised by an opposing party at any time as a means to dismiss the action. Whether the procedural steps to authorize the suit were followed or not, these homeowners' associations appear to possess a "sufficient stake in an otherwise justiciable controversy" to confer jurisdiction on the trial court to adjudicate this legal dispute. *Peninsula Prop. Owners Ass'n, Inc. v. Crescent Res., LLC*, 171 N.C. App. 89, 92, 614 S.E.2d 351, 353 (2005). Moreover, the General Statutes and the association's bylaws provide means for association members harmed by the improper commencement of this suit to seek redress from the courts if they wish to do so—either by seeking to stay or dismiss the action, or by pursuing a separate action against the appropriate parties for the unauthorized filing of the lawsuit.

Permitting a defendant to question the association's standing to bring suit where no member of the association has objected is "akin to letting the proverbial fox protect the interests of the chickens." *Port Liberte II Condo. Ass'n, Inc. v. New Liberty Residential Urban Renewal Co., LLC*, 86 A.3d 730, 740 (N.J. Super. Ct. App. Div. 2014). But I am unable to distinguish this case from our Court's earlier holding in

*Peninsula Property Owners Association*, which compels us to affirm the dismissal of this action for lack of jurisdiction. I therefore concur in the majority opinion.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 NOVEMBER 2016)

| | | |
|---|---|---|
| HARTFORD v. HARTFORD<br>No. 16-413 | Moore<br>(15CVD1404) | Reversed |
| IN RE A.J.P.<br>No. 16-473 | New Hanover<br>(14JT179) | Affirmed |
| IN RE A.K.<br>No. 16-368 | Rockingham<br>(15JA97-98) | Affirmed |
| IN RE A.M.<br>No. 16-331 | Alleghany<br>(13JT1) | Affirmed |
| McLEAN v. BANK OF AM., N.A.<br>No. 16-97 | Franklin<br>(14CVS1116) | Affirmed |
| SCOTT v. SCOTT<br>No. 16-88 | Cumberland<br>(13CVD5537) | Vacated and Remanded |
| STATE v. BAILEY<br>No. 16-356 | Buncombe<br>(14CRS80723)<br>(14CRS816-818) | Affirmed |
| STATE v. BANKS<br>No. 16-492 | Rowan<br>(09CRS51585) | Reversed and Remanded |
| STATE v. BARRETT<br>No. 16-327 | Wayne<br>(13CRS55838-40) | No Error |
| STATE v. BROWN<br>No. 16-84 | Forsyth<br>(12CRS55796) | Affirmed in part; remanded in part |
| STATE v. COLEMAN<br>No. 16-305 | Guilford<br>(12CRS91617) | No Error |
| STATE v. COLES<br>No. 16-223 | Forsyth<br>(14CRS55214)<br>(14CRS55216) | No Error |
| STATE v. DAVIDSON<br>No. 16-272 | Macon<br>(14CRS238)<br>(14CRS50638)<br>(14CRS50730) | NO ERROR IN PART, VACATED AND REMANDED FOR RESENTENCING IN 14 CRS 50638 |
| STATE v. FRYE<br>No. 16-362 | Randolph<br>(13CRS50415-18) | No error in part; vacate and remand in part. |

| | | |
|---|---|---|
| STATE v. HAMMONDS<br>No. 16-199 | Mecklenburg<br>(14CRS233245) | No Error |
| STATE v. HINES<br>No. 16-287 | Wilson<br>(14CRS51791)<br>(15CRS2) | NO ERROR IN PART;<br>DISMISSED IN PART. |
| STATE v. HOGG<br>No. 16-379 | Watauga<br>(13CRS50623)<br>(13CRS50625) | Dismissed |
| STATE v. HUNTER<br>No. 15-1265 | Mecklenburg<br>(13CRS13500) | No Error |
| STATE v. JONES<br>No. 16-345 | New Hanover<br>(12CRS56062) | No Error |
| STATE v. KING<br>No. 16-261 | Greene<br>(13CRS323-324) | No Error |
| STATE v. LILLY<br>No. 16-277 | Guilford<br>(10CRS96049) | Affirmed |
| STATE v. LUNSFORD<br>No. 16-505 | Wake<br>(05CRS81735) | Reversed and<br>Remanded |
| STATE v. MARSHALL<br>No. 16-22 | Johnston<br>(14CRS53092) | Affirmed |
| STATE v. STANLEY<br>No. 16-436 | Forsyth<br>(99CRS37337-38)<br>(99CRS37340)<br>(99CRS49952)<br>(99CRS49955) | VACATED AND<br>REMANDED FOR<br>RESENTENCING<br>HEARING |
| STATE v. THOMPSON<br>No. 16-435 | Mecklenburg<br>(12CRS217628) | No Error |
| STOKES v. DRUG SAFETY ALL., INC.<br>No. 15-382 | Chatham<br>(14CVS533) | Reversed and<br>remanded in part;<br>Dismissed in part. |

[250 N.C. App. 308 (2016)]

ALLIED SPECTRUM, LLC, d/b/a APEX CROWN EXPRESS; Plaintiff
v.
GERMAN AUTO CENTER, INC.; MOHAMED ALI DARAR; and
REEM TAMIM DARAR; Defendants

No. COA16-283

Filed 15 November 2016

**1. Civil Procedure—summary judgment—voluntary dismissal—rested case**

The trial court did not err in a case involving alleged false and misleading representations regarding a lease agreement by granting summary judgment in favor of defendants following plaintiff's filing of a notice of voluntary dismissal. Plaintiff had rested its case and lost its absolute right to voluntarily dismiss the case.

**2. Contracts—breach of contract—breach of lease agreement—summary judgment—sufficiency of evidence**

The trial court did not err in a case involving alleged false and misleading representations regarding a lease agreement by granting summary judgment in favor of defendants. Plaintiff failed to meet its burden of demonstrating the existence of a genuine issue of material fact.

Judge TYSON dissenting.

Appeal by plaintiff from order entered 7 July 2015 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 7 September 2016.

*Bratcher Adams PLLC, by Brice Bratcher and J. Denton Adams, for plaintiff-appellant.*

*Austin Law Firm, PLLC, by John S. Austin, for defendant-appellees.*

CALABRIA, Judge.

After plaintiff rested its case, it did not have an absolute right to voluntarily dismiss its complaint, and the trial court did not err in entering summary judgment. Where defendants supported their motion for summary judgment with affidavits, and plaintiff has failed to meet its burden on appeal of specifically showing the existence of a genuine issue of

material fact, the trial court did not err in granting summary judgment in favor of defendants.

## I. Factual and Procedural Background

In early 2013, German Auto Center, Inc. ("German") entered into negotiations with Kargo Corporation ("Kargo") concerning the sale of a gas station business located in Apex, North Carolina, and on 4 April 2013, Kargo contracted to purchase the gas station from German. The contract was signed by Kokila Amin ("Amin") on behalf of Kargo. Subsequently, Kargo transferred its interests to its successor at interest, Allied Spectrum, LLC ("plaintiff"). Amin, who had signed the contract on behalf of Kargo, was also a manager of plaintiff. On 1 May 2013, Kargo and German executed a lease agreement concerning the property on which the gas station was located. This lease was amended on the same day, and Amin's signature appears on both the agreement and the amendment. Physical possession of the property was delivered to plaintiff on 1 May 2013.

On 31 July 2014, plaintiff brought the instant action against German, its vice president Mohamed Ali Darar, and its president Reem Tamim Darar (collectively, "defendants"). Plaintiff's verified complaint alleged six counts of breach of contract, one count of breach of lease, one count of fraud in the inducement, one count of civil conspiracy, and one count of unfair and deceptive practices; and sought a declaratory judgment declaring the purchase agreement unenforceable, quantum meruit, and to pierce the corporate veil. Specifically, this complaint alleged that defendants, in the lease agreement, agreed to grant plaintiff a rent credit if plaintiff opened a food service business on the premises; that plaintiff installed equipment for food service and began serving food to customers; and that defendants subsequently refused to apply that credit. The complaint further alleged that on 1 July 2013, the Wake County Revenue Department issued a tax bill on the property showing a roughly 26% increase on property taxes; that on 11 March 2013, the Apex Planning & Community Development Department issued a notice of violation to defendants for various violations of unapproved site work; that because of these and other violations, the property was not issued a Certificate of Occupancy by the Town of Apex until 10 December 2013; that Kargo's application for an Alcoholic Beverage Permit was approved for Kargo but denied for the location due to defendants' failure to comply with Town of Apex building codes; that on 30 April 2013, defendants received a notice from the North Carolina Department of Environment and Natural Resources, Division of Waste Management, Underground Storage Tank Section ("DENR") listing ten different violations of North

Carolina code and law on the property; that neither Kargo nor plaintiff were informed of these violations prior to 5 May 2013; and that despite numerous demands by plaintiff, multiple issues with the location that existed prior to closing were not addressed by defendants, resulting in months of delay in plaintiff opening its business.

On 30 September 2014, defendants filed a verified answer to plaintiff's complaint, asserting three affirmative defenses of breach of contract, as well as waiver and estoppel, due diligence, and failure to join necessary parties. The answer also included a motion to dismiss. On 18 February 2015, defendants filed an amended answer and motion to dismiss, ostensibly alleging (but containing no arguments concerning) the defenses of accord and satisfaction, estoppel, injury by fellow servant, and release and waiver. The motion for dismissal was specifically sought pursuant to Rules 12(b)(6) (failure to state a claim) and 12(b)(7) (failure to join necessary parties) of the North Carolina Rules of Civil Procedure.

In April of 2015, defendants filed a motion for summary judgment, alleging that no genuine issues of material fact existed, and a motion to compel plaintiff to respond to defendants' first set of interrogatories. Defendants also filed a request for production of documents, or alternatively to dismiss for failure to prosecute. Plaintiff filed a motion to continue trial, contending that no pre-trial conferences had been held, no pre-trial orders had been entered, and discovery was still ongoing.

On 29 April 2015, the trial court held a hearing on defendants' motion for summary judgment. At the close of the hearing, the trial court took the matter under advisement to provide the parties the opportunity to present supplemental materials and arguments regarding the validity of the purported verification of the complaint. These materials were due the following day, 30 April 2015. However, on 30 April 2015, plaintiff filed a notice of voluntary dismissal without prejudice.

On 7 July 2015, the trial court entered an order on defendants' motion for summary judgment, first noting that, subsequent to the hearing, plaintiff filed a notice of voluntary dismissal. The trial court held that the notice of voluntary dismissal "does not divest this Court of ruling on [a] Motion for Summary Judgment, but the Court will consider any claims surviving the Motion for Summary Judgment to be voluntarily dismissed without prejudice." The trial court granted summary judgment in favor of defendants and dismissed plaintiff's claims with prejudice.

On 4 August 2015, plaintiff filed notice of appeal from the trial court's order granting summary judgment in favor of defendants. On

11 September 2015, the trial court entered an order extending the time in which plaintiff could serve the record on appeal.

Plaintiff appeals.

## II. 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)).

## III. Analysis

Although plaintiff raises two arguments on appeal, they are both fundamentally the same argument, to wit: that the trial court erred in granting summary judgment in favor of defendants. We disagree.

### A. Voluntary Dismissal

**[1]** First, plaintiff contends that the trial court erred in granting summary judgment in favor of defendants following plaintiff's filing of a notice of voluntary dismissal. "[A] plaintiff is vested with the authority to dismiss any of its claims prior to close of its case-in-chief." *Roberts v. Young*, 120 N.C. App. 720, 726, 464 S.E.2d 78, 83 (1995). Plaintiff contends that it had not rested its case when the notice of voluntary dismissal was filed, and that it was therefore entitled to voluntarily dismiss the complaint at any time.

The pivotal issue is whether plaintiff had rested its case. This Court has previously held that, "[w]here a party appears at a summary judgment hearing and produces evidence or is given an opportunity to produce evidence and fails to do so, and the question is submitted to the court for decision, he has 'rested his case' within the meaning of Rule 41(a)(1)(i) of the North Carolina Rules of Civil Procedure. He cannot thereafter take a voluntary dismissal under Rule 41(a)(1)(i)." *Maurice v. Hatterasman Motel Corp.*, 38 N.C. App. 588, 591-92, 248 S.E.2d 430, 432-33 (1978). Thus, the question is whether plaintiff had rested its case at the close of the 29 April 2015 hearing on defendants' motion for summary judgment.

Plaintiff contends that the hearing had not concluded. Specifically, plaintiff notes that the trial court chose to "take the matter under advisement[,]" and offered the parties the opportunity "to provide . . .

supplemental case law" to the court. However, upon examination of the transcript, we disagree.

At the hearing, plaintiff made extensive arguments that "what this complaint hinges on[] is whether these false and misleading representations were made[,]" and that this was a "clear-cut factual issue." Plaintiff asserted that "these factual issues would be better suited to be resolved at trial and not in a summary judgment issue." Defendants were permitted to respond, after which plaintiff spoke once again. When plaintiff's counsel finished speaking this time, counsel stated, "I have no further comments[.]" In response, the trial court stated the following:

> Um, I'm going to take the matter under advisement. I know time is of the essence, but I want to provide you an opportunity, if you choose, to provide for me supplemental case law solely on the issue of the validity of the purported verification in the complaint – of the complaint. Um, and I would like that by noon tomorrow.

Upon review, we find plaintiff's argument unconvincing. It is clear that plaintiff was afforded the opportunity to argue the issue of summary judgment, and in fact did so. At the conclusion of plaintiff's argument, plaintiff explicitly stated that it "[had] no further comments[,]" a phrase typically used to indicate that a party was resting its case. Further, the trial court foreclosed any further evidence, stating that the sole remaining matter before the court was the validity of plaintiff's purported verification. Given this context, we hold that plaintiff had, at the close of the hearing, rested its case. "[A]fter resting his case, a plaintiff forfeits the absolute right to take a dismissal." *Pardue v. Darnell*, 148 N.C. App. 152, 155, 557 S.E.2d 172, 174 (2001). We hold that, because plaintiff had rested its case and lost its absolute right to voluntarily dismiss the case, the trial court did not err in entering an order on defendants' summary judgment motion.

This argument is without merit.

B. Summary Judgment

**[2]** Second, plaintiff contends that the trial court erred in granting summary judgment in favor of defendants. Plaintiff contends, specifically, that the trial court erred in upholding defendants' objection to plaintiff's verified complaint.

In its argument on appeal, plaintiff contends that "[t]he Complaint sets forth facts with great specificity that would be admissible at trial[,]" and that "had the verified complaint been treated as an affidavit, . . . then

there would have been genuine issues of material fact present warranting a denial of Defendants' Motion." However, plaintiff does not allege what *specific* issue of material fact would have been created were the complaint to be treated as an affidavit.

"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." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982). "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." *Id.* Thus, the burden on plaintiff, at trial and now on appeal, is to show the existence of a genuine issue of material fact. Further, under this burden, "the plaintiff may not rely upon the bare allegations of his complaint to establish triable issues of fact, but must, by affidavits or otherwise, as provided by Rule 56, set forth specific facts showing that there is a genuine issue for trial." *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 699, 179 S.E.2d 865, 867 (1971).

On appeal, plaintiff has the burden of establishing "specific facts showing that there is a genuine issue for trial." Plaintiff's argument, however, is purely procedural; plaintiff contends that the trial court erred in declining to treat its verified complaint as an affidavit. The only argument plaintiff offers on genuine issues of material fact is a passing, bare assertion that "there would have been genuine issues of material fact present[,]" absent any supporting explanation, arguments, or citations.

We hold that plaintiff has failed to meet its burden on appeal of demonstrating the existence of a genuine issue of material fact. Therefore, the trial court's order is affirmed.

AFFIRMED.

Judge DAVIS concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

The majority's opinion concludes Plaintiff's voluntary dismissal without prejudice was ineffective to terminate the case and, consequently, the

trial court continued to possess jurisdiction to determine whether summary judgment was appropriate. The majority next concludes Plaintiff did not meet its burden on appeal of demonstrating the existence of genuine issues of material fact. As such, the majority holds Plaintiff's argument the trial court erred in refusing to treat the verified complaint as an affidavit is immaterial. I disagree and respectfully dissent.

Plaintiff properly filed and entered its voluntary dismissal without prejudice prior to resting its case. *See Wesley v. Bland*, 92 N.C. App. 513, 515, 374 S.E.2d 475, 476-77 (1988) (holding plaintiffs had not rested where attorney took a voluntary dismissal in lieu of arguing). This entry of dismissal, prior to Plaintiff resting its arguments and the trial court's ruling on summary judgment, deprived the court of jurisdiction to enter the summary judgment order. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2015).

In the alternative, under *de novo* review, the order granting Defendants' motion for summary judgment was error, since Defendants failed to meet their burden of showing no genuine issues of fact existed to demonstrate they were entitled to judgment as a matter of law. Plaintiff's complaint was properly verified and is properly treated as an affidavit. The trial court erroneously concluded the pleadings, arguments, and affidavits failed to show any genuine issues of material fact. I vote to reverse the trial court's order and remand for entry of Plaintiff's voluntary dismissal. In the alternative, I vote to reverse the trial court's entry of summary judgment for Defendants and remand for trial.

## I. Voluntary Dismissal

The majority's opinion asserts Plaintiff had rested its case at the close of the summary judgment hearing held on 29 April 2015. I disagree.

Under Rule 41(a)(1)(i) of the North Carolina Rules of Civil Procedure, a plaintiff may file for a voluntary dismissal, without prejudice, any time before resting its case. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1)(i) (2015); *see Roberts v. Young*, 120 N.C. App. 720, 726, 464 S.E.2d 78, 83 (1995) ("[A] plaintiff is vested with the authority to dismiss any of its claims prior to close of its case-in-chief."). Rule 41 "offers a safety net to plaintiff or his counsel who are either unprepared or unwilling to proceed with trial the first time the case is called." 2 G. Gray Wilson, North Carolina Civil Procedure § 41-1, at 41-3 (3d ed. 2007).

If a plaintiff has rested its case, a voluntary dismissal without prejudice may only be entered by stipulation of the parties or by court order. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) and (a)(2) (2015). For the purposes of summary judgment,

> [t]he record must show that plaintiff has been given the opportunity at the hearing to introduce any evidence relating to the motion and to argue his position. *Having done so and submitted the matter to the [trial court] for determination*, plaintiff will then be deemed to have "rested his case" for the purpose of summary judgment and will be precluded thereafter in dismissing his case pursuant to Rule 41 during the pendency of the summary judgment motion.

*Wesley*, 92 N.C. App. at 515, 374 S.E.2d at 477; *see also Alston v. Duke Univ.*, 133 N.C. App. 57, 61-62, 514 S.E.2d 298, 301 (1999) (holding the plaintiff had not rested where the attorney took a voluntary dismissal after the court ruled on a related discovery motion, but before the attorney had argued against summary judgment); *but see Maurice v. Hatterasman Motel Corp.*, 38 N.C. App. 588, 591-92, 248 S.E.2d 430, 432-33 (1978) (holding the plaintiff could not enter a voluntary dismissal after the trial court signed the summary judgment order, but before the order had been filed).

Although Plaintiff in this case presented arguments and a verified pleading as an affidavit to the trial court at the summary judgment hearing on 29 April 2015, Plaintiff had not rested and the case was not submitted to the trial court for final determination. These facts are distinguishable from *Maurice*, wherein this Court held the purported voluntary dismissal was improper once the trial court had already signed the motion at the close of the summary judgment hearing. *Maurice*, 38 N.C. App. at 591-92, 248 S.E.2d at 432-33.

After Plaintiff's final response to Defendants' argument at the summary judgment hearing, the trial court did not rule and still questioned whether the complaint was properly verified. This query was a key issue in the ultimate determination of summary judgment, as the verified complaint and Defendants' responses show genuine issues of material fact existed.

Instead of ruling on the summary judgment motion at the close of the hearing, the trial court expressly provided Plaintiff the opportunity to provide supplemental case law on the requirements of a verified complaint and left the matter open until noon of the next day. Rather than providing the case law or other authority and submitting the matter to the court for final determination, Plaintiff properly invoked the "safety net" provided in Rule 41(a)(1) and voluntarily dismissed its case without prejudice. *See* 2 G. Gray Wilson, North Carolina Civil Procedure § 41-1, at 41-3.

Since Plaintiff had not rested its case at the time it submitted and entered its voluntary dismissal, the trial court was divested of jurisdiction, and it had no power or authority to enter the order and grant Defendants' motion for summary judgment. *See Wesley*, 92 N.C. App. at 515, 374 S.E.2d at 477.

II. Summary Judgment

The majority's opinion next asserts Plaintiff failed to meet its burden on appeal of demonstrating genuine issues of material fact and that the trial court did not err in granting summary judgment in favor of Defendants. I disagree.

We review an appeal from summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). When considering a motion for summary judgment, the trial court views the evidence in a light most favorable to the non-moving party and resolves all inferences against the moving party. *See In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576; *Baumann v. Smith*, 298 N.C. 778, 782, 260 S.E.2d 626, 628 (1979).

"Summary judgment is a somewhat drastic remedy, [that] must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." *Draughon v. Harnett Cnty. Bd. of Educ.*, 158 N.C. App. 208, 211-12, 580 S.E.2d 732, 735 (2003) (internal quotation marks and citation omitted), *aff'd*, 358 N.C. 381, 591 S.E.2d 521 (2004).

North Carolina precedents consistently hold summary judgment is inappropriate "where matters of credibility and determining the weight of the evidence exist." *Id.* at 212, 580 S.E.2d at 735. For example, summary judgment is generally inappropriate in actions for fraud or other tortious conduct. *See Isbey v. Cooper Companies, Inc.*, 103 N.C. App. 774, 776, 407 S.E.2d 254, 256 ("Although summary judgment may be proper when absence of genuine issue is clearly established, summary judgment is generally improper in an action for fraud."), *disc. review denied*, 330 N.C. 613, 412 S.E.2d 87 (1991); *Smith-Douglass, Div. of Borden Chemical, Borden, Inc. v. Kornegay*, 70 N.C. App. 264, 266, 318 S.E.2d 895, 897 (1984) ("Questions of fraudulent intent ordinarily go to the jury on circumstantial evidence, and summary judgment is usually inappropriate.").

A. Defendants' Burden on Summary Judgment

The majority's opinion addresses Plaintiff's burden on appeal without first addressing whether Defendant initially met its burden at trial. My review demonstrates Defendants failed to show no genuine issues of material fact existed.

Irrespective of which party has the burden of proof at trial, for the purposes of summary judgment, "[t]he movant always has the burden of showing that there is no triable issue of fact and that he is entitled to judgment as a matter of law." *Baumann v. Smith*, 298 N.C. 778, 781, 260 S.E.2d 626, 628 (1979); *see Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735. As the Supreme Court has held:

> If the movant's forecast [of evidence which he has available for presentation at trial] fails to do this, summary judgment is not proper, whether or not the opponent responds. . . . The evidentiary matter supporting the moving party's motion may not be sufficient to satisfy his burden of proof, even though the opposing party fails to present any competent counter-affidavits or other materials.

*Savings & Loan Ass'n v. Trust Co.*, 282 N.C. 44, 51-52, 191 S.E.2d 683, 688 (1972) (internal quotation marks and citations omitted); *see Baumann*, 298 N.C. at 781, 260 S.E.2d at 628.

In *Baumann*, this Court held the defendants failed to meet this burden when they submitted a supporting affidavit, which "merely reaffirmed certain paragraphs of the verified answer and stated that defendants entered into an agreement with [a third party.]" *Baumann*, 298 N.C. at 782, 260 S.E.2d at 628. This Court emphasized the defendants' affidavit "did not challenge or alter the fact that the complaint alleged, and the answer denied, the existence of a contract between the parties." *Id.* at 782, 260 S.E.2d. at 628-29. This Court held summary judgment was inappropriate, whether or not the plaintiff properly responded. *Id.* at 781-82, 260 S.E.2d. at 628-29; *see Savings & Loan Ass'n.*, 282 N.C. at 51-52, 191 S.E.2d at 688.

Upon *de novo* review, Defendants in this case failed to meet their burden of demonstrating no genuine issues of material fact existed. In support of their motion for summary judgment, Defendants submitted two affidavits. Like in *Baumann*, Defendants' affidavits merely reaffirmed statements and allegations contained within their amended answer, and each affidavit failed to provide any additional evidence in

support of their motion for summary judgment. *See Baumann*, 298 N.C. at 782, 260 S.E.2d at 628.

The affidavit of Defendant-Reem Tamim Darar simply re-asserts the amended answer's denial that she "did not make any false or misleading statements to Plaintiff, its predecessors or their agents." Her affidavit confirms she exchanged an email communication with Plaintiff regarding Defendants' failure to respond to Plaintiff's email, but asserts she had no "material communications" regarding the sale of the premises to Plaintiff. Her affidavit offers no substantive evidence to demonstrate that Ms. Darar is entitled to summary judgment and leaves open genuine issues of material fact of "material communications" for the jury. *See id.*

While Defendant-Mohamed Ali Darar's affidavit is slightly more detailed than Ms. Darar's affidavit, it is also a mere denial of allegations in Plaintiff's complaint, which were previously denied in Defendants' amended answer. The affidavit did not offer or assert any uncontested facts or provide any new or substantive evidence to show no genuine issues of material fact existed in the many claims Plaintiff asserted against Defendants. The affidavit also did not assert any facts to shift the burden back on to Plaintiff. Each of the Defendants' affidavits are ultimately nothing more than re-statements of what they previously denied in their amended motion to dismiss and answer and, in fact, now admit asserted, but disputed, communications, which occurred between the parties.

Furthermore, many of Plaintiff's claims against Defendants are based upon allegations of fraud. As noted previously, such claims are generally not appropriate for summary judgment. *See Isbey*, 103 N.C. App. at 776, 407 S.E.2d at 256; *Smith-Douglass*, 70 N.C. App. at 266, 318 S.E.2d at 897. Since the evidence presented must be viewed in the light most favorable to the Plaintiff, as the non-moving party, and since Defendants' affidavits operate as mere affirmations of statements previously made in their amended motion to dismiss and answer, Defendants failed to meet their burden to show that no genuine issues of material fact existed to allow summary judgment to be appropriately entered against Plaintiff. *See Baumann*, 298 N.C. at 781, 260 S.E.2d at 628. The trial court erred in granting Defendants' motion for summary judgment.

B. Verification of a Complaint and Complaint as Affidavit

Since we review summary judgment motions *de novo* and Defendants, in this case, did not meet their initial burden on summary judgment, the majority errs by holding Plaintiff failed to meet its burden on appeal to show that genuine issues of material fact existed and that Plaintiff's

argument the trial court erred by refusing to treat the verified complaint as an affidavit is immaterial. *Baumann* and *Savings & Loan Ass'n* clearly state if the moving party does not meet its burden, then whether the non-moving party properly responds is immaterial. *See Savings & Loan Ass'n*, 282 N.C. at 51-52, 191 S.E.2d at 688; *Baumann*, 298 N.C. at 782, 260 S.E.2d at 628. However, I briefly address Plaintiff's arguments to show its complaint was properly verified and could be treated as an affidavit.

A verified complaint must contain a statement "that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true. Such verification shall be by affidavit of the party[.]" N.C. Gen. Stat. §1A-1, Rule 11(b) (2015). Plaintiff's complaint clearly meets this requirement.

Ms. Amin attached a separate, signed and notarized verification to the complaint, which stated "[t]hat the contents of the foregoing complaint are true to her *own knowledge*, except as to the matter stated on information and belief, and as to those matters she believes them to be true." (emphasis supplied). This language virtually mirrors the requirement for verification as listed in Rule 11. *Id.* Furthermore, as Plaintiff notes, this language was taken directly from *Thorp's N.C. Trial Practice Forms*. 1 Thorp's N.C. Trial Prac. Forms § 11:2 (7th ed.). This language has also repeatedly been upheld as sufficient to verify a complaint. *See e.g., Bauer v. Douglas Aquatics, Inc.*, 207 N.C. App. 65, 69, 698 S.E.2d 757, 761-62 (2010); *In re Dj.L.*, 184 N.C. App. 76, 82, 646 S.E.2d 134, 139 (2007); *In re D.D.F.*, 187 N.C. App. 388, 390, 654 S.E.2d 1, 2 (2007).

Since the complaint is verified, the question becomes whether the verified complaint may be treated as an affidavit to rebut Defendants' motion at the summary judgment hearing.

Rule 56 of the North Carolina Rules of Civil Procedure does not allow an adverse party to:

> rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (2015). Our Supreme Court has held the purpose of these sentences "is to pierce *general allegations* in the non-movant's pleadings, Rule 56(e) does not deny that a properly verified

pleading which meets all the requirements for affidavits may effectively set forth specific facts showing that there is a genuine issue for trial." *Schoolfield v. Collins*, 281 N.C. 604, 612, 189 S.E.2d 208, 212-13 (1972) (emphasis in original) (internal quotations and citations omitted).

A trial court may consider a party's verified complaint as an affidavit if it, "(1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Page v. Sloane*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (citations omitted). Generally, trial courts may not consider portions of an affidavit not based on the affiant's personal knowledge. *Moore v. Coachman Industries, Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 776 (1998).

This Court has held:

> [a]lthough a Rule 56 affidavit need not state specifically it is based on "personal knowledge," its content and context must show its material parts are founded on the affiant's personal knowledge. Our courts have held affirmations based on "personal[ ] aware[ness]," "information and belief," and what the affiant "think[s]," do not comply with the "personal knowledge" requirement of Rule 56(e). Knowledge obtained from the review of records, qualified under Rule 803(6), constitutes "personal knowledge" within the meaning of Rule 56(e).

*Hylton v. Koontz*, 138 N.C. App. 629, 634-35, 532 S.E.2d 252, 256 (2000) (citations omitted), *disc. review denied*, 353 N.C. 373, 546 S.E.2d 603 (2001).

In *Charlotte-Mecklenburg Hosp. Authority v. Talford*, 366 N.C. 43, 49-50, 727 S.E.2d 866, 870-71, *reh'g denied*, 366 N.C. 248, 728 S.E.2d 354 (2012), the plaintiff submitted an affidavit from its Director of Revenue stating the amount the plaintiff charged the defendant was reasonable for the same reasons as stated in its verified complaint. The complaint was verified by the plaintiff's Manager of Patient Financial Service, Legal Accounts.

The Supreme Court held:

> These affidavits do not say expressly that the affiant is familiar either with the amounts other similar facilities charge for medical services or with various published billing regulations and guidelines. Nor do they provide itemized comparisons of the amounts plaintiff charged for a

> particular service and either the amounts other facilities charge for the same service or any applicable regulations or guidelines regarding such charges. *Nonetheless, because of the affiants' positions in plaintiff's organization, we may infer that they have the requisite personal knowledge of those matters and would be competent to give the testimony contained in their affidavits.*

*Id.* at 50, 727 S.E.2d at 871 (emphasis supplied). Although the Supreme Court noted the better practice is not to leave it to the court to make inferences, the Court held because of the affiants' position within the plaintiff's company, the verified complaint met the three-prong requirement to be considered by the Court as an affidavit sufficient to oppose summary judgment. *Id.*

Here, the trial court did accept and treat portions of the verified complaint as an affidavit. While the trial court did not delineate which portions of the verified complaint it relied upon and which it did not, the court is not required to do so to determine summary judgment. *See In re Cook*, 37 N.C. App 575, 579, 246 S.E.2d 801, 804 (1978) ("Where both competent and incompetent evidence is before the trial court, we assume that the trial court, when functioning as the finder of facts, relied solely upon the competent evidence and disregarded the incompetent evidence." (citation omitted)).

Here, the trial court correctly held portions of the complaint may be treated as an affidavit. The statements made "upon information and belief" included within the verified complaint "do not comply with the 'personal knowledge' requirement." *Asheville Sports Properties, LLC v. City of Asheville*, 199 N.C. App. 341, 345, 683 S.E.2d 217, 220 (2009). Contrary to Defendants' assertions the complaint is "replete" with allegations made upon information and belief, only eight of the nearly two hundred allegations were qualified with this or language similar to "made upon information and belief." *See id.* The remaining allegations in the complaint are based on Ms. Amin's personal knowledge and the complaint and its attached and incorporated exhibits affirmatively show Ms. Amin was competent to testify concerning these matters.

First, many of the exhibits attached and incorporated into Plaintiff's complaint were personally signed by Ms. Amin in her role as a managing member and secretary of Plaintiff. These exhibits include the executed Offer to Purchase and Sale of Business Agreement, a list of inventory, a summary of payments from Plaintiff to Defendants, and the executed Triple Net Lease Agreement. Each of these exhibits serve as foundations

and proof to support many of Plaintiff's claims against Defendants. Ms. Amin's signature on these documents demonstrates her personal knowledge of the issues and affirmatively shows that she is competent to testify on these matters.

Second, Ms. Amin's signature on the attached documentary exhibits shows she is competent to testify on the matters asserted within the verified complaint due to the authority of her position as a managing member of Allied Spectrum, LLC. As in *Charlotte-Mecklenburg Hosp. Authority*, the finder of fact may properly infer, by and from the nature of her position, that she was aware of the documents, business dealings, conversations, and transactions between Plaintiff and Defendants. This knowledge makes her competent to testify to those matters. *See Charlotte-Mecklenburg Hosp. Authority*, 366 N.C. at 49-50, 727 S.E.2d at 870-71. Ms. Amin has personal knowledge and is competent to testify to the allegations and statements made in the verified complaint and the exhibits incorporated and attached thereto. *See id.* Plaintiff's verified complaint was properly treated as an affidavit by the trial court.

## III. Conclusion

"[A] plaintiff is vested with the authority to dismiss any of its claims prior to close of its case-in-chief." *Young*, 120 N.C. App. at 726, 464 S.E.2d at 83. Plaintiff properly filed its voluntary dismissal without prejudice prior to resting its case. The trial court was deprived of jurisdiction to enter the summary judgment order.

Presuming the trial court retained jurisdiction after Plaintiff filed its dismissal, Defendants' affidavits failed meet or carry their burden to show no genuine issues of material fact existed. The majority's conclusion that Plaintiff did not meet its burden on appeal to show genuine issues of material fact existed is erroneous.

I vote to reverse the trial court's order granting Defendants' motion for summary judgment on the alternative bases set forth herein, and remand to either dismiss pursuant to Plaintiff's voluntary dismissal, without prejudice, or to calendar Plaintiff's asserted claims for trial. I respectfully dissent.

BOLIER & COMPANY, LLC AND CHRISTIAN G. PLASMAN, PLAINTIFFS
v.
DECCA FURNITURE (USA), INC., DECCA CONTRACT FURNITURE, LLC, RICHARD HERBST, WAI THENG TIN, TSANG C. HUNG, DECCA FURNITURE, LTD., DECCA HOSPITALITY FURNISHINGS, LLC, DONGGUAN DECCA FURNITURE CO. LTD., DARREN HUDGINS AND DECCA HOME, DEFENDANTS
v.
CHRISTIAN J. PLASMAN A/K/A BARRETT PLASMAN, THIRD-PARTY DEFENDANT

No. COA15-1219

Filed 15 November 2016

**Appeal and Error—interlocutory orders and appeals—preliminary injunction—failure to demonstrate substantial right**

Plaintiffs' appeal from an interlocutory order by the trial court enforcing a preliminary injunction previously entered against them in this action was dismissed. Plaintiffs failed to satisfy their burden of demonstrating the loss of a substantial right absent immediate appeal of the order.

Appeal by plaintiffs and third-party defendant from order entered 26 May 2015 by Judge Louis A. Bledsoe, III in Catawba County Superior Court. Heard in the Court of Appeals 12 May 2016.

*The Law Offices of Matthew K. Rogers, PLLC, by Matthew K. Rogers, for plaintiffs-appellants and third-party defendant-appellant.*

*McGuireWoods LLP, by Robert A. Muckenfuss, Jodie H. Lawson, and Andrew D. Atkins, for defendants-appellees.*

DAVIS, Judge.

Bolier & Company, LLC ("Bolier"), Christian G. Plasman ("Plasman"), and Christian J. Plasman a/k/a Barrett Plasman ("Barrett") (collectively "Plaintiffs") appeal from an order by the trial court enforcing a preliminary injunction previously entered against them in this action. After careful review, we dismiss Plaintiffs' appeal.

## Factual Background

Bolier is a closely held North Carolina company in the business of selling furniture. Bolier was originally founded and owned by Plasman. On 31 August 2003, Plasman entered into an operating agreement (the "Agreement") with Decca Furniture (USA), Inc. ("Decca USA"), which

is a wholly-owned subsidiary of Decca Contract Furniture, LLC ("Decca China").[1] Pursuant to the Agreement, Plasman conferred a 55% ownership interest in Bolier to Decca USA while retaining a 45% interest for himself. In return, Decca USA agreed to supply Bolier with furniture for retail sale.

According to Plasman, Richard Herbst, the president of Decca USA, and Tsang C. Hung, the chairman of Decca USA's board of directors, represented to him prior to the execution of the Agreement that while it was necessary for Decca to own a majority ownership interest in Bolier "on paper" due to certain rules of the Hong Kong Stock Exchange, Bolier would, in reality, be operated as a 50/50 partnership between Decca USA and Plasman. Following the execution of the Agreement, Plasman served as Bolier's president and chief executive officer while his son, Barrett, worked as Bolier's operations manager. However, this arrangement ended on 19 October 2012 when Herbst terminated the employment of both Plasman and Barrett because Bolier's revenues were no longer sufficient to support their annual salaries.

Although their employment had been terminated, Plasman and Barrett continued to work regularly out of Bolier's offices, ultimately causing Decca USA to change the locks to the company's offices. Plasman and Barrett also opened bank accounts in Bolier's name and diverted approximately $600,000.00 in customer payments intended for Bolier to those accounts. They proceeded to pay themselves at least $62,192.15 from those accounts as salaries, despite the fact that they were no longer employed by Bolier.

On 22 October 2012, Plaintiffs filed the present action (the "Lawsuit") in Catawba County Superior Court alleging claims for dissolution; breach of contract; fraud; constructive fraud; misappropriation of corporate opportunities; trademark, trade dress and copyright infringement; conspiracy to defraud; and unfair trade practices. On 24 October 2012, the Lawsuit was designated as a mandatory complex business case and assigned to the North Carolina Business Court. Decca removed the Lawsuit to the United States District Court for the Western District of North Carolina on 29 October 2012. On that same date, Decca filed a motion for a temporary restraining order and preliminary injunction against the Plasmans pursuant to Rule 65 of the Federal Rules of Civil Procedure seeking, among other things, to prohibit any additional

---

1. In this opinion, we refer at times to Decca USA and Decca China collectively as "Decca" and to Plasman and Barrett collectively as "the Plasmans."

diversion of Bolier funds and to recover the funds that had already been diverted.

A hearing on Decca's motion was held before the Honorable Richard L. Voorhees. On 27 February 2013, Judge Voorhees entered an order ("Judge Voorhees' Order") granting Decca's motion by entering a preliminary injunction that barred the Plasmans from taking any further actions on Bolier's behalf. Judge Voorhees' Order also directed them to return all diverted funds to Bolier within five business days and to provide an accounting of those funds to Decca USA. The order also put in place various mechanisms to safeguard Plasman's rights as a minority owner of Bolier during the pendency of the litigation.

Plaintiffs filed a document entitled "Plaintiffs' and Third Party Defendant's Response to Court Order" on 6 March 2013. In this document, they represented that they had "fully complied to the best of their ability with the Court Order signed on February 27, 2013." In addition, they stated that "Plaintiffs['] response herein is intended to comply with the spirit of the Court Order, and by complying herein, Plaintiffs are not waiving Plaintiffs' rights to request reconsideration or appeal."

On 13 March 2013, Plaintiffs filed a document captioned "Supplemental Motion for Preliminary Injunction Conditions and Plaintiff Safeguard Conditions" in which they requested that the federal court impose additional obligations on Decca to protect Plasman's status as a minority owner of Bolier — including the issuance of an injunction bond.

Plaintiffs never made any attempt to appeal Judge Voorhees' Order to the United States Court of Appeals for the Fourth Circuit. Nor did they file a motion for reconsideration of Judge Voorhees' Order.

On 19 September 2014, Judge Voorhees entered an order dismissing Plaintiffs' federal copyright claims and declining to exercise supplemental jurisdiction over Plaintiffs' state law claims. As a result, the Lawsuit was remanded to state court.

Upon remand, Plaintiffs filed in the Business Court a motion entitled "Plaintiffs' Motion to Amend Preliminary Injunction, to Dissolve Portions of the Preliminary Injunction and Award Damages, and Motion for Sanctions." In this document, Plaintiffs asked the court, *inter alia*, to amend various aspects of the preliminary injunction conditions set forth in Judge Voorhees' Order and to dissolve other portions of that order. In support of their motion, Plaintiffs asserted, in part, that

> since the Preliminary Injunction was entered, Plaintiff has obtained significant evidence supporting that [sic]

> (1) the Preliminary Injunction was improvidently granted, (2) incorrectly entered without protection of an injunction bond, as well as [sic] (3) the facts demonstrate changed circumstances warranting amendment of the Preliminary Injunction.

Plaintiffs then requested the entry of an order containing the following provisions:

> 1. Plasman and Barrett should be awarded at least $574,660.36 in damages relating to improper termination.
>
> 2. Decca USA should be required to pay [a] cash bond of at least $5,471,000.00 and up to $10,000,000.00 to reimburse Bolier relating to Decca's self-dealing, misappropriation of Bolier's corporate opportunities and other tortious conduct.
>
> 3. Decca USA should be required to pay for [an] independent third party audit and accounting of Bolier, Decca Home, Elan by Decca, Decca Contract Furniture, and Decca Hospitality Furnishings to account for all sales of Bolier designs, as well as sales of residential furniture by Decca Home and Elan by Decca.
>
> 4. Sanctions as contemplated by Plaintiffs' Motion for Contempt . . . to defer [sic] similar conduct in the future.

Decca USA filed a document in the Business Court entitled "Defendant Decca USA's Motion to Enforce Order, Motion for Contempt, and Motion for Sanctions." In this motion, Decca USA asserted that the Plasmans had willfully violated Judge Voorhees' Order and, as a result, sought enforcement of the preliminary injunction. Decca USA further requested that the Plasmans be held in contempt and that sanctions be imposed against them.

On 26 March 2015, a hearing on the parties' motions was held before the Honorable Louis A. Bledsoe, III. On 26 May 2015, Judge Bledsoe entered an order ("Judge Bledsoe's Order") denying Plaintiffs' motion and stating, in pertinent part, as follows:

> The federal court not only found that Chris Plasman had interfered with Bolier's business operations by diverting Bolier's funds to himself and others but that injunctive relief was necessary to ensure management control would be exercised by the Majority in Interest as provided

> under the Bolier Operating Agreement. The federal court crafted a thoughtful, well-reasoned, and narrowly-tailored [Preliminary Injunction] Order that placed managerial and operational control in Decca USA, the 55% owner, and imposed numerous safeguards to protect Chris Plasman's 45% minority interest in the company. This Court has not been persuaded, by either evidence or argument, that the federal court's carefully drafted [Preliminary Injunction] Order should be modified, amended, or dissolved in any respect.

With regard to Decca USA's motion, Judge Bledsoe declined to hold the Plasmans in contempt. However, he granted Decca USA's motion to enforce Judge Voorhees' Order and ordered that the Plasmans pay Decca USA $62,192.15 plus applicable interest and provide to Decca USA the accounting that had been required under Judge Voorhees' Order.[2]

Plaintiffs filed notice of appeal from Judge Bledsoe's Order on 25 June 2015. On 30 December 2015, Decca filed a motion to dismiss Plaintiffs' appeal.

## Analysis

Decca has moved to dismiss Plaintiffs' appeal on the ground that it is an interlocutory appeal over which this Court lacks appellate jurisdiction. It is clear that this appeal is interlocutory. "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (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 interlocutory appeals "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*

---

2. Judge Bledsoe's Order also ruled on several other motions that had been made by the parties upon remand of the Lawsuit. However, none of Judge Bledsoe's rulings on those additional motions are directly relevant to the present appeal.

*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).

Judge Bledsoe's Order does not contain a certification under Rule 54(b). Therefore, Plaintiffs' appeal is proper only if Plaintiffs can demonstrate a substantial right that would be lost absent an immediate appeal.

In order to analyze the question of whether this Court possesses jurisdiction over this appeal, we must closely examine not only Judge Bledsoe's Order but also Judge Voorhees' Order and Plaintiffs' filings in response thereto. Judge Voorhees' Order rejected Plasman's arguments regarding his right to equal control of Bolier but recognized the need for the imposition of safeguards to protect his rights as a minority shareholder. The federal court proceeded to enter a preliminary injunction stating, in pertinent part, as follows:

> The protections afforded by *Meiselman* and its progeny developed in light of the generally applicable principle of majority rule. Bound by agreement, statute, and doctrine, the majority in interest otherwise has the right to control corporate affairs. *See, e.g.*, *Gaines v. Long Mfg. Co.*, 67 S.E.2d 350, 354 (N.C. 1951) ("The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors."); (*see also* Doc. 7-2 at 11) (providing that "all decisions or actions of the Company . . . or the Members shall require the approval, consent, agreement, or vote of the Majority in Interest").
>
> Here, the prior conduct of Plaintiff Plasman in continuing to manage and to control the operations of Bolier & Co.

has deprived the majority of this right. However, in light of Plaintiffs' claim that Defendants have engaged in self-serving transactions, the imposition of safeguards enabling Plaintiff Plasman to check the threat of self-dealing would be appropriate.

Defendants have proposed the following conditions, among others, to remain in effect pending the resolution of this case:

(1) Plaintiff Plasman is to be enjoined from holding himself out as President or CEO or Bolier & Co.;

(2) Third-Party Defendant Barrett Plasman is to have no further authority as an employee of Bolier & Co.;

(3) The Plasmans are to be prohibited from entering Decca USA or Bolier & Co. property without Decca USA's permission, and upon reasonable request, Decca USA shall grant such permission to Plaintiff Plasman in his role as minority member-manager;

(4) The Plasmans are to be enjoined from removing any property or fixtures from Bolier & Co.'s or Decca USA's premises without the written authorization or permission of Decca USA;

(5) The Plasmans are otherwise enjoined from interfering with Decca USA's or Bolier & Co.'s business operations;

(6) Within five business days of the entry of this Order, the Plasmans are to return to Decca USA's Bank of America lockbox all of Bolier & Co.'s monies, including but not limited to customer payments, diverted to them or to any bank account under their control, and such funds must be paid with a certified check;

(7) Within five business days of the entry of this Order, the Plasmans are required to provide an accounting to Decca USA, also to be filed with the Court, of all funds that were diverted from October 19, 2012, to the present, detailing who made the payments, when the payments were

received, the payment amounts, and the purpose of the payments;

(8) Decca USA shall provide Plaintiff Plasman with copies of Bolier & Co.'s financial statements on a monthly basis;

(9) At Plaintiff Plasman's request, all of Bolier & Co.'s books and records, including royalty and licensing payments, may be inspected and examined once every six months by an accountant of Plaintiff Plasman's choice at his expense at the Decca USA office or at a mutually agreeable location;

(10) Decca USA shall provide Plaintiff Plasman with copies of Bolier & Co.'s federal, state, and local income tax returns for each year beginning with 2012;

(11) Decca USA shall provide Plaintiff Plasman with any other information regarding Bolier & Co.'s affairs as is just and reasonable, or otherwise required by N.C. Gen. Stat. § 57C-3-04 or Bolier & Co.'s Operating Agreement;

(12) A member-manager meeting shall be held bi-annually, in April and October; in which Plaintiff Plasman may provide Bolier & Co. with his input regarding the company's management and affairs; and

(13) With regard to these member-manager meetings, Decca USA shall provide Plaintiff Plasman with at least ten days', and no more than fifty days', notice of the date, time, and place of such meetings.

*The Court so orders.*

Judge Voorhees' Order further provided that "[a]dditional conditions may be imposed upon subsequent motion of Plaintiff Plasman, to be filed with the Court within fourteen days of the date on which this Order is filed."

Seven days after Judge Voorhees' Order was entered, Plaintiffs filed a "Response to Court Order," which stated, in pertinent part, as follows:

"Plaintiffs['] response herein is intended to comply with the spirit of the Court Order, and by complying herein, Plaintiffs are not waiving Plaintiffs' rights to request reconsideration or appeal." In this document, after expressing concerns with several provisions of Judge Voorhees' Order, Plaintiffs stated that "[a]s set forth herein, Plaintiffs have fully complied to the best of their ability with the Court Order signed on February 27, 2013."

Seven days later, Plaintiffs filed a "Supplemental Motion for Preliminary Injunction Conditions and Plaintiff Safeguard Conditions" in which they sought the entry of "an order establishing Preliminary Injunction conditions to safeguard Plaintiffs Chris Plasman and Bolier & Company, LLC pending final resolution of the merits." Plaintiffs listed eleven specific requests for such safeguards. In this document, Plaintiffs also requested that the federal court "clarify the . . . [Preliminary Injunction] Order to specifically permit [the Plasmans] to retain funds paid to Chris Plasman and Barrett Plasman for wages earned and Bolier . . . expenses paid (including the $12,000.00 paid as reimbursement for legal expenses) prior to January 14, 2013 shall [sic] not be paid to Decca USA pending final outcome of the litigation[.]"

The federal court never issued an order directly responding to Plaintiffs' motion. Instead, on 19 September 2014 the federal court dismissed Plaintiffs' federal claims and remanded the Lawsuit to state court.

In ruling on Decca's motion to enforce Judge Voorhees' Order, Judge Bledsoe stated the following in his 26 May 2015 order:

> [T]he evidentiary record before the federal court in entering the [Preliminary Injunction] Order included copies of each of eleven checks made payable to the Plasmans in the total amount of $62,192.15, and the federal court was advised that these checks were purportedly for payment of the Plasmans' wages, expenses, and attorney's fees incurred between their termination on October 19, 2012 and when they were finally locked out of Bolier on January 14, 2013. . . .
>
> {33} Based on these facts, the Court concludes that the federal court intended that the Funds at Issue paid from the Bolier accounts to the Plasmans to constitute funds covered by paragraph 6 of the [Preliminary Injunction] Order, and therefore, that the federal court ordered that these funds be returned to "Decca USA's Bank of America

> lockbox" within five days of the entry of the [Preliminary Injunction] Order. The Court further concludes that the federal court required the Plasmans, within the same five-day time period, to provide an accounting to Decca USA of "all funds that were diverted from October 19, 2012, to the present, detailing who made the payments, when the payments were received, the payment amounts, and the purpose of the payments," . . . and rejected any contentions by the Plasmans that they were unable to provide the requested information. As a result, the Court concludes that Defendant Decca USA's Motion to Enforce Order, for Contempt, and for Sanctions should be granted, in part, to require the Plasmans to pay to Decca USA the Funds at Issue in the amount of at least $62,192.15, plus interest at the legal rate from March 6, 2013, and to provide the accounting to Decca USA required under paragraph 7 of the [Preliminary Injunction] Order.

With regard to Plaintiffs' motion to dissolve and amend Judge Voorhees' Order, Judge Bledsoe ruled as follows:

> {43} Finally, although Plaintiffs argue that Decca USA has mismanaged the company since Chris Plasman was removed as President and CEO, the Court finds that Plaintiffs have failed to offer persuasive or compelling evidence to show that Plaintiffs will suffer irreparable harm if Chris Plasman is not returned to the chief management position at Bolier, that Defendants can no longer show a likelihood of success on the merits, or that equity otherwise demands that the [Preliminary Injunction] Order should be dissolved or amended at this time. To the contrary, the Court is persuaded that the continuation of the [Preliminary Injunction] Order — in particular, management by Decca USA, Bolier's Majority in Interest — will not cause Chris Plasman irreparable harm, is in the best interests of Bolier, and remains necessary to protect Bolier from irreparable harm. The federal court not only found that Chris Plasman had interfered with Bolier's business operations by diverting Bolier's funds to himself and others but that injunctive relief was necessary to ensure management control would be exercised by the Majority in Interest as provided under the Bolier Operating Agreement. The federal court crafted a thoughtful, well-reasoned, and narrowly-tailored

> [Preliminary Injunction] Order that placed managerial and operational control in Decca USA, the 55% owner, and imposed numerous safeguards to protect Chris Plasman's 45% minority interest in the company. This Court has not been persuaded, by either evidence or argument, that the federal court's carefully drafted [Preliminary Injunction] Order should be modified, amended, or dissolved in any respect.

(footnote omitted).

Having reviewed the relevant orders and filings by the parties, we conclude that Plaintiffs have failed to establish the existence of appellate jurisdiction over this appeal. Plaintiffs essentially make three arguments as to why appellate jurisdiction exists despite the significant passage of time since the federal preliminary injunction was entered. First, they contend that Judge Voorhees' Order was not immediately appealable because it did not contain a final preliminary injunction. Second, they argue that even if his order would otherwise have been appealable, the documents they filed in response to the order tolled their deadline for taking such an appeal. Third, they assert that even assuming they have lost the opportunity to appeal Judge Voorhees' Order, Judge Bledsoe's Order — which they *have* appealed — deprived them of a substantial right such that it was independently appealable. We address each of these arguments in turn.

First, we conclude that Judge Voorhees' Order was, in fact, appealable. It is well settled that preliminary injunction orders issued by a federal court are immediately appealable. *See Nationsbank Corp. v. Herman*, 174 F.3d 424, 427 (4th Cir.), *cert. denied*, 528 U.S. 1045, 145 L.Ed.2d 481 (1999).

While Plaintiffs do not dispute the appealability of federal preliminary injunctions as a general proposition, they contend that Judge Voorhees' Order was not yet final because it invited Plasman to move for additional safeguards to protect his interest as a minority owner of Bolier. We are unable to agree with this contention.

As shown above, the preliminary injunction contained in Judge Voorhees' Order addressed the basic issues as to which the parties disagreed, including the fundamental question of who was legally entitled to control Bolier. While the federal court granted the Plasmans leave to seek additional procedural safeguards if they so desired, this invitation did not render the preliminary injunction incomplete and, therefore, unappealable.

Second, Plaintiffs contend that their subsequent filings in federal court tolled their deadline for appealing Judge Voorhees' Order. We disagree.

Plaintiffs' "Response to Court Order" was not a motion to reconsider Judge Voorhees' Order. Indeed, they expressly stated therein that "Plaintiffs are not waiving Plaintiffs' rights to request reconsideration or appeal." They further represented in this document that they had "fully complied to the best of their abilities with [Judge Voorhees' Order]."

Nor was the filing of Plaintiffs' "Supplemental Motion for Preliminary Injunction Conditions and Plaintiff Safeguard Conditions" sufficient to toll their deadline for taking an appeal of Judge Voorhees' Order. The bulk of this document simply contained a request for the imposition of additional "reasonable condition[s] and protections" to safeguard Plasman's rights as a minority shareholder during the pendency of the litigation. The document did not purport to be a motion for reconsideration of Judge Voorhees Order, and we decline Plaintiffs' invitation to treat it as such. Had Plaintiffs intended to seek reconsideration of Judge Voorhees' Order so as to toll their deadline for appealing the preliminary injunction, they were required to file a motion that unambiguously sought such relief. However, they failed to do so. While Plaintiffs may have held out hope that the federal court would nevertheless modify its preliminary injunction as a result of their motion, it was still incumbent upon them to protect their appeal rights during the interim by taking an appeal of Judge Voorhees' Order to the Fourth Circuit within the thirty-day deadline provided by Rule 4 of the Federal Rules of Appellate Procedure. *See* Fed. R. App. P. 4(a)(1)(A).

Finally, we reject Plaintiffs' argument that Judge Bledsoe's Order was independently appealable. The specific aspects of Judge Bledsoe's Order cited by Plaintiffs as depriving them of a substantial right are essentially identical to the preliminary injunction terms contained in Judge Voorhees' Order, which Plaintiffs never appealed. Thus, because Judge Bledsoe's Order merely *enforces* the preliminary injunction entered by Judge Voorhees, our consideration of the substantive issues raised by Plaintiffs in the present appeal would enable them to achieve a "back door" appeal of Judge Voorhees' Order well over three years after its entry.

While Plaintiffs point in particular to the portion of Judge Bledsoe's Order directing them to pay to Decca USA $62,192.15 plus interest, they ignore the fact that Judge Bledsoe was simply enforcing the ruling in Judge Voorhees' Order ordering them to return to Decca USA all of the

funds that the Plasmans had diverted from Bolier.[3] Indeed, as referenced above, Judge Bledsoe's Order carefully explained how it arrived at the $62,192.15 figure, which was based on the total of eleven checks made payable to the Plasmans purporting to represent payments for their wages, expenses, and attorneys' fees incurred between the date of their termination on 19 October 2012 and the date "they were finally locked out of Bolier on January 14, 2013."

As Judge Bledsoe's Order noted, the record before the federal court at the time Judge Voorhees' Order was entered contained copies of these eleven checks. Therefore, rather than imposing a new directive requiring the payment of money by the Plasmans to Bolier, Judge Bledsoe's Order simply quantified the amount of money that the federal court had ordered Plaintiffs to pay Decca USA in light of the documents that the parties had put before the federal court *at the time the preliminary injunction was entered.*

Nor did Judge Bledsoe's Order make any substantive modifications to the issue of Bolier's management. Instead, Judge Bledsoe's Order merely reiterated the federal court's rulings on this subject.

> The federal court not only found that Chris Plasman had interfered with Bolier's business operations by diverting Bolier's funds to himself and others but that injunctive relief was necessary to ensure management control would be exercised by the Majority in Interest as provided under the Bolier Operating Agreement. The federal court crafted a thoughtful, well-reasoned, and narrowly-tailored [Preliminary Injunction] Order that placed managerial and operational control in Decca USA, the 55% owner, and imposed numerous safeguards to protect Chris Plasman's 45% minority interest in the company. *This Court has not been persuaded, by either evidence or argument, that the federal court's carefully drafted [Preliminary Injunction] Order should be modified, amended, or dissolved in any respect.*

(Emphasis added).

---

3. We note that while Judge Voorhees' Order directed Plaintiffs to return this money to Decca USA within five business days of the entry of the order, over three and a half years have elapsed, and Plaintiffs are still attempting to avoid this directive.

In sum, Judge Bledsoe's Order simply reiterates that Plaintiffs are bound to comply with the federal preliminary injunction that was entered on 27 February 2013. Therefore, because Plaintiffs have failed to satisfy their burden of demonstrating the loss of a substantial right absent immediate appeal of the order, their appeal must be dismissed. *See Robinson v. Gardner*, 167 N.C. App. 763, 769, 606 S.E.2d 449, 453 ("Defendants have not demonstrated the existence of any substantial right that would qualify them for immediate appeal. . . . We, therefore, allow plaintiffs' motions to dismiss the appeals."), *disc. review denied*, 359 N.C. 322, 611 S.E.2d 417, 418 (2005).[4]

## Conclusion

For the reasons stated above, Plaintiffs' appeal is dismissed.

DISMISSED.

Judges DILLON and INMAN concur.

---

4. We also deny Plaintiffs' alternative request that we reach the merits of their appeal by treating the appeal as a petition for *certiorari*.

KAREN W. FLYNN, individually and in her representative capacity as trustee for: 2002 IRREVOCABLE TRUST FOR FAMILY OF MARTHA P. WILSON; and her capacity as account custodian for: BRYNLEY ELIZABETH WYLDE, JAKE WILLIAM FLYNN, JEFFREY E. FLYNN III, JESSICA J. FLYNN, JOSHUA R. FLYNN, KEEGAN B. WALL, MAKENNA KATHLEEN WYLDE, and RILEY PAGE WALL; Plaintiff
v.
DAVID WAYNE SCHAMENS; PILIANA MOSES SCHAMENS, individually and in her capacity as a Member of Invictus Asset Management, LLC; INVICTUS ASSET MANAGEMENT, LLC, individually and in its capacity as the General Partner of Invictus Capital Growth & Income Fund, LLP, and Invictus Income Fund, LLP; INVICTUS FUNDS, LLC; and TRADEDESK FINANCIAL GROUP, INC. d/b/a TRADESTREAM ANALYTICS, LTD.; Defendants

No. COA16-410

Filed 15 November 2016

**Arbitration—motion to confirm arbitration award—motion to vacate denied**

The trial court erred by failing to confirm an arbitration award upon plaintiff's motion. After denying defendants' motion to vacate, the trial court was required to enter an order confirming the arbitration award and a judgment in conformity with the order.

Appeal by plaintiff from order entered 27 January 2016 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 October 2016.

*Garella Law, P.C., by C. Kiel Garella, for plaintiff-appellant.*

*No brief filed for defendants-appellees.*

ELMORE, Judge.

Plaintiff argues on appeal that the trial court erred in failing to confirm an arbitration award upon plaintiff's motion. We agree. The trial court's order is reversed and the case remanded for entry of (1) an order confirming the arbitration award and (2) a judgment in conformity therewith.

## I. Background

Karen W. Flynn (plaintiff) sued David Shamens, Piliana Schamens, Invictus Asset Management, LLC, Invictus Capital Growth & Income Fund, LLP, Invictus Income Fund, LLP, and Tradedesk Financial Group,

Inc., (collectively, defendants) for alleged misconduct and misrepresentations related to investments made by plaintiff and the trust she managed into funds managed and controlled by defendants. The parties agreed to submit all claims to binding arbitration and stay court proceedings pending a resolution. In its decision and final award, the arbitrator found defendants jointly and severally liable to plaintiff for common law fraud, breach of fiduciary duty, and constructive fraud. Plaintiff was awarded damages totaling $2,107,090.79, plus interest.

Plaintiff subsequently moved for confirmation of the award and entry of judgment in Mecklenburg County Superior Court. Defendants, in turn, filed a motion to vacate the award. On 27 January 2016, the trial court entered an order denying defendants' motion to vacate and, without explanation, declaring "moot" plaintiff's motion to confirm. Plaintiff moved to correct the order but the court ultimately declined to hear the motion because notice of the hearing was not timely.

Plaintiff filed notice of appeal on 25 February 2016. On the hearing date, defendants moved to dismiss plaintiff's appeal, contesting jurisdiction based on improper service of the notice of appeal. After reviewing the record, we conclude that notice was properly given within the time and in the manner prescribed by our Rules of Appellate Procedure. We deny defendants' motion and address the merits of plaintiff's appeal.

## II. Discussion

Plaintiff has the right to appeal the trial court's order pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3) (2015) because the order "in effect determines the action, and prevents a judgment from which an appeal might be taken," or otherwise "discontinues the action." *See also* N.C. Gen. Stat. § 1-569.28(a)(3) (2015) ("An appeal may be taken from . . . [a]n order confirming or denying confirmation of an award.").

On appeal, plaintiff argues that the trial court was required to confirm the arbitration award following the denial of defendants' motion to vacate. When reviewing a trial court's decision to confirm or vacate an arbitration award, "we accept findings of fact that are not 'clearly erroneous' and review conclusions of law *de novo*." *Carpenter v. Brooks*, 139 N.C. App. 745, 750, 534 S.E.2d 641, 645 (2000) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947–48, 131 L. Ed. 2d 985, 996 (1995)); *see also First Union Secs., Inc. v. Lorelli*, 168 N.C. App. 398, 400, 607 S.E.2d 674, 676 (2005).

Upon a party's motion, a trial court must issue an order confirming an arbitration award unless the award is modified, corrected, or vacated.

N.C. Gen. Stat. §§ 1-569.22, .23(d), .24(b) (2015). If and when the trial court issues an order confirming, modifying, or vacating an arbitration award, it must also “enter a judgment in conformity with the order.” N.C. Gen. Stat. § 1-569.25(a) (2015). Case law interpreting the prior versions of these statutes has reached the same conclusion. *See, e.g.*, *Carteret Cnty. v. United Contractors of Kinston, Inc.*, 120 N.C. App. 336, 346, 462 S.E.2d 816, 823 (1995) (“[T]he court must confirm the award unless one of the statutory grounds for vacating or modifying the award exists.” (citation omitted)); *FCR Greensboro, Inc. v. C & M Invs. of High Point, Inc.*, 119 N.C. App. 575, 577, 459 S.E.2d 292, 294 (1995) (“[T]he trial court must confirm the award unless grounds exist to either vacate or modify the award.” (citation omitted)). And although the statutes were repealed and replaced by Session Law 2003-345, their substance has not changed. *Compare* N.C. Gen. Stat. § 1-569.22 (2015) (“Upon motion of a party for an order confirming the award, the court shall issue a confirming order unless the award is modified or corrected . . . or is vacated . . . .”), *with* N.C. Gen. Stat. § 1-567.12 (2001) (“Upon application of a party, the court shall confirm an award, unless . . . grounds are urged for vacating or modifying or correcting the award . . . .”); N.C. Gen. Stat. § 1-569.23(d) (2015) (“If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award . . . is pending.”), *with* N.C. Gen. Stat. § 1-567.13(d) (2001) (“If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.”); N.C. Gen. Stat. § 1-569.24(b) (2015) (“If a motion [to modify or correct the award] is granted, the court shall modify and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award.”), *with* N.C. Gen. Stat. § 1-567.14(b) (2001) (“If the application [to modify or correct the award] is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.”).

In this case, plaintiff filed a motion to confirm the arbitration award. Defendants in turn filed a motion to vacate, which was denied by the trial court. Defendants did not move to modify or correct the award, and there were no such motions pending before the court when it entered its order. If the court had granted defendants’ motion to vacate, then plaintiff’s motion to confirm would have been moot—but not *vice versa*. *See In re Arbitration Between State and Davidson & Jones Constr. Co.*, 72 N.C. App. 149, 152–53, 323 S.E.2d 466, 469 (1984). Upon denying defendants’ motion to vacate, therefore, the trial court was required to enter

an order confirming the arbitration award and a judgment in conformity with the order.

## III. Conclusion

We reverse the trial court's order and remand for entry of (1) an order confirming the arbitration award and (2) a judgment in conformity therewith.

REVERSED AND REMANDED.

Judges HUNTER, JR. and DILLON concur.

---

FLORENCE BAILEY HINTON, Plaintiff
v.
WILLIE GEORGE HINTON II, Defendant

No. COA16-85

Filed 15 November 2016

**Parties—motion to intervene—remand for reconsideration**

The Court of Appeals vacated the portion of the trial court's 17 November 2015 order denying movants' motion to intervene and remanded this matter to the trial court for reconsideration of the motion under Rule 24.

Appeal by movants from order entered 17 November 2015 by Judge Darrell B. Cayton, Jr. in Martin County District Court. Heard in the Court of Appeals 8 June 2016.

*The Jones Law Group, PLLC, by Jacinta D. Jones and Maria E. Bruner, for plaintiff-appellee.*

*Trimpi & Nash LLP, by John G. Trimpi, for movants-appellants.*

DAVIS, Judge.

This appeal arises from a divorce judgment that incorrectly listed the name of the couple's son instead of the name of the husband. Because of this error, the divorce judgment was set aside fifteen years later. Bryon A. Long, Nyesha H. Riddick, and Darvin A. Felton (collectively "Movants")

— who are all children of the husband — subsequently sought to intervene in the proceedings and have the order setting aside the divorce judgment vacated. Movants appeal from the trial court's 17 November 2015 order denying their motion to intervene. After careful review, we vacate the order in part and remand for further proceedings.

## Factual Background

Florence Bailey Hinton ("Mrs. Hinton") and Willie George Hinton, Sr. ("Mr. Hinton") were married in August 1974, and two children were born of the marriage: Raronzee J. Hinton and Willie George Hinton, II ("Willie"). The couple separated in August 1998, and Mrs. Hinton filed a complaint for divorce in Martin County District Court on 12 April 2000. In the caption of the complaint and on the accompanying summons, the name of the defendant was incorrectly listed as "Willie George Hinton, II." In the body of the complaint, Mrs. Hinton alleged that "Plaintiff and Defendant were married" and requested "that the bonds of matrimony heretofore existing between the parties be dissolved and the Plaintiff be granted an absolute divorce from the Defendant."

On 18 April 2000, Mr. Hinton received a copy of the summons and complaint, and on 25 April 2000, he filed an answer to the complaint. In the caption to his answer, Mr. Hinton listed his correct name: "Willie George Hinton, Sr." His answer admitted all of the allegations contained in Mrs. Hinton's complaint. The court issued a divorce judgment (the "Divorce Judgment") on 12 May 2000 that contained the incorrect name "Winton George Hinton, II"[1] as the defendant.

Mr. Hinton died intestate on 17 May 2015 after spending three weeks in the hospital. Although he never remarried, Mr. Hinton fathered three children outside of his marriage to Mrs. Hinton — Bryon A. Long, Nyesha H. Riddick, and Darvin A. Felton, who are the movants in this action. On 6 May 2015, prior to Mr. Hinton's death but after he entered the hospital, Mrs. Hinton filed a motion (1) to set aside the Divorce Judgment pursuant to Rule 60(b)(4) of the North Carolina Rules of Civil Procedure, asserting that it was void on its face due to impossibility in that it purported to have granted her a divorce from her *son* rather than from her husband; and (2) in the alternative, to correct the defendant's name on the Divorce Judgment pursuant to Rule 60(b)(1). On 29 May 2015, after Mr. Hinton's death, Mrs. Hinton amended her motion to delete the

1. While it is not clear from the record why the name "Winton" — rather than "Willie" — appeared on the Divorce Judgment, the listing of the defendant's first name as "Winton" does not form the basis for any of the issues presented in this appeal.

request to correct the error, leaving only the motion to set aside the Divorce Judgment.

On 4 June 2015, a hearing was held before the Honorable Darrell B. Cayton, Jr. to determine whether the Divorce Judgment should be set aside. On 9 June 2015, the trial court entered an order, stating as follows:

> 1. The parties had proper notice of this hearing and are properly before this Court.
>
> 2. [Mrs. Hinton] through her former counsel intended to file an absolute divorce action from her husband, Willie George Hinton, Sr., however a Civil Summons and Complaint for Absolute Divorce was ultimately filed and served upon Defendant Willie George Hinton II. This Court entered a divorce judgment based upon one year's separation from Willie George Hinton II on May 12, 2000.
>
> 2. [sic] [Mrs. Hinton's] lawful husband, Willie George Hinton, Sr., filed an answer in this action. Willie George Hinton, Sr., was not at the time of filing and has never been made a proper party to this action.
>
> 3. Defendant Willie George Hinton II was not married to [Mrs. Hinton] but rather is the (now adult) child of [Mrs. Hinton] and Willie George Hinton, Sr., born of the marriage between [Mrs. Hinton] and Willie George Hinton, Sr.
>
> 4. Neither [Mrs. Hinton] nor Willie George Hinton, Sr., who died after the filing of this Motion but prior to its hearing, remarried following the entry of the prior divorce judgment.
>
> 5. The prior judgment entered on May 12, 2000, obtains an absolute divorce judgment from Willie George Hinton II, a person to whom [Mrs. Hinton] was never married. Accordingly, the prior absolute divorce judgment of this Court is void due to impossibility.

Based on these findings, the trial court granted Mrs. Hinton's motion and set aside the Divorce Judgment.

On 15 June 2015, Movants filed a motion to intervene, a motion to substitute parties or to abate or continue, a motion to alter or amend judgment, and a motion for a new trial. In support of these motions, Movants filed affidavits in which they asserted, *inter alia*, that (1) they had initially learned at their father's wake that Mrs. Hinton was seeking

to correct the defendant's name on the Divorce Judgment; (2) they later discovered that Mrs. Hinton was instead trying to set aside the Divorce Judgment; and (3) upon realizing her true intentions, Movants retained counsel to prevent Mrs. Hinton from obtaining this relief.

In their motion to intervene, Movants stated, in pertinent part, as follows:

> 4. The aforesaid children of Willie G. Hinton have an interest as tenants in common in the real property owned by their father at his death and have a claim as heirs to his assets after the payment of claims of the estate and creditors. Plaintiff's claim would undermine their ownership interests in the event that she had the right to claim a spouse's allowance or an intestate share or qualify as administratrix.

On 28 August 2015, a hearing on Movants' motions was held before Judge Cayton. On 17 November 2015, the court entered an order containing the following findings of fact:

> 1. The parties and movants had proper notice of this hearing and are properly before this Court.
>
> 2. In this action . . . [Mrs. Hinton] through her former counsel intended to file an absolute divorce action from her husband, Willie George Hinton, Sr., however a Civil Summons was issued in the name of Defendant Willie George Hinton II and a Complaint for Absolute Divorce was filed and validly served upon Defendant Willie George Hinton II.
>
> 3. The summons and complaint were served upon Defendant Willie George Hinton II, the only defendant in this action. Service of process was accomplished by Sheriff's service by delivering said process to Robert Hinton at 906 Raleigh Street, Elizabeth City, North Carolina. Movants, through their various affidavits, verify that Robert Hinton was over the age of eighteen (18) years at that time, and that he and Willie George Hinton II resided at that address.
>
> 4. Defendant Willie George Hinton II was not married to [Mrs. Hinton] but rather is the (now adult) child of [Mrs.

Hinton] and Willie George Hinton, Sr., born of the marriage between [Mrs. Hinton] and Willie George Hinton, Sr.

5. [Mrs. Hinton's] lawful husband, Willie George Hinton, Sr., filed an answer in this action, admitting the allegations in [Mrs. Hinton's] complaint, including that [Mrs. Hinton] was married to Willie George Hinton II.

6. This Court entered a divorce judgment based upon one year's separation from Willie George Hinton II May 12, 2000.

7. On May 29, 2015, [Mrs. Hinton] filed an Amended Motion to Set Aside the prior judgment entered on May 12, 2000, following the death of Willie George Hinton, Sr.

8. On June 4, 2015, the Court held a hearing upon [Mrs. Hinton's] motion. The Defendant, Willie George Hinton, II, was properly served and present for said hearing. Finding that an absolute divorce judgment from Willie George Hinton II, a person to whom [Mrs. Hinton] was never married, is void *ab initio* due to impossibility, this Court entered an order on June 9, 2015, setting aside the May 12, 2000 divorce judgment after reviewing the record, considering the arguments of counsel and receiving no objection from the Defendant Willie George Hinton II.

9. No summons or amended summons was issued in the name of Willie George Hinton, Sr. or served upon Willie George Hinton, Sr., extending the Court's jurisdiction over Willie George Hinton, Sr., personally. Nothing in the record establishes any defect in service as to Willie George Hinton, Sr[.]

10. No amendment of [Mrs. Hinton's] complaint, or issue of fact raised in the answer filed by Willie George Hinton, Sr., established that [Mrs. Hinton] was married to Willie George Hinton, Sr., rather than Defendant Willie George Hinton, II. Nothing provided the Court with subject matter jurisdiction over the marriage between [Mrs. Hinton] and Willie George Hinton, Sr.

11. While the names of Willie George Hinton II and Willie George Hinton, Sr., are similar, Defendant Willie George Hinton II and Willie George Hinton, Sr., are distinct and

> separate individuals. Nothing in the record establishes that the summons or [Mrs. Hinton's] complaint contains a misnomer or misdescription as to the identity of the party intended to be sued.
>
> 12. Willie George Hinton, Sr., is not, and has never been, a party to this action entitled to notice and an opportunity to be heard.
>
> 13. Amending the identity of the Defendant from the named Defendant Willie George Hinton II to Willie George Hinton, Sr., amounts to an improper substitution or entire change of parties.
>
> 14. Movants, who are the heirs of Willie George Hinton, Sr., have no interest in this action as their ancestor, Willie George Hinton, Sr. is not, and has never been, a party to this action.

Based on these findings of fact, the trial court made the following pertinent conclusions of law:

> 3. Willie George Hinton, Sr., has never been a party to this action.
>
> 4. No substitution of a party to represent the interests of Willie George Hinton, Sr., in this action following his death is necessary or proper.
>
> 5. No alteration, amendment or modification of the prior order entered on June 9, 2015 to correct the name of the Defendant is necessary or proper.
>
> 6. No new trial is necessary or proper in that Willie George Hinton, Sr., nor his heirs or anyone purporting to represent his interests, are parties entitled to notice and an opportunity to be heard.
>
> 7. This Court's prior order, entered on June 9, 2015 upon the Court's own review of the record and consideration of the arguments of counsel, without objection from either the Plaintiff or the Defendant, was properly entered and is affirmed.

Based on these conclusions of law, the trial court ordered the following:

> 1. The Motion to Intervene, Motion to Alter or Amend Judgment, Motion for New Trial, and Motion to Substitute Parties or to Abate or Continue are denied.
>
> 2. The prior order of this Court entered June 9, 2015 is affirmed in that the divorce judgment entered May 12, 2000 is set aside.

On 11 December 2015, Movants filed a written notice of appeal.

## Analysis

Movants seek review from this Court over the trial court's 9 June and 17 November 2015 orders in their entirety. However, because Movants are not currently parties to this action, the only issue they are entitled to raise in the present appeal is whether the trial court erred in the portion of its 17 November 2015 order denying their motion to intervene.

Motions to intervene are governed by Rule 24 of the North Carolina Rules of Civil Procedure, which states, in pertinent part, as follows:

> (a) **Intervention of right.** — Upon timely application anyone shall be permitted to intervene in an action:
>
> > (1) When a statute confers an unconditional right to intervene; or
> >
> > (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) **Permissive intervention.** — Upon timely application anyone may be permitted to intervene in an action.
>
> > (1) When a statute confers a conditional right to intervene; or
> >
> > (2) When an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

N.C. Gen. Stat. § 1A-1, Rule 24 (2015).

Movants assert that the trial court erred in failing to grant their motion to intervene pursuant to Rule 24(a)(2). "[A] party is entitled to intervene pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a)(2) in the event that he or she can demonstrate (1) an interest relating to the property or transaction, (2) practical impairment of the protection of that interest, and (3) inadequate representation of the interest by existing parties." *Bailey & Assocs., Inc. v. Wilmington Bd. of Adjust.*, 202 N.C. App. 177, 185, 689 S.E.2d 576, 583 (2010). "This Court reviews a trial court's decision granting or denying a motion to intervene pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a)(2), on a *de novo* basis." *Id.*

The sole finding in the trial court's 17 November 2015 order expressly addressing Movants is finding No. 14, which states: "Movants, who are the heirs of Willie George Hinton, Sr., have no interest in this action as their ancestor, Willie George Hinton, Sr. is not, and has never been, a party to this action." Finding No. 12 reiterates the trial court's conclusion that "Willie George Hinton, Sr., is not, and has never been, a party to this action entitled to notice and an opportunity to be heard."

When a "finding includes a mixed question of fact and law . . . [it is] fully reviewable by this Court." *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 548, 356 S.E.2d 578, 586-87 (1987) (citation omitted). As explained below, we conclude that the above-quoted findings are fatally flawed because they are premised on an erroneous legal determination regarding Mr. Hinton's status as a party.

While Mrs. Hinton's complaint for divorce incorrectly listed Willie — as opposed to Mr. Hinton — as the defendant, Mr. Hinton filed an answer to the complaint thirteen days after the complaint was filed. His handwritten answer stated as follows:

State of North Carolina File No. 00CVD 177

Martin County

Name of Defendant:
Willie George Hinton, Sr.
Address:
906 Raleigh St.
City State Zip Code
Elizabeth City, N.C. 27909

To Each of The Plaintiff(s) Named Below:

Florence Bailey Hinton
906 Hunter St.
Elizabeth City, N.C. 27909

> Defendant answers complaint of Plaintiff says [sic]:
>
> That Defendan[t] admits to all of the complaints from 1 Thru [sic] 5 are true.
>
> Wherefore, the defendant answers the Plaintiff's prayers that the bonds of Matrimony heretofore existing between the parties be dissolved and the defendant be granted an absolute divorce from the Plaintiff.
>
> This the 20th day of April 2000.
>
> Willie George Hinton
> Defendant

By filing this answer, Mr. Hinton expressly became a party to the action and submitted himself to the jurisdiction of the court. *See* N.C. Gen. Stat § 1-75.7 (when a party "makes a general appearance in an action[,]" the court has personal jurisdiction over him).

Accordingly, we vacate the portion of the trial court's 17 November 2015 order denying Movants' motion to intervene and remand this matter to the trial court for reconsideration of the motion under Rule 24. *See Anderson v. Seascape at Holden Plantation, LLC*, 232 N.C. App. 3, 10, 753 S.E.2d 691, 698 (2014) ("Therefore, we reverse the trial court's order denying the POA's motion to intervene and remand for further proceedings.")

**Conclusion**

For the reasons stated above, we vacate the portion of the trial court's 17 November 2015 order denying Movants' motion to intervene and remand for further proceedings not inconsistent with this opinion.

VACATED IN PART AND REMANDED.

Judges ELMORE and Judge DIETZ concur.

DANIEL HIRSCHMAN, JASON & JOAN HICKEY, WILLIAM HLAVAC, CHRISTOPHER & AMY GAMBER, JAMES MILLER, JEFFREY C. PUGH AND JANICE M. RIVERO, PETITIONERS
v.
CHATHAM COUNTY, RESPONDENT

No. COA16-292

Filed 15 November 2016

**Jurisdiction—conditional use permit—outsider appeal—petition for writ of certiorari—failure to include applicant as respondent**

The trial court did not err by concluding that it lacked jurisdiction based on petitioners' failure to properly perfect their appeal under N.C.G.S. § 160A-393. When an applicant is granted a conditional use permit and an outsider appeals the decision through a petition for writ of certiorari but does not include the applicant as a respondent in the appeal, the superior court is without jurisdiction to review the merits.

Appeal by petitioners from Order entered 29 October 2015 by Judge Paul C. Ridgeway in Chatham County Superior Court. Heard in the Court of Appeals 21 September 2016.

*The Brough Law Firm, PLLC, by G. Nicholas Herman, for petitioners.*

*Poyner Spruill, LLP, by Richard J. Rose, for respondent Chatham County.*

*Smith Moore Leatherwood, LLP, by Karen M. Kemerait and M. Gray Styers, Jr., for respondents New Cingular Wireless PCS, LLC and American Tower, LLC.*

ELMORE, Judge.

Daniel Hirschman, Jason and Joan Hickey, William Hlavac, Christopher and Amy Gamber, James Miller, and Jeffrey C. Pugh and Janice M. Rivero (petitioners) appeal from the Chatham County Superior Court's order dismissing with prejudice their petition for writ of certiorari. After careful review, we affirm.

## I. Background

According to the petition, on 30 April 2014, American Tower, LLC and AT&T Mobility (the applicant) applied to Chatham County (respondent) for a conditional- use permit to erect and operate a monopole telecommunications tower. The Chatham County Board of Commissioners (BOC) held a quasi-judicial hearing on the matter on 16 June 2014, and it forwarded the application to the county planning board for a recommendation. On 5 August 2014, the county planning board recommended that the conditional-use permit be approved. The BOC held a meeting on 15 September 2014 in which it granted the conditional-use permit by adopting a resolution. The BOC's decision was filed with the clerk of the BOC on 6 October 2014.

Petitioners are citizens and residents of Chatham County who live "within plain view" of the proposed tower. On 31 October 2014, petitioners filed a "Petition for Review in the Nature of Certiorari," seeking review of the BOC's decision to grant the applicant a conditional-use permit. Petitioners alleged that they had standing to bring the petition because they were "owners of residences and lots in close proximity to the tower site such that the tower will be plainly visible from [p]etitioners' properties," and they "will sustain a diminution in the fair market values of their properties and an impairment of the residential integrity and character of their community."

On 10 November 2014, the Chatham County Superior Court issued a writ of certiorari. Respondent filed a response to the petition and a motion to dismiss, arguing that the petition was deficient in that petitioners failed to name the applicant as a respondent as required by N.C. Gen. Stat. § 160A-393(e). Thus, respondent claimed that the superior court lacked jurisdiction. Second, respondent argued that petitioners lacked standing because there was no evidence to establish that they would suffer special damages. On 30 April 2015, petitioners filed a "motion for entry of consent order allowing motion to intervene, or, in the alternative, for an order to include the applicant and other parties designated in the consent order [to] be added as respondents."

After a hearing on respondent's motion, the trial court entered an order concluding that it lacked subject matter jurisdiction over the cause "because the appeal was not properly perfected in accordance with N.C. Gen. Stat. § 160[A]-393(e) in that the [p]etitioners were not the applicants before the decision-making board whose decision is being appealed, and the [p]etitioners failed to name the applicants, AT&T and American Towers, as respondents in their petition." Accordingly, the

trial court granted respondent's motion to dismiss and dismissed the petition with prejudice. Petitioners appeal.

## II. Analysis

"The appellate court reviews *de novo* an order of the trial court allowing a motion to dismiss for lack of subject matter jurisdiction[.]" *Cooke v. Faulkner*, 137 N.C. App. 755, 757, 529 S.E.2d 512, 513 (2000) (citation omitted).

Petitioners argue that their failure to name the applicant as a respondent in the petition did not deprive the trial court of subject matter jurisdiction, relying exclusively on our holding in *MYC Klepper/Brandon Knolls L.L.C. v. Board of Adjustment for City of Asheville*, 238 N.C. App. 432, 436–37, 767 S.E.2d 668, 671 (2014). Respondent claims that the trial court correctly dismissed the petition because petitioners failed to comply with N.C. Gen. Stat. § 160A-393(e), which constituted a jurisdictional defect. Alternatively, pursuant to Rule 10(c)[1] of the North Carolina Rules of Appellate Procedure, respondent argues that the petition must be dismissed because petitioners lack standing.

> When deciding special use permits or conditional use permits, the board of county commissioners or planning board shall follow quasi-judicial procedures. . . . Every such decision of the board of county commissioners or planning board shall be subject to review of the superior court in the nature of certiorari consistent with G.S. 160A-388.

N.C. Gen. Stat. § 153A-340(c1) (2015). Section 160A-388(e2)(2) provides: "Every quasi-judicial decision shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-393." N.C. Gen. Stat. § 160A-388(e2)(2) (2015). Furthermore, "[a] petition for review shall be filed with the clerk of superior court by the later of 30 days after the decision is effective or after a written copy thereof is given in accordance with subdivision (1) of this subsection." *Id.*

N.C. Gen. Stat. § 160A-393, entitled "Appeals in the nature of certiorari," applies to "appeals of quasi-judicial decisions of decision-making

1. N.C. R. App. P. 10(c) (2016) provides:

> Without taking an appeal, an appellee may list proposed issues on appeal in the record on appeal based on any action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.

boards when that appeal is to superior court and in the nature of certiorari as required by this Article." N.C. Gen. Stat. § 160A-393(a) (2015); *see also* 2009 N.C. Sess. Law 2009-421 ("An act to clarify the law regarding appeals of quasi-judicial decisions made under Article 19 of Chapter 160A and Article 18 of Chapter 153A of the General Statutes."). "An appeal in the nature of certiorari shall be initiated by filing with the superior court a petition for writ of certiorari." N.C. Gen. Stat. § 160A-393(c). Relevant here, subsection (e), entitled "Respondent" provides:

> The respondent named in the petition shall be the city whose decision-making board made the decision that is being appealed, except that if the petitioner is a city that has filed a petition pursuant to subdivision (4) of subsection (d) of this section, then the respondent shall be the decision-making board. *If the petitioner is not the applicant before the decision-making board whose decision is being appealed, the petitioner shall also name that applicant as a respondent. . . .*

N.C. Gen. Stat. § 160A-393(e) (emphasis added). "Our appellate courts have consistently held that the use of the word 'shall' in a statute indicates what actions are required or mandatory." *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty.*, 233 N.C. App. 23, 28, 755 S.E.2d 75, 79, *disc. review denied*, 367 N.C. 508, 758 S.E.2d 862 (2014), and *aff'd*, 368 N.C. 360, 777 S.E.2d 733 (2015).

Here, respondent directs our attention to two unpublished opinions that have addressed this precise issue. In *Whitson v. Camden County Board of Commissioners*, COA12-1282, 2013 WL 3770664, at *1 (N.C. Ct. App. July 16, 2013), the Camden County Board of Commissioners approved Camden Plantation Properties, Inc.'s application for a conditional-use permit. Mr. Whitson, a nearby landowner, filed a petition for writ of certiorari, seeking review of the board's decision. *Id.* Pursuant to the county's motion, the superior court dismissed the petition because Mr. Whitson failed to name the applicant as a respondent in his petition, as required by statute. *Id.* On appeal, this Court observed that "[a]s the trial court concluded, '[N.C. Gen. Stat.] § 160A-393(e) is jurisdictional in nature.' " *Id.* at *2. Citing the "clear and unambiguous" language in N.C. Gen. Stat. § 160A-393(e), we concluded that the trial court properly dismissed the petition. *Id.*

In *Philadelphus Presbyterian Foundation, Inc. v. Robeson County Board of Adjustment*, COA13-777, 2014 WL 47325, at *1 (N.C. Ct. App. Jan. 7, 2014), *disc. review denied*, 367 N.C. 504, 758 S.E.2d 873 (2014),

this Court similarly affirmed a trial court's order for the same reason. The Robeson County Board of Commissioners approved Buie Lakes Plantation, LLC's application for a conditional-use permit. *Id.* The petitioners, a number of individuals and two corporations, filed a petition for writ of certiorari, seeking review of the board's decision. *Id.* The petitioners did not name the applicant, Buie Lakes, as a respondent. *Id.* The named respondents moved to dismiss the petition, which the superior court allowed because the petitioners failed to name the applicant as a respondent in the petition, as required by statute. *Id.* at *2.

On appeal, this Court acknowledged that *Whitson* was not binding, but we concluded that

> it is consistent with and compelled by our decision in *McCrann v. Village of Pinehurst*, 216 N.C. App. 291, 716 S.E.2d 667 (2011), in which the petitioner's challenge to the issuance of a conditional use permit was not filed within the thirty day period specified in N.C. Gen. Stat. § 160A-388(e2) and in which we held that this deficiency, like the failure to note an appeal in a timely manner, deprived the reviewing court of any jurisdiction to hear and determine the issues raised in the petition. . . .
>
> Although the filing of a *certiorari* petition certainly bears some resemblance to the institution of a civil action, as Petitioners implicitly assert, the analogy between an appeal and a request for *certiorari* review made in *McCrann* is clearly the correct one. In such *certiorari* proceedings, the "superior court is not a trier of fact, but assumes the posture of an appellate court." *In re Appeal of Willis*, 129 N.C. App. 499, 500, 500 S.E.2d 723, 725 (1998). . . . For that reason, we conclude that the extent to which a trial court obtains jurisdiction to address the issues raised in a *certiorari* petition should be analyzed in the same manner as the extent to which an appellate court obtains jurisdiction over an appeal from the General Court of Justice or an administrative agency.

*Philadelphus Presbyterian Found., Inc.*, 2014 WL 47325, at *3.

The *Philadelphus* Court also addressed the petitioners' argument that, based on our decision in *Mize v. Mecklenburg County*, 80 N.C. App. 279, 341 S.E.2d 767 (1986), the trial court was obligated to allow their motion to amend the petition. *Philadelphus Presbyterian Found.*,

*Inc.*, 2014 WL 47325, at *5. In *Mize*, the trial court dismissed the petitioners' "Petition in the Nature of Certiorari," filed under N.C. Gen. Stat. § 153A-345, for failing to join a necessary party. *Mize*, 80 N.C. App. at 280–81, 341 S.E.2d at 768. This Court reversed, noting that a dismissal "under Rule 12(b)(7) is proper only when the defect cannot be cured" and "under the circumstances presented, the court abused its discretion by failing to allow the petitioners to amend the petition to join the Zoning Board of Adjustment." *Id.* at 283–84, 341 S.E.2d at 769–70. The *Philadelphus* Court stated that the petitioners' reliance on *Mize* was misplaced because the *Mize* Court specifically noted the following:

> The language of [N.C. Gen. Stat. § ] 153A-345 requires only that any petition seeking review by the superior court be filed with the clerk of superior court within 30 days after the decision of the Board is filed or after a written copy has been delivered to every aggrieved party. *The petitioners complied with all the express requirements of this vague statute* by filing a petition in Mecklenburg County Superior Court within 30 days of the decision of the Board.

*Philadelphus Presbyterian Found.*, *Inc.*, 2014 WL 47325, at *5 (quoting *Mize*, 80 N.C. App. at 283, 341 S.E.2d at 769) (emphasis added).

The *Philadelphus* Court stated that "although the *Mize* petitioners failed to join a necessary party, they did comply with all of the statutorily prescribed prerequisites for the filing of a valid *certiorari* petition." *Id.*; *see Mize*, 80 N.C. App. at 281, 341 S.E.2d at 768 ("The statute[, N.C. Gen. Stat. § 153A-345,] does not set forth who is to be named as a respondent or defendant in a proceeding under its provisions."). In contrast, the *Philadelphus* petitioners "failed to comply with the additional statutory requirements for a valid certiorari petition spelled out in N.C. Gen. Stat. § 160A-393, a statutory section which was enacted over two decades after the issuance of our decision in *Mize*." *Philadelphus Presbyterian Found.*, *Inc.*, 2014 WL 47325, at *5. Accordingly, we stated: "[G]iven that the petitioners' failure to join a necessary party in *Mize* did not, unlike the failure to join a necessary party at issue here, constitute a jurisdictional defect, *Mize* provides no basis for an award of the relief which Petitioners seek in this case." *Id.*

Nonetheless, here petitioners argue that our holding in *MYC Klepper*, 238 N.C. App. at 436–37, 767 S.E.2d at 671, is "dispositive of the question presented by the instant appeal[.]" In *MYC Klepper*, the petitioner, a billboard sign owner, filed a petition for writ of certiorari, seeking

review of the City of Asheville Board of Adjustment's decision to uphold a notice of violation regarding a billboard sign it owned. *Id.* at 433–35, 767 S.E.2d at 669–71. The petitioner named the "Board of Adjustment for the City of Asheville," not the "City of Asheville," as required by N.C. Gen. Stat. § 160A-393(e) ("The respondent named in the petition shall be the city whose decision-making board made the decision that is being appealed[.]"). *Id.* at 436, 767 S.E.2d at 671. On appeal, this Court stated that the "defect" amounted to a failure to join a necessary party, "the City was on notice of this action and participated in the defense thereof[,]" and "the City's participation in the proceedings cured the defect in the petition[.]" *Id.* at 436–37, 767 S.E.2d at 671.

The facts of *MYC Klepper* are distinguishable from the current facts. In that case, the issue involved a notice of violation, not the granting of a conditional-use permit, and the petitioner was the billboard sign owner, not an interested neighbor. *Id.* at 433–35, 767 S.E.2d at 669–71. The *MYC Klepper* Court's holding did not address the statutory requirement that the applicant be named as a respondent when the petitioner is not the applicant. *See* N.C. Gen. Stat. § 160A-393(e).

We note that in *Darnell v. Town of Franklin*, 131 N.C. App. 846, 849–50, 508 S.E.2d 841, 844 (1998), a case decided before the enactment of N.C. Gen. Stat. § 160A-393, this Court held that the petitioner should have been allowed to amend her petition for writ of certiorari under Rule 15 in order to establish her status as an aggrieved party and to show that jurisdiction exists. The Court stated that "a pleading may not be amended so as to confer jurisdiction in a particular case stated; but there may be an amendment to show that the jurisdiction exists." *Id.* at 850, 508 S.E.2d at 844 (citations omitted). We also note, though, that in *Crossman v. Moore*, 341 N.C. 185, 187, 459 S.E.2d 715, 717 (1995), our Supreme Court interpreted Rule 15 and stated that it "speaks of claims and allows the relation back of claims if the original claim gives notice of the transactions or occurrences to be proved pursuant to the amended pleading. When the amendment seeks to add a party-defendant or substitute a party-defendant to the suit, the required notice cannot occur." Thus, the Court held that Rule 15 "is not authority for the relation back of a claim against a new party." *Id.* Since then, this Court "has construed the *Crossman* decision to mean that Rule 15(c) is not authority for the relation back of claims against a new party, but *may* allow for the relation back of an amendment to correct a mere misnomer." *Piland v. Hertford Cnty. Bd. of Comm'rs*, 141 N.C. App. 293, 299, 539 S.E.2d 669, 673 (2000).

While *Whitson* and *Philadelphus Presbyterian Foundation, Inc.* are unpublished and, therefore, not binding[2], we find their analyses persuasive and directly applicable here. *See Henderson v. Cnty. of Onslow*, ___ N.C. App. ___, ___, 782 S.E.2d 57, 60 (Feb. 2, 2016) (COA Nos. 14-1355 and 14-1356) (relying on and quoting *Philadelphus Presbyterian Foundation, Inc.*, 2014 WL 47325, at *6, for the proposition that "*certiorari* proceedings conducted pursuant to N.C. Gen. Stat. § 160A-393 . . . bear a much greater resemblance to appellate proceedings than to ordinary civil actions"). Recently, the *Henderson* Court stated:

> A petition for certiorari is not an action for civil redress or relief as is a suit for damages or divorce; a petition for certiorari is simply a request for the court addressed to judicially review a particular decision of some inferior tribunal or government body. . . . [A] petition for certiorari is not the beginning of an action for relief . . . .; in effect it is an appeal from a decision made by another body or tribunal. Certiorari was devised by the early common law courts as a substitute for appeal and it has been so employed in our jurisprudence since the earliest times.

*Henderson*, ___ N.C. App. at ___, 782 S.E.2d at 61 (quoting *Little v. City of Locust*, 83 N.C. App. 224, 226–27, 349 S.E.2d 627, 629 (1986)).

According to well-established law, "an appeal is not a matter of absolute right, but the appellant must comply with the statutes and rules of Court as to the time and manner of taking and perfecting his appeal." *Caudle v. Morris*, 158 N.C. 594, 595, 74 S.E. 98, 98 (1912); *see also In re Halifax Paper Co.*, 259 N.C. 589, 592, 131 S.E.2d 441, 444 (1963) ("There is no inherent or inalienable right of appeal from an inferior court to a superior court or from a superior court to the Supreme Court."); *Northfield Dev. Co. v. City of Burlington*, 165 N.C. App. 885, 887, 599 S.E.2d 921, 924 (2004) ("[A]venues of appeal are created by statute."). Moreover, "[c]ompliance with the requirements for entry of notice of appeal is jurisdictional." *State v. Oates*, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012) (citing *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197–98, 657 S.E.2d 361, 364–65 (2008)) ("The appellant's compliance with the jurisdictional rules governing the taking of an appeal is the linchpin that connects the appellate division with the trial division and confers upon the appellate court the authority to act in a

---

2. N.C. R. App. P. 30(e)(3) (2016) ("An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority.").

particular case."). Therefore, "a default precluding appellate review on the merits necessarily arises when the appealing party fails to complete all of the steps necessary to vest jurisdiction in the appellate court." *Dogwood Dev. & Mgmt. Co.*, 362 N.C. at 197, 657 S.E.2d at 364.

Here, petitioners were not the applicant before the decision-making board whose decision was appealed. Therefore, under N.C. Gen. Stat. § 160A-393(e), petitioners were required to name the applicant as a respondent, which they failed to do. As this Court has previously stated, "[t]he real adverse party in interest is the party in whose favor the Zoning Board's decision has been made." *Mize*, 80 N.C. App. at 282–83, 341 S.E.2d at 769 (noting that the zoning board was a necessary party because "the Board [was] the agency having custody of the record that [was] being reviewed"). In order to avoid the dilemmas our courts have previously faced in attempting to ascertain the required respondents in an appeal of a quasi-judicial decision, *see*, *e.g*, *id.* at 281, 341 S.E.2d at 768 ("First we address whether the Zoning Board of Adjustment is a necessary party to a petition filed pursuant to G.S. 153A-345(e)."), our General Assembly specifically listed the required respondents in N.C. Gen. Stat. § 160A-393(e). Thus, when an applicant is granted a conditional-use permit and an outsider appeals the decision through a petition for writ of certiorari but does not include the applicant as a respondent in the appeal, the superior court is without jurisdiction to review the merits. Accordingly, the trial court correctly concluded that it lacked jurisdiction because petitioners did not properly perfect their appeal in accordance with N.C. Gen. Stat. § 160A-393. We do not reach respondent's alternative argument on standing.

## III. Conclusion

The trial court did not err in dismissing the petition. We affirm.

AFFIRMED.

Judges ZACHARY and ENOCHS concur.

**IN RE GARRETT**

[250 N.C. App. 358 (2016)]

IN RE FORECLOSURE OF REAL PROPERTY UNDER DEED OF TRUST FROM IAN MAURICE GARRETT AND SUSAN GARRETT AKA SUSAN G. GARRETT, IN THE ORIGINAL AMOUNT OF $163,542.00, PAYABLE TO HOUSEHOLD REALTY CORPORATION, DATED NOVEMBER 30, 2000 AND RECORDED ON DECEMBER 7, 2000 IN BOOK 11774 AT PAGE 677, MECKLENBURG COUNTY REGISTRY

Nos. COA15-1083, 15-1118

Filed 15 November 2016

**1. Service of Process—New York address—same address on deed—used on prior occasions**

The trial court did not err by denying petitioner Household's motion to set aside the HOA Foreclosure under Rule 60(b)(4) based on alleged improper service. Given the use of the New York address on the deed and to serve Household on other occasions, service on Household in the HOA Foreclosure was not improper. Further, the Court of Appeals was not persuaded by either of Household's arguments against application of N.C.G.S. § 47F-3-116.1.

**2. Deeds—foreclosure—substitute trustee—motion to set aside —improper notice**

The trial court did not err in granting STS' motion to set aside and vacate the Household Foreclosure and substitute trustee's deed. STS was the owner of the property and was not noticed in the Household Foreclosure.

**3. Attorney Fees—vacated order—new hearing**

The Court of Appeals vacated the Fees Order and remanded the attorney fees issue to the trial court for a new hearing.

Appeal by petitioner from order filed 4 April 2015 by Judge William R. Bell in Mecklenburg County Superior Court and from order filed 15 June 2015 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Consolidated appeals heard in the Court of Appeals 29 March 2016.

*Katten Muchin Rosenman LLP, by Rebecca K. Lindahl, for appellant Household Realty Corporation.*

*Sellers, Ayers, Dortch & Lyons, P.A., by Robert C. Dortch, Jr., for appellee Wedgewood North Homeowners Association, Inc.*

*The Garis Law Firm, by Jeffrey I. Garis, for appellee Select Transportation Services LLC.*

McCULLOUGH, Judge.

Household Realty Corporation ("Household") appeals from order denying its motion to set aside the foreclosure in file number 13-SP-272 and granting Select Transportation Services LLC's ("STS") motion to set aside the foreclosure in file number 13 SP 3311. Household also appeals from a separate order awarding STS attorney's fees. For the following reasons, we affirm in part and vacate and remand in part.

## I. Background

As evidence of a debt owed by Ian and Susan Garrett (the "Garretts") to Household, on 30 November 2000, the Garretts executed a note in favor of Household secured by a deed of trust for property located at 8506 Piccone Brook Lane in Charlotte, North Carolina (the "property"), a single family residence in a community subject to the North Carolina Planned Community Act (the "PCA"), N.C. Gen. Stat. § 47F-1-101 *et seq.* The deed of trust was recorded in the Mecklenburg County Register of Deeds on 7 December 2000.

Due to the Garretts' default in the payment of assessments and other charges levied by Wedgewood North Homeowners Association, Inc. ("HOA"), on 29 June 2010, HOA filed and recorded a "Claim of Lien" on the property. HOA then initiated foreclosure proceedings, during which HOA's agent, JMA Holdings, LLC ("JMA"), purchased the property at public auction on 19 October 2010 for $2,486.25. An "Association Lien Foreclosure Deed" conveying the property to JMA was made on 11 November 2010 and recorded on 23 December 2010. By a non-warranty deed recorded on 27 July 2011, JMA conveyed the property to HOA. Upon the payment of the past due assessments, HOA later conveyed the property to Household by non-warranty deed recorded on 29 September 2011. The non-warranty deed conveying the property to Household designated Household as the grantee as follows:

Household Realty Corporation
c/o HSBC Bank USA
2929 Walden Avenue
Erie, NY 14043

Due to Household's default in the payment of assessments and other charges levied by HOA, on 3 January 2013, HOA filed and recorded a "Claim of Lien" on the property and initiated foreclosure proceedings in file number 13 SP 272 (the "HOA Foreclosure"). "Notice of Hearing Prior to Foreclosure of Claim of Lien" in the HOA Foreclosure was filed on

9 January 2013. Following a hearing on 22 February 2013, the Assistant Clerk of Superior Court issued an "Order Permitting Foreclosure of Claim of Lien" in the HOA Foreclosure. The property was purchased at public auction by Universal Funding, Inc. ("Universal"), for $2,400.00 on 28 March 2013. An "Association Lien Foreclosure Deed" conveying the property to Universal was made on 12 April 2013 and recorded on 31 May 2013. By non-warranty deed made on 3 June 2013 and recorded on 12 June 2013, Universal conveyed the property to STS. Final affidavits and reports regarding the HOA Foreclosure were filed on 6 June 2013.

However, before Universal conveyed the property to STS, Household initiated separate foreclosure proceedings in file number 13 SP 3311 on the deed of trust executed by the Garretts (the "Household Foreclosure"). A "Notice of Hearing" in the Household Foreclosure was filed on 8 May 2013 and an "Amended Notice of Hearing" was filed on 31 May 2013. Following a hearing, on 21 August 2013, the Assistant Clerk of Superior Court issued an "Order to Allow Foreclosure Sale" in the Household Foreclosure. STS was never provided notice of the hearing. Trustee Services of Carolina, LLC, conducted a sale of the property at public auction on 18 September 2013 in the Household Foreclosure. Household was the highest bidder, purchasing the property for $160,421.18. A notice of appeal of the order of foreclosure in the Household Foreclosure was filed 20 September 2013 and bond on appeal was set at $2,000.00. The bond was posted that same day and the Household Foreclosure was stayed pending resolution of the appeal. It is unclear who appealed the order of foreclosure because the signature on the notice of appeal is illegible. However, in a motion to dismiss the appeal as untimely filed by Household on 8 October 2013, Household indicates the Garretts filed the appeal. Household's motion to dismiss the appeal came on for hearing and was granted on 12 November 2013. By "Substitute Trustee's Deed" made on 5 March 2014 and recorded on 7 March 2014, Household was conveyed title to the property. Final affidavits and reports regarding the Household Foreclosure were filed on 7 March 2014.

Months later, on 20 October 2014, STS filed a Rule 60(b) motion to set aside and vacate the Household Foreclosure and the substitute trustee's deed conveying the property to Household. STS asserted the doctrine of merger and lack of proper notice as grounds to set aside the Household Foreclosure. STS also requested attorney's fees in its motion.

On 16 December 2014, Household filed its own Rule 60(b) motion to set aside the HOA Foreclosure, a response to STS's motion to set aside and vacate the Household Foreclosure and substitute trustee's deed, and a motion to consolidate the Rule 60(b) motions for hearing. In

their response to STS's motion, Household claimed it first learned of the HOA Foreclosure when it was served with STS's motion to set aside the Household Foreclosure.

The motions came on for hearing in Mecklenburg County Superior Court before the Honorable William R. Bell on 28 January 2015. On 4 April 2015, the trial court entered an order granting STS's motion to set aside and vacate the Household Foreclosure and substitute trustee's deed in file number 13 SP 3311 and denying Household's motion to set aside the HOA Foreclosure in file number 13 SP 272 (the "Rule 60(b) Order"). The order left the issue of reasonable legal expenses and attorney's fees to be determined at a later hearing. Household filed notice of appeal from the Rule 60(b) Order on 1 May 2015.

Notice of a hearing on STS's motion for attorney's fees was filed 26 March 2015, and the matter came on for hearing as scheduled in Mecklenburg County Superior Court before the Honorable Forrest D. Bridges on 18 April 2015. On 15 June 2015, the trial court entered an order awarding STS attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5 and N.C. Gen. Stat. § 1A-1, Rule 11(a) (the "Fees Order"). Household filed notice of appeal from the Fees Order on 2 July 2015.

Household's appeals from the Rule 60(b) Order and the Fees Order were consolidated for appeal by order of this Court on 1 March 2016.

## II. Discussion

Household's appeal from the Rule 60(b) order in COA15-1083 concerns the trial court's ruling on Rule 60(b) motions for relief from judgment or order pursuant to subsections (3), (4), and (6) of that rule. Those subsections of Rule 60(b) provide for relief from judgment or order 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 the following reasons:
>
> . . . .
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) The judgment is void;
>
> . . . .

(6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2015). "[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). "A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

Household challenges both the denial of its motion to set aside the HOA Foreclosure and the grant of STS's motion to set aside and vacate the Household Foreclosure and substitute trustee's deed.

Household's appeal from the Fees Order in COA15-1118 concerns the trial court's award of fees to STS. We address the Fees Order after the Rule 60(b) Order.

Denial of Household's Motion to Set Aside the HOA Foreclosure

**[1]** We first address the trial court's denial of Household's motion to set aside the HOA Foreclosure. Household contends the trial court erred in denying its motion to set aside the HOA Foreclosure under Rule 60(b)(4) because the HOA Foreclosure is void for lack of proper service. *See Van Engen v. Que Scientific, Inc.*, 151 N.C. App. 683, 689, 567 S.E.2d 179, 184 (2002) ("A judgment or order rendered without an essential element such as jurisdiction or proper service of process is void." (alterations omitted)).

Under the PCA, "[an] association . . . may foreclose a claim of lien in like manner as a mortgage or deed of trust on real estate under power of sale, as provided in Article 2A of Chapter 45 of the General Statutes, if the assessment remains unpaid for 90 days or more." N.C. Gen. Stat. § 47F-3-116(f) (2015). Article 21 of Chapter 45 of the General Statutes provides, in pertinent part, as follows:

> After the notice of hearing is filed, the notice of hearing shall be served upon each party entitled to notice under this section. The notice shall specify a time and place for the hearing before the clerk of court and shall be served not less than 10 days prior to the date of such hearing. The notice shall be served and proof of service shall be made in any manner provided by the Rules of Civil Procedure for service of summons, including service by registered mail or certified mail, return receipt requested. . . .

N.C. Gen. Stat. § 45-21.16(a) (2015). Under the Rules of Civil Procedure, service upon a domestic or foreign corporation may be accomplished by the following:

> a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office.
>
> b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.
>
> c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served as specified in paragraphs a and b.
>
> d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the officer, director, or agent to be served as specified in paragraphs a. and b., delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

N.C. Gen. Stat. § 1A-1, Rule 4(j)(6) (2015).

In the HOA Foreclosure, the "Notice of Hearing Prior To Foreclosure of Claim of Lien" filed on 9 January 2013 indicated it was to Household "by serving its Officer, Director, or Managing Agent" at both the property, "8506 Piccone Brook Lane, Charlotte, NC 28216," and "c/o HSBC Bank USA, 2929 Walden Avenue, Erie, NY 14043." On 22 February 2013, counsel for HOA filed an affidavit showing attempted service on Household at the two addresses indicated on the notice. HOA's counsel further indicated in the affidavit that reasonable attempts to ascertain Household's current address were made and the addresses used were believed to be the last known addresses for Household. Return receipts attached to the affidavit showed that the notice mailed to the property was returned marked "vacant" and the notice mailed to the New York address was received on 12 January 2013. Following a hearing on 22 February 2013, the Assistant Clerk of Superior Court issued an "Order

Permitting Foreclosure of Claim of Lien" in the HOA Foreclosure. In that foreclosure order, the Assistant Clerk found that "[n]otice of this [h]earing has been served on the record owners of real estate and to all persons against whom the [HOA] intends to assert liability for the debt as required [by] Chapter 45 of the North Carolina General Statutes and Rule 4 of the North Carolina Rules of Civil Procedure."

Thereafter, upon review of Household's Rule 60(b) motion and arguments, the trial court found as follows regarding service in the HOA Foreclosure:

> 9. Notice of the [HOA Foreclosure] resulting in the deed to Universal was mailed to Household as follows:
>
> Household Realty Corporation
> by serving its Officer, Director, or Managing Agent
> c/o HSBC Bank USA
> 2929 Walden Avenue
> Erie, NY 14043
>
> 10. At the time of the [HOA Foreclosure], Household maintained a registered agent for service of process in North Carolina and a principal office in Mettawa, Illinois.

Household recognizes the trial court's findings regarding service and does not dispute those findings, but instead contends the trial court erred in failing to issue a conclusion that service was proper. Household further contends service was not proper under Rule 4(j)(6) and, therefore, the HOA Foreclosure is void. Household specifically asserts that the New York address to which service was made was HSBC Bank USA's records department and not the office of a Household officer, director, or managing agent. Household also points out that it had a registered agent in North Carolina at the time of the HOA Foreclosure.

While Household may have had a registered agent in North Carolina that could have been served, that does not mean service was not proper to an officer, director, or managing agent, c/o HSBC Bank USA, to the New York address. The affidavit filed by HOA's counsel describes the attempts made to locate Household. Ultimately, HOA's counsel settled on service at the address of the property and the New York address. Upon review of the record, it is not clear that service to the New York address was not proper service upon an "officer, director, or managing agent" given that HOA was instructed to send the deed conveying the property to Household to the New York address and the New York address was used to provide notice to Household on other occasions.

Household acknowledges that it once asked HOA to send a copy of a recorded deed to the New York address; but Household contends that request did not empower HOA to serve process to the New York address. In support of its argument, Household cites *Fulton v. Mickle*, 134 N.C. App. 620, 518 S.E.2d 518 (1999), for the proposition that service upon a claims examiner with whom the plaintiff had communicated about the case was not proper service on the insurance company under Rule 4(j)(6). The present case, however, is easily distinguishable from *Fulton*. In *Fulton*, this Court held that the service was defective in two respects: "First, the process was not sent certified or registered mail, return receipt requested, and second, the process was not addressed to an officer, director, or agent authorized to receive service of process." *Id.* at 624, 518 S.E.2d at 521. Unlike in *Fulton*, service in the present case was by certified mail, return receipt requested, and addressed to "Household Realty Corporation by serving its Officer, Director, or Managing Agent." The return receipt was signed as received on 12 January 2013. Thus, the decisive factors in *Fulton* are not present in this case. Moreover, besides the acknowledged communications directing the deed to be sent to the New York address, the deed recorded on 29 September 2011 conveying the property from HOA to Household designated Household as the grantee with the New York address as follows:

Household Realty Corporation
c/o HSBC Bank USA
2929 Walden Avenue
Erie, NY 14043.

This is also the same New York address where the substitute trustee in the Household Foreclosure served Household, as indicated in the substitute trustee's affidavit of service. The return receipts in both the HOA Foreclosure and the Household Foreclosure appear to be signed as received by the same individual at the New York address.

Given the use of the New York address on the deed and to serve Household on other occasions, service on Household in the HOA Foreclosure was not improper. Thus, the trial court did not err in denying Household's motion to set aside the HOA Foreclosure.

Additionally, we note that it appears Household's motion is barred by a PCA provision validating certain foreclosure proceedings. That provision provides as follows:

> [A]ll nonjudicial foreclosure proceedings commenced by an association before October 1, 2013, and all sales and transfers of real property as part of those proceedings

> pursuant to the provisions of this Chapter or provisions contained in the declaration of the planned community, are declared to be valid, unless an action to set aside the foreclosure is commenced on or before October 1, 2013, or within one year after the date of the sale, whichever occurs last.

N.C. Gen. Stat. § 47F-3-116.1 (2015).

In the HOA Foreclosure, HOA filed and recorded a claim of lien on 3 January 2013 and then filed notice of foreclosure on 9 January 2013. The property was sold at public auction on 28 March 2013 and the deed conveying the property to Universal was made 12 April 2013 and recorded 31 May 2013. Final affidavits and reports concerning the HOA Foreclosure were filed 6 June 2013. Household did not file its motion to set aside the HOA Foreclosure until 16 December 2014.

The language of the statute is unambiguous and serves to validate the HOA Foreclosure "one year after the date of sale." As a result, Household's motion to set aside the HOA Foreclosure was untimely.

Household expressly acknowledges that more than one year elapsed between the HOA Foreclosure and the filing of its motion to set aside. Household, however, contends that the legislative history of the statute indicates the statute was not intended to bar a motion to set aside a foreclosure sale for lack of notice. Household also relies on *Howell v. Treece*, 70 N.C. App. 322, 319 S.E.2d 301 (1984), in which we held the one-year statute of limitations on motions to reopen or set aside judgments in tax foreclosure actions did not bar the plaintiff's subsequent action where the plaintiff did not receive notice of the foreclosure because a lapse of time could not satisfy the demands of due process. *Id.* at 326-27, 319 S.E.2d 303-304. Having already determined notice was proper, we are not persuaded by either of Household's arguments against application of N.C. Gen. Stat. § 47F-3-116.1. The trial court did not err in denying Household's motion to set aside the HOA Foreclosure.

Grant of STS's Motion to Set Aside the Household Foreclosure

**[2]** We next address the trial court's grant of STS's motion to set aside and vacate the Household Foreclosure and substitute trustee's deed. Household contends "STS's motion was granted under Rule 60(b)(6) because of the doctrine of merger[]" and, therefore, STS cannot argue service was improper in the Household Foreclosure. Household then asserts the trial court's denial of STS's motion based on the doctrine of merger is erroneous because STS did not have standing to challenge the

Household Foreclosure and the doctrine of merger is inapplicable in the present case. Household's arguments, in part, are based on its overruled assertion that the HOA Foreclosure is void.

While the trial court did address merger in its conclusions, noting that "merger extinguished Household's right to foreclose against any future owner of the [p]roperty[,]" it does not appear that that was the sole basis of the trial court's grant of STS's motion. In the order the trial court issued the following findings:

> 14. Universal acquired the Property by an Association Lien Foreclosure Deed which was recorded with the Mecklenburg County Registry on May 31, 2013.
>
> 15. STS acquired the Property from Universal through a Non-Warranty Deed which was recorded with the Mecklenburg County Registry on June 3, 2013.
>
> 16. Household failed to notice either of the subsequent owners, Universal or STS regarding the Foreclosure proceeding that they had filed on August 21, 2013 (the "Household Foreclosure").

The trial court then issued the following conclusions:

> 3. The [m]ovant, STS, had standing to file its motion on the grounds that it was the current owner of the [p]roperty at the time of the Household Foreclosure and is still the current owner.
>
> . . . .
>
> 5. As the Garretts were not the record owners of the [p]roperty at the time of the Household Foreclosure, the Household Foreclosure was invalid and void and therefore, should be set aside and vacated.

Based on these findings and conclusions, we overrule Household's argument that the trial court erred in granting STS's motion to set aside and vacate the Household Foreclosure and substitute trustee's deed and we do not address the merger portion of the trial court's order. Having upheld the trial court's denial of Household's motion to set aside the HOA Foreclosure, STS was the owner of the property and was not noticed in the Household Foreclosure. Therefore, the above conclusions of the trial court are correct and the trial court did not err in granting STS' motion to set aside and vacate the Household Foreclosure and substitute trustee's deed.

The trial court's 4 April 2015 order denying Household's motion and granting STS's motion is affirmed.

Attorney's Fees

**[3]** Concerning the trial court's award of attorney's fees to STS, Household contends the trial court erred in awarding fees because there was not proper notice of the bases for fees and because there was not a complete absence of justiciable issues. Our review of the matter is based solely on the record before this Court.

The record shows that STS first asserted its request for attorney's fees in its Rule 60(b) motion to set aside and vacate the Household Foreclosure and substitute trustee's deed. In the motion, STS simply requested in its prayer for relief that it "be granted all reasonable legal expenses and attorney's fees from 'Household[.]' " As indicated above, the trial court reserved the issue of attorney's fees for a subsequent hearing when it issued the Rule 60(b) Order. Thereafter, STS gave notice of a hearing that provided only that "the Presiding Judge will hear the claim of relief of the Plaintiff as set forth in the Motion, a copy of which has been served upon you along with this Notice of Hearing." Following a hearing on 28 April 2015, the trial court entered an order awarding attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5 and N.C. Gen. Stat. § 1A-1, Rule 11(a).

Household now argues STS failed to assert the bases of the request for attorney's fees in advance of the hearing as required by N.C. Gen. Stat. § 1A-1, Rule 7(b)(1), which provides as follows:

> An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) (2015) (emphasis added). Household contends STS never narrowed the possible bases for its request for attorney's fees and, therefore, it was not prepared to defend an assertion of Rule 11 sanctions. Furthermore, Household contends STS never requested attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5, which provides in pertinent part as follows:

> In any civil action, special proceeding, or estate or trust proceeding, 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).

In response to Household's arguments, STS contends the bases of its fee's request was made known during the hearing on attorney's fees.

Without addressing the merits of STS's arguments, we vacate the Fees Order and remand the attorney's fees issue to the trial court for a new hearing. The record before this Court, which is devoid of the 28 April 2015 hearing transcript, is unclear when and which bases for attorney's fees were asserted by STS. Additionally, the Fees Order is not entirely clear. The trial court found that "STS raised four statutory bases for an award of attorneys' fees in the instant motion[.]" Yet, there is no such motion in the record before this Court. Furthermore, in the same finding citing "four statutory bases," the trial court lists only three bases. Those bases listed do not include N.C. Gen. Stat. § 6-21.5, one of the bases on which the trial court ultimately determined fees should be awarded. Where the record is not clear, we will not surmise what happened below or what the trial court intended in its order.

## III. Conclusion

For the reasons discussed we affirm the trial court's denial of Household's Rule 60(b) motion and affirm the grant of STS's Rule 60(b) motion. We vacate the Fees Order and remand for a new hearing.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judges BRYANT and STEPHENS concur.

[250 N.C. App. 370 (2016)]

IN THE MATTER OF J.S., D.S., AND B.S.

No. COA16-582

Filed 15 November 2016

**Child Abuse, Dependency, and Neglect—child neglect—permanency planning order—jurisdiction—mootness**

Respondent mother's challenge in a child neglect case to a permanency planning order on the basis of its failure to comply with N.C.G.S. § 7B-1000 lacked merit. Further, the trial court's entry of both an order ending the jurisdiction of juvenile court and of a civil custody order rendered moot the merits of a permanency planning order.

Appeal by respondent-mother from order entered 8 April 2016 by Judge Monica M. Bousman in Wake County District Court. Heard in the Court of Appeals 20 October 2016.

*Ellis & Winters, LLP, by Lenor Marquis Segal, for Guardian ad Litem-appellee.*

*Leslie Rawls for respondent-appellant.*

ZACHARY, Judge.

Respondent-mother L.M. and respondent-father B.S. ("father") are the parents of three sons, J.S., D.S., and B.S.[1] Respondent-mother is also the mother of D.M., whose custody is not at issue in this appeal.[2] Respondent-mother appeals from the entry of a permanency planning order that granted father legal and physical custody of the children, with respondent-mother to have visitation. On appeal, respondent-mother argues that in entering its permanency planning order, the trial court failed to comply with the requirements of N.C. Gen. Stat. § 7B-1000(a) (2015). For the reasons that follow, we conclude that respondent-mother's arguments lack merit and that she is not entitled to relief.

1. To protect their privacy, we refer to the minor children by their initials.

2. Because D.M.'s custody is not the subject of this appeal, references in this opinion to "the children" will refer to J.S., D.S., and B.S., unless otherwise specified.

## I. Factual and Procedural History

In 2009, respondent-mother gave birth to a daughter, D.M., who has a different father than respondent-mother's other children. In 2011, twin boys were born to respondent-mother and father, and in 2012 the couple had another son. In 2013, the Wake County Department of Human Services (DHS) became involved with the family and on 14 January 2014, DHS filed petitions alleging that all four of respondent-mother's children were neglected. DHS obtained nonsecure custody of the children on 7 February 2014. On 26 February 2014, the trial court entered an order adjudicating the children to be neglected. The parents separated and a dispositional order was entered on 7 April 2014, continuing the children's legal custody with DHS and their physical placement with respondent-mother. Permanency planning orders were entered in 2014 and 2015, which provided that the permanent plan for the children was to be reunited with one of their parents.

In February 2015, DHS changed the physical placement of the children from respondent-mother to father, who was living with his parents. Between February 2015 and April 2016, the children lived with their father and paternal grandparents, but visited overnight with respondent-mother several days a week. On 8 April 2016, the trial court entered three orders in this case: a permanency planning order, an order transferring jurisdiction over the case from juvenile court to civil court, and a civil custody order. Regarding the transfer from juvenile to civil court, we note that:

> Although both juvenile proceedings and custody proceedings under Chapter 50 are before the District Court division, jurisdiction is conferred and exercised under separate statutes for the two types of actions. For that reason, we will refer to the District Court in this opinion as either the "juvenile court" or the "civil court" to avoid confusion. The "juvenile court" is the District Court exercising its exclusive, original jurisdiction in a matter pursuant to N.C. Gen. Stat. § 7B-200(a); the "civil court" is the District Court exercising its child custody jurisdiction pursuant to N.C. Gen. Stat. § 50-13.1, *et seq.*

*Sherrick v. Sherrick*, 209 N.C. App. 166, 169, 704 S.E.2d 314, 317 (2011). In its 8 April 2016 orders, discussed in detail below, the trial court (1) terminated the jurisdiction of juvenile court over this case and transferred jurisdiction to civil court for entry of a civil custody order; (2) entered a civil custody order awarding father the legal and primary physical

custody of the children and granting respondent-mother visitation privileges; and (3) entered a permanency planning order functionally identical to the civil custody order. On 12 April 2016, respondent-mother entered a notice of appeal from the permanency planning order. Respondent-mother did not appeal the civil custody order or the order transferring jurisdiction pursuant to N.C. Gen. Stat. § 7B-911.

## II. Standard of Review

Our review of a permanency planning order entered pursuant to N.C. Gen. Stat. § 7B-906.1 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 re J.H.*, __ N.C. App. __, __, 780 S.E.2d 228, 238 (2015) (internal quotations omitted). Factual findings that are not challenged on appeal 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). "In choosing an appropriate permanent plan under N.C. Gen. Stat. § 7B-906.1 [(2015)], the juvenile's best interests are paramount. We review a trial court's determination as to the best interest of the child for an abuse of discretion." *J.H.*, __ N.C. App. at __, 780 S.E.2d at 238 (2015) (internal quotation omitted).

## III. Discussion

On appeal, respondent-mother acknowledges the standard of review of a permanency planning order. However, in her appellate brief, respondent-mother does not challenge the evidentiary support for any specific finding of fact or argue that the trial court's conclusions of law are not supported by its findings of fact. Nor does respondent-mother argue that it is not in the best interest of the children for their legal and primary physical custody to be with their father, or that the trial court failed to follow the requirements of N.C. Gen. Stat. § 7B-906.1. Although we could affirm the trial court's order on the basis of respondent-mother's failure to make a viable argument challenging the permanency planning order, because of the importance of a child custody order, we will review respondent-mother's appellate arguments.

On appeal, respondent-mother focuses solely upon the fact that the permanency planning order changed the visitation schedule set out in the previous permanency planning order, reducing respondent-mother's visitation with the children. Respondent-mother argues that

the permanency planning order failed to comply with N.C. Gen. Stat. § 7B-1000(a) (2015), which provides in relevant part that:

> 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.

The plain language of § 7B-1000(a) states that it is applicable to an order entered after a review hearing at which the trial court considers whether to modify or vacate a previously entered order "in light of changes in circumstances or the needs of the juvenile." Respondent-mother devotes most of her appellate brief to an argument that the trial court erred by failing to make findings of fact demonstrating that there was a change in circumstances between the entry of the prior permanency planning order and the order from which respondent-mother appealed. The premise of respondent-mother's argument is that entry of a permanency planning order is governed by N.C. Gen. Stat. § 7B-1000. However, the permanency planning order states, appropriately, that it is entered pursuant to N.C. Gen. Stat. § 7B-906.1, and respondent-mother fails to articulate any legal basis for applying N.C. Gen. Stat. § 7B-1000 to a permanency planning order that was entered under N.C. Gen. Stat. § 7B-906.1. We conclude that entry of a permanency planning order is governed by N.C. Gen. Stat. § 7B-906.1 and not by N.C. Gen. Stat. § 7B-1000.

Moreover, respondent-mother fails to acknowledge or discuss the implications of the fact that she appealed *only* from the permanency planning order, and did not appeal the order transferring jurisdiction from juvenile court to civil court, or the civil custody order. In the 8 April 2016 order that was entered pursuant to N.C. Gen. Stat. § 7B-911 (2015), the trial court stated in relevant part:

> 2. That this Court has previously determined that there is no longer a need for this file to remain open, [as DHS] is no longer actively involved in this case and the jurisdiction of this Court should terminate.
>
> 3. That the Juveniles' status and the issues in this case are in the nature of a private custody agreement or dispute and there is not a need for continued State intervention on behalf of the juvenile[s] through a Juvenile Court proceeding.
>
> That the Court is awarding custody to a parent.

> Wherefore, the jurisdiction of this Court is hereby terminated and the legal status of the juvenile[s] and the custodial rights of the parties shall be governed by a civil custody order entered pursuant to [N.C. Gen. Stat. §] 7B-911 as follows:
>
> 1. That a civil Order shall be entered in a new Civil Domestic file and the Clerk is hereby directed to treat said Order as the initiation of a civil action for custody and to open an appropriate file. . . .

On 8 April 2016, the trial court also entered the civil custody order referenced in its N.C. Gen. Stat. § 7B-911 order. In its custody order, the trial court concluded that it was in the best interest of the children for father to have their sole legal custody and primary physical custody, and for respondent-mother to have visitation privileges. The permanency planning order entered by the trial court the same day, from which respondent-mother has appealed, incorporates the civil custody order and makes the same determinations regarding custody of the children, although the civil custody order includes additional details regarding the parties' future interactions and the visitation schedule.

Respondent-mother does not argue that the permanency planning order affected or invalidated the civil custody order. Respondent-mother has not appealed from the civil custody order or from the order entered pursuant to N.C. Gen. Stat. § 7B-911, and does not argue that the trial court erred in these orders. As a result, even if this Court were to conclude that the trial court had erred in its permanency planning order, the civil custody order would remain in effect, mooting the effect of respondent-mother's challenge to the permanency planning order. Respondent-mother does not argue that the permanency planning order might carry collateral consequences such that, notwithstanding her failure to challenge the custody order, the issue of the propriety of the permanency planning order is not moot.

We conclude that respondent-mother's challenge to the permanency planning order on the basis of its failure to comply with N.C. Gen. Stat. § 7B-1000 lacks merit, and that the trial court's entry of both an order ending the jurisdiction of juvenile court and of a civil custody order renders moot the merits of the permanency planning order. Accordingly, the trial court's order is

AFFIRMED.

Judges STROUD and McCULLOUGH concur.

IN THE MATTER OF UNWANA EYO PATRON, Petitioner

No. COA16-322

Filed 15 November 2016

**1. Jurisdiction—subject matter jurisdiction—child abuse—age of child at time of abuse**

The trial court had jurisdiction in a child abuse case to hear appellant stepmother's petition for judicial review of the Department of Social Services' administrative decision to place appellant's name on the Responsible Individuals List. Although the child was 18 years old at the time of the hearing, he was under the age of 18 at the time appellant struck him.

**2. Child Abuse, Dependency, and Neglect—child abuse—motion to stay proceedings—Responsible Individuals List—pending criminal charge arising out of same occurrence**

The trial court did not abuse its discretion in a child abuse case by failing to grant appellant stepmother's motion to stay the proceedings regarding the Department of Social Services' administrative decision to place appellant's name on the Responsible Individuals List.. Prior resolution of the pending criminal charge of felonious assault arising out of the same transaction or occurrence as the juvenile petition was not required. Further, the trial court was not required to make findings of fact or conclusions of law.

**3. Child Abuse, Dependency, and Neglect—child abuse—Responsible Individuals List—sufficiency of findings**

The trial court did not err in a child abuse case by affirming the Department of Social Services' administrative decision to place appellant stepmother's name on the Responsible Individuals List. The findings of fact were supported by competent evidence, and the conclusions of law were supported by those findings.

Appeal by petitioner from order entered 9 November 2015 by Judge Scott C. Etheridge in Randolph County District Court. Heard in the Court of Appeals 19 October 2016.

*Woodruff Law Firm, PA, by Jessica S. Bullock, for petitioner-appellant.*

*Randolph County Staff Attorney Erica Glass, for appellee Randolph County Department of Social Services.*

ENOCHS, Judge.

Randolph County Department of Social Services ("RCDSS") began a child protective services investigation regarding the minor child AJP[1] on 26 January 2015 due to a report alleging that Petitioner Appellant Unwana Eyo Patron ("Appellant") had physically abused her step-son AJP by striking him in the back of the head with a coffee mug. After substantiating the allegations of abuse, RCDSS made the administrative decision to place Appellant's name on the Responsible Individuals List (RIL). Appellant was granted judicial review of this decision, and the trial court held a hearing and ultimately ordered Appellant's name to be added to the RIL. Because the trial court made findings of fact supported by competent evidence, and from these made proper conclusions of law, we affirm this order.

Factual Background

On 26 January 2015, AJP woke and prepared to go to school. He needed a document signed by a parent and so he approached Appellant in their kitchen for her signature. Appellant told AJP to get out of the house because he was wearing his shoes inside. AJP returned to his bedroom, removed his shoes, and then went back to the kitchen to ask again for Appellant's signature. When he returned to the kitchen, he picked up a coffee mug filled with pens with which Appellant could sign AJP's document. Appellant snatched the mug from AJP and told him "I thought I said get out." Because AJP was upset about the way Appellant was treating him, he called her "selfish" and turned to exit the kitchen. Appellant then struck AJP in the back of the head with the coffee mug.

After being stuck, AJP touched his head and saw that he was bleeding. Appellant tried to apologize, but AJP "told her not to touch [him][.]" Appellant responded, "Well, then don't get blood on my floor[.]" AJP went to the bathroom to clean himself up but felt dizzy and lightheaded. He told his father what had happened and that he did not feel well, and his father took him to High Point Regional Hospital. At the hospital, AJP received four staples to close the wound. While at the hospital, AJP spoke with a social worker and a police officer and told them what had occurred.

At the time RCDSS began their investigation, AJP was 17 years old and resided in the home with his biological father, who was married

1. The initials "AJP" have been used throughout to protect the identity of the juvenile pursuant to Rule 3.1(b) of the North Carolina Rules of Appellate Procedure.

to Appellant, Appellant, and their three other children. Following an investigation of the incident with AJP, RCDSS substantiated the allegations of abuse and notified Appellant on 11 March 2015 that her name was to be placed on the RIL pursuant to N.C. Gen. Stat. § 7B-311(b) (2015). Appellant requested judicial review of RCDSS's decision to add her name to the RIL on 23 March 2015 by filing a Petition for Judicial Review: Responsible Individuals List. A hearing was held before the Honorable Scott C. Etheridge on 19 October 2015 in Randolph County District Court. Following the hearing, the trial court entered an order on 9 November 2015 placing Appellant's name on the RIL. It is from this order that Appellant timely appeals.

## Analysis

### A. Subject Matter Jurisdiction

**[1]** Jurisdiction is "[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." *Black's Law Dictionary* 929 (9th ed. 2009) (defining "judicial jurisdiction"). Subject matter jurisdiction, specifically, is " '[j]urisdiction over the nature of the case and the type of relief sought[.]' " *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (quoting *Black's Law Dictionary* 857 (7th ed. 1999). "[W]hen there is a want of jurisdiction by the court over the subject matter . . .," the judgment is void. *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956). "In reviewing a question of subject matter jurisdiction, our standard of review is *de novo*." *In re J.A.P. & I.M.P.*, 189 N.C. App. 683, 685, 659 S.E.2d 14, 16 (2008).

In the case *sub judice*, jurisdiction was granted to the district court by statute. Our General Assembly, "within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State" by statute. *Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941). The RIL and petitions for judicial review of decisions regarding who is added to the list exist pursuant to statute and are governed by Chapter 7B of the North Carolina General Statutes (the Juvenile Code). Jurisdiction over the RIL is also created by this governing statute. *See* N.C. Gen. Stat. §§ 7B-200, 7B-201, and 7B-311 (2015).

Article 2 of the Juvenile Code states in relevant part that "the [district] court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent. . . . The court also has exclusive original jurisdiction of . . . [p]etitions for judicial review of a director's determination under Article 3A of this Chapter," which specifically governs the RIL. N.C. Gen. Stat. § 7B-200(a)(9).

Article 3A further defines the district court's jurisdiction in petitions for judicial review of these determinations. "[U]pon the filing of a petition for judicial review by an individual identified by a director as a responsible individual, the district court of the county in which the abuse or neglect report arose may review a director's determination of abuse or serious neglect *at any time* if the review serves the interests of justice or for extraordinary circumstances." N.C. Gen. Stat. § 7B-323(e) (2015) (emphasis added).

Appellant has argued that once AJP turned 18 years of age, the trial court's jurisdiction ended pursuant to N.C. Gen. Stat. § 7B-201(a), which states that jurisdiction shall continue either "until terminated by order of the court or until the juvenile reaches the age of 18 years . . . ." AJP was 18 years of age at the time of the hearing, and so Appellant argues that jurisdiction had terminated. However, whether AJP was 18 at the time of the hearing on the petition for judicial review is not relevant to our inquiry into the trial court's jurisdiction.

If the victim of abuse or serious neglect is a juvenile at the time of the incident that initiated a department of social services' "investigative assessment response that results in a determination of abuse or serious neglect and the identification of a responsible individual," then "the director shall personally deliver written notice of the determination to the identified individual." N.C. Gen. Stat. § 7B-320(a) (2015). For judicial review of this determination, the relevant inquiry is whether AJP was under the age of 18 at the time Appellant struck him.

During the hearing addressing Appellant's petition, Ashley Coddle, a registered nurse in the High Point Regional Hospital Emergency Room, testified that she had cared for AJP on 26 January 2015. It appears from the transcript of her testimony that AJP's medical records were allowed into evidence by stipulation. These medical records, introduced as RCDSS's Exhibit 2, contain numerous instances where AJP's birthday is shown.[2] Appellant has not argued that this birthdate was incorrect. Knowing AJP's birthdate, and the date of the incident, it is clear from this record that AJP was 17 years old, a minor, at the relevant time.

Because AJP was 17 years old at the time Appellant struck him, her name was properly added to the RIL. The addition of her name to this list could be reviewed by the district court "at any time." Thereby, the trial

2. To protect the identity of the juvenile pursuant to N.C.R. App. P. 3.1(b), AJP's birthdate is withheld.

court had jurisdiction to hear Appellant's petition for judicial review and this assignment of error is overruled.

B. Motion to Stay

**[2]** Appellant has argued that the trial court erred by failing to grant her motion to stay the proceedings. Appellant had been charged with feloniously assaulting AJP for the same assault that caused her name to be placed on the RIL. She makes a statutory argument that because she had been named "a defendant in a criminal court case resulting from the same incident," the trial court should have allowed those criminal proceedings to run their course before reviewing the petition for judicial review. N.C. Gen. Stat. § 7B-324(b) (2015). Furthermore, she argues that the trial court erred by failing to include in its order any findings with regard to her motion to stay the proceedings as required. We disagree.

"If an individual seeking judicial review is named as a . . . defendant in a criminal court case resulting from the same incident, the district court judge *may* stay the judicial review proceeding." *Id.* (emphasis added). The word "may" connotes a discretionary decision, not a mandatory one, and so we review the trial court's decision here, like any grant or denial of a motion to stay, for an abuse of discretion. *Muter v. Muter*, 203 N.C. App. 129, 132, 689 S.E.2d 924, 927 (2010).

This Court has held that

> [w]e do not re-weigh the evidence before the trial court or endeavor to make our own determination of whether a stay should have been granted. Instead, mindful not to substitute [our] judgment in place of the [trial court's], we consider only whether the trial court's denial was a patently arbitrary decision, manifestly unsupported by reason.

*Id.* at 134, 689 S.E.2d at 928 (internal citations and quotation marks omitted).

In this case, there was no statutory mandate that the trial court grant a stay. Furthermore, Article 8 of the Juvenile Code, the article that governs juvenile petition hearing procedures, states in pertinent part that "[r]esolution of a pending criminal charge against a respondent arising out of the same transaction or occurrence as the juvenile petition shall not be the sole extraordinary circumstance for granting a continuance." N.C. Gen. Stat. § 7B-803 (2015). The trial court here heard arguments from counsel for both Appellant and RCDSS and denied the request for the stay. Our review of this denial of Appellant's motion to stay is not

to "consider . . . whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record." *State v. Lasiter*, 361 N.C. 299, 302, 643 S.E.2d 909, 911 (2007) (citing *Wainwright v. Witt*, 469 U.S. 412, 434, 83 L.Ed.2d 841, 858 (1985)). In this case, the transcript of the hearing shows that counsel for RCDSS gave the trial court several legitimate reasons for denying the motion. Therefore, the trial court's denial of the stay was neither patently arbitrary nor unsupported by reason and this portion of Appellant's argument is without merit.

Furthermore, the trial court was not required to make findings of fact or conclusions of law regarding Appellant's motion to stay. Rule 52(a)(1) of the North Carolina Rules of Civil Procedure states that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the [trial] court shall find the facts specifically and state separately its conclusions of law." However, it also states that "[f]indings of fact and conclusions of law are necessary on decisions of any motion . . . only when requested by a party . . . ." N.C.R. Civ. P. 52(a)(2). This Court has stated that "absent a specific request made pursuant to Rule 52(a)(2), a trial court is not required to either state the reasons for its decision or make findings of fact showing those reasons." *Strickland v. Jacobs*, 88 N.C. App. 397, 399, 363 S.E.2d 229, 230 (1988). Furthermore, when "there is no suggestion in the record that [the] defendant asked for findings of fact or conclusions of law to be included in the trial court's order, the court's failure to do so is not reversible error." *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 494, 586 S.E.2d 791, 798 (2003). Because there was no request made by Appellant for specific findings of fact or conclusions of law as to her motion, this portion of Appellant's argument is without merit.

C. Placement on the Responsible Individuals List

**[3]** A "[r]esponsible individual" is statutorily defined as "[a] parent, guardian, custodian, or caretaker who abuses or seriously neglects a juvenile." N.C. Gen. Stat. § 7B-101(18a) (2015). The Department of Health and Human Services "shall . . . maintain a list of responsible individuals" and "may provide information from this list to child caring institutions, child placing agencies, group home facilities, and other providers of foster care, child care, or adoption services that need to determine the fitness of individuals to care for or adopt children." N.C. Gen. Stat. § 7B-311(b). After "[t]he court determines that the individual is a responsible individual as a result of a hearing on the individual's petition for judicial review," their name shall be placed on the RIL. N.C. Gen. Stat. § 7B-311(b)(2).

"If the district court undertakes [a review of a director's determination of abuse or serious neglect], a hearing shall be held pursuant to [Section 7B-323] at which the director shall have the burden of establishing by a preponderance of the evidence abuse or serious neglect and the identification of the individual seeking judicial review as a responsible individual." N.C. Gen. Stat. § 7B-323(e). If, after the hearing, the court concludes that the director has not met his burden of establishing either the abuse or serious neglect, or that the Appellant was the responsible individual, the court shall reverse the director and expunge Appellant's name from the RIL. *Id.*

Appellant argues that the trial court erred in making several findings of fact that were not supported by competent evidence, and also that the trial court's conclusions of law were not supported by its findings. Therefore, we must review the trial court's order adjudicating Appellant a responsible individual. In reviewing this order, we must determine whether the findings of fact are supported by competent evidence, and whether the legal conclusions are supported by the findings of fact. *In re F.C.D.*, ___ N.C. App. ___, ___, 780 S.E.2d 214, 217 (2015). "If supported by competent evidence, the trial court's findings are binding on appeal even if the evidence would also support contrary findings." *In re F.C.D.*, ___ N.C. App. at ___, 780 S.E.2d at 217. "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). "Its conclusions of law, however, are reviewed *de novo*." *In re F.C.D.*, ___ N.C. App. at ___, 780 S.E.2d at 217.

Appellant has challenged Findings of Fact Numbers 2, 5 through 10, and 13 in the trial court's order, as well as each of the conclusions of law. Therefore, we shall take each in turn to determine whether the findings of fact are supported by competent evidence, and then whether these findings support the conclusions of law. However, Finding of Fact 2 states that "[t]his [c]ourt has subject matter jurisdiction of this matter[,]" and Conclusion of Law 1 states this same proposition. Because we have already determined this issue above, we shall not address it here.

The trial court made the following challenged findings of fact in support of its conclusion that "[t]he minor child [AJP] is an abused child" and that "[t]he petitioner [Appellant] is the responsible individual and her name should be submitted to be placed on the responsible individual's list":

5. The [c]ourt admitted into evidence High Point Regional Hospital medical records from the minor child [AJP] (RCDSS's exhibit #2); nine pictures of the minor child's injury (RCDSS's exhibit #1), and Petitioner's exhibit #1 (five pictures of Petitioner). In addition, the [c]ourt received testimony from the minor child [AJP] (hereinafter referred to as the minor child), [AJP's father], Officer Clifford Chewning Jr., and Petitioner [Appellant].

6. On or about January 26, 2015, the minor child lived . . . in Archdale, North Carolina with [Appellant], the minor child's father . . ., and the minor child's three siblings . . . .

7.[3] On this January 26, 2015, [Appellant] came home from work around 2 a.m. and when she came into the home, she woke the minor child and [AJP's father] up to ask why a dresser was in the living room and she requested the minor child to clean up the kitchen. The minor child cleaned up the kitchen. When the minor child woke up for school later that morning on January 26, 2015, the minor child went to the kitchen to attempt to retrieve a pen from a coffee mug to get some documents for school signed. [Appellant] told the minor child to leave the house because he had on sneakers. The minor child went to his room to take off his sneakers. The minor child went back to the kitchen to attempt to retrieve a pen from a coffee mug again, but [Appellant] cut in front of the minor child and grabbed the coffee mug. She told the minor child to get out again, and the minor child called [Appellant] "selfish." When the minor child turned to walk away from [Appellant], she hit the minor child on the crown of his head with a white coffee mug.

7. After this incident, the minor child bled profusely and [Appellant] told the minor child "don't get blood on my floor and go to the bathroom." Subsequently, the minor child went to the bathroom and he informed his father . . . that he was feeling dizzy and lightheaded.

---

3. Within the trial court's order there were two findings of fact labeled 7, and two labeled 8. This seems to be a typographical error.

[AJP's father] and the minor child left the home and went to High Point Regional Hospital.

8. The minor child was treated at High Point Regional Hospital for the gash to his head.

8. Officer Clifford Chewning, Jr. with the Archdale Police Department was called to the home of [AJP's father] and [Appellant] on January 26, 2015. When Officer Chewning arrived at the home, he spoke with [Appellant] and she told Officer Chewning that everything was found [sic] and that she had an altercation with [AJP's father] and the minor child. She did not tell Officer Chewning that she had hit the minor child in the head with a coffee mug. After Officer Chewning left the home, he spoke with the minor child at High Point Regional Hospital and the minor child told him that [Appellant] and he had argued around 2 am on January 26, 2015 regarding his father moving a chest of drawers. In addition, around 7 a.m., the minor child was going to get a pen from a mug, and [Appellant] grabbed the mug and hit him on the back of his head with the mug.

9. Officer Chewning did observe the gash of the back of the minor child's head on January 26, 2015 at High Point Regional Hospital.

10. Officer Chewning also spoke with [AJP's father]. [AJP's father] told Officer [Chewning] he did not witness the incident, but he heard the mug hit the minor child's head and he observed the minor child bleed from the gash on his head. He also observed [Appellant] tell the minor child not to bleed on the floor. [AJP's father] took the minor child to the hospital.

. . . .

13. The [Appellant's] version of the series of events that led to the January 26, 2015 event with the minor child are not consistent with the facts that were presented in this case.

With regards to the findings of fact, Appellant first specifically challenges the references to AJP as a "minor child" in Findings of Fact 5, 6, and 8. We have addressed AJP's age, and at what point in these proceedings that his age was relevant, in the above section addressing

jurisdiction. Therefore, we will only note that the introduction of AJP's medical records through Ashley Coddle gave competent and undisputed evidence from which the trial court could determine and find as fact that AJP was a "minor child" at the relevant time with regards to this petition for review. Therefore, this finding will not be disturbed on appeal.

Appellant has also argued that the trial court's findings of fact 7 through 10 (which is, in fact, six findings of fact as there were two findings labeled 7, and two labeled 8) were made without sufficient specificity and were simply recitations of witness' testimony. "[A] proper finding of facts requires 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." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982). However, in light of the record, the challenged findings of fact are sufficiently specific to enable our review. They give the relevant evidentiary facts from which the ultimate facts and conclusions could be found, *i.e.*, that Appellant's version of events was inconsistent with the other facts presented, that AJP was abused, and that Appellant was the responsible individual.

Finally, Appellant challenges Finding of Fact 13, and argues that the trial court failed to make a finding of fact with regard to her self-defense claim raised during the hearing. However, "when a trial judge sits as both judge and juror, as he or she does in a non-jury proceeding, it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (internal quotation marks omitted). It is not within this Court's purview to reweigh the evidence, as we are only to determine whether the findings of fact are supported by competent evidence and, if so, these are binding on appeal. *See In re F.C.D.*, ___ N.C. App. at ___, 780 S.E.2d at 217. If the trial court did not make a finding of fact with regards to Appellant's self-defense claim, it simply means that the trial court was not convinced that it was valid. "[I]t is well established that when the facts found by the trial court are 'sufficient to determine the entire controversy,' the court's 'failure to find other facts is not error.' " *Smallwood v. Smallwood*, ___ N.C. App. ___, ___, 742 S.E.2d 814, 822 (2013) (quoting *Graybar Elec. Co. v. Shook*, 283 N.C. 213, 217, 195 S.E.2d 514, 516 (1973)). Therefore, this portion of Appellant's argument is overruled.

Each of the findings of fact set out in the trial court's order was supported by competent evidence. We now review the trial court's conclusions of law *de novo*. The first conclusion of law was that the court had

subject matter jurisdiction over this matter. Because we have addressed this above, we shall not do so again.

The second conclusion of law was that "[t]he minor child [AJP] is an abused child," or juvenile. The Juvenile Code defines an abused juvenile as "[a]ny juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker . . . [i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means[.]" N.C. Gen. Stat. § 7B-101(1)(a). As discussed above, the trial court made the finding of fact that AJP was a minor child. It is not challenged that Appellant was a "parent, guardian, custodian, or caretaker." *Id.* Appellant argues that there was no competent evidence that the serious physical injury was inflicted "by other than accidental means." *Id.* However, the testimony of AJP tends to establish that when Appellant struck him in the head it was intentional, by other than accidental means. As stated above, if the trial court does not make a finding, it simply means that the trial court was not convinced that a fact existed. The trial court did not find that the serious injury was inflicted by accidental means; and therefore, this court can infer that it was inflicted by "other than accidental means." *Id.* We affirm this conclusion of law because it was without error.

Finally, the trial court concluded that "[Appellant] is the responsible individual and her name should be submitted to be placed on the responsible individual's list." A responsible individual is "[a] parent, guardian, custodian, or caretaker who abuses or seriously neglects a juvenile." N.C. Gen. Stat. § 7B-101(18a). Appellant was a "parent, guardian, custodian, or caretaker," and, as shown above, "abuse[d]" AJP, therefore, she is a responsible individual. *Id.* Because "[t]he name of an individual who has been identified as a responsible individual *shall* be placed on the responsible individual list . . . after . . . [t]he court determines that the individual is a responsible individual as a result of a hearing on the individual's petition for judicial review" (emphasis added), N.C. Gen. Stat. § 7B-311(b)(2) required the trial court to conclude as a matter of law that Appellant's name be placed on the responsible individual's list. Therefore, this conclusion of law was also without error.

## Conclusion

For the reasons set out above, each of Appellant's arguments are overruled. Therefore, the order of the trial court finding that Appellant was a responsible individual and placing her name on the RIL is affirmed.

AFFIRMED.

Judges DAVIS and INMAN concur.

IN THE MATTER OF T.R.

No. COA16-597

Filed 15 November 2016

**Child Custody and Support—child custody—Uniform Child-Custody Jurisdiction and Enforcement Act—subject matter jurisdiction**

The trial court had subject matter jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act to issue the 8 March 2016 order granting custody of the minor child to her father. All of the requirements of N.C.G.S. § 50A-201(a)(2) were satisfied. Further, the Illinois court determined that North Carolina would be a more convenient forum.

Appeal by respondent-mother from order entered 8 March 2016 by Judge Monica M. Bousman in Wake County District Court. Heard in the Court of Appeals 19 October 2016.

*Office of the Wake County Attorney, by Roger A. Askew, for petitioner-appellee Wake County Human Services.*

*Robert W. Ewing for respondent-appellant.*

*Michael N. Tousey for guardian ad litem.*

DAVIS, Judge.

M.R. ("Respondent") appeals from an order granting custody of her juvenile daughter, T.R. ("Tina"), to the child's father, "Ted."[1] Respondent argues that the trial court lacked subject matter jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA") to issue the order from which she appeals. After careful review, we affirm.

## Factual Background

Tina was born in 2007 in Springfield, Illinois to Respondent and Ted, who at the time were married. They separated in 2009 after Ted abandoned Respondent and Tina. On 7 January 2011, the Circuit Court of

1. Pseudonyms and initials are used throughout this opinion to protect the identities of the juveniles and for ease of reading. N.C. R. App. P. 3.1(b).

Sangamon County, Illinois issued an order dissolving the marriage and granting custody of Tina to Respondent subject to Ted's visitation rights.

In February 2012, Respondent — who is a migrant worker — moved with Tina and "Vanessa," Respondent's daughter from another relationship, from Illinois to Florida. They lived in Florida until 18 June 2014 when they moved to North Carolina. They lived in various places within North Carolina, including a migrant worker camp in New Hanover County. Respondent's work in North Carolina entailed recruiting and transporting migrant workers to a farm in Currie, North Carolina. Ted has continued to live in Illinois.

On 25 July 2014, Wake County Human Services ("WCHS") filed a juvenile petition in Wake County District Court alleging that Tina (then 7 years old) and Vanessa (then 12 years old) were neglected juveniles pursuant to N.C. Gen. Stat. § 7B-101 in that they did not receive proper care, supervision, or discipline from Respondent and lived in an environment injurious to their welfare. *See* N.C. Gen. Stat. § 7B-101(15) (2015). The petition included allegations that (1) while Respondent was at work, Vanessa had been raped by a man in the migrant worker housing development where they lived; (2) Vanessa worked for 11 hours each day doing field work; (3) Vanessa and Tina were often left alone while Respondent worked; and (4) Tina had reported that Respondent's boyfriend had touched Tina's genitalia on one occasion.

On 25 July 2014, the Honorable Monica M. Bousman entered an order in Wake County District Court granting WCHS non-secure custody of the children. A child planning conference was held on 30 July 2014, and a memorandum of understanding produced after the conference acknowledged that Respondent had been granted custody of Tina in the 2011 divorce proceeding in Sangamon County, Illinois. It also noted that Respondent had reported she was currently living in Florida.

On 3 September 2014, Judge Bousman contacted Judge April Troemper of the Circuit Court of Sangamon County regarding the case. As a result of this conversation, on 17 September 2014 Judge Troemper made the following docket entry:

> On 9/3/14, the Court received a call from Judge Bousman from North Carolina Juvenile Court regarding a pending matter involving the minor child [Tina]. The Courts discussed the status of the case in Illinois and in North Carolina and exchanged relevant documentation to determine the issue of jurisdiction. Upon further consideration and on the Court's own Motion, this Court is transferring

> jurisdiction of this file, including the pending motion to modify custody to Wake County, North Carolina. The minor child has not resided in the State of Illinois since approximately January 2012. The Court finds it is in the minor child's best interest to have custody matters addressed by the Courts in North Carolina where the allegations of abuse occurred. As such, the Court's mediation order is vacated. Clerk [is] instructed to prepare file for transfer and to send copy of this docket to the parties of record.[2]

In a subsequent order, Judge Bousman made the following finding of fact: "Jurisdictional issues with respect to the child, [Tina], have been resolved. [Circuit] Court Judge Troemper of Sangamon County, Illinois, has determined that the proper forum for this matter is the State of North Carolina." In this order, Judge Bousman also made the following conclusion of law: "Jurisdictional issues with respect to [Tina] have been resolved and North Carolina is the proper forum for the adjudication and disposition in this matter."

The trial court held an adjudication hearing on 13 November 2014 and a dispositional hearing on 9 December 2014. On 9 January 2015, the court issued an order adjudicating Tina and Vanessa to be neglected juveniles and a dispositional order keeping the children in WCHS's custody. In a 27 April 2015 order, the trial court placed Tina in a trial placement with Ted.

After holding a permanency planning hearing that began on 26 January 2016, the trial court issued a permanency planning order on 8 March 2016 finding that (1) Respondent was not progressing in her case plan; (2) reunification efforts with Respondent were contrary to Tina's health and safety; and (3) Tina was "doing very well in her trial placement with [Ted]." In that order, the court gave Ted custody of Tina and suspended Respondent's visitation rights pending further review by Tina's therapist. Respondent filed a timely appeal from the trial court's 8 March 2016 order.

## Analysis

Respondent's sole argument on appeal is that the trial court lacked subject matter jurisdiction under the UCCJEA to issue the 8 March 2016

---

2. There is no indication in the record that Respondent either failed to receive a copy of this docket entry or attempted to appeal Judge Troemper's transfer of the case to North Carolina.

order granting custody of Tina to Ted. The issue of whether a trial court possesses jurisdiction under the UCCJEA is a question of law that we review *de novo*. *In re J.H.*, __ N.C. App. __, __, 780 S.E.2d 228, 233 (2015).

The UCCJEA serves to "[a]void jurisdictional competition and conflict with courts of other States in matters of child custody" and to "[p]romote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child[.]" N.C. Gen. Stat. § 50A-101 (Official Comment) (2015). Under the UCCJEA, once a court of one state makes an initial child custody determination, that state ordinarily has "exclusive, continuing jurisdiction over the determination . . . ." N.C. Gen. Stat. § 50A-202(a) (2015). However, the UCCJEA contains provisions setting out several circumstances under which the courts of a second state *are* permitted to exercise jurisdiction over — and modify — a prior custody determination from the original state. *See* N.C. Gen. Stat. §§ 50A-202, 203, 204.

In the present case, we conclude that subject matter jurisdiction existed to support the trial court's 8 March 2016 order based on N.C. Gen. Stat. § 50A-203.[3] Under the applicable provisions of N.C. Gen. Stat. § 50A-203, a North Carolina court may modify an out-of-state child custody determination if both (1) North Carolina "has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2)" *and* (2) "[t]he court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202[4] *or* that a court of this State would be a more convenient forum under G.S. 50A-207[.]" N.C. Gen. Stat. § 50A-203(1) (emphasis added). We address each of these two requirements in turn.

---

3. We note that Respondent does not argue that the trial court lacked temporary emergency jurisdiction pursuant to N.C. Gen. Stat. § 50A-204 to enter its initial non-secure custody order. *See* N.C. Gen. Stat. § 50A-204(a) (2015) ("A court of [North Carolina] has temporary emergency jurisdiction if the child is present in [North Carolina] and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse."). Rather, Respondent argues that the trial court's temporary emergency jurisdiction could not have served as a basis for making a final custody determination. For the reasons set forth herein, however, we conclude that the 8 March 2016 order was properly issued pursuant to the trial court's jurisdiction under N.C. Gen. Stat. § 50A-203(1) rather than under N.C. Gen. Stat. § 50A-204.

4. The exceptions set forth in N.C. Gen. Stat. § 50A-202 are not applicable to the present case.

## I. Existence of Jurisdiction for North Carolina Court to Make Initial Custody Determination Under N.C. Gen. Stat. § 50A-201(a)(2)

N.C. Gen. Stat. § 50A-201(a)(2) provides, in pertinent part, that North Carolina may make an initial child custody determination if

> (2) . . . a court of the home state of the child has declined to exercise jurisdiction on the ground that [North Carolina] is the more appropriate forum under G.S. 50A-207[5] . . . *and*:
>
> > a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with [North Carolina] other than mere physical presence; *and*
> >
> > b. Substantial evidence is available in [North Carolina] concerning the child's care, protection, training, and personal relationships[.]

N.C. Gen. Stat. § 50A-201(a)(2) (emphasis added).

Here, the trial court possessed jurisdiction to make an initial custody determination under N.C. Gen. Stat. § 50A-201(a)(2) based on Judge Troemper's docket entry, which provided that the Illinois court was transferring the matter to Wake County District Court because Tina had not lived in Illinois since 2012 and the abuse had occurred in North Carolina. This ruling was tantamount to a determination that North Carolina was "the more appropriate forum" for purposes of N.C. Gen. Stat. § 50A-201(a)(2). The docket entry explained that after Judge Bousman and Judge Troemper had communicated with each other and exchanged relevant documents, Judge Troemper decided to "transfer[ ] jurisdiction of this file, including the pending motion to modify custody to Wake County, North Carolina" and that it was in the best interest of Tina to have custody issues adjudicated in North Carolina.

Respondent argues in her brief that the record is devoid of any order from an Illinois court determining that it no longer possessed exclusive,

---

5. N.C. Gen. Stat. § 50A-207, in turn, provides in pertinent part that "[a] court of this State which has jurisdiction . . . to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum." N.C. Gen. Stat. § 50A-207(a) (2015).

continuing jurisdiction or that a North Carolina court would be a more convenient forum. Respondent briefly acknowledges the Illinois docket entry but summarily asserts in a footnote that the docket entry is "not a court order sufficient to meet the requirements" of N.C. Gen. Stat. § 50A-203. However, Respondent does not provide any valid argument as to *why* the docket entry does not suffice as an order of the Illinois court for purposes of the UCCJEA.

The Illinois Court of Appeals "has accepted a docket sheet entry as an order of the court where there was no transcript of the hearing and no written order." *Severino v. Freedom Woods, Inc.*, 407 Ill. App. 3d 238, 250, 941 N.E.2d 180, 191 (2010) (citation omitted), *appeal denied*, 350 Ill. Dec. 873, 949 N.E.2d 665 (2011). Therefore, Illinois' own courts have acknowledged that a docket entry can serve as a court order where — as here — the docket entry is unaccompanied by a separate order or a hearing transcript.

Furthermore, Judge Troemper's docket entry possesses all of the substantive attributes of a court order. It reaches the conclusion that the case should be transferred from the courts of Illinois to the courts of North Carolina and fully explains its rationale for that conclusion. Moreover, as noted above, there is no indication in the record before us that Respondent did not receive a copy of the docket entry from the Illinois court or that Respondent made any effort to appeal Judge Troemper's ruling. As this Court has previously observed, "[n]othing in the UCCJEA requires North Carolina's district courts to undertake collateral review of a facially valid order from a sister state before exercising jurisdiction pursuant to N.C. Gen. Stat. § 50A-203(1)." *In re N.B.*, __ N.C. App. __, __, 771 S.E.2d 562, 566 (2015).

With regard to the additional requirements under N.C. Gen. Stat. § 50A-201(a)(2), the record shows that (1) Tina and Respondent had a "significant connection with [North Carolina] other than mere physical presence" in that they were living — and Respondent was working — in North Carolina at the time of the acts giving rise to the juvenile petition filed by WCHS; and (2) "[s]ubstantial evidence is available in [North Carolina] concerning [Tina's] care, protection, training, and personal relationships" in that the sexual assault against Tina — as well as other acts of neglect by Respondent involving Tina — occurred in North Carolina. Therefore, all of the requirements of N.C. Gen. Stat. § 50A-201(a)(2) were satisfied.

## II. Determination By Illinois Court That North Carolina Would Be More Convenient Forum

The final pertinent requirement for the existence of subject matter jurisdiction in the trial court under N.C. Gen. Stat. § 50A-203(1) is that the Illinois court must have determined that North Carolina "would be a more convenient forum" for a determination of custody. Once again, for the reasons set out above, this requirement was satisfied by Judge Troemper's docket entry transferring the case to Wake County District Court.

Accordingly, Respondent has failed to demonstrate that the trial court lacked subject matter jurisdiction to enter its 8 March 2016 order. As such, this order is affirmed.

## Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Judges INMAN and ENOCHS concur.

---

JESSIE NORTON, in her individual capacity and in her capacity as the executor of the Estate of NORMAN CHRISTOPHER NORTON, WILLIAM NORTON, and DANIEL MICHAEL NORTON, Plaintiffs

v.

SCOTLAND MEMORIAL HOSPITAL, INC., and DUKE UNIVERSITY HEALTH SYSTEM, INC., Defendant

No. COA16-530

Filed 15 November 2016

**1. Wrongful Death—loss of consortium—failure to comply with Rule 9(j)**

The trial court did not err by dismissing plaintiffs' wrongful death and loss of consortium claims based on failure to comply with Rule 9(j).

**2. Statutes of Limitation and Repose—wrongful death—loss of consortium**

The trial court's unchallenged dismissal of the wrongful death and loss of consortium actions under Rule 12(b)(6) for failure to file the claims within the statute of limitations remained undisturbed.

**3. Appeal and Error—preservation of issues—failure to argue**

Although plaintiffs argued that the negligence and negligent infliction of emotional distress claims were not "medical malpractice" claims and did not require a Rule 9(j) certification, plaintiffs failed to challenge the trial court's dismissal of these negligence claims pursuant to Rule 12(b)(6) for failure to state a claim. Any argument challenging the trial court's dismissal of those claims under Rule 12(b)(6) was abandoned.

**4. Emotional Distress—intentional infliction of emotional distress —premature dismissal**

The trial court's dismissal under Rule 12(b)(6) of plaintiffs' intentional infliction of emotional distress allegation against Scotland Memorial was premature and was reversed.

**5. Emotional Distress—intentional infliction of emotional distress —dismissal**

The trial court did not err by dismissing plaintiffs' intentional infliction of emotional distress claim against Duke Hospital.

Appeal by plaintiffs from order entered 23 February 2016 by Judge Richard T. Brown in Scotland County Superior Court. Heard in the Court of Appeals 3 October 2016.

*Peterkin Law Firm, PLLC, by Timothy J. Peterkin, for plaintiff-appellants.*

*Brotherton Ford Berry & Weaver, PLLC, by Robert A. Ford and Demetrius W. Berry, for defendant-appellee Scotland Memorial Hospital, Inc.*

*Young Moore and Henderson, P.A., by Angela Farag Craddock, Donna Renfrow Rutala, and David A. Senter, for defendant-appellee Duke University Health System, Inc.*

TYSON, Judge.

Plaintiffs appeal from the trial court's order dismissing their complaint under Rules 9(j) and 12(b)(6) of the Rules of Civil Procedure against defendants, Scotland Memorial Hospital, Inc. ("Scotland Memorial") and Duke University Health System, Inc. ("Duke Hospital"). We affirm in part, reverse in part, and remand.

## I. Background

Norman Christopher Norton was admitted to Scotland Memorial in Laurinburg, North Carolina on 9 July 2012 with complaints of abdominal pain. Mr. Norton was married to plaintiff Jessie Norton, and is the father of the couple's two children, also plaintiffs. Mr. Norton was fairly active and in good health.

While a patient at Scotland Memorial, Mr. Norton's condition worsened. He was transferred to the intensive care unit, placed on a ventilator, and subsequently died. It is unclear from the face of the complaint whether Mr. Norton died at Scotland Memorial or after he was transferred to Duke University Hospital in Durham, North Carolina. Duke Hospital's responsive pleading states Mr. Norton's deceased body was transferred to Duke Hospital on 11 July 2012. Scotland Memorial's responsive pleading states Mr. Norton's body was transferred to Duke Hospital on 12 July 2012.

Plaintiffs filed a complaint against Scotland Memorial and Duke Hospital on 10 July 2015. Plaintiffs allege Mr. Norton screamed and cried out several times for his wife and children, but Scotland Memorial staff refused to allow Mr. Norton's wife or family to see him.

The complaint alleges Mr. Norton's cries were so loud and adamant that other visitors in the waiting room commented. Mrs. Norton informed staff that she had waited an excessive amount of time to see her husband. Staff members sat beside her in the waiting room, but refused to allow her to see her husband. The complaint further alleges that neither Mr. Norton nor Mrs. Norton gave permission for Mr. Norton to be removed from the ventilator.

The complaint further alleges Duke Hospital staff asked Mrs. Norton if she wished for an autopsy to be performed, and she responded in the affirmative. The complaint alleges Mrs. Norton requested for Mr. Norton's head not to be cut during the autopsy. She had previously discussed this issue with Mr. Norton, and he had indicated it was important to him. Duke Hospital staff informed Mrs. Norton they were required to cut Mr. Norton's head based upon the orders received from Scotland Memorial.

The complaint also alleges Mr. Norton had previously agreed to be an organ donor, but declined to remain an organ donor when he renewed his driver's license. He had also discussed this issue with Mrs. Norton. Mrs. Norton was informed by the funeral home that Mr. Norton's organs and eyes had been removed from his body.

Plaintiffs' complaint alleges five causes of action against both defendants: (1) negligent infliction of emotional distress; (2) intentional infliction of emotional distress; (3) loss of consortium; (4) negligence; and (5) wrongful death. Both defendants filed motions to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief may be granted and under Rule 9(j) for failure to plead that a qualified expert had reviewed the medical care and records prior to filing the complaint.

On 23 February 2016, the trial court dismissed Plaintiffs' claims against both defendants with prejudice for failure to comply with the requirements of Rule 9(j). The court also concluded Plaintiffs' wrongful death claims against the defendants were barred by the statute of limitations, and dismissed those claims under Rule 12(b)(6). The trial court also dismissed Plaintiffs' remaining claims under 12(b)(6) for failure to state a claim upon which relief may be granted. Plaintiffs appeal.

## II. Dismissal of Plaintiffs' Claims

The trial court dismissed Plaintiffs' claims under three separate grounds: (1) failure to meet the requirements of Rule 9(j) for the medical malpractice claims; (2) failure to file the complaint within the applicable statute of limitations for the wrongful death and loss of consortium claims; and (3) failure to state a claim under Rule 12(b)(6).

### A. Standards of Review

A trial court's order dismissing a complaint pursuant to Rule 9(j) presents a question of law, and is therefore reviewed *de novo* on appeal. *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 256, 677 S.E.2d 465, 477, *disc. review denied*, 363 N.C. 651, 684 S.E.2d 690 (2009).

> On appeal from a motion to dismiss under Rule 12(b)(6), this Court reviews *de novo* "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted [.]" We consider the allegations in the complaint true, construe the complaint liberally, and only reverse the trial court's denial of a motion to dismiss if plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim.

*Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)), *disc. review denied*, 363 N.C. 372, 678 S.E.2d 234 (2009).

B. Dismissal of Wrongful Death and Loss of Consortium Claims

1. Rule 9(j)

**[1]** The trial court determined Plaintiffs had brought a "medical malpractice action" as defined by N.C. Gen. Stat. § 90-21.11, and dismissed all of Plaintiffs' claims for failure to comply with Rule 9(j).

Rule 9(j) of the North Carolina Rules of Civil Procedure requires dismissal of any complaint alleging medical malpractice, unless the pleading asserts a medical expert has reviewed the medical care and records, and would testify that the medical care did not comply with the applicable standard of care set forth in N.C. Gen. Stat. § 90-21.12. N.C. Gen. Stat. § 1A-1, Rule 9(j) (2015). A "medical malpractice action" is defined as either of the following:

> a. A civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.
>
> b. A civil action against a hospital . . . for damages for personal injury or death, when the civil action (i) alleges a breach of administrative or corporate duties to the patient, including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision and (ii) arises from the same facts or circumstances as a claim under sub-subdivision a. of this subdivision.

N.C. Gen. Stat. § 90-21.11(2) (2015).

"Rule 9(j) unambiguously requires a trial court to dismiss a complaint if the complaint's allegations do not facially comply with the rule's heightened pleading requirements." *Barringer*, 197 N.C. App. at 255, 677 S.E.2d at 477.

Plaintiffs' loss of consortium claim is derivative of, and relies upon the validity of the spouse's claim for injury or wrongful death. *See*, *e.g.*, *Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 40, 493 S.E.2d 460, 462 (1997). Plaintiffs have failed to show how their claims for wrongful death and loss of consortium do not arise from medical malpractice under the definitions set forth in N.C. Gen. Stat. § 90-21.11(2), which require a Rule 9(j) medical expert's certification. The trial court properly dismissed Plaintiffs' wrongful death and loss of consortium claims due to failure to comply with Rule 9(j).

2. Statute of Limitations

**[2]** In addition to dismissing the wrongful death and loss of consortium claims under Rule 9(j), the trial court determined the claims were also barred by the applicable statute of limitations. N.C. Gen. Stat. § 1-53(4) (2015). Plaintiffs have not challenged the trial court's dismissal based upon expiration of the applicable statute of limitations. Any argument challenging the trial court's dismissal of those claims based upon the statute of limitations is abandoned. N.C. R. App. P. 28(b)(6). The trial court's unchallenged dismissal of the wrongful death and loss of consortium actions under Rule 12(b)(6) for failure to file the claims within the statute of limitations remains undisturbed.

C. Negligence and Negligent Infliction of Emotional Distress

**[3]** Plaintiffs argue the negligence and negligent infliction of emotional distress claims are not "medical malpractice" claims and do not require a Rule 9(j) certification. Plaintiffs argue those claims are related to "how [Mr. Norton] was prevented from seeing his family as he was dying and the unauthorized autopsy and the displacement of [Mr. Norton's] organs."

Regardless of whether those claims require a Rule 9(j) certification, Plaintiffs failed to challenge the trial court's dismissal of these negligence claims pursuant to Rule 12(b)(6) for failure to state a claim. Any argument challenging the trial court's dismissal of those claims under Rule 12(b)(6) is abandoned. N.C. R. App. P. 28(b)(6). The trial court's unchallenged dismissal of those causes of actions under Rule 12(b)(6) remains undisturbed.

D. Intentional Infliction of Emotional Distress ("IIED")

Plaintiffs challenge the trial court's dismissal of the IIED claims against the defendants under both Rules 9(j) and 12(b)(6).

To state a claim for intentional infliction of emotional distress, a plaintiff must allege: "(1) extreme and outrageous conduct (2) which is intended to cause and does cause (3) severe emotional distress to another." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). Extreme and outrageous conduct is defined as conduct that 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." *Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 354, 595 S.E.2d 778, 782 (2004) (citation omitted).

Our appellate courts have "set a high threshold for finding that conduct meets the standard." *Dobson v. Harris*, 134 N.C. App. 573, 578, 521 S.E.2d 710, 715 (1999), *rev'd on other grounds*, 352 N.C. 77, 530 S.E.2d 829 (2000).

> This tort imports an act which is done with the intention of causing emotional distress or with reckless indifference to the likelihood that emotional distress may result. A defendant is liable for this tort when he desires to inflict severe emotional distress or *knows that such distress is certain, or substantially certain, to result from his conduct* or where he acts recklessly in deliberate disregard of a high degree of probability that the emotinal [sic] distress will follow and the mental distress does in fact result.

*Dickens*, 302 N.C. at 449, 276 S.E.2d at 333 (citations, quotations, and ellipsis omitted) (emphasis supplied).

"[T]he initial determination of whether conduct is extreme and outrageous is a question of law for the court: 'If the court determines that it may reasonably be so regarded, then it is for the jury to decide whether, under the facts of a particular case, defendants' conduct . . . was in fact extreme and outrageous.' " *Johnson v. Bollinger*, 86 N.C. App. 1, 6, 356 S.E.2d 378, 381-82 (1987) (quoting *Briggs v. Rosenthal*, 73 N.C. App. 672, 676, 327 S.E.2d 308, 311 (1985)).

### 1. Scotland Memorial

#### a. Rule 9(j) Requirement

**[4]** Plaintiffs argue a Rule 9(j) certification was not required for this claim, because the allegations do not involve an injury to Mr. Norton or concern his medical treatment or death. Instead, the injuries to Plaintiffs stem from Scotland Memorial staff's failure and refusal to allow Mrs. Norton and her children to see their husband and father as he was crying out in distress prior to his death. We agree.

Plaintiff's complaint alleges:

> 10. There were several times that Mr. Norton screamed and cried out for his wife and children to come back with him.
>
> 11. The staff at Scotland refused to allow Mr. Norton's family to see him. His cries were so loud and adamant that visitors in the waiting area commented on it.

> 12. At one point, Jessie Norton advised the hospital staff that she had waited an excessive amount of time to see her husband and she wanted to see him. At that point, staff members came and sat beside her and refused to let her see her husband.
>
> . . . .
>
> 23. The frustration regarding not being about [sic] to be there for Mr. Norton has haunted his family, causing emotional distress that has occasionally manifested into physical symptoms.

The complaint further alleges Mr. Norton was thereafter removed from the ventilator without his or Mrs. Norton's consent and died.

As discussed above, a Rule 9(j) certification is required in a "medical malpractice" action, which is defined as "a civil action for damages for personal injury or death arising out of the health care provider's furnishing or failure to furnish professional services," or "breach of an administrative or corporate dut[y] to the patient." N.C. Gen. Stat. § 90-21.11(2).

The allegations against Scotland Memorial regarding the staff's refusal to allow Mrs. Norton and her children to see Mr. Norton as he was distressed and crying out for them prior to the unconsented removal of the ventilator occurred while Scotland Memorial rendered medical services to Mr. Norton. Plaintiffs' claims for IIED against Scotland Memorial do not seek damages arising from allegations of Mr. Norton's "personal injury or death." *Id.* The damages claimed by Plaintiffs are not damages sustained by Mr. Norton. Rather, Plaintiffs, Mr. Norton's wife and children, claim they sustained emotional damage by hearing Mr. Norton call out to them prior to his death, and from being prevented from seeing him, coupled with the unconsented to removal of the ventilator. These unique and specific factual allegations do not fall under the plain language of Rule 9(j) to require a medical expert's certification. *Id.*

b. Rule 12(b)(6) Dismissal

"A complaint should not be dismissed under Rule 12(b)(6) 'unless it affirmatively appears that plaintiff is entitled to no *relief under any state of facts which could be presented in support of the claim*.' " *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985) (quoting *Presnell v. Pell*, 298 N.C. 715, 719, 260 S.E.2d 611, 613 (1979)) (emphasis supplied). "The system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Id.* "Such simplified notice pleading is made possible

by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Pyco Supply Co., Inc. v. American Centennial Ins. Co.*, 321 N.C. 435, 442-43, 364 S.E.2d 380, 384 (1988) (citation omitted).

Under the notice pleading standard, the face of Plaintiffs' complaint does not reveal an insurmountable bar to recovery on the allegations of IIED against Scotland Memorial for us to sustain the dismissal under Rule 12(b)(6). The allegations and circumstances surrounding Scotland Memorial's refusal to allow Mr. Norton's family to see him, and the hospital's reasonableness and justification, or lack thereof, and the consequences to the family are issues "for discovery and the other pretrial procedures." *Id.* at 444, 364 S.E.2d at 384.

Plaintiffs' IIED claims may later be determined to be insufficient to go to the jury, but that issue is not before us. Based solely upon the allegations on the face of their complaint, Plaintiffs should be provided the opportunity, afforded by the Rules of Civil Procedure, to discover and "to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Id.* The trial court's dismissal under Rule 12(b)(6) of Plaintiff's IIED allegation against Scotland Memorial was premature, and is reversed.

2. Duke Hospital

a. Rule 9(j) Requirement

**[5]** Plaintiffs' complaint alleges Mr. Norton was admitted as a patient and treated at Scotland Memorial, and "at some point, Mr. Norton was transferred to Duke." The complaint alleges:

> 15. Duke asked Mrs. Norton if she wanted an autopsy for Mr. Norton and she responded in the affirmative.
>
> 16. Mrs. Norton was asked on multiple occasions if she wanted an autopsy.
>
> 17. Mrs. Norton asked Duke if they would avoid cutting Mr. Norton's head open. This was an issue that she and Mr. Norton had discussed. This was an important issue to him.
>
> 18. Mrs. Norton was informed by Duke that they had to open his head because it was ordered by Scotland.
>
> 19. Mr. Norton had been an organ donor. However, when he renewed his most recent driver's license, he declined

> to be an organ donor. This was an important issue that he had addressed with his wife prior to his death.
>
> 20. At some point, Mr. Norton's previous driver's license was taken, not the most recent driver's license that indicated that he would not agree to be an organ donor.
>
> 21. When Mr. Norton's body arrived at the funeral home, his organs had been removed and were never returned.
>
> 22. Mrs. Norton was dealt with rudely as she sought to locate her husband's organs and eyes.
>
> . . . .
>
> 24. The misappropriation of Mr. Norton's organs has also created frustration, additional grief and emotional distress for his family.

Plaintiffs' claims against Duke Hospital pertain to alleged actions by Scotland Memorial and Duke Hospital after Mr. Norton's death, and do not involve the provision of medical care under N.C. Gen. Stat. § 90-21.11. A medical expert's certification under Rule 9(j) was not required to validate Plaintiffs' IIED claim against Duke Hospital, after Mr. Norton was deceased and the allegations against Duke Hospital pertain to the autopsy and removal of organs. *See Bennett v. Hospice & Palliative Care Ctr. of Alamance-Caswell*, __ N.C. App. __, 783 S.E.2d 260 (2016) (holding claims which occurred subsequent to the decedent's death, mishandling the body and failure to provide bereavement services, did not involve the provision of medical care to require a Rule 9(j) certification).

b. Rule 12(b)(6) Dismissal

Regardless of whether a Rule 9(j) certification was required for Plaintiffs' claim against Duke Hospital, Plaintiffs failed to state and plead sufficient facts to allege extreme and outrageous conduct by Duke Hospital or its staff. Accepting Plaintiffs' factual allegations against Duke Hospital as true and in the light most favorable to Plaintiffs with the benefit of every reasonable inference, the complaint indicates the autopsy was ordered by Scotland Memorial. Mrs. Norton was asked to consent and authorized Duke Hospital to perform an autopsy, but requested Duke Hospital to refrain from cutting Mr. Norton's head. Duke Hospital informed Mrs. Norton that such a procedure would be required under Scotland Memorial's order. The complaint does not indicate or assert whether Mrs. Norton then attempted to limit or prevent the

autopsy, or whether Mr. Norton's head was in fact cut during the course of the autopsy. The complaint does not allege whether Duke Hospital performed the autopsy, and only describes Mrs. Norton's conversation with Duke Hospital staff, when she consented to the autopsy.

Plaintiffs also allege Mr. Norton's organs were removed, even though his most recent driver's license indicated he did not consent to organ donation. Taking Plaintiffs' allegations as true, the complaint indicates Duke Hospital was in possession of Mr. Norton's previous driver's license, which indicated he had agreed to be an organ donor, and not his most recent driver's license, which did not so indicate.

> Our law recognizes that the next of kin has a quasi-property right in the body – not property in the commercial sense but a right of possession for the purpose of burial – and that there arises out of this relationship to the body an emotional interest which should be protected and which others have a duty not to injure intentionally or negligently . . . . Furthermore, the survivor has the legal right to bury the body as it was when life became extinct. *Kyles v. R. R.*, *supra* [147 N.C. 394, 61 S.E. 278]. For any mutilation of a dead body the one entitled to its custody may recover compensatory damages for his mental suffering caused thereby if the mutilation was either intentionally or negligently committed, *Morrow v. R. R.*, 213 N.C. 127, 195 S.E. 383, *or was done by an unlawful autopsy*. If defendant's conduct was wilful or wanton, actually malicious, or grossly negligent, punitive damages may also be recovered. *Kyles v. R. R.*, *supra*."

*Parker v. Quinn-McGowen Co.*, 262 N.C. 560, 561-62, 138 S.E.2d 214, 215-16 (1964) (emphasis supplied).

The complaint fails to allege whether Duke Hospital knew or should have known about Mr. Norton's change in status as an organ donor, or whether Duke Hospital intentionally disregarded his status as an organ donor. Plaintiffs' have failed to allege facts to show Duke Hospital acted with intention to cause emotional distress or with reckless indifference to the likelihood that emotional distress may result, or "kn[ew] that such distress is certain, or substantially certain, to result. *Dickens*, 302 N.C. at 449, 276 S.E.2d at 333. Plaintiffs' complaint does not indicate the conduct by Duke Hospital staff in performing the autopsy with Mrs. Norton's consent and the handling of Mr. Norton's organs was "beyond all possible bounds of decency, . . . atrocious, and utterly intolerable in

a civilized community." *Smith-Price*, 164 N.C. App. at 354, 595 S.E.2d at 782. *See Hardin v. York Mem'l Park*, 221 N.C. App. 317, 327, 730 S.E.2d 768, 777 (holding children of deceased parents failed to sufficiently plead extreme and outrageous conduct to support IIED claim against cemetery, where cemetery sold family burial plots to third parties and their mother was unable to be buried next to their father), *disc. review denied*, 366 N.C. 571, 738 S.E.2d 376 (2012). The trial court properly dismissed Plaintiffs' IIED claim against Duke Hospital. Plaintiffs' arguments are overruled.

## IV. Conclusion

Even were we to presume a Rule 9(j) certification is not required for some or all of the claims Plaintiffs raised in their complaint, the trial court's Rule 12(b)(6) dismissal of all claims, except the intentional infliction of emotion distress claim, is unchallenged and remains undisturbed. The trial court's Rule 12(b)(6) dismissal of Plaintiffs' IIED claim against Scotland Memorial was premature, and is reversed. The trial court did not err in dismissing the IIED claim against Duke Hospital under Rule 12(b)(6). The trial court's order is affirmed in part, reversed in part, and remanded.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Chief Judge MCGEE and Judge DIETZ concur.

EMMANUEL SERGEEF, Plaintiff
v.
TRANG SERGEEF, Defendant

No. COA16-489

Filed 15 November 2016

**1. Child Custody and Support—child support—calculation—tax returns**

The trial court did not err by its calculation of defendant mother's income for purposes of calculating her child support obligations. Although plaintiff dad proffered an alternative income computation model, the trial court chose to give greater weight to the information contained in defendant's tax returns.

**2. Child Custody and Support—retroactive child support—calculation—extraordinary expenses**

The trial court erred by failing to follow the North Carolina Child Support Guidelines when computing defendant mom's child support obligation to plaintiff dad. The trial court failed to enter the basic child support obligation required by line item 4. Further, the trial court's order regarding the minor son's extraordinary expenses was vacated and remanded to the trial court to make additional findings of fact and to recalculate the amount of retroactive child support in light of its additional findings.

**3. Child Custody and Support—retroactive child support—findings of fact—shared custody**

The trial court erred in a child support case by its finding of fact that since August 2013, the parties have shared custody of their minor daughter equally. This portion of the order was remanded to the trial court for the limited purpose of recalculating the amount of retroactive child support plaintiff dad was entitled to recover from defendant mother.

Appeal by Plaintiff from order entered 23 November 2015 by Judge Robin W. Robinson in New Hanover County District Court. Heard in the Court of Appeals 5 October 2016.

*J. Albert Clyburn for Plaintiff-Appellant.*

*No brief filed for Defendant-Appellee.*

ENOCHS, Judge.

Emmanuel Sergeef ("Plaintiff") appeals from the trial court's 23 November 2015 child support order. After careful review, we affirm in part, reverse in part, vacate in part, and remand.

## Factual Background

Plaintiff and Defendant were married on 22 July 2009. The parties are the parents of one minor child, Melissa.[1] The Defendant has one other biological child, Henry, from a previous relationship. The parties separated on 31 December 2012 and divorced on 1 August 2014. Defendant is self-employed and owns a nail salon business in Wilmington, North Carolina. Plaintiff has several sources of income, including carpentry and photography.

On 26 July 2013, Plaintiff filed a complaint in New Hanover County District Court seeking an emergency custody order for the parties' minor child Melissa on the ground that Defendant had engaged in a physical altercation with her minor son, Henry, resulting in intervention by the New Hanover County Department of Social Services and the filing of child abuse charges against her. On 3 September 2013, the Honorable J.H. Corpening, II entered an order granting Plaintiff temporary care, custody, and control of both Melissa and Henry.

On 3 December 2013, Plaintiff filed a motion in the cause seeking prospective child support, and on 9 December 2013 he filed an amended motion seeking retroactive child support as well. Defendant filed an answer and counterclaims for (1) custody of Melissa and Henry; (2) child support; and (3) absolute divorce.

On 2 July 2014, a hearing was held to determine custody of the minor children. That same day, the trial court entered a consent order providing that the parties would have joint legal and physical custody of Melissa, and that Henry would remain in Plaintiff's custody during the pendency of Defendant's probationary period related to the child abuse charges stemming from her altercation with Henry, after which time Henry would decide whether to reside with Plaintiff or Defendant. The order also reflected that the parties had agreed that child support would be calculated pursuant to the North Carolina Child Support Guidelines.

---

1. Pseudonyms are used throughout this opinion to protect the identity of the minor children.

A child support hearing was subsequently held before the Honorable Robin W. Robinson in New Hanover County District Court on 21 and 22 May 2015. At the hearing, Plaintiff submitted a two-step valuation model for determining Defendant's gross income for child support calculation purposes. The first component entailed a purported computation of Defendant's gross income by subtracting Defendant's business and rental expenses from her alleged gross revenue. The second sought to corroborate the first by presenting evidence of Defendant's personal expenditures as reflected in various banking records and a financial standing affidavit allegedly prepared and signed by Defendant, although Defendant denied ever signing this document at the hearing and maintained that the signature on the affidavit was a forgery. Plaintiff's model arrived at an estimated gross annual income for Defendant of $132,388.00.

Defendant, in turn, admitted into evidence her tax returns reflecting that her income was a substantially lesser amount than the $132,388.00 amount arrived at by Plaintiff. Defendant's 2013 tax returns reflected a gross income of $30,749.00 and her 2014 returns indicated a gross income of $23,666.00. Plaintiff's and Defendant's joint 2012 tax return reflected a combined gross income of $30,092.00.

On 23 November 2015, the trial court entered a child support order. The order adopted the gross income amount for Defendant as set forth in the tax return evidence introduced by Defendant at the hearing. Based on this information and the child support worksheets prepared by Defendant, the trial court determined that (1) Defendant did not owe any retroactive child support arrears to Plaintiff; and (2) beginning from 1 August 2015 forward, Defendant would pay $101.26 per month in child support to Plaintiff. On 18 December 2015, Plaintiff filed notice of appeal of the trial court's 23 November 2015 child support order.

## Analysis

It is well established that " '[c]hild support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion.' " *Trevillian v. Trevillian*, 164 N.C. App. 223, 226, 595 S.E.2d 206, 208 (2004) (quoting *Mason v. Erwin*, 157 N.C. App. 284, 287, 579 S.E.2d 120, 122 (2003)). "This Court's review is limited to a consideration of whether there is sufficient competent evidence to support the findings of fact, and whether, based on these findings, the Court properly computed the child support obligations." *Miller v. Miller*, 153 N.C. App. 40, 47, 568 S.E.2d 914, 918-19 (2002). Furthermore, "[e]videntiary issues concerning credibility, contradictions, and discrepancies are for the trial court — as the fact-finder — to resolve and, therefore, the trial court's

findings of fact are conclusive on appeal if there is competent evidence to support them despite the existence of evidence that might support a contrary finding." *Smallwood v. Smallwood*, ___ N.C. App. ___, ___, 742 S.E.2d 814, 817 (2013); *see Shipman v. Shipman*, 357 N.C. 471, 474-75, 586 S.E.2d 250, 253-54 (2003) ("Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges. Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary." (internal citations and quotation marks omitted)); *see also Wiseman Mortuary, Inc. v. Burrell*, 185 N.C. App. 693, 697, 649 S.E.2d 439, 442 (2007) (" 'Findings of fact are conclusive if supported by competent evidence, irrespective of evidence to the contrary.' " (quoting *Oliver v. Bynum*, 163 N.C. App. 166, 169, 592 S.E.2d 707, 710 (2004))).

I. Valuation of Defendant's Income

**[1]** Plaintiff's first argument on appeal is that the trial court erroneously calculated Defendant's income for purposes of calculating her child support obligations. Specifically, he contends that the trial court should have utilized his valuation method instead of relying on the information contained in Defendant's tax returns. We cannot agree.

Here, evidence was presented at the hearing as to Defendant's gross income based on the information reflected in her tax returns. Tax returns have long been consistently relied upon by North Carolina courts as constituting competent evidence of a self-employed individual's income. *See Kelly v. Kelly*, 228 N.C. App. 600, 608, 747 S.E.2d 268, 277 (2013) (in alimony modification action "the actual numbers presented to the trial court in the income tax returns of the defendant and his law firm support the trial court's finding that defendant's income has fluctuated but not decreased substantially. Defendant may disagree with the trial court's finding that any decreases in the two most recent years in his income have not been 'substantial' and that his business has not changed in a material way, but the trial court clearly considered the evidence, weighed its credibility, and made appropriate findings based on the evidence. This Court cannot substitute its judgment for that of the trial court in this situation"); *see also*, *e.g.*, *Hill v. Sanderson*, ___ N.C. App. ___, ___, 781 S.E.2d 29, 37 (2015); *Robinson v. Robinson*, 210 N.C. App. 319, 327, 707 S.E.2d 785, 792 (2011); *Squires v. Squires*, 178 N.C. App. 251, 257, 631 S.E.2d 156, 159 (2006); *Long v. Long*,

71 N.C. App. 405, 408, 322 S.E.2d 427, 430 (1984); *Whitley v. Whitley*, 46 N.C. App. 810, 811, 266 S.E.2d 23, 24 (1980).

While Plaintiff proffers an alternative income computation model based upon evidence he has compiled from information contained in Defendant's various banking records, the trial court chose to give greater weight to the information contained in Defendant's tax returns. We will not disturb a trial court's findings based upon competent evidence, even where other evidence may tend to support a contrary result. The trial court is in the best position to weight and consider the evidence and the testimony of witnesses at trial. As a result, we hold that competent evidence existed to support the trial court's findings of fact as to Defendant's income. Plaintiff's arguments on this issue are consequently overruled.

II. Computation of Defendant's Child Support Obligations

A. Retroactive Child Support Obligation for Henry

**[2]** Plaintiff contends that the trial court failed to follow the North Carolina Child Support Guidelines when computing Defendant's child support obligation to Plaintiff. We agree. The trial court correctly utilized worksheet A to compute Defendant's obligation, but failed to enter the basic child support obligation required by line item 4.

Plaintiff next contends that there was insufficient evidence in the record supporting its finding that "During the time that [Henry] was in the care of Plaintiff, Defendant paid for extraordinary expenses including her son's tuition at Wilmington Christian Academy which averaged $627.00 per month, out of pocket medical and dental expenses, shoes and clothing, cell phone bill and gave him spending money." After a thorough review of the record and transcript, we vacate this portion of the trial court's order and remand for additional findings.

While we note that Defendant's "Worksheet A Child Support Obligation Primary Custody" denotes a $627.00 amount under "[e]xtraordinary expense[s]" which is equivalent to the amount found by the trial court to be for Henry's private school expenses, the worksheet does not actually state that this is what the $627.00 amount pertains to. Additionally, nowhere else in the record on appeal is there any other evidence that Defendant paid for Henry's schooling during the applicable time period.

While it may be the case that this amount is, in fact, reflective of the amount paid by Defendant for Henry's education, the trial court did not expressly state in its findings that the $627.00 amount reflected in the child support worksheet was what it was relying upon in making this

finding. As a result, we vacate this portion of the trial court's order and remand to the trial court to make additional findings of fact on this issue. *See Hampton v. Hampton*, 29 N.C. App. 342, 344, 224 S.E.2d 197, 199 (1976) (" '[W]hen the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence . . . then the order entered thereon must be vacated and the case remanded for detailed findings of fact.' " (quoting *Crosby v. Crosby*, 272 N.C. 235, 238-39, 158 S.E.2d 77, 80 (1967))); *See Vadala v. Vadala*, 145 N.C. App. 478, 480, 550 S.E.2d 536, 538 (2001) (remanding for further findings of fact when trial court made finding as to amount of plaintiff's income, but gave "no indication as to how [plaintiff's income] was calculated" and this Court, therefore, could not "confirm or deny this finding").

Additionally, because the trial court's additional findings on remand may potentially impact the amount of retroactive child support owed, we direct the trial court to recalculate the amount of retroactive child support in light of its additional findings. *See Kowalick v. Kowalick*, 129 N.C. App. 781, 788, 501 S.E.2d 671, 676 (1998) ("We therefore remand for entry of findings on this issue, and for recalculation of the amount of Defendant's child support obligation if necessary.").

B. Retroactive Child Support Obligation for Melissa

**[3]** Plaintiff's final argument on appeal is that the trial court's finding that the parties had joint custody of Melissa from August 2013 through December 2013 was not based upon competent evidence. In support of his position, Plaintiff directs us to the following testimony of Defendant at the hearing:

> Q. All right. Now, let's talk about 2013. Can we agree, factually, that, on July 18, 2013, both of your children were placed in the custody of Mr. Sergeef?
>
> A. Yes.
>
> Q. All right. And can we agree that, for the balance of 2013, both of your children were in the physical legal custody of Mr. Sergeef?
>
> A. Yes.

Based on this exchange and the absence of any evidence to the contrary, we agree with Plaintiff that the trial court's finding of fact that "[s]ince August 2013, the parties have shared custody of their minor child, [Melissa], equally" is unsupported by the evidence. This, in turn, directly impacts the trial court's conclusion of law that "Defendant has

paid adequate support based on the North Carolina Child Support Guidelines and owes no arrears."

As discussed above, " 'when the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence . . . then the order entered thereon must be vacated and the case remanded for detailed findings of fact.' " *Hampton*, 29 N.C. App. at 344, 224 S.E.2d at 199 (quoting *Crosby*, 272 N.C. at 238-39, 158 S.E.2d at 80); *see also State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 649, 507 S.E.2d 591, 596 (1998) (reversing and remanding case for additional findings where findings were insufficient to support conclusion of law but "ample evidence" existed in record to support such additional findings as would ultimately support conclusion of law). "However, if there is no competent evidence to support a finding of fact, an exception to the finding must be sustained and a judgment or order predicated upon such erroneous findings must be reversed." *Bridges v. Bridges*, 85 N.C. App. 524, 526, 355 S.E.2d 230, 231 (1987).

In *Biggs v. Greer*, 136 N.C. App. 294, 305-06, 524 S.E.2d 577, 585-86 (2000), this Court found no competent evidence in the record to support the trial court's findings of fact in its child support modification order in support of its conclusion of law that there had been a material change in circumstances warranting a modification of an existing child support order. We reversed that portion of the trial court's order, but declined to remand the issue for additional findings to be made by the trial court. *Id.* at 306, 524 S.E.2d at 586.

In doing so, this Court distinguished previous cases in which we reversed and remanded for additional findings of fact where the trial court's findings were insufficient to support its conclusions of law but competent evidence in the record would have supported additional findings that would then, in turn, have ultimately supported those conclusions of law, holding as follows:

> The findings in the [child support order] were thus insufficient to support the trial court's conclusion therein that "there ha[d] been a substantial and material change in circumstances warranting a modification" of the existing child support order.
>
> In such circumstance, we have on an earlier occasion reversed the trial court's order and remanded the matter for further findings relative to retroactive child support. In the case *sub judice*, however, *the instant record reflects no competent evidence sufficient to support findings sustaining the conclusion of law. . . .*

> . . . We therefore decline to remand this matter for additional findings regarding the trial court's order of retroactive child support, but instead simply reverse that award.

*Id.* at 305-06, 524 S.E.2d at 586 (emphasis added) (internal citations omitted); *see Harnett Cnty. ex rel. De la Rosa v. De la Rosa*, ___ N.C. App. ___, ___, 770 S.E.2d 106, 113-14 (2015) ("In some cases, we may remand a case to the trial court to make additional findings of fact based upon the evidence presented, but here, the lack of findings is due to the lack of evidence itself. . . . We therefore reverse[.]").

Consequently, in light of this Court's decision in *Biggs*, we reverse the portion of the trial court's order concluding that no retroactive child support was owed by Defendant to Plaintiff pertaining to its erroneous finding that the parties shared joint custody of Melissa from August through the end of the 2013 calendar year where all of the evidence unambiguously demonstrated that Melissa was in Plaintiff's sole custody during that time period. We do, however, remand this portion of the order to the trial court for the limited purpose of recalculating the amount of retroactive child support Plaintiff is entitled to recover from Defendant in light of our holding.

## Conclusion

For the reasons stated above, the portion of the trial court's order pertaining to the valuation of Defendant's income is affirmed. The portion of the order concerning the amount of retroactive child support owed by Defendant pertaining to Henry is vacated and we remand for additional findings of fact and recalculation of the amount of retroactive child support — if any — owed. The portions of the order based upon the finding that Melissa was in the joint custody of both Plaintiff and Defendant from August through the end of the 2013 calendar year is reversed and remanded to the trial court for the limited purpose of recalculating the amount of retroactive child support owed.[2]

AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART; AND REMANDED.

Judges DAVIS and INMAN concur.

---

2. We also note that Defendant utilized an outdated version of the child support worksheets. On remand, we direct the trial court to ensure that the most recent version of the worksheets are used.

[250 N.C. App. 412 (2016)]

STATE OF NORTH CAROLINA, Plaintiff
v.
CHARLES DREW FAULKNER, Defendant

No. COA16-319

Filed 15 November 2016

**Constitutional Law—effective assistance of counsel—knowing, intelligent, and voluntary waiver**

The trial court did not err by allowing defendant to represent himself at a probation revocation hearing allegedly without making a valid determination that defendant's decision to proceed pro se was knowing, intelligent, and voluntary. The trial court properly conducted the inquiry required under N.C.G.S. § 15A-1242.

Appeal by defendant from judgment entered 16 October 2015 by Judge W. Osmond Smith, III in Person County Superior Court. Heard in the Court of Appeals 6 October 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Christine Wright, for the State.*

*Patterson Harkavy LLP, by Paul E. Smith, for defendant-appellant.*

ZACHARY, Judge.

Charles Drew Faulkner (defendant) appeals from judgments revoking his probation and activating the corresponding sentences that were imposed upon his convictions of criminal offenses in 2013 and 2014. Defendant argues on appeal that the trial court erred by allowing him to represent himself without first determining that his request to proceed *pro se* was knowing and voluntary. We conclude that the trial court properly conducted the inquiry required under N.C. Gen. Stat. § 15A-1242 (2015), and thus did not err by allowing defendant to represent himself at the probation revocation hearing.

## I. Factual and Procedural History

On 14 August 2013, defendant pleaded guilty to the sale of marijuana, possession of marijuana with intent to sell or deliver, possession of drug paraphernalia, and possession of a firearm by a convicted felon. The drug-related charges were consolidated and defendant was sentenced to a term of 10-21 months' imprisonment; the sentence was suspended

and defendant was placed on supervised probation for 24 months. Defendant received a consecutive suspended sentence of 17-30 months' imprisonment for possession of a firearm by a felon.[1] On 20 November 2014, defendant pleaded guilty to possession of marijuana with intent to sell or deliver, possession of drug paraphernalia, and maintenance of a dwelling for the purpose of selling marijuana. The court imposed two consecutive sentences of 6-17 months imprisonment, which were suspended, and defendant was placed on probation for a period of 36 months.

On 19 May 2015, defendant's probation officer filed violation reports alleging violations by defendant of the terms of the probationary sentences imposed in 2013, including his commission of the offenses to which he pleaded guilty in 2014, and being in arrears on court-ordered payments. It was also alleged that defendant had violated the terms of the 2014 probationary sentences in several respects, including having tested positive for the presence of marijuana. On 8 June 2015, defendant appeared in court on the charges of violating the terms of his probation. The trial court informed defendant that if he were indigent he would qualify for court-appointed counsel and that he also could hire an attorney or represent himself. After discussing the issue with defendant, the trial court granted defendant's request to represent himself with the assistance of standby counsel.

On 30 August 2015, the trial court conducted a probation revocation hearing. Defendant, who appeared *pro se*, did not offer evidence or raise any arguments pertaining to the substantive merits of the probation violation reports. Instead, defendant relied solely on the argument that he was a "Moorish National" or "sovereign citizen" and therefore was not subject to the court's jurisdiction. At the end of the hearing, the trial court found that defendant had violated the terms of his probation. The court activated the suspended sentences previously imposed on defendant and consolidated the judgments into two consecutive sentences of 14 - 26 months' followed by 6 - 17 months' imprisonment. Defendant gave oral notice of appeal.

## II. Standard of Review

On appeal, defendant contends that the trial court erred by allowing him to represent himself without making a valid determination that

---

1. Defendant later filed a motion for appropriate relief on the grounds that his prior record level was miscalculated in the judgment sentencing him for possession of a firearm by a felon. Defendant's motion was granted and he was resentenced to a term of 14-26 months' for possession of a firearm by a felon.

defendant's decision to proceed *pro se* was knowing, intelligent, and voluntary. We do not agree.

It is well-established that "[t]he right to counsel provided by the Sixth Amendment to the United States Constitution also provides the right to self-representation." *State v. White*, 349 N.C. 535, 563, 508 S.E.2d 253, 270-71 (1998) (citing *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562 (1975), and N.C. Const. art. I, § 23). "Before allowing a defendant to waive in-court representation by counsel, however, the trial court must insure that constitutional and statutory standards are satisfied." *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992). "[I]t is error for a trial court to allow a criminal defendant to release his counsel and proceed *pro se* unless, first, the defendant expresses 'clearly and unequivocally' his election to proceed *pro se* and, second, the defendant knowingly, intelligently, and voluntarily waives his right to in-court representation." *White*, 349 N.C. at 563, 508 S.E.2d at 271 (citation omitted).

Under North Carolina law, " 'Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court . . . must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to . . . representation by counsel.' A trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242." *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008) (quoting *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476). N.C. Gen. Stat. § 15A-1242 provides as follows:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

"We review a trial court's decision to permit a defendant to represent himself *de novo*." *State v. Garrison*, __ N.C. App. __, __, 788 S.E.2d 678, 679 (2016) (citing *State v. Watlington*, 216 N.C. App. 388, 393-94, 716 S.E.2d 671, 675 (2011)).

## III. Discussion

Defendant argues that the trial court committed reversible error by allowing him to proceed *pro se* at the probation revocation hearing without first determining that defendant's decision was knowing, intelligent, and voluntary. Analysis of this issue is best understood by reviewing the colloquy between the trial court and defendant, which is set out below:

> PROSECUTOR: . . . Charles Drew Faulkner. It's on for a first appearance for his probation violation. Needs to be advised.
>
> DEFENDANT: For the record, let the record show I'm Charles Drew Faulkner. I'm Moorish American National.
>
> THE COURT: Please stand, sir. You're charged with violating probation. If you were to be found in violation, you could have probation revoked. Your suspended sentences are 10 to 21 months, 14 to 26 months, 6 to 17 months and 6 to 17 months. Those are the sentences you could possibly be required to serve if you were found in violation and subject to revocation. Because of that, you're entitled to be represented by a lawyer. If you desire a lawyer and cannot afford one, the Court will appoint a lawyer to represent you at no cost to you at this time. An appointed lawyer is not necessarily free, in that if you were to be found in violation of probation, one of the conditions of judgment would be that you be required to reimburse the State for the value of your court-appointed attorney's services. You have the right to represent yourself, retain a lawyer to represent you or to apply for a court-appointed lawyer. Do you understand those matters, sir?
>
> DEFENDANT: Yes, I understand.
>
> THE COURT: What do you want to do about a lawyer?
>
> DEFENDANT: Represent myself.
>
> THE COURT: All right. The law requires me to have additional discussion with you. Do you understand if you choose to represent yourself, that I may not serve as a legal adviser to you?
>
> DEFENDANT: I understand.

THE COURT: That you would be expected to know and follow the rules and procedures that would be applicable as if you had a lawyer. Do you understand that?

DEFENDANT: Yes.

THE COURT: At a probation violation hearing, the State's not required to prove violations beyond a reasonable doubt, but only to the reasonable satisfaction of a judge. Do you understand that?

DEFENDANT: Yes. Can you state your jurisdiction for the record?

THE COURT: Further, do you understand that there might be things about the law that you don't understand because you're not schooled in law? There might be things that you couldn't take advantage of that would be to your benefit if you knew about. If you choose to represent yourself, you are, in effect, understanding all the circumstances you have, you are knowing the consequences and you further understand there might be things about the law that you can't use to your benefit? Do you understand that?

DEFENDANT: I don't.

THE COURT: There may be things about the law and procedures in probation violations. If you don't know those things . . . there might be some rights that you would lose or waive or give up or not be able to take advantage of. Sometimes people even refer to them as technicalities. So do you understand that if you choose to represent yourself, and you don't know something about the law, then that's just the way you find yourself. Do you understand that?

DEFENDANT: No.

THE COURT: Do you have any questions about that?

DEFENDANT: No.

THE COURT: Do you want to represent yourself?

DEFENDANT: I would ask to have standby counsel.

THE COURT: You'd like to have standby counsel?

DEFENDANT: Yes.

> THE COURT: Then do you understand if you choose to represent yourself, I'm required to have this conversation with you about your decision to be sure that you understand[.] . . . I don't have to decide whether it's a good decision, but that you understand your decision to represent yourself. So knowing all that you know about yourself, the circumstances that you find yourself in, the potential consequences, everything I've discussed with you and everything else that you know about your situation, you choose now to give up your rights to a lawyer and represent yourself, but you request standby counsel. Is that right?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: All right. Have the defendant sign a waiver of all counsel. This is a document agreeing to what you just said to me.
>
> . . .
>
> THE COURT: The Court has complied with 15A-1242. The defendant should be allowed to represent himself as he has requested. Further, pursuant to 15A-1243, the defendant's request to have standby counsel appointed to assist him when called upon and to bring to the Judge's attention matters favorable to the defendant upon which the Judge should rule upon his own motion is granted. That is, defendant's request for standby counsel is granted.
>
> . . .
>
> DEFENDANT: Could you state your jurisdiction for the record, sir?
>
> THE COURT: I think I understood your question. But would you say it a little slower and clearer?
>
> DEFENDANT: Would you state your jurisdiction for the record, sir?
>
> THE COURT: Yes, sir. I'm a Superior Court Judge.
>
> DEFENDANT: I didn't ask what kind of judge you were.
>
> THE COURT: You can move . . . on to the next case.

In the trial court's discussion with defendant, the court explained the "nature of the charges and proceedings and the range of permissible

punishments" and informed defendant of "his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled," as required by N.C. Gen. Stat. § 15A-1242. In response, defendant "clearly and unequivocally" asked to represent himself. The trial court then informed defendant that (1) if defendant represented himself, the trial court would not serve as a legal adviser to defendant; (2) if defendant proceeded *pro se* he would be expected to know and follow the rules and procedures of court; and (3) that at a probation violation hearing, the State is not required to prove violations beyond a reasonable doubt, but only to the reasonable satisfaction of the court. Defendant indicated that he understood each of these warnings regarding the consequences of representing himself. We conclude that the trial court's inquiry of defendant met the standard set out in N.C. Gen. Stat. § 15A-1242 and that the trial court did not err by allowing defendant to proceed *pro se*.

We note that this conclusion is also supported by our jurisprudence interpreting N.C. Gen. Stat. § 7A-457 (a) (2015), which provides in relevant part that:

> An indigent person who has been informed of his right to be represented by counsel . . . may, in writing, waive the right to in-court representation by counsel[.] . . . Any waiver of counsel shall be effective only if the court finds of record that at the time of waiver the indigent person acted with full awareness of his rights and of the consequences of the waiver. In making such a finding, the court shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged.

N.C. Gen. Stat. § 7A-457 requires the trial court to find "that at the time of waiver, the defendant acted with full awareness of his rights and of the consequences of the waiver. . . . This is similar to the inquiry required under N.C.G.S. § 15A-1242 and may be satisfied in a like manner." *State v. Heatwole*, 344 N.C. 1, 18, 473 S.E.2d 310, 318 (1996). Accordingly, in determining whether the trial court properly allowed defendant to represent himself, it is appropriate to consider the defendant's "age, education, familiarity with the English language, mental condition, and the complexity of the crime charged" as set out in N.C. Gen. Stat. § 7A-457. In this case, the record indicates that defendant was 23 years old, spoke English, had a G.E.D. degree, had attended college for one semester, and had no mental defects of record. In addition, there were no factual or legal complexities involved in the determination of

whether defendant had violated his probation. The alleged violations -- defendant's conviction of other offenses while on probation, testing positive for the presence of marijuana, and being in arrears on court-ordered payments -- were easily established by means of the official records of the defendant's 2014 convictions and the testimony of defendant's probation officer. Moreover:

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

*State v. Williams*, 230 N.C. App. 590, 597, 754 S.E.2d 826, 830 (2013) (quoting *State v. Tennant*, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000)), *disc. review denied*, 367 N.C. 298, 753 S.E.2d 670 (2014). As a result of the relative informality of and the lower burden of proof at a probation revocation hearing, defendant's decision to represent himself did not require defendant to navigate complex evidentiary or procedural rules. We conclude that the inquiry conducted by the trial court in this case complied with N.C. Gen. Stat. § 15A-1242, that the factors set out in N.C. Gen. Stat. § 7A-457 also support the court's decision, and that the trial court did not err by allowing defendant to represent himself.

Defendant's argument for a contrary result is primarily based upon the fact that during his colloquy with the trial court, defendant twice indicated that he did not understand a statement by the trial court. The relevant excerpt from the transcript is as follows:

> THE COURT: At a probation violation hearing, the State's not required to prove violations beyond a reasonable doubt, but only to the reasonable satisfaction of a judge. Do you understand that?
>
> DEFENDANT: Yes. Can you state your jurisdiction for the record?
>
> THE COURT: Further, do you understand that there might be things about the law that you don't understand because

> you're not schooled in law? There might be things that you couldn't take advantage of that would be to your benefit if you knew about. If you choose to represent yourself, you are, in effect, understanding all the circumstances you have, you are knowing the consequences and you further understand there might be things about the law that you can't use to your benefit? Do you understand that?
>
> DEFENDANT: I don't.
>
> THE COURT: There may be things about the law and procedures in probation violations. If you don't know those things . . . there might be some rights that you would lose or waive or give up or not be able to take advantage of. Sometimes people even refer to them as technicalities. So do you understand that if you choose to represent yourself, and you don't know something about the law, then that's just the way you find yourself. Do you understand that?
>
> DEFENDANT: No.
>
> THE COURT: Do you have any questions about that?
>
> DEFENDANT: No.

Defendant contends on appeal that because he twice indicated that he did not understand a statement by the trial court, the trial court's determination that defendant's waiver of counsel was knowing, intelligent, and voluntary was erroneous. We conclude that defendant's argument lacks merit.

First, the statements about which defendant indicated confusion were not essential to the trial court's inquiry. The two questions to which defendant answered "No" when he was asked whether he understood consisted of reminders by the trial court that defendant was not a lawyer and therefore might not be aware of all of the legal rules applicable to his case. However, the trial court asked other questions that established defendant's understanding of the most important consequences of self-representation: that the trial court would not provide legal assistance to defendant, that defendant would be held to the same standards as a litigant with legal representation, and that the burden of proof in a probation revocation case was lower than that in a criminal trial and required only proof to the judge's satisfaction. We conclude that the trial court's decision to allow defendant to represent himself would have been valid even if the court had omitted these questions.

In addition, "[i]t is axiomatic that 'it is within a trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial.' " *Don't Do It Empire, LLC v. Tenntex*, __ N.C. App. __, __, 782 S.E.2d 903, 910 (2016) (quoting *Clark v. Dyer*, __ N.C. App. __, __, 762 S.E.2d 838, 848 (2014), *cert. denied*, 368 N.C. 424, 778 S.E.2d 279 (2015)). Thus, the trial court could properly evaluate the credibility of defendant's contention that he did not understand one or more of the trial court's statements. In this regard, the trial court was also allowed to consider the fact that defendant consistently asserted that because he was a "Moorish National" or "sovereign citizen" he was not subject to the court's jurisdiction.

"[S]o-called 'sovereign citizens' are individuals who believe they are not subject to courts' jurisdiction[.] . . . [C]ourts repeatedly have been confronted with sovereign citizens' attempts to delay judicial proceedings, and summarily have rejected their legal theories as frivolous." *United States v. Davis*, 586 Fed. Appx. 534, 537 (11th Cir. 2014), *adopted by, relief dismissed at* 2015 U.S. Dist. LEXIS 118200 (N.D. Ga. 2015). The courtroom behavior of adherents to the "sovereign citizen" philosophy is sometimes frustrating to trial judges:

> The sovereign citizen typically files lots of rambling, verbose motions and, in court proceedings, will often refuse to respond coherently to even the simplest question posed by the Court. Each question by the judge is volleyed back with a question as to what is the judge's claim and by what authority is the judge even asking a question. . . . In proceedings, the observant sovereign citizen clings doggedly to the sovereign citizen script[.] . . . For the most part, the defendant's statements to the Court are gibberish.

*United States v. Cartman*, 2013 U.S. Dist. LEXIS 79137 *3 (N.D. Ga. 2013), *aff'd*, 607 Fed. Appx. 888 (11th Cir. Ga. 2015). A defendant's contention that he "does not understand" the proceedings is a common aspect of a "sovereign citizen" defense. For example, in *State v. Mee*, 233 N.C. App. 542, 756 S.E.2d 103 (2014), the defendant challenged the court's jurisdiction, asserting that he was "a sovereign from [Moorish] descent" and a "free indigenous man" with rights under "the United Nations Declaration of Rights of Indigenous Peoples." When the trial court tried to determine whether the defendant wanted appointed counsel, the defendant repeatedly claimed that he understood nothing about the proceedings. On appeal, this Court upheld the trial court's ruling that the defendant had forfeited the right to counsel, noting the trial court's statement that:

> THE COURT: . . . [T]he Court finds as a fact that Mr. Mee is intentionally disrupting these proceedings and intentionally trying to impede his trial. And that was apparent from his demeanor yesterday when I saw him. . . . So despite Mr. Mee's protestations that he does not understand these proceedings, the Court is of the opinion that he understands these proceedings very well, and just is not recognizing the Court[.] . . . He's obstructing these proceedings.

*Mee*, 233 N.C. App. at 559, 756 S.E.2d at 112-113. Similarly, in *United States v. Rowell*, 2016 U.S. Dist. LEXIS 134510 *7, *adopted by* 2016 U.S. Dist. LEXIS 134511 (E.D. Wis. 2016), the defendant, who claimed to be "a citizen of the Moorish Republic Nation," represented himself at trial. On appeal, the court held that the defendant was competent to waive counsel, notwithstanding the fact that the defendant had claimed not to understand the charges against him:

> . . . Mr. Ali Bey has chosen to proceed *pro se* and made his jurisdictional arguments without the assistance of counsel. Based on my in-court interactions with Mr. Ali Bey, I have concluded that he is intelligent, aware of his surroundings, and cognizant of the adverse consequences that can attend self-representation. . . . To be sure, at times Mr. Ali Bey asserted that he did not understand the charges against him or the penalties he faced. But his statements stemmed, from my observation, from his refusal to recognize the authority of the United States and not from a failure of comprehension.

We wish to be clear that this Court is not expressing an opinion on the sincerity of defendant's claim not to have understood two of the trial court's questions. Rather, we are simply noting that the trial court was charged with determining the credibility of defendant's statements. We also observe that after defendant indicated that he did not understand the trial court's statements, the court gave defendant an opportunity to ask questions and defendant indicated that he had no questions. We conclude that, on the facts of this case, the trial court's determination that defendant had made a voluntary, intelligent, and knowing waiver of counsel was not invalidated merely because defendant answered "No" when asked if he understood two of the trial court's questions.

Defendant also argues that the trial court failed to inform him of the nature of the charges and the proceedings and of the possible sentences that might be imposed. Defendant acknowledges that the trial court

reviewed these matters immediately before asking defendant whether he wished to retain counsel, seek assignment of counsel, or represent himself. Defendant contends, however, that the court's statements on the charges and possible penalties were not valid because the trial court did not repeat the same information after defendant asked to proceed *pro se*. Defendant cites no authority in support of this argument, and we conclude that defendant is not entitled to relief on this basis.

Finally, defendant asserts that when he requested that the trial court appoint standby counsel, defendant "was no longer unequivocally requesting to proceed *pro se*." In support of this position, defendant cites *Thomas*, in which the defendant stated that he did not want to proceed *pro se* or to be represented by counsel, but instead sought a "hybrid representation" in which the defendant would function as the "lead attorney" along with assigned counsel. *Thomas* is inapplicable to the present case, and defendant cites no authority holding that a defendant's request for standby counsel automatically invalidates his otherwise clear and unequivocal request to proceed *pro se*.

For the reasons discussed above, we conclude that the trial court did not err by granting defendant's request to represent himself at the probation revocation hearing. Defendant has raised no other challenges to the judgments that activated his suspended sentences and we conclude that these judgments should be

AFFIRMED.

Judges STROUD and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
RONNIE PAUL GODBEY

No. COA15-877

Filed 15 November 2016

**1. Evidence—privileged communications—consensual sexual activity between husband and wife—child sex abuse prosecution**

In defendant's prosecution for child sexual abuse, the trial court did not err by admitting privileged evidence over objection about consensual sexual activity between defendant and his wife pursuant to N.C.G.S. § 8-57.1.

**2. Evidence—consensual sexual activity between husband and wife—child sex abuse prosecution—pattern or modus operandi**

In defendant's prosecution for child sexual abuse, the trial court abused its discretion by overruling defendant's Rule 401 and 404(b) objections to the admission of evidence regarding consensual sexual activity between defendant and his wife. The evidence of the unique sexual act showed defendant's pattern or modus operandi and was not outweighed by its prejudicial effect.

Appeal by defendant from judgment entered 8 December 2014 by Judge Christopher W. Bragg in Rowan County Superior Court. Heard in the Court of Appeals 9 February 2016.

*Attorney General Roy Cooper, by Special Deputy Attorney General Anita LeVeaux, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender James R. Grant, for the defendant-appellant.*

BRYANT, Judge.

Where N.C. Gen. Stat. § 8-57.1 is applicable in any judicial proceeding in which the abuse of a child is in issue, the trial court did not err in applying section 8-57.1 to defendant's criminal prosecution for child sexual abuse. Further, because the privileged material was evidence of defendant's pattern or modus operandi and was not outweighed by its

prejudicial effect, it was not erroneously admitted under Rules 401, 403, or 404(b), and we find no error in the judgment of the trial court.

Ronnie Paul Godbey, defendant, and Karen Godbey ("Karen"), were married in 1996. At the time, Karen had two children: a three-year-old son and a daughter, Stephanie.[1] Karen and defendant later had two children together in 2002 and 2008. All four children lived with the couple.

One day in May 2010, when Stephanie was nineteen years old, Karen asked Stephanie to help care for her siblings. Stephanie, who was on the phone with her boyfriend, said she already had plans. Karen asked Stephanie to get off the phone and when Stephanie refused, Karen pulled the phone away and slapped her. When Karen told Stephanie she had to stay home and babysit, Stephanie walked out, at which point Karen said, "[I]f you leave, don't come back."

After this argument, Stephanie stayed with a friend, Millie, for a few weeks. At some point, Stephanie and Millie went to the home of Stephanie's maternal grandfather, Larry Gobble, where Millie told Gobble that her house was too small for Stephanie to continue staying with her. Stephanie told Gobble that she could not go back home and, Gobble, who testified for the State, said,

> well, here's the deal, unless you got some specific reason, like, you've been physically abused or you're in harms [sic] way of something being -- in some kind of danger, you're not going to come to my house and live. You're going to go home and work the problems out with your mother.

At this point, Stephanie told Gobble that defendant had "abused" her at night while Karen was sleeping, but did not go into further detail. Gobble asked Stephanie if she had told Karen, and Stephanie said she had not because she thought Karen would not believe her. Stephanie stayed with Millie for another week or so. Then, after discussing the situation with his pastor, Gobble allowed Stephanie to move into his home.

At some point during the next day or two after Stephanie first told her grandfather about the alleged abuse, Gobble arranged for Stephanie to speak with Karen over the phone. Stephanie told Karen that defendant had been coming into her room and "messing with" her and "bothering" her, which Stephanie later testified at trial had been going on since she was about ten years old and continued until her eighteenth birthday.

---

1. Because the victim was a minor during the time the crimes were committed, a pseudonym is used to protect her identity.

Stephanie and Karen agreed to meet to talk further and Stephanie told Karen that defendant "would do things to her" and "molest[ed]" her. Karen was upset and in tears and suggested talking to a pastor. Stephanie agreed, and the two met with a pastor that day.

When Stephanie left the meeting with Karen and the pastor, Karen called defendant and asked him to meet her at the pastor's office. When he arrived, Karen confronted him with Stephanie's allegations. Defendant denied "messing with" Stephanie and appeared very upset. Karen and defendant then went home. Karen later testified that she decided to stay with defendant because she did not believe Stephanie's accusations.

In December 2011, Detective Sarah Benfield with the Rowan County Sheriff's Department spoke with Gobble's pastor after the pastor reported a "past sex abuse." After speaking with the pastor, Detective Benfield interviewed Stephanie. Stephanie alleged that defendant frequently came into her room over the years and (1) rubbed her back, breasts, and vagina; (2) performed cunnilingus on her; (3) inserted his fingers into her vagina; and (4) forced her to perform fellatio. She also claimed that defendant would turn her over and "hump" her back until he ejaculated.

Detective Benfield then talked with Karen and explained all of Stephanie's allegations, including the allegation that defendant would hump Stephanie's back until he ejaculated. About a week after Detective Benfield's meeting with Karen, Karen contacted the detective and said that when defendant engaged her in sexual activity, he would do the same "back humping" that Stephanie alleged defendant would do to her. Detective Benfield had Karen come in and read and sign a statement to that effect, dated 12 January 2012. About a month after she signed the 12 January 2012 statement, Karen contacted Detective Benfield again and told her she wanted to change her earlier statement. On 1 February 2012, Karen met with Detective Benfield and initialed and signed an amended statement, through which she explained that defendant's

> doing something on my back was my idea. We only did it a few times. He would hump me on my back until he ejaculated on my back. It was when I wasn't able to have intercourse. It was consensual, and something we did together intimately, not against my will.

When Detective Benfield spoke with defendant, he denied having any sexual contact with Stephanie, said that Stephanie was lying, and told her that "this all started when she got kicked out of the house."

On 2 April 2012, defendant was indicted on two counts of first degree sex offense with a child, one count of statutory sex offense with a 13-, 14-, or 15-year-old, and three counts of indecent liberties with a child. All six indictments alleged an offense date range of 30 March 2001 through 29 March 2007 (the day before Stephanie's sixteenth birthday). Two years later, superseding indictments issued for the two charges of sex offense with a child. The case came on for trial at the 2 December 2014 Criminal Session of Rowan County Superior Court, the Honorable Christopher W. Bragg, Judge presiding.

Prior to trial, defendant moved to exclude any mention of sex acts between Karen and defendant, including references to Karen's statements to Detective Benfield. Defendant argued that private sex acts between a husband and wife were privileged marital communications under N.C. Gen. Stat. § 8-57(c). The trial court reserved judgment on the matter until Karen testified.

At trial, Stephanie testified about the abuse, including the "back humping." During its case-in-chief, the State did not call Karen as a witness or elicit any testimony from Detective Benfield, or any other witness, about defendant and Karen's sex life. At the close of the State's evidence, defendant asked the trial court to revisit the privilege issue before presentation of defense evidence. While the trial court agreed that sex acts between Karen and defendant were privileged marital communications, it held N.C. Gen. Stat. § 8-57.1 abrogated the privilege in this case.

Prior to the relevant portions of Karen's testimony, defendant renewed his objection to the State's cross-examination about her sex acts with defendant and also objected to such questioning on relevance and Rule 404(b) grounds. The trial court reiterated its prior ruling and overruled defendant's additional objections, holding that evidence of sex acts between Karen and defendant was admissible under Rule 404(b) "almost as a modus operandi . . . [to] show a pattern [of] conduct by [defendant]." On direct, Karen, called as a defense witness, mentioned that she gave statements on two occasions at the sheriff's department regarding Stephanie's allegations and that she signed a statement every time. She did not refer to, and defense counsel did not elicit, testimony regarding the substance of those statements.

The State then cross-examined Karen, over contemporaneous objection, about her statements to Detective Benfield. Karen testified that the sexual activity in question did not begin until after the birth of her and defendant's second child in 2008 (thus, beginning after the date ranges

alleged in the indictments). She explained that it did not entail defendant "humping" her back, but rather involved defendant rubbing his penis "between her butt." On redirect, Karen further explained the sex act she had described to Detective Benfield, stating that it involved defendant rubbing his penis between her oiled butt cheeks until he ejaculated, but that he never "humped" her back. Karen also explained that this was not something she enjoyed, but that it was her idea as sexual intercourse had become painful for her as a result of fibroids after her son's birth in 2008.

Defendant testified and denied abusing or inappropriately touching Stephanie. He also testified on cross-examination as follows:

> Q. Did you ever hear about an allegation and you humping Stephanie's back until you ejaculated?
>
> A. Did -- did I hear about it?
>
> Q. Yes.
>
> A. Yes, I heard about it. It's in the papers.
>
> Q. All right. That's something similar to what you and your wife do, correct?
>
> A. A little bit, but not -- not really.
>
> Q. Your wife's testimony was that didn't begin until 2008, after [your son] was born?
>
> A. That's when she had her problems, yes.

Defendant's ex-wife, son, and sister also testified as character witnesses. After the defense rested, the State re-called Detective Benfield, who testified about Karen's statements, noting that Karen never informed her that the activity she described with defendant only began in 2008. Defendant objected to this line of questioning for "reasons stated previously . . . including privilege."

In charging the jury, the trial court instructed, over defendant's objection that

> [e]vidence has been received tending to show that the defendant and [Karen] engaged in a sexual act where the defendant would rub his penis between her butt cheeks until the defendant ejaculated. This evidence was received solely for the purpose of showing that the defendant had the intent, which is a necessary element of the crime charged in this case, and that there existed in the mind

> of the defendant a common plan or scheme involving the crime charged in this case.
>
> If you believe this evidence, you may consider it, but only for the limited purpose for which it was received. You may not consider it for any other purpose.

After about two-and-a-half hours of deliberation, the jury asked the trial court whether it had to find defendant guilty of the sex offense charges in order to convict him of the indecent liberties offenses. The jury also asked "how [to] determine which act applies" to each indecent liberties charge, noting that all three indictments were worded the same. The trial court responded by instructing the jury that each charged offense was "separate and distinct" and by reiterating the pattern instruction on indecent liberties.

After another two-and-a-half hours of deliberation, the jury submitted a note to the trial court indicating it had reached a verdict in the sex offense cases, but was "unable to agree on an [sic] unanimous decision" in the indecent liberties cases. In response, the trial court dismissed the jury for the weekend and instructed it to return on Monday for further deliberations.

When the jury returned Monday morning, it asked to review defense exhibits 1–14, which included an illustrative diagram of the Godbey family home and pictures of the family. At 2:42 p.m., the jury indicated it had reached a unanimous verdict in one of the indecent liberties cases, but, with regard to the remaining charges, the jury foreman told the court that he "believe[d] that [the jury] could spend days discussing [the] two remaining charges without reaching an [sic] unanimous decision."

The trial court then gave the jury an *Allen* charge, typically given to encourage a deadlocked jury to try and reach a verdict, and allowed another hour and a half of deliberations. After the hour and a half of deliberations, the trial court declared a mistrial on the two remaining indecent liberties charges. In the other cases, the jury acquitted defendant of the three sex offense charges, but convicted him of one count of indecent liberties. Defendant was sentenced to sixteen to twenty months' imprisonment for the indecent liberties conviction and ordered to register as a sex offender for thirty years. Defendant entered oral notice of appeal.

---

On appeal, defendant argues that the trial court erred (I) by admitting privileged evidence over objection about consensual sexual activity

between defendant and his wife pursuant to N.C. Gen. Stat. § 8-57.1; and (II) abused its discretion by overruling defendant's Rule 401 and 404(b) objections to evidence about consensual sexual activity between defendant and his wife.

*I*

**[1]** Defendant first argues that the trial court erred by admitting, over objection, privileged evidence about consensual sexual activity between defendant and his wife and that this error entitles him to a new trial. Specifically, defendant contends the trial court erroneously concluded that the marital communications privilege did not apply to the evidence about spousal sexual activity as N.C. Gen. Stat. § 8-57.1 waives that privilege. Defendant argues that N.C.G.S. § 8-57.1 does not completely abrogate the privilege, but rather is limited to "judicial proceeding[s] related to a report pursuant to the Child Abuse Reporting Law," and therefore the trial court erroneously concluded that N.C.G.S. § 8-57.1 creates a broad exception to the marital communications privilege in all cases. We disagree.

Whether a communication is privileged is a question of law reviewed *de novo* by this Court. *See Nicholson v. Thom*, 236 N.C. App. 308, 318, 763 S.E.2d 772, 779 (2014). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

"[T]he marital communications privilege is premised upon the belief that the marital union is sacred and that its intimacy and confidences deserve[] legal protection." *State v. Rollins*, 363 N.C. 232, 236, 675 S.E.2d 334, 337 (2009) (citing *Hicks v. Hicks*, 271 N.C. 204, 205, 155 S.E.2d 799, 800 (1967)). "[W]hatever is known by reason of that intimacy should be regarded as knowledge confidentially acquired, and . . . neither [spouse] should be allowed to divulge it to the danger or disgrace of the other." *Hicks*, 271 at 205, 155 S.E.2d at 800 (citation omitted). In addition to protecting verbal expression, the marital communications privilege also protects actions which are "intended to be . . . communication[s] and [are] the type of act[s] induced by the marital relationship." *State v. Hammonds*, 141 N.C. App. 152, 171, 541 S.E.2d 166, 180 (2000) (citations omitted).

In assessing whether an act or expression is confidential such that it is afforded the protection of the marital privilege, a court must ask whether it was "prompted by the affection, confidence, and loyalty engendered by" the marriage. *Rollins*, 363 N.C. at 237, 675 S.E.2d at

337 (citations omitted); *see also State v. Freeman*, 302 N.C. 591, 596, 276 S.E.2d 450, 453 (1981) (modifying the common law rule to hold that "spouses shall be incompetent to testify against one another in a criminal proceeding only if the substance of the testimony concerns a 'confidential communication' between the marriage partners made during the duration of their marriage"). A court must also consider "[t]he circumstances in which the communication takes place, including the physical location and presence of other individuals . . . ." *Rollins*, 363 N.C. at 237, 675 S.E.2d at 337. There "must be a reasonable expectation of privacy on the part of the holder and the intent that the communication be kept secret." *Id.* at 238, 675 S.E.2d at 338.

The North Carolina Supreme Court has specifically held that sex between spouses is subject to the marital communications privilege. *Wright v. Wright*, 281 N.C. 159, 166–67, 188 S.E.2d 317, 322 (1972); *see Biggs v. Biggs*, 253 N.C. 10, 16, 116 S.E.2d 178, 183 (1960) ("[A]n act of intercourse between husband and wife is a confidential communication."), *overruled in part by Hicks*, 271 N.C. at 207, 155 S.E.2d at 802 (declining to follow *Biggs* "where there [was] a completely different factual situation").

While North Caroline General Statutes section 8-57 provides "[n]o husband or wife shall be compellable *in any event* to disclose any confidential communication made by one to the other during their marriage[,]" N.C. Gen. Stat. § 8-57(c) (2015) (emphasis added), there are exceptions:

> (b) The spouse of the defendant shall be *competent but not compellable* to testify for the State against the defendant in any criminal action or grand jury proceedings, except that the spouse of the defendant shall be both competent and compellable to so testify:
>
> . . .
>
> > (5) In a prosecution of one spouse for any other criminal offense against the minor child of either spouse, including any child of either spouse who is born out of wedlock or adopted or a foster child.

*Id.* § 8-57(b)(5); *see also Biggs*, 253 N.C. at 16–17, 116 S.E.2d at 183 ("It is true that an act of intercourse between husband and wife is a confidential communication. But the statute merely provides that 'no husband or wife shall be *compellable* to disclose any confidential communication.' [The husband's] testimony (and that of his wife) was *voluntarily given*; there was no effort to compel such testimony." (emphasis added)). In

other words, sections 8-57(b)(5) and (c) together provide that a witness-spouse may voluntarily testify about the abuse of a child, even over the objection of the defendant-spouse, but may not be compelled to do so. N.C.G.S. § 8-57(b)(5), (c).

N.C. General Statutes, section 8-57.1, however, abrogates the marital communications privilege even further with regard to cases of child abuse:

> Notwithstanding the provisions of G.S. 8-56 and G.S. 8-57, the husband-wife privilege shall not be ground for excluding evidence regarding the abuse or neglect of a child under the age of 16 years or regarding an illness of or injuries to such child or the cause thereof in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B of the General Statutes of North Carolina.

N.C.G.S. § 8-57.1 (2015).

"Questions of statutory interpretation are questions of law[.] . . ." *First Bank v. S & R Grandview, L.L.C.*, 232 N.C. App. 544, 546, 755 S.E.2d 393, 394 (2014). "The primary objective of statutory interpretation is to give effect to the intent of the legislature." *Id.* (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998)). "The plain language of a statute is the primary indicator of legislative intent." *Id.* (citation omitted). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation omitted). However, "statutory provisions must be read in context: 'Statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each.' " *First Bank*, 232 N.C. App. at 546, 755 S.E.2d at 395 (quoting *Williams v. Williams*, 299 N.C. 174, 180–81, 261 S.E.2d 849, 854 (1980)); *see Abernethy v. Bd. of Commr's of Pitt Cnty.*, 169 N.C. 631, 636, 86 S.E. 577, 580 (1915) (noting that in construing statutes, the court "may call to [its] aid . . . other laws or statutes related to the particular subject or to the one under construction, so that [it] may know what the mischief was which the Legislature intended to remove or remedy").

General Statutes, section 8-57 is titled "Husband and wife as witnesses in criminal actions," and subsection (c) states as follows: "No husband or wife shall be compellable *in any event* to disclose any confidential communication made by one to the other during their marriage."

N.C.G.S. § 8-57(c) (emphasis added). Section 8-57(c) provides that confidential communications between a husband and wife shall not be admitted into evidence at the objection of either the husband or the wife. *State v. Holmes*, 330 N.C. 826, 827, 829, 412 S.E.2d 660, 661, 662 (1992); *cf. Biggs*, 253 N.C. at 16–17, 116 S.E.2d at 183. Section 8-57.1, titled "Husband-wife privilege waived in child abuse," states in pertinent part as follows: "*Notwithstanding the provisions of G.S. 8-56 and G.S. 8-57*, the husband-wife privilege shall not be ground for excluding *evidence regarding the abuse or neglect of a child under the age of 16 years* . . . ." N.C.G.S. § 8-57.1 (emphasis added).

The only North Carolina case which cites to this statutory provision quotes the statute as follows: "Section 8-57.1 provides that notwithstanding the provisions of sections 8-56 and 8-57, 'the husband-wife *privilege* shall not be ground for excluding evidence [under certain circumstances relating to the abuse or neglect of a child under the age of sixteen years].' " *Holmes*, 330 N.C. at 834, 412 S.E.2d at 664–65 (alteration in original) (quoting N.C.G.S. § 8-57.1).

In *Holmes*, two codefendants were found guilty of second-degree murder, and at issue on appeal was "whether a witness spouse may testify at trial as to confidential communications made to her by defendant spouse over defendant spouse's objection and assertion of privilege." *Id.* at 827, 412 S.E.2d at 661. In holding that "she may not," the N.C. Supreme Court cited to N.C.G.S. § 8-57.1 for the purpose of negating the State's argument that N.C.G.S. § 8-57 "abolishe[d] the common law rule against the disclosure of confidential marital communications, leaving only a rule against being *compelled* to disclose a confidential marital communication . . . argu[ing] that section 8-57(b) makes the spouse *competent* to testify, and section 8-57(c) gives the privilege of not being *compelled* to the witness spouse . . . ." *Id.* at 827, 829, 412 S.E.2d 661, 662 (emphasis added).

In negating the State's argument outlined above, the N.C. Supreme Court reasoned that, "[i]f, as the State suggests, section 8-57 abolished the husband-wife privilege against disclosure of confidential communications made by one to the other during their marriage, section 8-57.1 would seem to be unnecessary." *Id.* at 834, 412 S.E.2d at 665; *see also* Note, Douglas P. Arthurs, Spousal Testimony in Criminal Proceedings—*State v. Freeman*, 17 Wake Forest L. Rev. 990, 995 (1981) (noting that "G.S. 8-57 was adopted to eliminate the incongruous result that a defendant could testify in his own behalf, but his spouse could not testify for or against him"). In other words, because N.C.G.S. § 8-57.1 abrogates the marital communications privilege "under certain circumstances" (not

those present in *Holmes*), N.C.G.S. § 8-57.1 would be redundant if section 8-57 functioned to abolish the privilege in its entirety. *See Holmes*, 330 N.C. at 833–34, 412 S.E.2d at 664–65; *see also State v. Williams*, 286 N.C. 422, 431, 212 S.E.2d 113, 119 (1975) ("[A] statute must be construed, if possible, so as to give effect to every part of it, it being presumed that the Legislature did not intend any of its provisions to be surplusage." (citation omitted)); *In re Hickerson*, 235 N.C. 716, 721, 71 S.E.2d 129, 132 (1952) ("[P]arts of the same statute, and dealing with the same subject, are to be considered and interpreted as a whole, and in such case it is the accepted principle of statutory construction that every part of the law shall be given effect if this can be done by any fair and reasonable intendment . . . ." (citations omitted)). This line of reasoning provides guidance to this Court in deciding the ultimate breadth of this statute's reach and whether or not N.C.G.S. § 8-57.1 is applicable in this case.

Although not binding on this Court, a Kentucky Supreme Court opinion has addressed this precise issue: whether a child abuse reporting statute which abrogates the marital privilege in child abuse cases may be applied to a *criminal* prosecution of a defendant for the sexual abuse of a child. *Mullins v. Commonwealth*, 956 S.W.2d 210, 210–11 (Ky. 1997). In *Mullins*, the defendant's wife "found him engaged in acts of sodomy with a 14-year-old babysitter." *Id.* at 211. The wife called the police and later testified against her husband to the grand jury. *Id.* However, by the time of trial, both the defendant and his wife claimed the marital privilege. *Id.* The Kentucky Court of Appeals affirmed the defendant's conviction for third-degree sodomy, stating that the trial court did not err in applying KRS 620.050(2) (Kentucky's statute abrogating both the professional-client/patient privilege and the marital privilege in cases of dependent, neglected, or abused children) in a *criminal* prosecution, stating the statute "declares that the husband and wife privilege is inapplicable in a criminal proceeding regarding a dependent, neglected or abused child." *Id.* (emphasis added).

In affirming the Court of Appeals' and the judgment of the trial court, the Kentucky Supreme Court reasoned as follows:

> The General Assembly may legislate in order to protect children, and it may determine that children's rights are paramount when there is a conflict with the privilege of an adult to exclude evidence regarding the abuse, dependency or neglect of a child. KRS Chapter 620 meets the legislative purpose of safeguarding the interests of children. The statute does not interfere with any judicial function, but rather it enhances it by refusing to allow a shield

> to a child abuser in the form of the husband-wife privilege and thereby improves the truth-finding function of the judicial process.
>
> The exceptions provided in KRE 504(c)(2) reflect the fact that the marital privilege is considered by many to be in disfavor as a result of abuses which prevent ascertaining the truth. The privilege exists only to protect marital harmony. . . .
>
> The courts have approached the privilege by narrowly and strictly construing it because it has the potential for shielding the truth from the court system. Many courts have determined that when the reason supporting the privilege, marital harmony, no longer exists, then the privilege should not apply to hide the truth from the trier of fact.
>
> . . . .
>
> Marital harmony can hardly be a valid legal principle when the wife in question calls the police to report the alleged sexual misdeeds of her husband with a child. The marital privilege is subordinate or inferior to the right of a child to be free from sexual abuses.

*Id.* at 212 (internal citations omitted); *see Kays v. Commonwealth*, ___ S.W.3d ___, ___, NO. 2014-CA-001924-MR, 2016 WL 5956995, at *8 (Ky. Oct. 14, 2016) (citing *Mullins*, 956 S.W.2d at 211) (involving third-degree rape and sodomy of a fifteen-year-old-girl where the defendant confided in his then-wife "[w]hen details of how he preyed upon his former student began unraveling" and the defendant sought to invoke spousal privilege) ("*Mullins* remains the law in Kentucky.").

Furthermore, the *North Carolina Juvenile Code: Practice and Procedure*'s interpretation of North Carolina's statute abrogating the marital privilege in cases of child abuse, N.C.G.S. § 8-57.1, seems to support a similar policy to the one enunciated in *Mullins*, namely that "[t]he marital privilege is subordinate or inferior to the right of a child to be free from sexual abuses." 956 S.W.2d at 212. *Practice and Procedure* states that "with respect to certain privileges, the privilege does not extend to circumstances where the information requires a mandatory report of child neglect or abuse *or where the information otherwise pertains to and is being sought in a proceeding concerning the abuse and neglect of a child.*" Thomas R. Young, *N.C. Juvenile Code: Prac. & Proc.* § 5:2 (May 2016) (emphasis added).

Even if N.C.G.S. § 8-57.1 is not a model of clarity, N.C. Gen. Stat. § 7B-310 contains similar language, and reading N.C.G.S. § 8-57.1 as applicable to "any judicial proceeding" is supported by the express limitations placed upon all privileges as enunciated in N.C.G.S. § 7B-310:

> No privilege, except the attorney-client privilege, shall be grounds for excluding evidence of abuse, neglect, or dependency *in any judicial proceeding* (civil, *criminal*, or juvenile) in which a juvenile's abuse, neglect, or dependency is in issue *nor* in any judicial proceeding resulting from a report submitted under this Article, both as this privilege relates to the competency of the witness and to the exclusion of confidential communications.

N.C.G.S. § 7B-310 (2015) (emphasis added).

In *State v. Byler*, this Court examined and compared the language of N.C. Gen. Stat. § 8-53.1 (regarding the physician-patient privilege) and N.C.G.S. § 7B-310, ultimately concluding that "these two sections are to be read together[,]" as "the doctor-patient privilege cannot serve to shield information from the jury when a defendant is on trial for child abuse." No. COA03-453, 2004 WL 2584962, at *3 (N.C. Ct. App. Nov. 16, 2004) (unpublished) (citation omitted) (affirming the trial court's admission of statements made by a psychologist who was hired by defense counsel to evaluate the defendant in the defendant's prosecution for the statutory rape of his own daughter). Because the language in N.C.G.S. § 8-53.1 almost exactly mirrors the language of N.C.G.S. § 8-57.1,[2] with the exception that section 8-53.1 deals with physician-patient privilege and section 8-57.1 with the marital privilege, this Court's analysis in *Byler* is highly instructive:

> [T]he plain language of section 7B-310 seems to create dual applicability by using the word "nor" and admonishing the use of the privilege in a "judicial proceeding" where

---

2. N.C.G.S. § 8-53.1 reads as follows:

> (a) Notwithstanding the provisions of G.S. 8-53 and G.S. 8-53.13, the physician-patient or nurse privilege shall not be a ground for excluding evidence regarding the abuse or neglect of a child under the age of 16 years or regarding an illness of or injuries to such child or the cause thereof in any judicial proceeding related to a report pursuant to the North Carolina Juvenile Code, Chapter 7B of the General Statutes of North Carolina.

N.C.G.S. § 8-53.1(a) (2015).

> abuse is at issue, independent of whether the proceeding resulted from a report. This interpretation is bolstered by the fact that section 8-53.1 uses "related to" instead of "resulting from," as in 7B-310 and these two sections are to be read together. *See State v. Etheridge*, 319 N.C. 34, 39–41, 352 S.E.2d 673, 677–78 (1987) (supporting this interpretation and applying these statutes to a criminal trial based on rape and other sexual offenses).

*Id.*; *see* N.C.G.S. § 8-57.1 ("[T]he husband-wife privilege shall not be ground for excluding evidence regarding the abuse . . . of a child . . . in any judicial proceeding *related to* a report pursuant to the Child Abuse Reporting Law . . . ."); *see also* Young, *N.C. Juvenile Code: Prac. & Proc.* § 5:2 n.14 ("N.C. Gen. Stat. § 8-53.1 (physician and nurse privilege not ground for excluding evidence regarding abuse or neglect of a child under the age of 16 years in Chapter 7B proceeding); N.C. Gen. Stat. § 8-57.1 (*husband and wife privilege same as physician and nurse*)[.]" (emphasis added)).

Thus, in the instant case, independent of whether defendant's prosecution for, *inter alia*, taking indecent liberties with a child *resulted from* a report made pursuant to the Child Abuse Reporting Law, it is sufficient that defendant's criminal prosecution for child sexual abuse was a "judicial proceeding *related to* a report pursuant to" the same. *See* N.C.G.S. § 8-57.1; *Byler*, 2004 WL 2584962, at *3. As such, sections 8-57.1 and 7B-310 "are to be read together[,]" *Byler*, 2004 WL 2584962, at *3, and, in a criminal proceeding regarding allegations of the sexual abuse of a juvenile, like the instant case, with the exception of the attorney-client privilege, "[n]o privilege," including the marital communications privilege, can be exercised to exclude evidence of such abuse. *See* N.C.G.S. § 7B-310; *see also* N.C.G.S. § 8-57.1.

"We believe the legislature, in balancing the [long-standing policy "to protect the intimacy of the marital union[,]" *Rollins*, 363 N.C. at 235, 675 S.E.2d at 336,] against the need to protect child victims, opted to provide the broadest possible exceptions to the [marital communications] privilege." *See State v. Etheridge*, 319 N.C. 34, 41, 352 S.E.2d 673, 677 (1987) ("We believe the legislature, in balancing the need for confidential medical treatment against the need to protect child victims, opted to provide the broadest possible exceptions to the physician-patient privilege."). Accordingly, the trial court did not err in applying N.C.G.S. § 8-57.1 to defendant's prosecution for child sexual abuse offenses, and defendant's argument is overruled.

*II*

**[2]** Defendant next argues the trial court abused its discretion by overruling defendant's Rule 401 and 404(b) objections to the admission of the same evidence described above—the consensual sexual activity between defendant and his wife. Specifically, defendant argues Karen's testimony regarding the sexual act was irrelevant as it was neither temporally proximate nor similar enough to Stephanie's allegations to warrant admission under Rule 404(b) and, further, that even if Karen's testimony had some minimal probative value, that value was substantially outweighed by the danger of unfair prejudice. Defendant contends that because there is a reasonable possibility that the trial court's errors contributed to defendant's conviction, he should be granted a new trial. We disagree.

"Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001) (citation omitted).

> Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the 'abuse of discretion' standard which applies to rulings made pursuant to Rule 403.

*Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation omitted). Pursuant to Rule 401, evidence is relevant if it has any tendency to make the existence of a fact of consequence more or less probable. N.C. Gen. Stat. § 8C-1, Rule 401 (2015). "We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Rule 404(b) is a

> general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

*State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990). "[A]ll evidence favorable to the [State] will be, by definition, prejudicial

to defendants. The test . . . is whether that prejudice to defendants is unfair." *Matthews v. James*, 88 N.C. App. 32, 39, 362 S.E.2d 594, 599 (1987). "The term 'unfair prejudice' means 'an undue tendency to suggest decision on an improper basis[.]' " *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907 (2006) (alteration in original) (quoting *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986)).

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2015). "[P]rior acts are sufficiently similar if there are some unusual facts present in both [act]s that would indicate that the same person committed them." *State v. Davis*, 222 N.C. App. 562, 567, 731 S.E.2d 236, 240 (2012) (citation omitted). "Two constraints govern admission of evidence under Rule 404(b): similarity and temporal proximity." *Summers*, 177 N.C. App. at 696, 629 S.E.2d at 906 (citation omitted).

Here, Stephanie described to Karen the sexual act performed by defendant, which description initially prompted Karen to sign a statement indicating she and defendant engaged in the same act. Stephanie testified the sexual act was a follows: "[Defendant] would turn [her] over on [her] stomach and he would hump [her] back until he ejaculated all over [her] back." Over defendant's objections before and during the following testimony, Karen testified on cross-examination as follows:

> Q. Was one of [Stephanie's] allegations Detective Benfield told you about, where [defendant] would go into [Stephanie's] room and hump her back until he ejaculated?
>
> A. Yes.
>
> Q. All right. Did that allegation surprise you?
>
> A. Every allegation surprised me.
>
> Q. Okay. Is that something that [defendant] and you did intimately together?
>
> . . .
>
> A. It was. And when you -- when she said it, I - - I thought about it, and I called her, and I discussed it with her. And

> then later on, it -- it was an issue after I had [my son in 2008]. I had problems, so it was -- it was something that I came up with because we couldn't do anything, but it wasn't the exact act either.
>
> Q. All right. Well tell me about the act then, ma'am.
>
> . . .
>
> A. I had -- after I had [my son] I had fibroids, so -- which is a female -- well, it was in your -- in your -- on your female organs. So it would be painful to have intercourse. So I suggested that defendant -- it -- it was -- see, when you – when you hear front and back on your -- you know, the -- I mean, this is your front and this is your back, so I automatically thought about my -- you know, it's your backside. But it was in an area -- it was not on my back, it was between my butt and it was -- that he would -- we would just – he would move around there until -- in the butt area.
>
> Q. Until he ejaculated?
>
> A. Yes.

Here, Karen's testimony was relevant to Stephanie's allegations—the sexual act Karen described was admissible as it showed a common scheme or plan, pattern, and/or common modus operandi and sufficient similarity to Stephanie's allegations of sexual abuse. *See* N.C.G.S. § 8C-1, Rule 404(b). Both Stephanie and Karen testified that defendant would engage in a sexual act whereby defendant would ejaculate on them, respectively, from behind. Even if Karen later amended her statement to differentiate the sexual act she and defendant engaged in from the sexual act Stephanie alleged defendant perpetrated on her, Detective Benfield testified that in her initial conversation with Karen, Karen "stated . . . that [defendant] did the same thing to her[,]" and Karen herself testified that the sexual act alleged by Stephanie whereby defendant would "hump her back," was one that she and defendant also engaged in. Indeed, where Karen's credibility as a witness is called into question, particularly with regard to the differing statements she made to Detective Benfield, credibility goes to the weight of the evidence, not its admissibility. *See State v. Stager*, 329 N.C. 278, 317, 406 S.E.2d 876, 898 (1991) ("The conflict in the evidence goes to the weight and credibility of the evidence not its admissibility.").

Defendant argues that the instant case is similar to *State v. Dunston*, in which the charges arose out of allegations that the defendant vaginally

and anally raped his foster daughter. 161 N.C. App. 468, 469, 588 S.E.2d 540, 542 (2003). In *Dunston*, the State elicited testimony from the defendant's wife that the defendant engaged in and liked consensual anal sex. *Id.* at 469, 472–73, 588 S.E.2d at 542, 544–45. This Court concluded that this fact, "[wa]s not by itself sufficiently similar to engaging in anal sex with an underage victim *beyond the characteristics inherent to both*, i.e., they both involve anal sex, [in order] to be admissible under Rule 404(b)." *Id.* at 473, 588 S.E.2d at 544–45 (emphasis added). This Court held "this evidence was not relevant for any purpose other than to prove [the] defendant's propensity to engage in anal sex, and thus, the trial court erred in admitting this evidence." *Id.* at 473, 588 S.E.2d at 545.

Here, the evidence was not offered to prove defendant's propensity to engage in a categorically defined sexual act, but rather was offered to show the similarity between the unique sexual act alleged by Stephanie and that described by Karen. Indeed, the sexual act alleged by Stephanie was so unique that Karen called Detective Benfield back after they spoke the first time as soon as she realized that she and defendant engaged in a sexual activity similar to the one Stephanie described:

> Q. . . . And when Detective Benfield told you [about Stephanie's allegation that defendant would go into her room and hump her back until he ejaculated], what did you say to her?
>
> A. I didn't say anything at the time until I went home and thought about everything.
>
> Q. All right. And then you called her back and told her that you had thought about that specific act, correct?
>
> A. Uh-huh, (affirmative.) Yes.

Karen described this particular sexual activity to Detective Benfield on two separate occasions and signed a statement to that effect which she read and understood before she signed it. Karen's statement read as follows:

> [Defendant] doing something on my back was my idea. We only did this a few times. He would hump me on my back until he ejaculated on my back. It was when I wasn't able to have intercourse. It was consensual, and something we did together intimately, not against my will.

The instant case is distinguishable from *Dunston* in that it does not involve a categorical or easily-defined sexual act, i.e., anal sex. Rather,

the instant case involves a more unique sexual act which both Stephanie and Karen described, at some point, as defendant "hump[ing] on [the] back until he ejaculated on [the back]." Accordingly, the State was able to show sufficient similarity between the acts "beyond those characteristics inherent to [the act]." *See State v. Al-Bayyinah*, 356 N.C. 150, 155, 567 S.E.2d 120, 123 (2002) (citation omitted).

With regard to the "temporal proximity" prong of the Rule 404(b) analysis, "remoteness in time *generally* affects only the weight to be given [404(b)] evidence, not its admissibility." *State v. Maready*, 362 N.C. 614, 624, 660 S.E.2d 564, 570 (2008) (alteration in original) (quoting *State v. Parker*, 354 N.C. 268, 287, 553 S.E.2d 885, 899 (2001)). "Remoteness for purposes of 404(b) must be considered in light of the specific facts of each case and the purposes for which the evidence is being offered." *State v. Mobley*, 200 N.C. App. 570, 577, 684 S.E.2d 508, 512 (2009) (quoting *State v. Hipps*, 348 N.C. 377, 405, 501 S.E.2d 625, 642 (1998)).

Here, Stephanie told Detective Benfield that the sexual abuse began in 2002, when she was about ten or eleven years old, and persisted until approximately 2010, when she was about eighteen years old. According to Karen, after the birth of her son in 2008, she developed fibroids. As it was painful for Karen to have intercourse, she suggested defendant have sex with her from the "backside," "in the butt area," until defendant ejaculated. Karen also testified that at no time prior to 2008 did she and defendant either "have sex by [defendant] inserting his penis between [her] butt cheeks" or "have any sex . . . from the back end[.]" Furthermore, Karen did not, at any point, indicate to Detective Benfield in her many statements that the sexual activity at issue occurred in any particular timeframe, nor did she tell Detective Benfield that this activity only happened after her son was born.

Defendant argues that as both defendant and Karen testified that they did not engage in the sexual activity described above until after their son was born in 2008, at which time Stephanie was seventeen years old, and none of the indictments alleged that defendant abused Stephanie after she turned sixteen, the consensual sexual activity at issue between defendant and Karen was too remote in time because it did not begin until at least a year after the last alleged incident of abuse. However, where, as here, that timeline is dependent on Karen and defendant's testimony to that effect, and as remoteness in time generally affects only the weight to be given Rule 404(b) evidence and not its admissibility, the sexual act described by Karen is not too remote in time from the acts Stephanie alleged for purposes of Rule 404(b).

Finally, the probative value of this evidence was not outweighed by the danger of undue prejudice. Whether the trial court should have excluded such evidence under Rule 403 is reviewed by this Court for abuse of discretion. *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (citations omitted); *State v. Boyd*, 321 N.C. 574, 578, 364 S.E.2d 118, 120 (1988) (finding "no abuse of discretion by the trial court in failing to exclude . . . testimony under the balancing test of Rule 403 since the alleged incident was sufficiently similar to the act charged and not too remote in time"). Not only was the evidence of great probative value, but it was also not so sensitive to be potentially inflammatory to the jury (the jury acquitted defendant of five of the six charges). Thus, we conclude the probative value of this evidence as proof of defendant's pattern or modus operandi is not outweighed by its prejudicial effect. Accordingly, we find no abuse of discretion by the trial court in admitting this testimony under Rule 403, nor did the trial court err in its rulings pursuant to Rules 401 and 404(b).

NO ERROR.

Judges DILLON and ZACHARY concur.

---

STATE OF NORTH CAROLINA
v.
JAMES HOWARD KILLIAN

No. COA16-268

Filed 15 November 2016

**Evidence—driving while impaired—results of roadside sobriety test—officer's interpretation**

Where defendant was convicted of impaired driving, the Court of Appeals rejected his argument that the trial court committed plain error by admitting testimony from the law enforcement officer who arrested him regarding the officer's interpretation of the results of a specific roadside sobriety test. Although the challenged testimony was admitted in error, in light of the overwhelming unchallenged evidence of defendant's impairment, he was not prejudiced by the admission of the challenged testimony.

Appeal by Defendant from judgment entered 8 July 2015 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 6 September 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Yvonne B. Ricci, for the State.*

*Jeffrey William Gillette for Defendant.*

STEPHENS, Judge.

Defendant appeals from the judgment entered upon his conviction of driving while impaired. Defendant contends that the trial court committed plain error in admitting testimony from the law enforcement officer who arrested him regarding the officer's interpretation of the results of a specific roadside sobriety test. Although we agree with Defendant that the challenged testimony was admitted in error, we conclude that, in light of the overwhelming unchallenged evidence of Defendant's impairment, he was not prejudiced by admission of the challenged testimony. Accordingly, Defendant is not entitled to a new trial.

*Factual and Procedural Background*

The evidence at trial tended to show the following: This case arises from an early-morning encounter on 29 June 2014 between Defendant James Howard Killian and Corporal Jonathan Ray of the Weaverville Police Department. As Ray was completing an unrelated traffic stop, Killian approached him, complaining that his moped had been "run off the road" by a law enforcement vehicle. Ray immediately detected a strong odor of alcohol emanating from Killian and asked Killian whether he had been drinking and whether he would submit to an Alco-Sensor breath test. Killian agreed to the breath test. The test registered positive for the presence of alcohol. Killian acknowledged having consumed two beers, and Ray asked him to submit to standard field sobriety testing. Killian agreed.

The next test Ray administered was the Horizontal Gaze Nystagmus ("HGN") test. During this test, Ray observed the movement of Killian's eyes for involuntary jerking that may be caused by consumption of alcohol and/or drugs. Ray testified that Killian exhibited signs of possible impairment. Ray next asked Killian to complete the "walk and turn" test, which Killian was unable to complete successfully. Killian declined to attempt the one-leg-stand test, citing pain and swelling in his knee. Ray then asked Killian to repeat the Alco-Sensor breath test, which again

gave a positive result. On the basis of Ray's observation of Killlian's slurred speech and glassy, red eyes, the odor of alcohol emanating from Killian, the two positive breath test results, the HGN test results indicating impairment, and Killian's failure to successfully complete the walk and turn test, in conjunction with his admission to consuming alcohol earlier, Ray determined that he had probable cause to arrest Killian for impaired driving. The entire encounter was recorded by Ray's dashboard camera and was played for the jury at trial.

As Ray took Killian into custody, Killian requested medical attention for his injured knee. Ray called emergency medical services to examine Killian's knee, after which Ray transported Killian to a local hospital for X rays of the knee. At the hospital, Ray read Killian his rights regarding submission of a blood sample to test for alcohol or other impairment. Killian signed a form acknowledging his understanding of his legal rights and submitted a blood sample. When tested, that sample indicated a blood alcohol content ("BAC") of 0.10 milligrams of alcohol per 100 milliliters, a level indicating legal impairment.[1] Once Killian was released from the hospital into Ray's custody, Killian was transported to the Buncombe County Detention Facility.

Killian was cited for driving while impaired and failure to comply with a driver's license restriction. On 11 June 2015, Killian was found guilty in Buncombe County District Court of driving while impaired. On the following day, Killian filed his notice of appeal to superior court. On 2 July 2015, Killian filed several motions in the trial court, including a motion to exclude Ray's testimony about field sobriety tests he administered, on the basis that Ray was not qualified as an expert in the interpretation of the results of such tests. Those motions were denied by the superior court, and Killian's case came on for trial at the 6 July 2015 criminal session of Buncombe County Superior Court, the Honorable Alan Z. Thornburg, Judge presiding. At trial, Killian did not object to Ray's testimony about his administration of the HGN test and Killian's results. The jury returned a guilty verdict, and the trial court imposed a sentence of 24 months in prison, suspended the sentence, and ordered 24 months of supervised probation. From the judgment imposed upon his conviction, Killian gave notice of appeal in open court.

*Discussion*

In his sole argument on appeal, Killian contends that the trial court plainly erred in denying his motion to exclude Ray's HGN testimony

1. A BAC result of 0.08 or above is one way to establish that a defendant has committed the offense of impaired driving. *See* N.C. Gen. Stat. § 20-138.1(a)(2) (2015).

and in allowing Ray to testify about the results of the HGN test without qualifying Ray as an expert pursuant to North Carolina Rule of Evidence 702(a). While we agree that admission of the HGN testimony was error, we conclude that the error did not have a probable impact on the jury's verdict.

As Killian acknowledges, because he did not object to the admission of the testimony at trial that he now challenges on appeal, he is entitled only to plain error review.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4). Our State's appellate courts may "review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citations omitted). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . ." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations and internal quotation marks omitted). "Under the plain error rule, [a] defendant must convince this Court not only that there was error, but that absent the error, the jury *probably* would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted; emphasis added).

Admission of Ray's testimony about the results of Killian's HGN test was clearly erroneous. North Carolina Rule of Evidence

> 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 education. 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). 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.

*State v. Godwin*, __ N.C. App. __, __, 786 S.E.2d 34, 37 (2016) (citations and internal quotation marks omitted), *disc. review allowed*, __ N.C. __, __ S.E.2d __ (2016), *available at* 2016 WL 5344499. Here, it is undisputed that Ray was not tendered as an expert in HGN interpretation and, accordingly, his testimony was not received as an expert in that field. This was error. *See id.* at __, 786 S.E.2d at 37.

Regarding prejudice, Killian argues that, but for the HGN testimony, the jury "likely" or "very likely" would have acquitted him of driving while impaired and, in support of this contention, Killian asserts that the remaining evidence against him was similar to that in *Godwin*, where we granted the defendant a new trial. While the additional, non-HGN evidence in *Godwin* bears some resemblance to that against Killian, the defendant in *Godwin* objected to the admission of the HGN testimony during his trial, thus preserving his right of appellate review on that issue. *Id.* at __, 786 S.E.2d at 36. Accordingly, in order to receive a new trial, the defendant in *Godwin* only had to establish that there was a *reasonable possibility* that the HGN testimony altered the jury's verdict. *See State v. Helms*, 348 N.C. 578, 583, 504 S.E.2d 293, 296 (1998) ("In order to establish prejudicial error in the erroneous admission of . . . HGN evidence, [a] 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.") (citation omitted). In contrast,

> [t]he plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to plain error, the appellate court must be convinced that absent the error the jury *probably* would have reached a different verdict. In other words, the appellate court must determine that the error in question *tilted the scales* and caused the jury to reach its verdict convicting the defendant. Therefore, the test for plain error places a *much heavier burden* upon the defendant than that imposed . . . upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection.

*State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (citations and internal quotation marks omitted; emphasis added). *See also State v. Pate*, 187 N.C. App. 442, 448-49, 653 S.E.2d 212, 217 (2007) ("A *reasonable possibility* of a different result at trial *is a much lower standard* than that a different result *probably* would have been reached

at trial, which is what this Court must find for there to be plain error.") (citations and internal quotation marks omitted; emphasis added).

In light of the "much lower standard" of prejudice applied in *Godwin*, *see id.*, Killian's contentions that the non-HGN evidence of his impairment was similar to the evidence in that case are inapposite. We have found no precedential case addressing plain error in the admission of HGN testimony. *But see State v. Jackson*, 237 N.C. App. 183, 767 S.E.2d 149 (2014) (unpublished), *available at* 2014 WL 5587011 (finding no error in admission of HGN evidence and discussing the overwhelming non-HGN evidence of the defendant's impairment—several traffic infractions, the odor of alcohol and marijuana, bloodshot and glassy eyes, admission by the defendant of having consumed two beers and smoked marijuana earlier in the day, and a blood alcohol level reading of 0.16 on an Intoxilyzer test—before noting in dicta that, even had the admission of the evidence been error, the Court would not have concluded the error likely altered the jury's verdict).

Here, even without the HGN testimony, the jury had before it the following evidence of Killian's impairment: Ray's observations of Killian's slurred speech, glassy, red eyes, and strong odor of alcohol; two positive breath test results; Killian's failure to successfully complete the walk and turn test and inability to attempt the one-leg stand; Killian's admission to having consumed two beers; the blood alcohol test results indicating legal impairment with a BAC of 0.10; and a recording from Ray's dashboard camera of his entire roadside encounter with Killian. In light of this significant evidence of impairment, we are not persuaded that, had Ray's testimony about the HGN test results not been admitted, the jury probably would have reached a different result. In our view, Killian's is not the "truly exceptional case[]. . . . [where] the error in question tilted the scales and caused the jury to reach its verdict convicting the defendant." *See Walker*, 316 N.C. at 39, 340 S.E.2d at 83 (citations and internal quotation marks omitted). Accordingly, he is not entitled to a new trial.

NO PREJUDICIAL ERROR.

Judges BYRANT and DILLON concur.

STATE OF NORTH CAROLINA
v.
CHARLES MICHAEL LOFTIS

No. COA16-65

Filed 15 November 2016

**Appeal and Error—driving while impaired—motion to suppress granted—State's failure to timely file writ of certiorari**

In an impaired driving case, where defendant's motion to suppress was granted and the State delayed filing its petition for a writ of certiorari beyond the date that the case was calendared for its final hearing, it was proper for the district court to dismiss the charge sua sponte because the State failed to dismiss the charge. In addition, when the State appealed the district court's dismissal, the superior court did not err when it dismissed the State's appeal because the State's notice of appeal did not specify a basis for its appeal.

Appeal by the State from order entered 23 September 2015 by Judge Milton F. Fitch, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 11 August 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.*

*The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant-appellee.*

McCULLOUGH, Judge.

The State appeals from the superior court's order dismissing the State's appeal and, in the alternative, affirming the district court's dismissal of the case. The State also filed a petition for writ of certiorari ("PWC") seeking review of the grant of Charles Michael Loftis' ("defendant") motion to suppress. For the following reasons, we affirm the superior court and deny the State's PWC.

I. Background

On 15 September 2012, Brittany Jefferson attempted to enter the drive-thru lane at a Burger King in Greenville, North Carolina when another vehicle cut her off. Ms. Jefferson honked her horn at the vehicle as she had to brake quickly to avoid a collision. The operator of the

other vehicle, later identified as defendant, leaned out the window and yelled obscenities at her. Based on defendant's behavior, Ms. Jefferson believed defendant was impaired. Ms. Jefferson then called 911, provided the operator her name and phone number, and reported what had just occurred. Officer Clarence Jordan with the Greenville Police Department was across the street from the Burger King and received the call regarding a silver Jeep at the Burger King. He observed a silver Jeep leave the Burger King and followed the car down Memorial Drive. While following the Jeep, Officer Jordan observed defendant move abruptly into the far right lane and make a wide right turn, "like a tractor-trailer turn" onto Regency Drive. At that time, Officer Jordan initiated a traffic stop which resulted in defendant being cited for driving while impaired in violation of N.C. Gen. Stat. § 20-138.1.

On 26 November 2012, defendant filed a motion to suppress the results of breath tests in which he provided breath samples indicating a blood alcohol level over the legal limit and a motion to suppress evidence on the ground that there was no reasonable or articulable suspicion to stop his vehicle. Defendant also filed a motion to dismiss the impaired driving charge on 10 March 2014 alleging double jeopardy after the driver's license was revoked as a civil penalty.

Defendant's motion to suppress the stop was heard in Pitt County District Court before the Honorable Lee Teague on 18 November 2014. The district court issued a "pre-trial indication" pursuant to N.C. Gen. Stat. § 20-38.6(f) on 19 November 2014 in which it concluded that "there was not reasonable suspicion to stop the [d]efendant's vehicle and [d]efendant's motion should be preliminarily granted." The State gave oral notice of appeal when the district court announced its decision and then filed notice of appeal from the pre-trial indication on 24 November 2014. The matter was heard in Pitt County Superior Court on 25 March 2015 by the Honorable Walter H. Godwin. After the hearing, the superior court affirmed the district court's pre-trial indication. In an order signed on 4 May 2015 and filed on 15 May 2015, the superior court judge concluded "[the officer] did not have a reasonable or articulable suspicion to stop defendant's motor vehicle and the District Trial Court was correct when it preliminarily granted his *Motion to Suppress Evidence.*" The case was then remanded to district court.

On 2 June 2015, the State moved to continue the case. The district court allowed the State's motion and continued the case until 16 June 2015, indicating it was the last continuance for the State by checking item number twelve on the order, which reads "Last Continuance For the," and circling "State."

When the case was later called on 16 June 2015, the State requested another continuance so that it could petition this Court pursuant to a writ of certiorari for review of the order granting defendant's motion to suppress. The district court judge denied the State's motion to continue and signed and filed the final order of suppression on 16 June 2015. The district court judge then directed the State to call the case or move to dismiss defendant's case. When the State refused to take any action, the district court, on its own motion, dismissed the case based on the State's failure to prosecute.

On 22 June 2015, the State appealed the district court's dismissal of the case to superior court. On 31 July 2015, defendant filed a motion to dismiss the State's appeal and a response to the State's appeal.

The State's appeal was heard in Pitt County Superior Court on 31 July 2015 by the Honorable Milton Fitch, Jr. Following the hearing, Judge Fitch granted defendant's motion to dismiss the State's appeal and, in the alternative, affirmed the district court's dismissal of the case after entry of the suppression order. The order was signed on 8 August 2015 and filed on 23 September 2015.

The State filed notices of appeal from Judge Fitch's order on 29 and 30 September 2015. On 18 February 2016, the State petitioned this Court for writ of certiorari requesting that this Court review the grant of defendant's motion to suppress.

## II. Discussion

The procedural history recited above is important as we must examine what issue is before us. The State finally filed its PWC on 18 February 2016 and requests that this Court ignore the procedural history by going to the merits of this traffic stop case. In our discretion, we decline to grant the writ and address the merits as we believe to do so would indicate that the State is exempt from the district court's decision on when a case is to be heard and would imply that granting a continuance motion but indicating that it is the "last continuance" is inapplicable to the State.

In the case at bar, the State is no doubt frustrated with the district and superior court rulings on defendant's motion to suppress. Nevertheless, the State had an avenue to challenge these rulings which the State perceives to be erroneous. While the State may not appeal the superior court's affirmance under N.C. Gen. Stat. § 20-38.7, *see State v. Fowler*, 197 N.C. App. 1, 11, 696 S.E.2d 523, 535 (2009), *disc. review denied and appeal dismissed*, 364 N.C. 129, 676 S.E.2d 695 (2010), and *State v. Palmer*, 197 N.C. App. 201, 203, 676 S.E.2d 559, 561 (2009), *disc. review*

*denied and appeal dismissed*, 363 N.C. 810, 692 S.E.2d 394 (2010), the State could have proceeded with a PWC. *See State v. Osterhoudt*, 222 N.C. App. 620, 626, 731 S.E.2d 454, 458 (2012). Of this the State was well aware, and in fact, had informed the district court and opposing counsel of its intent to do so as early as 2 June 2015.

Although the State had the transcript of the superior court hearing by 17 April 2015, the superior court's suppression order was filed by 15 May 2015, and the State indicated its intention to file a petition by 2 June 2015, no action was taken before the case was called on 16 June 2015. It should be noted that the "last continuance" to 16 June 2015 was over defense counsel's objection and an examination of the record reveals that this case had already been continued over fifteen times at the request of either the defense, the court, or the State.

The issue before this Court, however, is not the district court's denial of the State's motion to continue the case on 16 June 2015. The matter on appeal is the correctness of the superior court's 23 September 2015 order dismissing the State's appeal and, in the alternative, affirming the district court's dismissal of the case. These matters are issues of law, which this Court reviews *de novo*.

The Criminal Procedure Act provides that the State may appeal a district court ruling that dismisses criminal charges to the superior court unless the rule against double jeopardy prohibits further prosecution. N.C. Gen. Stat. § 15A-1432(a) (2015).

> When the State appeals pursuant to [N.C. Gen. Stat. § 15A-1432(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(b) (2015).

In the present case, the State's notice of appeal from the district court to the superior court stated that it was appealing the district court's decision, but did not otherwise specify any basis for its appeal. In full, the State's notice of appeal reads as follows:

> NOW COMES THE STATE OF NORTH CAROLINA, by the undersigned Assistant District Attorney and pursuant to North Carolina General Statute § 15A-1432, gives notice of appeal to the Superior Court from the written Order of the Honorable Lee Teague, District Court Judge Presiding, dated June 16, 2015. By its order, the court dismissed, the

> Driving While Impaired charge against the above named defendant after denying the State's motion to continue the case during a criminal session of District Court on June 16, 2015.

While this Notice may be sufficient for an appeal to this Court, as provided in N.C. Gen. Stat. § 15A-132(b), the State is required to specify the basis for its appeal to the superior court. An appeal under this statute requires more specificity than merely identifying the order which is being appealed. *See State v. Hinchman*, 192 N.C. App. 657, 662, 666 S.E.2d 199, 202 (2008); *State v. Hamrick*, 110 N.C. App. 60, 64, 428 S.E.2d 830, 832 (1993). For this reason alone, we believe Judge Fitch acted properly in granting defendant's motion to dismiss the State's appeal.

Yet, addressing the superior court's alternative ruling, we still affirm the decision. Undoubtedly the District Attorney was in an awkward positon when the case was called on 16 June 2015 after defendant's motion to suppress was granted. This case posture, however, had been foreseen by the North Carolina State Bar (the "Stare Bar") which issued a Formal Ethics Opinion in 2009. That Opinion reads as follows:

> A lawyer has an ethical duty, under Rule 3.1, not to bring a proceeding unless there is a basis in law and in fact for doing so that is not frivolous. In light of this duty, a prosecutor who knows that she has no admissible evidence supporting a DWI charge to present at trial must dismiss the charge prior to calling the case for trial.

2009 N.C. Eth. Op. 15 (N.C. St. Bar.), *available at* 2010 WL 610308.

The State found itself in this position by its own inaction. Having had the transcript since 17 April 2015, having had the order affirming the district court's pre-trial indication since 15 May 2015, and having stated its intention to file a PWC on 2 June 2015, but not having filed any petition by 16 June 2015, the State was obligated to move to dismiss. In the case *sub judice*, the State did nothing. The Assistant District Attorney refused to call the case and ultimately the court dismissed this case pursuant to its inherent power to manage its own docket, a right we have frequently recognized. *See Simeon v. Hardin*, 339 N.C. 358, 451 S.E.2d 858 (1994) (the district attorney may prepare the calendar, but the court holds ultimate authority over dockets).

While the State argues that the dismissal was not permissible under N.C. Gen. Stat. § 15A-954, that statute was not relied upon by the court as it applies only to motions by defense counsel; although, had

defendant moved for a dismissal pursuant to N.C. Gen. Stat. § 15A-954, dismissal could have been based on N.C. Gen. Stat. § 15A-954(a)(7), which provides:

> (a) The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:
>
> . . . .
>
> (7) An issue of fact or law essential to a successful prosecution has been previously adjudicated in favor of the defendant in a prior action between the parties.

N.C. Gen. Stat. § 15A-954(a)(7) (2015).

III. Conclusion

In this case, we conclude that the State delayed filing its petition for a writ of certiorari beyond the date that the case was calendared for its final hearing. As the State failed to dismiss the charge, as it is required to do pursuant to the State Bar's Formal Ethics Opinion, it was proper for the district court to dismiss the charge *sua sponte*. Moreover, when the State appealed the district court's dismissal, the notice of appeal did not specify a basis for its appeal. Consequently, the superior court did not err when it dismissed the appeal and in the alternative, affirmed the district court's dismissal of the case.

AFFIRMED.

Judges STEPHENS and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
RODNEY EDWARD WATSON, Defendant

No. COA16-184

Filed 15 November 2016

**Search and Seizure—tip from confidential informant—suspicious packages—shipped from Arizona with Utah return address**

Where Clayton Police Department officers received a tip from a confidential informant regarding suspicious packages that defendant had retrieved from a local UPS store and, based on that tip, officers intercepted defendant's vehicle and discovered illegal drugs inside the packages, the trial court erred in denying defendant's motion to suppress. The only suspicious factor found by the trial court was the Utah return address on the packages shipped from Arizona, and that factor alone was not sufficient to support the trial court's conclusion that the police had reasonable suspicion to detain defendant.

Appeal by Defendant from judgments entered 21 August 2015 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 23 August 2016.

*Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Adren L. Harris, for the State.*

*Richard Croutharmel for the Defendant.*

DILLON, Judge.

Rodney Edward Watson ("Defendant") appeals from the trial court's judgments convicting him of several drug-related offenses and declaring him a habitual felon. Specifically, he seeks review of the trial court's denial of his motion to suppress. For the following reasons, we vacate the judgments and remand for further proceedings consistent with this opinion.

## I. Background

Officers with the Clayton Police Department received a tip from a confidential informant regarding "suspicious" packages that Defendant had retrieved from a local UPS store. Based on this tip, the police intercepted Defendant's vehicle a short distance from the UPS store. During

the traffic stop, police conducted a canine sniff, which led to the discovery of illegal drugs inside the packages.

Defendant moved to suppress the drug evidence, contending that the police lacked reasonable suspicion to initiate the traffic stop. The trial court denied Defendant's motion. A jury subsequently convicted Defendant. On the basis of this conviction, Defendant pled guilty to habitual felon status. Defendant gave oral notice of appeal.

## II. Standard of Review

On appeal, Defendant challenges the trial court's order denying his motion to suppress. We review the order with the objective of "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). Conversely, a "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. Analysis

Defendant contends that the trial court's findings were not sufficient to support its conclusion that the officer had reasonable suspicion to stop Defendant's vehicle. We agree.

Before initiating a warrantless stop, a police officer must "have reasonable and articulable suspicion of criminal activity." *Hughes*, 353 N.C. at 206–07, 539 S.E.2d at 630. But if a stop is lacking in reasonable suspicion, any evidence generated from the stop is generally deemed inadmissible under the exclusionary rule. *See State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006) ("In short, evidence obtained in violation of an individual's Fourth Amendment rights cannot be used by the government to convict him or her of a crime."). An informant's tip may supply reasonable suspicion if the information provided reliably describes the suspect *and* establishes criminal activity. *Hughes*, 353 N.C. at 209, 539 S.E.2d at 632. Quoting the United States Supreme Court, our Supreme Court has stated:

> [A]n accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed

> criminal activity. *The reasonable suspicion here at issue requires that a tip be reliable* in its assertion of illegality, not just in its tendency to identify a determinable person.

*Id.* (emphasis added) (quoting *Florida v. J.L.*, 529 U.S. 266, 272 (2000)).

Here, the trial court found as follows: The informant, a Clayton UPS store employee, had been trained to detect narcotics. The informant had successfully notified the police about packages later found to contain illegal narcotics. These tips were used to secure a number of felony drug convictions.

On the day in question, the informant advised the police that a man, later identified as Defendant, had arrived at the UPS store in a truck and retrieved four packages with a Utah return address *when in fact* the packages had been sent from Arizona. Specifically, the trial court found as follows regarding the informant's tip:

> The Confidential Informant informed [the officer] that the four packages had been shipped from Tuscan [sic], Arizona yet the address on the package stated it was shipped from Ogden, Utah.
>
> The Confidential Informant stated to [the officer] that a black male and a black female operating a black Chevrolet truck were the individuals picking up the four suspicious packages. The Confidential Informant provided the license plate number of the Chevrolet truck to [the officer].

After receiving the tip, police arrived at the UPS store, observed Defendant driving away, and initiated a traffic stop.[1]

We believe that based on the previous experience with the informant, the police acted reasonably in relying on the informant's tip to conclude that Defendant had retrieved packages with Arizona shipping addresses which were in fact shipped from Utah. A return address on a package which differs from the package's actual city of origin is a legitimate factor in a trial court's reasonable suspicion calculus. Still, there is nothing *illegal* about receiving a package with a return address which

---

1. The parties concede that Defendant was seized during his encounter with the police officer as the officer's conduct "would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009) (internal quotation marks omitted).

differs from the actual shipping address. Indeed, there are a number of innocent explanations for why this could have occurred. For instance, here, the packages could have been sent by a Utah resident while vacationing in Arizona.

We recognize that innocent factors, when considered together, may give rise to reasonable suspicion. *See United States v. Sokolow*, 490 U.S. 1, 9 (1989). Courts have found reasonable suspicion on the basis of a number of innocent factors, including a suspicious return address. However, we are not aware of any case where a court has determined the existence of reasonable suspicion based *solely* on a suspicious return address. Rather, other additional factors have always factored in this calculus. These factors have included (1) the size and shape of the mailing; (2) whether the package is taped to seal all openings; (3) whether the mailing labels are handwritten; (4) whether the return address is fictitious; (5) unusual odors from the package; (6) whether the city of origin is a common "drug source" locale; and (7) whether there have been repeated mailings involving the same sender and addressee. *United States v. Alexander*, 540 F.3d 494, 501, 501 n.2 (6th Cir. 2008) (citations omitted).

In the present case, the only suspicious factor found by the trial court was the Utah return address on the packages shipped from Arizona. The trial court made no finding that the informant or the police had any prior experience with Defendant. The trial court made no finding that Tucson, the city of origin, was a known "drug source" locale. *See State v. Cooper*, 163 Vt. 44, 47, 652 A.2d 995, 997 (1994) (affirming trial court's finding of reasonable suspicion, in part, because Tucson is a known drug source locale). The trial court made no finding that the packages were sealed suspiciously, had a suspicious weight based on their size, had handwritten labels, or had a suspicious odor. *Id.*; *United States v. Lux*, 905 F.2d 1379, 1380 n.1, 1382 (10th Cir. 1990) (finding that there was reasonable suspicion to detain defendant as the package fit part of the "drug package profile"). Therefore, we hold that the trial court's findings in this case are insufficient to support its conclusion that the police had reasonable suspicion to stop Defendant. As such, the retrieved drug evidence was inadmissible under the exclusionary rule. *See McKinney*, 361 N.C. at 58, 637 S.E.2d at 872. Because the drug evidence was inadmissible, we also find that Defendant's habitual felon conviction was erroneous.

## IV. Conclusion

Because we hold that the trial court did not make sufficient findings to support its conclusion that the police had reasonable suspicion

to detain Defendant, we reverse the order denying Defendant's motion to suppress, vacate the judgments, and remand for further proceedings consistent with this opinion.

REVERSED.

Judges BRYANT and STEPHENS concur.

---

TOWN OF BELHAVEN, NC; AND THE NORTH CAROLINA NAACP STATE CONFERENCE OF BRANCHES, THE HYDE COUNTY NAACP BRANCH, AND THE BEAUFORT COUNTY NAACP BRANCH, PLAINTIFFS[1]

v.

PANTEGO CREEK, LLC; AND VIDANT HEALTH, INC., DEFENDANTS

No. COA16-373

Filed 15 November 2016

**1. Deeds—wish for land to be used for hospital—no reversionary interest**

Where the Town of Belhaven recorded a deed in 1948 granting a 100-foot strip of land to the Pungo District Hospital Corporation (PDHC), PDHC thereafter constructed a hospital on the land, PDHC in 2011 entered an agreement transferring full control of PDHC to Vidant Health, Inc. (Vidant), Vidant closed the hospital in 2014 and deeded it to Pantego Creek, LLC (Pantego Creek), and plaintiffs (Belhaven, the Pungo District Hospital Community Board, and several NAACP branches) filed a complaint against defendants (Pantego Creek and Vidant), the trial court did not err by granting defendants' motion to dismiss pursuant to Rule 12(b)(6) as to Belhaven's breach of contract claim against Vidant and by failing to enter declaratory judgment against Vidant and Pantego Creek. The Court of Appeals rejected plaintiffs' argument that defendants were successors in interest to the 1948 deed and therefore subject to language included therein that amounted to a reversionary interest held by Belhaven that the granted property be used for the operation of a hospital for the benefit of the town. Belhaven did not include any language creating a reversionary interest in the 1948 deed—and language expressing Belhaven's wishes did not create such an interest—and

---

1. Although not included in the caption of the trial court's order, Pungo District Hospital Community Board, Inc. is also a plaintiff in this case.

the deed gave PDHC and its successors in interest a title in fee simple absolute.

**2. Fraud—mediation agreement—not beneficiaries to agreement—no particularity in allegations**

Where the Town of Belhaven recorded a deed in 1948 granting a 100-foot strip of land to the Pungo District Hospital Corporation (PDHC), PDHC thereafter constructed a hospital on the land, PDHC in 2011 entered an agreement transferring full control of PDHC to Vidant Health, Inc. (Vidant), Vidant closed the hospital in 2014 and deeded it to Pantego Creek, LLC (Pantego Creek), and plaintiffs (Belhaven, the Pungo District Hospital Community Board, and several NAACP branches) filed a complaint against defendants (Pantego Creek and Vidant), the trial court did not err by granting defendants' motion to dismiss pursuant to Rule 12(b)(6) as to plaintiffs' claim against Vidant for fraud. Belhaven breached the mediation agreement when its community board was unable to assume operational responsibility for the hospital, so Vidant was entitled to close the hospital according to the mediation agreement. In addition, plaintiffs were not parties or third-party beneficiaries to the 2011 agreement and 2014 deed between Vidant, PDHC, and Pantego Creek, and therefore plaintiffs were incapable of suffering damages based on the 2011 agreement or 2014 deed. Further, plaintiffs failed to allege with any particularity how Vidant's exercise of its express option to close the hospital contained in the mediation agreement constituted fraud.

**3. Unfair Trade Practices—failure to allege fraud or deception—no business relationship**

Where the Town of Belhaven recorded a deed in 1948 granting a 100-foot strip of land to the Pungo District Hospital Corporation (PDHC), PDHC thereafter constructed a hospital on the land, PDHC in 2011 entered an agreement transferring full control of PDHC to Vidant Health, Inc. (Vidant), Vidant closed the hospital in 2014 and deeded it to Pantego Creek, LLC (Pantego Creek), and plaintiffs (Belhaven, the Pungo District Hospital Community Board, and several NAACP branches) filed a complaint against defendants (Pantego Creek and Vidant), the trial court did not err by granting defendants' motion to dismiss pursuant to Rule 12(b)(6) as to Belhaven's and the Community Board's unfair and deceptive trade practices claim against Vidant. Belhaven and the Community Board failed to allege any fraud or deception on the part of Vidant. Further, there was no business relationship between Vidant and plaintiffs.

**4. Fiduciary Relationship—alleged—agreement not intended for benefit of third parties**

Where the Town of Belhaven recorded a deed in 1948 granting a 100-foot strip of land to the Pungo District Hospital Corporation (PDHC), PDHC thereafter constructed a hospital on the land, PDHC in 2011 entered an agreement transferring full control of PDHC to Vidant Health, Inc. (Vidant), Vidant closed the hospital in 2014 and deeded it to Pantego Creek, LLC (Pantego Creek), and plaintiffs (Belhaven, the Pungo District Hospital Community Board, and several NAACP branches) filed a complaint against defendants (Pantego Creek and Vidant), the trial court did not err by granting defendants' motion to dismiss pursuant to Rule 12(b)(6) as to Belhaven's breach of fiduciary duty claim against Pantego Creek. By the 2011 agreement's plain terms, it was not intended for the benefit of third-party beneficiaries and was exclusively between Pantego Creek, PDHC, and Vidant. No fiduciary relationship ever existed between Pantego Creek and plaintiffs.

**5. Civil Rights—Section 99D-1 claim—standing—only individuals or Human Relations Commission**

Where the Town of Belhaven recorded a deed in 1948 granting a 100-foot strip of land to the Pungo District Hospital Corporation (PDHC), PDHC thereafter constructed a hospital on the land, PDHC in 2011 entered an agreement transferring full control of PDHC to Vidant Health, Inc. (Vidant), Vidant closed the hospital in 2014 and deeded it to Pantego Creek, LLC (Pantego Creek), and plaintiffs (Belhaven, the Pungo District Hospital Community Board, and several NAACP branches) filed a complaint against defendants (Pantego Creek and Vidant), the trial court did not err by granting defendants' motion to dismiss pursuant to Rule 12(b)(6) as to the NAACP's Section 99D-1 claim against defendants. The General Assembly only intended individually aggrieved persons or the North Carolina Human Relations Commission to have standing to bring an action under Section 99D-1.

**6. Jurisdiction—Rule 2.1 of General Rules of Practice for Superior and District Courts—designation as exceptional case**

Where the Town of Belhaven recorded a deed in 1948 granting a 100-foot strip of land to the Pungo District Hospital Corporation (PDHC), PDHC thereafter constructed a hospital on the land, PDHC in 2011 entered an agreement transferring full control of PDHC to Vidant Health, Inc. (Vidant), Vidant closed the hospital in 2014

and deeded it to Pantego Creek, LLC (Pantego Creek), and plaintiffs (Belhaven, the Pungo District Hospital Community Board, and several NAACP branches) filed a complaint against defendants (Pantego Creek and Vidant), the Court of Appeals found meritless and granted defendants' motion to dismiss plaintiffs' argument that the Senior Resident Superior Court Judge for the Second Judicial District and the Chief Justice of the Supreme Court of N.C. deprived plaintiffs of their right to a fair and impartial hearing when the Chief Justice designated the case as an exceptional case under Rule 2.1 of the General Rules of Practice for the Superior and District Courts upon the formal recommendation of the Senior Resident Superior Court Judge for the Second Judicial District and appointed Judge Albright to adjudicate the matter.

Appeal by Plaintiffs from order entered 13 October 2015 by Judge R. Stuart Albright in Beaufort County Superior Court. Heard in the Court of Appeals 19 October 2016.

*Alan McSurely for plaintiffs-appellants the North Carolina NAACP State Conference of Branches, the Hyde County NAACP Branch, and the Beaufort County NAACP Branch.*

*C. Scott Holmes for plaintiff-appellants Town of Belhaven, NC and Pungo District Hospital Community Board, Inc.*

*K&L Gates LLP, by Gary S. Qualls, Kathryn F. Taylor, Susan K. Hackney, and Steven G. Pine, for defendant-appellee University Health Systems of Eastern Carolina, Inc. d/b/a Vidant Health, Inc.*

*Sumrell, Sugg, Carmichael, Hicks and Hart, P.A., by Scott C. Hart, Arey W. Grady, and Frederick H. Bailey, III, for defendant-appellee Pantego Creek, LLC.*

ENOCHS, Judge.

The Town of Belhaven, North Carolina, the Pungo District Hospital Community Board, Inc., the NAACP State Conference of Branches, the Hyde County NAACP Branch, and the Beaufort County NAACP Branch (collectively "Plaintiffs") appeal from the trial court's order granting Pantego Creek, LLC's and Vidant Health, Inc.'s (collectively "Defendants") motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review, we affirm the trial court's order.

Factual Background

On 21 January 1948, the Town of Belhaven ("Belhaven"), located in Beaufort County, North Carolina, recorded a deed granting the Pungo District Hospital Corporation ("PDHC") a 100 foot strip of land ("the 1948 Deed"). The deed provided, in pertinent part, as follows:

> THIS DEED, MADE this the 20th day of January, 1948, by Town of Belhaven, a municipal corporation of the State of North Carolina, hereinafter designated as party of the first part, to Pungo District Hospital Corporation, hereinafter designated as party of the second part,
>
> WITNESSETH: That the party of the first part, in consideration of the benefits to be derived by the citizens of the Town of Belhaven from the construction and operation of a hospital on the property hereinafter described and pursuant to the authority granted by Chapter 659 of the Session Laws of 1947, has given, granted, bargained, sold and does hereby convey unto the party of the second part that certain lot or parcel of land in the Town of Belhaven, Beaufort County, North Carolina, particularly described as follows:
>
> That portion of Allen Street in said Town of Belhaven 100 feet in width extending from Front or [sic] Water Street Southwardly to Pantego Creek, reference being made to the map made by Norfolk Southern Railroad Company for a more accurate description thereof.
>
> TO HAVE AND TO HOLD the said piece or parcel of land, together with all and singular, the rights, ways, privileges and appurtenances thereto belonging or in anywise appertaining unto the party of the second part, its successors and assigns in fee simple, in as full and ample manner as the party of the first part is authorized and empowered to convey the same.

After recordation, PDHC constructed Pungo District Hospital ("the Hospital") on the land conveyed in the 1948 Deed. PDHC then managed and operated the Hospital until 2011.

In 2011, PDHC entered into an agreement ("the 2011 Agreement") with University Health Systems of Eastern Carolina, Inc., d/b/a Vidant Health, Inc. ("Vidant") and Pantego Creek, LLC ("Pantego Creek") — which was formed on 28 September 2011 by PDHC — transferring full

control of PDHC to Vidant. Pursuant to the 2011 Agreement, Pantego Creek was vested with the right to prosecute any breach of the 2011 Agreement by Vidant. The 2011 Agreement also expressly stated that "The Parties agree that this Agreement and all of the Transaction Agreements are not intended to be third party beneficiary agreements."

In September 2013, Vidant announced that it intended to close the Hospital. In response, Belhaven and the NAACP State Conference of Branches, the Hyde County NAACP Branch, and the Beaufort County NAACP Branch (collectively "the NAACP"), publicly denounced closure of the Hospital. Thereafter, the Mayor of Belhaven, the NAACP, and Vidant met on several occasions to discuss concerns surrounding the Hospital's imminent closure.

As a result of these meetings, the NAACP, Belhaven, and Vidant entered into a written agreement ("the Mediation Agreement") charging Belhaven with creating the Pungo District Hospital Community Board, Inc. ("Community Board"). The Mediation Agreement also stated the following: "In the event that the [Community Board] is unable to assume operational responsibility for the hospital for whatever reason on July 1, 2014, the Hospital will be closed[.]"

Belhaven failed to comply with the Mediation Agreement's terms when the Community Board failed to meet the 1 July 2014 deadline. As a result, Vidant closed the Hospital on 1 July 2014 and deeded the associated real property to Pantego Creek (the "2014 Deed").

Plaintiffs filed a complaint and motion for a temporary restraining order on 13 August 2014 in Beaufort County Superior Court. The following day, the Honorable Milton F. Fitch granted Plaintiffs' motion for a temporary restraining order. The case was thereafter removed to the United States District Court for the Eastern District of North Carolina. On 18 March 2015, the Honorable James C. Dever, III remanded the case to Beaufort County Superior Court on the ground that Plaintiffs had not actually brought a federal civil rights claim under Title VI of the Federal Civil Rights Act of 1964, but rather had alleged civil rights violations under N.C. Gen. Stat. § 99D-1 (2015).

On 6 April 2015, Plaintiffs filed their first amended complaint in Beaufort County Superior Court. The complaint set forth the following six causes of action: (1) breach of contract against Vidant as successor in interest to the 1948 Deed by Belhaven; (2) declaratory judgment against Defendants for breaching the 1948 Deed's terms by Belhaven; (3) fraud against Vidant; (4) unfair and deceptive trade practices against Vidant by Belhaven and the Community Board; (5) breach of fiduciary

duty against Pantego Creek by Belhaven; and (6) Section 99D-1 claim against Defendants by the NAACP.

On 30 April 2015, Senior Resident Superior Court Judge Wayland J. Sermons, Jr. sent a formal letter to Chief Justice Mark Martin of the North Carolina Supreme Court, copied to counsel for all parties, recommending that the case be designated as exceptional and that Chief Justice Martin assign a judge to the case in his absolute discretion. On 7 May 2015, Chief Justice Martin entered an order designating the case as exceptional pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts and appointing the Honorable R. Stuart Albright to adjudicate the matter.

On 10 July 2015, Defendants filed a motion to dismiss Plaintiffs' first amended complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted. Defendants attached the following documents to their motion: (1) the 2011 Agreement and related documentation thereto; (2) the Mediation Agreement; (3) an email from the president and CEO of Vidant to the Mayor of Belhaven incorporated by reference in Plaintiffs' complaint; and (4) the 1948 Deed.[2]

A hearing on Defendants' motion was held before Judge Albright on 6 October 2015 in Beaufort County Superior Court. On 13 October 2015, Judge Albright entered an order granting Defendants' motion to dismiss. Plaintiffs entered notice of appeal on 10 November 2015.

## Analysis

### I. Motion to Dismiss

On appeal, Plaintiffs contend that the trial court erred in granting Defendants' motion to dismiss. Specifically, they assert that they pled sufficient factual allegations to advance each of their claims. We disagree.

> "The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations

2. Plaintiffs briefly argue that the trial court erred by considering these documents without converting Defendants' motion to dismiss into a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. However, it is well settled that "[d]ocuments attached as exhibits to the complaint and incorporated therein by reference are properly considered when ruling on a 12(b)(6) motion." *Woolard v. Davenport*, 166 N.C. App. 129, 133-34, 601 S.E.2d 319, 322 (2004).

> included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. On appeal of a 12(b)(6) motion to dismiss, this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct."

*Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663-64 (2013) (quoting *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428-29 (2007)). We address each of Plaintiffs' claims in turn.

A. Breach of Contract and Declaratory Judgment

**[1]** Plaintiffs argue that because Defendants were successors in interest to the 1948 Deed they were subject to language included therein which amounted to a reversionary interest held by Belhaven that the granted property be used for the operation of a hospital for the benefit of the citizens of the town. They maintain that the trial court erred in dismissing Belhaven's breach of contract claim against Vidant and by failing to enter declaratory judgment against Vidant and Pantego Creek.

Plaintiffs assert that Article V, Section 3 of the North Carolina Constitution mandates that taxes shall only be levied for public purposes and contend that the subject land conveyed in the 1948 Deed can therefore never be used for anything other than for the operation of a hospital because it was conveyed by the Town of Belhaven — a governmental entity — to PDHC. Consequently, they argue that the closure of the Hospital would extinguish the land's use for a public purpose and, in turn, run afoul of Article V, Section 3.

The fundamental flaw with Plaintiffs' position is that Belhaven did not include any language creating a reversionary interest in the 1948 Deed to the effect that the land would revert to Belhaven in the event that the land ceased being used for the operation of a hospital. Instead, the language in the 1948 Deed clearly states that the land was conveyed in fee simple absolute to PDHC.

Significantly, our Supreme Court has long held that

> [t]his Court has declined to recognize reversionary interests in deeds that do not contain express and unambiguous language of reversion or termination upon condition broken.
>
> We have stated repeatedly that a mere expression of the purpose for which the property is to be used without provision for forfeiture or reentry is insufficient to create an estate on condition and that, in such a case, an unqualified fee will pass.

*Station Assocs. v. Dare Cnty.*, 350 N.C. 367, 370-71, 513 S.E.2d 789, 792-93 (1999) (internal citations omitted).

Here, we are satisfied that the language of the 1948 Deed does nothing more than express the purpose for which Belhaven wished the subject property to be used. There does not exist any express and unambiguous reversionary interest in the deed, and indeed, to the contrary, it plainly states that PDHC is entitled "TO HAVE AND TO HOLD the said piece or parcel of land, together with all and singular, the rights, ways, privileges and appurtenances thereto belonging or in anywise appertaining unto the party of the second part, its successors and assigns *in fee simple*, in as full and ample manner as the party of the first part is authorized and empowered to convey the same." (Emphasis added).

It is well settled that

> [a] grantor can impose conditions and can make the title conveyed dependent upon a grantee's performance. But if the grantor does not make any condition, but simply expresses the motive which induces him to execute the deed, the legal effect of the granting words cannot be controlled by the language indicating the grantor's motive. It is well established that the law does not favor a construction of the language in a deed which will constitute a condition subsequent unless the intention of the parties to create such a restriction upon the title is *clearly manifested*. For a reversionary interest to be recognized, the deed must contain express and unambiguous language of reversion or termination upon condition broken. A mere expression of the purpose for which the property is to be used without provision for forfeiture or re-entry is insufficient to create an estate on condition.

*Prelaz v. Town of Canton*, 235 N.C. App. 147, 155, 760 S.E.2d 389, 394 (2014) (internal citations, quotation marks, and brackets omitted).

Plaintiffs cite no authority for their proposition that an implicit reversionary interest is created simply because the granting party is a governmental entity which had a public purpose in mind at the time it conveyed certain property, nor are we aware of any. Consequently, we are bound by *Station Assocs., Inc.* and analogous cases requiring that for a reversionary interest to exist it must be expressly and unambiguously stated in a grant of real property. We therefore hold that no reversionary interest was created in the 1948 Deed and PDHC and its successors in interest acquired title to the subject property in fee simple absolute.

Furthermore, although unnecessary to our determination of this issue, we also note that the General Assembly has affirmatively provided that

> [i]t is the purpose of the General Assembly of the State of North Carolina to provide that if a person claims title to real property under a chain of record title for 30 years, and no other person has filed a notice of any claim of interest in the real property during the 30-year period, then all conflicting claims based upon any title transaction prior to the 30-year period shall be extinguished.

N.C. Gen. Stat. § 47B-1 (2015). Towards this end, the General Assembly has emphasized that "obsolete restrictions . . . which have been placed on the real property records at remote times in the past often constitute unreasonable restraints on the alienation and marketability of real property." N.C. Gen. Stat. § 47B-1(2). Consequently,

> (a) Any person having the legal capacity to own real property in this State, who, alone or together with his predecessors in title, shall have been vested with any estate in real property of record for 30 years or more, shall have a marketable record title to such estate in real property.
>
> (b) A person has an estate in real property of record for 30 years or more when the public records disclose a title transaction affecting the title to the real property which has been of record for not less than 30 years purporting to create such estate either in:
>
> (1) The person claiming such estate; or

> (2) Some other person from whom, by one or more title transactions, such estate has passed to the person claiming such estate;
>
> with nothing appearing of record, in either case, purporting to divest such claimant of the estate claimed.
>
> (c) Subject to the matters stated in G.S. 47B-3, such marketable record title shall be free and clear of all rights, estates, interests, claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to such 30-year period. All such rights, estates, interests, claims or charges, however denominated, whether such rights, estates, interests, claims or charges are or appear to be held or asserted by a person sui juris or under a disability, whether such person is natural or corporate, or is private or *governmental*, are hereby declared to be null and void.

N.C. Gen. Stat. § 47B-2(a)-(c) (2015) (emphasis added).

Because the 1948 Deed on its face states that it is fee simple, and since it had been held as such for over 60 years at the time of the events giving rise to the present appeal, we hold that the trial court did not err in dismissing Belhaven's breach of contract and declaratory judgment claims on this ground as well. Any argument that Defendants somehow violated the North Carolina Constitution when title was transferred to Vidant and then to Pantego Creek is foreclosed by the fact that they acquired fee simple absolute title from their predecessor in interest, PDHC, who also enjoyed title in fee simple as a result of the 1948 Deed's express provisions as discussed above *and* the fact that they had held it for well over the 30 year time period delineated in N.C. Gen. Stat. §§ 47B-1 and 47B-2. Consequently, Plaintiffs' arguments on this issue are overruled.

B. Fraud

**[2]** Plaintiffs next contend that the trial court erred in dismissing their claim against Vidant for fraud. We disagree.

> The well-recognized elements of fraud are 1) a false representation or concealment of a material fact, 2) reasonably calculated to deceive, 3) made with intent to deceive, 4) which does in fact deceive, and which 5) results in damage to the injured party. A complaint charging fraud must

> allege these elements with particularity. In pleading actual fraud, the particularity requirement is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations. Dismissal of a claim for failure to plead with particularity is proper where there are no facts whatsoever setting forth the time, place, or specific individuals who purportedly made the misrepresentations.

*Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 39, 626 S.E.2d 315, 321 (2006) (internal citations, quotation marks, and brackets omitted).

Significantly, the Mediation Agreement expressly stated that "In the event that the [Community Board] is unable to assume operational responsibility for the hospital for whatever reason on July 1, 2014, the Hospital will be closed[.]" Belhaven breached the Mediation Agreement when the Community Board was unable to legally assume control of the Hospital on 1 July 2014 and Plaintiffs do not contend otherwise. Therefore, in complete accord with the agreement, Vidant closed the Hospital as it was entitled to. The NAACP and Belhaven fully acquiesced to this portion of the agreement to which they are signatories. "In North Carolina, parties to a contract have an affirmative duty to read and understand a written contract before they sign it." *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 83, 721 S.E.2d 712, 718 (2012); *see Raper v. Oliver House, LLC*, 180 N.C. App. 414, 421, 637 S.E.2d 551, 555 (2006) (" 'Persons entering contracts . . . have a duty to read them and ordinarily are charged with knowledge of their contents.' " (quoting *Nationwide Mut. Ins. Co. v. Edwards*, 67 N.C. App. 1, 8, 312 S.E.2d 656, 661 (1984))).

Plaintiffs' agreement that Vidant could close the Hospital on 1 July 2014 was plain, clear, and unambiguous. Their attempt to allege fraud in their complaint does not address the import of this provision, but rather simply states that "[a]t the time Vidant made these representations, it was secretly implementing its plans to permanently close the [Hospital], convey the property to a small group of people who controlled the Pantego Creek, LLC, pay its agents to demolish the [Hospital], and to build clinics nearby to compete with the re-opened hospital."

Such a broad unparticularized allegation, despite ignoring the provision of the Mediation Agreement that "[i]n the event that the [Community Board] is unable to assume operational responsibility for

the hospital for whatever reason on July 1, 2014, the Hospital will be closed" additionally violates the pleading requirements of Rule 9(b) of the North Carolina Rules of Civil Procedure which requires that "[i]n all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *See Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981) ("[I]n pleading actual fraud the particularity requirement is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations.").

Moreover, Plaintiffs are incapable of suffering damages based on the 2011 Agreement or the 2014 Deed between Vidant, PDHC, and Pantego Creek because they were not parties to those agreements and were not third-party beneficiaries thereof.

> North Carolina recognizes the right of a third-party beneficiary . . . to sue for breach of a contract executed for his benefit. In order to assert rights as a third-party beneficiary under [a contract], plaintiffs must show they were an intended beneficiary of the contract. We have stated that plaintiffs must show:
>
> > (1) that a contract exists between two persons or entities; (2) that the contract is valid and enforceable; and (3) that the contract was executed for the direct, and not incidental, benefit of the [third party]. A person is a direct beneficiary of the contract if the contracting parties intended to confer a legally enforceable benefit on that person. *It is not enough that the contract, in fact, benefits the [third party], if, when the contract was made, the contracting parties did not intend it to benefit the [third party] directly*. In determining the intent of the contracting parties, the court should consider the circumstances surrounding the transaction as well as the actual language of the contract. When a third person seeks enforcement of a contract made between other parties, the contract must be construed strictly against the party seeking enforcement.

*Babb v. Bynum & Murphrey, PLLC*, 182 N.C. App. 750, 753-54, 643 S.E.2d 55, 57-58 (2007) (emphasis added) (internal citations and quotation

marks omitted) (quoting *Country Boys Auction & Realty Co., Inc. v. Carolina Warehouse, Inc.*, 180 N.C. App. 141, 146, 636 S.E.2d 309, 313 (2006)).

Here, the 2011 Agreement and the 2014 Deed between Vidant, PDHC, and Pantego Creek were for their exclusive benefit and Plaintiffs were not parties or third-party beneficiaries thereto. Therefore, any benefit they derived from the agreements would have properly been deemed incidental. Indeed, to wit, the 2011 Agreement expressly provides that "[t]he Parties agree that this Agreement and all of the Transaction Agreements are not intended to be third party beneficiary agreements."

Without standing to challenge Vidant's, PDHC's, and Pantego Creek's 2011 Agreement and 2014 Deed, Plaintiffs cannot maintain an action for fraud against Vidant. Further, because they have failed to allege with any particularity how Vidant's exercise of its express option to close the Hospital contained in the Mediation Agreement and referenced in the letter from Vidant's president and CEO to the Mayor of Belhaven constituted fraud, we hold that the trial court did not err in dismissing Plaintiffs' fraud claim against Vidant.

C. Unfair and Deceptive Trade Practices

**[3]** Plaintiffs next argue that the trial court erred by dismissing Belhaven's and the Community Board's unfair and deceptive trade practices claim against Vidant. We disagree.

> Under N.C.G.S. § 75-1.1, a trade practice is unfair if it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to customers. A trade practice is deceptive if it has the capacity or tendency to deceive. It is well recognized, however, that actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1.

*Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 61-62, 418 S.E.2d 694, 700 (1992) (internal citations and quotation marks omitted). "The elements of a claim for unfair or deceptive trade practices are: '(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business.' " *Noble v. Hooters of Greenville (NC), LLC*, 199 N.C. App. 163, 166, 681 S.E.2d 448, 452 (2009) (quoting *Furr v. Fonville Morisey Realty, Inc.*, 130 N.C. App. 541, 551, 503 S.E.2d 401, 408 (1998)).

Here, for the reasons discussed above, Belhaven and the Community Board have failed to allege any fraud or deception on the part of Vidant. Their claim for unfair and deceptive trade practices fails for this reason alone as they cannot establish the first element of the offense. Moreover, Plaintiffs do not have standing to bring an unfair and deceptive trade practices claim as there was no business relationship between Vidant and Plaintiffs, nor are they customers of Vidant, nor have they pled any injury in fact beyond the mere abstract allegation that "Plaintiffs suffered actual injury as a result of Vidant's conduct alleged herein." *See Carcano v. JBSS, LLC*, 200 N.C. App. 162, 175, 684 S.E.2d 41, 52 (2009) ("To have standing to bring a claim under the [Unfair and Deceptive Trade Practices] Act, the plaintiff must prove the elements of standing, including injury in fact. An injury in fact must be distinct and palpable, and must not be abstract or conjectural or hypothetical." (internal citation and quotation marks omitted)). Consequently, the trial court did not err in dismissing Belhaven's and the Community Board's unfair and deceptive trade practices claim against Vidant.

D. Breach of Fiduciary Duty

**[4]** Belhaven next contends that Pantego Creek owed it a fiduciary duty pursuant to the 2011 Agreement. However, as noted above, by that agreement's plain terms it was not intended for the benefit of third-party beneficiaries and was exclusively between Pantego Creek, PDHC, and Vidant. Thus, no fiduciary relationship ever existed between Pantego Creek and Plaintiffs. *See Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) ("For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties.").

Therefore, Belhaven has failed to sufficiently plead a viable claim for breach of fiduciary duty against Pantego Creek. Plaintiffs' arguments on this issue are without merit.

E. Section 99D-1 Claim

**[5]** Plaintiffs next argue that the trial court erred in dismissing the NAACP's N.C. Gen. Stat. § 99D-1 claim against Defendants. We disagree.

It is well established that

> [a]n organization generally lacks standing to sue for money damages on behalf of its members if the damage claims are not common to the entire membership, nor shared equally, so that the fact and extent of injury would require individualized proof. Where an association seeks to recover damages on behalf of its members, the extent

> of injury to individual members and the burden of supervising the distribution of any recovery mitigates against finding standing in the association.

*Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 167, 552 S.E.2d 220, 226 (2001) (internal citation, quotation marks, and brackets omitted); *see generally Landfall Grp. Against Paid Transferability v. Landfall Club*, *Inc.*, 117 N.C. App. 270, 450 S.E.2d 513 (1994).

N.C. Gen. Stat. § 99D-1(a)-(b1) provides, in pertinent part, the following:

> (a) It is a violation of this Chapter if:
>
> (1) Two or more persons, motivated by race, religion, ethnicity, or gender, but whether or not acting under color of law, conspire to interfere with the exercise or enjoyment by any other *person or persons* of a right secured by the Constitutions of the United States or North Carolina, or of a right secured by a law of the United States or North Carolina that enforces, interprets, or impacts on a constitutional right; and
>
> (2) One or more persons engaged in such a conspiracy use force, repeated harassment, violence, physical harm to *persons* or property, or direct or indirect threats of physical harm to *persons* or property to commit an act in furtherance of the object of the conspiracy; and
>
> (3) The commission of an act described in subdivision (2) interferes, or is an attempt to interfere, with the exercise or enjoyment of a right, described in subdivision (1), of another person.
>
> (b) Any *person* whose exercise or enjoyment of a right described in subdivision (a)(1) has been interfered with, or against whom an attempt has been made to interfere with the exercise or enjoyment of such a right, by a violation of this Chapter may bring a civil action. . . .

> (b1) The North Carolina Human Relations Commission may bring a civil action on behalf, and with the consent, of any person subjected to a violation of this Chapter. In any such action, the court may restrain and enjoin such future acts, and may award compensatory damages and punitive damages to the person on whose behalf the action was brought. Court costs may be awarded to the Commission or the defendant, whichever prevails. Notwithstanding the provisions of G.S. 114-2, the Commission shall be represented by the Commission's staff attorney.

(Emphasis added.)

Based upon the plain and unambiguous language of the statute, it is readily apparent that the General Assembly only intended individually aggrieved persons or the North Carolina Human Relations Commission to have standing to bring an action under Section 99D-1. "Where the language of a statute is clear and unambiguous, this Court is bound by the plain language of the statute." *Riviere v. Riviere*, 134 N.C. App. 302, 304, 517 S.E.2d 673, 675 (1999); *see also Mangum v. Raleigh Bd. of Adjustment*, 196 N.C. App. 249, 255, 674 S.E.2d 742, 747 (2009) ("One of the long-standing rules of interpretation and construction in this state is *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another."). Here, no named individual person or persons are parties to this lawsuit. Thus, the NAACP is without standing to assert a Section 99D-1 claim.

II. Designation of Case as Exceptional

**[6]** Plaintiffs' final argument on appeal, in essence, is that the Senior Resident Superior Court Judge for the Second Judicial District and the Chief Justice of the Supreme Court of North Carolina deprived Plaintiffs of their right to a fair and impartial hearing when the Chief Justice designated the present case as an exceptional case under Rule 2.1 of the General Rules of Practice for the Superior and District Courts upon the formal recommendation of the Senior Resident Superior Court Judge for the Second Judicial District and appointed Judge Albright to adjudicate the matter. For the first time on appeal, Plaintiffs now argue that they were prejudiced by Judge Albright's adjudication of the case and request that this Court vacate Judge Albright's order dismissing Plaintiffs' claims and remand for a new hearing with a judge that they would prefer over Judge Albright. On 25 July 2016, Defendants filed a motion to dismiss this portion of Plaintiffs' appeal.

We are without jurisdiction to consider this matter on appeal as the superior court had no jurisdiction to overrule a command of the Supreme Court and our jurisdiction is derivative of the superior court's jurisdiction. *See State v. Earley*, 24 N.C. App. 387, 389, 210 S.E.2d 541, 543 (1975) ("[T]he jurisdiction of the appellate courts on an appeal is derivative. If the trial court has no jurisdiction, the appellate courts cannot acquire jurisdiction by appeal."). Consequently, we conclude that Plaintiffs' argument on this issue is wholly meritless and grant Defendants' motion to dismiss this portion of Plaintiffs' appeal.

Conclusion

For the reasons stated above, the trial court's order is affirmed and Defendants' motion to dismiss the portion of Plaintiffs' appeal concerning the issues surrounding the designation of the case as exceptional is granted.

AFFIRMED IN PART; DISMISSED IN PART.

Chief Judge McGEE and Judge INMAN concur.

---

KRISTIE LEA WILLIAMS, Plaintiff
v.
JAMES MARION CHANEY, Defendant

No. COA16-274

Filed 15 November 2016

1. **Child Custody and Support—order not to make derogatory statements—ambiguous—willfulness**

   Where the trial court issued an order modifying plaintiff-mother's visitation and directing plaintiff not to make derogatory statements about the child or the child's family members, it was ambiguous whether the order proscribed the comments that plaintiff subsequently posted on Facebook. Thus, it could not be said that plaintiff's actions were willful, and it was error for the trial court to find her in contempt of the order.

2. **Child Custody and Support—attorney fees—insufficient findings**

   In an action initiated by plaintiff-mother in 2001 to obtain child custody and support, the trial court erred by ordering plaintiff to

pay attorney fees where the trial court's order contained no findings of fact indicating that the action was frivolous or, alternatively, that defendant was acting in good faith and defendant did not have sufficient means to defray the costs and expenses of the matter.

Appeal by Plaintiff from order entered 3 December 2015 by Judge Larry J. Wilson in Lincoln County District Court. Heard in the Court of Appeals 6 September 2016.

*Kristie Lea Williams, pro se.*

*James M. Chaney, Jr., pro se.*

DILLON, Judge.

Plaintiff Kristie Lea Williams appeals the trial court's contempt order entered 3 December 2015. For the following reasons, we reverse.

## I. Background

Plaintiff and Defendant James Marion Chaney, Jr., have been engaged in a protracted child custody battle for over a decade.[1] At present, Defendant has primary legal and physical custody of the child, and Plaintiff has certain visitation rights.

In May 2015, the trial court entered an order which modified Plaintiff's visitation and directed Plaintiff not to make derogatory statements about the child or the child's family members. On 3 December 2015, the trial court entered an order finding Plaintiff in contempt of the May 2015 order due to Plaintiff's Facebook group page post, and directed Plaintiff to pay attorney's fees. Forty-two days later, on 14 January 2016, Plaintiff filed her notice of appeal from the contempt order.

## II. Appellate Jurisdiction

Defendant has filed motions to dismiss Plaintiff's appeal, contending, in pertinent part, that Plaintiff's notice of appeal and her petition to appeal as an indigent were untimely. Plaintiff avers that she was not

---

1. This appeal marks the fourth in this matter. *See Williams v. Chaney*, No. COA 10-1278, 2011 WL 2445950 (N.C. Ct. App. June 21, 2011); *Williams v. Chaney*, No. COA11-164, 2011 WL 2848846 (N.C. Ct. App. July 19, 2011); *Williams v. Chaney*, ___ N.C. App. ___, 782 S.E.2d 122 (2016) (unpublished).

*served* with the contempt order until two weeks after it was entered, and that she filed her notice of appeal and indigent affidavit within thirty days of service.

Failure to timely file a notice of appeal as required by our Rules of Appellate Procedure "mandates dismissal of an appeal." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) (internal quotation marks omitted). Similarly, failure to timely file a petition to appeal as an indigent is fatal. *See Anderson v. Worthington*, 238 N.C. 577, 578, 78 S.E.2d 333, 333 (1953) (holding that compliance with N.C. Gen. Stat. § 1-288 is "mandatory and jurisdictional in character").

While it is unclear from the record whether this Court has jurisdiction to review Plaintiff's appeal, we exercise our "authority pursuant to North Carolina Rule of Appellate Procedure 21(a)(1) to treat the purported appeal as a petition for writ of certiorari," *Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008) (internal quotation marks omitted), and grant certiorari due to Plaintiff's seeming failure to take timely action. *See* N.C. R. App. P. 21(a)(1).

## III. Standard of Review

When reviewing a contempt order, our inquiry is "limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Shippen v. Shippen*, 204 N.C. App. 188, 189, 693 S.E.2d 240, 243 (2010) (internal quotation marks omitted). "In contempt proceedings the judge's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment." *Clark v. Clark*, 294 N.C. 554, 571, 243 S.E.2d 129, 139 (1978).

## IV. Analysis

Plaintiff argues that the finding of contempt in the contempt order should be reversed. She also argues that the award of attorney's fees in the contempt order should be reversed. We address each argument in turn.

### A. Finding of Contempt Was Improper

**[1]** In the contempt order, the trial court held Plaintiff in contempt of the May 2015 order. In pertinent part, the May 2015 order states as follows:

> The Plaintiff/Mother shall not intimidate the child or make any derogatory statements about the child or any of the child's family members.

The trial court held Plaintiff in contempt of this May 2015 order for posting certain comments on the Facebook page for her child's football team. These comments appear to express her frustration about missing a football game due to Defendant, the team's coach, allegedly failing to provide the correct information about the team's schedule. Specifically, she posted the following:

> I was confused as well because the calendar on the website for the school athletic department and the schedule that was handed out all said they had a JV game at Bessemer City and there was nothing anywhere on the school website that said it changed. Also, there was no mention in any of these places of the game they played during their Bye/Open week. Needless to say we missed getting to attend the Bye/Week game at Stuart Cramer due to not knowing. Then after me having cancer surgery on my upper leg and stiches we fought rush hour traffic to get over to Bessemer City for the JV game last Thursday night only to find out upon arrival there was no JV game, they haven't had a JV team for 2 years. **<u>My son's father James Chaney is a coach on the team and he did not inform me of either of the above changes. Very upset how I am attempting to rely on correct information being posted and the coaching staff communicating responsibly to all parents, divorced or not. I was in so much pain and traveled from SC to see that game and wasted all that gas and it could have been avoided with communication. I hope going further the information posted is accurate and the coaching staff is held to a[n] ethical standard of communicating with all parents or they should not be on the staff to use it as a way to keep a parent from participating/watching their child at a sporting event.</u>**

(alterations in original).

The May 2015 order does not expressly prohibit Plaintiff from publishing such comments on Facebook. In the contempt order, the trial court interpreted the May 2015 order to prohibit such comments. However, the trial court admits in the contempt order that the prior May

2015 order was not "artfully drawn" and that it was putting Plaintiff "on notice that the prohibition of the May 15, 2015 Order clearly covers communications in such a forum as the Facebook[.]"

We hold that the trial court did not err in its interpretation of its prior May 2015 order. It is certainly appropriate for a trial court to clarify its prior orders, and we are mindful that we must give at least some deference to the trial court's interpretation of its orders. *Blevins v. Welch*, 137 N.C. App. 98, 102, 527 S.E.2d 667, 671 (2000).

However, to be held *in contempt* for violating the May 2015 order, it must be shown that Plaintiff's violation of the May 2015 order was willful. N.C. Gen. Stat. § 5A-21(a)(2a) (2013) (stating that a court may enter a finding of contempt only if "[t]he noncompliance by the person to whom the order is directed is willful"). For contempt purposes, a party's noncompliance is willful if there is both "*knowledge* and *a stubborn resistance*" of a trial court directive. *Mauney v. Mauney*, 268 N.C. 254, 268, 150 S.E.2d 391, 393 (1966) (emphasis added). *See also Campen v. Featherstone*, 150 N.C. App. 692, 695, 564 S.E.2d 616, 618 (2002) (restating same general principle). However, "[i]f the prior order is *ambiguous* such that a defendant could not understand his respective rights and obligations under that order, he cannot be said to have *knowledge* of that order for purposes of contempt proceedings." *Blevins*, 137 N.C. App. at 103, 527 S.E.2d at 671 (emphasis added) (internal quotation marks omitted).

We hold that it is ambiguous whether the language of the May 2015 order proscribed Plaintiff's conduct. Accordingly, it cannot be said that her actions were willful; and, therefore, it was error for the trial court to find her in contempt of the May 2015 order. Of course, now that the contempt order has put Plaintiff on notice by clarifying the May 2015 order, Plaintiff may be held in contempt if she makes a similar posting in the future.

B. The Trial Court's Award of Attorney's Fees Was Erroneous

**[2]** Absent statutory authority, "[t]he general rule . . . is that counsel fees are not allowed as a part of the costs in civil actions or special proceedings." *Bowman v. Comfort Chair Co.*, 271 N.C. 702, 704, 157 S.E.2d 378, 379 (1967). N.C. Gen Stat. § 50-13.6 permits the recovery of attorney's fees in custody proceedings if the following applies:

> [T]he court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense

> of the suit. Before ordering payment of a fee in a support action, the court *must find as a fact* that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, *should* the court *find as a fact* that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

N.C. Gen. Stat. § 50-13.6 (2013) (emphasis added).

This action was initiated by Plaintiff in 2001 to obtain custody and child support. The May 2015 order, however, contained no findings of fact indicating that the action was frivolous or, alternatively, that (1) Defendant was acting in good faith; and (2) Defendant did "not have sufficient means to defray the costs and expenses of this matter." *Wiggins v. Bright*, 198 N.C. App. 692, 696, 679 S.E.2d 874, 877 (2009). Indeed, the May 2015 order contained no information as to the authority on which the trial court was relying in awarding attorney's fees. Under these circumstances, the trial court's award of attorney's fees was erroneous.

## V. Conclusion

For the foregoing reasons, we reverse the finding of contempt and award of attorney's fees in the contempt order. We remand this matter back to the trial court for further proceedings not inconsistent with this opinion. As we find that Plaintiff's noncompliance with the May 2015 order was not willful, we need not address Plaintiff's remaining arguments.

REVERSED.

Judges BRYANT and STEPHENS concur.

[250 N.C. App. 482 (2016)]

JAEKWON WILLIAMS, a minor, by and through his Guardian Ad Litem, DAVID JONES, DARRIUS WILLIAMS AND JASMINE WILLIAMS, Plaintiffs
v.
WOODMEN FOUNDATION d/b/a LIONS WATER ADVENTURE PARK, AKA WOODMEN FOUNDATION, A Nebraska Not-For Profit Corporation;

CITY OF ROCKY MOUNT d/b/a CITY OF ROCKY MOUNT PARKS & RECREATION DEPARTMENT d/b/a QUEST SUMMER DAY CAMP;

COUNTY OF LENOIR d/b/a CITY OF KINSTON/LENOIR COUNTY PARKS & RECREATION DEPARTMENT and CITY OF KINSTON d/b/a CITY OF KINSTON/LENOIR COUNTY PARKS & RECREATION DEPARTMENT;

JORDAN O'NEAL, JORDAN SHEAR, HARRISON WIGGINS, Unnamed LIONS WATER ADVENTURE PARK LIFEGUARDS and Unnamed PERSONS WITH MANAGERIAL, OPERATIONAL AND SUPERVISORY RESPONSIBILITY FOR LIONS WATER ADVENTURE PARK;

JARRON PARKER, MICHAEL DELOATCH, TINA MOORE, JUSTIN ATKINSON, TIARA BATTLE and Unnamed QUEST SUMMER DAY CAMP EMPLOYEES;

Unnamed ROCKY MOUNT PARKS & RECREATION DEPARTMENT EMPLOYEES; Unnamed KINSTON/LENOIR COUNTY PARKS & RECREATION DEPARTMENT EMPLOYEES, Defendants

No. COA16-167

Filed 15 November 2016

**Venue—non-fatal drowning—cause of action based on events in Lenoir County—venue improper in Edgecombe County**

In a case involving the non-fatal drowning of a child at a day camp operated by the City of Rocky Mount, where the only cause of action after the voluntary dismissal of numerous defendants was against defendant-appellants based on what allegedly occurred in Lenoir County, venue was improper in Edgecombe County and should have been transferred to Lenoir County.

Appeal by defendants from order entered 28 September 2015 by Judge Milton F. Fitch, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 23 August 2016.

*Taft, Taft & Haigler, PA, by Thomas F. Taft, Sr. and Lindsey A. Bullard, and Richardson, Patrick, Westbrook & Brickman, LLC, by Terry E. Richardson, Jr. and Brady R. Thomas, pro hac vice, for plaintiff-appellees.*

*Cranfill Sumner & Hartzog LLP, by Dan M. Hartzog, Jaye E. Bingham-Hinch, Meredith Taylor Berard, and Stephanie Gaston*

*Poley, for defendant-appellants City of Kinston, Caroline Banks, Stephen Corbett Hall, Jordan Shear, and Harrison Wiggins.*

*Cauley Pridgen PA, by James P. Cauley, III and David M. Rief, for defendant-appellants City of Kinston, Caroline Banks, Stephen Corbett Hall, Jordan O'Neal, Jordan Shear, and Harrison Wiggins.*

*Teague Campbell Dennis & Gorham LLP, by Bryan T. Simpson and Natalia K. Isenberg, for defendant-appellant County of Lenoir.*

*Allen Moore & Rogers LLP, by Jody Moore, and Williams Mullen, by Elizabeth D. Scott, for defendant-appellee Woodmen Foundation d/b/a Lions Water Adventure Park, aka Woodmen Foundation. No brief filed.*[1]

BRYANT, Judge.

Where the only cause of action is against defendant-appellants who were not voluntarily dismissed from the case and that cause of action is based solely on allegations of what occurred in Lenoir County, venue is improper in Edgecombe County, and we reverse the order of the trial court.

Jaekwon Williams, a minor, by and through his Guardian Ad Litem David Jones, Darrius Williams, and Jasmine Williams ("plaintiffs"), filed a complaint on 17 March 2015 in Edgecombe County Superior Court asserting a negligence claim against Woodmen Foundation, d/b/a Lions Water Adventure Park; City of Rocky Mount, d/b/a City of Rocky Mount Parks & Recreation Department, d/b/a Quest Summer Day Camp; County of Lenoir and City of Kinston, d/b/a City of Kinston/Lenoir County Parks & Recreation Department; five lifeguards from Lions Water Adventure Park; and five day camp employees from Quest Summer Day Camp (collectively, "defendants"). Plaintiffs also asserted a negligence per se claim against defendants Woodmen, County of Lenoir, and City of Kinston, after alleging that Jaekwon suffered a "non-fatal drowning" on 11 August 2014. Plaintiffs filed an Amended Complaint (also in Edgecombe County) on 20 March 2015, asserting the same claims.

Plaintiffs' relevant factual allegations in the amended complaint are as follows:

---

1. We note this unusual circumstance in which defendant-appellee Woodmen Foundation is not a party to this appeal; however, since this Court granted a motion to substitute counsel on behalf of defendant-appellee Woodmen Foundation during the pendency of this appeal, we list the above as counsel for explanatory purposes.

> 25. That on August 11, 2014, Jaekwon Williams was attending Quest Summer Day Camp, which was operated by Defendant Rocky Mount, d/b/a Rocky Mount Parks & Rec.
>
> 26. That on August 11, 2014, Jaekwon Williams traveled with the Quest Summer Day Camp to Lions Water Adventure Park, a water park owned by Defendant Woodmen and operated jointly by Defendants Woodmen, County of Lenoir and City of Kinston, both d/b/a Kinston/Lenoir Parks and Rec.
>
> 27. That while at Lions Water Adventure Park, Jaekwon Williams, who, pursuant to N.C.G.S. § 8-46, has a future life expectancy of at least 67.6 years, entered the water of the lap pool owned by Defendant Woodmen and operated jointly by Defendants Woodmen, County of Lenoir and City of Kinston, both d/b/a Kinston/Lenoir Parks and Rec.
>
> 28. That Defendants were informed and/or should have known that Jaekwon Williams was not able to swim, and should have used ordinary care in assuring his safety.
>
> 29. That due to the negligence, carelessness, recklessness and/or wanton conduct with reckless indifference of all Defendants, Jaekwon Williams was found at the bottom of the lap pool of Lions Water Adventure Park with no pulse or respirations, and suffered severe and permanent physical and mental injuries as a result of said non-fatal drowning.

In May and June of 2015, defendants filed their respective answers, amended answers, and motions to dismiss. Defendant County of Lenoir and defendants City of Kinston, Caroline Banks, Stephen Corbett Hall, Jordan O'Neal, Jordan Shear, and Harrison Wiggins (collectively "Kinston defendants") also filed motions to change venue from Edgecombe County to Lenoir County. Plaintiffs filed replies to each of defendants' amended answers on 14 July and 22 July 2015.

Prior to the hearing on the motion to change venue, plaintiffs settled their claim against defendants City of Rocky Mount d/b/a City of Rocky Mount Parks & Recreation Department d/b/a Quest Summer Day Camp, Jarron Parker, Tina Moore, Tiara Battle, Justin Atkinson, Michael DeLoatch, Unnamed Quest Summer Day Camp Employees, and Unnamed Rocky Mount Parks & Recreation Department employees (collectively, "Rocky Mount defendants"). However, it was not until 28 January 2016 that plaintiffs filed a voluntary dismissal as to the Rocky Mount defendants.

Meanwhile, on 8 September 2015, the Honorable Milton F. Fitch Jr., Judge presiding, heard the Motions to Change Venue of the Kinston defendants and the County of Lenoir (collectively "defendant-appellants") in Edgecombe County Superior Court. Plaintiffs submitted the affidavits of Jasmine Williams and Charles Wilson, MD, in opposition to the motions to change venue, which both generally stated that it would be in Jaekwon's best medical interests to be transported the shorter distance to the Edgecombe County Courthouse, rather than to the one in Lenoir County, for purposes of this litigation. Plaintiffs' counsel also argued it would be improper for the trial court to make a venue decision at that time, because the issue "[would] not [be] ripe to be heard . . . until discovery [had] been complete[d] and until factual determinations ha[d] been made." Counsel for defendant-appellants argued that because the Rocky Mount defendants had been voluntarily dismissed from the action, "there is no way that a cause of action or any part of a cause of action against [defendant-appellants] took place in Edgecombe County[,]" as "[a]ny cause of action against [defendant-appellants] had to have taken place at that pool in Lenoir County."

On 28 September 2015, Judge Fitch entered an order denying appellants' motions to change venue, finding "that the cause or some part thereof arose in Edgecombe County." Defendant-appellants appeal.

On 15 April 2016, defendant-appellants filed a motion to supplement the record on appeal with this Court. Defendant-appellants intended that a filed copy of the voluntary dismissal order dismissing the Rocky Mount defendants from this matter be a file-stamped copy, but did not receive one prior to the record being filed with this Court on 19 February 2016. Defendant-appellants did include a copy of the voluntary dismissal order in the Rule 11(c) Supplement to the Printed Record on Appeal, but it was not a file-stamped version. Defendant-appellants requested that a file-stamped copy of the voluntary dismissal be included as a supplement to the record on appeal pursuant to Rule 9(b)(5) of the North Carolina Rules of Appellate Procedure. For the following reasons, we allow defendant-appellants' motion.

In opposition to defendant-appellants' motion, plaintiffs claimed the filed-stamped copy of the voluntary dismissal—dated 28 January 2016—should not be included in the record on appeal as it was not "submitted for consideration" to the trial court prior to the filing of the trial court's order on 28 September 2015, which denied defendant-appellants' motion to change venue, and which is the order from which defendant-appellants now appeal.

However, even if a file-stamped version of the voluntary dismissal could not have been submitted to the trial court, practically speaking, plaintiffs cannot show that they would be prejudiced were this Court to allow defendant-appellants' motion to include a file-stamped copy in the record. To the contrary, the transcript of the hearing makes plain that the trial court and all parties present at the hearing were aware or became aware that plaintiffs had settled their claims with the Rocky Mount defendants, and certainly, plaintiffs themselves were aware of the settlement. Indeed, counsel for plaintiffs, in response to the question from the court, "Is that true, did Rocky Mount settle the claims?", stated, "Yes, sir, they have, Your Honor. It hadn't been finally approved." Accordingly, where plaintiffs cannot show that any improper prejudice would result, we allow defendant-appellants' motion to supplement the record on appeal.

---

Defendant-appellants' sole argument on appeal is that the trial court erred in denying defendants' motion to change venue, as Edgecombe County is not a proper venue for this action pursuant to N.C. Gen. Stat. §§ 1-77(2) and 1-83. Specifically, defendant-appellants argue venue is improper in Edgecombe County because defendant-appellants are "public officers," and each of defendant-appellants' actions or inactions alleged by plaintiffs occurred in Lenoir County. We agree.

Defendant-appellants appeal from an interlocutory order denying their motion to change venue from Edgecombe County to Lenoir County. "[I]mmediate appeal is available from an interlocutory order . . . which affects a 'substantial right.' " *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citations omitted). This Court has previously held that "a denial of a motion to transfer venue affects a substantial right." *Hyde v. Anderson*, 158 N.C. App. 307, 309, 580 S.E.2d 424, 425 (2000) (citation omitted). Accordingly, "[t]he trial court's order is immediately appealable and properly before [this Court]." *Morris v. Rockingham Cnty.*, 170 N.C. App. 417, 418, 612 S.E.2d 660, 662 (2005).

"A determination of venue under N.C. Gen. Stat. § 1-83(1) is . . . a question of law that [this Court] review[s] *de novo*." *TD Bank, N.A. v. Crown Leasing Partners, LLC*, 224 N.C. App. 649, 654, 737 S.E.2d 738, 741–42 (2012) (quoting *Stern v. Cinoman*, 221 N.C. App. 231, 232, 728 S.E.2d 373, 374 (2012)).

North Carolina General Statutes, section 1-83 provides, in relevant part, as follows:

> If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.
>
> The court may change the place of trial in the following cases:
>
> (1) When the county designated for that purpose is not the proper one.

N.C. Gen. Stat. § 1-83 (2015).

> The general rule in North Carolina, as elsewhere, is that where a demand for removal for improper venue is timely and proper, the trial court has no discretion as to removal. The provision in N.C.G.S. § 1-83 that the court "may change" the place of trial when the county designated is not the proper one has been interpreted to mean "must change."

*Miller v. Miller*, 38 N.C. App. 95, 97, 247 S.E.2d 278, 279 (1978) (internal citations omitted). Accordingly, "the trial court has no discretion in ordering a change of venue if it appears that the action has been brought in the wrong county." *Caldwell v. Smith*, 203 N.C. App. 725, 729, 692 S.E.2d 483, 486 (2010) (citation omitted).

The venue statute applicable to a "public officer," N.C. Gen. Stat. § 1-77, provides, in relevant part, as follows:

> Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law:
>
> . . .
>
> (2) Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer.

N.C.G.S. § 1-77 (2015). "The purpose of section 1-77 is to avoid requiring public officers to 'forsake their civic duties and attend the courts of a distant forum.' " *Wells v. Cumberland Cnty. Hosp. Sys., Inc.*, 150 N.C. App. 584, 587, 564 S.E.2d 74, 76 (2002) (quoting *Coats v. Sampson Cnty. Mem'l Hosp., Inc.*, 264 N.C. 332, 333, 141 S.E.2d 490, 491 (1965)).

When considering an action against a "public officer," "the following two questions must be addressed: '(1) Is defendant a "public officer or person especially appointed to execute his duties"? [and] (2) In what county did the cause of action in suit arise?' " *Morris*, 170 N.C. App. at 418, 612 S.E.2d at 662 (alteration in original) (quoting *Coats*, 264 N.C. at 333, 141 S.E.2d at 491). Regarding the first question, "[a]n action against a municipality is an action against a public officer under N.C. Gen. Stat. § 1-77(2) for purposes of venue." *Hyde*, 158 N.C. App. at 309, 580 S.E.2d at 425 (citations omitted). "Proper venue for municipalities is, therefore, usually the county in which the cause of action arose." *Id.* (citation omitted).

Regarding the second question, "a cause of action may be said to accrue, within the meaning of a statute fixing venue of actions, when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested." *Morris*, 170 N.C. App. at 420, 612 S.E.2d at 663 (quoting *Smith v. State*, 289 N.C. 303, 333, 222 S.E.2d 412, 432 (1976)). In a negligence action, the right to sue is vested when a person fails "to exercise that degree of care which a reasonable and prudent [person] would exercise under similar conditions and which proximately cause injury or damage to another." *Id.* (alteration in original) (quoting *Williams v. Trust Co.*, 292 N.C. 416, 422, 233 S.E.2d 589, 593 (1977)).

"North Carolina venue is determined at the commencement of the action, as denoted by the filing of the complaint." *Caldwell*, 203 N.C. App. at 729, 692 S.E.2d at 486 (citation omitted). "When reviewing a decision on a motion to transfer venue, the reviewing court must look to the allegations of the plaintiff's complaint." *Town of Maiden v. Lincoln Cnty.*, 198 N.C. App. 687, 690, 680 S.E.2d 754, 756 (2009) (quoting *Ford v. Paddock*, 196 N.C. App. 133, 135–36, 674 S.E.2d 689, 691 (2009)). In reviewing that complaint, this Court is "not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008) (alteration in original) (citation omitted).

The plain language of N.C. Gen. Stat. § 1-77 states that actions "[a]gainst a public officer or person especially appointed to execute his duties" "must be tried in the county where the cause, or some part

thereof, arose . . . ." N.C.G.S. § 1-77(2). If a claim is not being made against a non-party or entity, no "cause, or [any] part thereof" can be said to have arisen against them. *See id.* Indeed, where a party has been dismissed, for purposes of venue, the matter "proceed[s] as if he had never been a party . . . ." *Mitchell v. Jones*, 272 N.C. 499, 502, 158 S.E.2d 706, 709 (1968). Accordingly, any alleged acts or omissions by a non-party (here, the Rocky Mount defendants) which occurred in Edgecombe County, would not and could not give rise to a cause of action against the remaining defendant-appellants as no right to sue defendant-appellants has become vested by the actions or inactions of the non-party, Rocky Mount defendants. *See Morris*, 170 N.C. App. at 420, 612 S.E.2d at 663. The only remaining cause of action in this case is the cause of action against defendant-appellants, which is based solely on what allegedly occurred in Lenoir County.

Plaintiffs do not assert that any of defendant-appellants' alleged acts or omissions took place in Edgecombe County. Rather, plaintiffs' main argument on appeal, and entire argument to the trial court, was that it would be improper to rule on venue before plaintiffs could be permitted to conduct discovery and ascertain whether or not there were any acts or omissions which occurred in Edgecombe County, presumably by the remaining defendant-appellants. Plaintiffs' counsel argued to the trial court, in relevant part, as follows:

> Yes, we do need to do continuing discovery with Rocky Mount in order to determine where negligence acts did occur whether they were in Edgecombe County or Nash County.
>
> For all we know they may have occurred in Pitt County or Edgecombe -- I mean, in Wayne when the bus was driving them to the swimming pool. We don't know yet because we haven't had that discovery.
>
> . . .
>
> We believe that discovery will show that some part of [the negligence] occurred in Edgecombe or in Nash or maybe some other county. . . .
>
> In our pleadings, Your Honor, against Rocky Mount, we allege that there would be an opportunity through discovery to determine what else, what other negligence may have occurred and where it occurred.
>
> We don't know that right now. . . .

> We don't know any of those things yet, Your Honor. And we have a right to discover that and then bring these matters before the Court to make an informed decision on venue.
>
> . . .
>
> [W]e believe that that negligence occurred in Edgecombe or Nash County, but we don't know yet. And so we couldn't allege that in specificity . . . .
>
> It is exactly the reason that we're entitled to discovery before this matter is ri[pe] to be heard, Your Honor.
>
> . . .
>
> [U]ntil we have a chance to conduct other discovery, we won't know where that negligence occurred.
>
> . . .
>
> [T]his is not ripe to be heard at this moment until discovery has been complete and until factual determinations have been made.

Not surprisingly, plaintiffs have cited to no authority to support their contention that a motion on venue cannot be heard until discovery has been completed, as this is not the law. The law is clear: venue is properly determined at the commencement of the action by the factual allegations of the complaint. *See Caldwell*, 203 N.C. App. at 729, 692 S.E.2d at 486 (holding venue improper in Dare County where the plaintiffs' complaint and the defendant's affidavit indicated no party resided in that county at the commencement of the action). Discovery is not a tool for assessing where an action should ultimately proceed. And where, as here, certain parties have been dismissed from the action, it is as though those parties were never a part of the action. *See Mitchell*, 272 N.C. at 502, 158 S.E.2d at 709. Thus, as plaintiffs have repeatedly admitted that at the commencement of this action they had no facts which they could plead as to any acts or omissions by the remaining parties occurring outside of Lenoir County, this matter should be transferred to Lenoir County.

Accordingly, the trial court's order denying defendant-appellants' motion to change venue is

REVERSED.

Judges STEPHENS and DILLON concur.

PHOEBE WILLIFORD, Petitioner
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, and
NORTH CAROLINA DIVISION OF MEDICAL ASSISTANCE, Respondents

No. COA16-393

Filed 15 November 2016

**Public Assistance—Workers' Compensation Medicare Set-Aside Account—not counted from determining Medicaid eligibility**

The trial court erred by affirming the agency decision of the N.C. Department of Health and Human Services that treated petitioner's Workers' Compensation Medicare Set-Aside Account (WCMSA) as a countable resource for purposes of determining petitioner's eligibility for Medicaid. Petitioner established that the terms of a legally binding agreement—a Settlement Agreement incorporated into an order of the Industrial Commission—imposed legal restrictions on her use of the WCMSA funds, and therefore those funds could not be counted for purposes of determining her eligibility for Medicaid.

Appeal by petitioner from order entered 8 February 2016 by Judge Charles H. Henry in Sampson County Superior Court. Heard in the Court of Appeals 6 October 2016.

*Kathleen G. Sumner for petitioner-appellant.*

*Attorney General Roy Cooper, by Assistant Attorney General Kimberly S. Murrell, for respondents-appellees.*

ZACHARY, Judge.

Phoebe Williford (petitioner) appeals from an order by the trial court that affirmed the final agency decision of the North Carolina Department of Health and Human Services ("DHHS") and DHHS' Division of Medical Assistance ("DMA") (collectively, respondents), that terminated petitioner's entitlement to medical assistance benefits ("Medicaid"). On appeal, petitioner argues that the trial court erred by finding and concluding that the funds in petitioner's Workers Compensation Set-Aside Account were a countable resource for purposes of determining petitioner's eligibility for Medicaid. For the reasons that follow, we agree.

## I. Factual and Procedural Background

Petitioner was born on 8 November 1948, and is now a 68 year old widow. On 25 November 2005, petitioner suffered a workplace injury to her left arm and right knee; plaintiff has not been employed since she was injured. Petitioner sought and obtained workers' compensation medical and disability benefits from her employer. Petitioner became eligible for Medicare on 8 November 2009, when she reached 65 years of age. Petitioner received medical treatments for her injury, which were paid for with workers' compensation medical benefits. After several years of medical treatment, petitioner and her employer disagreed about the degree of permanent impairment of petitioner's left arm and right knee, and about the likelihood that petitioner's workplace injuries would require further medical treatment. The parties engaged in mediation and reached an agreement resolving the contested issues related to petitioner's workers' compensation claim.

On 19 April 2011, the Industrial Commission entered an order pursuant to N.C. Gen. Stat. § 97-17, that incorporated the parties' settlement agreement. In its order, the Commission concluded that the settlement agreement was "fair and just" and properly addressed the interests of all parties. The terms of the settlement agreement included a provision awarding petitioner a lump sum[1] for workers' compensation disability payments and attorney's fees. The agreement also provided that petitioner's employer would contribute $46,484.12 to fund a Workers' Compensation Medicare Set-Aside Account (WCMSA), which represented the parties' settlement of all future workers' compensation medical benefits for which petitioner's employer would be liable and that would otherwise be paid by Medicare.

When petitioner reached 65 years of age, she applied for and received assistance with her medical expenses pursuant to Medicaid for the Aged. Medicaid, a state and federal program discussed in detail below, provides funds for the medical expenses of applicants who meet various requirements and whose income and financial resources are below a specified amount. The requirement that is relevant to this appeal is that an applicant who is single and is over 65 years old may have no more than $2000 in liquid assets, such as bank accounts. The dispositive issue in this case is whether respondents properly classified the funds in petitioner's WCMSA as a financial resource for purposes of determining petitioner's eligibility for Medicaid.

---

1. The dollar amount of the settlement payment for disability and attorney's fees is blacked out in the copy of the agreement contained in the record.

On 27 December 2013, a local hearing officer for the Sampson County Department of Social Services (DSS) issued a decision terminating petitioner's eligibility for Medicaid, on the grounds that the funds in petitioner's WCMSA, which were then approximately $46,630, were a countable resource. Inclusion of petitioner's WCMSA in the calculation of her liquid assets resulted in respondents' conclusion that petitioner had more than $48,000 in countable resources. Petitioner appealed the decision of the local hearing officer to DHHS. On 10 June 2014, DHHS issued a "tentative decision" concluding that petitioner's WCMSA was a countable resource, and affirming the decision by DSS to terminate petitioner's Medicaid benefits. DHHS issued its final agency decision on 11 July 2014, in which it affirmed the tentative decision. On 30 July 2014, petitioner filed a petition for judicial review, and on 31 August 2015 the trial court conducted a hearing on this matter. On 8 February 2016, the trial court entered an order denying petitioner's petition for judicial relief and affirming DHHS's ruling that the funds in petitioner's WCMSA were a countable resource for purposes of determining her eligibility for Medicaid. Petitioner noted a timely appeal to this Court from the trial court's order.

## II. Standard of Review

Respondent DHHS is a North Carolina State agency. The standard of review of an administrative agency's decision is set out in N.C. Gen. Stat. § 150B-51 (2015), which "governs both trial and appellate court review of administrative agency decisions." *N. C. Dept. of Correction v. Myers*, 120 N.C. App. 437, 440, 462 S.E.2d 824, 826 (1995), *aff'd per curiam*, 344 N.C. 626, 476 S.E.2d 364 (1996). N.C. Gen. Stat. § 150B-51 provides that:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) . . . With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the *de novo* standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

"Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions." *Henderson v. N.C. Dep't of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988). "Where the petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record *de novo*[.] . . . Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *Blackburn v. N.C. Dep't of Public Safety*, __ N.C. App. __, __, 784 S.E.2d 509, 518 (internal quotations omitted), *disc. review denied*, __ N.C. __, 786 S.E.2d 915 (2016). In the present case, the facts are largely undisputed and we will apply a *de novo* standard of review to the legal issues raised in this appeal.

## III. Eligibility for Medicaid: Legal Principles

### A. Introduction

"The Medicaid program was established by Congress in 1965 to provide federal assistance to states which chose to pay for some of the medical costs for the needy. Whether a state participates in the program is entirely optional. 'However, once an election is made to participate, the state must comply with the requirements of federal law.' " *Correll v. Division of Social Services*, 332 N.C. 141, 143, 418 S.E.2d 232, 234 (1992) (quoting *Lackey v. N.C. Dept. of Human Resources*, 306 N.C. 231, 235, 293 S.E.2d 171, 175 (1982)) (other citation omitted). Accordingly, N.C. Gen. Stat. § 108A-56 (2015) states in relevant part that "[a]ll of the provisions of the federal Social Security Act providing grants to the states for medical assistance are accepted and adopted, and the provisions of this Part shall be liberally construed in relation to such act so that the intent to comply with it shall be made effectual."

### B. Eligibility for Medicaid Benefits

"North Carolina's Medicaid program is supervised and administered by Respondent Division of Medical Assistance (DMA), an agency

within the Department of Health and Human Services (DHHS)." *Ass'n for Home & Hospice Care, Inc. v. Div. of Med. Assistance*, 214 N.C. App. 522, 523, 715 S.E.2d 285, 287 (2011). DMA is "authorized to adopt . . . rules to implement or define the federal laws and regulations, the North Carolina State Plan of Medical Assistance . . . [and] the terms and conditions of eligibility for applicants and recipients of the Medical Assistance Program[.]" N.C. Gen. Stat. § 108A-51.1B(a) (2015). These rules are set out in the North Carolina Administrative Code (NCAC) and include, as relevant to this appeal, the following:

> 10A NCAC 23A .0102.
>
> > (57) "Reserve" means assets owned by members of the budget unit and that have a market value.
>
> 10A NCAC 23E .0202.
>
> > (a) North Carolina has contracted with the Social Security Administration under Section 1634 of the Social Security Act to provide Medicaid to all SSI recipients. Resource eligibility for individuals under any Aged, Blind, and Disabled coverage group shall be determined based on standards and methodologies in Title XVI of the Social Security Act[.] . . .
> >
> > . . .
> >
> > (i) The limitation of resources held for reserve for the budget unit shall be as follows: . . . (2) for aged, blind, and disabled cases, two thousand dollars ($2000.00) for a budget unit of one[.]
>
> 10A NCAC 23E .0207 RESERVE
>
> > (d) For all aged, blind, and disabled cases, the resource limit, financial responsibility, and countable and non-countable assets are based on standards and methodology in Title XVI of the Social Security Act[.]

These rules establish that in North Carolina eligibility for Medicaid is determined utilizing the federal standard for determining eligibility for Supplemental Security Income (SSI). Therefore, we next review the federal statutes and standards that are relevant to determining whether the WCMSA is an asset that should be included in calculating petitioner's financial reserves.

In the Code of Federal Regulations ("C.F.R."), 20 C.F.R. § 416.1205 states that an "aged, blind, or disabled" applicant for SSI must, in addition to meeting all other eligibility requirements, have no more than $2000 in "nonexcludable resources." Thus, respondents and petitioner are in agreement that petitioner may have no more than $2000 in countable assets. 20 C.F.R. 416.1201 defines "resources" in relevant part as follows:

> § 416.1201. Resources; general.
>
> (a) Resources; defined. . . . [R]esources means cash or other liquid assets . . . that an individual . . . owns and could convert to cash to be used for his or her support and maintenance.
>
> (1) If the individual has the right, authority or power to liquidate the property . . . it is considered a resource. . . .

The Social Security Administration (SSA) also issues a Program Operations Manual System, known as POMS, that instructs SSA employees on the SSA's interpretation of eligibility standards for SSI. "The POMS represent the 'publicly available operating instructions for processing Social Security claims.' The Supreme Court has stated that '[w]hile these administrative interpretations are not products of formal rulemaking, they nevertheless warrant respect.' " *Kelley v. Comm'r of Soc. Sec.*, 566 F.3d 347, 351 n.7 (3rd Cir. 2009) (quoting *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385, 154 L. Ed. 2d 972 (2003)).

Several POMS sections are relevant to the issues raised in this case. POMS SI 01110.100B. provides that "resources" are "cash and any other personal property" that an individual "owns; has the right, authority, or power to convert to cash [and]; is not legally restricted from using for [her] support and maintenance." Similarly, POMS SI 01120.010B.2. states in pertinent part that in order for an asset to be a countable resource, an "individual must have a legal right to access property. Despite having an ownership interest, property cannot be a resource if the owner lacks the legal ability to access funds[.]"

POMS SI 01120.010D gives several examples of assets that, although owned by an applicant, are not countable resources. One of these is set out in POMS SI 01120.010D.2., and describes a situation in which a court order requires an applicant to retain ownership of the house where his ex-wife resides with the applicant's children until the applicant's children reach the age of majority. POMS SI 01120.010D.2. states

that in that situation the applicant "is legally barred from converting [the house] to cash to be used for his own support and maintenance" and that as a result the house "is not his resource until . . . his younger son's eighteenth birthday." Another example set out in POMS SI 01120.010 is the circumstance in which an SSI recipient is awarded damages "to be used solely for medical expenses related to the accident." POMS SI 01120.010D.5. states that in that situation, "[a]lthough [the SSI recipient] owns the funds and has direct access to them, he is not legally free to use them for his own support and maintenance. Therefore the award funds are neither income nor resource." Finally, POMS SI 01110.115A. states SSA's "general rule" that "[a]ssets of any kind are not resources if the individual does not have . . . the legal right, authority, or power to liquidate them . . . or the legal right to use the assets for [her] support and maintenance."

As discussed above, in North Carolina eligibility for Medicaid is determined by reference to the standards applicable to eligibility for SSI. We conclude that these federal standards clearly establish that, in order for a given asset to be a countable resource, the asset must be *legally* available to the applicant *without legal restriction* on the applicant's authority to use the resource for support and maintenance. In reaching this conclusion, we are aware that 20 C.F.R. 416.1201(a)(1) states that if an applicant "has the right, authority or power to liquidate the property . . . it is considered a resource," while the POMS defines a countable resource as an asset that an applicant "owns; has the right, authority, or power to convert to cash [and]; is not *legally* restricted from using for [her] support and maintenance." We easily conclude that the phrase "right, authority or power to liquidate" refers to the legal right or authority to access funds:

> The [appellants] rely on . . . a federal regulation defining "resources" for purposes of an eligibility determination. The regulation provides: "If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource." . . . 20 C.F.R. § 416.1201(a)(1). Consistent with the agency's interpretation, Social Security Administration, Program Operations Manual Systems § SI 01110.115.A, and the federal government's litigating position . . . we think the regulation naturally *refers to a "legal" right, authority, or power to liquidate. What other sort of "right" or "power" would be at issue?* If the regulation merely referred to a raw power to liquidate -- even in breach of the contract or

> violation of law -- then it would impose virtually no limitation, for a pair of unscrupulous actors can reduce almost anything of value to a dollar amount.

*Geston v. Anderson*, 729 F.3d 1077, 1083 (8th Cir. N.D. 2013) (emphasis added).

This conclusion is also supported by "the North Carolina Adult Medicaid Manual, which is an 'internal instructional reference for DHHS employees in the application of DHHS policy and interpretation of the federal Medicaid requirements.' " *Joyner v. N.C. HHS*, 214 N.C. App. 278, 288, 715 S.E.2d 498, 505 (2011) (quoting *Martin v. N.C. Dep't. of Health and Human Servs.*, 194 N.C. App. 716, 720, 670 S.E.2d 629, 633 (2009)). Medicaid Manual § 2230 I.A. states that for purposes of determining an applicant's eligibility for Medicaid, resources are financial assets that an applicant "owns, or has the right, authority, or power to convert to cash" and that are "legally available for the [applicant's] support and maintenance." Medicaid Manual § 2230 IV.A.2. specifies that "[r]esources are considered available unless the [applicant] shows evidence of legal restraints such as judgments, estates, boundary disputes or legally binding agreements."

C. Medicare Secondary Payer Act and WCMSAs

The instant case also requires consideration of the Medicare Secondary Payer Act. "Medicare is a federal program providing subsidized health insurance for the aged and disabled. *See* 42 U.S.C. § 1395 *et seq.*" *Almy v. Sebelius*, 679 F.3d 297, 299 (4th Cir. Md. 2012), *cert. denied*, __ U.S. __, 184 L. Ed. 2d 653 (2013).

> For the first fifteen years, Medicare paid for medical services without regard to whether they were also covered by an employer group health plan. However, in 1980, Congress enacted a series of amendments, commonly referred to as the Medicare Secondary Payer ("MSP") provisions, which were designed to make Medicare a "secondary payer" with respect to such a plan.

*Wilson v. United States*, 405 F.3d 1002, 1005 (Fed. Cir. 2005). One of these provisions is 42 U.S.C. § 1395y(b)(2)(A)(ii) (2015), which states that Medicare coverage is not available if "payment has been made or can reasonably be expected to be made under a workmen's compensation law[.]" In order to comply with the MSP statute, in workers' compensation cases, "CMS mandates the creation of a Medicare "set aside" ("MSA") account. 42 C.F.R. § 411. The purpose of a MSA is to allocate a

portion of a workers' compensation award to pay potential future medical expenses resulting from the work-related injury so that Medicare does not have to pay." *Aranki v. Burwell*, 151 F. Supp. 3d 1038, 1040 (D. Ariz. 2015). A WCMSA "is a financial agreement that allocates a portion of a workers' compensation settlement to pay for future medical services related to the workers' compensation injury[.] . . . These funds must be depleted before Medicare will pay for treatment related to the workers' compensation injury[.]" Workers' Compensation Medical Set Aside Arrangements, https://www.cms.gov. The funds in a WCMSA must be deposited into an interest-bearing account, and the WCMSA may be administered by the workers' compensation claimant or by a professional administrator. The administrator must submit an annual accounting of any expenditures from the WCMSA. If funds in a WCMSA are used for any purpose other than medical expenses that arise from the claimant's compensable injury and would otherwise be payable by Medicare, then Medicare will refuse to pay for any medical expenses that were intended to be covered by the WCMSA until the claimant has replaced the funds and has then depleted them according to the WCMSA. *See* WCMSA Reference Guide, https://www.cms.gov/.

## IV. Discussion

Petitioner argues that the funds in the WCMSA are not a countable resource for purposes of determining her eligibility for Medicaid, because her use of the funds for her support and maintenance is subject to "legal restrictions" pursuant to a "legally binding agreement." We agree.

In this case, the Industrial Commission entered an order that incorporated the settlement agreement reached by petitioner and her employer and stated that:

> After giving due consideration to all matters involved in this case in accordance with Chapter 97, G.S. 97-17 . . . the compromise settlement agreement is deemed by the Commission to be fair and just[.] . . . The agreement is incorporated herein by reference and is approved[.] . . . $46,484.12 shall be paid by Defendants to fund Plaintiff's Medicare Set-Aside Account. . . . It is to be noted, however, that this Order does not purport to approve, resolve or address any issue or matter over which the Industrial Commission has no jurisdiction[.]

The Settlement Agreement that was incorporated into the Commission's order provided, as relevant to this appeal, the following:

. . .

The parties to this agreement hereby waive further hearings before the North Carolina Industrial Commission and, in presenting this Agreement for approval, represent that they have made available to the Commission with said Agreement all material medical and rehabilitation reports known to exist.

. . .

Since the date on which [petitioner] sustained an injury by accident . . . [she] has not returned to a job or position at the same or greater average weekly wage as she had on that date.

. . .

[Petitioner's] Workers' Compensation Claim has been accepted by Employer and Carrier. [Petitioner] is receiving social security disability benefits. The parties have agreed to settle [petitioner's] workers' compensation claim for the lump sum of [amount is blacked out] subject to the attribution set forth below.

. . .

The defendants agree to fund a Medicare Set Aside account in the amount of $46,484.12. These funds are for future medical treatment related to [petitioner's] compens[able] injuries.

. . . .

The parties agree that the cost of future medical care is in dispute. As a compromise, the Parties agree in addition to the settlement amount listed above [amount blacked out], [that] $46,484.12 (hereinafter referred to as "MSA Fund") shall be allocated to release [petitioner's employer and carrier from] all liability for future Medicare-covered medical expenses[.]

. . .

It is not the intention of the Employer or the Carrier to shift responsibility [for] future medical benefits to the Federal Government. The MSA Fund for future Medicare-covered

expenses is intended directly for payment of these expenses. Upon receipt of tangible evidence that the Medicare-covered expenses exceed the MSA Fund, those expenses will be forwarded to Medicare for payment of covered expenses with proper documentation, provided [petitioner] satisfies all of the Medicare program requirements at that time.

. . .

[Petitioner] understands and agrees that she is administering the Medicare Allocation as a self-administered plan[.]

. . .

A. [Petitioner] shall open an interest bearing bank account for the Medicare Allocation and shall disburse only payments for Medicare-covered expenses which are work related from said account.

B. [Petitioner] shall not pay non-Medicare-covered expenses from this account[.] . . .

C. [Petitioner] shall not pay any Medicare-covered expenses from this account that are unrelated to the work injury.

. . .

F. If payments from this account are used to pay for services that are not covered by Medicare, Medicare will not pay injury-related claims until these funds are restored to the set-aside account and then properly exhausted. In this circumstance, [petitioner] is responsible for restoring such funds to the account.

. . .

I. Even if [petitioner] is a Medicare Beneficiary, [petitioner] understands that Medicare will not pay for any expenses related to the work injury until, and unless, the [petitioner] can provide documentation indicating that the entire MSA account, including any accrued interest, was properly expended on Medicare-covered treatments and expenses related to the work injury covered by this Settlement Agreement.

> J. [Petitioner] must maintain accurate records of all expenses made from the Medicare Allocation[.] . . .
>
> K. [Petitioner] must prepare and submit an annual report to . . . include summaries of any transactions on, and status of, the MSA account.

"Settlement agreements between the parties, approved by the Commission pursuant to N.C.G.S. § 97-17, are binding on the parties and enforceable, if necessary, by court decree." *Saunders v. Edenton Ob/Gyn Ctr.*, 352 N.C. 136, 139, 530 S.E.2d 62, 64 (2000) (citing *Pruitt v. Publishing Co.*, 289 N.C. 254, 258, 221 S.E.2d 355, 358 (1976) (" . . . [I]t has been uniformly held that an agreement for the payment of compensation, when approved by the Commission, is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal."). "The Commission or any member or deputy thereof shall have the same power as a judicial officer . . . to hold a person in civil contempt . . . for failure to comply with an order of the Commission, Commission member, or deputy." N.C. Gen. Stat. § 97-80(g) (2015). We conclude that the Commission's order is a legally binding agreement.

Petitioner produced evidence that, pursuant to the terms of a Settlement Agreement that was incorporated into an order of the Industrial Commission, she may *only* use the funds in the WCMSA for (1) medical expenses (2) arising from her compensable injury (3) for which Medicare would otherwise be liable. If petitioner uses the WCMSA funds for any other purpose, Medicare will not pay for treatment for her compensable injury until she replaces the funds and then depletes them in accordance with the WCMSA. Specifically, petitioner *may not* use the funds in the WCMSA for her general support and maintenance. In addition, petitioner could be held in contempt of court for violating the terms of the Commission's order which incorporated the WCMSA. We hold that because petitioner established that the terms of a "legally binding agreement" impose "legal restrictions" on her use of the WCMSA funds, the trial court erred by affirming the agency decision of DHHS that treated the WCMSA as a countable resource for purposes of determining petitioner's eligibility for Medicaid. In reaching this conclusion, we have carefully considered respondents' arguments for a contrary result, but do not find them persuasive.

Respondents argue that the WCMSA is a countable resource on the grounds that petitioner's access to the WCMSA funds is not restricted by the bank in which the funds are deposited. We conclude that this fact

is not relevant to the determination of whether petitioner's use of the funds is restricted pursuant to a legally binding agreement.

Respondents also direct our attention to § 2330 of the North Carolina Adult Medicaid Manual, which discusses the financial resources of an applicant for Medicaid. As discussed above, § 2330 IV.A.2. states that the financial assets of an applicant "are considered available unless the [applicant] . . . shows evidence of legal restraints such as judgments, estates, boundary disputes, or legally binding agreements." A settlement agreement that is incorporated into an order of the Industrial Commission is binding on the parties involved, and is an order that is enforceable by court decree or contempt proceedings. Accordingly, the order, and the WCMSA that is a part of the order, is by definition a "legally binding agreement."

Respondents do not dispute these facts; instead their argument is based on language found in § 2330 IV.C. of the Medicaid Manual. § 2330 IV.C.2. states that "[a]ssets may not be available if there is a pre-existing agreement in which the [applicant] holds assets for another party but does not have an ownership interest. The pre-existing agreement is called a 'resulting trust' or is sometimes referred to as a 'legally binding agreement.' " Respondents' position is that because the Manual includes the phrase "legally binding agreement" in its discussion of resulting trusts, the *only* type of legally binding agreement that might impose legal restrictions upon an applicant's use of funds is a "resulting trust." This argument is without merit, for several reasons.

First, it is not clear why respondents employed the phrase "legally binding agreement" in conjunction with its discussion of a resulting trust.

> Trusts are classified in two main divisions: express trusts and trusts by operation of law. . . . [A]n express trust is based upon a direct declaration or expression of intention, usually embodied in a contract; whereas a trust by operation of law is raised by rule or presumption of law *based on acts or conduct, rather than on direct expression of intention*. . . . [T]he creation of a resulting trust involves the application of the doctrine that valuable consideration rather than legal title determines the equitable title resulting from a transaction[.]

*Bowen v. Darden*, 241 N.C. 11, 13, 84 S.E.2d 289, 292 (1954) (emphasis added) (citations omitted). "A trust of this sort does not arise from or depend on any agreement between the parties. It results from the fact that one man's money has been invested in land and the conveyance

taken in the name of another." *Teachey v. Gurley*, 214 N.C. 288, 292, 199 S.E. 83, 86-87 (1938).

Thus, a resulting trust is an equitable remedy that is applied in appropriate factual circumstances notwithstanding the *absence* of any express or binding agreement between the parties. Respondents do not cite any authority for their position that "legally binding agreement" is a synonym for a "resulting trust," and do not explain their use of the phrase "legally binding agreement" in the discussion of resulting trusts. In addition, although respondents assert that "for Medicaid purposes" a legally binding agreement must meet the definition of a resulting trust, they do not contend that the Manual includes among its enumerated definitions a definition of the phrase "legally binding agreement" that supports their position.

Moreover, even assuming, *arguendo*, that respondents employ an internal definition of the term "legally binding agreement" as being synonymous with "resulting trust," this would not change the outcome of this case. Respondents concede that in North Carolina an applicant's eligibility for Medicaid is determined in accordance with SSI regulations. As discussed above, both the federal and state regulations provide that a financial asset is not a countable resource if an applicant's use of funds for support and maintenance is subject to legal restrictions arising from a legally binding agreement. In the event of a conflict between the Manual and federal regulations, our decision would be governed by the SSI regulations:

> The principal authority upon which DHHS relied in concluding that [petitioner is not eligible for Medicaid benefits] was the North Carolina Adult Medicaid Manual, which is an "internal instructional reference for DHHS employees in the application of DHHS policy and interpretation of the federal Medicaid requirements." . . . Although the provisions of the Medicaid Manual are clearly entitled to some consideration in attempts to understand the rules and regulations governing eligibility for Medicaid benefits, we have previously stated that the Medicaid Manual "merely explains the definitions that currently exist in federal and state statutes, rules and regulations" and that "[v]iolations of or failures to comply with the MAF [Medicaid] Manual [are] of no effect" unless the act or omission in question amounts to a "failure to meet the requirements set out in the federal and state statutes and regulations[.]"

*Joyner*, 214 N.C. App. at 288-89, 715 S.E.2d at 505-06 (quoting *Martin*, 194 N.C. App. at 720, 670 S.E.2d at 633, and *Okale v. N.C. Dept. of Health and Human Servs.*, 153 N.C. App. 475, 478-79, 570 S.E.2d 741, 743 (2002)) (other citations omitted). "[I]n the event of a conflict between federal and state Medicaid statutes, the federal statutes must be deemed controlling." *Joyner* at 284, 715 S.E.2d at 503. Given that N.C. Gen. Stat. § 108A-58.1(l)(1) explicitly states that "[t]his section shall be interpreted and administered consistently with governing federal law" we will not adopt the interpretation of "legally binding agreement" proposed by respondents, as it would place North Carolina out of compliance with the applicable federal regulations.

Respondents also assert that the funds in the WCMSA are a countable resource on the grounds that the Industrial Commission order is not "binding" upon respondents and, as a result, does not constitute a legally binding agreement. Respondents offer no basis for their suggestion that a binding agreement must be "binding" upon DHHS. In addition, respondents emphasize that the order includes language acknowledging that the determination of petitioner's eligibility for needs-based entitlement programs is not within the jurisdiction of the Industrial Commission. We hold that the fact that the Industrial Commission's order states, accurately, that it does not purport to address issues outside its jurisdiction, has no bearing on the issues of whether the settlement agreement was binding upon petitioner, or upon whether it imposed legal restrictions on petitioner's use of the WCMSA funds.

Respondents also maintain that the WCMSA "is clearly a type of Medical Health Savings Account funded by Medicare."

> When Congress enacted the Medicare Prescription Drug, Improvement, and Modernization Act in 2003, it created, among other things, a new type of tax-favored account -- an HSA -- to help eligible individuals save for medical expenses. . . . An individual can make contributions to an HSA only if that individual is separately covered by a 'high deductible health plan,' which is a health plan that requires beneficiaries to pay a certain amount of out-of-pocket expenses before the insurance plan begins picking up the tab.

*Roup v. Commer. Research, LLC*, 349 P.3d 273, __ (Colo. 2015), *cert. denied*, __ U.S. __,, 193 L. Ed. 2d 723 (2016). Respondents fail to articulate any legal basis for their argument that a WCMSA is "a type of" HSA, and we conclude that this argument lacks merit.

For the reasons discussed above, we conclude that the Industrial Commission's order was a legally binding agreement, and that the WCMSA, which was incorporated into the order, barred petitioner from using the funds in the WCMSA for her support or maintenance. We hold that petitioner established that her use of the WCMSA funds was subject to legal restrictions arising from a legally binding agreement, and that the trial court erred by affirming respondents' ruling that the WCMSA was a countable resource. Having reached this conclusion, we find it unnecessary to address certain issues raised by the parties on appeal, including the degree of deference that should be accorded to a CMS memorandum, whether petitioner might have chosen to create a special needs trust instead of a WCMSA, or whether the trial court made its own findings of fact. We conclude that the WCMSA is not a countable resource for purposes of determining petitioner's eligibility for Medicaid, and that the trial court's order must be

REVERSED.

Judges STROUD and McCULLOUGH concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 15 November 2016)

| Case | County / Agency | Disposition |
|---|---|---|
| CLICK v. LEANDRO<br>No. 15-913 | Hoke<br>(14CVS319) | Affirmed in part;<br>Reversed in Part and<br>Remanded in Part |
| DARDEN v. DEP'T OF PUB. SAFETY<br>No. 16-337 | Office of Admin.<br>Hearings<br>(15OSP5439) | Affirmed |
| GERSING v. ACCETTURO<br>No. 16-273 | Avery<br>(14CVS181) | Affirmed |
| GUIDOTTI v. MOORE<br>No. 16-14 | Bladen<br>(15CVS108) | Reversed in part<br>and dismissed in part. |
| HUNTER v. NIBLACK<br>No. 16-231 | Cleveland<br>(15CVS76) | Affirmed. |
| IN RE A.G.<br>No. 16-687 | Scotland<br>(15J12) | Vacated and Remanded |
| IN RE C.W.G.<br>No. 16-598 | Cleveland<br>(14JT24) | Affirmed |
| IN RE D.P.<br>No. 16-529 | Guilford<br>(15JA169)<br>(15JA170) | Affirmed in part;<br>reversed in part;<br>remanded. |
| IN RE ESTATE OF LISK<br>No. 15-1317 | Anson<br>(15E35) | Affirmed |
| IN RE G.H.W.<br>No. 16-541 | Wake<br>(14JT238-239) | Affirmed |
| IN RE J.B.<br>No. 16-585 | Wake<br>(15JA262-263) | Affirmed |
| IN RE J.M-C.<br>No. 16-485 | Cabarrus<br>(11JB76) | Affirmed in Part;<br>remanded in Part;<br>Dismissed in Part. |
| IN RE K.D.<br>No. 16-546 | New Hanover<br>(15JA260) | Affirmed in part,<br>reversed and<br>remanded in part |
| IN RE K.D.M.H.<br>No. 16-457 | Guilford<br>(12JT42) | Affirmed |

| | | |
|---|---|---|
| IN RE K.R.<br>No. 16-583 | Guilford<br>(15JA212)<br>(15JA213) | Affirmed |
| IN RE L.S.<br>No. 16-664 | Wayne<br>(15JA119-122) | Affirmed in part;<br>reversed in part |
| IN RE M.C.<br>No. 16-171 | Mecklenburg<br>(15SPC4646) | Affirmed |
| IN RE M.F.B.<br>No. 16-388 | Guilford<br>(15JA44-47) | Affirmed |
| IN RE M.J.H.<br>No. 16-371 | Ashe<br>(14JT34) | Affirmed |
| IN RE S.I.P.<br>No. 16-208 | Cleveland<br>(14JT29)<br>(14JT69) | Affirmed |
| IN RE T.S.<br>No. 16-587 | Forsyth<br>(12JT209) | Affirmed |
| IN RE W.C.D.<br>No. 16-351 | Wake<br>(14JT227) | Affirmed |
| JOHNSON v. N.C. VETERINARY<br>MED. BD.<br>No. 15-1278 | Cumberland<br>(14CVS7161) | Affirmed |
| LEE v. MOORE<br>No. 16-415 | Bladen<br>(15CVS334) | Affirmed |
| LEWIS-SOLAR v. TOWN OF<br>BEECH MOUNTAIN<br>No. 16-321 | Watauga<br>(15CVS330) | Affirmed |
| PARKER v. W. PHARM. SERVS.<br>No. 16-447 | N.C. Industrial<br>Commission<br>(13-745623) | Affirmed |
| SANDHILL AMUSEMENTS, INC.<br>v. SHERIFF OF ONSLOW CTY.<br>No. 16-390 | Onslow<br>(13CVS3705) | Affirmed |
| SEC. NAT'L INVS., INC. v. RICE<br>No. 16-215 | Cumberland<br>(14CVS9498) | Reversed and<br>Remanded |
| SPITZER-TREMBLAY v. WELLS<br>FARGO BANK, N.A.<br>No. 16-334 | Orange<br>(15CVS1063) | Affirmed |

| | | |
|---|---|---|
| STATE v. APPLEWHITE<br>No. 16-335 | Wilson<br>(12CRS2215)<br>(12CRS2218-19) | No error in part;<br>remanded in part |
| STATE v. BAGLEY<br>No. 16-262 | Durham<br>(13CRS59100) | No Error |
| STATE v. BLAKE<br>No. 16-348 | Union<br>(14CRS56132)<br>(14CRS56133) | No Error; Dismissed<br>without Prejudice<br>in Part |
| STATE v. BUTLER<br>No. 16-412 | Guilford<br>(14CRS90317) | No Error |
| STATE v. BYNES<br>No. 16-245 | Greene<br>(13CRS50223)<br>(14CRS50-51)<br>(14CRS53) | No Error |
| STATE v. CARLISLE<br>No. 16-228 | Wayne<br>(13CRS50278) | Affirmed |
| STATE v. COKER<br>No. 16-180 | Wake<br>(12CRS217205-06) | Affirmed in part;<br>Vacated and<br>remanded in part. |
| STATE v. COURTNEY<br>No. 16-366 | Wake<br>(14CRS1278) | Reversed and<br>Remanded. |
| STATE v. EUBANKS<br>No. 16-251 | Orange<br>(12CRS51841) | No Error |
| STATE v. FARROW<br>No. 16-450 | Hyde<br>(15CRS50006)<br>(15CRS63) | Remanded |
| STATE v. FLOOD<br>No. 16-252 | Alamance<br>(07CRS15377)<br>(07CRS56309) | No Plain Error |
| STATE v. JEFFREYS<br>No. 16-285 | Edgecombe<br>(13CRS51079) | No Error |
| STATE v. LOCKLEAR<br>No. 16-179 | Catawba<br>(14CRS53308) | No Error |
| STATE v. MELVIN<br>No. 15-1323 | Mecklenburg<br>(13CRS218339-40) | NO PLAIN ERROR |
| STATE v. POWELL<br>No. 16-499 | Catawba<br>(15CRS1455) | AFFIRMED IN PART,<br>REMANDED IN PART. |

| | | |
|---|---|---|
| STATE v. TURNER<br>No. 16-214 | Rutherford<br>(13CRS51105) | No Error |
| SWOFFORD, INC. v. FISHER<br>No. 16-145 | Rockingham<br>(10CVD543) | AFFIRMED IN PART,<br>DISMISSED IN PART. |

ERIC CARL ALEXANDER, Plaintiff
v.
RICHARD C. ALEXANDER, an individual, and OTTO TRUCKING, INC.,
a North Carolina corporation, Defendants

No. COA16-556

Filed 6 December 2016

**Unfair Trade Practices—in or affecting commerce—misappropriation of funds—unlawful acts within a corporation**

The trial court erred by concluding that defendant Alexander's actions were in or affecting commerce, and there was no legal basis for finding defendant liable under North Carolina's Unfair and Deceptive Trade Practices Act. Defendant misappropriated Otto Trucking, Inc. funds through payments made directly to himself and his family members as well as payments made to cover personal expenses. The case involved unlawful actions within a single market participant, not outside businesses, distinct corporate entities, or the interruption of a commercial relationship between two market participants.

Appeal by defendant from judgment entered 31 July 2015 by Judge Tommy Davis in Macon County Superior Court. Heard in the Court of Appeals 2 November 2016.

*Kenney Sloan & VanHook, PLLC, by Stuart Sloan, for plaintiff-appellee.*

*Griffin Wells, P.A., by M. Chase Wells, for defendant-appellant.*

DAVIS, Judge.

This case involves a dispute regarding the meaning of the phrase "in or affecting commerce" as used in North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA"). Richard C. Alexander ("Defendant") appeals from a default judgment entered in favor of Eric Carl Alexander ("Plaintiff") on his claims for breach of fiduciary duty, unjust enrichment, and unfair and deceptive trade practices under the UDTPA. On appeal, Defendant argues that the trial court erred in determining that his acts were "in or affecting commerce" for purposes of the UDTPA. After careful review, we affirm in part, reverse in part, and remand for entry of a new judgment.

## Factual Background

Defendant and his late brother, Carl Alexander ("Carl"), operated Otto Trucking, Inc. ("Otto Trucking"), a closely-held corporation, together from 1998 until February 2013. The company provided shipping services to Caterpillar, Inc., its sole customer. Originally, out of the 100 total shares of stock in the corporation, Defendant and Carl each held 45 shares, the corporation controlled nine shares, and the bookkeeper, Claire Graham, held the remaining share.

A stock transfer occurred at some point prior to February 2013 as a result of which Defendant held 51 shares, Carl controlled 45 shares, and Graham held the remaining four shares. Upon Carl's death in February 2013, his 45 shares passed to Plaintiff, his son.

Before Carl's death, he and Defendant had generally made decisions regarding shareholder distributions jointly and informally. At the end of each year, they would distribute all of the funds held by the corporation except for those funds necessary to operate the company through the following March.

On 13 May 2015, Plaintiff sued Defendant in Macon County Superior Court alleging that Defendant had misappropriated Otto Trucking's corporate assets. The complaint included allegations that Defendant had (1) "caused the Corporation to pay himself individually a monthly fee to use an area of land near the Defendant's real property . . . to park and store corporate vehicles and equipment[,]" the monthly payment for which was "grossly in excess of a market rent for the land used . . . ."; (2) "used corporate funds and credit to pay for wholly personal expenses," including a vacation to Costa Rica and personal health care; and (3) paid a total of $16,925 in corporate funds to family members and friends even though the payments "had no business purpose . . . ."

In his complaint, Plaintiff alleged that Defendant was liable for breach of fiduciary duty, unjust enrichment, and unfair and deceptive trade practices under the UDTPA. Plaintiff also requested that Otto Trucking be dissolved. Defendant was served with a summons and complaint on 14 May 2015. After Defendant failed to file an answer, Plaintiff moved for entry of default on 18 June 2015, and the clerk of court made an entry of default that same day.

Plaintiff moved for a default judgment on 19 June 2015. A hearing was held on 20 July 2015 before the Honorable Tommy Davis in Macon County Superior Court. Plaintiff, Defendant, and Graham testified at the hearing. The trial court entered a default judgment on 31 July 2015, which included the following pertinent findings of fact:

10. The Defendant RICHARD ALEXANDER, as majority shareholder in the corporation OTTO TRUCKING, INC., over the course of the years 2014 and 2015 misdirected and misappropriated corporate funds to his personal benefit. The amounts found to be misdirected and misappropriated by the Defendant RICHARD ALEXANDER in 2014 and 2015 are as follows:

**2014 payments**

a) $24,000 in total payments denominated as 'land rent' in the corporation's financial records;

b) $16,925 in total payments made to the Defendant RICHARD ALEXANDER'S mother and other family members;

c) $759.02 in a payment made to purchase airline tickets with Spirit Airlines for a personal trip to Costa Rica;

d) $183.71 in a payment made to Asheville Eye Associates for a personal expense;

e) $389.62 in total payments for personal meals and entertainment;

f) $202.46 in a payment made for golfing;

g) $100 in a payment made for repairs to an excavator;

**2015 payments**

h) $12,000 in total payments denominated as 'land rent' in the corporation's financial records;

i) $1,490.99 in total payments for personal travel;

j) $202.11 in total payments made for meals and entertainment in Costa Rica;

The total amount of misappropriations for 2014 and 2015 is $56,252.91.

The trial court found Defendant liable for breach of fiduciary duty, unjust enrichment, and unfair and deceptive trade practices under the UDTPA. The court declined to dissolve Otto Trucking "given the profitability and ongoing operation of the business of the company." With regard to Plaintiff's UDTPA claim, the trial court specifically found that Defendant's "acts of misappropriation were unfair and deceptive acts which occurred in and affected commerce."

The trial court determined that had the funds not been misappropriated Plaintiff would have received a $25,313.81 disbursement. Based on the court's conclusion that Plaintiff was entitled to prevail on his UDTPA claim, the court trebled his damages to the amount of $75,941.42 and awarded Plaintiff attorney's fees in the amount of $5,125, resulting in a total judgment for Plaintiff in the amount of $81,066.42. Defendant filed a timely notice of appeal.[1]

## Analysis

Defendant's sole argument on appeal is that the trial court erred in finding him liable under the UDTPA because his acts were not "in or affecting commerce."[2] We agree.

Pursuant to Rule 55 of the North Carolina Rules of Civil Procedure, "[w]hen a defendant fails to timely answer a complaint, an entry of default may be made by the clerk on motion of the plaintiff." *Revelle v. Chamblee*, 168 N.C. App. 227, 230, 606 S.E.2d 712, 714 (2005) (citation omitted). Once an entry of default has been made, Rule 55 authorizes the plaintiff to move for entry of a default judgment. *See* N.C. R. Civ. P. 55(b). Upon the filing of a motion for a default judgment, the trial court may hold a hearing in order to "determine the amount of damages or to establish the truth of any averment by evidence or to take an investigation of any other matter[.]" N.C. R. Civ. P. 55(b)(2)(a).

"Once the default is established defendant has no further standing to contest the factual allegations of plaintiff's claim for relief." *Webb v. McJas, Inc.*, 228 N.C. App. 129, 133, 745 S.E.2d 21, 24 (2013) (citation and quotation marks omitted). If "the allegations of the complaint are sufficient to state a claim, the defendant has no further standing to contest the merits of plaintiff's right to recover." *Hartwell v. Mahan*, 153 N.C. App. 788, 790, 571 S.E.2d 252, 253 (2002) (citation and quotation marks omitted), *disc. review denied*, 356 N.C. 671, 577 S.E.2d 118 (2003). However, "[a] default judgment admits only the allegations contained within the complaint, and a defendant may still show that the complaint is insufficient to warrant plaintiff's recovery." *Webb*, 228 N.C. App. at 133, 745 S.E.2d at 24 (citation and quotation marks omitted).

---

1. Although Otto Trucking was named as a defendant in the complaint, it is not a party to this appeal.

2. Defendant does not challenge any aspect of the trial court's default judgment other than its finding that his acts were "in or affecting commerce" and the resulting determination that Defendant was liable under the UDTPA.

The UDTPA, which is contained in Chapter 75 of the North Carolina General Statutes, provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a) (2015). "Whether an act found . . . to have occurred is an unfair or deceptive practice which violates N.C.G.S. § 75-1.1 is a question of law for the court." *Walker v. Fleetwood Homes of N.C., Inc.*, 362 N.C. 63, 71, 653 S.E.2d 393, 399 (2007) (citation and quotation marks omitted). If a violation of the UDTPA is shown, the plaintiff is entitled to recover treble damages, and the trial court has the discretion to award attorney's fees. N.C. Gen. Stat. §§ 75-16, -16.1 (2015).

For purposes of the UDTPA, the term " 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75-1.1(b). The phrase " 'business activities' connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *White v. Thompson*, 364 N.C. 47, 52, 691 S.E.2d 676, 679 (2010) (citation, quotation marks, brackets, and ellipses omitted).

"Although this statutory definition of commerce is expansive, the [UDTPA] is not intended to apply to all wrongs in a business setting." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 593, 403 S.E.2d 483, 492 (1991). In *White*, our Supreme Court emphasized that the UDTPA "is not focused on the internal conduct of individuals within a single market participant, that is, within a single business[,]" but rather "the General Assembly intended the Act's provisions to apply to interactions *between market participants*." *White*, 364 N.C. at 53, 691 S.E.2d at 680 (emphasis added).

In *White*, three welders formed Ace Fabrication and Welding ("ACE"), a partnership created primarily to provide welding services for a plant owned by Smithfield Packing Company, Inc. ("Smithfield"). *Id.* at 49, 691 S.E.2d at 677. The three partners agreed that they would divide up the contracts they won between themselves and earn hourly wages for the hours each of them actually worked. One of the partners — the defendant — subsequently violated this agreement by (1) hiring several welders not affiliated with ACE to help him perform certain Smithfield jobs that had been awarded to ACE; and (2) bidding for Smithfield welding jobs on behalf of a new company he had formed called PAL. As a result of the defendant's actions, ACE ultimately went out of business. *Id.* at 49-50, 691 S.E.2d at 677-78. The defendant's former business

partners sued him for breach of fiduciary duty and for unfair and deceptive trade practices. *Id.* at 50, 691 S.E.2d at 678.

After the jury found that the defendant had breached his fiduciary duty to the plaintiffs, the trial court determined that the defendant had violated the UDTPA. *Id.* at 51, 691 S.E.2d at 678. Our Supreme Court affirmed the decision of a divided panel of this Court, holding that the defendant's unlawful acts toward his partners did *not* fall within the UDTPA because his acts were not "in or affecting commerce." The Supreme Court explained its ruling as follows:

> [T]he unfairness of [the defendant's] conduct occurred in interaction among the partners within ACE. Plaintiffs were partners with [the defendant] in a single market participant. Plaintiffs alleged and proved that [the defendant] breached his fiduciary duty as a partner in this single market participant. . . . Because [the defendant] unfairly and deceptively interacted only with his partners, his conduct occurred completely within the ACE partnership and entirely outside the purview of the [UDTPA].

*Id.* at 53-54, 691 S.E.2d at 680.

The Court specifically rejected the argument that the defendant's acts were "in or affecting commerce" on the theory that they caused ACE to cease its operations as a viable competitor in the marketplace for specialty fabrication work, which potentially increased the prices that Smithfield would need to pay for such work in the future. The Court held that such an argument "overlooks that the unfairness of [the defendant's] conduct did not occur in his dealings with Smithfield Packing" and that the defendant "was found to have breached his fiduciary duty to *his partners* through his conduct within the ACE partnership." *Id.* at 54, 691 S.E.2d at 680 (emphasis added). The Supreme Court concluded that "[t]he General Assembly simply did not intend for such conduct to fall within the [UDTPA]'s coverage." *Id.*

We believe that the Supreme Court's analysis in *White* compels a result in Defendant's favor in the present case. Here, the evidence shows that the unlawful acts by Defendant involved his misappropriation of Otto Trucking funds through payments made directly to himself and his family members as well as payments made to cover some of his own personal expenses.

As in *White*, the "unfairness of [Defendant's] conduct did not occur in his dealings with [other market participants.]" *Id.* The inflated

payments that Defendant caused Otto Trucking to make to himself — as "land rent" in connection with the storage of the company's vehicles — and the other payments he caused Otto Trucking to make for the benefit of himself and his family members are more properly classified as the misappropriation of corporate funds within a single entity rather than commercial transactions between separate market participants "in or affecting commerce." Like the plaintiff in *White*, Plaintiff here "alleged and proved that [Defendant] breached his fiduciary duty as [co-owner of] this single market participant. . . . Because [Defendant] unfairly and deceptively interacted only with [Plaintiff, his co-owner], his conduct occurred completely within [the corporation] and entirely outside the purview of the [UDTPA]." *Id.* at 53-54, 691 S.E.2d at 680.

The cases cited by Plaintiff are materially distinguishable. Defendant principally relies on *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999), *disc. review denied*, 365 N.C. 360, 718 S.E.2d 396 (2011). In that case, the defendant-employee of the plaintiff, Sara Lee Corporation ("Sara Lee"), was responsible for purchasing computer equipment for Sara Lee from outside vendors. The defendant created several companies through which he sold Sara Lee equipment at inflated prices while concealing his own ownership interests in those businesses. *Id.* at 29, 519 S.E.2d at 309.

The trial court found that the defendant had breached his fiduciary duty to Sara Lee through this self-dealing and that his acts came within the UDTPA, and the Supreme Court agreed that the defendant's actions were "in or affecting commerce." The Court held that "[t]rusting that these were legitimate transactions secured at competitive prices in the marketplace, [Sara Lee] regularly conducted business with the companies in which defendant had an interest. In this case, defendant and plaintiff clearly engaged in buyer-seller relations in a business setting[.]" *Id.* at 33, 519 S.E.2d at 312. In *White*, the Supreme Court distinguished *Sara Lee*, noting that there "the defendant-employee's unfair or deceptive actions were within the [UDTPA]'s ambit because they did not occur solely within the employer-employee relationship, but rather occurred in interactions between the plaintiff and the defendant's outside businesses." *White*, 364 N.C. at 53, 691 S.E.2d at 680.

Defendant also cites *Songwooyarn Trading Co. v. Sox Eleven, Inc.*, 213 N.C. App. 49, 714 S.E.2d 162 (2011). In that case, the plaintiff corporation, Songwooyarn Trading Company ("Songwooyarn"), created a separate corporation, Sox Eleven, Inc. ("Sox Eleven"), and hired the defendant, Ung Chul Ahn, to operate it. Sox Eleven was set up as an intermediary to facilitate the sale of socks manufactured by Songwooyarn

— a South Korean company — to wholesalers in the United States. *Id.* at 51, 714 S.E.2d at 164. Songwooyarn sued Ahn after he failed to remit to Songwooyarn a payment that had been made by a wholesaler to Sox Eleven for an order of socks sold by Songwooyarn. The trial court found Ahn liable under the UDTPA. *Id.* at 53, 714 S.E.2d at 166.

On appeal, this Court affirmed the trial court's ruling, finding the case to be analogous to *Sara Lee* and relying on the fact that Songwooyarn and Sox Eleven were "distinct corporate entities." *Id.* at 57, 714 S.E.2d at 168. We held as follows:

> By misappropriating th[e] funds, Defendant Ahn interrupted the commercial relationship between Songwooyarn and Sox Eleven. Because there are multiple companies, including a North Carolina corporation, involved, we conclude that Ahn's actions were "in or affecting commerce" and constituted unfair or deceptive acts or practices.

*Id.*

Unlike in *Sara Lee* and *Songwooyarn*, the present case does not involve "outside businesses," "distinct corporate entities," or the interruption of a "commercial relationship" between two market participants. Rather, as in *White*, the unlawful acts at issue here occurred within a single market participant.

For these reasons, the trial court erred in concluding that Defendant's actions were "in or affecting commerce." Therefore, no legal basis existed for finding Defendant liable under the UDTPA and awarding Plaintiff treble damages and attorney's fees.

## Conclusion

For the reasons stated above, we reverse the portion of the trial court's 31 July 2015 judgment finding Defendant liable under the UDTPA, trebling the amount of damages, and awarding Plaintiff attorney's fees. Accordingly, we remand this matter for entry of a new judgment consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Judges INMAN and ENOCHS concur.

DONNA J. BISHOP and JOHN WILLIAM BISHOP, Plaintiffs
v.
COUNTY OF MACON; MACON COUNTY SHERIFF'S DEPARTMENT; ROBERT L. HOLLAND, Individually and in his Official Capacity as Sheriff of Macon County; C.J. LAU, Individually and in his Official Capacity as Deputy Sheriff of Macon County; GARY GARNER and W.T. POTTS, Defendants

No. COA16-350

Filed 6 December 2016

**1. Conversion—improper dismissal of claim—collateral estoppel—federal court dismissal not an adjudication on merits**

The trial court erred by dismissing plaintiff-appellant's conversion claim on the basis of collateral estoppel based on the dismissal of the same claim in federal court. The federal court's dismissal pursuant to Federal Rule 12(b)(6) was not an adjudication on the merits for purposes of collaterally estopping plaintiff from raising the same or related claim under North Carolina state law in our State's courts.

**2. Pleadings—sanctions—sufficiency of evidence**

The trial court did not err by denying defendants' motion to impose sanctions. There was no evidence in the record to support a legal conclusion that sanctions were proper on the basis asserted by defendants.

Appeal by plaintiff Donna J. Bishop and cross-appeal by defendants Macon County Sheriff's Department; Robert L. Holland, individually and in his official capacity as Sheriff of Macon County; C.J. Lau, individually and in his official capacity as Deputy Sheriff of Macon County, and W.T. Potts from order entered 5 October 2015 by Judge Robert T. Sumner in Macon County Superior Court. Heard in the Court of Appeals 20 September 2016.

*Bidwell & Walters, P.A., by Paul Louis Bidwell and Jessica A. Walters, for plaintiff-appellant Donna J. Bishop.*

*Bidwell & Walters, P.A., by Paul Louis Bidwell and Douglas A. Ruley, for plaintiff-appellee John William Bishop.*

*Womble, Carlyle, Sandridge and Rice, LLP, by Sean F. Perrin, for defendant-appellants Macon County, Macon County Sheriff's Department, Robert Holland, and C.J. Lau.*

*Long, Parker, Warren, Anderson & Payne, P.A., by Ronald K. Payne, for defendant-appellant W.T. Potts.*

BRYANT, Judge.

Where a federal court's dismissal of claims pursuant to Federal Rule 12(b)(6) is not an adjudication on the merits for purposes of collaterally estopping a plaintiff from raising the same or related claim under North Carolina State law in our State's courts, the trial court erred in dismissing plaintiff-appellant's conversion claim based on collateral estoppel, and we reverse. Where there is no evidence in the record to support a legal conclusion that sanctions are proper, we affirm the trial court's order denying defendants' motion to impose sanctions.

In September 2006, John William Bishop resided with his friend, Gary Garner, in Macon County, North Carolina. During that time, John Bishop worked for W.T. Potts, who operated a real estate management company. Between late 2006 and early 2007, multiple larcenies were reported by owners of vacation homes managed by Potts. On 1 March 2007, John Bishop went to live with his mother, Donna J. Bishop.

Three days later, Garner filed a complaint with the Macon County Sheriff's Department, accusing John Bishop of stealing cash from him and telling investigating officers that John Bishop was in possession of stolen goods. On or about 20 March and 11 April 2007,[1] based on Garner's allegations, Deputy Sheriff C.J. Lau executed search warrants at the home of John Bishop and his mother, Donna, and seized numerous items of personal property. The Bishops alleged that the items seized were not identified either in the applications for the warrants or in the warrants themselves. The seized items included two televisions, a remote control, a surround-sound system, a router, and eight oriental rugs of varying sizes. It is alleged that Deputy Lau released the seized property to Potts, but did not instruct Potts to preserve the seized property; instead, the Bishops allege Potts distributed items to purported victims of the larcenies, and kept or disposed of the remainder of the property.

Following the execution of the search warrants, Donna Bishop was arrested on charges of possession of stolen property, which were later dismissed. The Bishops alleged the charges were dismissed for "insufficient evidence, in return for guilty pleas by [her son, John Bishop],

---

1. The dates on which the search warrants were executed vary throughout the record.

entered, in part, to protect his mother." John Bishop entered *Alford* pleas to two charges of breaking and entering. The Bishops demanded that their personal property be returned, but their demand was refused.

On 5 April 2010, the Bishops filed a federal court complaint against Garner, Potts, the County of Macon, and the Macon County Sheriff's Office (collectively, "defendants"), arising out of the same incidents alleged in the complaint filed in the instant case, including claims under 42 U.S.C. § 1983 against Sheriff Robert L. Holland and Deputy Lau. *See State of N.C. ex. rel. Bishop v. Cnty. of Macon et. al*, 2: 10cv09, 2010 WL 4640222 (W.D.N.C. Aug. 22, 2010). In addition to the section 1983 claims alleging violations of the Fourth and Fourteenth Amendments for arrest and illegal seizure, the Bishops alleged state claims of negligence, false arrest, malicious prosecution, conversion, bailment, and punitive damages. *See id.* All the named defendants filed motions to dismiss and, by order filed 22 August 2011, the Honorable Martin Reidinger dismissed the federal and state law claims without prejudice.

The Bishops appealed to the United States Court of Appeals for the Fourth Circuit and Judge Reidinger's order was affirmed in part, vacated in part, and remanded. *Bishop v. Cnty. of Macon et. al*, No. 11-2021, 2012 WL 2366162 (4th Cir. June 22, 2012) (per curiam) (unpublished). The Fourth Circuit held John Bishop's federal section 1983 suit was barred by *Heck v. Humphrey*, 512 U.S. 477, 129 L.Ed.2d 383 (1994), which holds that a section 1983 suit must be dismissed if "judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." 2012 WL 2366162 at *1; *see Heck*, 512 U.S. at 486, 129 L.Ed.2d at 393–94 ("[T]he hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction . . . ."). The Fourth Circuit reasoned that John Bishop's "success on his claim for deprivation of property would . . . imply the invalidity of his convictions" as they "cannot stand without evidence that John was in possession of the stolen items. This is so because his possession was the only evidence that John committed any offense." *Bishop*, 2012 WL 2366162 at *2 (citation omitted). The Fourth Circuit held that *Heck* did not bar Donna Bishop's section 1983 claims and remanded those and the remaining state claims to the district court. *Id.*

On remand, Donna Bishop's federal claims and both John and Donna's state claims for negligence and bailment were dismissed with prejudice by the Honorable Max Cogburn on 29 September 2014. Judge Cogburn declined to exercise supplemental jurisdiction over the remaining state

law claims for false arrest, malicious prosecution and abuse of process, and conversion, and dismissed them without prejudice. On 28 October 2014, the Bishops filed notice of appeal to the Fourth Circuit.

On 18 November 2014, the Bishops (hereinafter, "plaintiffs") filed their complaint in the instant case in Buncombe County Superior Court based on the same facts alleged in federal court, but omitting the federal claims. Subsequently, plaintiffs filed a motion to stay proceedings in superior court as "the determination of [plaintiffs'] state law claims remain[ed] on appeal at [that] time . . . [and] in the event that the Fourth Circuit Court of Appeals affirms the lower Court's ruling."

Venue was changed to Macon County, and thereafter, defendants County of Macon, Macon County Sheriff's Department, Sheriff Holland, Deputy Lau, and Potts[2] filed a motion to dismiss the entire complaint and a motion for sanctions against plaintiffs and their respective counsel. On 9 July 2015, the Fourth Circuit affirmed Judge Cogburn's order in *Bishop v. Cnty. of Macon et. al*, No. 14-2172, 2015 WL 4126427 (4th Cir. July 9, 2015) (per curiam) (unpublished).

Thereafter, plaintiffs dismissed all claims of negligence, malicious prosecution, abuse of process, and bailment. At a 14 September 2015 hearing on defendants' motions to dismiss, plaintiffs also dismissed claims against Macon County. As a result, the only claims remaining on the date of the hearing were for conversion, false arrest (against all defendants except Potts), and a claim for punitive damages. On 5 October 2015, the Honorable Robert T. Sumner granted defendants' motion to dismiss plaintiffs' complaint and denied defendants' motion for sanctions. Donna Bishop ("plaintiff-appellant") appealed, and defendants cross-appealed the denial of their motion for sanctions only as against John Bishop and his counsel.

---

## *I. Plaintiff-Appellant's Appeal*

**[1]** On appeal, plaintiff-appellant Donna Bishop argues the trial court erred in dismissing her claim for conversion on the basis of collateral estoppel based on the dismissal of the same claim in federal court. We agree, as the federal court's dismissal was not an adjudication on the merits.

---

2. Defendant Gary Garner was the only defendant who did not file any motions in the instant case.

"This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

> The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

*Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted).

"The elements of collateral estoppel . . . are as follows: (1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 678, 657 S.E.2d 55, 61 (2008) (quoting *McDonald v. Skeen*, 152 N.C. App. 228, 230, 567 S.E.2d 209, 211 (2002)). In other words, "[u]nder collateral estoppel, parties are precluded from retrying *fully litigated* issues that were decided in any prior determination, even where the claims asserted are not the same." *McCallum v. N.C. Coop. Extension Serv. of N.C. State Univ.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231 (2001) (emphasis added) (citation omitted). Thus, "even if the subsequent action is based on an entirely different *claim*[,]" collateral estoppel bars "the subsequent adjudication of a previously determined *issue*[.]" *Williams v. City of Jacksonville Police Dep't*, 165 N.C. App. 587, 591–92, 599 S.E.2d 427–28 (2004) (emphasis added) (quoting *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004)).

Collateral estoppel also applies where, as here, the first adjudication is conducted in federal court and the second in state court. *McCallum*, 142 N.C. App. at 52, 542 S.E.2d at 231 (citation omitted). "Thus, as an initial step, we must determine whether the federal court's dismissal of [p]laintiffs' claims under *Federal* Rule 12(b)(6) was a final judgment on the merits that actually decided the issue of [conversion]." *Fox v. Johnson*, ___ N.C. App. ___, ___, 777 S.E.2d 314, 323 (2015) (emphasis added), *disc. rev. denied*, 368 N.C. 679, 781 S.E.2d 480 (2016).

In *Fox*, this Court held that the dismissal of a federal case for failure to state a claim was not an adjudication on the merits for the purpose of collateral estoppel, as it would have been if it had been dismissed

pursuant to North Carolina Rule 12(b)(6). *Id.* at ___, 777 S.E.2d at 324 ("It is well settled that '[a] dismissal under [North Carolina Rule of Civil Procedure] Rule 12(b)(6) operates as an adjudication on the merits unless the court specifies that the dismissal is without prejudice." (alterations in original) (quoting *Hoots v. Pryor*, 106 N.C. App. 397, 404, 417 S.E.2 269, 274 (1992))). This holding was based in large part on the heightened pleading standard under Federal Rule 12(b)(6), which "is a different, *higher* pleading standard than mandated under our own General Statutes." *Id.* (noting "[t]he purpose of a motion under Federal Rule 12(b)(6) is to test[ ] the sufficiency of a complaint and *not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses*" (alterations in original) (citation omitted)); *see generally Ashcroft v. Iqbal*, 556 U.S. 662, 173 L.Ed.2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 167 L.Ed.2d 929 (2007). This Court also noted in *Fox* that "the federal court explicitly applied the so-called 'plausibility' pleading standard as enunciated . . . in . . . *Twombly*[.]" *Fox*, ___ N.C. App. at ___, 777 S.E.2d at 324.

Thus, this Court noted that

> the "issue actually litigated in the prior suit . . . and . . . actually determined" by the federal court, *see Bluebird Corp.*, 188 N.C. App. at 678, 657 S.E.2d at 61 (citation and internal quotation marks omitted), was whether Plaintiffs' pleadings met the plausibility standard applicable to motions to dismiss pursuant to Federal Rule 12(b)(6). The federal court's opinion simply did not consider or address the issue of whether Plaintiffs' pleadings sufficiently stated a claim to survive a motion to dismiss pursuant to the *notice pleading requirements of North Carolina Rule 12(b)(6)*.

*Id.* at ___, 777 S.E.2d at 325 (alterations in original) (emphasis added).

Similarly, in the instant case, Judge Cogburn's order did not specifically note it was referencing *Federal* Rule 12(b)(6) in discussing defendants' motion to dismiss. However, just as the federal court did in *Fox*, in citing and explaining the law relating to motions to dismiss for failure to state a claim, Judge Cogburn cited only to federal case law, including *Twombly* and *Iqbal*, the two cases which have become synonymous with the federal heightened-pleading standard. *See id.* at ___, 777 S.E.2d at 324. Furthermore, the federal court in the instant case declined to exercise its supplemental jurisdiction over the state law claims, including the conversion claim, "[i]n the interest of avoiding needless decisions of state law[.]" In so doing, it dismissed the claim "without prejudice,"

essentially choosing "not to resolve contests surrounding the facts, the merits of [the] claim, or the applicability of defenses" to the conversion claim. *Id.*

Thus, "[g]iven the difference between the federal and State pleading standards, we must conclude," as this Court did in *Fox*, "that a federal court's dismissal of claims pursuant to Federal Rule 12(b)(6) is not an adjudication on the merits for purposes of collaterally estopping . . . plaintiff[s] from raising the same or related claim[] under State law in our State's courts." *Id.* at ___, 777 S.E.2d at 325 (citation omitted). Accordingly, the trial court erroneously granted defendants' motion to dismiss based upon their assertion of collateral estoppel as plaintiffs' claim for conversion was not "fully litigated" in federal court. *See McCallum*, 142 N.C. App. at 51, 542 S.E.2d at 231.

### *II. Defendants' Cross-Appeal*

On cross-appeal, defendants contend the trial court erred in denying defendants' motions for Rule 11 sanctions against John Bishop and his counsel. Specifically, defendants contend Bishop's complaint lacked legal sufficiency as the statute of limitations barred all of his claims, or alternatively, his claims were barred by res judicata, collateral estoppel, and other well-established law. We disagree.

> 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).

North Carolina Rule of Civil Procedure 11(a) provides as follows:

> The signature of an attorney or party [on a pleading] 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.

N.C. Gen. Stat. § 1A-1, Rule 11(a) (2015). "A pleading lacking in any of [the three above-mentioned areas—legal sufficiency, factual sufficiency, or proper purpose—]is sufficient to support sanctions under Rule 11." *Golds v. Central Express, Inc.*, 142 N.C. App. 664, 668, 544 S.E.2d 23, 27 (2001) (citation omitted).

"A court's failure to enter findings of fact and conclusions of law on this issue is error which generally requires remand in order for the trial court to resolve any disputed factual issues." *McClerin v. R-M Indus., Inc.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995) (citation omitted). "However, remand is not necessary when there is no evidence in the record, considered in the light most favorable to the movant, which could support a legal conclusion that sanctions are proper." *Id.* (citation omitted). Here, defendants' challenge to the court's ruling mainly concerns the legal sufficiency of the complaint.

> Whether a motion is legally sufficient requires this Court to look at "the facial plausibility of the pleading and only then, if the pleading is implausible under existing law, to the issue of whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by existing law."

*In re Thompson*, 232 N.C. App. 224, 230, 754 S.E.2d 168, 173 (2014) (quoting *Polygenex Int'l, Inc. v. Polyzen, Inc.*, 133 N.C. App. 245, 249, 515 S.E.2d 457, 460 (1999)).

A. Statute of Limitations

When supplemental state law claims are within a federal court's jurisdiction because the action was brought pursuant to federal or constitutional law, "a voluntary dismissal under the Federal Rules in a non-diversity case in federal court does not toll the statute of limitations or invoke a savings provision." *Bockweg v. Anderson*, 328 N.C. 436, 439, 402 S.E.2d 627, 629 (1991).

After a state claim is dismissed in federal court, the state period of limitations is "tolled while the claim is pending and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period." *Harter v. Vernon*, 139 N.C. App. 85, 94, 523 S.E.2d 836, 841–42

(2000) (quoting *Estate of Fennell v. Stephenson*, 137 N.C. App. 430, 435, 538 S.E.2d 911, 914 (2000)). Defendants contend that John Bishop had until 22 July 2012—thirty days after the 2012 Fourth Circuit order—to refile his state claims to avoid the statute of limitations, and that by filing on 18 November 2014, his claims were barred. Defendants' argument relies on the initial 22 August 2011 order dismissing John Bishop's state law claims, which order was affirmed by the Fourth Circuit on 22 June 2012. However, John Bishop's state law claims were dismissed without prejudice and, in the 29 September 2014 order, the federal court resolved the issue regarding the status of John Bishop's state law claims by addressing them as well as those of Donna Bishop:

> "The Court finds that public official immunity stands in bar to the claims against Holland and Lau based on negligence and bailment in their individual capacities. The same reasoning bars any such claim by *Mr. Bishop* against Holland and Lau in their individual capacities.
>
> . . .
>
> 2. The Third Claim for Relief asserted by *John Bishop* . . . based on negligence are [sic] hereby **DISMISSED** with prejudice as to Holland and Lau in their individual capacities;
>
> 3. The Seventh Claim for Relief asserted by *John Bishop* . . . based on bailment are [sic] hereby **DISMISSED** with prejudice as to Holland and Lau in their individual capacities[.]

(Emphasis added).

Pursuant to the express terms of this order, some, if not all, of John Bishop's state law claims survived in the federal court proceedings at least until the entry of the federal court's 29 September 2014 order. Therefore, at a minimum, John Bishop had thirty days to refile in state court, which deadline he met on 29 October 2014 by filing an application for extension of time. Accordingly, his claims were not barred by the statute of limitations.

B. Res Judicata or Collateral Estoppel

**[2]** Defendants also argue the trial court erred in imposing sanctions as John Bishop's conversion claim was barred by res judicata and collateral estoppel as the 29 September 2014 order determined that the seizures were lawful and "[o]ne of the essential elements of conversion

is wrongful possession by the defendants." For the reasons stated in Section I and those that follow, we disagree.

Under the doctrine of res judicata, "a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) (citation omitted). Under the doctrine of collateral estoppel, "the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Williams*, 165 N.C. App. at 589, 599 S.E.2d at 427 (quoting *Whitacre P'ship*, 358 N.C. at 15, 591 S.E.2d at 880).

Here, defendants contend that because defendants Macon County and the Macon County Sheriff's Department were dismissed as parties in the federal lawsuit, res judicata barred any claims against them in this lawsuit. Defendants' argument is supported almost entirely by federal district court cases, none of which are from North Carolina or even the Fourth Circuit, and one North Carolina state case which is inapplicable here.

Here, the controlling 29 September 2014 order, which defendants contend bars John Bishop's state claims based on res judicata, addressed the merits of both plaintiffs' state law claims for negligence and bailment, addressed the liability of Macon County in the course of dismissing Donna Bishop's federal claims, and declined to exercise supplemental jurisdiction over all remaining state law claims. John Bishop responded to this order by (1) appealing to the Fourth Circuit the issue of whether the federal court acted properly in addressing the merits of some of plaintiffs' state law claims once the federal claims were dismissed; (2) filing the instant state court action within the thirty-day tolling period, but then obtaining a stay pending appeal; and (3) voluntarily dismissing the claims the federal court addressed on the merits once that order was affirmed by the Fourth Circuit Court of Appeals on 29 June 2015.

Thus, the only state law claims that could conceivably be barred by res judicata or collateral estoppel based on the federal court's decision are the claims for negligence and bailment, even assuming the federal court's dismissal of these claims for failure to state a claim pursuant to Rule 12(b)(6) functioned as "a final judgment on the merits that actually decided the issue[s] . . . ." *Fox*, ___ N.C. App. at ___, 777 S.E.2d at 323;

*see also supra* Section I. Accordingly, defendants' argument that the trial court erred in failing to impose sanctions on John Bishop based on the filing of claims barred by res judicata is overruled.

Defendants' argument regarding collateral estoppel—that the federal court's ruling that the seizures were lawful precludes relitigating the issue of conversion because "wrongful possession" is a necessary element of conversion—is without merit. To the contrary, a conversion claim requires wrongful possession *or conversion*, *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012) (citation omitted), and the latter element can occur through a wrongful failure to hold property as required by law after the defendant lawfully came into possession of the property. *See Heaton-Sides v. Snipes*, 233 N.C. App. 1, 3–5, 755 S.E.2d 648, 650–51 (2014) (reversing the trial court's conclusion of law that the plaintiff failed to prove her conversion claim in a foreclosure action where the defendants provided the plaintiff with only one opportunity to remove personal property from foreclosed property once defendants were placed in lawful possession of the same). Like Donna Bishop's claim for conversion, John's claim alleged the element of wrongful conversion based on defendants' alleged "dispos[al] of evidence seized in execution of the subject search warrants" or defendants' failure to "preserve[] the evidence seized in the execution of the search warrants . . . ." Accordingly, for the reasons stated here and in Section I, John Bishop's conversion claim appeared to be well grounded in fact and law.

Lastly, defendants contend John Bishop wrongfully asserted claims seeking to hold nonsuable entities, defendants Macon County and Macon County Sheriff's Department, responsible for alleged wrongdoings of deputy sheriffs, despite precedent which holds otherwise. We disagree.

It is true that "[t]here is no North Carolina statute authorizing suit against a county's sheriff's department." *Efird v. Riley*, 342 F. Supp. 2d 413, 420 (M.D.N.C. 2004). However, where, as here, "[p]laintiffs took voluntary dismissals on all claims asserted in the Complaint except conversion" prior to the 14 September 2015 hearing, and there is no evidence that the voluntary dismissals were taken in "bad faith," *see Stocum v. Oakley*, 185 N.C. App. 56, 65, 648 S.E.2d 227, 234 (2007) ("[V]oluntary dismissals must be taken in good faith and with the intent to pursue the action." (citation omitted)), and defendants put forth no evidence to show the existence of an improper purpose, defendants' argument is overruled.

Accordingly, because "there is no evidence in the record, considered in the light most favorable to the movant, which could support a legal conclusion that sanctions are proper[,]" we affirm the trial court's denial of the motion for sanctions.

In conclusion, based on all of the foregoing, the trial court erred in dismissing Donna Bishop's conversion claim based on collateral estoppel as "a federal court's dismissal of claims pursuant to Federal Rule 12(b)(6) is not an adjudication on the merits for purposes of collaterally estopping . . . plaintiff[s] from raising the same or related claim[] under State law in our State's courts." *Fox*, ___ N.C. App. at ___, 777 S.E.2d at 325 (citation omitted). In addition, the trial court did not err by denying defendants' motion to impose sanctions on John Bishop where the record does not contain evidence to support sanctions on the basis asserted by defendants.

REVERSED IN PART; AFFIRMED IN PART.

Judges STEPHENS and DILLON concur.

---

WILLIAM L. DAISY, Plaintiff
v.
BEULAH LESTER YOST, Defendant

No. COA16-324

Filed 6 December 2016

**Negligence—contributory—auto collision at stoplight**

The evidence at trial was not sufficient to show that plaintiff was contributorily negligent in a case in which plaintiff proceeded straight through an intersection while defendant turned left at the same time in the same intersection. There was nothing in the record to suggest that plaintiff acted unreasonably in assuming that defendant would yield and would not turn her vehicle into plaintiff's path after he entered the intersection.

Appeal by Plaintiff from judgment entered 3 September 2015 and order entered 7 December 2015 by Judge Eric C. Morgan in Guilford County Superior Court. Heard in the Court of Appeals 20 September 2016.

*Carruthers & Roth, PA., by Richard L. Vanore, Norman F. Klick, Jr., and Mark K. York, for the Plaintiff-Appellant.*

*Law Office of William T. Corbett, Jr. PLLC, by William T. Corbett, Jr., for the Defendant-Appellee.*

DILLON, Judge.

## I. Background

William L. Daisy ("Plaintiff") and Beulah Lester Yost ("Defendant") were involved in an automobile collision in Greensboro. The uncontested evidence at trial established that the collision occurred as follows: Plaintiff was approaching an intersection at the posted speed limit intending to continue straight. Defendant was approaching the same intersection from the opposite direction intending to make a left-hand turn across Plaintiff's lane of travel.

When Plaintiff arrived at the intersection, his light had turned from green to yellow. When Defendant arrived at the intersection in her left turn lane, her light had turned from a flashing yellow arrow to a solid yellow arrow. As Plaintiff proceeded *straight through the intersection*, Defendant made a left turn across Plaintiff's lane of travel, causing the front of Defendant's turning vehicle to strike the side of Plaintiff's vehicle, pushing it into a light post at the corner of the intersection.

Plaintiff commenced this action against Defendant seeking compensatory damages for personal injuries and property damage resulting from the collision.[1] Plaintiff moved for a directed verdict on the issue of contributory negligence. The trial court denied the motion and submitted the issue to the jury. The jury returned a verdict finding that (1) the collision was proximately caused by the negligence of Defendant, but that (2) Plaintiff was contributorily negligent in causing the collision. Based on the jury's verdict, the trial court entered judgment for Defendant. Plaintiff subsequently filed a motion for judgment notwithstanding the verdict ("JNOV"), and alternatively, motion for a new trial. The trial court denied Plaintiff's motion, and Plaintiff timely appealed.

## II. Analysis

On appeal, Plaintiff makes a number of arguments, including the argument that there was no evidence to support the jury instruction on the issue of Plaintiff's contributory negligence. We conclude that the evidence presented at trial was not sufficient to warrant a jury instruction

---

1. Because the parties stipulated to the amount of damages prior to trial, this issue was not submitted for determination by the jury.

on the issue of contributory negligence and therefore reverse the ruling of the trial court on this issue. Based on this conclusion, we need not address Plaintiff's remaining arguments.

Contributory negligence is defined as "negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Jackson v. McBride*, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967).

With respect to contributory negligence as a matter of law, "[t]he general rule is that a directed verdict for [the moving party] on the ground of contributory negligence may only be granted when the evidence taken in the light most favorable to [the non-moving party] establishes the [non-moving party's] negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom." *Clark v. Bodycombe*, 289 N.C. 246, 251, 221 S.E.2d 506, 510 (1976). "If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for directed verdict should be denied." *Whisnant v. Herrera*, 166 N.C. App. 719, 722, 603 S.E.2d 847, 850 (2004). The non-moving party must be given "the benefit of every inference which may reasonably be drawn in [her] favor." *Hicks v. Food Lion, Inc.*, 94 N.C. App. 85, 88, 379 S.E.2d 677, 679 (1989).

In order to prove contributory negligence on the part of a plaintiff, the defendant must demonstrate: "(1) [a] want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury." *West Constr. Co. v. Atlantic Coast Line R.R. Co.*, 184 N.C. 179, 180, 113 S.E.2d 672, 673 (1922).[2] A plaintiff may move for a directed verdict on the issue of contributory negligence at the close of all the evidence. *Hawley v. Cash*, 155 N.C. App. 580, 583, 574 S.E.2d 684, 686 (2002). Here, the motion should have been granted if there was not "more than a scintilla of evidence" supporting each element of Defendant's claim that Plaintiff was contributorily negligent. *Id.*

In the present case, we conclude that there was not more than a scintilla of evidence that Plaintiff was contributorily negligent in causing the collision. Plaintiff testified that he was approximately one-hundred (100) feet from the center of the intersection and traveling at the posted speed limit of thirty-five (35) miles per hour when he first noticed

2. Because contributory negligence is an affirmative defense, the burden of proof on the issue of contributory negligence rests with the defendant. *Clary v. Alexander County Bd. Of Ed.*, 286 N.C. 525, 532, 212 S.E.2d 160, 165 (1975).

Defendant's vehicle and when his traffic signal changed from green to yellow. After determining that he could not safely bring his vehicle to a stop before the light turned red, Plaintiff proceeded through the intersection at thirty-five (35) miles per hour while his light was still yellow.

Defendant did not put on any evidence. On appeal, Defendant points to the testimony of a witness who was at the accident scene, who stated on cross-examination that "it seemed like [Plaintiff] was going fast" as evidence of Plaintiff's negligence. However, this witness actually testified that she was not looking at the intersection prior to the collision and "didn't see [Plaintiff's] car driving" or "going into the intersection." The witness's statement regarding Plaintiff's speed was solely in reference to "the way [Plaintiff's] car bounced off [the light post]" *after* Defendant's car had collided with Plaintiff's car. We conclude that the testimony of this witness does not amount to "more than a scintilla" of evidence showing that Plaintiff was contributorily negligent in causing the collision. Even viewed in a light most favorable to Defendant, *Green v. Rouse*, 116 N.C. App. 647, 650, 448 S.E.2d 846, 847 (1994), the evidence fails to raise even a "mere conjecture" of contributory negligence on the part of Plaintiff. *See Jones v. Holt*, 268 N.C. 381, 384, 150 S.E.2d 759, 762 (1966) (holding that if the evidence "merely raises a conjecture" of contributory negligence, the issue must not be submitted to the jury).

In addition, N.C. Gen. Stat. § 20-155(b) provides that "[t]he driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." N.C. Gen. Stat. § 20-155(b) (2015). While Plaintiff certainly had a duty to drive no faster than was safe under the circumstances, to keep his vehicle under control, to maintain a reasonably careful lookout, and to take reasonably prudent steps to avoid a collision, "he [was] entitled to assume, even to the last moment," that Defendant, "[would] comply with the law . . . before entering [Plaintiff's lane of travel]." *Snider v. Dickens*, 293 N.C. 356, 358, 237 S.E.2d 832, 834 (1977); *see also Penland v. Greene*, 289 N.C. 281, 283, 221 S.E.2d 365, 368 (1976) (holding that a person has no duty to anticipate negligence on the part of others and "has the right to assume and to act on the assumption that others will observe the rules of the road and obey the law"). The right to rely on this assumption, though, is not absolute. *Id.* Where circumstances which exist at the time are such that a reasonable person would be on notice that he cannot rely on the assumption that other drivers would yield to his right of way, he is under a duty "to exercise that care which a reasonably careful and prudent person would exercise under

all the circumstances then existing." *Id.* However, here, there is nothing in the record which suggests that Plaintiff failed to act reasonably in assuming that Defendant would yield and would not turn her vehicle into his path after he entered the intersection.

In conclusion, we find that the evidence at trial was not sufficient to show that Plaintiff was contributorily negligent in causing the collision. Plaintiff's motion for directed verdict should have been granted and the issue of contributory negligence should not have been submitted to the jury. Therefore, we reverse the judgment of the trial court. Further, because the jury determined that Defendant was negligent in causing Plaintiff's damages, we direct the trial court on remand to enter judgment in favor of Plaintiff for the amount of damages already stipulated to by the parties.

REVERSED AND REMANDED.

Judges BRYANT and STEPHENS concur.

---

ELI GLOBAL, LLC AND GREG LINDBERG, PLAINTIFFS
v.
JAMES A. HEAVNER, DEFENDANT

No. COA16-186

Filed 6 December 2016

**1. Libel and Slander—defamation—libel—slander per se—motion to dismiss**

The trial court erred by dismissing plaintiffs' complaint for failure to state a claim for defamation. Plaintiffs stated a claim for libel and slander *per se* sufficient to withstand defendant's motion to dismiss.

**2. Unfair Trade Practices—motion to dismiss—defamation—attorney fees**

The trial court erred by dismissing plaintiffs' claim for unfair and deceptive practices. The trial court's dismissal of this claim was predicated on its erroneous determination that plaintiffs had failed to state a claim for defamation. Further, the court erred by awarding attorney fees to defendant under N.C.G.S. § 75-16.1.

Appeal by plaintiffs from orders entered 24 July 2015 and 13 August 2015 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 24 August 2016.

*Smith Moore Leatherwood, LLP, by Matthew Nis Leerberg and Kip David Nelson, and Anderson Tobin, PLLC, by Kendal B. Reed (pro hac vice), for plaintiff-appellants.*

*Hoof Hughes Law, PLLC, by James H. Hughes, and Hutson Law Office, P.A., by Richard M. Hutson, II, for defendant-appellee.*

CALABRIA, Judge.

Plaintiffs appeal from the trial court's dismissal of their action. Because plaintiffs' complaint stated claims for defamation and unfair and deceptive practices, we reverse and remand.

## *I. Background*

Greg Lindberg manages Eli Global, LLC (collectively, "plaintiffs"), which maintains its principal office in Durham, North Carolina. Plaintiffs' business involves purchasing and investing in other companies and their assets. James A. Heavner ("defendant") owns the following affiliated companies: University Directories, LLC; Vilcom, LLC; Vilcom Interactive Media, LLC; Vilcom Properties, LLC; and Vilcom Real Estate Development, LLC (collectively, "the UD Entities"). The UD Entities are based in Chapel Hill, North Carolina.

In 2013, defendant retained an investment banker for the purpose of selling the UD Entities as a going concern. Defendant and Eli Global engaged in preliminary sale negotiations, during which Eli Global was permitted to conduct a due diligence analysis of the companies. However, due diligence revealed that the UD Entities were performing poorly and would require a significant capital investment in order to become financially viable. As a result, Eli Global did not make a purchase offer.

Thereafter, another one of Lindberg's companies, UDX, LLC ("UDX"),[1] purchased and acquired from the lender-bank certain commercial loans that had been executed by defendant and the UD Entities. As owner of the loans, UDX then provided written notices of default and demanded

1. UDX is not a party to this action.

payment. Since the UD Entities were unable to pay, they filed for Chapter 11 bankruptcy protections on 24 October 2014.

That day, defendant published a press release, which stated in full:

> CHAPEL HILL, N.C. October 24, 2014–University Directories, LLC filed for protection today under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Middle District of North Carolina to ward off a hostile takeover of the company.
>
> Prior to filing the petition, University Directories had retained an investment banker and after negotiating with a number of potential purchasers, had chosen Eli Global, LLC and signed a letter of intent with Greg Lindberg, Eli Global [sic] president. University Directories' lender, Harrington Bank, was aware of the impending sale and expected the loans to be paid in full at closing–a normal course of events.
>
> During the due diligence phase of the sales transaction, Harrington Bank was acquired by Bank of North Carolina. BNC immediately sold its University Directories loans and other loans to entities related to University Directories to UDX, LLC, a new entity created by Lindberg.
>
> UDX LLC, having acquired the loans, suddenly and without warning gave notice of default and disposition of collateral, demanding ownership of University Directories for its own operations. In addition, Lindberg and UDX, LLC gave notice that it [sic] intended to declare other loans in default, jeopardizing assets owned by companies related to University Directories.
>
> While the business court might provide relief from such a hostile takeover, it does not do so quickly. In order to protect the business and its employees, University Directories made the decision to file a Chapter 11 petition, along with its related entities obligated on the various notes. Thus, the company will be in protective custody of the courts so that it can continue business operations and pursue a sale of the 40-year-old business to a qualified buyer, thereby protecting its employees, customers, and creditors.
>
> University Directories is owned by James A. Heavner and several of the company's managers. Heavner said of the

> filing, "This Company has never missed a bank payment and is current on every loan. We chose to take this action with reluctance because it may cause anxiety among our stakeholders. Yet, in 50 years of owning, operating and selling over three dozen companies, mostly in the media business, we have never encountered anything like this. We will certainly litigate this matter and, in the meantime, the courts are here to protect it. It is an extraordinary situation when potential business partners turn out to be predators."
>
> University Directories, LLC; Print Shop Management, LLC; Vilcom LLC; Vilcom Interactive Media, LLC; Vilcom Properties, LLC; and Vilcom Real Estate Development are all companies in this filing and are located at 88 Vilcom Center Drive, Suite 160, Chapel Hill, NC. James A. Heavner is a principal of each company. University Directories, founded in 1974, is a collegiate marketing and media company. Vilcom Interactive Media owns and operates WCHL, a radio station broadcasting from Chapel Hill and "Chapelboro," an on-line [sic] news and marketing service. Vilcom Real Estate Development owns properties in North Carolina and South Carolina. Print Shop operates a retail store in Chapel Hill.

Several local media outlets, including *The News & Observer*, *The Triangle Business Journal*, and *Chapelboro*, subsequently published articles based on defendant's press release. Defendant also told a *Chapelboro* writer that he "was surprised when the potential partnership with Eli Global turned from a sale to a takeover[,]" and "[w]hat we thought were going to be honorable purchasers of a good company turned out to be predatory in ways none of us could have imagined."

On 23 April 2015, plaintiffs filed a complaint against defendant, asserting claims for defamation, libel, libel *per se*, slander, slander *per se*, and unfair and deceptive acts or practices. Without filing an answer, on 18 June 2015, defendant moved to dismiss plaintiffs' complaint for failure to state a claim upon which relief may be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2015). On 24 July 2015, the trial court entered an order dismissing plaintiffs' complaint and granting defendant's oral motion for attorneys' fees. *See* N.C. Gen. Stat. § 75-16.1 (allowing the judge presiding over an action for unfair and deceptive acts to award "reasonable" attorneys' fees to the "prevailing party" upon a finding that the party asserting the claim "knew, or should have known,

the action was frivolous and malicious"). On 3 August 2015, plaintiffs filed a motion for new trial, motion for reconsideration, and request for ruling on objections to defendant's motion to dismiss, pursuant to N.C. Gen. Stat. § 1A-1, Rules 59 and 60. Following a hearing, on 13 August 2015, the trial court entered: (1) an amended dismissal order awarding additional attorneys' fees to defendant and including further findings of fact on that issue; and (2) an order denying plaintiffs' motion for new trial, motion for reconsideration, and request for ruling on objections. Plaintiffs timely appealed from all three of the trial court's orders.

## *II. Analysis*

### A. Sandard of Review

"A motion made pursuant to Rule 12(b)(6) tests the legal sufficiency of the plaintiff's complaint." *Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 430, 432 (1993) (citation omitted). "Dismissal under Rule 12(b)(6) is proper when on its face the complaint reveals either no law supports the plaintiff's claim or the absence of fact sufficient to make a good claim, or when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Id.* (citation omitted). Accordingly, a plaintiff's complaint should not be dismissed "unless it affirmatively appears [the] plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim." *Id.* (citations and quotation marks omitted).

### B. Defamation

**[1]** Plaintiffs first contend that the trial court erred in dismissing their complaint for failure to state a claim for defamation. We agree.

An action for defamation may be maintained by a person or a business entity. *See R.H. Bouligny, Inc. v. United Steelworkers of Am.*, 270 N.C. 160, 168, 154 S.E.2d 344, 352 (1967) (explaining that a corporation may "be injured in its credit, in its business good will, or in its relations with its employees . . . [and] its corporate nature is not a bar to its recovery of damages from the wrongdoer"). "In order to recover for defamation, a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 897 (2002) (citation omitted), *appeal dismissed and disc. review denied*, 357 N.C. 163, 580 S.E.2d 361, *cert. denied*, 540 U.S. 965, 157 L. Ed. 2d 310 (2003). "[D]efamation includes two distinct torts, libel and slander." *Tallent v. Blake*, 57 N.C. App. 249, 251, 291 S.E.2d 336, 338 (1982). Generally,

written defamation constitutes libel, while oral defamation is slander. *Id.* But "when defamatory words are spoken with the intent that the words be reduced to writing, and the words are in fact written, the publication is both slander and libel." *Clark v. Brown*, 99 N.C. App. 255, 261, 393 S.E.2d 134, 137 (citation omitted), *disc. review denied*, 327 N.C. 426, 395 S.E.2d 675-76 (1990).

North Carolina recognizes three categories of libel: (1) libel *per se*, which covers publications that are "obviously defamatory"; (2) "publications which are susceptible of two reasonable interpretations, one of which is defamatory and the other is not"; and (3) libel *per quod*, which includes publications that are "not obviously defamatory, but which become so when considered in connection with innuendo, colloquium and explanatory circumstances." *Ellis v. Northern Star Co.*, 326 N.C. 219, 223, 388 S.E.2d 127, 129-30 (citation omitted), *reh'g denied*, 326 N.C. 488, 392 S.E.2d 89 (1990). "Slander is actionable either *per se* or *per quod*." *Mkt. Am., Inc. v. Christman-Orth*, 135 N.C. App. 143, 151, 520 S.E.2d 570, 577 (1999) (citation omitted), *disc. review denied*, 351 N.C. 358, 542 S.E.2d 213 (2000).

In the instant case, the complaint alleged that defendant made the following false statements "concerning [p]laintiffs":

> i. "In addition, Lindberg and UDX, LLC gave notice that it [sic] intended to declare other loans in default, jeopardizing assets owned by companies related to University Directories."
>
> ii. That [p]laintiffs attempted "a hostile takeover."
>
> iii. "It is an extraordinary situation when potential business partners turn out to be predators."
>
> iv. "What we thought were going to be honorable purchasers of a good company turned out to be predatory in ways none of us could have imagined."
>
> v. "[I] was surprised when the potential partnership with Eli Global turned from a sale to a takeover."

The full press release was also included in the body of the complaint. Plaintiffs asserted that "[i]n addition to being false, these statements are defamatory in that they tend to impeach [p]laintiffs in their business and otherwise tend to subject [p]laintiffs to ridicule, contempt, or disgrace." The complaint further alleged that defendant's "statements especially harm and disparage [p]laintiffs due to the nature of [p]laintiffs'

business in negotiating the purchase of other businesses and their assets." According to plaintiffs, defendant "intended these statements to be reduced to writing, and such statements were in fact written" and published as a press release "to several media outlets, . . . [which] in turn published articles based" thereon. Plaintiffs alleged that as a result of defendant's statements, "third parties are deterred from negotiating and closing transactions" with them. Thus, the complaint set forth the elements of a *prima facie* case for defamation. *See Boyce & Isley*, 153 N.C. App. at 29, 568 S.E.2d at 897.

On appeal, plaintiffs argue that defendant's statements are actionable as defamation *per se*, defamation *per quod*, and under the second class of libel. However, the complaint contained no allegation that defendant's statements are "susceptible of two meanings, one defamatory, and that the defamatory meaning was intended and was so understood by those to whom the publication was made." *Renwick v. News & Observer Pub. Co.*, 310 N.C. 312, 317, 312 S.E.2d 405, 408, *reh'g denied*, 310 N.C. 749, 315 S.E.2d 704, *cert. denied*, 469 U.S. 858, 83 L. Ed. 2d 121 (1984). Consequently, plaintiffs' complaint "failed to bring the [statements] complained of within the second class of libel[.]" *Id.* at 316, 312 S.E.2d at 408 (citations omitted). We next consider whether plaintiffs' complaint stated a claim for defamation *per se*.

Whether a statement is defamatory *per se* is a question of law to be decided by the trial court. *See Ellis*, 326 N.C. at 224, 388 S.E.2d at 130. The court must consider the full context of the statement, viewing the words "within the four corners" of the publication and interpreting them "as ordinary people would understand" them. *Renwick*, 310 N.C. at 319, 312 S.E.2d at 410. In order to be actionable *per se*, the words "must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided." *Boyce & Isley*, 153 N.C. App. at 30-31, 568 S.E.2d at 898-99 (citation omitted). "In an action for libel or slander *per se*, malice and damages are deemed presumed by proof of publication, with no further evidence required as to any resulting injury." *Id.* at 30, 568 S.E.2d at 898 (citation omitted).

"It is well settled that false words imputing to a merchant or business man conduct derogatory to his character and standing as a business man and tending to prejudice him in his business are actionable, and words so uttered may be actionable *per se*." *Badame v. Lampke*, 242 N.C. 755, 757, 89 S.E.2d 466, 468 (1955). Our Supreme Court has explained that

> in order to be actionable without proof of special damage, the false words (1) must touch the plaintiff in his special trade or occupation, and (2) must contain an imputation necessarily hurtful in its effect on his business. That is to say, it is not enough that the words used tend to injure a person in his business. To be actionable *per se*, they must be uttered of him in his business relation. Defamation of this class ordinarily includes charges made by one trader or merchant tending to degrade a rival by charging him with dishonorable conduct in business.

*Id.* (citations omitted); *see also Ellis*, 326 N.C. at 224, 388 S.E.2d at 130 (holding that a letter accusing the plaintiff-company of committing "an unauthorized act" on behalf of the defendant-company was libelous *per se* because it "impeache[d the plaintiff] in its trade as a food broker"); *Ausley v. Bishop*, 133 N.C. App. 210, 215, 515 S.E.2d 72, 76 (1999) (determining that the plaintiff's allegations that the defendant, a former employee who "was launching his own business as an appraiser," had engaged in theft and loan fraud "undoubtedly had the capacity to harm [the] defendant in his trade or profession").

As stated in their complaint, plaintiffs' business is "to invest in companies as a going concern, which at times includes negotiating to purchase other businesses or their assets." Indeed, Eli Global was a prospective buyer of the UD Entities before due diligence revealed their poor financial health. Accordingly, defendant's characterization of plaintiffs as "potential business partners [who] turn[ed] out to be predators" impugned them in their "special trade or occupation." *Badame*, 242 N.C. at 757, 89 S.E.2d at 468.

Defendant asserts that pursuant to this Court's decision in *Nucor Corp. v. Prudential Equity Grp., LLC*, 189 N.C. App. 731, 659 S.E.2d 483 (2008), his statements are not defamatory *per se* because they do not allege any "illegal or wrongful activity" by plaintiffs. *See id.* at 737, 659 S.E.2d at 487 (distinguishing *Ellis* and *Ausley* on the grounds that those cases involved allegations of "specific wrongful acts," whereas "here, no specific acts on the part of [the] plaintiff have been alleged"). In *Nucor*, the plaintiff-manufacturer alleged that the following statements, published by the defendant-financial company in an email sent to investors nationwide, were libelous *per se*:

> Alienated customers may encourage Nippon Steel, Brazil's CSN or some of Nucor's sixteen plant managers to build new steel companies in addition to Thyssen, Severcorr,

> or reborn Weirton Steel adding ten million tons. Alienated customers may file antitrust lawsuits as has been done in the electrode, container board OSB, or other sectors. A clever attorney could make hay from trebled damages on Nucor's $2.6 billion pre-tax earnings[, and] Nucor needs to wake up from its monopoly dreams and get back to reality in our view.

*Id.* (alteration in original). The trial court granted the defendants' motion to dismiss, and we affirmed on appeal.

Defendant's reliance on *Nucor* is misplaced for several significant reasons. First, not only did the *Nucor* publication fail to assert "any illegal or wrongful activity" by the plaintiff, it failed to assert *any* statement of verifiable fact. We explained,

> as to "alienated customers" the publication notes that "[a] clever attorney could make hay from trebled damages on Nucor's $2.6 billion pre-tax earnings." We do not find any part of this statement, which does not allege specific wrongful conduct on the part of the plaintiff and uses such rhetorical language as "could make hay[,]" to be defamatory. The second statement, "Nucor needs to wake up from its monopoly dreams and get back to reality in our view[,]" is also an opinion statement without any alleged facts on which we could find grounds for a claim of libel *per se*.

*Id.* at 737-38, 659 S.E.2d at 487 (alterations in original) (internal citations omitted). By contrast, defendant's assertion that Lindberg and UDX "gave notice that [they] intended to declare other loans in default, jeopardizing assets owned by companies related to University Directories" is a statement of verifiable fact which may be proven true or false. *Cf. Daniels v. Metro Magazine Holding Co.*, 179 N.C. App. 533, 539, 634 S.E.2d 586, 590 (2006) ("If a statement cannot reasonably be interpreted as stating actual facts about an individual, it cannot be the subject of a defamation suit." (citation, brackets, and quotation marks omitted)), *appeal dismissed and disc. review denied*, 361 N.C. 692, 654 S.E.2d 251 (2007). Although some of defendant's remarks may appear to express an opinion, a person "cannot preface an otherwise defamatory statement with 'in my opinion' and claim immunity from liability[.]" *Id.*

Second, in *Nucor*, we declined to consider paragraphs of the plaintiff's complaint that provided further details about the antitrust lawsuits filed in other sectors because such "explanatory circumstances" may

not be considered on a claim for libel *per se*. 189 N.C. App. at 737, 659 S.E.2d at 487 ("Words which are libelous *per se* do not need an innuendo, and, conversely, words which need an innuendo are not libelous *per se*." (citation omitted)). Defendant's press release requires no such explanation. By stating "[w]hat we thought were going to be honorable purchasers of a good company . . . [,]" defendant clearly means that plaintiffs are *not*, a harmful imputation given that plaintiffs' particular trade is buying and investing in other businesses. *See Badame*, 242 N.C. at 757, 89 S.E.2d at 468 (noting that defamation *per se* in the business context "ordinarily includes charges made by one trader or merchant tending to degrade a rival by charging him with dishonorable conduct").

Third, viewing the *Nucor* publication "as a whole," we concluded that the "overall import of the document was not derogatory of [the] plaintiff." 189 N.C. App. at 738, 659 S.E.2d at 487 (observing that "[t]he publication also states that 'We believe Nucor is a fine company, and we are not aware of any "company-specific" flaw or blemish.' "). The same cannot be said here. "One does not have to 'read between the lines' to discover the [press release's] defamatory content." *Boyce & Isley*, 153 N.C. App. at 32, 568 S.E.2d at 899 (citing *Renwick*, 310 N.C. at 318, 312 S.E.2d at 409).

Defendant, citing several business dictionaries for support, argues that "predator" and "hostile takeover" are "recognized business terms" that accurately describe plaintiffs and the parties' business transaction; therefore, he contends that his statements are true and cannot serve as the basis of a defamation claim. However, defendant's reliance on extrinsic sources is premature, given that "on a Rule 12(b)(6) motion, the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims[.]" *Andrews*, 109 N.C. App. at 275, 426 S.E.2d at 432 (citation, quotation marks, and brackets omitted).

Viewing defendant's remarks "within the four corners" of the press release and "as ordinary people would understand" them, *Renwick*, 310 N.C. at 319, 312 S.E.2d at 410, we do not believe that the average readers of *Chapelboro* and *The News & Observer* would read "predator" to mean "a company that buys or tries to buy another company that is in a weaker financial position," as defendant contends on appeal. Even assuming, *arguendo*, that readers of *The Triangle Business Journal* might immediately recognize this business definition, defendant's defamatory meaning is nevertheless revealed by his statements that he has "never encountered anything like this" and "will certainly litigate this matter." *Cf. Boyce & Isley*, 153 N.C. App. at 31, 568 S.E.2d at 899

(rejecting the defendants' assertion that "the average person is familiar with the concept of contingency fees in the context of large class-action lawsuits" and holding that their television advertisement alleging that a political opponent "charg[ed] . . . more [per hour] than a policeman's salary" was defamatory *per se*).

We are similarly unpersuaded by defendant's alternative argument that his remarks are protected as "rhetorical hyperbole," a statement so exaggerated or outlandish that "no reasonable reader would believe [it] to be literally true." *Craven v. Cope*, 188 N.C. App. 814, 818, 656 S.E.2d 729, 733 (2008). Defendant's press release was plainly intended to assuage stakeholders' anxiety after the UD Entities filed for Chapter 11 bankruptcies. Considering defendant's statements in this context, their defamatory tenor is even more evident. *See Renwick*, 310 N.C. at 319, 312 S.E.2d at 410.

We hold that plaintiffs stated a claim for libel and slander *per se* sufficient to withstand defendant's motion to dismiss. Notably, "[w]hether or not plaintiffs may ultimately prevail on these claims is not a matter before this Court." *Boyce & Isley*, 153 N.C. App. at 35, 568 S.E.2d at 901. At this early stage in the proceedings, however, they have met their low burden of proving that they are "entitled to offer evidence to support the[ir] claims[.]" *Andrews*, 109 N.C. App. at 275, 426 S.E.2d at 432.

**C. Unfair and Deceptive Practices**

**[2]** Plaintiffs next contend that the trial court erred by dismissing their claims for unfair and deceptive practices. We agree.

N.C. Gen. Stat. § 75-1.1(a) provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." A claim for unfair and deceptive practices requires proof of: "(1) an unfair or deceptive act or practice, (2) in or affecting commerce, which (3) proximately caused actual injury to the claimant." *Nucor*, 189 N.C. App. at 738, 659 S.E.2d at 488 (quoting *Craven*, 188 N.C. App. at 819, 656 S.E.2d at 733). "[A] libel *per se* of a type impeaching a party in its business activities is an unfair or deceptive act in or affecting commerce in violation of [N.C. Gen. Stat.] § 75-1.1, which will justify an award of damages . . . for injuries proximately caused." *Ellis*, 326 N.C. at 226, 388 S.E.2d at 131 (citation omitted).

As previously discussed, plaintiffs stated a claim for defamation *per se* based on defendant's statements impeaching their business reputation. Regarding plaintiffs' claim for unfair and deceptive practices, the

complaint further alleges that defendant's "false and defamatory statements constitute an unfair or deceptive act or practice in or affecting commerce which proximately caused actual injury to [p]laintiffs in violation of section 75-1.1 of the North Carolina General Statutes." Because the trial court's dismissal of this claim was predicated on its determination that plaintiffs had failed to state a claim for defamation, we conclude that the trial court also erred in dismissing plaintiffs' claim for unfair and deceptive practices.

Additionally, N.C. Gen. Stat. § 75-16.1 provides that a judge presiding over an action for unfair and deceptive practices may, in certain instances, award "reasonable" attorneys' fees to "the prevailing party." Having determined that the trial court erred by dismissing plaintiffs' claim for unfair and deceptive practices, we necessarily conclude that the court also erred by awarding attorneys' fees to defendant.

### *III. Conclusion*

Plaintiffs' complaint set forth the elements and necessary factual allegations to support claims for defamation *per se* and unfair and deceptive practices; therefore, the trial court erred by granting defendant's motion to dismiss and in awarding attorneys' fees to defendant. Having so concluded, we need not consider plaintiffs' remaining arguments.

REVERSED AND REMANDED.

Judges DAVIS and TYSON concur.

[250 N.C. App. 546 (2016)]

IN THE MATTER OF A.H. & C.H.

No. COA16-581

Filed 6 December 2016

**1. Termination of Parental Rights—hearing—right to present evidence**

The trial court did not abuse its discretion in a termination of parental rights case by allegedly restricting respondent mother's right to present evidence at the termination hearing. The trial court applied the same evidentiary standards to all parties and respondent had the right to participate and present relevant evidence at the disposition hearing.

**2. Termination of Parental Rights—best interests of children—findings of fact**

The trial court did not abuse its discretion in a termination of parental rights case by determining that termination of the mother's parental rights was in the best interests of the two minor children. The trial court made the requisite findings and respondent failed to show that the court's decision was so arbitrary that it could not have been the result of a reasoned decision.

Appeal by Respondent from orders entered 8 June 2015, 19 October 2015, and 19 January 2016 by Judge William A. Marsh, III in Durham County District Court. Heard in the Court of Appeals 19 October 2016.

*Senior Assistant County Attorney Bettyna Belly Abney, for petitioner-appellee Durham County Department of Social Services.*

*Mobley Law Offices PA, by Marie H. Mobley, for guardian ad litem.*

*Peter Wood for respondent-appellant mother.*

INMAN, Judge.

Respondent-mother ("Mother") appeals from an order terminating her parental rights as to her minor children C.H. ("Clark")[1] and A.H. ("Andrew"). On appeal, Mother contends that the trial court abused its

1. We use the pseudonyms adopted by the parties to protect the juveniles' identities.

discretion by restricting her right to present evidence at the termination hearing and by determining that termination of her parental rights was in the best interests of Clark and Andrew. After careful review, we hold that the trial court did not abuse its discretion.

## Factual and Procedural History

On 5 June 2002, Mother gave birth to Andrew. On 5 November 2006, Mother gave birth to Clark. The children's biological father passed away on 2 October 2010.

On 20 April 2013, Mother, Andrew, and Clark were at a Food Lion in Durham, North Carolina. Andrew attempted to steal candy from the store, but was caught. Upon hearing of Andrew's attempted theft, Mother hit Andrew in the face, grabbed him around the neck in a choke hold position, and caused Andrew's head to hit a bank card swipe machine. Food Lion security personnel and other bystanders immediately intervened and stepped in between Mother and Andrew. Mother then exited the store with Clark, leaving Andrew behind. Mother did not leave any contact information. As Mother left, her car's license plate number was noted.

The Durham County Police Department was notified and located Mother shortly after her exit. Mother claimed she left the Food Lion to go to the police department. Mother was charged with misdemeanor child abuse, misdemeanor assault on a child under twelve, and misdemeanor assault on a handicapped person.

At the Durham Police Station, Mother told a social worker that she wanted Andrew and Clark to be placed in foster care, because she did not think her family members in Durham were good placements for the children. Andrew and Clark were immediately placed in a rapid response therapeutic home.

The Durham County Department of Social Services ("DSS") filed petitions alleging that both Andrew and Clark were neglected. At the adjudication hearing on 6 June 2013, Mother stipulated to all of the court's findings of fact and the adjudication that both juveniles were neglected. At the conclusion of the disposition hearing on 2 July 2013, the trial court placed the children in the legal custody of DSS, allowed Mother supervised visitation, and ordered Mother to follow all recommendations resulting from a psychological evaluation, including anger management.

At the time of the grocery store incident and initial placement, Andrew was ten years old and Clark was six years old. Both children

suffered from behavioral and developmental disorders. Andrew had been diagnosed with Attention Deficit Hyperactivity Disorder, developmental delay, and Major Depressive Disorder, and was receiving services for autism, behavioral issues, and anxiety. Additionally, Andrew received occupational therapy. Clark had been diagnosed with developmental delay, speech impairment, and epilepsy, and suffered from seizures. Like his brother, Clark also received occupational therapy. Although it was unknown if a formal diagnosis had been made, Clark demonstrated symptoms of autism and Attention Deficit Hyperactivity Disorder.

On 15 July 2013, Andrew was hospitalized after running away from his foster home and expressing suicidal tendencies. Andrew was admitted to the Duke Medical Center Emergency Department, where he expressed that he was upset he did not get to speak with Mother and stated he wanted to live with her and his brother. Mother attempted to visit Andrew while he was in the emergency department, but hospital policies did not allow visitation. Andrew's mental health medical team recommended he be placed in a therapeutic foster home that could provide Intensive Alternative Family Therapy. The team also recommended that Andrew be placed in a home where he would be the only child and that the foster parent(s) have prior experience or special training with parenting autistic children.

On 5 September 2013, after conducting a hearing to review the custody and placement of Andrew and Clark, the trial court entered a Review Order. The court found that Clark had remained in the same foster care placement since 4 June 2013 and that Mother had participated in autism support groups, reviewed the children's care with social workers, and attended medical appointments for the children. The court concluded that it was in the best interest of the children to remain in the legal custody of DSS, with DSS having placement authority. The court ordered Mother to continue in individual therapy for anger management and parenting skills, maintain visitation with the children, and participate in other services or therapy as recommended.

On 5 October 2013, Andrew was re-hospitalized after running away again from his foster home. While at the hospital, Andrew expressed, again, that he wanted to live with his mother. Andrew continued to express suicidal thoughts. Clark had been moved from his previous foster home, and was placed in a new foster home.

On 4 and 6 December 2013, the trial court held an initial permanency planning hearing. On 6 January 2014, the trial court entered a

Permanency Planning Order concluding that "it is in the best interest[s] of the children that the permanent plan of care be reunification with the mother[.]" The court's findings of fact noted Andrew's second hospitalization, his move to a new foster care home, and his ongoing condition. The court also found that Mother had attended supervised visits, medical appointments, treatment team meetings, Child and Family Team meetings, and individual weekly therapy sessions. The court ordered Mother to continue with the same services and to participate in and complete a forensic parental evaluation.

Two months later, on 10 March 2014, Andrew ran away from school and, when found, expressed to officers that that he wanted to be run over by a car. Andrew's medical team recommended a stay at Spring Brook Behavioral Healthcare ("Spring Brook"), and Andrew was placed at Spring Brook on 27 March 2014. Mother participated in family therapy at Spring Brook. During a family therapy session, Mother expressed to Andrew her hatred towards Brianna Dearing ("Dearing"), a social worker. Mother stated she wanted to beat Dearing "bad." When Andrew explained Dearing was trying to help them, Mother said, "no[,] she is not helping us," and spoke for about three minutes about how she could beat Dearing to death. Due to Mother's statements regarding Dearing, the therapist redirected Mother out of the room.

On 3 June 2014, after conducting a permanency planning review hearing on 2 May 2014, the trial court entered a Permanency Planning Review Order. The trial court found that as of the 2 May 2014 hearing, Mother had completed all services with the Autism Society of North Carolina and had begun a parenting program. The court further found that while the children could not return home immediately, reunification was possible within the following six months.

On 25 September 2014, the court held another permanency planning review hearing. In an order entered in open court that same day, the court found that Andrew had shown improvement while at Spring Brook and had stopped inflicting and threatening self-harm. Andrew's therapist reported that Andrew recounted spankings by his older brother and an incident where Mother duct-taped Andrew's feet together. The therapist indicated that Andrew expressed a desire for revenge and anger towards his family. Mother had visited Andrew at Spring Brook, until her visitation was suspended because of her disruptive behavior during two visits. Once she was allowed to resume supervised visitation, Mother was unable to do so due to a staff shortage. Clark was doing well with his foster family and in school. Mother was attending parenting classes and visitations but had "not consistently demonstrated positive parenting

skills during visitation[s].” The court changed the permanent plan of care, adding guardianship by a court-approved caretaker as an alternative to reunification with Mother. The court directed Mother to continue participating in individual therapy.

On or about 4 November 2014, DSS filed a motion to modify visitation. The motion alleged that on 23 October 2014, Clark attended supervised visitation with Mother in her home. During this visit, Clark had a “melt down” and Mother dragged Clark to a time out. The supervisor found it “difficult” to redirect Mother during visits, as Mother had refused to change her behavior. DSS requested that all visitation be supervised and located at DSS.

On 8 June 2015, more than two years after Andrew and Clark were removed from Mother’s custody and initially adjudicated neglected, the trial court entered a Permanency Planning Review Order changing the permanent plan of care to adoption, with an alternate plan of guardianship by a court-approved caretaker. The court’s findings noted, *inter alia*, a report by Andrew’s therapist that Mother “consistently minimizes [Andrew]’s feelings about past incidents and that she often becomes angry” during the phone conversations and a report by Clark’s social worker that his “most disruptive days continue to be the days when he has visits with his mother.”

The court found that Mother had not completed all recommended services, had refused to participate in family therapy for Andrew, and had not changed her parenting behavior. The court found that “[Mother] continues to have unrealistic expectations for [Andrew’s and Clark’s] behaviors and is unwilling to work on managing their mental health issues. She continues to insist their behaviors arise solely from residing in foster care and not due to her own parenting approach.” The court found that the permanent plan of reunification could not be implemented at that time because Mother “ha[d] not completed all of the recommended services, nor ha[d] she consistently demonstrated positive parenting skills during visitation.” The court concluded that reunification efforts with Mother would be either futile or inconsistent with the children’s health, safety, and need for a safe permanent home within a reasonable period of time.

On or about 1 June 2015, DSS filed a Motion/Petition for Termination of Parental Rights. DSS alleged Mother’s parental rights were subject to termination pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(1) (neglect), (2) (failure to make reasonable progress), (3) (failure to pay a reasonable portion of the cost of the children’s care), and (6) (dependency).

On 5 August 2015, Mother subpoenaed Andrew to appear and testify at Mother's termination of parental rights hearing.

On 11 August 2015, Mother personally filed with the trial court a ten-page report entitled "Respondent Parent's Court Summary" ("the Parent Report"). Mother attached to the Parent Report documents that she intended to submit at the termination proceeding.

On 13 August 2015, the Guardian Ad Litem Attorney Advocate ("GAL") filed a motion to quash Mother's subpoena for Andrew's testimony. The motion to quash alleged that Andrew "will likely experience significant emotional distress and regress from his recent progress in therapy, if required to appear and testify in this proceeding." The GAL argued the subpoena was unreasonable and oppressive. The GAL attached a letter from Andrew's therapist, which provided, in pertinent part:

> This letter is to inform the court in the case of [Andrew] and his inability to provide testimony in court proceedings. The KidsPeace clinical team have staffed this case and determined that [Andrew]'s presence in court and testimony would be detrimental to his treatment progress and stability.
>
> . . .
>
> Should [Andrew] be required to testify[,] he will likely experience an emotional and behavioral regression as indicated by previous exposure to this topic when talking with [Mother] during supervised phone calls. The team has observed [Andrew] experience mood disturbances, behavioral regression, and an increase in symptoms of trauma after these conversations. Although the origin of this regression is unclear, it appears closely related to the topic of court. After requesting that these conversations cease, symptoms and behaviors subsided. It is therefore clinically recommended that [Andrew] not provide testimony in court to maintain treatment gains and promote well-being.

On 14 August 2015, Mother filed a response opposing the GAL's motion to quash. Mother's response focused on Andrew's competency and that Andrew's testimony would be relevant to the termination proceeding.

On 19 August 2015, the trial court held a hearing on the motion to quash. In an order entered 19 October 2015, the court found that

according to Andrew's therapist, he would "likely experience significant emotional distress and regress from his recent progress in therapy, if required to appear and testify in this proceeding." Additionally, the court found that Mother "could not clearly articulate any factual issues within the child's knowledge that were necessary to her defense of the termination action, and unavailable from other sources." The court concluded: "1. Any testimony of the child would be of little probative value[;] 2. The experience of testifying is likely to cause the child significant emotional harm [; and] 3. The best interests of the child are this court's paramount concern." Based on its findings and conclusions, the court quashed Mother's subpoena.

On 14 August 2015, Mother's counsel delivered to the Guardian ad Litem Durham Office and the DSS County Attorney all of the documentary evidence that she sought to admit at the termination proceeding in a multi-pronged file folder (the "Green Folder"). The Green Folder contained numerous documents, including the Parent Report, which Mother had filed *pro se* with the trial court. On 6 October 2015, the GAL filed a "GAL's Response to Mother's Proposed Evidence & Motion in Limine," seeking to exclude from evidence the contents of the Green Folder. The GAL provided specific responses regarding the relevancy of each document contained in the Green Folder, specifically noting that the Parent Report "[s]hould not have been filed, [] needs to be struck from the court file[,]" and "[s]hould not be introduced prior to [the] best interests phase, if reached."

On 19 October 2015, prior to the commencement of the adjudication phase of the termination proceeding, the trial court conducted a hearing on the GAL's motion *in limine*. On that day, the trial court granted the GAL's motion with respect to the Parent Report, noting that it was filed without the signature of counsel. The trial court also granted the GAL's motion to exclude from evidence the other contents of the Green Folder.

The court held hearings to determine whether grounds existed to terminate Mother's parental rights beginning on 19 October, and continuing on 20 October, 21 October, and 19 November 2015. On 19 November 2015, the adjudication phase of the termination hearing (the "adjudication hearing") ended and the trial court found in open court "clear and convincing evidence that grounds exist for termination of parental rights." Later that same day, the trial court conducted the disposition phase of the termination hearing (the "disposition hearing") and determined in open court that termination of Mother's parental rights was in the best interests of the children. A written order on the termination proceeding was entered 19 January 2016. In the order, the court found

clear, cogent, and convincing evidence of N.C. Gen. Stat. § 7B-1111(a)(1) (neglect), (2) (failure to make reasonable progress), (3) (failure to pay a reasonable portion of the cost of care for Andrew and Clark), and (6) (dependency) as grounds for termination of Mother's parental rights. The court also concluded that "it is in the best interests of [Andrew] and [Clark] that the parental rights of their mother be terminated."

Mother filed a Notice of Appeal from the 8 June 2015 Permanency Planning Review Order, the 19 October 2015 Order Quashing Subpoena, and the 19 January 2016 Order Terminating Parental Rights. However, in her brief filed with this Court, Mother does not challenge the 8 June 2015 Permanency Planning Review Order, which ceased reunification efforts.

## Standard of Review

"The court's determination of the juvenile's best interest will not be disturbed absent a showing of an abuse of discretion." *In re E.M.*, 202 N.C. App. 761, 764, 692 S.E.2d 629, 630 (2010) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

The trial court's evidentiary decisions, including a decision granting a motion to quash a subpoena on grounds that it is unduly burdensome, also will not be disturbed absent a showing of abuse of discretion. *See State v. Hurt*, 235 N.C. App. 174, 182, 760 S.E.2d 341, 348, *review denied*, 367 N.C. 807, 766 S.E.2d 679 (2014) ("A motion to quash a subpoena is addressed to the sound discretion of the trial court and is not subject to review absent a showing of an abuse of discretion.").

## Analysis

Mother contends that the trial court abused its discretion by restricting her right to present evidence at the termination proceeding. Additionally, Mother asserts that the trial court abused its discretion in determining that termination of her parental rights was in the best interests of Andrew and Clark. For the reasons discussed below, we disagree with Mother's arguments.

A termination of parental rights proceeding consists of a two-step process: an adjudication phase and a disposition phase. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984); *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). In the adjudication phase, "the court must take evidence, find the facts, and adjudicate the existence or nonexistence of any of the circumstances set forth in N.C. Gen. Stat.

§ 7B–1111, which authorizes the termination of the respondent's parental rights." *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005) (citation omitted); *see also* N.C. Gen. Stat. § 7B–1111 (2015).

"After finding that grounds for termination exist, the trial court moves to the disposition phase." *In re A.R.H.B.*, 186 N.C. App. 211, 218, 651 S.E.2d 247, 253 (2007) (citation omitted). In the disposition phase or the "best interest" phase, the trial court "must determine whether termination of parental rights is in the best interests of the child." *In re R.B.B.*, 187 N.C. App. 639, 643, 654 S.E.2d 514, 518 (2007). At this phase, "[t]he court may consider any evidence, including hearsay evidence . . . that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile." N.C. Gen. Stat. § 7B-1110(a) (2015). The North Carolina Supreme Court has held that

> [w]henever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court, subject to the discretionary powers of the trial court to exclude cumulative testimony. Without hearing and considering such evidence, the trial court cannot make an informed and intelligent decision concerning the best interest of the child.

*Matter of Shue*, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984).

## I. Right To Present Evidence

**[1]** Mother contends that the trial court abused its discretion by restricting her right to present evidence at the termination hearing. Specifically, Mother argues that the trial court erred in: (1) quashing her subpoena for Andrew's testimony, (2) not allowing her to make an offer of proof as to what Andrew would have said if he testified, (3) not allowing her to present the Parent Report, and (4) applying one set of evidentiary rules to Mother and a more lenient set of evidentiary rules to other parties. We disagree.

### A. Quashing of the Subpoena

As an initial matter, we must clarify the specific phase of the termination proceeding during which, by quashing her subpoena, Mother contends the trial court restricted her right to present evidence. At the hearing on the motion to quash, when questioned about which phase of the termination proceeding she sought to present Andrew's testimony in, Mother responded "[t]hat's my decision. That's my attorney's decision." However, on appeal, Mother does not challenge the adjudication phase

of the termination proceeding, noting "[a]dmittedly, the court correctly found grounds to terminate parental rights[.]" Accordingly, we review whether the trial court's quashing of the subpoena restricted Mother's right to present evidence at the disposition or "best interest" phase of the termination proceeding.

The GAL requested the trial court quash Mother's subpoena on the basis that compelling Andrew to appear and testify during either phase of the termination proceeding would be "unreasonable and oppressive." *See* N.C. Gen. Stat. § 1A-1, Rule 45(c)(3) and (5) (2015) (providing that a trial court may modify or quash a subpoena if the subpoenaed person demonstrates the existence of certain grounds, including that the subpoena is otherwise unreasonable or oppressive). As support for the notion that the subpoena was unreasonable and oppressive, the GAL noted the following pertinent facts:

> 6. In a phone conversation in early July, 2015, mother told [Andrew] that she was going to have her attorney interview him, and that she wanted him to testify at the TPR hearing. In the days that followed, [Andrew] was agitated, and observed to be walking in his sleep. Mother was warned that this topic was upsetting to [Andrew]. . . .
>
> 7. The child ha[d] not expressed any desire to participate in the hearing on termination of his mother's parental rights.
>
> 8. According to the child's therapist, he will likely experience significant emotional distress and regress from his recent progress in therapy, if required to appear and testify in this proceeding.

Additionally, the GAL attached a letter from Andrew's therapist stating "[t]he Kidspeace clinical team have staffed this case and determined that [Andrew's] presence in court and testimony would be detrimental to his treatment progress and stability."

The motion to quash the subpoena came on for hearing on 19 August 2015. Andrew's therapist, Stephanie Batchelor ("Batchelor"), and Mother testified at the hearing. Batchelor testified that Andrew had not, in their conversations, expressed any interest in participating in the termination proceeding. On cross examination, counsel for Mother and Batchelor engaged in the following exchange:

> MOTHER'S COUNSEL: So, it is correct that you do believe that [Andrew] could participate in a limited capacity in this hearing?

> BATCHELOR: If it was so required I think that you would probably not get what you hope to because of his level of anxiety and that he does have some limited insights.

Following Batchelor's testimony, Mother testified. Mother's counsel inquired as to what topics Mother expected Andrew to testify about, which resulted in the following exchange:

> [MOTHER]: Well there are a number of things uhm, that he could potentially tell you. Uhm, about his life with me and uhm, his life in foster care and how different the two are and whether it be a positive or a negative uhm, change being in foster care. Uhm, the experiences being institutionalized for nine months and being hospitalized three times in nine [months] under DSS's custody. Uhm, he's been through a traumatic time. He's been out of school for most of the two years. His IEP was out of compliance for most of the two years that he's been in foster care. He could tell you a number of things but his experience has not been positive. His uhm, experience in foster care has been a detriment.
>
> THE COURT: Okay, [Mother], I'm going to interrupt you. I don't want you to testify about what you perceive his experience to be. I think the question was what did you expect him, the subject matter that you expected to elicit from him.
>
> [MOTHER]: Okay.
>
> THE COURT: And I believe that question's been answered.

Mother testified that Andrew's "wants and needs from his perspective need[] to be presented to the [c]ourt." Furthermore, Mother testified that "I'm aware that [Andrew] could [testify] in chambers or he could [testify] off site, or remotely, but he still needs that opportunity. It doesn't absolutely have to be in the courtroom." Thereafter, the trial court concluded:

> All right, the [c]ourt has heard testimony as well as reviewed the uhm, GAL Exhibits and Petitioner's Exhibits and the [c]ourt finds that given the burdens of proof in a hearing to terminate parental rights, that the testimony of one of the two minor children which are the subject of these hearings would be of extremely limited prohibitive [sic] value and in fact in a balancing test of concerns it

> would overwhelmingly . . . be detrimental to his well-being and the guiding star in this courtroom is the best interests of minor children and having so concluded that it would be of limited prohibitive [sic] value and detrimental, the [c]ourt quashes the subpoena issue in this matter.

The trial court memorialized the order quashing the subpoena on 19 October 2015, finding the following:

> 1. [Andrew] is thirteen years old, and under the care of therapist, Stephanie Batchelor.
>
> . . .
>
> 3. [Andrew] has had little face-to-face contact with his mother since March, 2015, and no visitation. Mother participated in one session of family therapy with [Andrew], but then refused to attend further sessions. Said family therapy was made a precondition to resumed supervised visitation by this court's order, entered March 17, 2015.
>
> 4. The conditions that led to the removal of [Andrew] have already been adjudicated, and those findings of fact and conclusions of law are beyond appeal. The hearing on terminating mother's parental rights will focus on mother's progress in completing the things this court determined were necessary to correct the conditions that led to removal, and mother's present mental health. [Andrew] has little direct knowledge of these things.
>
> 5. In a phone conversation in early July, 2015, mother told [Andrew] that she was going to have her attorney interview him, and that she wanted him to testify at the TPR hearing. In the days that followed, [Andrew] appeared agitated. Mother was warned that this topic was upsetting to [Andrew]. Mother subsequently requested the address of the child's foster home, in order to mail a subpoena directly to the child. DSS did not provide the address. Mother's attorney served the subpoena upon the attorney for the GAL program.
>
> 6. According to the child's therapist, he will likely experience significant emotional distress and regress from his recent progress in therapy, if required to appear and testify in this proceeding.

> 7. The burden of proof in the termination of parental rights is upon the petitioner, Durham County DSS. Mother could not clearly articulate any factual issues within the child's knowledge that were necessary to her defense of the termination action, and unavailable from other sources.

Based on these findings, the trial court made the following conclusions:

> 1. Any testimony of the child would be of little probative value.
>
> 2. The experience of testifying is likely to cause the child significant emotional harm.
>
> 3. The best interests of the child are this court's paramount concern.

Mother argues that the trial court "failed to adequately consider the relevancy of any testimony by Andrew." After careful review of the transcript of the hearing and the written order, we disagree with Mother's contention and hold that the trial court sufficiently considered the relevancy of Andrew's testimony as to the termination proceeding in determining whether to quash Mother's subpoena.

Mother did not specify before the trial court that she was requesting Andrew's testimony at the disposition hearing. Several of the trial court's findings of fact in the subpoena order relate to the relevance of Andrew's testimony as to the adjudication hearing. However, the record reflects that the trial court also considered the relevance of Andrew's testimony to the disposition hearing. At the hearing on the GAL's motion to quash the subpoena, Mother outlined the topics she expected Andrew to testify about, including his life with Mother and his life in foster care, and his experiences in foster care. The trial court found that Andrew "has had little face-to-face contact with his mother since March, 2015, and no visitation." This finding is relevant to the bond between the parent and child – one of the six factors the relevant statute directs the trial court to consider in determining the best interests of the child. *See* N.C. Gen. Stat. § 7B–1110(a). The trial court's conclusion that "[a]ny testimony of the child would be of little probative value" demonstrates that it adequately considered the relevancy of Andrew's testimony as to the termination proceeding as a whole, including the disposition hearing.

In determining whether to quash the subpoena, the trial court also considered if testifying was in Andrew's best interest. The court admitted into evidence and considered a letter written by Batchelor on

12 August 2015. The court also heard the opinion of Batchelor that testifying "could potentially pose a risk factor for [Andrew] to emotionally and behaviorally regress and cause increased anxiety." Batchelor testified that "it's my understanding based on two phone calls in which [Mother] discussed court testimony with [Andrew], . . . he appeared distressed and with a labile mood and some behavioral regression afterwards." The trial court concluded that "[t]he experience of testifying is likely to cause the child significant emotional harm" and "[t]he best interests of the child are this court's paramount concern."

By presenting comprehensive evidence regarding Andrew's mental health condition and his extreme distress during and following contacts with Mother regarding her desire that he testify, the GAL properly demonstrated that the subpoena for Andrew was "unreasonable or oppressive." Mother has failed to show that the trial court abused its discretion in quashing the subpoena. We therefore affirm the trial court's decision.

B. Offer of Proof

Mother contends that the trial court erred during the disposition hearing by denying her request to make an offer of proof as to what Andrew would have said if he were allowed to testify. We disagree.

Mother alleges error based on the following exchange at the disposition hearing between Mother, her attorney, and the trial court:

> MOTHER'S COUNSEL: And why did you want to have [Andrew] testify in this hearing?
>
> MOTHER: I wanted him to speak for himself.
>
> MOTHER'S COUNSEL: Okay.
>
> MOTHER: Because Ms. Dearing has been speaking for him.
>
> MOTHER'S COUNSEL: Okay. Uhm, what do you believe [Andrew] would have said if he, if he would have testified, regarding your relationship?
>
> THE COURT: Sustained.
>
> MOTHER'S COUNSEL: Your Honor, this is something that's actually required uhm, for the record and for the higher courts that whenever a subpoena for a child is quashed there has to be, this has to be on the record what the child would have testified to—

> THE COURT: No, I don't think that's a correct statement of the law. I think the person may be required to submit a proffer about the subject matter but to have someone else and speak and say that if this person came they would have said XYZ, uhm, is rather preposterous.
>
> MOTHER'S COUNSEL: Okay.
>
> THE COURT: The objection is sustained.
>
> MOTHER'S COUNSEL: Okay, thank you, [y]our Honor.
>
> MOTHER: Can I provide a proffer?
>
> THE COURT: No, you may not.

The trial court's statement that "I think the person may be required to submit a proffer about the subject matter but to have someone else and speak and say that if this person came they would have said XYZ . . . is rather preposterous" misstated North Carolina statute and precedent. The North Carolina Code of Evidence provides that a litigant cannot obtain relief on appellate review from a ruling excluding evidence unless, "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." N.C. Gen. Stat. § 8C-103(a)(2) (2015). The North Carolina Supreme Court has held that

> in order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record. . . . [T]he essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred.

*State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985) (citation omitted).

The trial court's misstatement of the law was not, however, an abuse of discretion in this case, because the essential content or substance of testimony that Mother sought to elicit from Andrew had been previously made known to the trial court. Prior to the disposition hearing, during the hearing on the GAL's motion to quash Mother's subpoena of Andrew, Mother testified:

> Well there are a number of things uhm, that he could potentially tell you. Uhm, about his life with me and uhm, his life in foster care and how different the two are and whether it be a positive or a negative uhm, change being in foster care. Uhm, the experiences being institutionalized for nine months and being hospitalized three times in nine [months] under DSS's custody. Uhm, he's been through a traumatic time. He's been out of school for most of the two years. His IEP was out of compliance for most of the two years that he's been in foster care. He could tell you a number of things but his experience has not been positive. His uhm, experience in foster care has been a detriment.

This Court has held that "[t]hough a *formal* offer is the preferred method, there are reasons where a trial court may deem an informal offer to be appropriate." *State v. Martin*, __ N.C. App. __, __,774 S.E.2d 330, 333 (2015), *review denied*, __ N.C. __, __, 775 S.E.2d 844 (2015). This Court has explained that

> an informal offer is only sufficient when the attorney making the offer demonstrates a specific forecast of what the testimony would be, rather than merely his guess as to what the witnesses might say. A specific forecast would typically include the substance of the testimony (as opposed to merely stating what he plans to ask the witness), the basis of the witness' knowledge, the basis for the attorney's knowledge about the testimony, and the attorney's purpose in offering the evidence.

*Id.* at __,774 S.E.2d at 333 (internal quotation marks, citations, and alterations omitted).

At the hearing on the GAL's motion to quash the subpoena, Mother represented to the court a "specific forecast" of Andrew's testimony. Mother stated that Andrew could testify about his life with her and his life in foster care and the difference between the two; his experience being institutionalized for nine months and hospitalized three times while in DSS custody; his IEP being out of compliance during his time in foster care; and his experience in foster care being a detriment. In addition to forecasting the substance of Andrew's testimony, Mother represented the basis of Andrew's knowledge as being his own personal knowledge and the basis of her knowledge about Andrew's testimony as being her opinion. Finally, Mother represented that her purpose in offering Andrew's testimony was so his "wants and needs from his

perspective" could be presented to the court. We hold that Mother's testimony at the subpoena hearing provided a sufficient informal offer of proof that the trial court could, in its discretion, rely upon in excluding a formal offer of proof because Mother's prior testimony "establish[ed] the essential content or substance of the excluded testimony." *State v. Walston*, 229 N.C. App. 141, 145,747 S.E.2d 720, 724 (2013), *reversed on other grounds*, 367 N.C. 721, 766 S.E.2d 312 (2014).

At the disposition hearing, following the trial court's statement indicating that an offer of proof must be limited to the subject matter of anticipated testimony, Mother's counsel did not attempt to make a further or different offer. Mother, not her counsel, then asked the trial court to allow her to testify about what she expected Andrew's testimony to be, and the trial court rejected Mother's personal request. We note that the better practice for Mother's counsel would have been to announce to the trial court the intention to make an offer of proof before seeking testimony from Mother about what Andrew would say if called to testify, so that it would be clear to the trial court that Mother was not offering into evidence testimony that was hearsay or lacking foundation. We also note that the better practice for the trial court would have been to allow Mother's counsel to proceed in making a formal offer of proof. However, we cannot conclude that the trial court, after having heard and considered Mother's proffered information at a prior hearing, abused its discretion in rejecting Mother's proffer at the disposition hearing. In the context of all the evidence presented, we cannot hold that the trial court's ruling was "so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

C. Parent Report

Mother contends that the trial court abused its discretion when it did not allow her to introduce her Parent Report and other documents into evidence at the disposition hearing. We reject this argument because Mother failed to preserve the issue for appellate review.

Prior to the start of the adjudication hearing, on 19 October 2015, the trial court conducted a hearing on the "GAL's Response to Mother's Proposed Evidence & Motion in Limine." Counsel for all parties were present and had the opportunity to be heard. The trial court focused on the impropriety of Mother's filing of the Parent Report and the other documents contained in the Green Folder independent of her counsel, in violation of the North Carolina Rules of Civil Procedure. The trial court granted the GAL's motion *in limine*, and ordered that the documents be stricken "in their entirety from the [c]ourt file."

The court's ruling excluding the documents from evidence and striking them from the record prior to the adjudication hearing did not prevent Mother's counsel from seeking to properly introduce them as evidence during the disposition hearing. Mother's counsel failed to proffer the Parent Report and all contents of the Green Folder during the disposition hearing, and, as such, Mother has not preserved this issue for appellate review. *See State v. McCall*, 162 N.C. App. 64, 68, 589 S.E.2d 896, 899 (2004) (holding that where a motion *in limine* is granted, "[i]n order to preserve the underlying evidentiary issue, a party . . . is required . . . to attempt to introduce the evidence at the trial") (internal quotation marks, citations, and alterations omitted). The reason for this requirement is that the trial court's ruling on a motion *in limine* is preliminary to any evidence, and the court may reconsider the admissibility of challenged evidence based on other evidence presented at trial. *Heatherly v. Indus. Health Council*, 130 N.C. App. 616, 619-20, 504 S.E.2d 102, 105 (1998) (holding that "the court's ruling is not a final ruling on the admissibility of the evidence in question, but only interlocutory or preliminary in nature. Therefore, the court's ruling on a motion *in limine* is subject to modification during the course of the trial[]"). For example, during the disposition hearing, Mother's counsel introduced in evidence a 2015 letter from Dr. Morris at Duke Medicine that Mother had attached to the Parent Report and included in the Green Folder. Over the GAL's objection, the trial court admitted the document into evidence.

D. Different Evidentiary Rules

Mother contends the trial court abused its discretion by applying a different set of evidentiary rules to her than it did to other parties. We disagree.

Mother testified and presented evidence during the disposition hearing, the only phase of the termination proceeding at issue in her appeal. Mother argues that "[t]he trial court's refusal to allow the [Parent Report] was just another example of its double standard during the best interest phase." We reject this argument because, as discussed *supra*, Mother's counsel did not seek to introduce the Parent Report during the disposition hearing.

Mother also argues that the trial court violated her due process rights by quashing her subpoena for Andrew's testimony. One purpose of the Juvenile Code is "[t]o provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents[.]" N.C. Gen. Stat. § 7B-100 (2015); *see also In re L.D.B.*, 168 N.C. App. 206, 209, 617 S.E.2d 288, 290 (2005)

(holding that a respondent father's right to present evidence in a termination hearing "is inherent in the protection of due process[]").

As explained above, we hold that the trial court did not abuse its discretion in quashing the subpoena for Andrew's testimony. The trial court's decision to quash Mother's subpoena was based on a reasonable weighing by the trial court of the relevance of Andrew's testimony and the detrimental effect that testifying would have on Andrew. A careful review of the record demonstrates that the trial court's evidentiary rulings "assure[ed] fairness and equality" and provided Mother with a meaningful opportunity to participate in the termination proceeding.

At the disposition hearing, the trial court admitted the following exhibits presented by Mother: a 12 May 2014 letter from Dr. Alexander Myers and Louise Southern at the Autism Society of North Carolina; letters dated 21 July 2015 and 22 September 2015 from Dr. Beatriz Morris at Duke Children's Primary Care; an evaluation report sent from the diagnostic team to the IEP Committee of Clark's school; and a letter dated 17 August 2015 from Dr. Barbara Keith Walter with Duke University Medical Center. Moreover, prior to the disposition hearing, Mother was provided with reports putting her on notice of the theories of DSS and the GAL regarding the best interests of the children. Mother could have subpoenaed witnesses to come and testify regarding these reports in the disposition hearing, but failed to do so.

Because the trial court applied the same evidentiary standards to all parties and because Mother had the right to participate and present relevant evidence at the disposition hearing, we reject Mother's argument.

## II. Best Interest Determination

**[2]** Finally, Mother contends that the trial court abused its discretion by determining that termination of her parental rights was in the best interests of the children. Specifically, Mother challenges Dispositional Findings of Fact[2] Numbers 4, 5, 6, 7, and 8 as not supported by competent evidence, and challenges the court's conclusion that termination was in the best interests of the children. For the reasons discussed below, we conclude that each of the challenged findings of fact were supported by competent and sufficient evidence introduced during the termination proceeding, and that the trial court's conclusion was supported by its findings of fact.

---

2. Mother's brief mistakenly refers to these dispositional findings as conclusions of law.

"We review the trial court's conclusion that a termination of parental rights would be in the best interest of the child on an abuse of discretion standard." *In re R.B.B.*, 187 N.C. App. 639, 648, 654 S.E.2d 514, 521 (2007).

A. Challenged Findings

Mother challenges Dispositional Finding of Fact 4, which reads: "[Andrew] loves his mother, but is wary of her anger. He does not mention her, or ask about her present circumstances. [Clark] shows affection towards his mother during visits, but parts from her without distress." Dearing, Andrew's social worker, testified that Andrew "definitely loves his mother very much, . . . it's you know, apparent . . . in his conversations with her on the phone from what I've heard. I've not participated in those. . . . [B]ut he, you know, definitely is receptive to talking to her." However, Dearing also testified that "in conversations with [Andrew's] previous therapist and his present therapist, he does have some concerns about her anger. . . . [A]nd you know, whether or not she would still be angry with him if he returned home." Furthermore, Dearing testified that "other than the phone calls, [Andrew] does not really talk about [Mother]." Dearing testified that Clark "does have a bond with his mother as well. . . . [H]e is affectionate towards her . . . usually when he comes in for visits, although does want to . . . end the visit at certain times, . . . he, you know, responds to her attention . . . but then is just as willing to leave [] when the visit is over." This evidence was competent and sufficient to support the challenged finding.

Mother also challenges Dispositional Finding of Fact 5, which reads: "[t]he permanent plan is adoption. Mother declined to relinquish. Termination of parental rights will promote the prompt achievement of the plan for permanence." During the adjudication hearing, at DSS's request, the trial court took judicial notice of the decretal portions of each review hearing, including the oral order entered 17 March 2015, memorialized to writing 8 June 2015. In that Permanency Planning Review Order, the trial court changed the permanent plan of care for the children to adoption, with an alternative plan of guardianship with a court-appointed caretaker. At the disposition hearing, Dearing testified that if Andrew becomes "legally free" for adoption, there will be "a lot more" available placement options for him. The trial court noted that termination of Mother's parental rights will "aid in the accomplishment of a permanent plan for [Andrew] . . . now that he has blossomed relatively speaking . . . so that he can be in a stable home . . . and search for that home[.]" This evidence was competent and sufficient to support the challenged finding.

Mother also challenges Dispositional Finding of Fact 6, which reads: "[t]he likelihood of adoption for [Andrew] is good. His present foster parents do not wish to adopt. [Andrew] is already listed on a 'legal risk placement' website, but legal clearance will enable the social worker to reach out to far more candidates to provide [Andrew] with a permanent home." Dearing testified that, in the past school year, Andrew had transitioned to "more mainstream classes" and "was able to pass all of his classes this past quarter," with the exception of one "D." Dearing testified that Andrew is "doing well with the foster parents," has shown a decrease in self-injurious behavior, "is very likeable," and is "very adaptable to [] our family unit." Dearing further testified that "while he does have the diagnosis of autism[,] he is very high functioning . . . and would be considered adoptable." Dearing testified that Andrew's "current caretakers have stated that they are not interested in adopting him, not because they don't care for him but just because they [] don't want to have the commitment of adopting any child. It's not just [Andrew] specifically." This evidence was competent and sufficient to support the challenged finding.

Mother challenges Dispositional Finding of Fact 7, which reads: "[t]he likelihood of adoption for [Clark] is high, because his present foster family wants to adopt him, and has demonstrated strong ability to meet his needs." Dearing testified that Clark's foster family has "stated very strongly that they want to adopt him." Dearing testified that Clark "has certainly shown a lot more progress in this home than he has in any of the placements that he has been in previously[,]" noting that his speech and behavior had both improved. Dearing further testified that Clark's foster mother has worked with children with autism for over twenty years and "has a great deal of . . . experience in the field of working with children and adults with autism." This evidence was competent and sufficient to support the challenged finding.

Finally, Mother challenges Dispositional Finding of Fact 8, which reads: "[t]here are no present viable candidates for guardianship or custody, and adoption is far more likely than either of those to result in true permanence and repose for these children." Dearing testified that "in order to give the children permanence, [] given [Mother's] difficulty interacting with foster placements in the past, there is not really [] a possibility that there would be a stable placement that either child could go to." Dearing testified that "in order to have a permanent placement for either child, the parental rights would need to be terminated." This evidence was competent and sufficient to support the challenged finding.

B. <u>"Best Interest" Factors</u>

Mother contends that the termination order did not adequately consider three of the six factors a trial court is instructed to consider in making its best interest determination. In determining the issue of best interest, N.C. Gen. Stat. § 7B-1110(a) directs the trial court to consider and make written findings regarding the following relevant 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.

Mother argues the trial court did not consider "the likelihood of adoption," "whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile," and "the bond between the juvenile and the parent." Because the record reflects that the trial court considered evidence as to each relevant ground listed in N.C. Gen. Stat. § 7B–1110(a) and made adequate findings, we disagree with Mother's contention.

The trial court's dispositional findings demonstrate that the court considered the relevant criteria in determining that termination was in the best interests of Andrew and Clark. Specifically, as discussed *supra*, the trial court made findings, supported by competent evidence, concerning the likelihood of adoption for Andrew and Clark, concerning whether termination of Mother's parental rights would aid in the accomplishment of the permanent plan of adoption, and concerning the bond between Mother and each of the children.

Mother contends that the trial court abused its discretion in concluding that termination of her parental rights was in the best interest of Andrew because "[r]ealistically[,] Andrew was not going to be adopted by anyone." Mother argues that Andrew's situation is comparable to the juvenile in *In re J.A.O.*, 166 N.C. App. 222, 227-28, 601 S.E.2d 226, 230 (2004).

In *J.A.O.*, this Court held that the trial court abused its discretion in determining that termination of the mother's parental rights was in the best interest of the juvenile, where the GAL "argued at trial[ that] it is highly unlikely that a child of [the juvenile's] age and physical and mental condition would be a candidate for adoption, much less selected by an adoptive family." *Id.* at 228, 601 S.E.2d at 230. This Court recognized that a small possibility of the juvenile's adoption remained, but, held, "we are unconvinced that the remote chance of adoption in this case justifies the momentous step of terminating respondent's parental rights." *Id.*

This case is distinguishable from *J.A.O.* Dearing testified that "while [Andrew] does have the diagnosis of autism[,] he is very functioning" and "would be considered adoptable." Furthermore, Dearing testified that if Andrew were to become "legally free," *i.e.*, if Mother's rights were terminated, there will be a "lot more . . . options available for him." This testimony provided competent evidence to support the trial court's finding that "[t]he likelihood of adoption for [Andrew] is good." Moreover, this Court has held that "the absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights." *In re D.H.*, 232 N.C. App. 217, 223, 753 S.E.2d 732, 736 (2014) (citation omitted). Therefore, we reject Mother's argument that the trial court did not adequately consider the adoptability of Andrew.

Mother also contends that the trial court did not adequately consider her bond with her children. Specifically, Mother argues that "[b]oth children had great relationships with their mother."

In determining the best interests of the children, in addition to the evidence presented at the disposition hearing and previously addressed *supra*, the trial court also considered evidence from the adjudication hearing. The trial court made the following pertinent findings of fact based on the evidence presented at the adjudication hearing:

> 30. . . . Mother's visits were transferred from her home to the observation room at DSS after an October 23, 2015 incident in which [M]other admitted to dragging [Clark] to his time-out spot during a tantrum. . . .
>
> 31. . . . [Mother] once told [Andrew] it was his fault he was in foster care. These things were upsetting to [Andrew], who had a long-standing pattern of excessive self-blaming and self-harm, known to his mother.
>
> . . .

> 33. . . . In his individual therapy, [Andrew] had shared memories of incidents in his mother's home that were painful to him, such as his being locked out of his home at night, or occasions in which [Mother] allowed [Andrew's] older brother [] to give [Andrew] "whoopings" for bad behavior. When these issues were raised in family therapy, [Mother] was defensive and dismissive, and refused to validate the child's memories or feelings, to the child's detriment.

These findings are unchallenged by Mother on appeal. "Unchallenged findings of fact are binding on appeal." *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011) (citation omitted).

As support for Mother's contention that the trial court did not adequately consider her bond with her children, Mother points to evidence tending to show that Andrew wanted to live with his mother, that Mother attempted to visit and contact her children often, and that Mother was committed to the care and needs of her children. Mother's argument, however, disregards the well-established principle that "[f]indings of fact supported by competent evidence are binding on appeal, despite evidence in the record that might support a contrary finding." *In re C.I.M.*, 214 N.C. App. 342, 345, 715 S.E.2d 247, 250 (2011). Here, the trial court made ample findings of fact regarding the bond between Mother and her children.

Mother has failed to show that the court's decision that the termination of her parental rights as being in the best interests of Andrew and Clark was "so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. Accordingly, we hold that the trial court made the requisite findings under N.C. Gen. Stat. § 7B–1110(a) and these findings reveal a reasoned decision within the court's discretion.

## III. Conclusion

We hold that the trial court did not improperly restrict Mother's right to present evidence at the disposition hearing. Additionally, we hold that the trial court made the necessary and relevant findings in determining that termination of her parental rights was in the best interests of Andrew and Clark. Accordingly, the trial court did not abuse its discretion and we affirm the decision of the trial court.

AFFIRMED.

Judges DAVIS and ENOCHS concur.

IN THE MATTER OF D.M.O.

No. COA16-575

Filed 6 December 2016

**Termination of Parental Rights—grounds—abandonment—findings of fact—willfulness**

The trial court erred by terminating respondent mother's parental rights on the ground of abandonment where the trial court failed to make findings of willfulness. The trial court's order was vacated and remanded for further findings of fact and conclusions of law regarding N.C.G.S. § 7B-1111(a)(7).

Appeal by respondent-mother from order entered 16 March 2016 by Judge Beverly A. Scarlett in Orange County District Court. Heard in the Court of Appeals 19 October 2016.

*H. Wood Vann for petitioner-appellee father.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Joyce L. Terres, for respondent-mother.*

*No brief filed for guardian ad litem.*

ELMORE, Judge.

Respondent-mother appeals from the trial court's order terminating her parental rights to D.M.O. ("David")[1] on the ground of abandonment. We vacate and remand.

## *I. Background*

Respondent-mother and petitioner-father are the biological parents of David. The parties resided together with David as a family unit from the date of his birth in March 2007 until the parties separated in July 2010 due to escalating conflict between the parties that resulted in respondent-mother committing acts of domestic violence against petitioner-father. After the parties separated, petitioner-father took physical custody of David and filed a custody action in Durham County.

After a hearing, the trial court entered a permanent custody order on 25 January 2011, which granted petitioner-father legal and physical

1. A pseudonym is used to protect the minor's identity.

custody of David and respondent-mother unsupervised visitation on Tuesdays, Thursdays, and Saturdays. Respondent-mother and petitioner-father made agreements over the years to change the times of visitation, based on mutual convenience and changes in David's school and extracurricular activity schedules.

For several years, respondent-mother has struggled with drug addiction and substance abuse and has been incarcerated multiple times at multiple jails and prisons for issues related to drugs and other crimes. Relevant to this appeal, she was incarcerated at Wake County jail from 10 December 2014 to 7 January 2015. She was incarcerated at Durham County jail, participating in a drug treatment program, from 23 January to 2 March 2015. She returned to Wake County jail on 9 March and then was transferred in late July to a prison within the North Carolina Department of Adult Correction, where she remained until the termination hearing.

On 28 May 2015, petitioner-father filed a petition to terminate respondent-mother's parental rights to David alleging, *inter alia*, that she "willfully abandoned [David] for at least six (6) consecutive months immediately preceding the filing of the petition," pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). From jail, respondent-mother handwrote a letter to the clerk of court stating that she did not want her parental rights terminated, that she had been incarcerated for most of the year, and that she wanted an attorney. Respondent-mother also stated that "she ha[d] contacted [petitioner-father] many, many times[, and she] had either gotten [n]o response or [petitioner-father responding] 'No' & 'Busy' on multiple occasions[.]" On 30 June 2015, respondent-mother filed a formal response denying the allegations that she willfully abandoned David. At some point in July 2015, respondent-mother was transferred from Wake County jail to Eastern Correctional Institution in Maury, North Carolina. On 26 August 2015, a guardian ad litem ("GAL") was appointed for David.

On 29 January 2016, the district court held a termination hearing. On 16 March 2016, the trial court entered an order concluding that grounds existed to terminate respondent-mother's parental rights based on willful abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) and that termination was in David's best interests. Respondent-mother appeals.

## *II. Analysis*

Respondent-mother argues the trial court erred by concluding she willfully abandoned David pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) because there was insufficient evidence and findings of her "willfulness." In addition, respondent-mother contends the trial court erred by not

requiring David's GAL to perform his statutory duties of "offer[ing] evidence and examin[ing] witnesses at adjudication," as well as "explor[ing] options with the court at the dispositional hearing." *See* N.C. Gen. Stat. § 7B-601(a) (2015).

### A. Standard of Review

" 'This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law.' " *In re C.J.H.*, __ N.C. App. __, __, 772 S.E.2d 82, 88 (2015) (quoting *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000)). "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." *Id.* (citation omitted). We review *de novo* whether a trial court's findings support its conclusions. *See In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008) (citation omitted), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

However, meaningful appellate review requires that trial courts make "*specific findings* of 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." *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982). "Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (citation and quotation marks omitted). The court's order must include "specific ultimate facts to support the judgment, and the facts found must be sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." *Montgomery v. Montgomery*, 32 N.C. App. 154, 156–57, 231 S.E.2d 26, 28 (1977) (citations omitted).

### B. Willful Abandonment

Respondent-mother asserts "the trial court erred in concluding that [her] parental rights should be terminated solely on the basis of N.C. Gen. Stat. § 7B-1111(a)(7) when there were no findings of willfulness."

N.C. Gen. Stat. § 7B-1111(a)(7) (2015) (emphasis added) establishes grounds for terminating parental rights when "[t]he parent has *willfully* abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." In the context of abandonment, "[w]illfulness is 'more than an intention to do a thing; there must

also be purpose and deliberation.' " *In re S.R.G.*, 195 N.C. App. 79, 84, 671 S.E.2d 47, 51 (2009) (quoting *In re Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986)). Because "[w]ilful[l] intent is an integral part of abandonment and . . . is a question of fact to be determined from the evidence[,]" *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962), a trial court must make adequate evidentiary findings to support its ultimate finding of willful intent. *See In re T.M.H.*, 186 N.C. App. 451, 452, 652 S.E.2d 1, 1 (2007) (remanding for further findings "[w]here the trial court failed to make findings of fact and conclusions of law concerning the willfulness of respondent's conduct"). "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 Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997) (citation and quotation marks omitted).

Although "the trial court may consider [a parent's] conduct outside [the six-month] window in evaluating [a parent's] credibility and intentions[,]" *C.J.H.*, __ N.C. App. at __, 772 S.E.2d at 91 (citations omitted), the "determinative" period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition. *Young*, 346 N.C. at 251, 485 S.E.2d at 617. Thus, termination based on abandonment requires findings that "show more than a failure of the parent to live up to [his or her] obligations as a parent in an appropriate fashion." *In re S.R.G.*, 195 N.C. App. at 87, 671 S.E.2d at 53. The findings must "demonstrate that [a parent] had a 'purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims' to [the child]." *In re S.Z.H.*, __ N.C. App. __, __, 785 S.E.2d 341, 347 (2016) (quoting *S.R.G.*, 195 N.C. App. at 87, 671 S.E.2d at 53) (reversing a termination order based on abandonment for insufficient findings).

Here, respondent-mother's behavior between 28 November 2014 and 28 May 2015 is determinative. The trial court's relevant findings as to respondent-mother's conduct during this period follow:

> A. From 2012 to early 2015, when [respondent-mother] was not incarcerated, she showed up late for visits and over time the visits decreased in frequency. [Respondent-mother] was in custody from December 10, 2014 through January 7, 2015, and January 23, 2015 through March 2, 2015, and March 9, 2015 through present.
>
> B. [David] participates in baseball and basketball. [Petitioner-father] notified [respondent-mother] of [David's] game schedule. [Respondent-mother] attended

a few of the games. She has not attended any games over the last year.

C. To the knowledge of [petitioner-father] and his wife, [respondent-mother] last saw [David] in March or April of 2014. [Respondent-mother] has a history of asking to see [David] and now [sic] showing up or calling to cancel the visitation.

. . . .

G. [Respondent-mother] did not visit with [David] or contact [David] during November 2014 or December 2014.

. . . .

I. On or about January 7, 2015, [respondent-mother] texted [petitioner-father] telling [petitioner-father] that she loves and misses [David]. [Respondent-mother] did not ask to speak to [David] or ask that a message be conveyed to [David]. [Respondent-mother] did not exercise Court ordered visits with [David] during January 2015.

J. [Respondent-mother] failed to exercise Court ordered visitation during February 2015.

K. [Respondent-mother] failed to exercise Court ordered visitation during March 2015.

L. [Respondent-mother] failed to exercise Court ordered visitation during April 2015.

M. [Respondent-mother] failed to exercise Court ordered visitation during May 2015.

N. [Respondent-mother] has called in the past and requested to speak to [David]. Her request was honored (see [petitioner-father's] Exhibit 2).

O. [Respondent-mother] has requested visits in the past and those visits were allowed by [petitioner-father]. (see [petitioner-father's] Exhibit 2).

P. [Respondent-mother's] sister has requested visits with [David] and phone calls. Requests were granted (see [petitioner-father's] Exhibit 2).

Q. [Respondent-mother] testified that she had made attempts to call and sent letters but did not keep track of

> when she did so because she did not think she would need them. Her recollection was that she sent a letter in April and May of 2015. Furthermore, she also sent a small number of texts during times she was not in custody.

Respondent-mother argues these findings are inadequate to establish that she willfully abandoned David. Specifically, she contends that despite findings that she was incarcerated for all but 33 of the determinative 180 days preceding the filing of the termination petition, the court found that she failed to exercise visitation and attempted to make contacts during this period, yet failed to make "findings that any of [respondent-mother's] conduct was willful or manifested a willful intent to abandon her son." We agree.

"[I]ncarceration, standing alone, neither precludes nor requires a finding of willfulness [on the issue of abandonment,]" *In re McLemore*, 139 N.C. App. 426, 431, 533 S.E.2d 508, 511 (2000) (citation omitted), and "[d]espite incarceration, a parent failing to have any contact can be found to have willfully abandoned the child[.]" *In re D.J.D.*, 171 N.C. App. 230, 241, 615 S.E.2d 26, 33–34 (2005) (citation omitted). However, the circumstances attendant to a parent's incarceration are relevant when determining whether a parent willfully abandoned his or her child, and this Court has repeatedly acknowledged that the opportunities of an incarcerated parent to show affection for and associate with a child are limited. *See*, *e.g.*, *In re B.S.O.*, 234 N.C. App. 706, 711, 760 S.E.2d 59, 64 (2014) ("[A] parent's opportunities to care for or associate with a child while incarcerated are different than those of a parent who is not incarcerated. The opportunities of an incarcerated parent are even more limited than those of a deported parent . . . ."); *In re Shermer*, 156 N.C. App. 281, 290, 576 S.E.2d 403, 409 (2003) ("*Because respondent was incarcerated*, there was little involvement he could have beyond what he did—write letters to [his children] and inform DSS that he did not want his rights terminated." (emphasis added)); *In re Adoption of Maynor*, 38 N.C. App. 724, 726–27, 248 S.E.2d 875, 877 (1978) ("[T]he fact that the respondent was unable to locate his son and was unable to make support payments *as a result of his incarceration*, is inconsistent with a willful intent to abandon his son." (emphasis added)); *see also D.J.D.*, 171 N.C. App. at 240, 615 S.E.2d at 33 (affirming termination of parental rights based in part upon abandonment, "acknowledg[ing] that incarceration limited [the parent's] ability to show affection"); *In re J.L.K.*, 165 N.C. App. 311, 318–19, 598 S.E.2d 387, 392 (2004) (upholding a termination order based upon neglect, stating that "[a]lthough his options for showing affection [while incarcerated] are greatly limited,

the respondent will not be excused from showing interest in his child's welfare by whatever means available"). Additionally, the effects of a parent's addiction may be relevant when considering evidence related to willfulness on the issue of abandonment. *See*, *e.g.*, *S.R.G.*, 195 N.C. App. at 86, 671 S.E.2d at 52 (analyzing findings relating to a parent's failure to comply with her case plan and continued substance abuse, explaining that "[t]hese are failings that do not inherently suggest a willful intent to abandon, as they are subject to other explanations—uncontrolled addiction, for example" (citations omitted)); *Bost v. Van Nortwick*, 117 N.C. App. 1, 18, 449 S.E.2d 911, 921 (1994) ("Our review of respondent's inability to pay child support *due to his dependency on alcohol* and related financial problems does not support a finding of willful abandonment.").

Furthermore, our cases have consistently recognized that the finding of willful intent for abandonment under N.C. Gen. Stat. § 7B-1111(a)(7) is something greater than that of the willful intent for leaving a child in foster care without making reasonable progress under N.C. Gen. Stat. § 7B-1111(a)(2). *See*, *e.g.*, *In re J.L.H.*, 224 N.C. App. 52, 54, 741 S.E.2d 333, 335 (2012) ("The willful leaving of the juvenile in foster care is 'something less than willful abandonment' and 'does not require a showing of fault by the parent.' (citation omitted)); *S.N.*, 194 N.C. App. at 146, 669 S.E.2d at 59. Under N.C. Gen. Stat. § 7B-1111(a)(2), "[w]illfulness is established when [a parent] had the *ability* to show reasonable progress, but was unwilling to make the effort." *In re D.C.*, 225 N.C. App. 327, 330, 737 S.E.2d 182, 185 (2013) (emphasis added) (citation and quotation marks omitted). In determining willfulness in this context, "[i]t is significant that the tasks assigned . . . were within [a parent's] ability to achieve, and did not require financial or social resources beyond [a parent's] means." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001); *see also In re Matherly*, 149 N.C. App. 452, 455, 562 S.E.2d 15, 18 (2002) ("Evidence showing *a parents' ability, or capacity to acquire the ability*, to overcome factors which resulted in their children being placed in foster care *must be apparent for willfulness to attach.*" (emphasis added) (citation omitted)).

In *D.J.D.*, this Court considered the termination of parental rights under willful abandonment when the parent was incarcerated during the relevant six-month period. 171 N.C. App. at 241, 615 S.E.2d at 33–34. In that case, the trial court found that, *inter alia*, while the respondent had been in custody, "he . . . had absolutely no contact with his children"; "[h]e ha[d] made no telephone calls, sent any cards, written any letters, nor arranged for any gifts"; "no one acting on his behalf (family member or friend) had contacted the Department of Social Services [DSS] requesting

a visit with or attempting to communicate with [his] children"; and he had paid "no child support . . . but . . . was not employed at the time." *Id.* at 235, 615 S.E.2d at 30. The trial court also found that although the respondent "did have contact with his mother, sister, and the children's mother," he never requested those individuals, or any other family member or friend, to contact DSS to check on the welfare of his children nor to ascertain an address where he could send letters to his children. *Id.* Additionally, the court found that "[a]lthough respondent is limited as to what he can do at this time to provide for his children while he is incarcerated, he has failed to provide any contact, love, or affection for his children," *id.* at 236, 615 S.E.2d at 30, and, therefore, terminated his parental rights under abandonment. On appeal, we held that these findings were sufficient to terminate the respondent's parental rights based on abandonment, since they established that the respondent, although able to while incarcerated, "ha[d] taken none of the steps to develop or maintain a relationship with his children." *Id.* at 241, 615 S.E.2d at 34.

In *B.S.O.*, this Court considered a parent's deportation to another country in the context of termination based on abandonment and analogized deportation with incarceration, noting that "[t]he opportunities of an incarcerated parent are even more limited than those of a deported parent, . . . [who] would be free to work, send funds to support a child, or communicate with a child by phone, internet, or mail from his own country." 234 N.C. App. at 711–12, 760 S.E.2d at 64. The *B.S.O.* Court noted several findings made by the trial court, including that the deported parent failed to "provide[ ] any financial support for the children *although [he had] the ability to do so*," had "no known disabilities," and had on one occasion contacted his social worker while in Mexico but otherwise made no effort to keep updated on his children while they were in custody. *Id.* at 711, 760 S.E.2d at 63. The *B.S.O.* Court explained that "[b]oth the evidence and the court's findings reflect that *respondent-father's arrest and subsequent deportation did not prevent him from communicating* with his children and [the agency that retained custody of his children]." *Id.* at 713, 760 S.E.2d at 65 (emphasis added). Accordingly, we upheld the termination based upon abandonment because the findings "show[ed] that, during the relevant six-month period, respondent-father 'made no effort' to remain in contact with his children or their caretakers and neither provided nor offered anything toward their support" although able. *Id.* at 711, 760 S.E.2d at 64.

Here, despite finding that respondent-mother had a history of substance abuse and was incarcerated for multiple periods spanning across each of the determinative six months, the court also found that, during

those months, respondent-mother failed to exercise visitation and to attend David's sports games, and failed to contact David during three of those months. Yet the court never made findings addressing how respondent-mother's periodic incarceration at multiple jails, addiction issues, or participation in a drug treatment program while in custody might have affected her opportunities to request and exercise visitation, to attend games, or to communicate with David. The trial court made no findings establishing whether respondent-mother had made any effort, had the capacity, or had the ability to acquire the capacity, to perform the conduct underlying its conclusion that respondent-mother abandoned David willfully. Unlike in *D.J.D.*, the trial court here made no findings indicating that it considered the limitations of respondent-mother's incarceration, or that respondent-mother was able but failed to provide contact, love, or affection to her child while incarcerated. Unlike in *B.S.O.*, the trial court here made no findings related to respondent-mother's ability but failure to provide financial support or her abilities but failures to make efforts to communicate with her child or her child's caretakers.

We conclude that the trial court's findings (subparts B, I-M) are inadequate to support its conclusion of willful abandonment, as these findings fail to address respondent-mother's efforts or ability to request and exercise visitation, to attend David's sports games, or to communicate with David, particularly in light of the incomplete findings relating to her history of substance abuse and periodic incarcerations at multiple jails spanning each of the determinative six months, as well as the evidence of her participation in drug rehabilitation program while in custody and petitioner-father's testimony that he was not as receptive to her having a relationship with David while she was in and out of custody.

The trial court's remaining findings, identified as subparts A–S, are inadequate to support a conclusion on the issue of abandonment. Subparts C and Q are recitations of testimony without the force of a finding of fact. *See In re M.R.D.C.*, 166 N.C. App. 693, 699, 603 S.E.2d 890, 894 (2004) ("Recitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge . . . ." (citations and quotation marks omitted)). Subparts A, G, H, N, O, and P are insufficiently specific, in that these findings fail to identify specific conduct within the determinative period. Subparts D, E, F, P, R, and S fail to address factual grounds which could support a conclusion that respondent-mother willfully abandoned David. Thus, the trial court's findings do not demonstrate that respondent-mother had a "purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to

[David]." *S.Z.H.*, __ N.C. App. at __, 785 S.E.2d at 348 (citation and quotation marks omitted).

Nonetheless, "when a court fails to make appropriate findings or conclusions, this Court is not required to remand the matter if the facts are not in dispute and only one inference can be drawn from them." *In re J.K.C.*, 218 N.C. App. 22, 39, 721 S.E.2d 264, 276 (2012) (citation and quotation marks omitted). Here, however, there are material conflicts in the evidence relating to the issue of respondent-mother's willfulness that were not resolved by the trial court's order.

**C. Conflicts in Evidence**

According to petitioner-father's testimony, respondent-mother never sent any letters addressed to him or David during the relevant six-month period; he was receptive to respondent-mother having a relationship with David, except "[he] wasn't as receptive" "when [he] was getting text messages from the jail that [respondent-mother] was in jail every other week or every other month"; respondent-mother never called him from Durham County jail between 23 January and March 2015; she never asked him in January 2015 if David could participate in her birthday; she never called him on 3 March 2015 for David's birthday; and she never texted him between 2 and 9 March 2015, when she was temporarily released from jail.

According to respondent-mother's testimony, however, she called petitioner-father on 7 January when she was released from jail and texted him about seeing David, but he "texted [her] back saying that they had plans"; she called petitioner-father "several times" between 7 and 23 January and he failed to answer; she called him twice when she was in Durham County jail between 23 January and 2 March, but he never accepted the calls; she called petitioner-father several times on 3 March to speak with David on his birthday but petitioner-father never answered; she then sent text messages asking to see David for his birthday sometime that week "[a]nd when [petitioner-father] didn't response to any of those texts, [she] sent one [requesting that he] . . . at least tell [David she] love[s] him and happy birthday." Respondent-mother testified that she made several phone calls and wrote several letters "but when [petitioner-father] didn't call [her] back, . . . there was nothing [she] could do." When asked why she did not exercise visitation when she was released from jail in late November 2014, she replied: "Because [petitioner-father] had cut off the visits. He was not allowing me to see [David]." Respondent-mother stated that between 9 March and 28 May, she tried to contact petitioner-father about David by sending letters

to petitioner-father's address, "sen[ding] one [letter] every month" but "[she] never got any response."

We recognize that the power to observe and listen to all the witnesses in a termination hearing "allows the trial court to 'detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges.' " *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citation omitted). Although it was certainly within the court's discretion to discredit respondent-mother's testimony regarding her attempts to contact petitioner-father about David and to attempt to request and exercise visitation, the current findings are inadequate or fail to resolve conflicts in the evidence material to a conclusion that respondent-mother abandoned David willfully, particularly: whether and to what extent respondent-mother called, texted, and mailed letters during the relevant period; whether and to what extent respondent-mother was able to participate in exercising parental duties on account of her periodic incarceration at multiple jails; and whether and to what extent petitioner-father hindered respondent-mother from communicating with David or exercising visitation; among other evidentiary findings relevant to determining the ultimate finding of willfulness in the context of abandonment.

Without further fact-finding, we cannot determine whether the trial court's conclusions are supported by its findings. Accordingly, we vacate the termination order and remand to the trial court for further findings and conclusions relating to the issue of the willfulness of respondent-mother's conduct during the relevant six-month period, in order for the trial court to determine whether petitioner-father proved the ground of willful abandonment. *See, e.g.*, *In re F.G.J.*, 200 N.C. App. 681, 694, 684 S.E.2d 745, 754 (2009) (vacating a termination order and remanding for further fact-finding to address when "the trial court's current findings [were] insufficient to permit this Court to review its decision under N.C. Gen. Stat. § 7B-1111(a)(2)"). The trial court must resolve material conflicts in the evidence related to the willfulness of respondent-mother's conduct and may, in its discretion, receive additional evidence in order to do so. *In re D.R.B.*, 182 N.C. App. 733, 738–39, 643 S.E.2d 77, 81 (2007) (vacating and remanding termination order for entry of adequate findings of fact and conclusions of law to demonstrate grounds for termination and permitting the trial court to receive additional evidence on remand).

We have considered respondent-mother's remaining argument that the trial court erred by failing to require the GAL to perform his statutory duties of "offer[ing] evidence and examin[ing] witnesses at

adjudication," as well as "explor[ing] options with the court at the dispositional hearing." *See* N.C. Gen. Stat. § 7B-601(a) (2015). Although the record and transcript as developed do not permit us to engage in a meaningful review, the record demonstrates that the GAL presented his best-interests report, listened to respondent-mother's testimony during adjudication, and participated during the dispositional phase of the termination hearing but is unclear as to when the GAL arrived and left the court room during the proceedings. We emphasize that adherence to the GAL program by both the GAL and the trial court is critically important to ensure minors' best interests are protected and served.

## *III. Conclusion*

The trial court failed to enter adequate findings of fact and conclusions of law to demonstrate grounds for termination regarding N.C. Gen. Stat. § 7B-1111(a)(7). In addition, the trial court's order fails to resolve material conflicts in the evidence relevant to a conclusion that respondent-mother willfully abandoned David. Accordingly, we vacate the trial court's order and remand for further findings of fact and conclusions of law regarding N.C. Gen. Stat. § 7B-1111(a)(7). The trial court may hear and receive additional evidence.

VACATED AND REMANDED.

Judges HUNTER, JR. and DILLON concur.

IN THE MATTER OF D.T.N.A.

No. COA16-542

Filed 6 December 2016

**Termination of Parental Rights—care and supervision of child—findings**

An order terminating the respondent's parental rights was reversed and the matter was remanded for further proceedings. Respondent's parental rights were terminated on the ground that he was incapable of providing the proper care and supervision of the child. The court's finding to that effect was based on drug use, the inability to care for the child's daily needs, poor decision-making, failure to comply with the case plan, and the lack of an appropriate child care placement arrangement. Those findings were not supported by the evidence and did not support the conclusion that respondent was incapable of providing proper care and supervision.

Appeal by respondent from order entered 22 February 2016 by Judge Betty J. Brown in Guilford County District Court. Heard in the Court of Appeals 21 November 2016.

*Mercedes O. Chut, for Guilford County Department of Health and Human Services, petitioner-appellee.*

*Amanda Armstrong for guardian ad litem.*

*Appellate Defender Glen Gerding, by Assistant Appellate Defender Annick Lenoir-Peek for respondent-appellant.*

McCULLOUGH, Judge.

Respondent, the father of D.T.N.A. (hereafter "Danny"[1]), appeals from an order terminating his parental rights on grounds (1) he is incapable of providing proper care and supervision such that the child is a dependent juvenile and lacks an appropriate alternative child care arrangement; and (2) during the six months immediately preceding the filing of the petition to terminate parental rights, he willfully abandoned Danny. Because the evidence and findings of fact do not support the

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

court's conclusions of law that these two grounds exist for termination of respondent's parental rights, which the appellee and the guardian *ad litem* candidly concede in their briefs, we reverse the order.

## I. Procedural History

On 10 February 2014, Guilford County Department of Health and Human Services ("Petitioner") filed a juvenile petition seeking an adjudication that the infant Danny was a neglected and dependent juvenile. Petitioner took nonsecure custody of Danny on that date. On 9 April 2014, the court held a hearing and filed an order on 5 May 2014 adjudicating Danny to be a dependent juvenile and continuing custody with petitioner. The court found that Danny's mother was arrested on 7 February 2014 on charges of multiple criminal offenses in this state and South Carolina, including armed robbery. Respondent had pending charges in Guilford County of possession of marijuana and driving while impaired, and he was on probation.

The court thereafter conducted several review hearings. At a permanency planning and review hearing on 31 July 2015, the court changed the permanent plan from reunification to adoption with a concurrent plan of reunification. On 28 September 2015, petitioner filed a petition to terminate the parental rights of both parents. The court conducted a hearing on 19 January 2016 and filed an order on 22 February 2016 terminating the parental rights of both parents. Respondent filed notice of appeal on 23 March 2016.

## II. Standard of Review

During the adjudication phase of a termination of parental rights proceeding, the trial court "examines the evidence and determines whether sufficient grounds exist under N.C. Gen. Stat. § 7B-1111 to warrant termination of parental rights." *In re T.D.P.*, 164 N.C. App. 287, 288, 595 S.E.2d 735, 736 (2004), *aff'd per curiam*, 359 N.C. 405, 610 S.E.2d 199 (2005). The focus is upon "whether the parent's individual conduct satisfies one or more of the statutory grounds which permit termination." *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007). On appeal, our review is limited to a determination of whether the findings of fact are supported by clear, cogent and convincing evidence and whether the findings of fact support the adjudicatory conclusions of law. *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6, *disc. review denied sub nom. In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004). The conclusions of law are reviewable *de novo*. *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009). We accordingly determine whether the court's findings of fact

support the court's conclusions of law that grounds existed to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), incapability of providing for proper care and supervision, and N.C. Gen. Stat. § 7B-1111(a)(7), willful abandonment.

## III. Discussion

### A. Incapability of Providing Proper Care and Supervision

We first address termination of respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(6) on the ground that he is incapable of providing for the proper care and supervision of Danny and the incapability will continue for the foreseeable future. N.C. Gen. Stat. § 7B-1111(a)(6) (2015). The incapability under this statute "may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement." *Id.* To terminate parental rights on this ground, the court's findings must address (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements. *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005).

In finding of fact number 30, the trial court stated:

> Within the meaning of N.C.G.S. § 7B-1111(a)(6), the father is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is dependent within the meaning of N.C.G.S. § 7B-101, there is reasonable probability that such incapability will continued [sic] for the foreseeable future and his incapability is due to conditions that render him unable to parent the juvenile because of his drug use, inability to care for [Danny's] daily needs, poor decision making that affected the well-being of his juvenile and lacks an appropriate alternative child care arrangement. [Respondent] has visited with [Danny], but the juvenile has been in care since he was two or three days old and now he is fast approaching his second birthday. [Respondent] has failed to comply with his case plan.

The court thus based its finding that respondent is incapable of providing proper care and supervision on four bases: (1) respondent's drug use; (2) his inability to care for Danny's daily needs; (3) his poor decision making; and (4) his failure to comply with the case plan. We examine each basis to determine whether it is supported by evidence and

whether it supports a conclusion that respondent is incapable of providing proper care and supervision. We also examine the finding that he lacks an appropriate alternative child care placement arrangement.

(1) Respondent's Drug Use. The court made only one finding of fact concerning respondent's usage of drugs, as follows:

> 23. [Respondent] admitted to the use of illegal substances and smoked "pot" as recently as New Year's Eve. Further, [respondent] refused to submit to drug testing by the Department of Health and Human Services and the Court considers these refusals as a positive drug screen. [Respondent] testified that he had to work and on November 10, 2015, when he was given the documents for the drug screen he said "It'll be good[.]"[] The Court considered this test positive because [respondent] failed to take the drug screen as no test results were received. [Respondent] admitted using marijuana on or about New Year's [E]ve.

Other than respondent's admission to smoking marijuana on the one occasion on New Year's Eve three weeks before the hearing, we can find no evidence in the record affirmatively showing that respondent engaged in substance abuse after the child was born. At best, the court's finding assumes, without basis, that by not taking a drug test, respondent would have tested positive for controlled substances. The record, however, tends to suggest otherwise. The preamble to the court's order terminating respondent's parental rights states that the court took judicial notice of the court file. Among other things, the court file contained permanency planning orders in which the court found as facts that respondent has had multiple drug screens as part of his criminal probation during the pendency of this matter, all of which have been negative. The court report prepared by petitioner for the permanency planning hearing on 18 November 2015 showed that since Danny has been in foster care, respondent has tested negative for all illegal substances, that the social worker had not asked respondent to undergo a drug screen for several months until 10 November 2015, and that respondent was on criminal probation until July 2015, during which time he never tested positive for any illegal substances.

Even if respondent had used drugs, the burden is upon the petitioner to show that the parent's substance abuse would prevent the parent from providing for the proper care and supervision of the child. *In re A.G.M.*, __ N.C. App. __, __, 773 S.E.2d 123, 133 (2015). A mere showing that a

parent has abused alcohol or drugs is insufficient to terminate parental rights. *In re Phifer*, 67 N.C. App. 16, 25, 312 S.E.2d 684, 689 (1984). We can find no evidence to indicate that respondent's alleged drug or substance abuse would prevent him from providing for the proper care and supervision of Danny. Petitioner thus has not satisfied this burden.

(2) Inability to provide for child's daily needs. Respondent challenges the court's finding number 20 in which the court found that "[respondent] knows how to care for [Danny] but could not demonstrate the techniques he learned through the Healthy Start Program on the juvenile. Further, [respondent] failed to pay attention to [Danny] and played video games instead of caring for his child."

The other findings made by the court, and the report of the lead caseworker for Healthy Start, contradict this finding. For example, in finding of fact number 18, the court narrates parenting issues or deficiencies but then notes that respondent rectified the issues or addressed the deficiencies when they were called to his attention. The report of the Healthy Start lead caseworker dated 27 April 2015 shows that respondent engages Danny during visits "with play, literacy and displays of affection," responds to cues from Danny, provides "appropriate redirection for unwanted behavior," and "demonstrate[s] an understanding of child milestones[,] often referencing the material presented during past sessions and with Fathers Matters [sic]." The caseworker noted "[t]here have not been any presented concerns during the supervised visits" and respondent "has maintained compliance with Healthy Start and will be transitioned to closing in May 2015 having completed his service goals with the program."

(3) Poor decision making. Respondent challenges finding of fact number 25 in which the court found respondent "made poor decisions regarding [Danny] and clearly chooses his girlfriend over his child." The finding does not specify the "poor decisions" made by respondent, and other findings made by the court do not demonstrate that respondent "clearly chooses his girlfriend over his child." The court found that respondent moved out of the home he shared with the girlfriend so he could have unsupervised visits with Danny. The court further found that although respondent did subsequently move back in with the girlfriend, respondent reported that after he moved out of the apartment someone shot at the windows and doors of the apartment, which suggests that the apartment was not located in a neighborhood that was safe for Danny.

(4) Non-compliance with case plan. Finding of fact number 16 shows that the case plan required respondent to obtain and maintain

stable employment, provide copies of his paycheck stubs and employment updates within 48 hours, obtain suitable and stable housing for a minimum of six months, complete a parenting assessment and follow the recommendations, attend all visits, participate in shared parenting, participate in Healthy Start services, participate in Fathers Matter Group, participate in "CC4C" when requested, and meet with the JCITI coordinator and attend all JCITI court reviews. Other findings show that respondent worked at a college two days per week earning $750 per month, supplemented by playing music, and that respondent stayed current in his child support obligation of $50.00 per month. Respondent cleaned his house, and relinquished his pit bull dogs, to make the home appropriate for the child. Respondent was permitted visits twice per week, which started in March 2015. Although he did miss eight visits between March and late July 2015, he attended the majority of them and he successfully completed the Healthy Start parenting program. Other than a finding that respondent failed to participate in "shared parenting," the court's findings do not indicate that respondent failed to comply with participation in CC4C, meetings with the JCITI coordinator, and attendance of JCITI reviews.

<u>(5) Lack of Alternative Child Care Arrangement</u>. In finding of fact number 27, the court found that respondent never offered another child care placement for Danny, other than himself and his girlfriend. This finding is contradicted by the case file, which showed respondent had recommended a cousin for placement, that a home study was conducted and placement with this relative was recommended by petitioner, and that the court approved this placement on 28 February 2014. In addition, at the termination hearing the social worker testified that relatives were identified by respondent as a placement option, that a home study of these relatives was conducted, and that placement with the relatives was approved but that placement with this relative was not utilized because respondent believed it was better for Danny to remain in the current foster placement.

### B. <u>Willful Abandonment</u>

One's parental rights may be terminated if the court determines that a parent "has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion" to terminate parental rights. N.C. Gen. Stat. § 7B-1111(a)(7) (2015). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986). "[I]f 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 . . . abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962).

In finding of fact number 32, the court found

> Within the meaning of N.C.G.S. § 7B-1111(a)(7), during the six months immediately preceding the filing of the Petition to Terminate the Parental Rights, that is, from March 28, 2015 to September 28, 2015, [Respondent] has willfully abandoned the juvenile in that the father has failed to provide a plan for [Danny] and comply with his case plan.

As with finding of fact number 30, the finding that respondent failed to provide a case plan and comply with it is directly contradicted by the court's other findings of fact which we have discussed above and is not supported by evidence. The court's findings of fact show that respondent did enter into a case plan and that he substantially complied with the case plan.

We further conclude that the court's findings of fact do not support the conclusion of law that respondent has willfully abandoned the child. The court's findings demonstrate that respondent is current in his child support obligation, regularly visits the child and interacts with him, attends parenting classes to become a better parent to the child, and participates in the child's medical appointments. These findings do not portray a parent who "manifests a willful determination to forego all parental duties and relinquish all parental claims to the child[]" or "withholds his presence, his love, his care, [and] the opportunity to display filial affection, and willfully neglects to provide support and maintenance[]" within the accepted definitions of abandonment.

The order terminating respondent's parental rights is accordingly reversed and the matter is remanded to Guilford County District Court for further proceedings.

REVERSED AND REMANDED.

Judges BRYANT and TYSON concur.

IN THE MATTER OF P.T.W., D.O.B.: 4/7/2013

No. COA16-632

Filed 6 December 2016

**1. Termination of Parental Rights—cessation of reunification efforts—sufficiency of findings of fact**

The trial court did not err by entering an order ceasing reunification efforts and an order terminating respondent mother's parental rights. Although the trial court's finding that respondent had not reengaged in therapy since moving to Pitt County was not supported by the evidence presented at the hearing, the remaining findings of fact supported the trial court's ultimate decision to cease reunification efforts.

**2. Appeal and Error—preservation of issues—failure to object at trial—guardian ad litem**

Respondent mother failed to object to the lack of a guardian ad litem (GAL) for her minor child during the parental termination proceedings, and the issue was therefore not preserved for appellate review. Further, there was nothing to suggest it was unreasonable for the trial court to forego GAL assistance in determining the minor child's best interests.

Appeal by Respondent-Mother from orders entered 31 August 2015 and 18 April 2016 by Judge Keith Gregory in District Court, Wake County. Heard in the Court of Appeals 17 October 2016.

*Wake County Attorney's Office, by Deputy County Attorney Roger A. Askew and Senior Assistant County Attorney Allison Pope Cooper, for Wake County Human Services.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender J. Lee Gilliam, for Respondent-Appellant Mother.*

McGEE, Chief Judge.

K.W. ("Respondent-Mother") appeals an order entered 31 August 2015 ceasing reunification efforts ("CRO") and an order entered 18 April 2016 terminating her parental rights ("TPR order"). After careful review, we affirm.

## I. Background

Respondent-Mother's sixth child, P.T.W., was born on 7 April 2013. Respondent-Mother received no prenatal care throughout her pregnancy, and P.T.W. was born with a medical condition that caused his intestines to be outside his body. As a result, P.T.W. required multiple corrective surgeries and remained in the Neonatal Intensive Care Unit at Wake Medical Center ("WMC") until 15 May 2013. At the time of P.T.W.'s birth, Respondent-Mother did not have custody of any of her five other children.

Wake County Human Services Child Protective Services ("WCHS") received an assist request from Vance County Department of Social Services ("VCDSS") on 22 April 2013 reporting conditions that had led to the removal of Respondent-Mother's five other children from her custody. The report cited Respondent-Mother's confirmed alcohol and drug abuse, past threats to harm her children, and sustained lack of employment. WMC staff later informed WCHS that, prior to the 22 April 2013 report, Respondent-Mother

> had been inconsistent with visit[ing P.T.W.] at the hospital, reported not having supplies for the baby, and was not prepared to provide appropriate care for her special needs infant. In addition . . . [Respondent-Mother] appeared to have slurred speech and oppositional behaviors when talking to [WMC] staff, indicative of substance abuse.

At WMC, Respondent-Mother identified Lynn Williams ("Williams") as P.T.W.'s father, but subsequently informed a WCHS social worker that she was unsure of P.T.W.'s paternity. DNA testing later confirmed Williams as P.T.W.'s father.[1] Respondent-Mother told WCHS she had recently secured her own housing, but could not afford to have the electricity turned on.

WCHS filed a juvenile petition on 3 May 2013 alleging P.T.W. was dependent and in need of alternative placement by the State. WCHS was given non-secure custody of P.T.W. that same day.

Respondent-Mother appeared at a child planning conference on 9 May 2013. WCHS recommended that Respondent-Mother "complete a mental health assessment and a substance abuse assessment and follow all recommendations, . . . obtain/maintain stable and suitable housing and lawful income sufficient to meet the needs of her family, and follow

---

1. Williams's parental rights were terminated by the same order Respondent-Mother appeals, but Williams is not a party to the present appeal.

the court orders from Vance County." Respondent-Mother reported she had obtained full-time employment and had completed her case plan with VCDSS. WCHS also recommended that Respondent-Mother be granted a one-hour supervised visit with P.T.W. once a week.

Respondent-Mother underwent a mental health assessment on 24 May 2013 that resulted in a diagnosis of Adult Antisocial and Antisocial Personality Disorder. She also submitted to a substance abuse assessment on 3 June 2013 and was diagnosed with "Alcohol Abuse in partial remission." Respondent-Mother alleged that, on or around 1 June 2013, Williams slammed her against a wall and threatened to kill her. Respondent-Mother was granted an *ex parte* domestic violence protective order ("DVPO") against Williams on or around 3 June 2013.

Following a review hearing on 12 June 2013, P.T.W. was adjudicated dependent by order entered 25 June 2013. The trial court ordered that Respondent-Mother

> a) continue to show proof of stable and suitable housing and lawful income to meet the needs of the child; b) complete a psychological evaluation and follow all recommendations; c) follow the recommendations of her substance [abuse] assessment by complying with random drug/alcohol screens; d) demonstrate knowledge learned from anger management and parenting classes in her social interactions and life choices and take a parenting class for infants and toddlers; e) complete SafeChild MOVE [Mothers Overcoming Violence through Education and Empowerment] program and demonstrate knowledge learned; [and] f) maintain contact with WCHS and notify the agency of any change in situation or circumstance within [five] business days.

The court ordered that Respondent-Mother receive at least one hour a week of supervised visitation with P.T.W., and that WCHS "continue to make reasonable efforts to eliminate the need for placement of [P.T.W.] outside the home."

In August 2013, the trial court approved placement of P.T.W. with Letha Richardson ("Richardson"), Respondent-Mother's cousin. However, multiple attempts by WCHS to contact Richardson about placing P.T.W. were unsuccessful and P.T.W. remained in WCHS custody. Respondent-Mother moved from Raleigh to Lillington, in Harnett County, on 3 September 2013. At the request of VCDSS, Harnett County Department of Social Services ("HCDSS") conducted a home study of

Respondent-Mother's residence in Lillington. HCDSS informed VCDSS that it did not recommend placement of Respondent-Mother's children with her as of 27 November 2013.[2] Respondent-Mother moved to Fuquay-Varina, in Wake County, in January 2014.

Between August 2013 and July 2015, the trial court held approximately eight review hearings to evaluate Respondent-Mother's compliance with P.T.W.'s case plan and WCHS's continuing efforts at reunification. Following a hearing on 16 May 2014, the trial court found that, since February 2014, Respondent-Mother had missed five of eleven scheduled visits with P.T.W. and, during the visits she did make, she was "not able to demonstrate skills taught in her parenting class." The trial court further found Respondent-Mother "d[id] not recognize how her mental health problems . . . affect her ability to parent, and ha[d] not really begun any therapy as ordered." It further found Respondent-Mother had not "demonstrated that she can control her anger, as she continue[d] to demonstrate impulsive tendencies, making derogatory statements to . . . her therapist, foster parents, and social workers." Additionally, the court found Respondent-Mother "continue[d] to have contact with [Williams] despite a DVPO that [was] in place and . . . had . . . call[ed] the police for [Williams] violating the order." The court ordered WCHS to cease reunification efforts with respect to Williams, but "continue to make reasonable efforts to work towards the reunification of [P.T.W.] with [Respondent-Mother]."

At a hearing on 4 November 2014, the trial court found Respondent-Mother had (1) completed several court-ordered services, (2) enrolled herself in an anger management class, (3) demonstrated a better attitude in working with WCHS, (4) secured suitable housing in Fuquay-Varina, (5) obtained two part-time jobs, (6) had not had any positive drug screens, and (7) was "complying with the treatment recommendations of her psychological [assessment]." The court further found that if Respondent-Mother "continue[d] the progress in correcting the conditions which led to [P.T.W.'s] removal, it [would] be possible for the Court to return [P.T.W.] to a safe environment with her in the next [six] months."

At a hearing on 17 December 2014, based on Respondent-Mother's continued progress, the trial court granted her two hours a week of unsupervised visitation with P.T.W. Following a hearing on 28 January 2015,

---

2. In a court summary dated 14 July 2015, WCHS indicated "[this] denial was due to numerous concerns in regards to [Respondent-Mother], not the physical structure of the home."

the trial court increased Respondent-Mother's visitation with P.T.W. to one twenty-four hour unsupervised visit a week.

Several weeks later, VCDSS informed WCHS that Respondent-Mother's five-year-old child had reported witnessing Respondent-Mother engaging in a sexual act with Respondent-Mother's oldest son. Upon receiving this information, WCHS reinstated supervised visitation between Respondent-Mother and P.T.W. Respondent-Mother filed a motion for review of the change in visitation on 13 April 2015. Following a hearing on 6 May 2015, the trial court found Respondent-Mother's behavior during visits with P.T.W. had become "inappropriate"[3] and that she had "presented zero evidence . . . that remotely show[ed] that [P.T.W.] would be safe in her care." The court suspended Respondent-Mother's visitation with P.T.W. "indefinitely." Respondent-Mother moved to Farmville, in Pitt County, on or about 22 May 2015.

WCHS submitted a court summary on 14 July 2015 in which it recommended that the trial court cease reunification efforts with Respondent-Mother and change the permanent plan for P.T.W. to adoption. Following a review hearing on 22 July 2015, the trial court ceased reunification efforts by order entered 31 August 2015. The trial court concluded that reunification efforts with Respondent-Mother would be inconsistent with P.T.W.'s "safety and need for a safe home within a reasonable time," and ordered WCHS to "make reasonable efforts aimed at achieving a permanent plan of adoption."

WCHS filed a petition to terminate Respondent-Mother's parental rights with respect to P.T.W. on 9 October 2015. WCHS alleged that Respondent-Mother had "willfully abandoned [P.T.W.] for at least six months immediately preceding the filing of the Petition." Following a review hearing on 3-4 March 2016, the trial court terminated Respondent-Mother's parental rights by order entered 18 April 2016. Respondent-Mother appeals both the CRO and TPR order.[4]

---

3. Specifically, the trial court found that, during visits with P.T.W., Respondent-Mother "ma[de] phone calls instead of interacting with [P.T.W.], call[ed] the social worker derogatory names, and ma[de] comments that [were] inappropriately sexual in nature."

4. Respondent-Mother appeals the TPR order only insofar as it failed to correct alleged deficiencies in the CRO.

## II. Sufficiency of CRO Findings

### A. *Standard of Review*

**[1]** Respondent-Mother first argues that certain "crucial" findings of fact in the trial court's CRO were not supported by the evidence and, as a result, the totality of the evidence did not support the trial court's ultimate finding that reunification efforts "would be inconsistent with [P.T.W.'s] safety and need for a safe home within a reasonable time." "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 I.R.C.*, 214 N.C. App. 358, 361, 714 S.E.2d 495, 497 (2011) (citation and quotation marks omitted); *see also In re N.G.*,186 N.C. App. 1, 10-11, 650 S.E.2d 45, 51 (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." (citation and quotation marks omitted)); *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003) ("In a permanency planning hearing held pursuant to Chapter 7B, the trial court can only order the cessation of reunification efforts when it finds facts based upon credible evidence *presented at the hearing* that support its conclusion of law to cease reunification efforts." (citation omitted) (emphasis added)). "The trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013) (citation omitted) (emphasis added); *see also Forehand v. Forehand*, 238 N.C. App. 270, 273, 767 S.E.2d 125, 128 (2014) ("Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." (citation and quotation marks omitted)). This is true "even where some evidence supports contrary findings." *In re A.J.M.*, 177 N.C. App. 745, 748, 630 S.E.2d 33, 35 (2006) (citation and quotation marks omitted). Unchallenged findings "are deemed to be supported by sufficient evidence and are [also] binding on appeal." *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009).

### B. *Analysis*

Our Juvenile Code provides that

> [i]n any order placing a juvenile in the custody or placement responsibility of a county department of social services, . . . the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:

> (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]

N.C. Gen. Stat. § 7B-507(b)(1) (2013).[5] *See In re I.R.C.*, 214 N.C. App. at 362, 714 S.E.2d at 498 ("When a trial court is required to make findings of fact, it must make the findings of fact specially. . . . [It] may not simply recite allegations, but must through processes of logical reasoning from the evidentiary facts find the ultimate facts essential to support the conclusions of law." (citation and quotation marks omitted)). In the present case, in accordance with N.C.G.S. § 7B-507(b)(1), the trial court found that reunification efforts with Respondent-Mother would be "inconsistent with [P.T.W.'s] health, safety and need for a safe, permanent home within a reasonable time." This finding followed numerous, more specific findings of fact.

We consider whether the specific findings of fact Respondent-Mother challenges were supported by competent evidence presented at the cease reunification hearing and whether, considered together, the findings supported the trial court's ultimate statutory finding that reunification efforts would be inconsistent with P.T.W.'s health, safety, and need for a safe, permanent home within a reasonable time.[6]

1. Alleged Sexual Abuse by Respondent-Mother

Respondent-Mother first contends there was no credible evidence to support "the existence of a sexual relationship between" Respondent-Mother and her oldest son. Respondent-Mother characterizes the alleged sexual abuse as "the gravamen of the cease reunification order."

---

5. As the parties observe, the General Assembly amended N.C.G.S. § 7B-507 in 2015, and cessation of reunification is now governed by other statutory provisions. However, those amendments became effective after Respondent-Mother's cease reunification hearing and entry of the CRO at issue in this case. Accordingly, for purposes of this opinion, citation is made to the statute applicable at the time of the cease reunification hearing and entry of the CRO.

6. We note that N.C.G.S. § 7B-507(b) permitted the court to order that reunification efforts shall *either* "not be required *or* shall cease." (emphasis added). We underscore this because, at Respondent-Mother's cease reunification hearing, the trial court stressed it was only directing that WCHS would no longer be required to make reasonable efforts at reunification, and that it was not terminating Respondent-Mother's parental rights or foreclosing her ability to take steps toward reunification.

The trial court found that

> [Respondent-Mother's] visits were suspended . . . in May 2015 due to allegations that she and her [eighteen]-year old son had a sexual relationship. This inappropriate relationship was disclosed by another child of [Respondent-Mother]. Vance County Department of Social Services substantiated the abuse.

As an initial matter, we disagree with Respondent-Mother's assertion that the alleged sexual abuse was the "gravamen"[7] of the trial court's decision to cease reunification efforts. The CRO explicitly incorporated by reference a court summary prepared by WCHS, submitted to the trial court on 14 July 2015 and admitted into evidence without objection at the hearing on 22 July 2015. *See In re R.A.H.*, 182 N.C. App. 52, 60, 641 S.E.2d 404, 409 (2007) (holding that "[DSS] reports constitute competent evidence, and the trial court properly relied upon them in reaching its finding of fact."). The WCHS report reviewed the case history extensively, including reunification efforts undertaken by WCHS, and listed the following factors in support of ceasing reunification:

> [Respondent-Mother] [1] has not provided documentation of lawful income[;] . . . [2] has been evicted from her last address in Wake County[;] . . . [3] caused significant damage to the rental home at the time of the eviction[;] . . . [4] has not followed the recommendations of her psychological [assessment][;] . . . [5] is unable to consistently demonstrate skills learned in parenting class during her interactions with [P.T.W.][;] . . . [6] did not start anger management class until 8/2014[;] [7] has been unable to demonstrate skills learned in Anger Management [classes][;] [8] has not complied with [her] Vance County DSS [case plan], [and] that agency is in the process of terminating her parental rights[;] . . . [9] has not maintained an environment conducive to the safety and protection of [P.T.W.][;] . . . [10] did not attend an initial mental health appointment until 4/7/14[;] . . . [11] stated to the clinicians at Monarch that she did not need mental health treatment[;] . . . [12] has not demonstrate[d] skills learned in the MOVE program in her life choices and interactions with others[;]

---

7. *Black's Law Dictionary* defines "gravamen" as "[t]he substantial point or essence of a claim, grievance, or complaint." *Black's Law Dictionary* 721 (8th ed. 2004).

> . . . [13] continued to visit with . . . Williams while he was in jail despite a DVPO in place[;] . . . [14] [Respondent-Mother] and . . . Williams were seen together following [Respondent-Mother's] visitation with [P.T.W.] on 2/15/14 despite [Respondent-Mother] having a DVPO against . . . Williams[;] [and] [15] Substantiated CPS case for sex abuse by Vance County DSS 6/2015.

Additionally, when the trial court orally reviewed its findings in support of ceasing reunification at the conclusion of the CRO hearing on 22 July 2015, it made *no mention* of the sexual abuse allegations. Thus, it is clear the alleged sexual abuse was merely one among many circumstances the trial court considered in rendering its ultimate decision to cease reunification efforts.

The WCHS report prepared in advance of the cease reunification hearing stated that on 25 February 2015,

> WCHS was made aware of a new allegation in regards to sex abuse between [Respondent-Mother] and her oldest son. The allegations of sex abuse were substantiated at the conclusion of the Child and Family Evaluation [conducted by Vance County DSS]. Vance County DSS has made the steps to put [Respondent-Mother] on the . . . Responsible Individuals List. In addition, the police investigation is currently on-going with an outcome in regards to charges being filed to be made in the next week or two.

At the cease reunification hearing, WCHS social worker Mary Torr ("Torr) testified that, in June 2015, "Vance County [DSS] substantiated a case for sex abuse against [Respondent-Mother]." Torr told the court that "the allegations were that one of [Respondent-Mother's] younger children was forced to watch [Respondent-Mother] inappropriately touch her oldest son. . . . And a CME and [Child and Family Evaluation ("CFE")] were done. Vance County did substantiate and the police are still currently completing their investigation."

Torr was then asked to explain the process of "CME/CFE substantiation." Torr told the court that in Respondent-Mother's case,

> Vance County [DSS] [was] the one [who made the determination]. It's not an opinion-based decision. [It is] [a]lso based on all of the evidence that was collected during the actual investigation. That included interviews with various people, it included what happened during the

> CME and what information was provided during the CFE that was completed, and then based on all of that information, then that case would have been staffed in Vance County, and they . . . made a decision that, based on all the evidence that they had, that the allegations were in fact true. . . . The social workers don't make the decisions independently. Everything is a decision that comes with a discussion, a staffing with additional social workers, with supervisors, sometimes people that are higher up in the chain of command.

Torr's testimony and the DSS report constituted sufficient evidence to support the trial court's finding that "[VCDSS] substantiated abuse." Importantly, the trial court did *not* find that sexual abuse in fact occurred or was committed by Respondent-Mother, or, as Respondent-Mother phrases it, "the existence of a sexual relationship between [Respondent-Mother and her oldest son]." The trial court found only that VCDSS "substantiated abuse," a process Torr described at length during the hearing.[8]

2. Respondent-Mother's Parenting Skills

Respondent-Mother also argues the evidence did not support the trial court's finding that she "ha[d] not demonstrated sustained parenting improvements during the last two years." In support of this argument, Respondent-Mother points to court orders from November 2014, December 2014, and January 2015 that indicated Respondent-Mother was making progress during her visits with P.T.W. and which increased her visitation rights. However, Respondent-Mother did not offer these specific examples at the cease reunification hearing.

On the other hand, the WCHS court summary introduced without objection at the cease reunification hearing indicated the following:

> [Respondent-Mother] has been unable to show sustained changes in her parenting over the past two years. Early on, [Respondent-Mother] would use her cell phone throughout visits instead of paying attention to [P.T.W.]. During an office visit, [P.T.W.] cried for nearly [two] hours and [Respondent-Mother] did not respond to directions to comfort [him]. . . . [Respondent-Mother] has used her visitation as an opportunity to [make unrelated phone calls]. [Respondent-Mother] has made numerous inappropriate

8. The subsequent TPR indicated no criminal charges were ever filed against Respondent-Mother related to the sex abuse allegations.

> comments in visitations including asking her oldest son if he wanted to kiss [P.T.W.'s] behind while she was changing the diaper, talking about sexual relationships, telling her other son that she was going to dress him up in an adult diaper and take pictures, discussing whooping's [sic], and needing to get her sex look on for a picture to be taken.

The report also documented Respondent-Mother's "sporadic" visitation attendance throughout the previous two years. Torr testified that Respondent-Mother had "been unable to consistently demonstrate skills learned in parenting classes during her interactions with [P.T.W.]" Torr also testified that, between the time WCHS reinstated supervised visitation in February 2015 and the time Respondent-Mother's visitation was suspended altogether in May 2015, "the visits [with P.T.W.] did not go well[.]" Respondent-Mother did not offer contrary evidence at the cease reunification hearing. *See In re M.J.G.*, 168 N.C. App. 638, 643-44, 608 S.E.2d 813, 816-17 (2005). Thus, the evidence was sufficient to support the trial court's finding that Respondent-Mother had not "demonstrated sustained parenting improvements during the last two years."

3. History of Family Violence

Respondent-Mother next argues there was insufficient evidence to support the trial court's finding that she "display[ed] zero awareness of or insight into her own past of domestic violence with [P.T.W.'s] father." Respondent-Mother does not challenge the court's finding that she "continued to visit [Williams] in jail despite filing a [DVPO] against him," and admits as much in her brief to this Court.

The WCHS court summary indicated the following:

> [Respondent-Mother] had had [sic] a pattern of violence in her relationship with [Williams]. [Respondent-Mother] took out a DVPO against [Williams] on [4 June 2013]. In that DVPO, [Respondent-Mother] described a [domestic violence] incident that took place between her and [Williams] where he pushed her against the wall and twisted her arm back. [Respondent-Mother] had several of her children in the home with her for a visitation when this incident happened. In the DVPO complaint, [Respondent-Mother] also stated that [Williams] was "always threatening to kill [her]," that [Williams] went to jail in October of 2012 for assaulting [her], that she was going to get a DVPO in December of 2012 but that [Williams] had talked her out of it, and that [Williams] had strangled [her] when she was pregnant with [P.T.W.].

> [Respondent-Mother] did complete the MOVE program. However, [Respondent-Mother] reported that she "loved going to the classes because she was fascinated by women that allow men to beat on them[.]"
>
> Despite having a DVPO in place against [Williams], [Respondent-Mother] would visit with [Williams] while he was in jail. [A social worker] observed [Respondent-Mother] and [Williams] walking to the bus stop together after a visitation at Millbrook. During a visitation on [10 June 2014], [Respondent-Mother] reported that she and [Williams] were going to be getting married, possibly before the end of the year.

Torr testified at the cease reunification hearing that Respondent-Mother "continued to visit with [Williams] . . . while he was in jail and after he was in jail, despite [a] domestic violence protection order being in place."

Respondent-Mother presented no evidence at the cease reunification hearing tending to contradict the foregoing testimony. Respondent-Mother does not dispute evidence of domestic violence with Williams, or that she maintained contact with Williams while the DVPO was in effect. Respondent-Mother's only argument is that "there was no evidence [she] had seen [Williams] since May 2014, other than possibly 'walking to the bus stop together,' " which she does not explicitly deny. However, the trial court did *not* find that Respondent-Mother had in fact seen Williams since May 2014, nor did it imply, as Respondent-Mother suggests, that she and Williams "were currently involved in domestic violence[.]" It found only that Respondent-Mother lacked "awareness of or insight into her own *past* of domestic violence with [Williams]." This finding was supported by the WCHS court summary as well as Torr's testimony at the hearing.

4. Therapy Engagement

Respondent-Mother also challenges the trial court's finding that she "ha[d] not reengaged in therapy" since moving to Pitt County. We agree this finding was not supported by evidence presented at the cease reunification hearing.

The WCHS court summary contained no information regarding Respondent-Mother's therapy (or lack thereof) since her move to Pitt County, which Respondent-Mother testified occurred on or about 22 May 2015. The report detailed Respondent-Mother's therapy participation while she was still residing in Wake County, and noted that

Respondent-Mother had worked with the same mental health provider for approximately one year while living in Fuquay-Varina.

Respondent-Mother was evicted from her home in Fuquay-Varina on or about 21 May 2015. Respondent-Mother testified she notified Torr by voicemail that she had left the home, although it is unclear whether Respondent-Mother indicated she would be moving to Pitt County or if she provided a new address. Torr testified she could not understand a lot of Respondent-Mother's voicemail due to poor cell phone reception, but that she "did hear that [Respondent-Mother] had left . . . Wake County." Torr did not testify at the cease reunification hearing regarding Respondent-Mother's involvement in therapy after leaving Wake County.

Respondent-Mother did testify about efforts she made to resume the court-ordered therapy after moving to Pitt County:

> Q: Okay. Let's see. Are you still working with your [Wake County] therapist?
>
> [Respondent-Mother]: No. When I moved to Pitt County, I called Mary Torr and I left her a voicemail because I knew I had five days to report my move. I called her on the fourth day, and . . . I told [her] that . . . I ha[d] moved to . . . Farmville, North Carolina, and I had set an appointment up in Pitt County Mental Health and I asked [Torr] on that voice call could she please help me with [therapy] service there. I said, you do know, in order for me to have my son, I have to continue with therapy. Will you please help me find a therapist there. [Torr] never returned my call.
>
> . . .
>
> Q: So the reason that you're changing therapists is because of your change of address to a different address?
>
> [Respondent-Mother]: Yes.
>
> Q: And what you're doing is you're looking to get some help for a referral to [a] particular person over in Pitt County?
>
> [Respondent-Mother]: Yes, I went one time. My appointment was [in] June. . . . [The therapist's] name is Ms. Jennifer, and I went to see her and she told me, because I had been in outpatient therapy for over a year, she is not going to recommend seeing me . . . [more than] once a

> month, and I had an appointment with her last week and I missed that appointment.

When Respondent-Mother was asked whether she was "able to set up the appointment with the Pitt County therapist on [her] own," Respondent-Mother testified: "Yes, ma'am, because I called [Torr] and she never returned my call, so I did it on my own." Thus, the only evidence presented at the cease reunification hearing regarding Respondent-Mother's therapy since moving to Pitt County indicated Respondent-Mother had made some effort to continue therapy, and that she had met with a provider in Pitt County on at least one occasion. In the absence of any evidence to the contrary, the trial court's finding that Respondent-Mother "ha[d] not reengaged in therapy" since moving to Pitt County was not supported by the evidence. *See In re M.J.G.*, 168 N.C. App. at 646, 608 S.E.2d at 818.

Notwithstanding this conclusion, we hold that the remaining findings of fact support the trial court's ultimate decision to cease reunification efforts. *Id.*; *see also In re K.S.*, 183 N.C. App. 315, 329-30, 646 S.E.2d 541, 549 (2007) (holding that, although one of the trial court's findings was not supported by competent evidence, "the remaining findings of fact . . . [were] sufficient to support the trial court's conclusion that . . . reasonable efforts to reunify should be suspended.").

5. Anger Management

Respondent-Mother argues the trial court erroneously found that, despite attending anger management classes, Respondent-Mother "[had] consistently demonstrate[d] that she cannot control her emotions." However, Respondent-Mother does not challenge the trial court's related findings that she had "call[ed] social workers names, yell[ed], use[d] profanity, abruptly end[ed] telephone conversations with the social worker and [was] generally combative," or that the trial court "ha[d] observed [Respondent-Mother's] combative demeanor in court." Respondent-Mother concedes she expressed "anger at the May [2015] hearing where her visits had been suspended[.]" Additionally, the WCHS court summary indicated Respondent-Mother's previous therapist had reported that, despite working on anger management issues for more than a year, Respondent-Mother "still had a lot of work to do." The trial court's finding that Respondent-Mother "consistently demonstrate[d] that she cannot control her emotions" was supported by competent evidence.

6. Failure to Maintain Stable Housing

Respondent-Mother lastly challenges the trial court's finding that she "does not maintain stable housing." Respondent-Mother concedes

she was evicted from her home because the landlord obtained an eviction judgment against her on or about 11 May 2015. The WCHS court summary indicated that

> [t]he landlord reported [Respondent-Mother] caused significant damage to the home at a cost of several thousand dollars. Some of the damage included breaking all the windows in the house, pouring paint all over floors of the home and then pouring a [fifty] pound bag of dog food over the paint on the floors.

Respondent-Mother did not offer any evidence to the contrary. On appeal, she notes only that "[t]he landlord did not testify at the cease reunification hearing and [Respondent-Mother] was not questioned about any damages to the property."

In addition to the evidence regarding Respondent-Mother's recent eviction, Torr testified at the cease reunification hearing that Respondent-Mother had not provided a new address to WCHS since leaving Wake County, and Torr did not know where Respondent-Mother was then residing. We conclude there was competent evidence to support the trial court's finding that Respondent-Mother had failed to maintain stable housing.

7. VCDSS Termination Proceedings

Respondent-Mother alleges the trial court erroneously believed it was required to cease reunification efforts with respect to P.T.W., based on a statutory provision enacted shortly before the cease reunification hearing and which became effective 1 October 2015. N.C. Gen. Stat. § 7B-901(c)(2), which applies to initial dispositional hearings only, provides that

> [if] the disposition order places a juvenile in the custody of a county department of social services, the court shall direct that reasonable efforts for reunification . . . shall not be required if the court makes written findings of fact pertaining to any of the following: . . . A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent.

N.C. Gen. Stat. § 7B-901(c)(2) (2015).[9]

---

9. N.C. Gen. Stat. § 7B-901(c) was amended by S.L. 2016-94, § 12C.1.(g) (eff. 1 July 2016) to provide that "the court shall direct that reasonable efforts for reunification . . . shall not be required if the court makes written findings of fact pertaining to any of the following, *unless the court concludes that there is compelling evidence warranting continued reunification efforts* . . . ." (emphasis added).

Respondent-Mother's argument is without merit. There is no indication in the record that the trial court based its decision to cease reunification efforts on a finding or belief that Respondent-Mother's parental rights had been terminated with respect to any of her other children. On the contrary, the trial court *explicitly* stated that any VCDSS proceedings had no bearing on its decision to cease reunification with respect to P.T.W. After summarizing numerous factual findings supporting its decision to cease reunification, the court said:

> I know that Wake County mentioned that [Respondent-Mother] has a pending matter in Vance County where [a] termination [hearing], I believe, is set [for] today. However, I will say that the Court, given the fact that [that] may be something that's pending and has not occurred, I don't think, respectfully, the Court would use that as a reason to cease.

The trial court was clearly not acting under a mistaken belief that it was required to cease reunification because Respondent-Mother's rights to any of her other children had already been terminated (much less pursuant to a statute that was not even in effect at the time). This argument is overruled.

8. Findings in TPR Order

Respondent-Mother contends that, because "the termination of parental rights order did not correct the deficiencies in the cease reunification order," the TPR order must be reversed along with the CRO. We disagree.

In *In re L.M.T.*, our Supreme Court held that, because a CRO and TPR order must be reviewed together on appeal, "*incomplete* findings of fact in [a] cease reunification order may be cured by findings of fact in the termination order." 367 N.C. at 170, 752 S.E.2d at 457 (emphasis added). Thus, "[e]ven if [a] cease reunification order *standing alone* had been *insufficient*," a reviewing court may look to the subsequent TPR order to determine whether, considered together, the trial court has made sufficient findings of fact under the former N.C.G.S. § 7B-507(b). *Id.*, 367 N.C. at 169-70, 752 S.E.2d at 456 (emphases added); *see also In re A.E.C.*, 239 N.C. App. 36, 45, 768 S.E.2d 166, 172 (2015) (holding "termination order, taken together with the earlier [permanency planning and cease reunification] orders, [did] not contain sufficient findings of fact to cure the defects in the earlier orders.").

Respondent-Mother's argument that the TPR order failed to correct certain deficiencies in the CRO is premised upon a conclusion that there

were deficiencies in the CRO which required correcting. Respondent-Mother essentially reasserts her arguments about the insufficiency of evidence at the cease reunification hearing with respect to three factual issues: (1) her ability to maintain stable housing, (2) the alleged sexual abuse of her oldest son, and (3) her alleged contact with Williams. However, as discussed above, we have already concluded that the evidence presented at the cease reunification hearing was sufficient to support the trial court's findings with respect to each of those issues. Thus, the CRO was not "deficient" on those grounds, and we need not consider whether the TPR "corrected" CRO findings which were based on competent evidence presented at the cease reunification hearing.

## III. Failure to Appoint Guardian *Ad Litem*

### A. *Standard of Review*

**[2]** Respondent-Mother argues the trial court abused its discretion by failing to appoint a guardian *ad litem* ("GAL") to represent P.T.W. at the termination hearing. She concedes that the trial court was not mandated by statute to appoint a GAL for P.T.W., either when WCHS first filed the dependency petition or at the termination hearing. *See* N.C. Gen. Stat. § 7B-601(a) (2015) (providing in part that "when a juvenile is alleged to be *dependent*, the court *may* appoint a guardian ad litem to represent the juvenile." (emphases added)); N.C. Gen. Stat. § 7B-1108(b) (2015) (requiring appointment of GAL in a termination proceeding "[i]f [a respondent files] an answer or response den[ying] any material allegation of the [termination] petition or motion[.]"). Because the appointment of a GAL in the present case was discretionary, the trial court's decision is reviewable for abuse of discretion only. *See In re M.H.B.*, 192 N.C. App. 258, 261, 664 S.E.2d 583, 585 (2008). We note, however, that a trial court's complete failure to exercise discretion constitutes reversible error. *Id.*

### B. *Analysis*

#### 1. Preservation of Error

In certain instances, a trial court must appoint a GAL for a juvenile, including where a petition alleges a juvenile is abused or neglected, *see* N.C.G.S. § 7B-601(a), or, in a termination proceeding, if a respondent files a written answer or response to the termination petition and "[the] answer or response denies any material allegation of the petition or motion," *see* N.C.G.S. § 7B-1108(b). If a GAL was previously appointed pursuant to N.C.G.S. § 7B-601, and if appointment of a GAL "could also be made under [N.C.G.S. § 7B-1108]," the GAL appointed under N.C.G.S.

§ 7B-601 “shall also represent the juvenile in all [termination] proceedings . . . unless the court determines that the best interests of the juvenile require otherwise.” N.C. Gen. Stat. § 7B-1108(d) (2015). However, if appointment of a GAL is not statutorily required, “the court may, in its discretion, appoint a [GAL] for a juvenile, either before or after determining the existence of grounds for termination of parental rights, in order to assist the court in determining the best interests of the juvenile.” N.C. Gen. Stat. § 7B-1108(c) (2015).

“This Court has previously held that in order to preserve for appeal the argument that the trial court erred by failing to appoint [a] child a GAL, a respondent must object to the asserted error below.” *In re A.D.N.*, 231 N.C. App. 54, 65-66, 752 S.E.2d 201, 209 (2013) (citing *In re Fuller*, 144 N.C. App. 620, 623, 548 S.E.2d 569, 571 (2001); *In re Barnes*, 97 N.C. App. 325, 326, 388 S.E.2d 237, 238 (1990)). In *In re A.D.N.*, the respondent-mother filed a response to a termination petition in which she denied many of the petition’s material allegations. Accordingly, the trial court was required to appoint a GAL under the plain language of N.C.G.S. § 7B-1108(b). Despite the trial court’s failure to do so, this Court held the respondent-mother did not preserve the issue for appeal because she “failed to object at trial to the failure of the trial court to appoint the child a GAL.” *Id.*; *see also* N.C.R. App. P. 10(a)(1) (2016) (“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make . . . [and have] obtain[ed] a ruling upon the party’s request, objection, or motion.”). Similarly, in the present case, Respondent-Mother failed to object to the lack of a GAL for P.T.W. during the termination proceedings, and the issue was therefore not preserved for appellate review.

As we observed in *In re A.D.N.*, in both *Fuller* and *Barnes*, “this Court invoked Rule 2 of the [North Carolina] Rules of Appellate Procedure in order to reach the [unpreserved] issue [of] whether the trial court erred by failing to appoint a GAL for the child and, in both cases, found prejudicial error in the failure to appoint a GAL.” 231 N.C. App. at 66, 752 S.E.2d at 209. Under Rule 2, we may suspend the Rules of Appellate Procedure if necessary “[t]o prevent manifest injustice to a party[.]” N.C.R. App. P. Rule 2 (2016); *see also Stann v. Levine*, 180 N.C. App. 1, 10-11, 636 S.E.2d 214, 220 (2006) (“Our Supreme Court has described appropriate opportunities for the invocation of Rule 2 as ‘rare occasions’ and ‘in exceptional circumstances,’ and a thorough review of the Court’s Rule 2 jurisprudence supports such characterizations.” (citations omitted)).

In *In re A.D.N.*, in declining to invoke Rule 2, our Court found *Fuller* and *Barnes* factually distinguishable. We noted that “there [was] no indication in [*Fuller* and *Barnes*], as there [was] here, that the appealing respondent had repeatedly chosen substance abuse over the child’s welfare throughout the child’s life and had almost entirely abdicated responsibility for the child[.]” *In re A.D.N.*, 231 N.C. App. at 66, 752 S.E.2d at 209.

We find Respondent-Mother’s case more akin to *In re A.D.N.* than either *Fuller* or *Barnes*.[10] The CRO set forth a number of steps Respondent-Mother could take in order to reunify with P.T.W. There was evidence at the termination hearing that Respondent-Mother failed to meet many of those terms, including the requirements that she maintain suitable housing; maintain sufficient legal income; maintain regular contact with WCHS; demonstrate learned anger management skills; demonstrate learned parenting skills; and comply with her VCDSS case plan. Torr testified that, at the time of the termination hearing, WCHS “ha[d] not received any documentation [from Respondent-Mother] of safe or suitable housing.” Although Respondent-Mother brought a copy of a lease with her to the termination hearing, she acknowledged she had never provided a copy to WCHS. Torr testified that Respondent-Mother had not provided any proof of income to WCHS since on or about 19 August 2013, shortly after P.T.W. was adjudicated dependent. There was evidence of Respondent-Mother’s continuing issues with anger management, including during her last visitation with P.T.W., on 5 May 2015, when she “referred to [Torr] as a cracker and slammed the door . . . while [Torr] was holding [P.T.W.].” There was evidence that Respondent-Mother had not demonstrated learned parenting skills over the preceding two years. Torr testified that during a 21 April 2015 visitation with P.T.W., Respondent-Mother

> was yelling in an open room about sex abuse allegations with both [P.T.W.] present and the child who was the subject of the allegation present, and she proceeded to spend the first [twenty] minutes of the visit kissing [P.T.W.] on the lips, despite him trying to get away from her and turning his face, and then told him that he needed to kiss her in order to get a toy back after she took the toy away from him.

---

10. We also observe that, in contrast to Respondent-Mother’s case, in *Fuller*, *Barnes*, and *In re A.D.N.*, the trial courts’ failure to appoint a GAL expressly violated N.C.G.S. § 7B-1108(b) or its statutory predecessor. Respondent-Mother acknowledges that she “filed no answer to the [termination] petition, so no GAL was automatically triggered under [N.C.G.S.] § 7B-1108(b).”

Respondent-Mother also did not maintain regular contact with WCHS following the cease reunification hearing. Respondent-Mother testified at the termination hearing that, despite earning "about $600" per week, she had not sent any financial support, clothing, or gifts for P.T.W. since her visitation was suspended in May 2015. Although the CRO ordered Respondent-Mother to "[f]ollow all recommendations of her psychological assessment," which included individual counseling, Respondent-Mother testified at the termination hearing that she last visited a therapist in late December 2015. Additionally, although the CRO ordered Respondent-Mother to "[c]omply with [her] Vance County DSS foster care case plan," both Respondent-Mother and her mother, Shirley Adams ("Adams"), testified at the termination hearing that they were actively violating a Vance County court-ordered custody arrangement with respect to another of Respondent-Mother's minor children.

At the cease reunification hearing on 22 July 2015, the trial court stressed to Respondent-Mother that it was not terminating her parental rights, and that she could still take steps to reunify with P.T.W. Addressing Respondent-Mother directly, the trial court stated:

> You can still do what you need to do, and if in fact you do what you need to do and then something is presented to the Court where I have to make a decision about whether or not to terminate or continue this relationship [with P.T.W.], trust me, I'm going to be fair and impartial. . . . I have not terminated your parental rights. It's up to you. If you want to reunify [with P.T.W.] and do what you need to do, you know what you need to do.

Notwithstanding these instructions, and the requirements specified in the CRO, Respondent-Mother failed in a number of ways to "do what [she] need[ed] to do" to reunify with P.T.W.

At the termination hearing, the trial court asked Respondent-Mother: "Do you accept responsibility for any of the situations that you are in now?" She responded: "No, I don't. No, I don't, no, no." In light of Respondent-Mother's willful failure to make progress on her WCHS case plan, both before and after reunification efforts were ceased, and because a GAL appointment was not statutorily required, we do not find it necessary to invoke Rule 2 "to prevent manifest injustice" to either Respondent-Mother or P.T.W. *See In re H.D.*, ___ N.C. App. ___, ___, 768 S.E.2d 860, 865 (2015) ("Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort.); *In re C.M.*, 183 N.C. App. 207, 211-12, 644 S.E.2d 588, 593

(2007) (observing that as "[r]espondent mother had over two years . . . to work on a case plan with DSS, she had ample time to follow through with the services designed to assist her in learning to parent."); *In re O.C.*, 171 N.C. App. 457, 464, 615 S.E.2d 391, 395 (2005) (finding that, "even if respondent was entitled to a GAL for the . . . earlier dependency proceedings, there [could not] be prejudice to her in the termination proceedings because she was not even entitled to the appointment of a GAL for the termination proceedings.").

2. Abuse of Discretion

Even if we were to reach the merits of this issue, Respondent-Mother's argument fails. As noted above, because appointment of a GAL for P.T.W. was entirely discretionary in this case, review is limited to determining whether the trial court abused its discretion. We find no indication that the trial court's non-appointment of a GAL to represent P.T.W. at the termination hearing was "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *See In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015).

Respondent-Mother maintains that, although appointment of a GAL was discretionary under N.C.G.S. § 7B-1108(b), "the trial court still had an obligation to consider whether appointment of a GAL was in [P.T.W.'s] best interest [pursuant to N.C.G.S. § 7B-1108(c)]."[11] The purpose of a discretionary GAL appointment in a termination proceeding is "to assist the court in determining the best interests of the juvenile." N.C.G.S. § 7B-1108(c). As with the GAL appointment itself, the question of whether a GAL would "assist the court in determining the best interests of the juvenile" is a matter for the trial court to decide. On the record before us, Respondent-Mother has shown no reason to second-guess the

11. Although not cited by Respondent-Mother, N.C. Gen. Stat. § 7B-1108.1 provides that, in a TPR proceeding, the trial court "*shall* conduct a pretrial hearing" (either separately or in combination with the adjudicatory hearing) and shall consider, *inter alia*, "[w]hether a guardian ad litem should be appointed for the juvenile, if not previously appointed." N.C. Gen. Stat. § 7B-1108.1(a)(2) (2015) (emphasis added). Thus, while N.C.G.S. § 7B-1108(c) uses permissive language (*i.e.*, "the court may, in its discretion, appoint a guardian ad litem for a juvenile . . . ."), N.C.G.S. § 7B-1108.1 requires the trial court to affirmatively consider whether a GAL should be appointed for the termination hearing. *See In re Z.T.B.*, 170 N.C. App. 564, 569, 613 S.E.2d 298, 300 (2005) ("The use of the word 'shall' by our Legislature has been held by this Court to be a mandate, and the failure to comply with this mandate constitutes reversible error."). We are unable to discern from the record on appeal whether the trial court conducted a hearing, pursuant to N.C.G.S. § 7B-1108.1, at which it considered whether a guardian ad litem should have been appointed for P.T.W. at the termination hearing. However, Respondent-Mother has not alleged the trial court violated N.C.G.S. § 7B-1108.1, and we do not decide the issue.

trial court's apparent belief that a GAL was not necessary to assist it in determining P.T.W.'s best interests. During the best interests phase of the termination hearing, the trial court heard testimony from Torr, Respondent-Mother, and Adams. Torr testified about P.T.W.'s current foster care placement, his relationship with his foster parents, and his emotional and developmental needs. Torr also testified about WCHS efforts to investigate placing P.T.W. with a family member, including a visit Torr made to Adams's home in Henderson several months prior.

The trial court heard testimony from Respondent-Mother about her current living arrangement, employment, drug and alcohol abstinence, and family support system. Finally, the trial court heard testimony from Adams about her desire and ability to assume P.T.W.'s care and custody. The trial court's comments at the conclusion of the termination hearing clearly demonstrate that P.T.W.'s best interests were carefully weighed against the evidence presented. There is nothing to suggest it was unreasonable for the trial court to forego GAL assistance in determining P.T.W.'s best interests.

We conclude Respondent-Mother failed to preserve this argument for appellate review. Even if the issue was reviewable, we find no abuse of discretion occurred.

## IV. Conclusion

We affirm the trial court's 31 August 2015 order ceasing reunification efforts with Respondent-Mother and the 18 April 2016 order terminating Respondent-Mother's parental rights.

AFFIRMED.

Judges DIETZ and TYSON concur.

JUDITH M. DALY ATTORNEY AT LAW, P.A., D.B.A. DALY LAW FIRM, PLAINTIFF
V.
ALESSANDRA L. MCKENZIE, DEFENDANT

No. COA16-466

Filed 6 December 2016

**1. Appeal and Error—interlocutory orders and appeals—failure to give notice of appeal—no substantial right**

Defendant failed to preserve for appellate review the denial of her motion for consolidation of cases where she failed to give notice of appeal from the denial of her motion. Further, the denial did not involve the merits of plaintiff's claim for money owed and did not affect the judgment in that case in order to allow immediate appeal from the interlocutory order.

**2. Discovery—motion for continuance—no request for 11 months**

The trial court did not abuse its discretion by denying defendant's request for a continuance. Even if defendant had informed the trial court of specific relevant and admissible matters on which she wanted to conduct discovery, defendant failed to file any motion or request for discovery during the 11 months that the case was pending.

Appeal by defendant from order entered 2 October 2015 by Judge Richard Halloway in Iredell County District Court. Heard in the Court of Appeals 20 October 2016.

*Gottholm, Ralston & Benton, PLLC, by Matthew L. Benton, for plaintiff-appellee.*

*Defendant-appellant Alessandra McKenzie, pro se.*

ZACHARY, Judge.

Alessandra McKenzie (defendant) appeals from an order requiring her to pay Judith M. Daly Attorney at Law, P.A., d.b.a. Daly Family Law Firm (plaintiff) the sum of $17,509.63 plus costs. On appeal, defendant argues that the trial court erred and abused its discretion by denying her oral motion for a continuance and her motion to consolidate this case with a case that defendant had filed in superior court. After careful consideration of defendant's arguments, we conclude that the issue of the

trial court's denial of defendant's motion to consolidate is not properly before us, and that the trial court did not abuse its discretion by denying defendant's motion for a continuance.

## I. Factual and Procedural Background

On 4 January 2012, defendant hired plaintiff to represent her in a contested family law case involving issues of child custody, child support and equitable distribution. Defendant paid plaintiff approximately $56,475 for legal services rendered by plaintiff between January and September, 2012. In October, 2012, plaintiff informed defendant that she owed plaintiff $17,509.63 for legal services and that plaintiff would not continue to represent defendant until this amount was paid. Defendant failed to remit the amount owed to plaintiff, who then ceased her representation of defendant. On 8 March 2013, plaintiff sent defendant a letter stating that plaintiff intended to initiate legal action against defendant to collect the debt she owed to plaintiff. The letter also informed defendant that, if she disputed the fees or expenses that plaintiff was claiming, defendant could contact the North Carolina State Bar. Plaintiff never received any communication from the State Bar concerning the matter.

On 8 October 2014, plaintiff filed a complaint against defendant seeking to recover $17,509.63 from defendant for plaintiff's legal services. On 6 November 2013, defendant filed a *pro se* answer denying the material allegations of plaintiffs' complaint and asserting counterclaims for breach of contract, negligence and gross negligence, malpractice, and intentional infliction of emotional distress. The matter was referred to arbitration, which was scheduled for 5 February 2015. The arbitration was rescheduled until 16 February 2015, due to defendant's scheduling conflict with another court appearance, and was rescheduled again until 31 March 2015. During the arbitration conducted on 31 March 2015, defendant took a voluntary dismissal of her counterclaims. Following arbitration, plaintiff was awarded $17,509.63, the amount of defendant's debt to plaintiff.

On 30 April 2015, defendant appealed from the arbitration award and sought a trial *de novo*. The matter was scheduled for a bench trial during the week of 8 June 2015; however on 10 June 2015, the trial was continued until the week of 29 June 2015 at plaintiff's request. On 26 June 2015, defendant filed a new answer, denying the material allegations of plaintiff's complaint and asserting counterclaims for which defendant sought damages in excess of $50,000. The case was continued from 29 June 2015 until 13 July 2015, and again from 13 July 2015 until 31 August 2015, both times at defendant's request.

On 22 July 2015, defendant filed a complaint against plaintiff in Iredell County Superior Court. Defendant (although defendant is the named plaintiff in her lawsuit, we refer to her as the defendant throughout this opinion to avoid confusion) asserted claims for breach of contract, malpractice, intentional infliction of emotional distress, and violation of the Unfair and Deceptive Trade Practices Act. Defendant did not assert that she had suffered damages in excess of $50,000; however, she did allege that she had paid plaintiff more than $50,000 and that plaintiff had breached the contract for plaintiff's provision of legal services. On 24 August 2015, defendant filed a motion in district court, seeking consolidation of plaintiff's claim with the case defendant had filed in superior court, pursuant to N.C. Gen. Stat. § 1A-1, Rule 42.

Plaintiff's claim for money owed by defendant came on for a bench trial in Iredell County District Court on 31 August 2015. Plaintiff was represented by counsel at the hearing, and defendant appeared *pro se*. At the outset of the trial, defendant asked the trial court to rule on her motion to consolidate the complaint that defendant had filed in superior court with plaintiff's claim, so that the cases would be tried together in superior court. Plaintiff's counsel argued that under N.C. Gen. Stat. § 1A-1, Rule 42(a), only a superior court judge could rule on defendant's Rule 42 motion. The trial court agreed with plaintiff and denied defendant's motion to consolidate.

After the trial court denied defendant's Rule 42 motion, defendant made an oral motion to continue because she needed "time for discovery." Plaintiff objected on the grounds that the case had been continued several times and plaintiff had already provided defendant with the file in her case. Defendant contended that she was entitled to discovery in order to prepare for her superior court case, but admitted that she had not filed any written requests for discovery. The trial court denied defendant's continuance motion.

During the trial, plaintiff testified under oath that she and defendant had a contract for legal representation under the terms of which defendant owed plaintiff $17,509.63, and introduced documents in support of her testimony. When plaintiff sought to introduce a billing document, defendant "objected" on the grounds that she wanted a continuance in order to hire an attorney and refile her motion for consolidation in superior court. The trial court admitted the bill into evidence, but took a short recess in order to allow defendant to contact an attorney. After the recess, defendant again argued that she needed a continuance in order to obtain discovery. Plaintiff objected and argued that defendant had failed to seek discovery for eleven months and that defendant's

last-minute request for another continuance was made for an "improper purpose." When the trial court denied defendant's requests for a continuance, defendant stated that she would "just appeal whatever."

After plaintiff rested her case, defendant called plaintiff as a witness. Her examination of plaintiff focused upon instances during plaintiff's representation of defendant when, in defendant's opinion, plaintiff was unprepared. Defendant did not testify at the trial or present any other witnesses.

On 2 October 2015, the trial court entered two written orders. In an "Order on Motion to Consolidate" the court denied defendant's Rule 42 motion for consolidation of cases. In a separate order, the trial court entered findings of fact and conclusions of law concerning the merits of plaintiff's claim. The trial court found that defendant owed plaintiff $17,509.63, and ordered defendant to pay that amount, plus costs. On 30 October 2015, defendant filed a notice of appeal "from Judge Richard Holloway's decision in Daly v. Alessandra McKenzie, 14-CVD-2186, heard in the District Court of Iredell County on August 31, 2015."

## II. Scope of Appeal

**[1]** N.C.R. App. P. 3(d) (2015) provides in relevant part that a notice of appeal "shall designate the judgment or order from which appeal is taken[.]" In this case, defendant's notice of appeal stated that she was appealing "from [the trial court's] decision in Daly v. Alessandra McKenzie, 14-CVD-2186[.]" Although defendant did not use the word "order," we may reasonably infer that the "decision" to which defendant referred was the trial court's decision in favor of plaintiff on plaintiff's claim for money owed by defendant. However, defendant neither gave notice from the trial court's denial of her motion to consolidate cases, nor used language that could be interpreted to refer to the denial of her consolidation motion. We hold that defendant failed to give notice of appeal from the denial of her motion to consolidate.

Although N.C.R. App. P. 3(d) requires an appellant to designate the judgment or order from which an appeal is taken, N.C. Gen. Stat. § 1-278 (2015) provides that "[u]pon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment."

> This Court has held that even when a notice of appeal fails to reference an interlocutory order, in violation of Rule 3(d), appellate review of that order pursuant to N.C. Gen. Stat. § 1-278 is proper under the following

> circumstances: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment. All three conditions must be met.

*Tinajero v. Balfour Beatty Infrastructure, Inc.*, 233 N.C. App. 748, 757, 758 S.E.2d 169, 175 (2014) (citing *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 641, 535 S.E.2d 55, 59 (2000)). 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. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). The denial of defendant's motion for consolidation was interlocutory as it did not resolve the issues raised by plaintiff's complaint. However, even if we treat defendant's statement to the court that she intended to appeal as an objection, the denial of defendant's motion to consolidate does not meet the third requirement for review of an interlocutory order from which appeal is not taken, which is that the interlocutory order "must have involved the merits and necessarily affected the judgment." "An order involves the merits and necessarily affects the judgment if it deprives the appellant of one of the appellant's substantive legal claims." *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 348, 666 S.E.2d 127, 133 (2008). The denial of defendant's motion to consolidate cases did not involve the merits of plaintiff's claim for money owed, and did not affect the judgment in that case. We conclude, therefore, that defendant has failed to preserve for appellate review the denial of her motion for consolidation of cases.

## III. Standard of Review

As a general rule, "when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Lyons-Hart v. Hart*, 205 N.C. App. 232, 235, 695 S.E.2d 818, 821 (2010). "[A] trial court's findings of fact in a trial without a jury will be upheld if supported by any competent evidence[,] . . . even when evidence to the contrary is present." *North Carolina Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 702, 412 S.E.2d 318, 322 (1992) (citation omitted). We note that defendant asserts, incorrectly, that the standard of review of the trial court's factual determinations is "plain error." "In North Carolina, plain error review has no application to appeals in civil cases." *State v. Lawrence*, 365 N.C. 506, 507 fn1, 723 S.E.2d 326, 327 fn1 (2012).

" 'The standard of review for denial of a motion to continue is generally whether the trial court abused its discretion.' " *HSBC Bank USA Nat. Association v. PRMC, Inc.*, __ N.C. App. __, __, 790 S.E.2d 583, 586 (2016) (quoting *Morin v. Sharp*, 144 N.C. App. 369, 373, 549 S.E.2d 871, 873 (2001)). As a result, we review the ruling that defendant challenges for abuse of discretion. "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] 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).

IV. Denial of Defendant's Request for a Continuance

**[2]** At the beginning of the trial on plaintiff's claim, defendant asked the trial court to rule on her Rule 42 motion for consolidation of cases. When the court denied her motion, defendant then asked for a continuance, stating that "I am not ready to proceed today. . . . I need to have time for discovery, Your Honor." However, defendant admitted that during the 11 months since plaintiff had filed her complaint, defendant had not filed any written requests or motions seeking discovery. In addition, the record establishes that the case had previously been continued on three occasions, once at plaintiff's request and twice upon defendant's request. Based upon these facts, the trial court denied defendant's motion for a continuance.

During the trial, defendant "objected" to the introduction of a bill for plaintiff's legal services to defendant on the grounds that defendant was "asking for a continuance so I can get -- so I can get an attorney for this matter[.]" The trial court ruled that the billing document was admissible, but took a recess in order to allow defendant to contact an attorney. After the recess, during which defendant was unable to hire an attorney, plaintiff testified that she had provided defendant with the file of her case. The trial court asked defendant what discovery she was seeking, in addition to what had already been provided. Defendant answered that she wanted to obtain "deposition, notes -- definitely notes. . . . [and] also, I would like to see the appointment book. . . ." Plaintiff argued that defendant's answer showed that she sought discovery for her superior court case, which was not before the court. The trial court denied defendant's second motion for a continuance.

The record thus establishes that: (1) as of 31 August 2015, the case had been continued three times, twice at defendant's request; (2) during the eleven months in which the case was pending, defendant did not file any written requests or motions for discovery; (3) plaintiff had

provided defendant with a copy of her file; (4) defendant did not offer any explanation for her failure to hire an attorney and admitted that she was represented by counsel on the family law matters for which she had originally hired plaintiff; and (5) defendant failed to present her Rule 42 motion to a superior court judge. On these facts, we hold that the trial court's decision to deny defendant's request for a continuance was not an abuse of discretion.

We have considered defendant's arguments to the contrary, insofar as they are based on the record. "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)." *Kerr v. Long*, 189 N.C. App. 331, 334, 657 S.E.2d 920, 922 (2008). "Our appellate courts 'can judicially know only what appears of record.' " *Hampton v. Scales*, __ N.C. App. __, __, 789 S.E.2d 478, 487 (2016) (quoting *State v. Price*, 344 N.C. 583, 593-94, 476 S.E.2d 317, 323 (1996)). In this regard, we observe that defendant makes certain assertions that she "fail[s] to support . . . by citation to sworn testimony, affidavit, documentary evidence, or any other record evidence" and that "[i]t 'is axiomatic that the arguments of counsel are not evidence.' " *Basmas v. Wells Fargo Bank N.A.*, 236 N.C. App. 508, 513, 763 S.E.2d 536, 539 (2014) (quoting *State v. Roache*, 358 N.C. 243, 289, 595 S.E.2d 381, 411 (2004)).

For example, in her statement of facts, defendant contends that on 29 June 2015 she "requested that the trial be continued for 11-12 months to allow her to conduct discovery" and that the court "did not rule on Appellant's discovery request, but instead recused himself, and continued the case to 13 July 2015." Defendant cites page 28 of the record for this statement. However, the continuance order on page 28 contains no reference to the reason for defendant's continuance motion or to the court's recusal. Nor do defendant's arguments at trial constitute "evidence" of the matters asserted.

In support of her argument that the trial court erred by denying her request for a continuance, defendant challenges the evidentiary support for the trial court's Finding No. 10 in its order, which addresses defendant's continuance request:

> 10. The Defendant today testified that she was unprepared to proceed today and was asking for a continuance. The case had been continued three prior times, twice for the Defendant and once for the Plaintiff, but the file does not reflect why. The Defendant also asked for a continuance

> to obtain discovery, but could not state which discovery she was wishing to obtain. The Plaintiff testified that discovery was already issued to the Defendant in the form of her file. The Defendant attempted to contact an attorney for today's hearing and the Court in fact took breaks for her to do that, but the Defendant stated she could not do that.

Defendant contends that the "trial transcript plainly demonstrates that [the trial court's] statement that reasons for the prior grants of continuances in proceedings were unknown is belied by testimonial evidence offered by the parties." However, the "testimonial evidence" to which defendant refers consists only of the unsworn statements or arguments of defendant and counsel for plaintiff, which we do not consider. Defendant also contends that "it is clear from the testimony and undisputed facts that all prior continuances were for good cause" and that "[c]ontrary to representations made by counsel for [plaintiff], the continuances were not merely to delay." Plaintiff's argument at trial regarding defendant's motive for seeking a continuance is not evidence, and we do not consider it. Nor do we consider defendant's contentions regarding the reasons for the previous continuances, as the continuance orders do not themselves provide a reason for the continuance. Moreover, defendant fails to identify any evidence indicating that the trial court denied her request for a continuance on the grounds that the earlier continuances were not for good cause. Accordingly, the reasons for these earlier continuances are not relevant to our analysis of whether the trial court abused its discretion in denying her motion on the day of trial.

Defendant further asserts that the trial court's finding that defendant was unable to identify the discovery she sought for the trial on plaintiff's complaint was contradicted by defendant's statements that she sought "documents and things . . . including case notes and legal research in this matter, her appointment book, and the ability to conduct further discovery that would expand into issues related to her counterclaims." The trial of plaintiff's claim for money owed by defendant presented the straightforward question of whether, under the terms of the parties' contract, defendant owed a debt to plaintiff for legal services. Defendant articulates no relationship between this trial and the discovery of the above-listed items, which she candidly admits were sought in the hopes that they "would expand into issues related to her counterclaims." In addition, defendant does not identify any discoverable material to which she was entitled that could have had an effect on the outcome of the trial on plaintiff's complaint. We conclude that the trial court's finding

is supported by competent evidence. We further conclude that, even if defendant had informed the trial court of specific relevant and admissible matters on which she wanted to conduct discovery, it would not have been an abuse of discretion for the trial court to deny her continuance motion, given that she had failed to file any motion or request for discovery during the 11 months that the case was pending.

For the reasons discussed above, we conclude that the trial court did not abuse its discretion by denying defendant's request for a continuance, and that the orders of the trial court should be

AFFIRMED.

Judges STROUD and McCULLOUGH concur.

---

KELLY F. LEWIS, Employee, Plaintiff
v.
TRANSIT MANAGEMENT OF CHARLOTTE, Employer, SELF-INSURED (COMPENSATION CLAIMS SOLUTIONS, Third-Party Administrator), Defendant

No. COA16-69

Filed 6 December 2016

**1. Workers' Compensation—additional medical compensation—expiration of statute of limitations—correction of underpayment**

The trial court did not err by denying plaintiff's request for additional medical compensation for expiration of the statute of limitations where a corrective payment was made for underpayment of indemnity compensation after the original statute of limitations had expired. Although plaintiff argued that the corrective payment was actually the last payment, so that the statute of limitations had not run, the corrective payment had not yet been made at the time of the Industrial Commission's decision and could not have been the last payment.

**2. Workers' Compensation—indemnity compensation corrected—request for additional medical payments**

It was not clear whether the Industrial Commission erred by denying plaintiff's request for additional medical benefits following a corrective payment for indemnity compensation. Because the corrective payment had not yet been made to restart the limitations,

the issue of how to treat such corrective payments under N.C.G.S. § 97-25 did not need to be decided and was left to the legislature.

**3. Workers' Compensation—corrective payment—laches—remedy at law**

The doctrine of laches was not available as an alternative in a workers' compensation case where a corrective payment for an underpayment was ordered after the statute of limitations had initially run. Equitable doctrines are not available in a workers' compensation case where there is a remedy at law; here, both N.C.G.S. § 97-25.1 and 97-47 supplied remedies at law to bar claims where there had been a delay in the case.

Appeals by plaintiff and defendant from Opinion and Award entered 20 November 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 June 2016.

*The Sumwalt Law Firm, by Vernon Sumwalt, Mark T. Sumwalt, and Lauren H. Walker, for the plaintiff-appellant.*

*The Smith Law Firm, by John Brem Smith and Elizabeth N. Binion, for the defendant-appellant.*

McCULLOUGH, Judge.

Kelly Lewis ("plaintiff"), an employee of Transit Management of Charlotte ("defendant"), appeals from the opinion and award of the North Carolina Industrial Commission (the "Commission") denying his claim for additional medical compensation. Defendant also appeals from the Commission's opinion and award. For the following reasons, we affirm.

I. Background

Plaintiff, a bus operator for defendant, suffered an admittedly compensable injury on 15 June 2009 when an SUV rear-ended the bus plaintiff was driving. Defendant completed a Form 19 dated 16 June 2009 reporting plaintiff's injury to the Commission. Later that year, a physician completed a Form 25R dated 17 November 2009 indicating plaintiff was at maximum medical improvement and suffered a 0% impairment to his back. A Form 28 dated 2 December 2009 reported that plaintiff had returned to work as of that date and a Form 28B, completed at the same time as the Form 28, indicated that plaintiff had received a total of $22,631.71 from defendant and administrator Compensation Claims

Solutions as a result of his injury – $13,875.84 in temporary total disability compensation and $8,755.87 in medical compensation.

Years later, plaintiff completed a Form 18 notice of accident to employer and claim of employee dated 28 April 2014 related to the 15 June 2009 accident. Following defendant's denial of plaintiff's claim based on the expiration of the statute of limitations in a Form 61 dated 2 May 2014, plaintiff filed a Form 33 request that his claim be assigned for hearing dated 5 May 2014. In the Form 33, plaintiff indicated his claim was for additional temporary total disability compensation owed due to defendant's underpayment because of a miscalculation of plaintiff's average weekly wage, and for compensation for additional medical treatment of injuries. Defendant responded by completing a Form 33R dated 19 May 2014, in which defendant elaborated on its assertion that plaintiff's claim was barred by the statute of limitations as follows: "The Form 28B was filed on December 2, 2009 showing the last check being forwarded December 2, 2009. Accordingly, Plaintiff's claim is barred by Section 97-47 and Section 97-25.1."

Prior to the case coming on for hearing before a deputy commissioner, the parties entered into a pre-trial agreement in which they stipulated to the above facts. The parties also stipulated to the following:

> 9. . . . Although the Form 28B shows that the last medical compensation was paid on November 24, 2009, the claims payment history shows a payment by Defendant for "medical expense" on April 22, 2010, to "Electrostim Med Services" for $253.06 in Plaintiff's workers' compensation claim.
>
> 10. Plaintiff settled his third-party action and executed a release on April 14, 2010.
>
> 11. Defendant agreed to accept $11,500.00 in full satisfaction of its workers' compensation subrogation lien under N.C. Gen. Stat. § 97-10.2 and received a check in that amount dated April 14, 2010.
>
> . . . .
>
> 13. On Apri1 30, 2014, Plaintiff, through counsel, asked for a claims payment history and a payroll history from Defendant covering the 52 weeks before Plaintiff's injury on June 15, 2009. Plaintiff received the claims payment history from Defendant on April 30, 2014.

> 14. As also shown on the Form 28B, Defendant's claims payment history indicates payments [of] temporary total disability at a weekly compensation rate of $578.16 for a period of twenty-four and 3/10 (24.3) weeks for a total of $13,875.84. The average weekly wage corresponding to this compensation rate is $867.24. As shown by the Form 28B and the claims payment history, Defendant has not paid any temporary partial or permanent partial disability compensation to Plaintiff since he returned to his job at Defendant on December 2, 2009.
>
> 15. On 2 May 2014, Plaintiff received the wage information covering the 52 weeks before his injury on June 15, 2009, from Defendant.
>
> 16. Plaintiff's wage information with Defendant-Employer shows that Plaintiff's average weekly wage was $906.83, resulting in a compensation rate of $607.58 during the 52 weeks before his injury in this case. These figures indicate that Defendant has underpaid Plaintiff by $887.92 during the 24.3 weeks represented on the Form 28B.

The matter was submitted for consideration by a deputy commissioner on stipulated facts and exhibits after the parties agreed to waive a hearing scheduled for 28 October 2014. Pursuant to the pre-trial agreement, the deputy commissioner considered only "the procedural issue of whether [p]laintiff [was] time-barred from seeking additional benefits under N.C. Gen. Stat. § 97-25.1 or § 97-47 or both." Deputy Commissioner Wanda Blanche Taylor filed her opinion and award in favor of plaintiff on 8 April 2015. Defendant gave notice of appeal from the deputy commissioner's opinion and award to the Full Commission on 13 April 2015 and then completed a Form 44 application for review dated 21 April 2015.

The matter was heard by the Full Commission on 11 August 2015 and the Commission filed its opinion and award modifying the deputy commissioner's opinion and award on 20 November 2015. The Commission concluded that "[p]laintiff is entitled to payment by defendant of $714.90 to correct the underpayment of the amount owed for temporary total disability benefits during the period from 16 June 2009 through 1 December 2009[,]" "[a]s the last payment of compensation occurred on 22 April 2010, plaintiff's right to additional medical treatment terminated two years later, in 2012, and his request for additional medical treatment filed 5 May 2014 is barred by the two-year statute of limitations contained in N.C. Gen. Stat. § 97-25.1[,]" and "[t]here has not been a 'final

award' in this case that would trigger the limitations period contained in N.C. Gen. Stat. § 97-47." The Commission also concluded that case law relied upon by defendant and the doctrines of estoppel and laches did not apply in the present case. Based on its findings and conclusions, the Commission issued the following award:

> 1. Defendant shall pay plaintiff $714.90 to correct the underpayment of the amount owed for temporary total disability benefits during the period from 16 June 2009 through 1 December 2009.
>
> 2. Plaintiff's claim for additional medical treatment is time-barred under N.C. Gen. Stat. § 97-25.1.

Plaintiff gave notice of appeal from the Commission's opinion and award on 2 December 2015. Defendant gave notice of appeal from the Commission's opinion and award on 8 December 2015, after defendant issued a check to plaintiff for $714.90 dated 7 December 2015. Defendant's records of the $714.90 payment list the payment type as "Indemnity TTD[,]" the claim status as "Open[,]" and indicate the check was "Per Full Commission O&A 11 20 15[.]"

## II. Discussion

Review of an opinion and award of the Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This '[C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). The Commission's conclusions of law are reviewed *de novo*. *Busque v. Mid-America Apartment Communities*, 209 N.C. App. 696, 706, 707 S.E.2d 692, 699 (2011).

### Plaintiff's Appeal

**[1]** As clearly stated in plaintiff's brief, plaintiff "appeals the Full Commission's determination that the limitations period for more medical treatment expired before 5 May 2014, when he applied for that treatment." The period for medical compensation is limited by N.C. Gen. Stat. § 97-25.1, which provides as follows:

> The right to medical compensation shall terminate two years after the employer's last payment of medical or

> indemnity compensation unless, prior to the expiration of this period, either: (i) the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation. If the Commission determines that there is a substantial risk of the necessity of future medical compensation, the Commission shall provide by order for payment of future necessary medical compensation.

N.C. Gen. Stat. § 97-25.1 (2015). Plaintiff now contends the Commission erred in concluding that the two-year limitations period in N.C. Gen. Stat. § 97-25.1 had expired and that plaintiff was barred from seeking additional medical compensation. This issue presents a question of law which we review *de novo*.

Based on the stipulated facts, the Commission issued the following unchallenged findings:

> 1. The Form 28B filed by defendant on 2 December 2009 reflects that temporary total disability compensation was paid from 16 June 2009 through 1 December 2009, that the last compensation check was forwarded on 2 December 2009, and that this check represented final payment.
>
> 2. The Form 28B further reflects that the last medical compensation was paid on 24 November 2009, and that this payment represented final payment. However, as stipulated by the parties, defendant's claims payment history reflects that the actual last payment by defendant of medical compensation was made on 22 April 2010.
>
> 3. Because defendant paid plaintiff temporary total disability benefits based on an incorrect average weekly wage, plaintiff has been underpaid a total of $714.90 in temporary total disability benefits.

Plaintiff acknowledges the above findings of fact, and also that his request for additional medical compensation was made in the Form 33 request for a hearing that was filed on 5 May 2014. Nevertheless, plaintiff contends that his application for additional medical compensation was not barred by the two-year limitations period because the "last" payment of medical or indemnity compensation occurred on 7 December 2015, almost a year and a half after plaintiff's application, when defendant paid plaintiff what it owed due to the underpayment of temporary total

disability compensation. In support of his contention, plaintiff asserts various arguments. Yet, just as the Commission identified, the critical inquiry in this case is what constitutes the "last payment" under N.C. Gen. Stat. § 97-25.1. The Commission relied on *Busque*, 209 N.C. App. 696, 707 S.E.2d 692, and *Harrison v. Gemma Power Systems, LLC*, 234 N.C. App. 664, 763 S.E.2d 17, 214 WL 2993853 (July 2014) (unpub.). We, too, now look to those decisions for guidance.

In *Busque*, the plaintiff suffered a compensable injury on 18 January 2003 and was paid medical expenses for treatment received through 21 April 2013. *Busque*, 209 N.C. at 696-97, 707 S.E.2d at 694. The last check was issued to the plaintiff on 31 July 2003. *Id.* at 700, 707 S.E.2d at 696. Approximately four years later, on 18 July 2007, the plaintiff filed a Form 33 in which she sought additional medical compensation. *Id.* at 697, 707 S.E.2d at 694. On appeal, this Court addressed whether the plaintiff was barred from further recovery by the limitations period in N.C. Gen. Stat. § 97-25.1 and, based on a "straight-forward" reading of the statute, held that the plaintiff was barred. *Id.* at 706-707, 707 S.E.2d at 699-700. This Court explained as follows:

> Applying the statute to the present case, the "last payment of medical or indemnity compensation" for the 18 January 2003 fall was a check issued to [the plaintiff] dated 31 July 2003. [The plaintiff's] application for additional medical compensation was not filed until 18 July 2007-more than two years beyond 31 July 2003. Thus, [the plaintiff's] right to medical compensation for that injury has terminated.

*Id.* at 707, 707 S.E.2d at 700. This Court further addressed the plaintiff's argument that "the term 'last payment of . . . compensation' can only refer to a 'final award[,]' " and disagreed with the plaintiff's application of the statute, finding there was no continuing denial of compensability in the case as the plaintiff filed her only request for coverage on 18 July 2007, more than two years after the 31 July 2003 check. *Id.*

In *Harrison*, the plaintiff suffered a compensable injury on 2 March 2001 and received payments for medical treatment until 18 May 2009, the date of the last recorded payment. *Harrison*, 214 WL 2993853, at *1-3. On 25 January 2012, the plaintiff filed a Form 33 "alleging that [the d]efendant 'failed to authorize [the] plaintiff's request for further treatment . . .' and raised the issue of [the p]laintiff's right to indemnity benefits as a result of the 2 March 2001 injury." *Harrison*, 214 WL 2993853, at *3. Among the issues on appeal, this Court addressed whether the Commission erred in denying the plaintiff additional medical compensation benefits

for medical expenses incurred after 18 May 2009. *Harrison*, 214 WL 2993853, at *4. Relying on *Busque*, this Court again applied a straightforward reading of the statute and held that "because the last payment of medical compensation made by [the d]efendant was more than two years prior to [the p]laintiff's current Form 33 filing, . . . [the p]laintiff's right to additional medical compensation [was] time-barred pursuant to N.C. Gen. Stat. § 97–25.1." *Id.* Yet, in so holding, this Court addressed the plaintiff's argument that " 'the last payment of compensation in the claim has not yet taken place' because '[the p]laintiff is still owed payment for temporary total disability and/or permanent partial impairment.' " *Id.* This Court explained that, "[s]tated differently, [the p]laintiff argues that the two-year statute of limitations period found in N.C. Gen. Stat. § 97-25.1 has not yet begun and will not begin until [the p]laintiff receives a payment from [the d]efendant for indemnity benefits." *Id.* This Court rejected that argument as misguided for the following reasons:

> First, [the p]laintiff's argument ignores the plain language of the statute. "The right to medical compensation shall terminate two years after the employer's *last* payment of medical or indemnity compensation . . . ." N.C. Gen. Stat. § 97–25.1 (emphasis added). In context, the word "last" does not refer to a hypothetical future payment that [the p]laintiff may be entitled to receive after presenting a claim to the Industrial Commission. On its face, the "last" payment refers to the most recent payment of medical or indemnity benefits that has actually been paid. Second, [the p]laintiff's argument assumes the certainty of a future indemnity payment before the right to such payment has been decided by the Industrial Commission. Third, accepting Plaintiff's interpretation of the statute would allow claimants seeking additional medical compensation to obviate the statute of limitations in any case by asserting a valid claim for indemnity benefits alongside a claim for additional medical compensation. Such an expansive interpretation ignores the clear intent of our legislature to limit claims for additional medical compensation to a specified time period.

*Id.* Although the *Harrison* decision is unpublished, we find the Court's analysis persuasive and now adopt it as our own.

As the Commission found in the present case based on the stipulations of the parties, the last payment of temporary total disability compensation was paid on 2 December 2009 and the last payment of medical

compensation was paid on 22 April 2010. Applying a straight-forward reading of N.C. Gen. Stat. § 97-25.1, the two-year limitations period for additional medical compensation expired two years after 22 April 2010 and years before plaintiff filed his request for additional compensation for medical treatment in the Form 33 on 5 May 2014.

Plaintiff argues that the present case is distinguishable from both *Busque* and *Harrison* because defendant's payment on 7 December 2015 of the $714.90 that was owed to plaintiff due to the underpayment of temporary total disability benefits was an indemnity payment. Thus, plaintiff asserts the last payment for purposes of N.C. Gen. Stat. § 97-25.1 was on 7 December 2015 and the two-year limitations period did not begin to run until 7 December 2015, more than a year and a half after his request for additional medical compensation. Plaintiff further contends that the Commission's order is inconsistent because it orders the corrective payment by defendant but holds plaintiff's claim for additional medical treatment is time-barred. We are not convinced by plaintiff's arguments.

While the 7 December 2015 payment may be for the underpayment of indemnity compensation, that corrective payment had not been made at the time of the Commission's decision and, therefore, could not have been the "last payment" under a straight-forward application of N.C. Gen. Stat. § 97-25.1. At the time the Commission reviewed the evidence, made its findings, and issued its conclusions, the last actual payment of medical or indemnity compensation was paid on 22 April 2010. Thus, the evidence supports the Commission's findings and the findings support the Commission's conclusions, which correctly apply N.C. Gen. Stat. § 97-25.1.

**[2]** Although we hold the Commission did not err in denying plaintiff's request for additional medical compensation in its 20 November 2015 opinion and award, the question remains whether plaintiff could seek additional medical benefits following defendant's payment of the amount of temporary total disability benefits owed to plaintiff due to the miscalculation in the average weekly wage on 7 December 2015. Stated differently, the issue is whether a payment to correct an earlier error in medical or indemnity payments to make an employee whole restarts the limitations period in N.C. Gen. Stat. § 97-25.1. Defendant argues such a corrective payment is not the type of medical or indemnity payment that would restart the statute of limitations because "[t]he check was not for any new compensation, medical or indemnity, but rather to correct the underpayment that occurred four years ago."

When the corrective payment is considered in light of the purpose of the limitations period explained in *Harrison*, plaintiff's argument seems reasonable-for as the Commission noted,

> applying plaintiff's interpretation of "last payment" would thwart the legislatures' intent in enacting N.C. Gen. Stat. § 97-25.1 to limit claims for medical compensation to a specific time period recognized by the Court in *Harrison*, as well as the general aim of the Workers' Compensation Act to provide not only a swift and certain remedy to injured workers, but also to ensure a limited and determinate liability for employers.

We further agree with the Commission that plaintiff's interpretation could result in increased litigation in cases where honest miscalculations resulting in indemnity benefits could lead to a reset of the two-year limitations period and additional liability in cases where the last medical or indemnity payment was otherwise made years earlier. Yet, there is no such distinction between medical and indemnity payments in the normal course of a workers' compensation case and subsequent corrective payments in the statute. Since we need not decide the issue in the present case because the corrective payment had not yet been paid to restart the limitations period, we simply note that N.C. Gen. Stat. § 97-25.1 is not entirely clear as to how such corrective payments are to be treated and leave the matter for the legislature to address.

Defendant's Appeal

**[3]** In defendant's appeal, defendant contends the Commission "erred in holding that [there is] a remedy at law under N.C. Gen. Stat. § 97-47 and not applying the equitable doctrine of laches to bar plaintiff's claim." In raising this issue, defendant challenges the Commission's order requiring the corrective payment of temporary total disability compensation owed to plaintiff due to the miscalculation of plaintiff's average weekly wage. This issue, like the first issue, presents a question of law which we review *de novo*.

N.C. Gen. Stat. § 97-47 provides that "on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded . . . ." N.C. Gen. Stat. § 97-47 (2015). Yet, similar to N.C. Gen. Stat. § 97-25.1, N.C. Gen. Stat. § 97-47 restricts the period of time during which the Commission's review and modification of an award may take place. It provides,

> [n]o such review shall affect such award as regards any moneys paid but no such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article, except that in

> cases in which only medical or other treatment bills are paid, no such review shall be made after 12 months from the date of the last payment of bills for medical or other treatment, paid pursuant to this Article.

N.C. Gen. Stat. § 97-47 (2015). Also limiting the application of N.C. Gen. Stat. § 97-47, "[o]ur case law defines a 'change in condition' under [N.C. Gen. Stat.] § 97-47 as a condition occurring after a final award of compensation that is 'different from those existent when the award was made' and results in a substantial change in the physical capacity to earn wages." *Pomeroy v. Tanner Masonry*, 151 N.C. App. 171, 179, 565 S.E.2d 209, 215 (2002) (internal citations and alterations in original omitted). Thus, N.C. Gen. Stat. § 97-47 is not applicable when there has been no final award. *See Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 666, 75 S.E.2d 777, 782 (1953).

In the present case, the Commission relied on *Biddix* to reach the conclusion that "[t]here has not been a 'final award' in this case that would trigger the limitations period contained in N.C. Gen. Stat. § 97-47." The Commission further concluded that "the equitable doctrines of estoppel and laches do not apply to bar plaintiff's claim in the instant matter as defendant has a remedy at law under N.C. Gen. Stat. §§ 97-25.1 and 97-47, namely, the ability to plead the affirmative defense of lapse of the limitations periods set forth in these statutes."

Defendant does not challenge the Commission's conclusion that the limitations period in N.C. Gen. Stat. § 97-47 had not been triggered, and even concedes that there has not been a final award. Defendant instead claims the Commission's conclusions are inconsistent because the remedy at law under N.C. Gen. Stat. § 97-47 would be that the limitations period had run from a final award. Defendant asserts there can be no remedy at law without a final award and contends equity should prevent plaintiff's claim from remaining open. Defendant relies on *Miller v. Carolinas Medical Center-Northeast*, 233 N.C. App. 342, 756 S.E.2d 54 (2014) to support his argument that waiting 4 years to challenge the average weekly wage is too long and not within a "reasonable time." We are not persuaded.

While equitable doctrines are available in workers' compensation cases, they may not be applied where there is a remedy at law. *Daugherty v. Cherry Hospital/N.C. Dept. of Health and Human Services*, 195 N.C. App. 97, 101-103, 670 S.E.2d 915, 919-20 (2009). Upon review, it is clear that both N.C. Gen. Stat. §§ 97-25.1 and 97-47 supply remedies at law to bar claims where there has been a delay in the case. Simply because

the limitations period has not run in the present case to bar plaintiff's recovery of the underpaid amount of disability compensation owed to him does not mean the doctrine of laches is available as an alternative. If that were the case, any time a limitations period has not expired, the doctrine of laches may be asserted as an alternative bar to recovery. Furthermore, as the Commission concluded, the *Miller* case, relied on by defendant for what is a "reasonable time," is distinguishable from the present case. In *Miller*, there was a Form 21 agreement at issue in which the average weekly wage was recorded and the Court, based on principles of contract law, held that "a party to a Form 21 agreement which contains a verification provision but no provision regarding the time by which verification must be sought cannot assert a right to seek verification once a 'reasonable time' has passed." 233 N.C. App. at 349, 756 S.E.2d at 59. In the present case, there was no agreement and, therefore, no requirement that plaintiff seek verification of the average weekly wage within a reasonable time, as required in *Miller*.

Where N.C. Gen. Stat. §§ 97-25.1 and 97-47 provide remedies at law for the delay in seeking benefits, the Commission did not err in rejecting the application of the doctrine of laches in this case.

## III. Conclusion

For the reasons discussed, we affirm the opinion and award of the Commission.

AFFIRMED.

Judges STEPHENS and ZACHARY concur.

TED B. LOCKERMAN, ADMINISTRATOR D.B.N. OF THE ESTATES OF ELLEN DUDLEY SPELL, DECEASED, AND SULIE DANIEL SPELL, DECEASED, On Behalf of the Estates and on Behalf of All Others Similarly Situated, Plaintiffs
v.
SOUTH RIVER ELECTRIC MEMBERSHIP CORPORATION, a North Carolina Electric Membership Cooperative, Defendant

No. COA15-1113

Filed 6 December 2016

**1. Corporations—electrical cooperative—fiduciary duty—capital credits**

The trial court did not err by granting defendant electric cooperative's second motion for summary judgment. Defendant did not owe plaintiff members a fiduciary duty with regard to the discounting of capital credits.

**2. Statutes of Limitation and Repose—conversion—unjust enrichment—unfair or deceptive trade practices—breach of contract—equitable estoppel**

The trial court did not err by granting defendant electric cooperative's third motion for summary judgment on the issues of conversion, unjust enrichment, unfair or deceptive trade practices, breach of contract, and equitable estoppel. Plaintiffs' claims were barred by the statute of limitations or were released pursuant to N.C.G.S. § 28A-25-6(e).

Appeal by plaintiffs from orders entered 8 August 2012 and 8 June 2015 by Judge James L. Gale in Sampson County Superior Court. Heard in the Court of Appeals 10 May 2016.

*Andrew M. Jackson and Stevens Martin Vaughn & Tadych, PLLC, by K. Matthew Vaughn and Michael J. Tadych, for plaintiff-appellants.*

*Smith and Christensen, L.L.P., by Aaron M. Christensen and W. Britton Smith, Jr., for defendant-appellee.*

BRYANT, Judge.

Where defendant, an electric cooperative, did not owe plaintiffs a fiduciary duty with regard to the discounting of capital credits and plaintiffs' claims are otherwise barred by the statute of limitations or were

released pursuant to N.C. Gen. Stat. § 28A-25-6(e), the trial court did not err in granting defendant's motions for summary judgment, and we affirm the orders of the trial court.

Defendant South River Electric Membership Corporation ("SREMC", or "the Cooperative"), is a nonprofit electric membership cooperative organized and existing pursuant to the laws of the North Carolina Rural Electrification Authority. Headquartered in Harnett County, North Carolina, SREMC provides electric service to members in Sampson, Harnett, Cumberland, Johnston, and Bladen Counties.

SREMC sets a retirement cycle for capital credits, "annually allocat[ing] to each Member . . . Operating Margins from the Cooperative Service in proportion to the value or quantity of the Cooperative Service used, received, or purchased by each member during the applicable fiscal year ('Capital Credits')." SREMC makes capital credit retirements nineteen years after the year in which the credits were assigned. SREMC's Board (the "Board") "determine[s] the method, basis, priority, and order of retiring and refunding Capital Credits . . . ." There is no fixed time by which capital credits must be retired and all members and former members have a personal property interest in their accumulated capital credits.

When a member or former member dies owning capital credits, that member's accumulated capital credits become property of the deceased member's estate. A deceased member's personal representative may request, and the Board may authorize, a special retirement of the deceased member's accumulated capital credits. Prior to a 2001 resolution, SREMC had made special retirements of capital credits to the estates of deceased former members on a non-discounted basis. In March 2001, the Board unanimously passed a resolution "that all capital credits to estates of members dying after June 30, 2001, shall be calculated based on a 6% discount rate and a discount period equal to the number of years of patronage capital then outstanding." On 4 June 2001, the Board amended the Cooperative's bylaws (the "2001 bylaws") and approved a policy of discounting special retirements to the estates of deceased former members, to be "calculated on a discount rate equal to the Wall Street Journal Prime Rate as of December 31 of each applicable year . . . ." As a result, from August 2001 until December 2002, SREMC discounted special or early retirements of capital credits using a 6% annual discount rate. Then, in January 2003, SREMC began using a discount rate based on the Wall Street Journal Prime Rate as of 31 December of the previous year.

The 2001 bylaws allowed the Board to authorize the Cooperative to wholly or partially retire and refund capital credits to members and former members. SREMC does not notify members on each occasion when changes are made to the bylaws and it did not provide notice concerning the 4 June 2001 changes.

On 4 May 1976, J.J. (Jay) Faircloth died intestate, a citizen and resident of Cumberland County, North Carolina, survived by his widow, Lillie M. Faircloth, who inherited Jay's capital credits. Lillie M. Faircloth McLelland ("McLelland") died testate on 8 December 1999, prior to the changes made to SREMC's discounting policy. At the time of her death in 1999, McLelland, then citizen and resident of Lenoir County, North Carolina, owned accumulated capital credits of $1,117.17.

On 8 October 2002, SREMC paid the sum of $1,117.17 to the Lenoir County Clerk of Court for McLelland. SREMC did not apply a discount to McLelland's capital credits, nor did it retain any portion of them. This is the only instance in which a deceased former member's capital credits were not discounted once SREMC began its discounting program.

From January 2003 onwards, the annual discount rate was based on the WSJ Prime Rate as of December 31 of the previous year. During calendar year 2003, SREMC used a 4.25% annual discount rate for discounting capital credits to the estates of deceased members.

Ellen Dudley Spell ("Ellen"), deceased, was a citizen and resident of Sampson County and a member of SREMC at the time of her death on 3 October 2002. She owned $695.22 of capital credits. On 22 October 2002, Ellen's daughter applied for Ellen's capital credits. SREMC prepared a form titled "Request for Refund of Capital Credit Allocation to Estate of Deceased Member," which stated as follows:

> I understand that this Application represents a request for an early retirement of the stated capital credits and that a discount factor (as approved by the Cooperative's Board of Directors) will apply to this requirement and refund. The present discount factor is 6%.

SREMC discounted the $695.22 in capital credits by $398.66 at retirement, using the 6% annual discount rate in effect at that time. As a result, SREMC returned $296.56 of the $695.22 in accumulated capital credits to Ellen's estate (the "EDS Estate"), and accrued $398.66 to its "net savings."

Sulie Daniels Spell ("Sulie"), also deceased, was a citizen and resident of Sampson County and a member of SREMC at the time of her

death on 28 April 2009. She owned $221.55 of capital credits. Sulie's son applied for Sulie's capital credits, using the same form described above, except the "present discount factor" was listed as "3.25%." SREMC discounted Sulie's capital credits by $94.79, leaving $126.76 to be paid to the clerk of court for Sulie's estate (the "SDS Estate"). As a result, SREMC accrued $94.79 to its "net savings."

On 7 February 2011, plaintiff Andrew M. Jackson, a citizen and resident of Sampson County, North Carolina, was appointed Administrator of both the EDS and SDS Estates by the Clerk of Superior Court of Sampson County, North Carolina. On 9 February 2011, Jackson filed a complaint in Sampson County against SREMC. Styled as a class action, plaintiffs are the EDS and SDS Estates. The complaint included claims for declaratory judgment, breach of fiduciary duty, conversion, unjust enrichment, unfair or deceptive trade practices ("UDTP"), and breach of contract,[1] all related to SREMC's retirement of capital credits. On 25 August 2011, Ted B. Lockerman was substituted as Administrator of the EDS and SDS Estates and as plaintiff in this action. Thereafter, SREMC removed the case to the Business Court, where it was assigned to the Honorable James L. Gale. On October 21, 2011, Judge Gale entered a Phase One Case Management Order.

In December 2011, SREMC filed and served two motions for partial summary judgment, both of which were granted. In granting its first motion, the trial court acknowledged that SREMC could legally discount capital credits of deceased members when the credits are retired early. Plaintiffs do not appeal this ruling.

In granting SREMC's second motion, the trial court concluded that SREMC has no "fiduciary duty" to its members when retiring capital credits. Plaintiffs' initial appeal of that ruling was dismissed as interlocutory per opinion of this Court on 6 August 2013. *Lockerman v. S. River Elec. Membership Corp.*, No. COA12-1450, 2013 WL 4006997 (N.C. Ct. App. Aug. 6, 2013) (unpublished).

SREMC filed a third summary judgment motion, seeking a ruling on all remaining claims. Plaintiffs filed their response, and the trial court heard the pending motions on 6 October 2014. In its Opinion and Final Judgment, the trial court granted SREMC's third motion for summary judgment, dismissing with prejudice all of plaintiffs' remaining claims based on the statutes of limitations. Plaintiffs appeal.

---

1. Claims for *ultra vires* and *intra vires* corporate acts have been voluntarily dismissed.

On appeal, plaintiffs argue that the trial court erred in granting defendant SREMC's (I) second and (II) third motions for summary judgment.

*I*

**[1]** Plaintiffs first argue that the trial court erred in granting SREMC's second motion for summary judgment by ruling that, as a matter of law, SREMC owes no fiduciary duties to plaintiffs' estates and those similarly situated regarding the "retirement" of capital credits. Specifically, plaintiffs contend that SREMC owes fiduciary duties based either upon its legal relationship with its members (*de jure)* or upon evidence sufficient to allow a finder of fact to find a special relationship of trust and confidence (*de facto*). 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, 523–24, 649 S.E.2d 382, 385 (2007)).

A "fiduciary relation" is one that "may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). "In less clearly defined situations the question whether a fiduciary relationship exists is more open and depends ultimately on the circumstances. Courts have historically declined to offer a rigid definition of a fiduciary relationship in order to allow imposition of fiduciary duties where justified." *HAJMM Co. v. House of Raeford Farms, Inc. (HAJMM Co. II)*, 328 N.C. 578, 588, 403 S.E.2d 483, 489 (1991) (citation omitted). "Thus, the relationship can arise in a variety of circumstances, and may stem from varied and unpredictable facts." *Id.* (internal citation omitted).

In North Carolina, a fiduciary duty can arise by operation of law (*de jure*) or based on the facts and circumstances (*de facto*):

> [The fiduciary duty] not only includes all legal relations [(*de jure*)], such as attorney and client, broker and principal, executor or administrator and heir, legatee or devisee, factor and principal, guardian and ward, partners, principal and agent, trustee and *cestui que trust*, but it extends to any possible case in which a fiduciary relation exists in

> fact, and in which there is a confidence reposed on one side, and resulting domination and influence on the other [(*de facto*)].

*Abbitt*, 201 N.C. at 598, 160 S.E. at 906 (citation omitted).

As plaintiffs and SREMC do not stand in a legal relationship which imposes a *de jure* fiduciary relationship, we must determine whether plaintiffs have adequately asserted a *de facto* fiduciary relationship. "Whether such a relationship exists is generally a question of fact for the jury." *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 178, 684 S.E.2d 41, 53 (2009) (citation omitted). However, this Court can determine the adequacy of the evidence to support such a jury finding as a matter of law. *See Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 452, 579 S.E.2d 505, 510 (2003) ("Determination of whether a particular set of facts establishes the existence of a fiduciary duty may present a question of law for the court." (citations omitted)).

"Common to [a *de jure* fiduciary] relationship[] is a heightened level of trust and the duty of the fiduciary to act in the best interests of the other party." *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014). By contrast, other relationships, like those of debtor-creditor, *Sec. Nat'l Bank of Greensboro v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 95, 143 S.E.2d 270, 276 (1965) ("There was no fiduciary relationship; the relation was that of debtor and creditor."), and employer and employee, *Dalton v. Camp*, 353 N.C. 647, 651–52, 548 S.E.2d 704, 707–08 (2001) (holding that "the nature of virtually all employer-employee relationships[,] without more . . . [is] inadequate to establish [an at-will employee's] obligations as fiduciary in nature"), will not typically give rise to fiduciary duties.

Accordingly, we must determine whether plaintiffs have presented sufficient facts that indicate the relationship between plaintiffs and SREMC was "one in which 'there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . .' " *Dalton*, 353 N.C. at 651, 548 S.E.2d at 707 (quoting *Abbitt*, 201 N.C. at 598, 160 S.E. at 906).

The standard for finding a *de facto* fiduciary relationship is a demanding one: "Only when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the special circumstance of a fiduciary relationship has arisen." *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*,

189 N.C. App. 601, 613, 659 S.E.2d 442, 451 (2008) (quoting *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 348 (4th Cir. 1998)).

In *HAJMM Co. II*, the plaintiff, a limited partnership and for-profit corporation, sought damages for, *inter alia*, breach of fiduciary duty based on the defendants' (an agricultural cooperative) allegedly improper refusal to redeem "revolving fund certificates" issued by the defendant-co-op to the plaintiff. 328 N.C. at 579–80, 403 S.E.2d at 485. The defendant-co-op in *HAJMM Co. II* was capitalized in part when the plaintiff and two other turkey producers sold to the defendant-co-op all their stock in Raeford Turkey Farms, Inc. ("RTF"). *Id.* at 580, 403 S.E.2d at 485. As part of the consideration for selling their interests in RTF to the defendant-co-op, the plaintiff received revolving fund certificates, which became part of the defendant's capital structure and were categorized as stockholder's equity. *Id.* The certificates noted they were subject to the company's bylaws, and were "retirable in the sole discretion of the board of directors, either fully or on a pro rata basis." *Id.* at 581, 430 S.E.2d at 485–86. The plaintiff's $387,500 certificate was not retired and continued to be carried on the defendant's books as part of its capital structure. *Id.* at 581, 430 S.E.2d at 486. When the plaintiff demanded payment on the certificate, the defendant refused, even though the plaintiff's evidence showed that the defendant-co-op had been profitable during the relevant time period, held $3.4 million in outside securities, and had $922,000 cash on hand. *Id.* at 582, 430 S.E.2d at 486. At the close of evidence at trial, the trial court submitted issues to the jury and received, *inter alia*, the following answer: "Do the defendants . . . owe a fiduciary duty to the plaintiff, HAJMM? Yes." *Id.*

On appeal to this Court, the defendants argued the trial court erred in submitting to the jury the issue of whether the defendants owed plaintiff a fiduciary duty. *HAJMM Co. v. House of Raeford Farms, Inc. (HAJMM Co. I)*, 94 N.C. App. 1, 11, 379 S.E.2d 868, 874 (1989), *aff'd in part as modified, rev'd in part by HAJMM Co. II*, 328 N.C. 578, 403 S.E.2d 483 (1991). This Court disagreed and, in affirming in part and reversing in part this Court's decision in *HAJMM Co. I*, the N.C. Supreme Court noted as follows:

> The jury's determination on the fiduciary relationship issue rested on *substantial and compelling competent evidence that plaintiff placed special confidence and trust in [the] defendants when it agreed to accept the revolving fund certificate in return for its interest in RTF and that with regard to the certificate, [the] plaintiff justifiably*

> *expected [the] defendants to deal fairly.* It rested also on the factual characteristics of the certificate itself, about which there is little or no dispute. The dispute regarding the certificate has revolved around the legal effect to be given its characteristics.

*HAJMM Co. II*, 328 N.C. at 590, 430 S.E.2d at 491 (emphasis added). Our Supreme Court also noted that the legal dispute regarding the certificate had been resolved by the Court of Appeals favorable to the plaintiff who "contended the certificate evidenced enough of an equity interest in [the defendant-co-op] to lead as a matter of law to the creation of a fiduciary relation between the parties[,]"and, because the Supreme Court chose not to review this issue, it "thus bec[ame] the law of the case." *Id.*; *see also HAJMM Co. I*, 94 N.C. App. at 11–12, 379 S.E.2d at 874.

Here, SREMC's decisions regarding discounting early-retired capital credits do not support a finding that SREMC owed plaintiffs a fiduciary duty. Unlike the plaintiff in *HAJMM Co. I & II*, plaintiffs in the instant case cannot show that SREMC "figuratively [held] all the cards[.]" *Broussard*, 155 F.3d at 348 (citation omitted).

First, no member or representative of a deceased member is required to have a capital credit retired early: "Upon the death of any Member . . . *and pursuant to a written request from the Deceased Member's legal representative*, the Board may retire the Deceased Member's Capital Credits . . . under the terms and conditions agreed upon by the Deceased Member's legal representative and the Cooperative." Indeed, plaintiffs shared some control with SREMC over the retirement transaction as SREMC "currently makes general capital credit retirements on a dollar for dollar basis 19 years after the year for which the operating margins were allocated." Plaintiffs retained the right to choose whether to receive an early payout or wait for payout when the credits reached their date of maturity.

Thus, as plaintiffs were required to submit a written request on behalf of their deceased members in order to receive capital credits before their date of maturity, plaintiffs' participation in early capital credit retirement was entirely voluntary. Furthermore, SREMC's members have no guarantee that their credits will be retired early, even upon written request—the bylaws provide for redeeming capital credits only where "the financial condition of the Cooperative will not be impaired thereby." *See Four Cnty. Elec. Membership Corp. v. Powers*, 96 N.C. App. 417, 420, 425, 386 S.E.2d 107, 109, 112 (1989) ("Unlike funds received from the sale of stocks and bonds, monies ultimately termed

patronage capital by [a federal tax-exempt entity] are merely part of the gross receipts received for the sale of electricity when billings are rendered. Patronage capital ultimately owed to . . . members is at the time of receipt uncertain as to both amount and fact of liability.").[2]

Unlike the issuance of the certificate in *HAJMM Co. I*, which was held to be more indicative of a corporation/shareholder relationship, 94 N.C. App. at 11, 379 S.E.2d at 874, here, members of SREMC "receive no interest or dividends on their capital credits" and retained some control over the capital credit retirement process. The plaintiff in *HAJMM Co.*, on the other hand, retained no control over the issuance of his certificate—his certificate was retirable only at the discretion of the defendant-co-op board. *HAJMM Co. II*, 328 N.C. at 581, 430 S.E.2d at 486.

Second, plaintiffs cannot show evidence that SREMC exerted such "dominion and control" such that it must be held accountable as a fiduciary where plaintiffs were sufficiently on notice regarding SREMC's discounting program. The request form submitted by plaintiffs disclosed on its face that a discount factor would be applied in determining the amount of capital credit to be refunded. Each application signed by plaintiffs included this notice, even if the amount to be discounted was not filled in until after plaintiffs signed and returned their applications. Additionally, the Bylaws outlining the discount policy were available to plaintiffs at any time upon request, even if SREMC does not generally provide notification to its members on each occasion when there are changes made to the bylaws, and it did not do so concerning the 4 June 2001 changes.

Thus, as plaintiffs retained some control over the retirement transaction and were sufficiently on notice that early-retired capital credits would be subject to discounting, plaintiffs here have not presented adequate evidence such that a jury could find there was "substantial and compelling competent evidence that plaintiff[s] placed special confidence and trust in defendant[]," nor that they "justifiably expected

---

2. Other courts have recognized that patron credits cannot be considered an "indebtedness" which is presently due and payable. *In re E. Me. Elec. Coop., Inc.*, 125 B.R. 329, 336 (Bankr. D. Me. 1991) (noting that "the directors of a cooperative are free to refuse to pay value to retire a patron's account" and that "patronage dividends allocated cooperative patrons' accounts do not constitute an indebtedness" (citations omitted)); *Evanenko v. Farmers Union Elevator*, 191 N.W.2d 258, 261 (N.D. 1971) (noting that other courts have held that "patronage credits are not such an indebtedness on the part of the cooperative due the patron which can be collected at any time" and concluding that "patronage credits constitute an interest of the patron in the cooperative which is contingent and not immediately payable").

defendant[] to deal fairly." *Id.* at 590, 430 S.E.2d at 491. Thus, the trial court did not err in concluding that the facts established by the record "did not create a special relationship that rise[s] to the level necessary to impose fiduciary duties on SREMC" with respect to plaintiff's estates and those similarly situated regarding the retirement of their capital credits. Plaintiffs' argument, that the trial court erred by granting SREMC's second motion for summary judgment, is overruled.

*II*

**[2]** Plaintiffs lastly argue that the trial court erred in granting SREMC's third motion for summary judgment, ruling that plaintiffs' remaining claims were barred by the statutes of limitations or were otherwise not supported by a sufficient forecast of the evidence. Specifically, plaintiffs contend that (1) the EDS Estate's claims for conversion, unjust enrichment, UDTP, and breach of contract are not time barred and (2) the SDS Estate's claims are not barred by the clerk's acceptance of payment and are otherwise supported by sufficient evidence. We disagree.

This Court reviews an appeal from a summary judgment order *de novo*. *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

*1. Plaintiff EDS Estate's Claims*

This action was initiated on 9 February 2011. The discounted balance of plaintiff EDS Estate's capital credits was paid out by SREMC more than eight years prior to that date on 9 December 2002. "After a defendant pleads the statute of limitations, the plaintiff has the burden of demonstrating she brought the action within the applicable limitation period." *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 81, 712 S.E.2d 221, 226 (2011) (citation omitted). "Whether a claim is time-barred is a mixed question of law and fact." *Id.* (citation omitted). "If a plaintiff's claim is barred by the running of the applicable statute of limitations, summary judgment in favor of a defendant is appropriate." *ABL Plumbing & Heating Corp. v. Bladen Cnty. Bd. of Educ.*, 175 N.C. App. 164, 168, 623 S.E.2d 57, 59 (2005) (citation omitted).

A. Conversion

Plaintiffs assert that discounting capital credits to their present value constitutes conversion. We disagree.

Conversion claims are subject to a three-year statute of limitations running from the date of the alleged wrongful conduct. N.C. Gen. Stat. § 1-52(4) (2015).

A claim for conversion "requires (1) an unauthorized assumption and exercise of right of ownership over property belonging to another and (2) a wrongful deprivation of it by the owner, regardless of the subsequent application of the converted property." *N.C. State Bar v. Gilbert*, 189 N.C. App. 320, 324, 663 S.E.2d 1, 4 (2008) (citation omitted). Generally, a claim for conversion accrues when "some act is done which is a denial or violation of the plaintiff's dominion over or rights in the property." *Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., Inc.*, 192 N.C. App. 74, 86, 665 S.E.2d 478, 489 (2001) (quoting *Lake Mary Ltd. P'ship v. Johnston*, 145 N.C. App. 525, 532, 551 S.E.2d 546, 552 (2001)). However, where a person or entity has lawfully obtained possession, the true owner must demand return of the goods and receive an absolute refusal to surrender them. *See Hoch v. Young*, 63 N.C. App. 480, 483, 305 S.E.2d 201, 203 (1983) (citation omitted).

Here, plaintiff EDS Estate applied for a refund of its capital credits on 22 October 2002. On 9 December 2002, SREMC discounted the capital credit balance and paid the EDS Estate the discounted amount of $215.79. In connection with the special retirement of these capital credits, SREMC accrued $398.66 to its "net savings." Plaintiff EDS Estate made no further request that SRMEC refund the amount it retained at that time.

On these facts, a conversion claim would have accrued when and if SREMC had retained (or refused to surrender) the discounted portion of retired capital credits in response to plaintiff's demand for the same. Accordingly, the three-year statute of limitations had run by 9 December 2005, well before the initiation of this action on 9 February 2011, and plaintiff EDS Estate's claim for conversion is time-barred.

B. Unjust Enrichment

"A claim for unjust enrichment must be brought within three years of accrual under subsection 1 of [N.C. Gen. Stat. §] 1-52." *Stratton*, 211 N.C. App. at 85, 712 S.E.2d at 228 (citing *Housecalls Home Health Care, Inc. v. State*, 200 N.C. App. 66, 70, 682 S.E.2d 741, 744 (2009)). To the extent plaintiff EDS Estate's unjust enrichment claims are premised upon its conversion theories, this claim is also subject to a three-year statute of limitations. *See id.* at 85, 712 S.E.2d at 228–29 (holding that statute of limitations for unjust enrichment and conversion claims applied, rather than statute of limitations that applied to claims seeking relief on the ground of fraud or mistake where heir of estate was in essence pursuing a conversion claim). As such, plaintiff EDS Estate's claim for unjust enrichment is time-barred.

C. Unfair or Deceptive Trade Practices ("UDTP")

A UDTP claim must be brought within four years of the accrual of the cause of action. N.C. Gen. Stat. § 75-16.2 (2015); *see* N.C. Gen. Stat. § 75-1.1(a) (2015) ("[U]nfair or deceptive acts or practices in or affecting commerce, are declared unlawful."). A UDTP claim based on fraud accrues only "at the time the fraud is discovered, or *should have been discovered* with the exercise of reasonable diligence." *Trantham v. Michael L. Martin, Inc.*, 228 N.C. App. 118, 126, 745 S.E.2d 327, 334 (2013) (quoting *Nash v. Motorola Commc'ns & Elecs., Inc.*, 96 N.C. App. 329, 331, 385 S.E.2d 537, 538 (1989)). Applying that limitations period here, all UTDP claims based on payment of capital credits prior to 9 February 2007 are time-barred.

D. Breach of Contract

Claims based upon a contract are subject to a three-year statute of limitations. N.C.G.S. § 1-52(1). "It is a well-settled rule in North Carolina that a cause of action for breach of contract accrues, and the statute of limitations period begins to run, '[a]s soon as the injury becomes apparent to the claimant or should reasonably become apparent[.]' " *ABL Plumbing*, 175 N.C. App. at 168, 623 S.E.2d at 59 (alteration in originals) (quoting *Liptrap v. City of High Point*, 128 N.C. App. 353, 355, 496 S.E.2d 817, 819 (1998)).

Plaintiffs' brief asserts only that its varying claims, including breach of contract, should not be time-barred based on the doctrine of equitable estoppel, *see infra* Section 1.E., and the trial court's order notes that plaintiffs' brief to the trial court "pose[d] no opposition to SREMC's assertion that the [EDS] [E]state's breach of contract claim should be time-barred." Accordingly, we affirm the trial court's ruling that the breach of contract claim is also time-barred.

E. Equitable Estoppel

Plaintiffs claim that SREMC should be equitably estopped from asserting the statute of limitations as a defense to the above claims on behalf of the EDS Estate. For the following reasons, we disagree.

"[A] defendant may properly rely upon a statute of limitations as a defensive shield against 'stale' claims, but may be equitably estopped from using a statute of limitations as a sword, so as to unjustly benefit from his own conduct which induced a plaintiff to delay filing suit." *Friedland v. Gales*, 131 N.C. App. 802, 806, 509 S.E.2d 793, 796 (1998) (citations omitted).

> The essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.

*Id.* at 807, 509 S.E.2d at 796–97 (quoting *Parker v. Thompson-Arthur Paving Co.*, 100 N.C. App. 367, 370, 396 S.E.2d 626, 628–29 (1990)).

Here, plaintiffs would need to show the EDS Estate lacked knowledge and the means of ascertaining the real facts, in 2002, concerning the discount rate established by the Board in the Bylaws. However, the EDS Estate's representative was on notice of the discounting by virtue of the application form itself, had both the opportunity and the capacity to review the bylaws, and could ask questions like any other estate representative was able to do.[3] *See Dallaire*, 367 N.C. at 369, 760 S.E.2d at 267 ("A party cannot establish justified reliance on an alleged misrepresentation if the party fails to make reasonable inquiry regarding the alleged statement." (citation omitted)). Further, there is no evidence in the record which would support a finding that SREMC affirmatively concealed facts regarding the discounting program, even if it did not advertise the amendments made in 2001. Accordingly, plaintiff EDS Estate cannot overcome the statute of limitations defenses through equitable estoppel and its argument on this point is overruled.

*(2) Plaintiff SDS Estate's Claims*

By application dated 28 May 2009, Sulie's son applied for decedent Sulie's capital credits. Following the Board's approval, SREMC tendered the sum of $126.76 to the Sampson County Clerk of Court pursuant to N.C. Gen. Stat. § 28A-25-6.

Plaintiff SDS Estate contends the Clerk of Court's acceptance of SREMC's payment on behalf of the SDS Estate is limited to the amount paid the Clerk and does not extend to the amounts SREMC retained

3. Upon request of the representative for the Orpah Blanche Scott and Lee Ivey Williams Estates, SREMC provided the following formula used for retiring capital credits: Accumulated Capital Credits – Discount Factor = Net Capital Credit Amount – Outstanding Bad Debt = Capital Credit check amount OR Bad Debt Balance Remaining.

as "net savings." Plaintiff asserts this payment does not constitute a "release of indebtedness" which would bar plaintiff's claims for declaratory judgment, conversion, unjust enrichment, breach of contract, and UDTP. We disagree.

"The receipt from the clerk of the superior court of a payment purporting to be made pursuant to this section [of Chapter 28A, Administration of Decedents' Estates] is a full release to the debtor for the payment so made." N.C. Gen. Stat. § 28A-25-6(e) (2015). Here, the trial court held that this language operated to release SREMC from further liability to plaintiffs regarding the SDS Estate, "not only to the amount paid, but also to the amount withheld by SREMC as a result of discounting." While plaintiff argues the release should not apply as SREMC did not advise the Clerk of the discount, the SDS Estate received and accepted without protest precisely what it was due pursuant to the Cooperative's Bylaws. As we find that SREMC's payment to the Clerk constituted a release of indebtedness pursuant to N.C. Gen. Stat. § 28A-25-6(e), we need not address the remaining claims made on behalf of the SDS Estate.

In conclusion, as the facts of this case do not compel a finding that SREMC owed plaintiffs a fiduciary duty with regard to the discounting of capital credits and plaintiffs' claims are otherwise barred by the statute of limitations or were released pursuant to N.C. Gen. Stat. § 28A-25-6(e), the trial court did not err in granting SREMC's second and third motions for summary judgment. Accordingly, the orders of the trial court are

AFFIRMED.

Judges STROUD and DIETZ concur.

SETTLERS EDGE HOLDING COMPANY, LLC; MOUNTAIN AIR DEVELOPMENT CORPORATION; VIRGINIA A. BANKS; WILLIAM R. BANKS; JEANI H. BANKS; MICHAEL R. WATSON; SHEREE B. WATSON; VIRGINIA A. BANKS, WILLIAM R. BANKS, AND SHEREE B. WATSON IN THEIR CAPACITY AS TRUSTEES OF WILLIAM A. BANKS REVOCABLE TRUST; MORRIS ATKINS IN HIS CAPACITY AS TRUSTEE OF WILLIAM BANKS FAMILY IRREVOCABLE TRUST NUMBER 1; AND MORRIS ATKINS IN HIS CAPACITY AS TRUSTEE OF WILILAM BANKS FAMILY IRREVOCABLE TRUST NUMBER 2, Plaintiffs-Appellants

v.

RES-NC SETTLERS EDGE, LLC, Defendant-Appellee

No. COA15-1055

Filed 6 December 2016

**Damages and Remedies—recoupment—breach of contract**

The trial court's order granting summary judgment was reversed and remanded to determine the amount of recoupment, if any, defendant may recover from plaintiffs on its claim for breach of contract after deduction of any damages proven by plaintiffs.

Appeal by plaintiffs from orders entered 4 November 2013 and 28 May 2015 by Judges Mark Powell and Marvin P. Pope in Superior Court, Yancey County. Heard in the Court of Appeals 10 February 2016.

*Rayburn Cooper & Durham, P.A., by G. Kirkland Hardymon, Ross R. Fulton, and Benjamin E. Shook, for plaintiffs-appellants.*

*Nelson Mullins Riley & Scarborough, LLP, by Christopher J. Blake and D. Martin Warf, for defendant-appellee.*

STROUD, Judge.

Plaintiffs appeal from the trial court's 4 November 2013 order granting defendant RES-NC Settlers Edge, LLC's motion for partial summary judgment and from the order entered 28 May 2015 granting defendant's motion for lack of subject matter jurisdiction and denying plaintiffs' motion for summary judgment. On appeal, plaintiffs argue that the trial court erred in striking their affirmative defenses for lack of subject matter jurisdiction, not granting collateral estoppel effect to a prior foreclosure order, and in granting summary judgment in favor of defendant while denying summary judgment in favor of plaintiffs. After review, we find that in this case, the FDIC effectively repudiated the loan contract by refusing to fund the draw requests yet failed to give plaintiffs proper

notice of the repudiation. With proper notice, plaintiffs could have asserted an administrative claim for damages. Although the trial court would lack jurisdiction for any affirmative claim by plaintiffs for damages, plaintiffs did not bring any claim for damages, and the trial court does have jurisdiction to consider defendant's counterclaim and thus plaintiffs' affirmative defenses to that counterclaim.

Although plaintiffs cannot recover damages from defendant, plaintiffs' affirmative defenses raise the issue of recoupment. Defendant has not demonstrated any genuine issue of material fact and all of the evidence, taken in the light most favorable to defendant, shows that the FDIC effectively repudiated plaintiff Settlers Edge's loan contract, but this does not necessarily require judgment forgiving the loan entirely. Instead, there are genuine issues of material fact as to the amount of recoupment, if any, plaintiffs are entitled to, based upon defendant's repudiation of the loan contract. Accordingly, plaintiffs' affirmative defense of repudiation raised the issue of recoupment based upon defendant's repudiation of the loan contract. Because there are questions of material fact as to recoupment, we reverse and remand for further proceedings to determine the amount of damages, if any, defendant may recover from plaintiffs on its claim for breach of contract after deduction of any damages proven by plaintiffs.

I. Background

Plaintiffs' complaint set forth the following facts. Plaintiff Settlers Edge ("Settlers Edge") is a limited liability company organized in 2007 to develop and maintain Mountain Air Country Club and residential lots on a parcel of real property ("the Property") in Yancey County, North Carolina. In June 2007, Settlers Edge secured a $15,500,000.00 loan from Integrity Bank in Georgia to finance the construction of Mountain Air Country Club on the Property. A material term of the financing agreement between Settlers Edge and Integrity Bank was that "Settlers Edge would receive funding for the approximately $7 million in construction and carrying expenses necessary to develop the Property into marketable lots with utilities and amenities. This funding took the form of monthly loan draw requests submitted by Settlers Edge to Integrity Bank."

Integrity Bank funded the development of the Property with the monthly loan draws as agreed from 20 June 2007 through 28 August 2008, but then on 29 August 2008, Integrity Bank was placed under the receivership of the Federal Deposit Insurance Corporation ("FDIC"), which assumed all of its assets and obligations. On 19 September 2008, Settlers Edge submitted a draw request for the month of August for

$41,677.20. The FDIC refused to disburse the requested funds. After several attempts to get the FDIC to pay the loan draw, Settlers Edge sent a formal written notice and demand through counsel to the FDIC stating that it was in "material breach" of its obligations and demanding performance. The FDIC never responded. At some point before 27 October 2009, "the FDIC caused a substitute trustee to be appointed to institute foreclosure proceedings on the Deed of Trust."

In the foreclosure proceeding, plaintiffs herein raised the defense of material breach of the loan agreement by the FDIC. The Yancey County Clerk of Superior Court entered an order on 11 February 2010 denying the FDIC's request for foreclosure, finding plaintiffs were "not in default under the Loan Documents," so the FDIC did not "have the right to institute foreclosure proceedings against the property described in the Deed of Trust." The FDIC then "appealed the ruling, then claimed to have assigned all of its rights, title and interest in the Development Financing to a new entity, Multibank 2009-1 RES-ADC Venture, LLC ('Multibank')." Multibank eventually "claim[ed] to have assigned its right, title and interest in the Development Financing to defendant RES-NC." The FDIC, through RES-NC[1], after being assigned the rights to the Development Financing from Multibank, dismissed the FDIC's appeal to the Yancey County Superior Court on 6 May 2010.

On 15 October 2010, plaintiffs filed this action for a declaratory judgment, claiming:

> that (a) the FDIC committed a material breach of the terms of the Construction Loan Agreement; (b) that pursuant to North Carolina law, this material breach excused their further performance under the various component agreements which comprise the Development Financing; (c) that this issue has been previously litigated and actually adjudicated and that RES-NC is collaterally stopped from re-litigating this issue; and (d) that Plaintiffs have no obligation to pay RES-NC any funds.

Defendant filed its answer and counterclaim on 31 July 2013, denying the allegations in plaintiffs' complaint and asserting as affirmative defenses that the Yancey County Clerk of Court's order has no preclusive effect and that the Yancey County Clerk of Court lacked jurisdiction

1. We use the FDIC and defendant RES-NC interchangeably throughout the body of this opinion, as defendant RES-NC eventually stepped in the shoes of the FDIC when it was assigned the FDIC's rights, title, and interest in the Development Financing agreement.

or authority to enter an order excusing plaintiffs' performance under the loan agreement. Defendant also alleged a counterclaim for breach of contract against plaintiffs to recover the full amount of the loan, plus fees and interest.

Defendant filed a motion for partial summary judgment on 19 September 2013 asserting that there were "[n]o genuine issues of material fact" regarding plaintiffs' material breach and collateral estoppel claims and defendant's affirmative defenses. Furthermore, defendant stated that the claims and defenses "are legal issues that require no discovery and are ripe for adjudication by the Court." On 30 September 2013, plaintiffs filed their reply to defendant's counterclaim, arguing that defendant's counterclaim fails to state a claim upon which relief can be granted and asserting the following affirmative defenses: 1) material breach of contract; 2) counterclaim barred under Equal Credit Opportunity Act ("ECOA"); 3) laches; 4) estoppel; 5) waiver; 6) release; 7) unclean hands; 8) repudiation; 9) material modification and release; 10) failure to mitigate damages; 11) collateral estoppel and res judicata; 12) lack of standing and not the real party in interest; 13) lack of consideration; and 14) reservation of any additional defenses that may be revealed during discovery or after receiving additional information.

After a hearing on 7 October 2013, the trial court entered an order on 4 November 2013 granting defendant's motion for partial summary judgment. The court concluded that defendant's claim was not precluded by the Yancey County Clerk of Court's order denying foreclosure and that the order "does not have preclusive effect with respect to the issues of (a) whether the FDIC breached the loan documents; (b) whether the FDIC's breach was material; and (c) whether Plaintiffs' obligations to Defendant under the loan documents are excused." Plaintiffs filed a notice of appeal from the court's order on 4 December 2013, but their appeal was dismissed as interlocutory by this Court on 16 December 2014.

On 14 May 2015, defendant filed a motion to dismiss plaintiffs' declaratory judgment for lack of subject matter jurisdiction and motion for summary judgment as to defendant's counterclaim. In support of the motion to dismiss for lack of subject matter jurisdiction, defendant argued that the trial court lacked jurisdiction "over Plaintiffs' claims as a matter of federal law under the requirements of 12 U.S.C. § 1821(d)(13)(D)." Defendant also asked for summary judgment, alleging that there was no genuine issue of material fact regarding (a) plaintiffs' default of the loan, (b) plaintiffs' failure to repay any amounts borrowed under the loan, and (c) plaintiffs indebtedness to defendant "in the total outstanding amount of $20,523,921.31."

On 15 May 2015, plaintiffs also filed a motion for summary judgment, noting that:

> 1. Plaintiffs commenced this action by filing their Complaint against Defendant . . . on October 15, 2010 seeking a declaratory judgment that, due to the prior material breach by the Defendant's predecessor-in-interest, Plaintiffs were excused from further performance under the loan documents at issue in this case.
>
> 2. Following consolidation of this action with a separate action commenced by Defendant in the Superior Court for Alexander County, North Carolina, Defendant filed its Answer and Counterclaim on July 31, 2013 seeking to recover from Plaintiffs based on Plaintiffs' alleged breach of the Loan Documents at issue.
>
> 3. On or about September 30, 2013, Plaintiffs filed their Reply to Defendants Counterclaims and asserted, among others, affirmative defenses based on (1) the prior material breach of the loan documents by Defendant's predecessor-in-interest, (2) the repudiation of the loan documents by Defendant's predecessor-in-interest, and (3) the material modification of the underlying loan obligation.
>
> 4. Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, "the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits . . . show that there is no genuine issue as to any material fact," and that Defendant is entitled to judgment dismissing Defendant's Counterclaim in its entirety as a matter of law based on the aforementioned defenses. N.C.R. Civ. P. 56 (2015).

The trial court heard the parties respective motions at a hearing on 25 May 2015 and subsequently entered an order and judgment on 28 May 2015 granting defendant's motion to dismiss for lack of subject matter jurisdiction and defendant's motion for summary judgment. Specifically, the court concluded:

> 1. As a matter of federal law, under the requirements of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), 12 U.S.C. § 1821(d)(13)(D), this Court lacks subject matter jurisdiction over: (a) Plaintiffs' claim for declaratory relief set forth in Plaintiffs'

> Complaint in this action; and (b) Plaintiffs' First, Sixth, Eighth, Ninth, Tenth, and Eleventh Affirmative Defenses set forth in Plaintiffs' Reply to Counterclaim in this action. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction is, therefore, GRANTED, and Plaintiffs' Complaint and the First, Sixth, Eighth, Ninth, Tenth, and Eleventh Affirmative Defenses set forth in Plaintiffs' Reply to Counterclaim are hereby DISMISSED.
>
> 2. Defendant has established that there are no genuine issues of material fact with respect to its Counterclaim for breach of contract, and that Defendant is entitled to judgment as a matter of law. Plaintiffs have failed to raise any genuine issue of material fact with respect to Defendant's Counterclaim for breach of contract, or with respect to Plaintiffs' Second, Third, Fourth, Fifth, Seventh, Twelfth and Thirteenth Affirmative Defenses set forth in Plaintiffs' Reply to Counterclaim in this action. Defendant's Motion for Summary Judgment on its Counterclaim for breach of contract is, therefore, GRANTED.
>
> 3. Plaintiffs are not entitled to summary judgment as a matter of law. Plaintiffs' Motion for Summary Judgment is, therefore, DENIED.

The court denied plaintiffs' motion for summary judgment and entered final judgment against plaintiffs on defendant's counterclaim, jointly and severally, for $20,523,921.31. Plaintiffs filed a notice of appeal on 26 June 2015.

## II. FIRREA and Affirmative Defenses

Plaintiffs first argue on appeal that the trial court erred in striking their affirmative defenses for lack of subject matter jurisdiction and denied plaintiffs due process. Specifically, plaintiffs contend that the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), 12 U.S.C.A. § 1821(d)(13)(D) (2014), upon which defendant and the trial court relied, does not bar affirmative defenses.

FIRREA sets out the authority and procedures for the FDIC to follow when a depository institution, such as Integrity Bank, becomes insolvent and grants the FDIC broad powers and duties as a "conservator or receiver" of the depository institution. *See* 12 U.S.C.A. § 1821(d)(2)(A). Generally, the FDIC becomes the "Successor to institution" and has "by operation of law":

> (i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and
>
> (ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

*Id.*

The FDIC is granted authority, among other things, to "[o]perate the institution" (B); exercise the functions of any member, stockholder, director, or officer of the institution (C); take any actions "necessary to put the insured depository institution in a sound and solvent condition" (D); to liquidate the depository institution and "proceed to realize upon the assets of the institution" (E); and to pay "all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter." (H). 12 U.S.C.A. § 1821(d)(2)(B)-(E), (H). In a case "involving the liquidation or winding up of the affairs of a closed depository institution," the receiver is required to

> (i) promptly publish a notice to the depository institution's creditors to present their claims, together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the publication of such notice; and
>
> (ii) republish such notice approximately 1 month and 2 months, respectively, after the publication under clause (i).

12 U.S.C.A. § 1821(d)(3)(B).

FIRREA also sets out the administrative process for a debtor to bring "any claim against a depository institution[.]" *See* 12 U.S.C.A. § 1821(d)(4)(A)- rulemaking authority. Thus, FIRREA contemplates that the claims arising out the failure of a depository institution will be resolved by the receiver, and if a debtor raises a claim against the institution, that claim will be determined in the federal administrative process established for this purpose. Therefore, judicial review by the courts is quite limited.

> (D) Limitation on judicial review
>
> Except as otherwise provided in this subsection, no court shall have jurisdiction over--

> (i) any claim or *action for payment from*, or any action seeking a *determination of rights* with respect to, the *assets* of any *depository institution* for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
>
> (ii) any claim relating to *any act or omission of such institution* or the *Corporation* as receiver.

12 U.S.C.A. § 1821(d)(13)(D) (emphasis added).

Here, the FDIC was appointed as receiver for Integrity Bank on 29 August 2008 and assumed all of Integrity Bank's assets and liabilities at that time -- including the obligation to fund plaintiffs' draw requests. The FDIC sent a letter on 2 September 2008 informing Settlers Edge that Integrity Bank had been closed and the FDIC had taken over as receiver. The FDIC suggested Settlers Edge seek refinancing of the loan documents. Settlers Edge submitted a draw request for August 2008 on 19 September 2008 for $41,677.20 and received no response from the FDIC. The FDIC sent additional letters on 20 October 2008 to the guarantors of Integrity Bank's loan to Settlers Edge notifying the guarantors that they had 30 days to strictly comply with the terms and provisions of the loan agreement. On 4 December 2008, Settlers Edge sent written notice to the FDIC of material breach.

Further, the exhibits submitted with the record on appeal include the "Supplemental Brief in Opposition to Foreclosure Proceeding" filed by Settlers Edge, which contains facts indicating that "the FDIC never took the good faith step of acknowledging the obligations it assumed from Integrity Bank, nor did it exercise its statutory right to 'repudiate' those obligations. Instead, the FDIC took a 'heads I win, tails you lose' position leaving Settlers Edge in limbo." Settlers Edge noted that in this case, "the FDIC made unsuccessful efforts to quickly sell off the Loan Documents with the goal of making the draw request funding the loan purchaser's problem. Doubtless, the FDIC also acted on the hope that Settlers Edge would either quietly accept this situation or that it would go bankrupt and that an appointed trustee would lack the resources to bring the estate's claims to recover for the breach."

In a deposition on 6 March 2015, William R. Banks, plaintiffs' representative, was asked whether Settlers Edge understood "that there was a deadline by which to submit claims against the FDIC in connection with the receivership of Integrity Bank?" Mr. Banks replied, "Not to my knowledge." The record on appeal does not contain documents from

that time period regarding when or whether plaintiffs received notice of the receivership or whether plaintiffs filed any claim as provided by statute. Plaintiffs filed this lawsuit on 31 July 2013.

Plaintiffs' declaratory judgment claim in this case does "seek[ ] a determination of rights," 12 U.S.C.A. § 1821(d)(13)(D), regarding the assets of the depository institution so this portion of Plaintiffs' claim would be barred by FIRREA. But plaintiffs argue that even if the declaratory judgment action is barred by FIRREA, their affirmative defenses to defendant's counterclaims are not. Plaintiffs sought to raise affirmative defenses of material breach and material modification to defendant's counterclaims seeking recovery *against Plaintiffs* for breach of contract.

Thus, plaintiffs contend that while the limitation of judicial review in 12 U.S.C.A. § 1821(d)(13)(D) applies to *claims* for payment or for a determination of rights against the receiver, it does not apply to plaintiffs' *affirmative defenses*. Although this issue has not been specifically addressed by a court in North Carolina, other states have dealt with similar cases. The results vary depending upon the facts and procedural postures of the cases, including rules which may be unique to the particular state. We have therefore sought to find cases which address the issue in a context which is most similar to this case. The Nevada Supreme Court considered this issue in a similar context and determined that affirmative defenses are not barred. *See Schettler v. Ralron Capital Corp.*, 275 P.3d 933 (Nev. 2012). In *Schettler*, the defendant borrower and Silver State Bank

> executed a Business Loan Agreement (the Loan) and a Promissory Note (the Note), under which Silver State provided Schettler with a $2,000,000 revolving line of credit. Schettler agreed to pay interest on the loan monthly until the loan's maturity date, at which time he would be required to pay all outstanding principal and any remaining unpaid accrued interest. The original maturity date of the Loan and the Note was September 15, 2007. On that date, Schettler and Silver State entered into a Change in Terms Agreement that modified the maturity date to September 15, 2008. That same day, Schettler also executed a Commercial Guaranty in his capacity as Trustee for the Vincent T. Schettler Living Trust, guaranteeing to pay all of the Loan obligations. It is undisputed that the Loan, the Note, and the Commercial Guaranty (loan agreement) were valid and enforceable contracts at their inception.

*Id.* at 934-35.

On 14 August 2008, Silver State notified Schettler that it had frozen the funds remaining on the line of credit because of a change in his financial condition or that Silver State believed his "prospect of performance on the Note was impaired." *Id.* at 935. Silver State also informed Schettler that

> it had decided to cancel any current commitments until Schettler cured the defaults, but that until that time, Schettler was responsible for payment of interest on the loan. At the time of the default notice, however, Schettler was current on his payments, and the loan had an outstanding principal balance of $1,114,000.

*Id.* (quotation marks and brackets omitted).

A few weeks later, Silver State went into receivership and the FDIC was appointed as receiver. *Id.* RalRon later acquired Schettler's loan agreement and demanded full payment of principal, interest, and late fees from Schettler; upon Schettler's failure to pay, RalRon filed a lawsuit in Nevada state court seeking recovery upon the loan agreement. *Id.* Schettler filed an answer which raised several counterclaims and affirmative defenses for "breach of contract, breach of the implied covenant of good faith and fair dealing, and estoppel." *Id.* RalRon filed a motion for summary judgment on its claims for breaches of contract and personal guaranty, claiming that Schettler's counterclaims and affirmative defenses "were barred because Schettler failed to file any administrative claims with the FDIC as required by FIRREA, and that RalRon was a holder in due course immune from Schettler's defenses." *Id.* The trial court agreed and

> granted summary judgment in favor of RalRon on its claims for breach of contract and breach of personal guaranty. In so doing, the district court barred Schettler's affirmative defenses and dismissed his counterclaims, reasoning that, because they were all essentially claims against the FDIC and Schettler had failed to follow the claims administration process, they were barred by FIRREA.

*Id.* at 935-36.

Schettler appealed, and the Nevada Supreme Court reversed because it determined that Schettler's affirmative defenses were not barred by FIRREA and that genuine issues of material fact remained as to the determination of damages. *Id.* at 942. We find the Nevada court's rationale to be persuasive.

Convincingly, a majority of courts addressing this issue have held that while FIRREA's jurisdictional bar applies to claims and counterclaims, it does not apply to defenses and affirmative defenses.

The Third Circuit Court of Appeals, which has examined this issue in detail, has explained that FIRREA's jurisdictional bar only applies to four categories of actions:

> (1) claims for payment from assets of any depository institution for which the FDIC has been appointed receiver; (2) actions for payment from assets of such depository institution; (3) actions seeking a determination of rights with respect to assets of such depository institution; and (4) a claim relating to any act or omission of such institution or the FDIC as receiver.

The court held that these categories did not include a defense or an affirmative defense because those are neither an action nor a claim, but rather a *response* to an action or a claim. Therefore, it held, the jurisdictional bar contained in § 1821(d)(13)(D) does not apply to defenses or affirmative defenses. To support its conclusion, the court explained that interpreting FIRREA's jurisdictional bar to include defenses and affirmative defenses would, in a substantial number of cases, result in an unconstitutional deprivation of due process. Specifically, if parties were barred from presenting defenses and affirmative defenses to claims which have been filed against them, they would not only be unconstitutionally deprived of their opportunity to be heard, but they would invariably lose on the merits of the claims brought against them. Beyond constitutional concerns, the court also explained that because a defendant is unable to know what his or her defense will be before hearing the claim, it seems that it would be nearly impossible for a party to submit future hypothetical defenses to the administrative claims procedure -- defenses to lawsuits which may not yet have been brought against a party or which may never be brought at all. We join in the majority's reasoning and conclude that while FIRREA's jurisdictional bar applies to claims and counterclaims, it does not apply to defenses or affirmative defenses.

*Id.* at 939-40 (citations, quotation marks, brackets, and ellipses omitted). *See also*, *e.g.*, *Nat'l Union Fire Ins. Co. v. City Savings*, *F.S.B.*, 28 F.3d 376, 393 (3d. Cir. 1994) ("[T]he plain meaning of the language contained in § 1821(d)(13)(D) indicates that the statute does not create a jurisdictional bar to defenses or affirmative defenses which a party seeks to raise in defending against a claim."); *Resolution Trust Corp. v. Love.*, 36 F.3d 972, 977-78 (10th Cir. 1994) ("[I]f Congress had intended to remove from the jurisdiction of the courts any and all actions, claims or defenses which might diminish the assets of any depository institution . . . or [which might] diminish or defeat any claims of the [FDIC] in any capacity, it would [have] been simple to so provide. But Congress did not so provide. Instead, the act gives the [FDIC] authority over any claim by a creditor or claim of security, preference or priority. *Clearly, an affirmative defense asserted by a defendant in an action brought by the [FDIC] is none of these.*" (Citations and quotation marks omitted) (Emphasis added)).

But plaintiffs argue that the FDIC's refusal to pay the monthly draws was essentially a repudiation of the agreement, although the FDIC did not formally repudiate the loan, even if it had a statutory right to repudiate the loan. Although the lender in *Schettler* similarly failed to fund his loan, repudiation was not specifically addressed in *Schettler*.[2] Under 12 U.S.C.A. § 1821, plaintiffs would have a limited right to recover in the administrative forum for repudiation of the loan. FIRREA provides the FDIC or a receiver does have "Authority to repudiate contracts":

> In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease--
>
> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and

2. In *Schettler*, Silver State announced that it would no longer perform under the contract on 14 August 2008, even before going into receivership, claiming concern over Schettler's ability to pay. 275 P.3d at 935. At the time of Silver State's default notice to Schettler, however, "Schettler was current on his payments, and the loan had an outstanding principal balance of $1,114,000." *Id.* Silver State was not placed into receivership until 5 September 2008, a few weeks after the default notice. *Id.* Here, the repudiation at issue occurred after Integrity Bank failed and the FDIC did have a right to repudiate plaintiffs' loan.

(C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C.A. § 1821(e)(1)(A)-(C).

The conservator or receiver for an insured depository institution is required to "determine whether or not to exercise the rights of repudiation under this subsection within a reasonable period following such appointment." 12 U.S.C.A. § 1821(e)(2). Damages in a claim for repudiation are generally

(i) limited to actual direct compensatory damages; and

(ii) determined as of--

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

12 U.S.C.A. § 1821(e)(3)(A). The claimant cannot recover any "(i) punitive or exemplary damages; (ii) damages for lost profits or opportunity; or (iii) damages for pain and suffering." 12 U.S.C.A. § 1821(e)(3)(B). For repudiation of a "qualified financial contract[,]" compensatory damages are

(i) deemed to include normal and reasonable costs of cover or other reasonable measures of damages utilized in the industries for such contract and agreement claims; and

(ii) paid in accordance with this subsection and subsection (i) of this section except as otherwise specifically provided in this section.

12 U.S.C.A. § 1821(e)(3)(C).

In the present case, the FDIC did not *formally* repudiate the plaintiffs' loan but by its actions the FDIC repudiated the agreement by refusing to honor the terms of the loan agreement and to pay the monthly draws as required by the agreement. *See* 12 U.S.C.A. § 1821(e) ("Provisions relating to contracts entered into before appointment of conservator or receiver"). *In Westberg v. F.D.I.C.*, 741 F.3d 1301 (D.C.

Cir. 2014), the D.C. Circuit Court of Appeals addressed a situation somewhat similar to the one before us. The appellants, husband and wife, obtained a residential construction loan from a bank that soon collapsed. *Id.* at 1302. The FDIC was appointed as receiver and repudiated their loan agreement, "but notified the Westbergs that they were obligated to continue making payments on the portion of the loan that had been disbursed to them before [the bank]'s failure." *Id.* The D.C. Circuit found that "the Westbergs' claim for declaratory relief is inextricably related to the FDIC's act of repudiation. Although it is formally brought against Multibank, it is functionally against the FDIC. It is therefore a 'claim' . . . that must first be resolved in the administrative claims process." *Id.* at 1308. Therefore, while *Westberg* addresses repudiation, it involved a claim brought by the debtor against the bank, not an affirmative defense. Also, in *Westberg*, the FDIC *did* formally repudiate the contract, and the formal repudiation was important to the D.C. Circuit's holding that the claim should have been in the administrative process. *Id.* Here, by contrast, the FDIC never gave any notice of repudiation of the contract and plaintiffs have raised it as an affirmative defense to defendant RES-NC's counterclaim.

The FDIC did, however, effectively repudiate it by refusing to fund Settlers Edge's draw requests, which is quite similar to Silver State's action in *Schettler*. 275 P.3d at 935. *See also Lawson v. F.D.I.C.*, 3 F.3d 11, 15 (1st. Cir. 1993) ("In other words, the FDIC did not transfer the Lawsons' CD contracts intact to a new obligor; it effectively *repudiated* those contracts when it declined either to pay the promised interest itself or to oblige anyone else to do so. The repudiation may have been informal but there was certainly no ambiguity[.]"). Here, Settlers Edge submitted a draw request on 19 September 2008 for $41,677.20 for August 2008 and received no response from the FDIC. The FDIC refused to fill that request, and on 4 December 2008, Settlers Edge sent written notice to the FDIC of material breach. Thus, the question is whether the plaintiffs' rights are limited to those under 12 U.S.C.A. § 1821(e) where the FDIC has effectively repudiated the contract by its actions, although it failed to formally notify plaintiffs of repudiation. As in *Lawson*, the FDIC's actions here, though informal, clearly constituted a repudiation. *Id.* ("At the same time, it was a repudiation and breach of the contracts represented by the CDs since the FDIC, which had inherited the contracts, effectively declined to pay the promised interest in the future or commit Fleet Bank to do so.").

As no formal repudiation appears in the record on appeal and defendant seeks to recover damages from plaintiffs for breach of contract,

plaintiffs were free to raise repudiation as an affirmative defense to defendant's counterclaim. The receiver cannot use FIRREA as both a sword and shield at the same time; if it wants the benefit of the limited damages and administrative procedure that FIRREA provides, then it must "determine whether or not to exercise the rights of repudiation" under 12 U.S.C.A. § 1821(e)(2) "within a reasonable period" of its appointment and give notice of repudiation. Once the receiver has given notice of repudiation, then the debtor must proceed under FIRREA or lose its rights to assert any claims. The facts regarding the FDIC's actions as noted herein are undisputed, and the record does not show, nor does defendant argue, that any formal repudiation was ever made. It is also undisputed that the FDIC effectively repudiated the contract by its failure to pay the loan draw requests, so the trial court erred when it denied plaintiffs the opportunity to raise repudiation as an affirmative defense.

Although we have determined that the FDIC effectively repudiated the contract and that plaintiffs are entitled to raise the repudiation as an affirmative defense, the question remains of the proper remedy. Plaintiffs argue that the repudiation is a material breach which excuses them from any performance whatsoever under the loan contract and thus requires dismissal of defendant's counterclaim for breach of contract. But this argument ignores the fact that the FDIC did have a right to repudiate the loan contract and that a debtor's right to recover damages, even if properly brought as an administrative claim under FIRREA, is limited.

In *Schettler*, the Nevada court addressed how the debtor's affirmative defense may be used to offset any claim by the lender and determined that on remand the trial court must consider recoupment. 275 P.3d at 941-42. Neither plaintiffs nor defendant specifically requested recoupment here, but the same was true in *Schettler*. *Id.* at 941, n. 7. The Nevada court noted that fair notice of the defense was raised by the pleadings in *Schettler*, and the same is true here. *Id.* ("Although Schettler did not specifically allege that he was entitled to 'recoupment' in his answer to RalRon's complaint, when construed as a whole, his answer sufficiently encompassed the concept of recoupment. Recoupment must be plead affirmatively, and if it is not raised it is ordinarily deemed waived. However, if a plaintiff had notice that a defendant was relying on recoupment, the affirmative defense will be allowed. Fair notice was given because it was specifically raised on reconsideration, which is a part of the issues on appeal. Accordingly, we will not treat recoupment as waived." (Citations, quotation marks, and brackets omitted)).

> Recoupment is a right of the defendant to have a deduction from the amount of the plaintiff's damages, for the

> reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the same contract. Recoupment must arise out of the same transaction and involve the same parties; thus, it does not apply when the defendant's allegations arise out of a transaction extrinsic to the plaintiff's cause of action. While the defendant may thus defend against the plaintiff's claim by asserting competing rights arising out of the same transaction and thereby extinguish or reduce any judgment awarded to the plaintiff, recoupment does not allow the defendant to pursue damages in excess of the plaintiff's judgment award. Thus, by its very nature and regardless of whether the same facts could constitute a separate claim for damages, recoupment seeks to challenge the foundation of the plaintiff's claim and, consequently, we recognize recoupment as an affirmative defense not barred by FIRREA. Here, based on his allegations, Schettler may be able to demonstrate that he is entitled to recoup against any amount awarded RalRon on its claims, up to the amount awarded.

*Id.* at 941 (citations, quotation marks, and brackets omitted).

Recoupment has not been addressed as extensively or recently in North Carolina as in Nevada, but North Carolina's law of recoupment is essentially the same.

> A recoupment is a defence by which a defendant, when sued for a debt or damages, might recoup the damages suffered by himself from any breach by the plaintiff of the *same contract*. And . . . it [has been] held that where a justice has jurisdiction of the principal matter of an action, he also has jurisdiction of incidental questions necessary to its determination, and hence may even admit an equity to be set up as a defence.
>
> There are many resemblances and dissimilarities between these several defences. In a counter-claim to an action upon a contract, where a judgment is prayed against the defendant, he may recover the excess, if any. If no judgment or relief is prayed, it is a set-off, if it is a claim distinct from and independent of the action. But if it is a matter growing out of or connected with the subject of the action, then it is recoupment.

> In our case the defendants pleaded "set-off and counter-claim," but they demanded no relief against the plaintiffs, and the defense set up arose out of the contract set forth in the complaint, and their defence therefore fell under the head of recoupment.

*Hurst v. Everett*, 91 N.C. 399, 404-05 (1884) (citations omitted).

Recoupment is limited to a set-off against the defendant's counterclaim, so plaintiffs cannot recover any damages, even if they were to present evidence of greater damages than what they would owe on defendant's counterclaim for breach of contract. In addition, since defendant had a legal right to repudiate the loan agreement, the measure of damages which plaintiffs may assert as recoupment should be limited by the compensatory damages which they would have been allowed to prove under a FIRREA claim, as set forth in 12 U.S.C.A. § 1821(e)(3)(A). Depending upon the amount of compensatory damages shown by plaintiffs, the recoupment could offset all of the damages claimed by defendant, but cannot exceed the amount of defendant's damages. Because the trial court erred by barring plaintiffs' affirmative defense and there are genuine issues of material fact regarding the amount of recoupment plaintiffs may be entitled to as an offset against defendant's claim for breach of the loan agreement, we reverse the trial court's order granting summary judgment and remand for further proceedings consistent with the opinion.

III. Collateral Estoppel Effect

Next, plaintiffs argue that the trial court erred in not granting collateral estoppel effect to the foreclosure order entered by the Clerk of Court which found that Settlers Edge was not in default of the loan. Plaintiffs contend:

> Here, it is undisputed that Defendant dismissed the appeal of the Foreclosure Order, rendering it a final, binding order. It is also undisputed that the Clerk determined that Settlers Edge was not in default, that the parties to the Foreclosure and this action are the same or are in privity with each other, and that entering the Second Order necessarily required finding Settlers Edge in default.
>
> Moreover, there is no dispute that, at the time of the Foreclosure, the maturity date of the Note had passed, Settlers Edge had not repaid amounts otherwise due under the Note, and the Note had been declared in default

> by the FDIC. In Defendant's Motion and materials submitted in support, Defendant states no basis for default other than Settlers Edge's failure to pay the Note in full prior to the maturity date. . . . This case has remained substantially static, factually and legally, since the Foreclosure Order, and the Trial Court's determination that Settlers Edge was in default is inconsistent with the Foreclosure Order. The Trial Court erred, first, by entering the First Order denying collateral estoppel effect to the Foreclosure Order, and, second, by finding Settlers Edge in default in the Second Order despite the prior, contrary finding by the Clerk in the Foreclosure Order.

But based upon the prior appeal to this Court, we cannot find that the Clerk's foreclosure order may have any collateral estoppel effect. The issue actually decided by the Yancey County Clerk of Court is not clear from the foreclosure order, which contains conclusions that seem to go both ways. Nevertheless, we are bound by this Court's prior opinion regarding the foreclosure order:

> The application of the preclusive doctrines of collateral estoppel and *res judicata* must be narrowly construed and cannot be left to uncertain inference. Here, given that the order denying foreclosure (1) did not include specific findings expressly determining that a material breach had occurred; and (2) did find that a valid debt existed between Plaintiffs and the FDIC, *we are unable to conclude that the Clerk actually determined that a material breach had occurred*. Such a conclusion would force us to speculate as to the Clerk's thought processes in rendering its findings, which we are not permitted to do.

*Settlers Edge Holding Co., LLC, v. RES-NC Settlers Edge, LLC ("Settlers Edge I")*, 238 N.C. App. 198, 768 S.E.2d 66, 2014 WL 7149116, *5, 2014 N.C. App. LEXIS 1291, *12-13 (2014) (unpublished) (citations and quotation marks omitted) (emphasis added). This Court previously decided that the basis for the Clerk's order is unclear, and we are bound by that ruling. In addition, even assuming that a material breach occurred, as discussed above, this breach was a repudiation and plaintiffs are limited to asserting their affirmative defense and offsetting defendant's damages by recoupment. We therefore decline to address this issue further.

## IV. Summary Judgment

Finally, plaintiffs contend that the trial court erred in granting summary judgment in favor of defendant and denying summary judgment in favor of plaintiffs "due to its failure to consider the legal and undisputed factual merits of plaintiffs' affirmative defenses." As we have already concluded that the trial court had jurisdiction to consider plaintiffs' affirmative defenses and that the contract was effectively repudiated, we agree that the trial court should not have granted summary judgment in favor of defendants, and we reverse its order doing so. But this does not mean that we can grant summary judgment in favor of plaintiffs, since on remand the trial court must consider the proper measure of offset for the defendant's breach of contract in recoupment.

## V. Conclusion

In sum, while we decline to find any collateral estoppel effect from the Clerk's prior order and cannot grant summary judgment in favor of plaintiffs at this time, we conclude that the FDIC effectively repudiated the contract and plaintiffs are entitled to raise the repudiation as an affirmative defense. But because the FDIC had a right to repudiate, plaintiffs' right to recover damages is limited. Since we have concluded that the trial court erred by barring plaintiffs' affirmative defense, and since there are genuine issues of material fact remaining in regards to the amount of recoupment plaintiffs may be entitled to as an offset against defendant's claim for breach of the loan agreement, we reverse the trial court's order granting summary judgment and remand for further proceedings consistent with this opinion to determine the amount of damages defendant may recover from plaintiffs, if any, for its breach of contract claim.

REVERSED AND REMANDED.

Judges ELMORE and DIETZ concur.

STATE OF NORTH CAROLINA
v.
CALVIN LAMAR ADAMS

No. COA15-1384

Filed 6 December 2016

**Search and Seizure—investigatory stop—motion to suppress evidence—driving while impaired—resisting public officer—driving while license revoked—exigent circumstance—hot pursuit**

The Court of Appeals invoked Rule 2 and held that the trial court did not err by denying defendant's motion to suppress. Hot pursuit is an exigent circumstance sufficient to justify a warrantless entry and arrest. The officers here were in hot pursuit when they initiated an investigatory stop for driving while license revoked in front of defendant's residence and then pursued defendant into his residence to arrest him for resisting a public officer when he did not obey their orders to stop.

Appeal by defendant from judgments entered 19 August 2015 by Judge Robert T. Sumner in Gaston County Superior Court. Heard in the Court of Appeals 26 May 2016.

*Attorney General Roy Cooper, by Associate Attorney General Paige Phillips, for the State.*

*Jeffrey William Gillette for defendant-appellant.*

McCULLOUGH, Judge.

Calvin Lamar Adams ("defendant") appeals the denial of his motion to suppress following the entry of judgments on his convictions for driving while impaired ("DWI") and resisting a public officer. For the following reasons, we find no error.

## I. Background

On 7 October 2011, defendant was arrested and citations were issued for driving while license revoked ("DWLR"), DWI, resisting a public officer, and possession of less than one-half ounce of marijuana. Officers then sought and obtained a search warrant for defendant's house, vehicle, and person. Defendant's vehicle was seized during the execution of

the search warrant on 8 October 2011. On 10 October 2011, defendant successfully petitioned for the pretrial release of his vehicle pursuant to N.C. Gen. Stat. § 20-28(e2) on the ground that any period of license revocation had expired prior to the date of the alleged offense. In an order striking the storage fees for defendant's vehicle, the district court noted that defendant's vehicle was seized in error because, although the DMV system showed defendant's license was revoked from 27 July 2011, defendant's license was in fact active from 29 August 2011 when defendant paid the civil revocation fee, even though it was not sent to the DMV.

After several motions to continue the matter, defendant's case came on for trial in Gaston County District Court before the Honorable Richard B. Abernathy. On 9 December 2014, the DWLR charge was dismissed, defendant was found not guilty of possession of marijuana, and defendant was found guilty of impaired driving and resisting a public officer. Defendant gave notice of appeal.

Prior to his case coming on for trial in superior court, on 6 March 2015, defendant filed a motion to suppress all evidence obtained during and subsequent to his seizure on the bases that his seizure was unlawful, entry into his home was unlawful, and his arrest was unlawful – all in violation of defendant's constitutional rights. Defendant elaborated as follows: "[s]pecifically, law enforcement officers unlawfully seized [defendant] without the requisite reasonable suspicion and unlawfully entered his residence without a warrant or probable cause to arrest him. Moreover, those officers arrested him without probable cause."

Defendant's motion to suppress came on for hearing in Gaston County Superior Court before the Honorable Todd Pomeroy on 22 April 2015. The evidence presented at the suppression hearing tended to show as follows: Gastonia Police Officer C. Singer was on routine patrol with Officer R. Ghant on 7 October 2011 when, at approximately 11:00 p.m., Officer Singer observed defendant driving a vehicle eastbound on Meade Avenue in the opposite direction the officers were traveling. Officer Singer was familiar with defendant and defendant's vehicle because he had stopped defendant and charged defendant with DWI on 27 July 2011, approximately three months prior. Officer Singer knew defendant's license had been suspended as a result of the July DWI and turned around to follow defendant in time to observe defendant pull into his driveway from Meade Avenue. Officer Singer then had Officer Ghant run defendant's tag and license information through DCI, which confirmed that defendant's license was revoked.

Upon the belief that defendant was driving while his license was suspended, Officer Singer pulled into defendant's driveway directly behind defendant's vehicle and initiated a traffic stop by activating his blue lights. By the time Officer Singer activated his lights, defendant had exited from the driver's seat of his vehicle and was approximately 15-20 feet away from the front door of his residence, walking toward the front door. At that time, Officer Ghant instructed defendant to stop and to get back inside his car. Despite having a boot on one of his feet as the result of an injury, defendant picked up his pace toward the front door and Officer Singer advised him to stop running. Officer Ghant pursued defendant while Officer Singer grabbed the in-car camera mic. Defendant entered the front door and then attempted to close the front door on Officer Ghant. Officer Ghant was able to keep the front door from shutting and held the door open until Officer Singer arrived. The officers were then able to force the front door open and made physical contact with defendant just inside the front door. Officer Singer then patted defendant down for a safety check and found what he believed was a bag of marijuana in defendant's pocket. Defendant was arrested and charged with DWLR, possession of marijuana, and resisting a public officer. Further observation of defendant after his arrest led Officer Singer to believe defendant was impaired. Consequently, another officer was called to perform field sobriety tests. Defendant was then additionally charged with DWI.

Following the evidence, defendant focused his argument for suppression on the officer's alleged illegal entry into defendant's residence. The State argued the officers were in hot pursuit. Upon consideration of the facts and arguments, the trial judge denied defendant's motion to suppress, concluding there was reasonable suspicion to stop defendant's vehicle for DWLR and probable cause to arrest for resisting a public officer once defendant ignored the blue lights and verbal commands to stop and entered his residence.

Defendant's DWI and resisting a public officer charges came on for trial in Gaston County Superior Court before the Honorable Robert T. Sumner on 17 August 2015. Prior to jury selection, the trial court addressed additional pretrial matters. Upon consideration of those matters, the trial court overruled defendant's objection to the introduction of a chemical analyst's affidavit into evidence, granted defendant's motion to exclude mention of prior DWI and DWLR charges against defendant, and denied defendant's motion to exclude marijuana evidence. The defense then alerted the trial judge that defendant's motion to suppress had been denied and, consequently, the defense may object when certain evidence or testimony was introduced. The trial then proceeded.

On 19 August 2015, the jury returned verdicts finding defendant guilty of DWI and resisting a public officer. The convictions were consolidated and an impaired driving judgment was entered. Defendant received a 60-day sentence that was suspended on condition that defendant serve 24 months of unsupervised probation. Defendant gave notice of appeal in open court.

## II. Discussion

On appeal, defendant argues the trial court erred in denying his motion to suppress because the officers' entry into his residence to arrest him was unlawful. Thus, defendant contends all evidence of his impairment obtained as a result of the alleged unlawful entry was tainted and must be suppressed.

Yet, as an initial matter, we address the State's contention that defendant waived the argument now asserted on appeal. It has long been the rule that "[i]n order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C. R. App. P. 10(a)(1) (2015). In this case, the State contends defendant waived his argument on appeal by failing to include the precise argument on appeal in his pretrial motion to suppress and by failing to object when evidence of his impairment was introduced at trial. We disagree that defendant failed to adequately include the argument on appeal in his pretrial motion, but agree that defendant failed to object to evidence offered at trial.

N.C. Gen. Stat. § 15A-977 governs motions to suppress evidence in superior court and provides, in pertinent part, that "[a] motion to suppress evidence in [S]uperior [C]ourt made before trial must be in writing and . . . must state the grounds upon which it is made." N.C. Gen. Stat. § 15A-977(a) (2015). The State asserts that the only grounds for suppression identified by defendant in the pretrial motion were that there was no reasonable suspicion for the initial stop of defendant and there was no probable cause to believe defendant was involved in criminal activity. The State then contends that defendant abandoned those two grounds during the suppression hearing and argued only that there were no exigent circumstances warranting hot pursuit. The State contends the lack of exigent circumstances is the argument now asserted on appeal and that it was not contained in defendant's pretrial motion to suppress. We are not convinced. It is clear from defendant's motion that defendant asserts there was an unlawful entry into his residence to arrest

him "without a warrant and without exigent circumstances." While the motion does not mention "hot pursuit," the motion was sufficient to preserve the issue now on appeal.

Concerning preservation of the issues at trial, "[t]he law in this State is now well settled that 'a trial court's evidentiary ruling on a pretrial motion [to suppress] is not sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.' " *State v. Hargett*, __ N.C. App. __, __, 772 S.E.2d 116, 119 (2015) (quoting *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (citations omitted; emphasis in original)). In defendant's motion, defendant sought to suppress all evidence obtained subsequent to the officers' entry into defendant's residence to arrest defendant. As indicated above, all evidence of impairment necessary to prove the DWI charge was obtained after defendant was arrested. It is evident defense counsel was aware of the need to renew objections to the evidence at trial as defense counsel informed the judge prior to jury selection that defendant's motion to suppress had been denied and, consequently, the defense may object when certain evidence or testimony was introduced. Defense counsel, however, failed to do so when evidence of impairment was admitted at trial. Specifically, Officer Singer testified that after defendant was detained, he noticed defendant had slurred speech and bloodshot eyes. Officer Singer also testified that he found an empty bottle of hydrocodone and a bag of what he believed to be marijuana in defendant's pocket. Officer Ewers, who was called to perform field sobriety tests on defendant, testified that defendant appeared lethargic, defendant's eyelids were droopy, and defendant's eyes were bloodshot. Officer Ewers then explained that defendant had trouble following directions during a horizontal gaze nystagmus test, leading him to believe defendant was impaired. Linda Farren, a forensic scientist supervisor with the State Crime Laboratory who was admitted as an expert in forensic toxicology, testified that defendant's blood samples tested positive for benzodiazepines, specifically alprazolam or Xanax, and cannabinoids. The chemical analyst's report was then admitted into evidence without objection. Defendant does not dispute that the above evidence of impairment was admitted without objection, but instead points out that defense counsel objected when the State sought to admit the bag of marijuana found on defendant as State's Exhibit 1. Defendant contends it is clear from the "object[ion] on the Fourteenth Amendment" that defense counsel intended to preserve the suppression motion and "it would be wrong to assume [defendant] intended to waive his objection[.]" We disagree. Defendant's objection to the marijuana evidence does not preserve for appellate review the admissibility

of all evidence of impairment obtained following defendant's arrest. In fact, despite defendant's objection to the admission of the bag of marijuana, other evidence of defendant's possession of the marijuana was introduced into evidence without objection. *See State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995) ("Where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost."). By failing to object to the other evidence obtained subsequent to his arrest, defendant waived review.

Defendant, however, seeks to have this Court invoke Rule 2 of the North Carolina Rules of Appellate Procedure to review the merits of his case if his arguments are not otherwise preserved. That rule allows this Court to "suspend or vary the requirements or provisions of any of [the appellate rules] in a case pending before it upon application of a party or upon its own initiative[]" in order to prevent manifest injustice to a party. N.C. R. App. P. 2 (2016). In our discretion, we invoke Rule 2 and reach the merits of this case.

Generally, 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). "When findings of fact are not challenged on appeal, 'such findings are presumed to be supported by competent evidence and are binding on appeal.' " *State v. Washington*, 193 N.C. App. 670, 672, 668 S.E.2d 622, 624 (2008) (quoting *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (internal quotation marks omitted)), *disc. review denied*, 363 N.C. 138, 674 S.E.2d 420 (2009). "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 conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.' " *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000) (quoting *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

However, because there was no objection to the evidence below, defendant asserts the proper standard of review in the present case upon invoking Rule 2 is plain error.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To

> show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

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

While we agree plain error review is proper, it makes no difference in this case because if the trial court erred in denying defendant's motion to suppress, it is certain that the error was fundamental because there would be no evidence of impairment to support the DWI charge if defendant's motion to suppress had been allowed. Thus, in the present case, where there is no dispute as to the relevant facts, we address only the application of search and seizure law.

"Both the United States and North Carolina Constitutions protect against unreasonable searches and seizures." *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (citing U.S. Const. amend. IV; N.C. Const. art. I, § 20). The Supreme Court has emphasized that "the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' " *Welsh v. Wisconsin*, 466 U.S. 740, 748, 80 L. Ed. 2d 732, 742 (1984) (quoting *United States v. United States District Court*, 407 U.S. 297, 313, 32 L. Ed. 2d 752 (1972)). Therefore, "the Court has recognized, as 'a "basic principle of Fourth Amendment law[,]" that searches and seizures inside a home without a warrant are presumptively unreasonable.' " *Id.* at 749, 80 L. Ed. 2d at 742 (quoting *Payton v. New York*, 445 U.S. 573, 586, 63 L. Ed. 2d 639 (1980)). Yet, there are exceptions to the warrant requirement, which the Court has noted are "few in number and carefully delineated." *Id.* at 749, 80 L. Ed. 2d at 743 (citation omitted). A warrantless arrest in the home may be reasonable where there is probable cause and exigent circumstances. *Id.* (citing *Payton*, 445 U.S. at 583-90, 63 L. Ed. 2d 639).

> With respect to exigent circumstances, this Court has explained: Exigent circumstances exist when there is [a] situation that demands unusual or immediate action and that may allow people to circumvent usual procedures. . . . The United States Supreme Court has approved the following exigent circumstances justifying warrantless searches and seizures: (1) where law enforcement officers are in "hot pursuit" of a suspect; (2) where there is immediate and present danger to the public or to law enforcement officers; (3) where destruction of evidence is imminent;

> and (4) where the gravity of the offense for which the suspect is arrested is high.

*State v. Jordan*, __ N.C. App. __, __, 776 S.E.2d 515, 519 (internal quotation marks and citations omitted), *disc. review denied*, 368 N.C. 358, 778 S.E.2d 85 (2015). "A determination of whether exigent circumstances are present must be based on the 'totality of the circumstances.' " *State v. Nowell*, 144 N.C. App. 636, 643, 550 S.E.2d 807, 812 (2001), *aff'd per curiam*, 355 N.C. 273, 559 S.E.2d 787 (2002).

Defendant now contends there were no exigent circumstances warranting entry into defendant's home to arrest defendant. We disagree.

It is undisputed that the officers had reasonable suspicion to initiate an investigatory stop of defendant for DWLR when they pulled into defendant's driveway behind him and activated the blue patrol car lights as defendant was exiting his vehicle and making his way toward his front door. Defendant did not stop for the blue lights and then continued hurriedly toward the front door after the officers told defendant to stop. At that point, the officers had probable cause to arrest defendant for resisting a public officer and began a "hot pursuit" of defendant, one of the exigent circumstances delineated by the courts. The officers arrived at the front door of defendant's residence just as defendant made his way across the threshold and were able to prevent defendant from closing the door. Officers then forced the front door open and detained and arrested defendant just inside the front door. We hold such warrantless entry and arrest was proper under *United States v. Santana*, 427 U.S. 38, 49 L. Ed. 2d 300 (1976).

In *Santana*, the Supreme Court addressed whether hot pursuit justified the warrantless entry into the home of a defendant to arrest that defendant when the defendant retreated from the threshold of the house into the vestibule upon the arrival of the police. Relying on *United States v. Watson*, 423 U.S. 411, 46 L. Ed. 2d 598 (1976) (a warrantless arrest of an individual in a public place upon probable cause did not violate the Fourth Amendment), the Court first held that the defendant was in a public place for purposes of Fourth Amendment jurisprudence while standing in the doorway to the house because she was not in an area where she had any expectation of privacy. *Santana*, 427 U.S. at 42, 49 L. Ed. 2d at 305. Relying on *Warden v. Hayden*, 387 U.S. 294, 18 L. Ed. 2d 782 (1967) (police, who had probable cause to believe that an armed robber had entered a house a few minutes before, had the right to make a warrantless entry to arrest the robber and to search for weapons), the Court then held that "a suspect may not defeat an arrest which has been

set in motion in a public place, and is therefore proper under *Watson*, by the expedient of escaping to a private place." *Santana*, 427 U.S. at 43, 49 L. Ed. 2d at 306.

In the present case, defendant does not argue the officers were not in hot pursuit, but instead contends the officers' entry into defendant's residence was unreasonable because there was no threat of violence, no evidence subject to destruction, and no likelihood of defendant fleeing his own home to elude detection. Defendant's assertions, however, fail to recognize that defendant was considered fleeing when he failed to stop upon the activation of the blue lights and the officers' commands to stop. As the Court recognized in *Santana*, "[t]he fact that the pursuit here ended almost as soon as it began did not render it any the less a 'hot pursuit' sufficient to justify the warrantless entry into [defendant's] house." *Id.* at 43, 49 L. Ed. 2d at 305. Moreover, defendant conflates the exigent circumstances recognized by this Court in *Jordan*. While the Court in *Santana* did note that "[o]nce [the defendant] saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence[,]" *id.*, that observation was separate and apart from the hot pursuit justification for the warrantless entry and arrest. Hot pursuit has been recognized as an exigent circumstance sufficient to justify a warrantless entry and arrest when there is probable cause without consideration of immediate danger or destruction of evidence.

Defendant also argues the officers' decision to engage in hot pursuit was unreasonable. Defendant cites *State v. Johnson*, 64 N.C. App. 256, 307 S.E.2d 188 (1983), for the proposition that the reasonableness of hot pursuit is based on the presence of exigent circumstances before the chase begins. Upon review, it is clear *Johnson* is not instructive here.

In *Johnson*, officers obtained arrest warrants for two individuals believed to be located at the defendant's residence, went to the defendant's residence to serve the arrest warrants, and, upon arrival, chased an individual falsely believed to be identified in one of the arrest warrants into the defendant's residence, whereupon the officers discovered controlled substances. *Johnson*, 64 N.C. App. at 258-59, 307 S.E.2d at 189-90. Upon review of the trial court's denial of the defendant's motion to suppress, this Court reversed, holding that "no exigent circumstances existed that would justify the warrantless entry into [the] defendant's house and the later seizure of the evidence which [the] defendant seeks to suppress." *Id.* at 264, 307 S.E.2d at 193. In so holding, this Court acknowledged that the State relied on hot pursuit to justify the warrantless entry, but explained that "[i]n so doing, the State seeks to focus [the Court's] attention on events that occurred after the point in time

when a judgment as to whether a search warrant was required should already have been made." *Id.* at 262, 307 S.E.2d 191. This Court pointed out that over three and a half hours elapsed between when officers received the arrest warrants and when they attempted to execute the warrants, noting there was ample time to get a search warrant. *Id.* at 263, 307 S.E.2d at 192. This Court then specifically noted that it "need not consider whether [the officer] was in 'hot pursuit' and whether that alone was sufficient to justify his entry into [the] defendant's home. The need for a search warrant should have been anticipated in this case." *Id.* Upon further appeal to our Supreme Court, the Court took issue with this Court's conclusions because the evidence and findings of fact were insufficient to support this Court's conclusions that "it would appear that the arrest raid was in fact a planned raid[,]" "there was ample time to secure a search warrant and ample reason to anticipate the need for one[,]" and "the need for a search warrant should have been anticipated in this case." *State v. Johnson*, 310 N.C. 581, 587-88, 313 S.E.2d 580, 584 (1984) (internal citations and alterations in original omitted). Thus, the Court remanded the case for new *voir dire* proceedings. *Id.* at 589, 313 S.E.2d at 584-85. The Court did, however, reemphasize the issue of hot pursuit was not determinative in the case, explaining that

> while in this case, it is evident that, at the time of entry into defendant's home, [the officer] was engaged in the "hot pursuit" of a person he suspected to be a fugitive, the issue remains as to whether there was an unjustified delay or failure to obtain a search warrant after the existence of probable cause as to the whereabouts of the suspects.

*Id.* at 586, 313 S.E.2d at 583.

Similarly, other cases relied on by defendant, such as *Welsh*, 466 U.S. 740, 80 L. Ed. 2d 732 (warrantless entry into the defendant's home to arrest him for a noncriminal traffic offense was unconstitutional), which defendant cites for the holding "that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made[,]" *id.* at 753, 80 L. Ed. 2d at 745, are not instructive because they do not involve hot pursuit. *See id.* (noting "the claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of the petitioner").

As described above, in this case, the officers initiated an investigatory stop for DWLR in front of defendant's residence and then pursued defendant into his residence to arrest him for resisting a public officer when he did not obey their orders to stop. By definition, this was hot pursuit.

III. Conclusion

For the reasons discussed, we invoke Rule 2 to reach the merits of defendant's argument and hold there was no error below.

NO ERROR.

Judges STEPHENS and ZACHARY concur.

---

STATE OF NORTH CAROLINA
v.
ANDREW ROBERT HOLLOWAY

No. COA16-381

Filed 6 December 2016

**1. Drugs—constructive possession—presence in home where marijuana burning in oven**

Where defendant and another man were present in a house in which marijuana was burning in the oven and causing smoke to come out of the house, the trial court erred by denying defendant's motion to dismiss the charges related to possession of marijuana and drug paraphernalia. Defendant did not live or admit to living in the house, no identifying documents of his were found in the house, and the most incriminating circumstance presented by the State, besides defendant's presence in the house on the day of fire, was a photograph of defendant found face down in a plastic storage bin in one of the bedrooms.

**2. Drugs—maintaining a dwelling—presence in home where marijuana burning in oven**

Where defendant and another man were present in a house in which marijuana was burning in the oven and causing smoke to come out of the house, the trial court erred by denying defendant's motion to dismiss the charge of maintaining a dwelling. There was no evidence that defendant was the owner or the lessee of the dwelling, and there was no evidence that defendant paid for its utilities or upkeep. Further, there was no evidence that defendant had been seen in or around the dwelling before or that he lived there.

**3. Drugs—acting in concert—presence in home where marijuana burning in oven**

Where defendant and another man were present in a house in which marijuana was burning in the oven and causing smoke to come out of the house, the trial court plainly erred by instructing the jury on acting in concert. The State presented no evidence that defendant had a common plan or purpose to possess marijuana or drug paraphernalia with the other man. At most, the State showed that defendant and the man were acquainted and that defendant was present in the house on the day the drugs were found.

Appeal by defendant from judgments entered 18 September 2015 by Judge Jeffrey P. Hunt in Rutherford County Superior Court. Heard in the Court of Appeals 18 October 2016.

*Attorney General Roy Cooper, by Special Deputy Attorney General Scott Stroud, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.*

BRYANT, Judge.

Where the trial court erred in denying defendant's motions to dismiss all charges due to the State's failure to present substantial evidence, and where the trial court erred in instructing the jury on acting in concert, a theory not supported by the evidence, we vacate the judgments of the trial court.

On 22 October 2013, Tommy Turner, a police officer with the Forest City Police Department was on duty and heard a report of a breaking and entering at 305 Hardin Road. Officer Turner drove to the address, joining Officer James Greene who was already on the scene. Officer Greene heard a commotion coming from inside the residence and announced the police were there and anyone inside was to come out. After about twenty minutes, Officer Turner, who was stationed at the back of the house, noticed smoke coming from the back of the house. The fire department was called, and around the same time, two men left the house through the front door. Because the officers were responding to a breaking and entering in progress, the two men, identified as Robert McEntire and defendant Andrew Robert Holloway, were placed in custody.

Firemen who responded to the call discovered the source of the smoke in the kitchen to be a quantity of marijuana burning in the oven. The firemen doused the oven's contents with water and handed the marijuana to police officers waiting outside.

Forest City police officers obtained a search warrant for the residence, and in the kitchen, officers found $4,000.00 in cash, McEntire's driver's license, and other items with McEntire's name on them, including a vehicle title. In a bedroom, officers found a gun, gun magazine, digital scales, and a small bag of marijuana. The total amount of marijuana recovered from the residence weighed 19.86 pounds. Officers later learned that McEntire lived at the two-bedroom house on 305 Hardin Road, although the original lessee was one Danielle Taylor. Other than a photograph of defendant found in a container in a bedroom, there were no items found in the residence bearing defendant's name or otherwise connected to defendant.

On 15 September 2014, defendant was indicted on multiple charges, including trafficking in marijuana, possession with intent to sell and deliver marijuana, maintaining a dwelling house for keeping and selling marijuana, and possession of drug paraphernalia. On 17 November 2014, defendant was indicted as an habitual felon.[1]

On 14 September 2015, defendant's case was called for trial before the Honorable Jeffrey P. Hunt, Superior Court Judge presiding. Defendant was also tried on a charge of possession of a firearm by a felon.

At trial at the close of the State's evidence, defendant moved to dismiss all of the charges based on insufficient evidence, arguing that the State's only evidence tying defendant to the residence or the items discovered therein was his presence on the afternoon of 22 October 2013 and the single photograph of him found face down in a plastic storage container in a bedroom. The State countered that once the marijuana was burning and smoke was filling the house, "someone inside the residence is going to know about it. Certainly is going to have the ability to control its disposition and use at that point." According to the State, because there was no evidence of what defendant was doing inside the

1. Defendant was also originally indicted on the following additional charges: trafficking in cocaine, possession with intent to sell and deliver cocaine, and maintaining a dwelling house for keeping and selling cocaine. Prior to the start of trial the State took dismissals on all cocaine charges. Nothing in the record suggests on what basis defendant was originally charged with the cocaine-related offenses. Other than the warrants and indictments themselves, there is no evidence in the record that any cocaine was found in the residence at 305 Hardin Road or on defendant's person.

residence while the officers were knocking at the door, the jury was entitled to infer that defendant constructively possessed the drugs, drug paraphernalia, and the firearm, and that he, in concert with McEntire, kept the dwelling to distribute marijuana. The State also argued that "the photograph is evidence that [defendant] stays there[,]" and thus it was reasonable to infer that defendant was at the house "all the time." The trial court denied defendant's motion.

Defendant's evidence included the testimony of his mother, Serene Holloway, and McEntire. McEntire had pled guilty to and was serving a sentence for trafficking, possession with intent to sell and deliver, possession of drug paraphernalia, and maintaining a dwelling in connection with the 22 October 2013 incident at his residence. Defendant's mother and McEntire explained how McEntire came to have the photograph of defendant. McEntire further testified that defendant was merely visiting on the day his home was searched and that defendant had arrived shortly before the police. McEntire also testified that the marijuana, paraphernalia, and firearm were all his and that defendant did not know about their presence in the home.

At the close of all the evidence, defendant again moved to dismiss all the charges based on insufficient evidence. The court denied the motion.

Without objection, the trial court instructed the jury on the theory of acting in concert generally as to all of the charges, in addition to instructing on actual and constructive possession. The jury convicted defendant of all possession-related charges except the firearm charge, of which he was acquitted. The jury also convicted defendant of knowingly maintaining a dwelling house, the lesser-included offense of intentionally keeping or maintaining a dwelling house. In a subsequent proceeding, the jury found defendant had attained the status of habitual felon. Defendant was sentenced to 120 days for maintaining a dwelling, 97 to 129 months for trafficking in marijuana, 38 to 58 months for possession with intent to sell and distribute marijuana, and 120 days for possession of drug paraphernalia, with all sentences running consecutively. Defendant gave notice of appeal in open court.

---

On appeal, defendant contends the trial court erred in denying defendant's motion to dismiss for insufficient evidence and, therefore, plainly erred by instructing the jury that it could convict defendant of acting in concert where there was no evidence of a common criminal plan. We agree.

Defendant first argues the trial court erred in denying his motion to dismiss where there was insufficient evidence of possession to prove any of the possessory offenses charged. Specifically, defendant contends the State erroneously relied on the theory of constructive possession and acting in concert and presented insufficient evidence that defendant maintained a dwelling for the purpose of keeping or selling a controlled substance.

"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) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)).

The court must also "view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences that can be drawn from the evidence." *Id.* at 378–79, 526 S.E.2d at 455 (quoting *Barnes*, 334 N.C. at 75, 430 S.E.2d at 918). Evidence presented by the State need only provide a reasonable inference of guilt in order for the motion to be denied and the case submitted to the jury. *State v. Shelman*, 159 N.C. App. 300, 305, 584 S.E.2d 88, 92 (2003) (citation omitted). Contradictions and discrepancies in the evidence must be resolved in the State's favor, and defendant's evidence, unless favorable to the State, is not considered. *Id.* at 305, 584 S.E.2d at 92–93 (citations omitted). However, "[w]hen the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citing *State v. Lee*, 348 N.C. 474, 488–89, 501 S.E.2d 334, 343 (1998)).

A. Constructive Possession

**[1]** Defendant first argues the State failed to present substantial evidence demonstrating defendant's constructive possession of marijuana and drug paraphernalia. We agree.

For possession with intent to sell or deliver marijuana, the State was required to present substantial evidence of three elements: (1) possession, (2) of a controlled substance, (3) with the intent to sell or deliver that controlled substance. N.C. Gen. Stat. § 90-95(a)(1)–(2) (2015).

> (1) Any person who . . . possesses in excess of 10 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:
>
> a. Is in excess of 10 pounds, but less than 50 pounds, such person shall be punished as a Class H felon[.]

*Id.* § 90-95(h)(1)a.

In order to prevail on a motion to dismiss a possession of drug paraphernalia charge, the State must provide substantial evidence that (1) defendant possessed drug paraphernalia, and (2) defendant had "the intent to use [drug paraphernalia] in connection with controlled substances." *State v. Hedgecoe*, 106 N.C. App. 157, 164, 415 S.E.2d 777, 781 (1992). "It is unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia to . . . store, contain, or conceal a controlled substance . . . ." N.C. Gen. Stat. § 90-113.22(a) (2015). The statute specifically notes that "[s]cales and balances for weighing or measuring controlled substances" constitute drug paraphernalia. N.C. Gen. Stat. § 90-113.21(a)(5) (2015).

The State must prove either "actual or constructive" possession in order to convict a defendant of possession of marijuana or drug paraphernalia. *See State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). When a person lacks actual physical possession, but "nonetheless has the intent and capability to maintain control over a controlled substance[,]" constructive possession occurs. *State v. Givens*, 95 N.C. App. 72, 76, 381 S.E.2d 869, 871 (1989) (quoting *State v. Baize*, 71 N.C. App. 521, 529, 323 S.E.2d 36, 41 (1984)). However, "[w]here possession of the premises is nonexclusive, constructive possession of the contraband materials may not be inferred without other incriminating circumstances." *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984) (citation omitted).

" '[C]onstructive possession depends on the totality of the circumstances in each case,' so that '[n]o single factor controls.' " *State v. Ferguson*, 204 N.C. App. 451, 460, 694 S.E.2d 470, 477 (2010) (alterations in original) (quoting *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986)). "Our cases addressing constructive possession have tended to turn on the specific facts presented." *Miller*, 363 N.C. at 99, 678 S.E.2d at 594 (citations omitted). But "two factors frequently considered are the defendant's proximity to the contraband and indicia of the defendant's control over the place where the contraband is found." *Id.* at 100, 678 S.E.2d at 595.

In *Miller*, the police found the defendant "in a bedroom of the home where two of his children lived with their mother." *Id.* The defendant was discovered sitting on the same end of the bed where cocaine was recovered and, upon sliding to the floor, he was within reach of the cocaine discovered on the floor behind the bedroom door. *Id.* The defendant's birth certificate and state-issued identification were also found in the same bedroom. *Id.* The N.C. Supreme Court reasoned that "[e]ven though [the] defendant did not have exclusive possession of the premises, these incriminating circumstances permit[ted] a reasonable inference that [the] defendant had the intent and capability to exercise control and dominion over cocaine in that room." *Id.*

In *Brown*, the N.C. Supreme Court found sufficient other incriminating evidence in a case of constructive possession when cocaine and other drug packaging paraphernalia were found on a table beside which the defendant was standing when the officers entered the apartment, the defendant had been observed at the apartment multiple times, he possessed a key to the apartment, and he had over $1,700.00 in cash in his pockets. 310 N.C. at 569–70, 313 S.E.2d at 589.

In the instant case, there is no dispute that the marijuana recovered from the house at 305 Hardin Road was in excess of ten pounds, but less than fifty pounds. *See* N.C.G.S. § 90-95(h)(1)a. However, there was no evidence that defendant *actually* possessed the marijuana or drug paraphernalia, and defendant contends there was also insufficient evidence to show *constructive* possession of the same.

Here, the only evidence of defendant's close proximity to drugs was that he was seen by the police emerging from a house in which drugs were ultimately found burning in an oven. "The most the State has shown is that defendant had been in an area where he could have committed the crimes charged." *State v. Minor*, 290 N.C. 68, 74–75, 224 S.E.2d 180, 185 (1976) (reversing the trial court's denial of the defendant's motion for nonsuit because there was no evidence linking the defendant to the marijuana other than the fact that he had been a visitor to an abandoned house located 100 feet from a marijuana field). Nothing other than mere suspicion provides a connection between the drugs and defendant.

Unlike the birth certificate and identification found in *Miller*, the state-issued driver's license and other documents found in the residence belonged to McEntire, not *defendant*. *See* 363 N.C. at 100, 678 S.E.2d at 595. Unlike the cash discovered in *Brown*, here, the $4,000.00 in cash was not discovered on defendant's person, but was discovered in a kitchen drawer. *See* 310 N.C. at 569, 313 S.E.2d at 589. Unlike the drugs

found within arms'-reach of both defendants in *Miller* and *Brown*, here the marijuana was discovered burning in an oven, and as defendant and McEntire exited the house before the marijuana was discovered, the State has not and cannot show where defendant was—defendant's proximity—in relation to the marijuana in order to establish constructive possession. Thus, the State's only evidence tying defendant to the residence or items discovered therein was his presence on the afternoon of 22 October 2013 and the single photograph of defendant found face down in a plastic storage bin located in a bedroom.

The State argues that this Court should follow the reasoning in *State v. Moor*e, in which this Court upheld the convictions of two codefendants for offenses related to the growing of marijuana in a field near their home based on the theory of constructive possession. 79 N.C. App. 666, 669–71, 675–76, 340 S.E.2d 771, 773–75, 777 (1986). However, *Moore* is easily distinguishable from and inapplicable to the instant case. For example, in *Moore*, the fingerprints of both the defendants were found on items within the house near the marijuana field; defendant Moore "had in his possession a key that fit the gate and the door to the house[,]" and defendant "Moore's truck was present on the premises and contained twine identical to the twine used to tie the marijuana plants to the stakes and to twine found within the house." *Id.* at 675, 340 S.E.2d at 777–78.

Here, there was no evidence that linked defendant to the house or the contents therein: (1) no evidence defendant had any possessory interest in the house; (2) no evidence defendant had a key to the residence; (3) no evidence of defendant's fingerprints on any items seized or found in the house; (4) no evidence of any items belonging to defendant (including the photograph of defendant which belonged to McEntire) seized or found in the house; and (5) no evidence of incriminating evidence on defendant's person. *See id.* Therefore, as in *Minor*, here, there is no evidence linking defendant to the house at Hardin Drive or the marijuana and drug paraphernalia found therein other than the fact that defendant had been a visitor to the house and emerged from the house with the main resident. *See* 290 N.C. at 75, 224 S.E.2d at 185.

Furthermore, particularly as regards a defendant's presence and photographs of a defendant at the scene where drugs are discovered, the dissenting opinion in *Miller* offers the following highly instructive example:

> In *State v. McLaurin*, the defendant was convicted of possession of drug paraphernalia under a constructive possession theory. 320 N.C. 143, 144, 357 S.E.2d 636, 637 (1987). Law enforcement searched the defendant's

> residence pursuant to a search warrant and found drug paraphernalia which contained traces of cocaine, throughout the house. *Id.* In a crawl space beneath the dwelling, law enforcement found three marked one hundred dollar bills that were used in a previous drug transaction. 320 N.C. at 145, 357 S.E.2d at 637. *The defendant admitted to living in the residence, and photographs of her were found inside the house along with her Medicaid card. Id.* However, the defendant did not have exclusive control over the premises, leading this Court to conclude that "because there was no evidence of other incriminating circumstances linking her to [the seized paraphernalia], her control was insufficiently substantial to support a conclusion of her possession of the seized paraphernalia." 320 N.C. at 147, 357 S.E.2d at 638.

363 N.C. at 108, 678 S.E.2d at 600 (Brady, J., dissenting) (emphasis added).

Unlike in *McLaurin*, in which there was found to be insufficient substantial evidence to support a conclusion of constructive possession, even where "[t]he defendant admitted to living in the residence, and photographs of her were found inside the house along with her Medicaid card[,]" *see id.* (Brady, J., dissenting), here, there are even fewer "incriminating circumstances." Here, defendant did not live or admit to living in the house at 305 Hardin Road, no identifying documents of his were discovered at the house, and the most incriminating circumstance presented by the State, besides defendant's presence on the day, is a photograph of defendant found face down in a plastic storage bin in one of the bedrooms. This is not substantial evidence because, at most, it "raises no more than a suspicion of guilt[.]" *Id.* at 99, 678 S.E.2d at 594 (citation omitted). In fact, we are unable to find any other case in which a charge was allowed to go to the jury based on such a thin suspicion of guilt and sustain a guilty verdict. As such, defendant's motion to dismiss all possessory-related charges should have been granted.

B. Maintaining a Dwelling

**[2]** Defendant next argues the trial court erred in denying his motion to dismiss the charge of maintaining a dwelling. We agree.

> (a) It shall be unlawful for any person:
>
> . . .

> (7) To knowingly keep or maintain any . . . dwelling house . . . which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article[.]

N.C. Gen. Stat. § 90-108(a)(7) (2015).

> Whether a person "keep[s] or maintain[s]" a dwelling, within the meaning of N.C. Gen. Stat. § 90-108(a)(7), requires the consideration of several factors, none of which are dispositive. Those factors include: ownership of the property; occupancy of the property; repairs to the property; payment of taxes; payment of utility expenses; payment of repair expenses; and payment of rent.

*State v. Bowens*, 140 N.C. App. 217, 221–23, 535 S.E.2d 870, 873–74 (2000) (internal citations omitted) (concluding the trial court erred in denying the defendant's motion to dismiss the charge of maintaining a dwelling, but affirming the trial court's denial of the defendant's motion to dismiss the charge of possession with intent to sell or deliver marijuana). "General Statute 90-108(a)(7) does not require residence, but permits conviction if a defendant merely keeps or maintains a building for the purpose of keeping or selling controlled substances." *State v. Alston,* 91 N.C. App. 707, 711, 373 S.E.2d 306, 310 (1988).

In *Bowens*, the "[d]efendant was charged with knowingly and intentionally maintaining a dwelling used for keeping or selling controlled substances." 140 N.C. App. at 221, 535 S.E.2d at 873. The defendant argued on appeal that the State failed to present substantial evidence that the defendant "maintained the dwelling" at issue. *Id.* at 222, 535 S.E.2d at 873. The State's evidence showed that the defendant

> was seen in and out of the dwelling 8-to-10 times over the course of 2-to-3 days; nobody else was seen entering the remises during this 2-to-3 day period of time; men's clothing was found in one closet in the dwelling; [and an officer] testified he believed [the] [d]efendant lived at [the dwelling] . . . although he offered no basis for that opinion and had not checked to see who the dwelling was rented to or who paid the utilities and telephone bills.

*Id.* at 221–22, 535 S.E.2d at 873.

In concluding the State's evidence "[did] not constitute substantial evidence" that the defendant maintained the dwelling in question, this

Court noted that "[t]here [was] no evidence [the] [d]efendant was the owner or the lessee of the dwelling, or that he had any responsibility for the payment of the utilities or the general upkeep of the dwelling." *Id.* at 222, 535 S.E.2d at 873 (citations omitted). Further, in reversing the conviction for maintaining a dwelling, this Court noted that "[t]estimony [the] [d]efendant was present at the dwelling on several occasions and testimony he lived [there] [could] not alone support a conclusion [the] [d]efendant kept or maintained the dwelling." *Id.* (footnote omitted).

In the instant case, there is even less evidence than there was in *Bowens*. Here, there is no evidence that defendant was the owner or the lessee of the dwelling at 305 Hardin Road, nor was there evidence that defendant paid for its utilities or upkeep. *See id.* Further, unlike the evidence presented in *Bowens*, here there was no evidence that defendant had been seen in or around the dwelling before, nor was their evidence that defendant lived there. Accordingly, the trial court erred in denying defendant's motion to dismiss the charge of maintaining a dwelling.

C. Acting in Concert

**[3]** Defendant also contends the State failed to present substantial evidence demonstrating he was acting in concert with McEntire in the commission of all of the crimes charged and, as such, the trial court committed plain error by instructing the jury on this theory of guilt. We agree.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4) (2015). The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve . . . errors in the judge's instructions to the jury . . . ." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citations omitted). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

"To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose." *State v. Joyner*, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979) (citation omitted).

Under the doctrine of acting in concert, the State is not required to prove actual or constructive possession if it can establish that the defendant was "present at the scene of the crime and the evidence is sufficient to show he [was] acting together with another who [did] the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *Id.* at 357, 255 S.E.2d at 395. "It is not, therefore, necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle . . . ." *Id.* at 357, 255 S.E.2d 395. However, there must be evidence of a common plan or purpose shared by the accused with one other person. *See State v. Williams*, 299 N.C. 652, 656–57, 263 S.E.2d 774, 777–78 (1980). Where there is "no evidence of joint action other than presence at the scene[,]" such evidence will not be sufficient for the charge to be submitted to the jury. *James*, 81 N.C. App. at 97, 344 S.E.2d at 81 (citations omitted). "Mere presence at the scene of a crime is not itself a crime, absent at least some sharing of criminal intent." *Id.* at 97, 344 S.E.2d at 81–82 (citation omitted).

In *James*, the trial court instructed the jury on both constructive possession and acting in concert, and the defendant was convicted of possession with intent to sell and deliver cocaine. *Id.* at 96–97, 344 S.E.2d at 81–82. In finding the evidence was insufficient for the charge to be submitted on both theories, this Court reasoned that, regarding acting in concert, the only evidence connecting the defendant "to the cocaine was that he was found in the kitchen where the refrigerator containing the drugs was located" and he had a gun in his hand, which was not introduced into evidence, and there was no evidence that it was loaded or usable. *Id.* at 96, 344 S.E.2d at 81. This Court held that this evidence "raise[d] no more than a suspicion that [the defendant] was intentionally involved in the possession of the cocaine." *Id.* at 97, 344 S.E.2d at 82.

Here, the State presented no evidence that defendant had a common plan or purpose to possess marijuana or drug paraphernalia with McEntire. At most, the State proved defendant and McEntire were acquainted and defendant was present on 22 October 2013 when the drugs were found. However, "[m]ere presence at the scene of a crime is not itself a crime," and the State presented no evidence that defendant and McEntire shared any "criminal intent." *Id.* at 97, 344 S.E.2d at 81–82 (citation omitted).

"[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284

N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citations omitted). Thus, the trial court erred in instructing the jury on the theory of acting in concert.

In conclusion, having determed that the trial court erred in denying defendant's motions to dismiss, and in givng an instruction on acting in concert, we vacate the judgments of the trial court.

VACATED.

Judges CALABRIA and STEPHENS concur.

---

STATE OF NORTH CAROLINA
v.
WILLIAM SHELDON HOWELL

No. COA16-303

Filed 6 December 2016

**Sentencing—enhancement based on prior conviction and habitual felon status**

The trial court erred by enhancing defendant's sentence for misdemeanor possession of marijuana to a Class I felony based on a prior conviction and then to a Class E felony based on defendant's habitual felon status. Status as a habitual felon cannot be used to further enhance a sentence that is not itself a substantive offense.

Appeal by defendant from judgment entered 9 December 2015 by Judge Mark E. Powell in Transylvania County Superior Court. Heard in the Court of Appeals 4 October 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Susan Fountain, for the State.*

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

BRYANT, Judge.

Where the sentencing statute states that a Class 1 misdemeanor under the Controlled Substances Act "shall be punished as a Class I felon[y]" where the misdemeanant has committed a previous offense

punishable under the Act, the sentencing statute acts to enhance punishment for a misdemeanor offense and is not a separate felony. Accordingly, we reverse the trial court's judgment sentencing defendant as a Class E felon.

On 27 October 2014, a grand jury sitting in Transylvania County indicted defendant William Sheldon Howell on the charge of, *inter alia*, attaining habitual felon status. On 15 June 2015, defendant was further indicted on charges of possession of marijuana over one-half ounce but less than one-and-one-half ounce, a Class 1 misdemeanor, and of having been previously convicted of any offense in violation of the Controlled Substances Act.

On 9 December 2015, defendant entered into a plea agreement with the State: defendant pled guilty to the Class 1 misdemeanor possession of marijuana, acknowledged the prior conviction of a drug offense in violation of the Controlled Substances Act which subjected defendant to an enhanced punishment, and acknowledged attaining habitual felon status. Other pending charges were dismissed. Before accepting defendant's plea, the court engaged defendant in the following discussion regarding his sentencing exposure:

> THE COURT: I had a conference on Monday with [defense counsel] and [the prosecutor] concerning the charges against you. And [defense counsel] was arguing that the way the statute [punishing possession of marijuana greater than one-half ounce but less than one and one-half ounces] was worded . . . [an enhanced sentence due to a prior controlled substance conviction should be interpreted as] a Class 1 misdemeanor punished as a felony, not really a felony but just punished as a felony. . . .
>
> . . .
>
> I'm going to go over the charges. The possession of marijuana greater than one-half ounce but less than one-and-one-half ounces is a Class 1 misdemeanor with a possible maximum sentence of 120 days in prison, but there's no mandatory minimum sentence. Do you understand that charge?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Now, because you have the prior convictions for controlled substances that Class 1 misdemeanor can be punished as a Class I felony. And that has a possible

> maximum sentence of 24 months in prison, but there's no mandatory minimum sentence. Do you understand that, I'll say, enhanced punishment?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: . . . [B]ecause you've obtained the status of habitual felon, the Class I felony can be punished as a Class E felony with a possible maximum sentence of 88 months in prison, but no mandatory minimum sentence. . . .
>
> Do you understand that now?
>
> THE DEFENDANT: Yeah, I understand that. Yes, sir.

Defendant entered a plea of guilty to the Class 1 misdemeanor possession of marijuana offense, admitted he had a prior drug conviction that would enhance the punishment, and acknowledged that he had attained habitual felon status. The trial court accepted defendant's plea and entered a consolidated judgment on the charges.

> THE COURT: All right. Madam Clerk, a Class 1 misdemeanor, but I will say for the record I'm treating it as a Class I felony because of the prior conviction. And that Class I felony because of the habitual felon status is punished as a Class E felony.

Defendant was sentenced to an active term of 29 to 47 months, which the court suspended and placed defendant on supervised probation for a period of 36 months. Defendant appeals.

---

Pursuant to North Carolina General Statutes, section 15A-1444,

> [a] defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed: . . . (2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 ["Punishment limits for each class of offense and prior record level" (felony)] or G.S. 15A-1340.23 ["Punishment limits for each class of offense and prior conviction level" (misdemeanor)] for the defendant's class of offense and prior record or conviction level[.]

N.C. Gen. Stat. § 15A-1444(a2) (2015). As defendant challenges the sentence imposed on the basis that such is not authorized by G.S. §§ 15A-1340.17 or 15A-1340.23, this appeal is properly before this Court.

On appeal, defendant argues that the trial court erred by enhancing his sentence for misdemeanor possession of marijuana to a Class I felony based on a prior conviction and then to a Class E felony based on defendant's habitual felon status. We agree.

Per his plea agreement, defendant pled guilty to a Class 1 misdemeanor, *see* N.C. Gen. Stat. 90-95(d)(4), and acknowledged a prior conviction for an offense also punishable under the Act. On appeal, defendant contends that the Controlled Substances Act (the Act) does not elevate the *offense* of a Class 1 misdemeanor to a Class I felony. Instead, rather, where a defendant commits a Class 1 misdemeanor and has a prior conviction in violation of the Act, the Class 1 misdemeanor is simply enhanced and the offense sentenced as a Class I felony. In support of his proposition, defendant cites *State v. Priddy*, 115 N.C. App. 547, 445 S.E.2d 610 (1994) (habitual impaired driving), and *State v. Smith*, 139 N.C. App. 209, 533 S.E.2d 518 (2000) (habitual misdemeanor assault).

In *Smith*, the defendant challenged the sentence imposed upon him after being convicted of two counts of habitual misdemeanor assault and attaining habitual felon status. 139 N.C. App. 209, 533 S.E.2d 510. The defendant argued that the habitual misdemeanor assault offense did not create a substantive offense but merely conferred a status upon the defendant for the purpose of enhancing punishment. *Id.* at 212, 533 S.E.2d at 519. The *Smith* Court looked to the wording of the habitual misdemeanor assault statute.

> A person *commits the offense of* habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33(c) or G.S. 14-34 and has been convicted of five or more prior misdemeanor convictions, two of which were assaults. A person convicted of violating this section is guilty of a Class H felony . . . .

*Id.* at 213, 533 S.E.2d at 520 (alteration in original) (quoting N.C. Gen. Stat. § 14-33.2). The *Smith* Court noted similar language in the habitual impaired driving statute, General Statute section 20-138.5. "A person *commits the offense of* habitual impaired driving if he drives while impaired as defined in G.S. 20–138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20–4.01(24a)

within seven years of the date of this offense." *Id.* (alteration in original) (quoting N.C. Gen. Stat. § 20-138.5(a)). The Court contrasted the language of these two statutes with that of the habitual felon statute: "Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof *is declared to be* an habitual felon . . . ." *Id.* (quoting N.C. Gen. Stat. § 14-7.1). The Court considered the declaration "commits the offense of" used in both the habitual misdemeanor assault statute and the habitual impaired driving statute followed by the series of required acts indicative of a substantive offense, while the phrase " 'declared to be' immediately before 'habitual felon' " in the habitual felon statute, "denot[es] a status, rather than an offense." *Id.*

In *Priddy*, the defendant made a challenge similar to the argument presented in *Smith*: "[T]he habitual impaired driving does not constitute a separate felony offense; rather, it is a mere punishment enhancement statute like . . . the habitual felon statute." *Priddy*, 115 N.C. App. at 548, 445 S.E.2d at 612. As in *Smith*, the *Priddy* Court reasoned that "the legislature clearly intended felonious habitual impaired driving to constitute a separate felony offense," and not a mere punishment enhancement. *Id.* at 550, 445 S.E.2d at 612.

We now turn our attention to the case sub judice. Within Chapter 90, Article 5 of our General Statutes is codified the North Carolina Controlled Substances Act (the Act). Defendant pled guilty to possession of marijuana, a Schedule VI controlled substance, greater than one-half ounce (and less than one and one-half ounces). N.C. Gen. Stat. § 90-94(1) (2015). Pursuant to section 90-95, governing violations of the Act, it is unlawful for any person to possess a controlled substance. *Id.* § 90-95(a)(3). Possession of more than one-half ounce and not in excess of one and one-half ounces of marijuana is punishable as a Class 1 misdemeanor. *Id.* § 90-95(d)(4). Defendant pled guilty to this Class 1 misdemeanor and admitted to receiving a prior conviction that would enhance his sentence to a Class I felony.

> The prescribed punishment and degree of any offense under this Article shall be subject to the following conditions, but the punishment for an offense may be increased only by the maximum authorized under any one of the applicable conditions:
>
> . . .
>
> (3) If any person commits a Class 1 misdemeanor under this Article and if he has previously been convicted for

> one or more offenses under any law of North Carolina . . . which offenses are punishable under any provision of this Article, *he shall be punished as a Class I felon.*

*Id.* § 90-95(e)(3) (emphasis added).

Because section (e) states that the defendant "shall be punished as a Class I felon," it appears that our General Assembly intended that section (e)(3) act as a sentence enhancement rather than a separate offense. *Cf. Smith*, 139 N.C. App. at 213, 533 S.E.2d 520 ("A person *commits the offense of* habitual misdemeanor assault . . . ." (alteration in original) (quoting N.C. Gen. Stat. § 14-33.2)); *Priddy*, 115 N.C. App. 547, 445 S.E.2d 610. Thus, while defendant's Class 1 misdemeanor is punishable as a felony under the circumstances present here, the substantive offense remains a Class 1 misdemeanor. Defendant's status as an habitual felon cannot be used to further enhance a sentence that is not itself a substantive offense. Therefore, because defendant's habitual felon status has no impact on his sentence as a misdemeanant, punishing defendant's offense as a Class E felony is not authorized by sections 15A-1340.17, 15A-1340.23, or 90-95(e)(3). Accordingly, we reverse the trial court order sentencing defendant as a Class E felon due to defendant's habitual felon status and remand for resentencing.

REVERSED AND REMANDED.

Judges CALABRIA and STEPHENS concur.

[250 N.C. App. 692 (2016)]

STATE OF NORTH CAROLINA
v.
DONNA HELMS LEDBETTER

No. COA15-414-2

Filed 6 December 2016

**Appeal and Error—writ of certiorari—procedural process—Rule 1—Rule 2—Rule 21**

Defendant's petition for writ of certiorari to review her motion to dismiss in a driving while impaired case, prior to entry of her guilty plea, did not assert any of the procedural grounds set forth in Rule 21 to issue the writ. Although the statute provides jurisdiction, the Court of Appeals is without a procedural process under either Rule 1 or 21 to issue the discretionary writ under these facts, other than by invoking Rule 2.

Appeal by defendant from judgment entered 27 October 2014 by Judge Jeffrey P. Hunt in Rowan County Superior Court. Originally heard in the Court of Appeals 8 October 2015, with opinion issued 3 November 2015. The defendant's petition for discretionary review pursuant to N.C. Gen. Stat. § 7A-31 was allowed by the Supreme Court of North Carolina on 22 September 2016, for the limited purpose of remanding to this Court for reconsideration.

*Attorney General Roy Cooper, by Assistant Attorney Generals Christopher W. Brooks and Ashleigh P. Dunston, for the State.*

*Meghan A. Jones, for defendant-appellant.*

PER CURIAM.

This case is before the Court on remand by Order of the North Carolina Supreme Court dated 22 September 2016, to be reconsidered in light of that Court's recent decisions in *State v. Thomsen*, __ N.C. __, 789 S.E.2d 639 (2016) and *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2016).

## I. Procedural Background

The facts underlying this case are set forth in detail in our previous opinion, *State v. Ledbetter*, __ N.C. App. __, 779 S.E.2d 164 (2015), and are briefly presented here. Donna Helms Ledbetter ("Defendant") was charged with driving while impaired. Defendant filed a motion to

dismiss the charges on 23 December 2013, and argued the State had violated N.C. Gen. Stat. § 20-38.4 (setting forth procedures for magistrates to follow when the arrestee appears to be impaired during the initial appearance) and *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988) (holding a DWI charge is subject to dismissal for magistrate's failure to "inform [the accused] of the charges against him, of his right to communicate with counsel and friends, and of the general circumstances under which he may secure his release.")

Following the court's denial of her motion, Defendant entered a plea of guilty. The plea arrangement stated "[Defendant] expressly retains the right to appeal the Court's denial of her motion to dismiss/suppress her Driving while Impaired charge in this case and her plea of guilty is conditioned based on her right to appeal that decision[.]" Defendant purportedly appealed to this Court from the judgment entered upon her guilty plea, and argued the trial court erred by denying her "motion to dismiss." The State moved to dismiss Defendant's appeal, and to deny her petition for writ of certiorari.

This Court held Defendant did not have a statutory right to appeal the motion to dismiss under either §§ 15A-1444(a)-(d) or 15A-979(b). *Ledbetter*, __ N.C. App. at __, 779 S.E.2d at 170-71. Defendant had petitioned this Court to issue a writ of certiorari to review the denial of her motion to dismiss. This Court held Rules 1 and 21 of the North Carolina Rules of Appellate Procedure governs our appellate procedures and do not set forth the grounds Defendant asserted to issue the requested writ. In the exercise of our discretion, we further declined to invoke Rule 2 to suspend the Rules of Appellate Procedure to exercise our admitted jurisdiction to issue the writ under N.C. Gen. Stat. § 1444(e). We dismissed Defendant's purported appeal. *Id.*

## II. *Thomsen* and *Stubbs*

After our initial opinion was issued in this case, the Supreme Court issued its opinion in *Thomsen*. In that case, the defendant pled guilty to rape of a child and sexual offense with a child, both felonies which carry mandatory minimum sentences of 300 months. *Thomsen*, __ N.C. at __, 789 S.E.2d at 641. After it consolidated the convictions and sentenced the defendant to a prison term of 300 to 420 months, the trial court immediately *sua sponte* granted its own motion for appropriate relief ("MAR") and vacated the judgment and sentence. The trial court determined the mandatory sentence violated the Eighth Amendment, and imposed a lower sentence pursuant to the Structured Sentencing Act. *Id.*

The State petitioned this Court to issue the writ of certiorari to review the trial court's order granting its own MAR. This Court allowed the State's petition, addressed the State's argument and held, over a dissent, the mandatory minimum sentence did not violate the Eighth Amendment, and remanded the case for resentencing. *Id.* The Supreme Court addressed the issue raised by the dissenting opinion, whether this Court had subject matter jurisdiction to review, by certiorari, the trial court's grant of its own MAR. *Id.*

In *Thomsen*, the Supreme Court relied upon its decision in *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2016). *Stubbs* was decided and issued while *Ledbetter* was initially pending before our Court, and is addressed and cited within our previous opinion. *See Ledbetter*, __ N.C. App. at __, 779 S.E.2d at 168.

In *Stubbs*, the Court considered whether the Courts in the appellate division have jurisdiction to review, by certiorari, the trial court's grant of a MAR in favor of the defendant. The trial court's *ruling* on a MAR is statutorily subject to review by certiorari. N.C. Gen. Stat. § 15A-1422(c) (2015). The Court noted the statute "does not distinguish between an MAR when the State prevails below and an MAR under which the defendant prevails." *Stubbs*, 368 N.C. at 43, 770 S.E.2d at 76. The Court stated:

> Accordingly, given that our state constitution authorizes the General Assembly to define the jurisdiction of the Court of Appeals, and given that the General Assembly has given that court broad powers "to supervise and control the proceedings of any of the trial courts of the General Court of Justice," *id.* § 7A-32(c), and given that the General Assembly has placed no limiting language in subsection 15A-1422(c) regarding which party may appeal a ruling on an MAR, we hold that the Court of Appeals has *jurisdiction* to hear an appeal by the State of an MAR when the defendant has won relief from the trial court.

*Id.* at 43, 770 S.E.2d at 76 (emphasis supplied).

The Court noted the Rules of Appellate Procedure are pertinent to its analysis. *Id.* At that time, the language of Rule 21 only permitted appellate review of the issuance of the writ of certiorari to review an " 'order of the trial court *denying* a motion for appropriate relief.' " *Id.* (quoting N.C. R. App. P. 21(a)(1)) (emphasis supplied). The defendant in *Stubbs* argued that under the language of the Rule, the State may not seek review by certiorari of an order of a trial court *granting* a motion for appropriate relief. *Id.*

The Supreme Court disagreed, and held:

> As stated plainly in Rule 1 of the Rules of Appellate Procedure, "[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law." [N.C. R. App. P. 1] Therefore, while Rule 21 might appear at first glance to limit the jurisdiction of the Court of Appeals, the Rules cannot take away jurisdiction given to that court by the General Assembly in accordance with the North Carolina Constitution.

*Id.* at 43-44, 770 S.E.2d at 76.

Where § 15A-1422(c) contains "no limiting language . . . regarding which party may appeal a ruling on an MAR," the Court held this Court has jurisdiction to hear an appeal by the State of an MAR when defendant has won relief from the trial court. *Id.* at 43, 770 S.E.2d at 76. On the same day the *Stubbs* opinion was filed, and prior to the issuance of its mandate, the Supreme Court specifically amended Rule 21 to set forth a procedure under the appellate rules to permit review of *all rulings* on motions for appropriate relief in accordance with the language of N.C. Gen. Stat. § 15A-1422(c)(3). N.C. R. App. P. 21(a) (2016).

As in *Stubbs*, the Court in *Thomsen* noted "[t]he General Assembly has exercised [its] constitutional authority in N.C.G.S. § 7A-32(c) by giving the Court of Appeals 'jurisdiction . . . to issue the prerogative writs, including . . . certiorari, . . . to supervise and control the proceedings of any of the trial courts of the General Court of Justice.' " *Thomsen*, __ N.C. at __, 789 S.E.2d at 641 (quoting N.C. Gen. Stat. § 7A-32(c) (2015)). The Court explained N.C. Gen. Stat. § 7A-32(c) "empowers the Court of Appeals to review trial court rulings on motions for appropriate relief by writ of certiorari unless some other statute restricts the jurisdiction," and "only the General Assembly can take away the jurisdiction that it has conferred." *Id.* at __, 789 S.E.2d at 641-42.

"Subsection 7A-32(c) thus creates a default rule that the Court of Appeals has *jurisdiction* to review a lower court judgment by writ of certiorari. The default rule will control unless a more specific statute restricts *jurisdiction* in the particular class of cases at issue." *Id.* at __, 789 S.E.2d at 642 (emphasis supplied).

## III. Authority Under the Rules of Appellate Procedure

Both *Thomsen* and *Stubbs* address the appellate courts' *jurisdiction* to issue the writ of certiorari upon the State's petition, where statutorily

authorized, after the trial court granted both defendants' MAR. N.C. Gen. Stat. § 15A-1444(e) provides that a criminal defendant who pleads guilty to a criminal offense "may petition the appellate division for review by writ of certiorari." N.C. Gen. Stat. § 15A-1444(e) (2015). Our initial opinion in this case neither denies, nor purports to limit, this Court's *jurisdiction* to issue the writ under N.C. Gen. Stat. § 15A-1444(e), or any other statute.

The issue in the present case does not pertain to the existence of appellate *jurisdiction* under the statutes. Rather, the issue pertains to the "govern[ing] procedure" and processes available to properly exercise our jurisdiction and guide our discretion of whether to issue a writ of certiorari, following a defendant's guilty plea. N.C. Rule App. P. Rule 1(b) (2016). Defendant's petition, purportedly under N.C. Gen. Stat. § 15A-1444(e), does not invoke any of the three grounds set forth in Appellate Rule 21 to guide this Court's discretion to issue the writ under this Rule to review her guilty plea.

We are without a procedural basis to do so, without invoking Rule 2 to suspend the Rules. *See Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999) (Appellate Rule 2 "relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances.").

Appellate Rule 1 states the Rules of Appellate Procedure "*govern procedure* in all appeals from the courts of the trial division to the courts of the appellate division . . . *and in applications to the courts of the appellate division for writs and other relief* which the courts or judges thereof *are empowered* to give." N.C. R. App. P. 1(b) (emphasis supplied). Appellate Rules 1, 2 and 21 provide this Court with a procedure and mechanism to guide our discretion to grant or deny a petition to issue the writ of certiorari under the jurisdiction the appellate courts are "empowered" to exercise under our Constitution and statutes. N.C. R. App. P. 1(b), *Stubbs*, __ N.C. __, 789 S.E.2d at 641-42.

Under the current language of Appellate Rule 21, no procedural mechanism exists under that Rule to issue the discretionary writ of certiorari to review the trial court's judgment entered upon Defendant's guilty plea under N.C. Gen. Stat. § 15A-1444(e), without further exercising our discretion to invoke Rule 2 to suspend the Rules. *See State v. Biddix*, __ N.C. App. __, 780 S.E.2d 863 (2015) (declining to exercise Rule 2 to suspend the appellate rules, denying petition for writ of certiorari, and dismissing defendant's purported appeal from guilty plea where the issue is not listed for review to issue a writ of certiorari pursuant to

Appellate Rule 21); *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.").

This Court's jurisdiction to hear and consider issues raised by a party is often broader, but not necessarily synonymous, with the procedural framework under our appellate rules. The appellate rules are replete with circumstances in which this Court possesses jurisdiction, but the rules procedurally do not allow appellate review without invoking Rule 2. For example, although this Court maintains jurisdiction over an appeal, this Court is also bound by Rules 10 and 28 of the Rules of Appellate Procedure, which generally limits review to a only those issues properly preserved and briefed. N.C. R. App. P. 10(a)(1) (2016); N.C. R. App. P. 28(b) (2016).

## IV. Conclusion

After further consideration and review of both *Thomsen* and *Stubbs*, and under the jurisdictional authority provided by N.C. Gen. Stat. § 15A-1444(e), Defendant's petition for writ of certiorari to review her motion to dismiss, prior to entry of her guilty plea, does not assert any of the procedural grounds set forth in Rule 21 to issue the writ. Although the statute provides jurisdiction, this Court is without a procedural process under either Rule 1 or 21 to issue the discretionary writ under these facts, other than by invoking Rule 2.

In the further exercise of our discretion under the facts before us, we decline to invoke Rule 2 to suspend the requirements of the appellate rules to issue the writ of certiorari. Appellate Rule 2 sets forth the discretionary basis and restates "the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances." *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300. Defendant's petition before us does not meet that threshold.

Upon remand and after reconsideration and further discretionary review, Defendant's petition is denied, and her appeal is dismissed. The prior mandate issued by this court remains undisturbed. *It is so ordered.*

PETITION DENIED AND APPEAL DISMISSED.

Panel Consisting of: McCullough, Dietz, Tyson, JJ.

[250 N.C. App. 698 (2016)]

STATE OF NORTH CAROLINA
v.
DEVONTE SHAWMAR LYONS

No. COA 16-365

Filed 6 December 2016

**Jury—statement by trial court—futility of requesting to review witness testimony**

The trial court erred in defendant's trial for offenses stemming from a robbery and murder by making comments prior to closing arguments that suggested it would be futile for the jury to request to review witness testimony. The error, however, was not prejudicial, as defendant failed to identify any particular testimony by the accomplice witnesses which, if reviewed by the jury, would suggest a reasonable probability of a different result at his trial.

Appeal by Defendant from judgment entered 30 July 2015 by Judge Forrest D. Bridges in Superior Court, Cleveland County. Heard in the Court of Appeals 19 September 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Sonya Calloway-Durham, for the State.*

*Glover and Petersen, P.A., by Ann B. Petersen and James R. Glover, for Defendant.*

McGEE, Chief Judge.

Devonte Shawmar Lyons ("Defendant") appeals his convictions for first-degree murder under the felony murder rule, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Defendant contends he was prejudiced by the trial court's failure to exercise its discretion pursuant to N.C. Gen. Stat. § 15A-1233(a) to permit the jury to review certain witness testimony. We find no prejudicial error.

## I. Background

The evidence at trial tended to show the following: Defendant, Aryka Roberts ("Roberts"), Rashad Schenck ("Schenck"), and Jessica Edwards ("Edwards") gathered at the residence of their mutual friend, Garrett Frederick ("Frederick"), in Kings Mountain around 6:30 p.m.

on 13 March 2012. Roberts was Defendant's girlfriend. Schenck and Edwards were dating each other. The four of them sat in a sunroom where they smoked marijuana and listened to music. Roberts called a "chat line" used for "meet[ing] men [in the area] who want to talk or do other things." Roberts explained the chat line process at trial: "You just call and [record] a [voicemail] greeting and either [the men] can message you or you message them." Using the speakerphone, Roberts began playing messages men had left for her on the chat line.

One of the messages was from a man with a heavy foreign accent. Roberts decided to send him a message, and she and the man had a brief conversation over the phone making "small talk[]." Roberts told the man she lived in Kings Mountain and asked him to meet her there. Later, when asked why the man was interested in meeting her, Roberts testified "[she] told him for sex." Roberts and the caller exchanged phone numbers. After hanging up, Defendant and Roberts decided to "rob [the man with the accent] and get [his] money."

Defendant, Roberts, Schenck, and Edwards left Frederick's residence together around 9:00 p.m. and drove in a 1998 Toyota Camry ("the Camry") belonging to Roberts to Ebenezer, a small community outside Kings Mountain. During the ten-minute drive to Ebenezer, they discussed whether Roberts should meet the man at a hotel, but it was ultimately decided that Roberts should meet him at 206 Putnam Place, a vacant house where her father used to live. Along the way, they stopped at another home and picked up Schenck's cousin, Sheldon Thompson ("Thompson"). Roberts was "on and off [Defendant's cell phone]" with the man they intended to rob, giving him driving directions to Ebenezer from Charlotte. Roberts testified that

> [t]he plan [they developed while on the way to Ebenezer] was for [Roberts] to go get in [the man's] car. [Edwards] was going to wait in [Roberts's] car . . . at [a neighbor's] house. [Defendant, Schenck, and Thompson] were supposed to hide in the bushes, come up to the car, scare the man and only rob him, and we [were] all supposed to go back to my car and leave.

Roberts "didn't remember . . . having a conversation about who [specifically] was going to take the money."

Schenck testified Defendant was supposed to get the money using a gun, and Schenck was supposed to "watch out [from the Camry] . . . to make sure . . . nothing happen[ed] to [Defendant]." Schenck also

testified it "was not unusual for [him] to back up [Defendant] in a prostitution situation . . . involving [Roberts]."

They next stopped at Schenck's grandmother's house in Ebenezer. Roberts and Schenck went inside and Defendant and Edwards remained in the Camry. The man from the chat line "was calling back and forth on [Defendant's] phone" and Edwards spoke to him while Roberts was inside Schenck's grandmother's house. When Schenck and Roberts returned to the car, Roberts drove "right down the road . . . [about] a minute" and parked at the residence of her family friend, Wayne Bell ("Bell"). Roberts spoke over the phone to the man a final time to give him specific directions to 206 Putnam Place.

At Bell's house, Defendant, Roberts, Schenck and Thompson got out of the Camry and Edwards got into the front seat. Defendant, Roberts, Schenck and Thompson walked through Bell's backyard and approached the back of the house at 206 Putnam Place. Roberts went to the left of the house and the others went to the right. Roberts could see a white Cadillac ("the Cadillac") parked in the driveway of 206 Putnam Place. Roberts got in the Cadillac's passenger side and the driver introduced himself to her as Francis Munufie ("Munufie"). After talking to Munufie briefly, Roberts got out of the Cadillac and went back behind the house, where she spoke with Defendant, who was still with Schenck and Thompson. Roberts testified she was "really nervous and antsy" and told Defendant that Munufie "was . . . touching [her] uncomfortably, and [she] wanted for it to be over." She asked "what the holdup was." Defendant told Roberts: "Shut up. We got this. We're going to do this. We're coming." Roberts had not seen Defendant with a weapon at that point.

Roberts returned to the Cadillac. Defendant came up to the driver's side door and "knocked on the window with a gun." Defendant told Munufie to get out of the Cadillac and tried to open the door, but it was locked. Roberts unlocked the door from inside. Roberts testified she immediately got out and ran to the back of 206 Putnam Place and then to the Camry parked in Bell's driveway. She heard four or five gunshots as she ran.

Schenck testified that Munufie opened the door and Defendant began "reach[ing] for [Munufie's] pockets" while Munufie was still sitting in the Cadillac. Defendant told Munufie to get out of the car and when Munufie did, "[Defendant] had the gun in [Munufie's] face telling him to give [Defendant] the money." Munufie motioned as if he was going to pull something out of his back pocket, but brought his hand up empty.

Defendant was still holding the gun in Munufie's face, demanding money, and Munufie "slapped [at] the gun." Schenck testified that after Munufie slapped the gun a third time, Defendant shot Munufie in his left upper arm. Schenck, Roberts, and Thompson then ran back to the Camry. As he was running, Schenck heard "multiple [gun] shots." Edwards testified that, while waiting in the Camry, she "heard five or six gunshots. And less than a minute later [Schenck, Thompson, and Roberts] were in the back seat [of the Camry] and [Roberts] told me to go."

According to Roberts, Defendant returned to the Camry last, and "jump[ed] in the front seat" as Edwards was pulling out of Bell's driveway. Edwards drove away, but "ran off the side of the road at one point because [she] was shook [up]." Edwards testified "[e]verybody was frantic. [Roberts] was like, 'What happened? What happened? Did you kill him?' And [Defendant] said, 'I don't know. I shot him in the face.' And that's – I think at that point I swerved off the road. [Defendant] said, 'I'm sorry. I'm sorry.' " Schenck testified Roberts was "screaming [at Defendant] . . . [asking] did [Defendant] shoot the dude." According to Schenck, Defendant did not respond at first, but eventually said, "I had to do it." Roberts testified she "was . . . crying really bad and . . . [asking Defendant] 'What happened? What happened?' " and that Defendant simply responded, "I'm sorry."

Roberts switched seats with Edwards and began driving. She drove to the apartment of Schenck's cousin, Angelica Adams ("Adams"), in Gastonia. At Adams's apartment, the group sat in the living room smoking marijuana. According to Roberts, Defendant asked Adams for "[s]ome Comet or some bleach or some kind of stuff to clean with" and went to the bathroom. Around 3:00 a.m., Adams drove Edwards to her home in Galilee and drove Schenck and Thompson back to Ebenezer.

Roberts and Defendant got in the Camry parked outside Adams's apartment and talked for about twenty minutes. Roberts later told police that, after Adams and the others left, Roberts saw Defendant wrap a gun in a yellow t-shirt and hide it under some stairs at the apartment complex. Around 6:00 a.m., Defendant and Roberts went to Defendant's mother's apartment in Kings Mountain. They fell asleep briefly, but were awakened by police knocking on the door of the apartment. Two officers spoke with Roberts and Defendant separately. Roberts testified she "[b]asically gave [the officers] the runaround, a bunch of lies, jumbled up lies." Before leaving, the officers told Roberts they wanted to talk to her again. They also seized the Camry, saying it had been seen near 206 Putnam Place the previous night.

Deputy Jimmy Ellis ("Deputy Ellis") of the Cleveland County Sheriff's Office ("CCSO") testified he responded to a 911 call around 10:55 p.m. on 13 March 2012 reporting five or six gun shots fired near Putnam Place in Ebenezer. Deputy Ellis observed a white Cadillac parked in the driveway at 206 Putnam Place. The vehicle's lights were on, and there was music blaring loudly from inside. As Deputy Ellis approached the Cadillac, he saw the driver's side door was open and found a man, later identified as Francis Munufie, lying on his back with an apparent gunshot wound to his head. Deputy Ellis radioed a request for EMS and backup deputies. A number of officers arrived and began canvassing the neighborhood. Investigators spoke with Bell, who informed them he had seen Roberts and several others in her Camry parked nearby earlier that evening. Police found four spent nine millimeter gun shell casings in the grass and driveway ten to fifteen feet from Munufie's body.[1]

A medical examiner performed an autopsy on Munufie's body on 14 March 2012, and determined Munufie suffered gunshot wounds to the left side of his head, to his upper right, and "graze wounds" to the right side of his abdomen. The examiner collected an intact bullet from behind Munufie's right collarbone, several small bullet fragments from Munufie's arm, and a small bullet fragment located near Munufie's jawbone. The bullet and bullet fragments were packaged as evidence and returned to CCSO. CCSO investigators also discovered a bullet fragment lodged in the interior of Munufie's Cadillac when the vehicle was processed for fingerprints on 16 March 2012. The shell casings, bullet and bullet fragments, and a subsequently recovered firearm were all sealed and delivered to the State Bureau of Investigation's Western Lab by CCSO Detective Gary Lee for ballistics testing.

Throughout the week following Munufie's death, investigators interviewed Defendant, Roberts, Schenck, Thompson, and Edwards. Roberts submitted fingerprint and DNA samples on 20 March 2012. On the way to the Law Enforcement Center for fingerprinting, Roberts told detectives she had been involved with the attempted robbery of Munufie. Roberts also suggested investigators should search Adams's apartment building in Gastonia for the gun used during the robbery attempt. The same day, CCSO Sergeant Mark Craig ("Sgt. Craig") went to Adams's apartment, where he found a nine millimeter, semi-automatic handgun wrapped in a yellow t-shirt underneath a staircase on the outside of the building.

---

1. Crime scene investigators observed three spent shell casings on the night of the murder before Munufie's body was removed from the scene. A fourth cartridge was found by a detective upon returning to 206 Putnam Place around 4:00 p.m. the next day.

Roberts later agreed to speak to Defendant while wearing a hidden audio recording device. She testified Defendant was "real standoffish" during the conversation and "kept telling her to shut the fuck up, and [saying] he didn't want to talk about [the robbery attempt]."

CCSO Detective Jessica Woosley ("Det. Woosley") testified Defendant was arrested on 23 March 2012 on charges of first-degree murder, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Roberts, Schenck, Edwards, and Thompson were also arrested on the same charges and later entered into plea agreements with the State. A grand jury indicted Defendant on 9 April 2012 for first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon.

Roberts, Schenck, Edwards, and Thompson testified for the State at Defendant's trial on 13 July 2015. Deborah Chancey ("Chancey"), a firearms analyst at the State Crime Lab, testified regarding her analysis of the four fired shell casings, five bullets and/or bullet fragments, and handgun submitted to the Crime Lab for testing. It was Chancey's opinion that the shell casings exhibited "a sufficient amount of agreement" with casings test-fired from the handgun received by the Crime Lab. However, Chancey also testified that although the bullet and bullet fragments received by the Crime Lab "exhibited some agreement of detail with the test-fires, . . . the amount of agreement was not sufficient to identify [them] to any particular firearm."

Erin Ermish ("Ermish"), a DNA analyst at the State Crime Lab, testified about forensic testing she performed on a number of items of evidence in the case, including DNA swabbings from the exterior driver's side door handle of Munufie's Cadillac; the gun recovered from Adams's apartment; and the yellow t-shirt that had been wrapped around the gun. On cross-examination, Ermish testified, "For any of the items that I tested, I did not get a match between [Defendant's] [DNA] profile and the DNA [detected on the item]." Defendant did not testify or present any additional evidence.

At the close of the evidence, but prior to closing arguments, the trial court instructed the jury:

> As jurors you are often referred to as the fact finders, which simply means that it's up to you to find the true facts in this case from the evidence according to what your recollection of the evidence is. When you go back and start deliberating, if six of you say, Well, I remember this witness says things this way and the other six of you say No, I

> don't remember it that way, . . . *you don't have the option of saying*, Well, let's go ask the judge and let the judge tell us what did that witness really say. Because if you ask that question, my response is going to be, That's part of your job, to figure it out and to make that determination based on your recollection and not what I say the evidence is, what [the lawyers] say the evidence is, but what you say the evidence is. That's why you've been listening so carefully, so that you can determine the true facts from the evidence as you find the evidence to be.

After closing arguments, the trial court further instructed the jury, "If you need to review any exhibits or if you have any questions, please write out such request and . . . I will bring you back into the courtroom to address any such questions or requests." Defendant was convicted on 30 July 2015 of first-degree felony murder, attempted robbery with a dangerous weapon,[2] and conspiracy to commit robbery with a dangerous weapon. The trial court arrested judgment on the conviction for attempted robbery with a dangerous weapon and consolidated the remaining convictions into a single judgment. Defendant was sentenced to an active term of life in prison without parole. Defendant gave notice of appeal in open court.

## II. Jury Instructions Regarding Witness Testimony

### A. *Standard of Review*

Defendant contends the trial court violated a statutory mandate requiring trial courts to exercise discretion in considering jury requests to review witness testimony or other evidence. Specifically, N.C. Gen. Stat. § 15A-1233(a) provides in part:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence.

2. During the charge conference, following an argument by defense counsel that the robbery was incomplete, the trial court dismissed the charge of robbery with a dangerous weapon and replaced it with attempted robbery.

N.C. Gen. Stat. § 15A-1233(a) (2015). According to Defendant, certain comments made by the trial court to the jury prior to closing arguments demonstrate the court's failure to exercise discretion as directed by the statute. Defendant's argument is reviewable despite the fact that he did not raise this objection at trial. *See State v. Starr*, 365 N.C. 314, 317, 718 S.E.2d 362, 365 (2011) ("When a trial court violates [N.C.G.S. § 15A-1233(a)] by denying the jury's request . . . upon the ground that the trial court has no power to grant the motion in its discretion, the ruling is reviewable, and the alleged error is preserved by law even when the defendant fails to object." (citation and internal quotation marks omitted)). "Alleged violation of a statutory mandate presents a question of law, which we review *de novo* on appeal." *Dion v. Batten*, ___ N.C. App. ___, ___, 790 S.E.2d 844, 852, 2016 WL 4088417 at *8 (2016).

A trial court's failure to exercise its discretion under N.C.G.S. § 15A-1233(a) warrants a new trial only where the error was prejudicial. *See State v. Johnson*, 164 N.C. App. 1, 20, 595 S.E.2d 176, 187 (2004). Accordingly, to prevail in the present appeal, Defendant must show not only a failure by the trial court to exercise its discretion but also "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at [his] trial[.]" *See* N.C. Gen. Stat. § 15A-1443(a) (2015); *State v. Hatfield*, 225 N.C. App. 765, 769, 738 S.E.2d 236, 239 (2013).

As this Court recently held upon its review of relevant case law,

> a trial court's error in failing to exercise its discretion in denying a jury's request to review testimony constitutes prejudicial error when the requested testimony (1) is 'material to the determination of [a] defendant's guilt or innocence'; and (2) involves 'issues of some confusion or contradiction' such that the jury would want to review this evidence to fully understand it.

*State v. Chapman*, ___ N.C. App. ___, ___, 781 S.E.2d 320, 327 (2016) (quoting *State v. Johnson*, 346 N.C. 119, 126, 484 S.E.2d 372, 377 (1997)).

B. *Analysis*

1. *Exercise of Discretion Under N.C.G.S. § 15A-1233(a)*

Our Supreme Court has observed that N.C.G.S. § 15A-1233(a) codifies "the long-standing common law rule that the decision whether to grant or refuse a request by the jury for a restatement of the evidence lies within the discretion of the trial court." *State v. Barrow*, 350 N.C. 640, 646, 517 S.E.2d 374, 378 (1999). It is error for a trial court to make

statements that, even considered contextually, "suggest[] the trial court [does] not have discretion to grant the jury's request [to review witness testimony]." *See Hatfield*, 225 N.C. App. at 771, 738 S.E.2d at 240. For example, a trial court fails to exercise its discretion to deny a jury's request to review witness testimony by responding that a transcript is "not available," *see State v. Lang*, 301 N.C. 508, 511, 272 S.E.2d 123, 125 (1980), or that the court lacks "the ability" to present the transcript to the jury, *see Barrow*, 350 N.C. at 648, 517 S.E.2d at 379. *See also Johnson*, 346 N.C. at 124, 484 S.E.2d at 376 (holding trial court failed to exercise its discretion to grant jury's request where "[t]he trial court told the jury, 'I'll *need* to instruct you that we *will not be able* to replay or review the testimony for you." (emphases in original)); *Hatfield*, 225 N.C. App. at 771, 738 S.E.2d at 240 (holding trial court failed to exercise its discretion in considering jury's request where, after jury requested review of witness testimony, "the trial court simply told the jury, '[w]e can't do that.' "); *State v. Thompkins*, 83 N.C. App. 42, 45, 348 S.E.2d 605, 607 (1986) (holding trial court failed to exercise its discretion in denying jury request to rehear testimony where the trial court told the jury, "[I]t is not possible to arrange that. . . . I'm sorry that there is no way I can accommodate that request.").

In the present case, the trial court failed to exercise its discretion to grant or deny a request by the jury to review witness testimony. Contrary to the State's contention that the trial court merely made it "clear [to the jurors] that if they asked him for his interpretation [of witness testimony]," the judge would instruct them to "make that determination based on [their own] recollection[s]," the court did not inform the jury it would refuse to *interpret the meaning* of any particular testimony or "recapitulate the facts" of the case. Rather, the court made comments prior to closing arguments that suggested it would be futile for the jury to request to review witness testimony whatsoever:

> When you go back and start deliberating, if six of you say, Well, I remember this witness says things this way and the other six of you say, No, I don't remember it that way . . . you don't have the option of saying, Well, let's go ask the judge and let the judge tell us what did that witness really say. Because if you ask that question, my response it going to be, That's part of your job, to figure it out and to make that determination based on your recollection[.]

Although the trial court's surrounding comments may have emphasized the jury's fact-finding role, its unequivocal statement that jurors "[*would not*] *have the option*," during deliberations, to ask the court "what . . .

[a] witness really [said]" suggested the court lacked the ability to even consider such a request. This was error. *See State v. Long*, 196 N.C. App. 22, 40, 674 S.E.2d 696, 706 (2009) (citing "cases in which our courts have concluded that although the trial court admonished the jury to rely upon their recollections, the trial court did not exercise its discretion because of accompanying language which indicated the trial court did not believe it had the discretion to grant the request." (citation and internal quotation marks omitted)); *see also Johnson*, 164 N.C. App. at 20, 595 S.E.2d at 187 ("While [§ 1233(a)] refers solely to requests made by the jury for review of certain testimony or evidence, we nonetheless find that the purpose and intent of the statute are violated . . . [where] the trial court's pretrial comments *could have foreclosed* the jury from making a request for such testimony or evidence. Thus, we find error even without a request by the jury." (emphasis added)).

2. *Prejudicial Error*

Even when a trial court fails to exercise its discretion to grant or deny a jury's request to review evidence, a defendant must demonstrate he was prejudiced by the trial court's failure to exercise discretion. *See* N.C.G.S. § 15A-1443(a) (providing in part that "[t]he burden of showing . . . prejudice . . . is upon the defendant."). This Court has held it is not necessarily prejudicial error to preemptively deny a jury an opportunity to request to review witness testimony even where "a [defendant's] conviction hinges in large part on the credibility of an alleged accomplice who testifies at trial[.]" *Johnson*, 164 N.C. App. at 20, 595 S.E.2d at 187. The defendant must show that certain testimony involved issues of some confusion and contradiction such that it is likely a jury would want to review the testimony. *See id.* (citation and internal quotation marks omitted).

This Court has also distinguished "cases where *material* evidence was requested [by the jury], [as opposed to] cases where the evidence requested was *not determinative of guilt or innocence*." *Long*, 196 N.C. App. at 40, 674 S.E.2d at 707 (citations omitted) (emphases added). We thus consider whether, in the present case, Defendant has identified specific witness testimony involving issues of such confusion and contradiction that the jury would have likely wanted to review it or that was material to the determination of Defendant's guilt or innocence. We conclude he has not.

Defendant alleges he was prejudiced by the trial court's failure to exercise its discretion because "[t]he only evidence linking [Defendant] to the homicide" came from four accomplice witnesses who "gave

conflicting testimony about [1] the alleged plan to commit a robbery and how and when it developed[;] . . . [2] the details of what happened during the robbery attempt[;] . . . [3] what Defendant . . . allegedly said during the drive to Gastonia[;] and . . . [4] what allegedly happened at the apartment of [Adams] in Gastonia." As Defendant bears the burden of showing prejudice, we limit our review to the specific areas of purportedly "conflicting [witness] testimony" Defendant identifies. We address each in turn.

a. *The alleged plan to commit a robbery*

Defendant first contends that Roberts, Schenck, and Edwards "gave contradictory testimony about the alleged discussions prior to the homicide concerning the plan to rob [Munufie after] lur[ing him] to the scene by [Roberts] through the chat line connection[.]" Beyond this general assertion, Defendant does not point to any specific testimony by the individual witnesses which he characterizes as "conflicting" on this subject. Our review of the record indicates that, in fact, the accomplice witnesses gave largely consistent accounts of the planning stage leading up to the attempted robbery. For example, Roberts, Schenck, and Edwards all testified that, while they were at Frederick's house, Roberts was talking on the chat line in order to select a person to rob. Roberts, Schenck, and Edwards all testified the original plan was to lure Munufie to a hotel, but after group discussion, they settled on 206 Putnam Place. It was undisputed that Roberts gave Munufie driving directions to Kings Mountain and later to Putnam Place specifically. Roberts testified that, after picking up Thompson in Ebenezer, the plan that emerged

> was for [Roberts] to go get in [Munufie's] car. [Edwards] was going to wait . . . in the Camry . . . . [Defendant, Schenck, and Thompson] were supposed to hide in the bushes [behind 206 Putnam Place], come up to the [Cadillac], scare [Munufie] and only rob him, and we [were] all supposed to go back to [the Camry] and leave.

Roberts testified she could not recall whether there was any discussion of who would actually take Munufie's money. Schenck also testified that the plan was for Roberts to get in the Cadillac, but that Defendant was supposed to "get the money . . . with a gun." However, both Roberts and Schenck testified they did not see Defendant with a gun during the planning stage. Edwards testified that "[t]he plan was that [Munufie would] come down [to Kings Mountain] and [Roberts] was going to get in the car with him and then he was going to get robbed, I guess." We are unable to discern any material contradictions among the accomplice witnesses'

testimony on this issue, and Defendant has not pointed to any specific conflicts in support of his argument.

b. *The details of what happened during the robbery attempt*

Defendant next argues the accomplice witnesses "gave conflicting testimony about the details of what happened during the robbery attempt." Specifically, Defendant contends that "[t]he testimony of [Schenck] and [Roberts] that [Defendant] was seen holding a gun when he allegedly encountered . . . Munufie at the driver's side door of [the] Cadillac was both confusing and contradicted." Defendant offers two reasons why the testimony of Schenck and Roberts on this point was "confusing and contradicted." First, Defendant maintains the evidence showed that during the attempted robbery, Defendant "was wearing loose-waisted pajama pants, the kind of clothing . . . unlikely to provide a means for holding and concealing a . . . firearm." Second, Defendant notes that, while Schenck and Roberts both testified Defendant touched the driver's side door handle of Munufie's Cadillac, Defendant's DNA was not discovered anywhere on the vehicle's exterior.

The factual details Defendant identifies did not contradict the testimony of Schenck and Roberts about their own observations of Defendant holding a gun during the robbery attempt. Although Schenck testified Defendant was wearing "pajama pants" during the attempted robbery, he did not testify they were "loose-waisted." Schenck also did not testify that he saw Defendant pull the gun from his waistband; he testified only that, by the time Defendant approached the driver's side door of the Cadillac, "[Defendant] had pulled out a gun[.]" Roberts testified that, when she got out of the Cadillac the first time and went to the back of the house to ask Defendant what was taking so long, she did not see Defendant with a gun. Roberts then returned to the Cadillac, with her back to Defendant as he approached the driver's side door, and testified she could only see "shadows out of [her] peripheral view." Like Schenck, Roberts testified that Defendant "knocked on the [driver's side] window with a gun." Roberts testified she did not actually see a gun in Defendant's possession "[until] he knocked on the window with the gun." Neither witness testified about when or how Defendant obtained the gun; where he concealed it on his person, if at all; or when he first pulled out the gun.

Roberts and Schenck both testified Defendant tried to open the driver's side door of Munufie's Cadillac. Thus, the State offered consistent testimony on this issue from multiple eyewitnesses to the actual robbery attempt, and Defendant did not offer contradictory testimony.

*Cf. Hatfield*, 225 N.C. App at 773, 738 S.E.2d at 241 (holding trial court's failure to exercise its discretion under N.C.G.S. § 15A-1233(a) was prejudicial where requested testimony was that of the sole eyewitness to the defendant's alleged crimes, and defendant directly contradicted the witness's testimony at trial.). The jury heard expert testimony regarding the lack of Defendant's DNA on Munufie's Cadillac, against which it could weigh the testimony of Roberts and Schenck that Defendant in fact touched the Cadillac's door handle. Defendant has failed to show some confusion or contradiction that would make it likely that the jury would have wanted to review the testimony of Roberts or Schenck on this issue.

c. *Defendant's alleged statements during the drive to Gastonia*

Defendant next contends that Roberts, Schenck, and Edwards "gave contradictory testimony about the statements allegedly made by [Defendant] during the drive to Gastonia after the homicide." Once again, Defendant does not direct us to specific testimony by the individual witnesses.

Thompson testified that, during the car ride to Gastonia, "[n]obody said anything." Thompson was the only accomplice witness to deny ever having gone to 206 Putnam Place on 13 March 2012. He also testified he had a "bad memory" and remembered very little about the night of the attempted robbery or the days that followed. However, Roberts, Schenck, and Edwards all testified about statements Defendant made during the drive. The statements attributed to Defendant by these witnesses, although not identical, were not inconsistent. Roberts testified she "was . . . crying really bad and [asking Defendant], 'What happened? What happened?' . . . [and after a couple of minutes Defendant] just said, 'I'm sorry.' " Roberts also testified that she said, "Damn, we're going to get in trouble," and that Defendant replied, "No, we ain't." According to Schenck, Roberts

> kept asking [Defendant] why – "Did you shoot him? Why did you shoot him? How many times did you shoot him?" [Defendant] wasn't really saying nothing [sic] [at first]. . . . And while we [were] driving [Roberts] just kept asking [Defendant] like, "Why did you do it?" And [Defendant] was just like, "I had to do it."

Edwards testified that, during the drive to Gastonia, "[e]verybody was frantic. [Roberts] was like, 'What happened? What happened? Did you kill him? And [Defendant] said, 'I don't know. I shot him in the face.' . . . [Defendant] said, 'I'm sorry. I'm sorry.' "

This testimony from Roberts, Schenck, and Edwards about Defendant's alleged statements during the drive to Gastonia was mutually reinforcing, not mutually exclusive. Each witness described a similar sequence of events: Roberts pressing Defendant to explain what happened; Defendant's initial silence; and an eventual statement by Defendant suggesting some level of culpability. Defendant has not shown any direct contradictions among the witness accounts. Further, as the State presented testimony from multiple eyewitnesses to the actual robbery attempt, the statements Defendant allegedly made after the fact were not material to the determination of defendant's guilt or innocence.

d. *What allegedly happened at Adams's apartment in Gastonia*

Finally, Defendant contends he was prejudiced by the trial court's error because the accomplice witnesses "gave conflicting testimony about what allegedly happened at the apartment of Angelica Adams in Gastonia." Defendant makes this assertion generally but, in arguing prejudice, does not point to specific examples of "conflicting [witness] testimony" about what transpired at Adams's apartment. We find nothing in the relevant witness testimony on this topic that was either material to a determination of Defendant's guilt or innocence or involved issues of such confusion or contradiction that the jury would likely have needed to review the testimony in order to understand it.

Adams and the four accomplice witnesses testified about what happened while they were at the apartment, and certain details differed among the witnesses. Schenck, Edwards, and Thompson all testified that, at some point while they were at Adams's apartment, Defendant and the four accomplices went outside and talked. Schenck and Edwards testified that while they were outside, they discussed possible alibis. Thompson testified that they didn't "talk[] about too much of [anything]" while outside the apartment. Adams testified that, "[a]s far as [she could] remember," the group remained in her apartment for their entire visit and the only person who left her presence was Defendant, who used a bathroom in the apartment. Roberts testified that the group was only at the apartment for approximately ten minutes before Adams drove Schenck, Edwards, and Thompson home; Edwards testified the group stayed for approximately one hour; and Adams testified the group stayed for several hours.

Roberts was the only one of the four accomplice witnesses who testified Defendant used the bathroom at Adams's apartment. Roberts was also the only witness to testify that Defendant asked Adams for some

cleaning products before going into the bathroom. Adams testified that Defendant used her bathroom, and that when she returned home later she found "dirt, [and] black stuff all over [the bathroom] sink." Adams and all four accomplice witnesses testified consistently that, at some point, Adams drove Schenck, Edwards, and Thompson home, leaving Roberts and Defendant alone together. No witness testified he or she saw Defendant with a gun while the group was together inside or outside Adams's apartment. Thus, there was no "conflicting" witness testimony on any of these issues.

Roberts testified that, after the others left, she and Defendant sat in the Camry talking for approximately twenty minutes. According to Roberts, she again asked Defendant what happened during the attempted robbery, and Defendant replied, "Sorry, I had to." Roberts testified that, while they were still sitting in the car, she saw Defendant wrap a gun in a t-shirt and then go "hide it up under the [apartment] stairs." Although Roberts was the only eyewitness to testify about Defendant hiding a gun at Adams's apartment after the attempted robbery, Defendant was not prejudiced by the jury's lack of opportunity to review that specific testimony.

Roberts's testimony was corroborated by several investigating officers who testified at trial. Det. Woosley testified Roberts told investigating officers they might find the gun at Adams's apartment on 20 March 2012.[3] Det. Woosley testified she relayed that information to other CCSO officers who then acted upon it. CCSO Lieutenant Mark Craig ("Lt. Craig") testified he went to Adams's apartment on 20 March 2012 "[t]o look for a yellow shirt and a gun . . . [after] receiv[ing] a call from [his CCSO] captain[.]" CCSO Officer John Kaiser ("Officer Kaiser") testified he was with Lt. Craig on 20 March 2012 when Lt. Craig received a call indicating they should search Adams's apartment. Officer Kaiser testified they "were looking for a yellow cloth or [t]-shirt. And the information we had was that there would be a gun inside this yellow cloth or [t]-shirt. That's what we were looking for." Upon arriving at Adams's apartment complex, Lt. Craig immediately "noticed something yellow under a staircase. And I was there to retrieve something yellow and . . . thought surely it couldn't be this easy." Taken together, these officers' testimony established that, based on information received from Roberts, CCSO officers found a gun

---

3. The jury also heard an audio recording of portions of Roberts's 20 March 2012 interview with Det. Woosley and CCSO Detective Amy Stroupe. The State offered the recording into evidence as a prior consistent statement, and the trial court received it "for the purposes [sic] of corroboration and only for that purpose."

at Adams's apartment wrapped in a yellow t-shirt and placed beneath a staircase, consistent with Roberts's eyewitness testimony.

Additionally, Roberts's testimony about Defendant hiding a gun at Adams's apartment was not the only evidence linking Defendant to the *crime of attempted robbery*. *Cf. Hatfield*, 225 N.C. App. at 772, 738 S.E.2d at 241 ("Our Supreme Court has previously held that a jury is likely to want to review testimony that is the only evidence directly linking [a] defendant to the alleged crimes." (citation and internal quotation marks omitted)). Instead, Roberts's testimony was the only evidence linking Defendant to the subsequent possession of a gun possibly used in the robbery attempt. Both Schenck and Roberts testified they saw Defendant committing the attempted robbery. *Cf. Thompkins*, 83 N.C. App. at 46, 348 S.E.2d at 607 (finding trial court's failure to exercise its discretion was prejudicial where "[t]he jury requested a review of the testimony of . . . the only witness to identify defendant as the perpetrator. Whether the jury fully understood [that witness's] testimony was material to the determination of defendant's guilt or innocence.") Accordingly, we cannot conclude Roberts's testimony about Defendant hiding a gun at the apartment complex was "determinative of [Defendant's] guilt or innocence." *See Long*, 196 N.C. App. at 40, 674 S.E.2d at 707.

Defendant has failed to identify any particular testimony by the accomplice witnesses which, if reviewed by the jury, suggests "a reasonable possibility . . . [of] a different result . . . at [Defendant's] trial[.]" *See* N.C.G.S. § 15A-1443(a). Accordingly, we find Defendant received a trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges STROUD and INMAN concur.

STATE OF NORTH CAROLINA
v.
JOHN EDDIE MANGUM, Defendant

No. COA16-344

Filed 6 December 2016

**Search and Seizure—intoxicated driver—totality of circumstances**

Where the Grifton Police Department received an anonymous tip regarding an intoxicated driver; a police lieutenant subsequently observed a car matching the description from the tip; and the lieutenant followed the car and observed it driving well below the speed limit, stopping for an unusual period of time before making a right turn, and stopping for fifteen or twenty seconds before crossing railroad tracks, the trial court properly denied defendant's motion to suppress evidence obtained as a result of the stop of his vehicle. The trial court's findings of fact were supported by competent evidence, its conclusions of law were supported by the findings of fact, and, based on the totality of the circumstances, the police lieutenant had reasonable, articulable suspicion to stop defendant.

Appeal by defendant from order entered 8 October 2015 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 7 September 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Robert T. Broughton, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.*

ZACHARY, Judge.

Where the trial court's findings of fact were supported by competent evidence, and its conclusions of law were supported by the findings of fact, the trial court properly denied defendant's motion to suppress the stop of his vehicle.

## I. Factual and Procedural Background

On 1 March 2013 at approximately 6:55 p.m., Lieutenant James Andrews of the Grifton, North Carolina Police Department received an anonymous phone call about an intoxicated person driving a black,

four-door Hyundai leaving a Dollar General store and traveling north on Highland Boulevard. Shortly thereafter, Lt. Andrews saw a black Hyundai drive north on Highland Boulevard, past the police station. Lt. Andrews observed that the vehicle was traveling roughly 20 miles per hour in a 35 miles-per-hour (m.p.h.) zone. After following the vehicle a short distance, Lt. Andrews watched it stop at the intersection of McCrae and Highland Streets—where there is no stop sign, traffic light, or traffic control device—for "longer than usual." The Hyundai resumed motion, turned right on McCrae Street, still proceeding at 20 miles per hour in a 35 m.p.h. zone, and then stopped at a railroad crossing for 15 to 20 seconds, although there was no train coming and no signal to stop. The first road that intersects McCrae Street after crossing the tracks is Gordon Street, and the next is Brooks Alley. After the Hyundai crossed the tracks, Lt. Andrews activated the blue emergency lights on his police cruiser and signaled the vehicle to pull over; it did not do so for another two to three blocks. This failure to yield, which lasted for approximately two minutes, prompted Lt. Andrews to "bump" his siren a number of times. The vehicle turned left onto Pitt Street, proceeded for approximately one hundred yards, and stopped in the middle of the road. Lt. Andrews arrested the driver, John Eddie Mangum (defendant), for impaired driving. Defendant was found guilty in district court, and appealed to superior court.

Prior to trial in superior court, defendant moved to suppress the evidence obtained as a result of the traffic stop. On 20 August 2015, after a hearing on defendant's suppression motion, the trial court orally granted the motion in open court, and the State gave notice of appeal. On the next day, however, the trial court reversed its ruling and denied defendant's motion to suppress. The trial court entered a written order denying the suppression motion on 18 September 2015.

The trial court's pertinent findings in its order denying the suppression motion were that: (1) Lt. Andrews received a concerned citizen report that a drunk driver operating a black, four-door Hyundai was headed north on Highland Boulevard; (2) while Lt. Andrews followed him, defendant drove well below the speed limit; (3) defendant stopped for an unusual period of time before making a right turn, despite the absence of a stop sign or light; (4) defendant stopped for approximately fifteen or twenty seconds before crossing the railroad tracks, despite the fact that no train was approaching; (5) defendant did not immediately stop when Lt. Andrews activated his blue lights, but instead continued driving for approximately two minutes and traveled another two or three blocks; and (6) defendant stopped in the middle of Pitt Street, a narrow

road with no bank or curb. Based on these findings, the trial court concluded that "based upon the totality of circumstances, there was a reasonable and articulable suspicion to stop . . . [d]efendant's vehicle."

Defendant pleaded guilty and preserved his right to appeal the suppression ruling. The trial court sentenced defendant to six months' imprisonment, suspended the sentence, and placed defendant on supervised probation for 24 months. Defendant appeals.

## II. Standard of Review

Our review of a suppression order is limited to determining "whether competent evidence supports the trial court's findings of fact and whether the findings [in turn] support the [trial court's] conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). Because the trial court 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[,]" *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 620 (1982), "[w]e accord great deference to [the] trial court's findings of fact," and any findings left unchallenged "on appeal are binding and deemed to be supported by competent evidence." *State v. Knudsen*, 229 N.C. App. 271, 275, 747 S.E.2d 641, 645 (2013) (citation omitted). "This deference is afforded the trial judge because he is in the best position to weigh the evidence, given that he has heard all of the testimony and observed the demeanor of the witnesses." *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 631 (2000).

However, "[a] trial court's conclusions of law on a motion to suppress are reviewed *de novo* and are subject to a full review, under which this Court considers the matter anew and freely substitutes its own judgment for that of the trial court. . . . The conclusions of law 'must be legally correct, reflecting a correct application of applicable legal principles to the facts found.' " *Knudsen*, 229 N.C. App. at 281, 747 S.E.2d at 649 (citations omitted).

## III. Motion to Suppress

A. Factual Findings

Defendant first argues that one of the trial court's findings of fact is unsupported by the evidence and therefore erroneous. Specifically, defendant challenges Finding of Fact No. 25, which states in relevant part: "The Hyundai did not stop immediately in response to [Lt. Andrews'

activation of the] blue lights, and instead continued two additional blocks east past Gordon Street and Brooks Alley."

Lt. Andrews made four statements at the suppression hearing as to when he activated his blue emergency lights. On direct examination, Lt. Andrews stated that he activated his lights immediately after he crossed the railroad tracks, adding that "[w]e went two blocks . . . [and] passed Gordon Street and Brooks Alley." On cross-examination, Lt. Andrews confirmed this statement, but shortly thereafter, he consulted his notes and indicated that his lights were activated at Brooks Alley. Toward the end of cross-examination, defense counsel asked, "And you also testified that you had your lights on at – maybe – you said Brook [sic] Alley – when you turned your blue lights on; is that correct?" to which Lt. Andrews replied, "Yes, ma'am." According to defendant, the "only reasonable inference to be drawn from this [statement] is that . . . [Lt.] Andrews was revising his earlier testimony to conform with his notes, which indicated that he activated his blue lights at Brooks Alley."

Our review of the written suppression order, however, reveals that the trial court explicitly addressed this discrepancy in Findings of Fact Nos. 22 and 23:

> 22. . . . Once the Hyundai crossed the railroad tracks, [Lt.] Andrews made the decision to activate emergency equipment and stop the Hyundai.
>
> 23. On cross-examination by counsel for [d]efendant [Lt.] Andrews acknowledged that he wrote in his notes from the DWI stop that he activated his blue lights at Brook [sic] Alley.

As a result, Finding of Fact No. 25 represents the trial court's reconciliation of Lt. Andrews' conflicting statements regarding the point at which he activated his blue lights. This finding is supported by Lt. Andrews' statement on direct examination and his confirmation of that statement on cross-examination. That Lt. Andrews went on to acknowledge that his notes differed from his recollection is of no moment. Our Supreme Court has specifically noted that when "supported by competent evidence, the trial court's findings of fact are conclusive on appeal, even if conflicting evidence was also introduced." *State v. Wilkerson*, 363 N.C. 382, 434, 683 S.E.2d 174, 205 (2009) (citation omitted). "Furthermore, a trial court's resolution of a conflict in the evidence will not be disturbed on appeal[.]" *State v. Steen*, 352 N.C. 227, 237, 536 S.E.2d 1, 7 (2000) (citation omitted). Properly harmonized, Findings of Fact Nos. 22, 23, and 25 suggest that the trial court credited Lt. Andrews' initial statements after

it considered the differing statements he gave during the latter portions of his cross-examination. Acknowledging the trial court's resolution of conflicting testimony, we conclude that Finding of Fact No. 25 is supported by competent evidence and thus is binding on appeal.

Defendant also argues that, based on the trial court's "comments" in Findings of Fact Nos. 30 and 31, defendant's "stop in the middle of Pitt St[reet] was insignificant in its determination that the stop was supported by reasonable suspicion[.]" Findings of Fact Nos. 30 and 31 read as follows:

> 30. When it came to a stop, the Hyundai stopped in the middle of Pitt Street rather than along the uncurbed roadside. There is no ditch or bank along the roadsides on that section of Pitt Street. The Court noted [at the suppression hearing], however, that Pitt Street is a narrow road.
>
> 31. [Lt.] Andrews testified that the Hyundai's position in the middle of the street had the potential to disrupt traffic flow along Pitt Street, but did not actually disrupt flow because no cars were traveling down that road at the time.

Because it is not our prerogative to usurp the province of the trial court, we refuse to declare that Findings of Fact Nos. 30 and 31 include only extraneous information. Qualifications contained in those findings may be considered on appeal. Moreover, the trial court had to consider all the circumstances of the traffic stop, and despite defendant's assertions to the contrary—i.e., that the court included extra, insignificant information in its order—we must assume the court found the facts that were necessary to support its ruling. Accordingly, we reject defendant's contention that his stop in the middle of Pitt Street was wholly "insignificant" to the trial court's denial of the suppression motion.

B. Reasonable Suspicion and Investigatory (*Terry*) Stop

1. *General Principles*

In his principal argument on appeal, defendant contends that the trial court erred in denying his motion to suppress the stop. More specifically, defendant contends that because Lt. Andrews lacked reasonable suspicion to stop defendant, the stop violated the Fourth Amendment and Article I, Section 20 of the North Carolina Constitution. We disagree.

The Fourth Amendment to the United States Constitution protects, *inter alia*, the "right of the people . . . against unreasonable searches and seizures." U.S. Const. amend. IV. When government officials, including

law enforcement agents, engage in the exercise of discretion and search or seize citizens, the Fourth Amendment imposes a standard of "reasonableness," *see Terry v. Ohio*, 392 U.S. 1, 20-21, 20 L. Ed. 2d 889, 905 (1968), upon their actions in order " 'to safeguard the privacy and security of individuals against arbitrary invasions[.]' " *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312, 56 L. Ed. 2d 305, 311 (1978) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528, 18 L. Ed. 2d 930, 935 (1967)). The actions of law enforcement agents must comport with the Fourth Amendment, the requirements of which are "enforceable against the States through the Due Process Clause" of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655, L. Ed. 2d 1081, 1090 (1961).

> The language of Article I, Section 20 " 'differs markedly from the language of the Fourth Amendment to the Constitution of the United States.' " Nevertheless, Article I, Section 20 provides protection "similar" to the protection provided by the Fourth Amendment, . . . and it is well-settled that both Article I, Section 20 and the Fourth Amendment prohibit the government from conducting "unreasonable" searches. Whether a search is unreasonable, and therefore prohibited by Article I, Section 20, and the proper tests to be used in resolving that issue " 'are questions which can only be answered with finality by [the North Carolina Supreme Court].' " The North Carolina Supreme Court has stated that we may not construe provisions of the North Carolina Constitution as according lesser rights than are guaranteed by the federal Constitution. . . . Accordingly, we first determine whether the [stop] violates the Fourth Amendment; if so, the [stop] also violates Article I, Section 20. If we determine that the [stop] does not violate the Fourth Amendment, we may then proceed to determine whether Article I, Section 20 provides " 'basic rights *in addition* to those guaranteed by the [Fourth Amendment].' "

*Jones v. Graham Cty. Bd. of Educ.*, 197 N.C. App. 279, 288-90, 677 S.E.2d 171, 177-78 (2009) (emphasis added; citations omitted).

> North Carolina appellate courts are not bound, as to matters of federal law, by decisions of federal courts other than the United States Supreme Court. Even so, despite the fact that they are not binding on North Carolina's courts, the holdings and underlying rationale of decisions

> rendered by lower federal courts may be considered persuasive authority in interpreting a federal statute.

*In re Fifth Third Bank*, 216 N.C. App. 482, 488-89, 716 S.E.2d 850, 855 (2011) (citations and quotation marks omitted), *cert. denied*, 366 N.C. 231, 731 S.E.2d 687 (2012).

> In analyzing federal constitutional questions, we look to decisions of the United States Supreme Court[,] . . . [and] decisions of the North Carolina Supreme Court construing federal constitutional . . . provisions, and we are bound by those interpretations. We are also bound by prior decisions of this Court construing those provisions, which are not inconsistent with the holdings of the United States Supreme Court and the North Carolina Supreme Court.

*Johnston v. State*, 224 N.C. App. 282, 288, 735 S.E.2d 859, 865 (2012) (citing *State v. Elliott*, 360 N.C. 400, 421, 628 S.E.2d 735, 749 (2006), and *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989)), *aff'd*, 367 N.C. 164, 749 S.E.2d 278 (2013).

In *Terry*, the United States Supreme Court held that police officers may initiate a brief, investigatory stop of an individual when "specific and articulable facts . . . , taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S. at 21, 20 L. Ed. 2d at 906. A *Terry* stop is justified when the detaining officer has reasonable suspicion, that is, "a particularized and objective basis[,] for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18, 66 L. Ed. 2d 621, 629 (1981).

2. *The Point From Which Reasonable Suspicion Must Be Measured*

Before determining whether defendant's motion to suppress was properly denied, we must address a key issue pertaining to the scope of the trial court's "reasonable suspicion" analysis. At the suppression hearing, the State argued that a determination of when the *Terry* stop occurred—i.e., the point at which Lt. Andrews was required to have a reasonable suspicion of criminal activity—was dispositive in this case. To that end, after acknowledging that if defendant had been "stopped at the railroad tracks, [it] probably [would have been] a bad stop[,]" the State cited *California v. Hodari D.*, 499 U.S. 621, 113 L. Ed. 2d 690 (1991), and contended that under the totality of the circumstances both *before and after* Lt. Andrews signaled his intention to pull defendant over, the eventual stop was supported by a reasonable suspicion of criminal activity. The essence of this argument is that the activation of an

officer's emergency lights does not constitute an official stop (and therefore a seizure) in and of itself, but is merely an order to stop, with no concomitant seizure of the person. Therefore, the stop/seizure did not occur when Lt. Andrews activated his blue lights and bumped his siren; instead, it occurred when defendant yielded to this show of authority. According to the State, the window of inquiry into the existence of reasonable suspicion had to include defendant's failure to comply with the order to stop for approximately two minutes and his decision to park in the middle of Pitt Street.

In rendering its oral ruling at the suppression hearing, the trial court excluded these two circumstances from its analysis:

> All right, we have a tip with no indicia of reliability and no corroboration. The conduct stopping at a – slow driving and stopping at a[n] intersection to turn right and stopping at a railroad crossing that falls within the broad range of what could be described as normal driving behavior. I'm going to grant the motion. It's close.

However, the trial court appears to have considered these circumstances in the reversal of its initial, oral ruling, as the written order explicitly notes that the court reviewed *Hodari D.* before reaching its final decision on defendant's suppression motion.

As discussed above, we reject defendant's challenges to the trial court's factual findings regarding his failure to immediately comply with the order to stop and his eventual stop in the middle of Pitt Street. Yet defendant further argues that these circumstances, which emerged after Lt. Andrews activated his blue lights, should not have factored into the trial court's ruling as a matter of law. In other words, defendant maintains that the trial court's inquiry into the existence of reasonable suspicion should have been confined to events that occurred *before* Lt. Andrews ordered defendant to stop. According to this view, the stop occurred—and defendant was seized—when Lt. Andrews activated his blue lights, and events that occurred after that point were improperly considered.

In contrast, the State asserts that the circumstances Lt. Andrews observed after activating his lights and bumping his siren were properly considered, and supported the trial court's ultimate conclusion that the stop passed constitutional muster.

Accordingly, this matter presents the questions of (1) when the stop officially occurred, and (2) at what point during the process of the stop Lt. Andrews was required to have reasonable suspicion.

The Fourth Amendment's protections are applicable only to "searches and seizures" within the meaning of the federal constitution. *Terry*, 392 U.S. at 16, 20 L. Ed. 2d at 903. The United States Supreme Court announced in *Terry* that "[o]nly when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may [it be] conclude[d] that a 'seizure' has occurred." 392 U.S. at 19 n. 16, 20 L. Ed. 2d at 905 n. 16. In *United States v. Mendenhall*, the Court established the principle that a person is seized "*only if*, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980) (opinion of Stewart, J.) (emphasis added). The *Mendenhall* decision instituted an objective test as to when a seizure occurs.

The United States Supreme Court, however, clarified this holding in *Hodari D.* when it concluded that the "only if" language used in *Mendenhall* "states a *necessary*, but not a *sufficient*, condition for seizure—or, more precisely, for seizure effected through a 'show of authority.' " *Hodari D.*, 499 U.S. at 628, 113 L. Ed. 2d at 698. The *Hodari D.* Court rejected the notion that a defendant is seized upon a police officer's mere exhibition of authority, and held that a Fourth Amendment seizure requires either the application of physical force or submission to an officer's show of authority. *Id.* at 626, 113 L. Ed. 2d at 697. Consequently, *Hodari D.* introduced the possibility of a subjective element into Fourth Amendment seizure analysis: an individual's decision either to disregard the show of authority or to yield to it may determine the existence of a seizure.

In *Hodari D.*, two police officers were patrolling a high-crime area in an unmarked vehicle when they observed a group of youths, including the defendant, huddled around a car. *Id.* at 622, 113 L. Ed. 2d at 695. When the officers approached the car, the youths dispersed. *Id.* at 623, 113 L. Ed. 2d at 695. One of the officers exited the patrol car, pursued the defendant through an alley, and eventually overtook him. *Id.* During the pursuit but before the officer tackled and handcuffed him, the defendant "tossed away what appeared to be a small rock[,]" which was later determined to be crack cocaine. *Id.*

The defendant moved to suppress evidence of the cocaine in a California juvenile court, but the motion was denied. *Id.* The California Court of Appeals reversed, holding that the defendant "had been 'seized' when he saw [the officer] running towards him, that this seizure was unreasonable under the Fourth Amendment, and that the evidence of cocaine had to be suppressed as the fruit of that illegal seizure." *Id.*

In reversing the California Court of Appeals' decision, the United States Supreme Court both "accept[ed] as true for purposes of [its] decision[ ] that [the police] pursuit qualified as a show of authority calling upon [the defendant] to halt[,]" *id.* at 625-26, 113 L. Ed. 2d at 697 (internal quotation marks omitted), and "rel[ied] entirely upon the State's concession" that the police "did not have the reasonable suspicion required to justify stopping [the defendant]" at the moment they gave chase. *Id.* at 623-24 n.1, 113 L. Ed. 2d at 695-96 n.1 (internal quotation marks omitted). As a result, the Court held that even if the officers did not have reasonable suspicion to effectuate an investigatory stop when the pursuit began, the cocaine evidence should not have been suppressed because the defendant failed to comply with the officers' original show of authority and thus was not seized when he tossed the drugs aside.

Since *Hodari D.*, courts across this nation have considered whether events that occur between an officer's initial "show of authority" and an individual's actual seizure may be considered when determining if the police had reasonable suspicion to justify a *Terry* stop. Several states have rejected *Hodari D.* on state constitutional grounds and afforded their citizens heightened privacy protections. *See, e.g.*, *State v. Garcia*, 147 N.M. 134, 217 P.3d 1032 (2009); *State v. Randolph*, 74 S.W.3d 330 (Tenn. 2002); *Baker v. Commonwealth*, 5 S.W.3d 142 (Ky. 1999); *State v. Young*, 135 Wash.2d 498, 957 P.2d 681 (1998) (en banc); *Commonwealth v. Stoute*, 422 Mass. 782, 665 N.E.2d 93 (1996); *Commonwealth v. Matos*, 543 Pa. 449, 672 A.2d 769 (1996); *State v. Quino*, 74 Haw. 161, 840 P.2d 358 (1992); *State v. Oquendo*, 223 Conn. 635, 613 A.2d 1300 (1992). In so doing, most of these states have maintained *Mendenhall*'s "free-to-leave" test as the proper measure of a seizure under their state constitutions.

Other state courts have adopted *Hodari D.*'s seizure analysis and considered circumstances that arose after a suspect's failure to comply with an officer's order to stop. *E.g.*, *Williams v. State*, 212 Md. App. 396, 69 A.3d 74 (2013); *In re Kelsey C.R.*, 243 Wis. 2d 422, 626 N.W.2d 777 (2001); *People v. Archuleta*, 980 P.2d 509 (Colo. 1999) (en banc); *State v. Weaver*, 259 Kan. 844, 915 P.2d 746 (1996); *Perez v. State*, 620 So.2d 1256 (Fla. 1993). Under these decisions, the reasonable suspicion inquiry does not begin when police issue an order to stop; rather, it begins when the suspect actually yields to that show of authority.

In the federal context, some circuit courts of appeal have emphasized that a stop should be justified at its inception. *See Feathers v. Aey*, 319 F.3d 843, 848-49 (6th Cir. 2003) ("The question is whether, at the moment that they initiated the stop, the totality of the circumstances

provided the officers with the reasonable suspicion required in order to detain a citizen under *Terry*."); *United States v. Finke*, 85 F.3d 1275, 1279 (7th Cir. 1996) ("Under *Terry* the stop must be justified at its inception. . . ."). However, the weight of authority in the federal appellate courts is that, under *Hodari D.*, a suspect postpones the point of seizure (and the beginning of the official stop) by failing to comply with an officers' initial show of authority. *See, e.g.*, *United States v. Simmons*, 560 F.3d 98, 105-07 (2d Cir. 2009); *United States v. Waterman*, 569 F.3d 144, 145-46 & n. 3 (3d Cir. 2009); *United States v. Muhammad*, 463 F.3d 115, 123 (2d Cir. 2006); *United States v. Randolph*, 131 F. App'x 459, 462 (6th Cir. 2005); *United States v. Swindle*, 407 F.3d 562, 567-69 (2d Cir. 2005); *United States v. Smith*, 396 F.3d 579, 586 n. 5 (4th Cir. 2005); *United States v. Valentine*, 232 F.3d 350, 358-59 (3d Cir. 2000); *United States v. Johnson*, 212 F.3d 1313, 1316-17 (D.C. Cir. 2000); *Watkins v. City of Southfield*, 221 F.3d 883, 889 n. 3 (6th Cir. 2000); *United States v. Santamaria–Hernandez*, 968 F.2d 980, 981-83 (9th Cir. 1992); *see also United States v. Walraven*, 892 F.2d 972, 975-76 (10th Cir. 1989) (pre-*Hodari D.* case holding that reasonable suspicion existed for investigatory stop in part because vehicle failed to stop promptly in response to police lights). The principle underscored by these decisions is that the reasonable suspicion inquiry includes events that occur between the initiation and the completion of a stop.

Recently, the Fourth Circuit reiterated this principle in the context of traffic stops, and held that "it is entirely proper for [a police officer] to justify his ultimate seizure of [a suspect] with reference to facts that occurred after activation of the siren but before [the suspect's] eventual submission to police authority, such as [an] initial failure to stop[.]" *United States v. Holley*, 602 F. App'x 104, 107 (4th Cir. 2015). In *Holley*, a police officer activated his blue lights to pull over the vehicle in which the defendant was a passenger, but the vehicle failed to stop and continued to drive "erratically." *Id.* at 105. The district court granted the defendant's motion to suppress firearms recovered from the eventual stop, and held: "[T]he fact that this car took off and didn't stop is not a part of the [reasonable suspicion] equation." *Id.* at 106. On appeal, the Fourth Circuit reversed and concluded that "[b]y failing to take account of these pre-seizure observations as part of its reasonable suspicion analysis, the district court *improperly truncated its review.*" *Id.* at 107 (emphasis added).

North Carolina decisions comport with the principles and the analysis recognized in *Holley*. Although our Supreme Court has never squarely addressed the point from which reasonable suspicion to conduct a

*Terry* stop must be measured, it has cited *Hodari D.* in passing.[1] *State v. Brooks*, 337 N.C. 132, 142, 446 S.E.2d 579, 586 (1994). By contrast, when confronted with situations where a suspect refused or failed to comply with an officer's show of authority, this Court has consistently applied *Hodari D.*'s standard for determining when a seizure occurs under the Fourth Amendment. *E.g.*, *State v. Eaton*, 210 N.C. App. 142, 146-48, 707 S.E.2d 642, 645-46 (2011); *State v. Leach*, 166 N.C. App. 711, 716-17, 603 S.E.2d 831, 835 (2004); *State v. West*, 119 N.C. App. 562, 566, 459 S.E.2d 55, 57-58 (1995). In addition, our courts have included events that occurred after an officer's order to stop in Fourth Amendment reasonable suspicion and probable cause analyses in both pre- and post-*Hodari D.* cases. *See State v. White*, 311 N.C. 238, 244, 316 S.E.2d 42, 46 (1984) (reasonable suspicion for *Terry* stop existed where officer observed defendant's drunken appearance and where defendant failed to pull over in response to blue lights and only stopped in response to siren); *State v. Atwater*, __ N.C. App. __, 723 S.E.2d 582, 2012 WL 133416, at *2 (2012) (unpublished) (citing *Hodari D.* and holding that: "[D]efendant did not stop upon Officer Modlin's activation of his patrol car's blue lights. Defendant fled from Officer Modlin at a high rate of speed, drove erratically, and ran two stop signs. Regardless of whether Officer Modlin had a reasonable suspicion that defendant was involved in criminal activity prior to turning on his blue lights, defendant's subsequent actions gave Officer Modlin reasonable suspicion to stop defendant for traffic violations."); *State v. Milien*, 144 N.C. App. 335, 342, 548 S.E.2d 768, 773 (2001) (considering defendant's failure to immediately stop in response to officers' activation of blue lights in probable cause analysis); *State v. Jordan*, 120 N.C. App. 364, 367-68, 462 S.E.2d 234, 237 (1995) (finding reasonable

---

1. We note that this Court and our Supreme Court have consistently applied *Mendenhall*'s objective test to determine whether a defendant was seized under the federal constitution in the absence of physical force. *See, e.g.*, *State v. Campbell*, 359 N.C. 644, 662-63, 617 S.E.2d 1, 13 (2005); *State v. Gaines*, 345 N.C. 647, 663, 483 S.E.2d 396, 406 (1997); *State v. Isenhour*, 194 N.C. App. 539, 543, 670 S.E.2d 264, 267-68 (2008). However, as explained below, this Court has applied *Hodari D.* and held that a suspect who fails to submit to law enforcement authority is not seized within the meaning of the Fourth Amendment. Furthermore, the *Mendenhall* Court required more than a determination that a reasonable person would not have felt free to the leave when it stated: "We adhere to the view that a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards." 446 U.S. at 553, 64 L. Ed. 2d at 508. Finally, our Supreme Court has never rejected *Hodari D.* in favor of heightened seizure protections under our State Constitution. We are not aware of any North Carolina decisions holding, for example, that a suspect who disregards a police officer's show of authority is seized because a reasonable person would have submitted to the officer's command.

suspicion for stop existed, in part, based on defendant's failure to immediately pull over in response to officer's blue lights). Most importantly, in *West*, this Court held that an officer's questioning and attempted frisk of the defendant did not violate the Fourth Amendment and "decline[d] [the defendant's request] to reject the United States Supreme Court's *Hodari D.* standard" and afford greater protection against unreasonable searches and seizures under the North Carolina State Constitution. 119 N.C. App. at 565-66, 459 S.E.2d at 57-58. Therefore, until our Supreme Court rules otherwise, West precludes any determination that Article I, Section 20 of our State Constitution provides a heightened, more protective, standard than the one compelled by *Hodari D.*

Against this backdrop, we conclude that defendant was not seized within the meaning of the Fourth Amendment until he stopped his vehicle on Pitt Street. When Lt. Andrews activated his blue lights, he asserted his authority and ordered defendant to pull over. Yet because defendant chose to continue driving, there was no submission to the officer's authority and therefore no seizure at that time. Rather, the *Terry* stop occurred approximately two minutes later, when defendant did in fact pull over. Accordingly, the trial court's reasonable suspicion inquiry properly took account of circumstances that arose after Lt. Andrews' activation of his blue lights but before defendant's actual submission to police authority.

3. <u>Reasonable Suspicion Analysis</u>

We now consider whether Lt. Andrews had reasonable suspicion to stop defendant's vehicle. The reasonable, articulable suspicion standard articulated in *Terry* and its progeny has been applied to brief investigatory traffic stops. *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008). As this Court has recognized,

> "a traffic stop based on an officer's *mere* suspicion that a traffic violation is being committed, but which can only be verified by stopping the vehicle, such as drunk driving or driving with a revoked license, is . . . justified if the totality of circumstances affords an officer reasonable grounds to believe that criminal activity may be afoot."

*State v. Wilson*, 155 N.C. App. 89, 94-95, 574 S.E.2d 93, 98 (2002) (quoting *State v. Young*, 148 N.C. App. 462, 471, 559 S.E.2d 814, 821 (2002) (Greene, J., concurring) (citations omitted)), *appeal dismissed and disc. review denied*, 356 N.C. 693, 579 S.E.2d 98 (2003), *overruled on other grounds by Styles*, 362 N.C. at 414-15, 665 S.E.2d at 440. Although it is "not possible" to precisely articulate what constitutes "reasonable

suspicion," *Ornelas v. United States*, 517 U.S. 690, 695, 134 L. Ed. 2d 911, 918 (1996), the following principles should be considered in any judicial evaluation of an investigatory traffic stop pursuant to *Terry*.

To begin, while the constitutional basis for a warrantless investigatory stop must rest on something "more than an 'inchoate and unparticularized suspicion or hunch' of criminal activity," *Illinois v. Wardlow*, 528 U.S. 119, 124, 145 L. Ed. 2d 570, 576 (2000) (quoting *Terry*, 392 U.S. at 27, 20 L. Ed. 2d. at 909 (internal quotation marks omitted)), only a "minimum level of objective justification" is required. *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989) (citation omitted). *Terry*'s reasonable suspicion standard simply requires that "[t]he 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. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citing *Terry*, 392 U.S. at 21-22, 20 L. Ed. 2d at 906). As a result, reasonable suspicion may be demonstrated through an evidentiary showing that is "considerably less than [a] preponderance of the evidence." *Wardlow*, 528 U.S. at 123, 120, 145 L. Ed. 2d at 576.

In addition, an analysis of reasonable suspicion requires a complete review of the facts and circumstances supporting an investigatory stop. *State v. Johnson*, __ N.C. App. __, __, 783 S.E.2d 753, 762 (2016). "Thus, context matters: actions that may appear innocuous at a certain time or in a certain place may very well serve as a harbinger of criminal activity under different circumstances." *United States v. Branch*, 537 F.3d 328, 336 (4th Cir. 2008). When assessing the legality of a *Terry* stop, the "totality of the circumstances" must be evaluated to ensure that the "whole picture . . . [is] taken into account." *Cortez*, 449 U.S. at 417, 66 L. Ed. 2d at 629. "It is the entire mosaic that counts, not single tiles." *United States v. Whitehead*, 849 F.2d 849, 858 (4th Cir. 1988), *abrogated on other grounds by Gozlon-Peretz v. United States*, 498 U.S. 395, 112 L. Ed. 2d 919 (1991). Courts are therefore not permitted to consider each fact in isolation. *United States v. Arvizu*, 534 U.S. 266, 274, 151 L. Ed. 2d 740, 750 (2002) (rejecting the approach taken by the Ninth Circuit in attempting to delimit the extent to which certain factors may be considered as a type of "divide-and-conquer analysis"). Instead, courts must look at "the cumulative information available" to an officer who conducts a *Terry* stop, *id.* at 273, 151 L. Ed. 2d at 750, and refuse to find the stop unjustified based on a mere "piecemeal refutation of each individual" fact and inference. *Whitehead*, 849 F.2d at 858. This means "that multiple factors 'quite consistent with innocent travel' can, when viewed together, 'amount to reasonable suspicion.' " *State v. Barnard*, 362 N.C 244, 250,

658 S.E.2d 643, 647 (2008) (Brady, J., dissenting) (quoting *Sokolow*, 490 U.S. at 9, 104 L. Ed. 2d at 11). Accordingly, "the key determination is not the innocence of an individual's conduct, 'but the *degree of suspicion* that attaches to particular types of noncriminal acts.' " *Id.* (quoting *Sokolow*, 490 U.S. at 10, 104 L. Ed. 2d at 12).

Finally, the legal evaluation of a police officer's reasonable suspicion determination must be grounded in a pragmatic approach. Reasonable suspicion is a "nontechnical conception[] that deal[s] with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Ornelas*, 517 U.S. at 695, 134 L. Ed. 2d at 918 (citations omitted). Our nation's highest court has acknowledged that the "concept of reasonable suspicion is somewhat abstract" and has "deliberately avoided reducing it to a neat set of legal rules[.]" *Arvizu*, 534 U.S. at 274, 151 L. Ed. 2d at 750 (citations and internal quotations marks omitted). As such, "common sense and ordinary human experience must govern over rigid criteria." *United States v. Sharpe*, 470 U.S. 675, 685, 84 L. Ed. 2d 605, 615 (1985). To that end, courts should "credit[ ] the practical experience of officers who observe on a daily basis what transpires on the street[,]" *United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993), so as to avoid "indulg[ing] in unrealistic second-guessing" of law enforcement judgment calls. *Sharpe*, 470 U.S. at 686, 84 L. Ed. 2d at 616; *Cortez*, 449 U.S. at 418, 66 L. Ed. 2d at 629 ("The process [by which reasonable suspicion is determined] does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers.")

Defendant maintains that the anonymous tip was insufficient to create reasonable suspicion to stop him. He further argues that Lt. Andrews' observations prior to and after activating his lights were similarly insufficient.

As to the concerned citizen report, we agree that an anonymous tip, absent "sufficient indicia of reliability[,]" is not on its own sufficient to create reasonable suspicion for a stop. *Hughes*, 353 N.C. at 207, 539 S.E.2d at 630 (citing *Florida v. J.L.*, 529 U.S. 266, 270, 146 L. Ed. 2d 254, 260 (2000)). Nevertheless, "a tip that is somewhat lacking in reliability may still provide a basis for reasonable suspicion if it is buttressed by sufficient police corroboration." *Id.*

Here, it is insufficient that the tip accurately described defendant's vehicle and the direction in which it was heading. *Hughes*, 353 N.C. at

209, 539 S.E.2d at 632 (recognizing that "reasonable suspicion does not arise merely from the fact that the individual met the description given to the officers"); *see also J.L.*, 529 U.S. at 272, 146 L. Ed. 2d at 261 (noting that an accurate tip may help police identify a person, but "does not show that the tipster has knowledge of concealed criminal activity"). A Fourth Amendment violation would likely have occurred if Lt. Andrews had stopped defendant's vehicle based solely on the tip.

However, the tip was not the sole basis for the stop. The subsequent observations of Lt. Andrews "buttressed" the tip through "sufficient police corroboration[,]" *Hughes*, 353 N.C. at 207, 539 S.E.2d at 630, and those observations ultimately formed the basis for Lt. Andrews' suspicion of criminal activity. Lt. Andrews testified that defendant consistently drove roughly 15 miles below the 35 m.p.h. speed limit. This Court has recognized that driving substantially lower than the speed limit is a factor that may contribute to a police officer's reasonable suspicion in stopping a vehicle. *See State v. Bonds*, 139 N.C. App. 627, 629, 533 S.E.2d 855, 857 (2000); *see also State v. Aubin*, 100 N.C. App. 628, 632, 397 S.E.2d 653, 655 (1990) (noting that, based on prior precedent, "observations of a car going 20 miles an hour below the posted speed and weaving within its lane are sufficient to raise a reasonable suspicion that the driver is operating the vehicle while impaired") (citation omitted). In *Bonds*, we noted that the National Highway Traffic Safety Administration had stated that "driving ten miles per hour or more under the speed limit, plus staring straight ahead with fixed eyes, indicates a fifty percent chance of being legally intoxicated." 139 N.C. App. at 629, 533 S.E.2d at 857. Furthermore, our Supreme Court has held that one dominant factor can create reasonable suspicion. *Barnard*, 362 N.C. at 248, 658 S.E.2d at 645. The *Barnard* Court concluded that the defendant's thirty-second delay at a green traffic light gave rise to a reasonable, articulable suspicion that he may have been driving while impaired. *Id.*

Here, Lt. Andrews located defendant's vehicle after receiving the concerned citizen report, and observed it traveling 20 miles per hour in a 35 m.p.h. zone. The vehicle stopped at the intersection of McCrae and Highland Streets—where there was no stop sign or signal to stop—for "longer than usual," turned right on McCrae Street, and continued traveling well below the speed limit. The vehicle stopped again at a railroad crossing. Although there was no train coming and no signal to stop, the vehicle remained motionless at the crossing for 15-20 seconds. After the Hyundai crossed the train tracks, Lt. Andrews activated his blue emergency lights and signaled the vehicle to pull over. However, defendant continued driving north on McCrae Street. Lt. Andrews bumped his

siren, but still, the vehicle did not respond. Critically, defendant failed to yield for approximately two minutes, adding to the suspicion of criminal activity. Defendant eventually turned left onto Pitt Street, traveled one hundred yards, and stopped in the middle of the road. Although Pitt Street is a narrow road with no bank or curb, Lt. Andrews observed that defendant passed several safe places to pull over after the blue lights were activated.

There are plenty of innocent explanations for each of these circumstances, but individual facts "susceptible of innocent explanation" may combine "to form a particularized and objective basis" for reasonable suspicion. *Arvizu*, 534 U.S. at 277, 151 L. Ed. 2d at 752. That is what happened here. From these facts, we conclude that Lt. Andrews was not acting on a mere hunch by the time defendant finally stopped his vehicle. Instead, Lt. Andrews made a judgment call based on his observation of several facts that, when taken together, reasonably indicated the possibility of criminal activity, namely that defendant was driving while impaired. Although defendant claims that all of his actions were consistent with normal driving behavior, "[i]t must be rare indeed that an officer observes behavior consistent [o]nly with guilt and incapable of innocent interpretation." *United States v. Price*, 599 F.2d 494, 502 (2d Cir. 1979) (citations omitted). We are also particularly mindful that "*post hoc* judicial review of police action should not serve as a platform for 'unrealistic second-guessing' of law enforcement judgment calls." *Branch*, 537 F.3d at 337 (citation omitted). Accordingly, we hold that the trial court's findings, which are supported by competent evidence, support its conclusions of law. In sum, because the stop of defendant's vehicle was supported by Lt. Andrews' reasonable suspicion of criminal activity, it did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures.

## IV. Conclusion

For the foregoing reasons, we conclude that the trial court properly considered events that occurred after Lt. Andrews activated his blue lights but before defendant complied with the order to stop. Based on the totality of the circumstances, Lt. Andrews possessed a reasonable, articulable suspicion that defendant might be engaged in criminal activity. Accordingly, we affirm the trial court's denial of defendant's motion to suppress.

AFFIRMED.

Judges ELMORE and ENOCHS concur.

STATE OF NORTH CAROLINA
v.
ELIAZAR JUAN MENDOZA

No. COA16-224

Filed 6 December 2016

**1. Evidence—expert witness—letters—bias or prejudice—child advocacy—sexual child abuse**

The trial court did not abuse its discretion in a child sexual abuse case by failing to admit into evidence three letters the expert witness wrote that were published in the Winston-Salem Journal in 2003. Defendant failed to demonstrate a reasonable possibility of a different result at trial had the letters been admitted since defendant was still permitted to cross-examine the expert about her possible bias or prejudice in child advocacy matters.

**2. Evidence—expert testimony—sexual child abuse—report and treatment records—late discovery—additional time to review**

The trial court did not abuse its discretion in a child sexual abuse case by admitting certain expert testimony over defendant's objections. Defendant conceded, both the report and treatment records were made available to defendant in February 2015, and the trial court granted defendant approximately two additional months to review the evidence and prepare to cross-examine the witnesses at trial.

**3. Appeal and Error—preservation of issues—failure to argue at trial—post-traumatic stress disorder**

Although defendant argued that the trial court committed prejudicial error in a child sexual abuse case by allowing an expert witness to testify that she diagnosed the minor child with post-traumatic stress disorder and thus impermissibly vouched for the child, defendant failed to preserve this argument by failing to raise this issue at trial.

**4. Evidence—expert witnesses—treatment records—sexual child abuse—minor child's sexual activity**

The trial court did not abuse its discretion in a child sexual abuse case by not allowing defendant to cross-examine two expert witnesses about information in their treatment records regarding the minor child's sexual activity with partners other than defendant

father even though it did not fall within one of the categories in the Rape Shield Statute.

Appeal by Defendant from judgments dated 20 April 2015 by Judge Edwin G. Wilson, Jr., in Superior Court, Forsyth County. Heard in the Court of Appeals 3 October 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Sherri Horner Lawrence, for the State.*

*Beechler Tomberlin, PLLC, by Christopher A. Beechler; and Bennett & Guthrie, PLLC, by Jasmine M. Pitt, for Defendant.*

McGEE, Chief Judge.

Eliazar Juan Mendoza ("Defendant") appeals his convictions for felony sexual child abuse, first-degree rape, first-degree sexual offense, and indecent liberties with a child. Defendant contends the trial court erred by (1) precluding Defendant from fully cross-examining certain expert witnesses, and (2) admitting certain expert testimony over Defendant's objections. We find no error.

## I. Background

Defendant and Mirna Solace ("Ms. Solace") were married for about fifteen years and four children were born of the marriage. Their eldest daughter, G.J., who was born on 8 March 1996, had a close relationship with Defendant, her father, and enjoyed spending time with him. When G.J. was nine years old, Ms. Solace told G.J. that she and Defendant "were going to take a break and that [the children might] not be able to see [Defendant] because they were going to split." The family was living in a townhouse in the Sugar Creek apartment complex in Winston-Salem, where G.J. shared a room with her younger sister, Y.J. They shared a bunk bed, with G.J.'s bed on the bottom and Y.J.'s bed on the top.

G.J. testified that on the night Ms. Solace told her that she and Defendant had decided to separate, Defendant came into her bedroom around midnight. G.J. thought Defendant was coming to say goodnight, but Defendant got in bed next to her and unzipped her footie pajamas. Defendant took G.J.'s foot out of the pajamas and slipped his shorts off. Defendant said "hush, . . . it [is] going to hurt." Defendant got on top of G.J. and penetrated her vagina with his penis. Defendant held her wrists above her head and began moving back and forth. G.J. whimpered but stopped when Defendant again told her to hush. Y.J. was asleep in

the top bunk bed and did not wake up. Defendant stopped moving back and forth and G.J. felt something wet against her thigh. G.J. testified that Defendant "walked out [of the bedroom] as if nothing had happened." The next day, G.J. felt sore in her vaginal area and stayed in bed all day. She did not tell anyone what happened with Defendant the night before.

A few nights later, Defendant again came into G.J.'s bedroom around midnight and got in her bed. He unzipped her pajamas, "spread [her] legs open . . . [and] penetrated [her] vaginally." Y.J. was asleep in the top bunk bed. Defendant "started moving back and forth and held . . . [G.J.'s] arms up . . . above [her] head[.]" G.J. cried softly but did not scream out or yell. Defendant told G.J. not to tell anyone.

On a third occasion shortly thereafter, Defendant came into G.J.'s bedroom while she and Y.J. were asleep on the floor in opposite corners of the room. Defendant had a children's book in his hand and told G.J. he was going to read to her. After reading one page from the book, Defendant got underneath G.J.'s blanket, removed her shorts and underwear, spread her legs open, and penetrated her vaginally with his penis. Defendant was not wearing a condom and ejaculated on G.J.'s stomach. Y.J. did not wake up at any point. G.J. testified that, over the next two years, when Defendant was not traveling for work, he raped her approximately two times per week.

When G.J. was eleven years old, Ms. Solace accused Defendant of cheating on her and told him she "didn't want him in the house anymore[.]" Ms. Solace refused to let Defendant sleep in their bedroom that night, so Defendant made the children sleep downstairs with him on the living room floor. G.J. slept next to Defendant. After all the children were asleep, Defendant woke G.J. up by shaking her, pulled down her pants and underwear, and opened her legs. G.J. tried to push Defendant away, but Defendant told her not to move and she stopped resisting because she believed Defendant would hurt her. Defendant penetrated her vaginally with his penis and then ejaculated onto her thigh.

When G.J. was thirteen, Defendant moved to Kannapolis. G.J. testified Defendant raped her once when she and her siblings visited him in Kannapolis. G.J. stopped visiting Defendant when she was fourteen years old.

G.J. testified that, when she was in middle school, she began struggling academically and having problems at home. She also began secluding herself and arguing with her siblings. G.J. felt angry "[f]or allowing [herself] to carry such a burden, and for letting [the sexual abuse]

continue for so long." She began cutting herself and taking OxyContin pills. She experienced recurrent nightmares and multiple anxiety attacks.

When G.J. was sixteen years old, she attended a church service at which Victoria Burgos, the daughter of Pastor Mario Burgos ("Pastor Burgos"), shared an experience of past sexual abuse. One year later, in late July or early August 2013, G.J. told her mother Defendant had sexually abused her when she was nine years old. Ms. Solace called Pastor Burgos and told him about G.J.'s allegations against Defendant. Pastor Burgos and his family came over to Ms. Solace's apartment and Ms. Solace appeared to be "in shock." Pastor Burgos told her the abuse would have to be reported to the police, and he called the police about a week later.

Officer M.L. Mitchell ("Officer Mitchell") of the Winston-Salem Police Department ("WSPD") testified he received a call on 9 August 2013 "in reference to an [alleged] indecent liberties with a minor." Officer Mitchell responded to 4039 Bethania Station Road, where he spoke with Pastor Burgos and Ms. Solace. With Pastor Burgos translating from Spanish to English, Ms. Solace told Officer Mitchell that G.J. said she had been sexually abused by Defendant. G.J. was in a different room during this initial conversation. Officer Mitchell then interviewed G.J. privately. G.J. told Officer Mitchell she had been sexually assaulted by Defendant "approximately [ten] times total, [ten] different times between [nine] and [ten] years old to [fifteen] years old." G.J. said the assaults occurred at the Sugar Creek apartment complex and Defendant's house in Kannapolis. Officer Mitchell testified:

> [G.J.] said that her father would . . . come into her bedroom after she had already gone to bed. He would get on top of her, [and] undress her until she was fully naked. . . . [S]he said that [Defendant] would then insert his penis into her vagina, and would hold her down by her shoulders with . . . his hands. And [she] stated that he would stay in that position until he ejaculated. And then she stated that . . . he would touch her all over her body in various places. And then once he was done, he would get up and walk out of the room without saying anything to her.

G.J. said she had attempted to resist Defendant only once, when she was about twelve years old, but Defendant "just push[ed] down on her harder." Officer Mitchell referred the case to the WSPD Criminal Investigations Division.

WSPD Detective Robert Williams ("Det. Williams"), who had special training in interviewing children and investigating alleged child sexual abuse, interviewed G.J. alone on 14 August 2013. Det. Williams asked G.J. what prompted her to finally come forward with the sexual abuse allegations, and she said "she couldn't hold it in anymore, she just needed to tell someone, and the first person she told was her mother." Det. Williams testified G.J. gave him an account that was largely consistent with her testimony at trial. Det. Williams also interviewed Pastor Burgos and Ms. Solace. Det. Williams told Ms. Solace that G.J. should have a comprehensive medical examination.

Dr. Meggan Goodpasture ("Dr. Goodpasture"), a physician at Wake Forest Baptist Medical Center ("WFBMC") and Brenner's Children Hospital ("BCH"),[1] examined G.J. on 17 September 2013. Prior to the medical examination, G.J. spoke with Cynthia Stewart ("Ms. Stewart"), a social worker at WFBMC and BCH. Ms. Stewart's role was to "gather[] [information about G.J.'s] social history . . . [and] complet[e] a diagnostic interview" to help "inform [Dr. Goodpasture's] medical examination." Dr. Goodpasture testified that, during her medical examination, she noticed "very faint superficial scars on [G.J.'s] left forearm, which were well healed." Dr. Goodpasture also performed vaginal and anal exams on G.J. She testified that G.J.'s "anatomy appeared completely normal." Dr. Goodpasture found G.J. had "no vaginal bleeding, discharge or lesions[,] . . . [and] no abnormal [anal] dilat[ion] or fissures or scars." She testified that "there was at least a number of months since [G.J.'s] last contact with [Defendant]" and that "most of the time, after children disclose a history of sexual abuse, their [physical] exams are completely normal." Dr. Goodpasture also "conducted testing [on G.J.] for sexually transmitted infections, which [came back] 'negative.' " She recommended G.J. receive therapy.

Ms. Stewart testified as an expert in interviewing children in cases of suspected abuse or neglect. Ms. Stewart met with G.J. before G.J.'s medical examination "to make sure that [Dr. Goodpasture] knew exactly how to physically examine her[.]" Ms. Stewart's description of her interview with G.J. was largely consistent with G.J.'s testimony at trial, including Ms. Stewart's testimony that, during the interview,

---

1. Dr. Goodpasture testified that her role at Brenner Children's Hospital was to "provide both inpatient and outpatient consultations upon requests [sic] for children, whether [it involves] some concern for . . . child physical abuse, child sexual abuse, [or] child neglect[.]"

> [G.J.] voiced several things that were consistent with her being in distress, and that she mentioned how she felt responsible. She talked about the negative consequences that she perceived that could be there. She talked about feeling so bad that she wanted to hurt herself. She talked about being very angry all the time and upset about things, [being] on edge.

In Ms. Stewart's opinion, the characteristics she observed in G.J. were consistent with past sexual abuse.

Blair Cobb ("Ms. Cobb"), a licensed clinical social worker and pediatric therapist at Family Preservation Services, testified as an expert in child counseling. Ms. Cobb first met with G.J. in early November 2013. Ms. Cobb testified that, at that meeting, G.J. exhibited the following:

> Primarily symptoms of anxiety, nightmares, difficulty concentrating, difficulty sleeping. [G.J.] also discussed re-experiencing symptoms of memories and of a traumatic event. She had symptoms of hypervigilance, [such as being] easily startled, always looking out for danger or things to occur and avoidance; not wanting to be around things that reminded her of what had occurred. She also expressed irritability and anger. . . . She reported to me that she was sexually abused by her father.

Ms. Cobb told G.J. they "could move forward with trauma-focused cognitive behavioral therapy, and . . . explained to her what that treatment outlined, and scheduled her next session."

Ms. Cobb testified that any time a client "[came] in . . . having [experienced] a traumatic event," she would discuss different symptoms associated with post-traumatic stress disorder ("PTSD"), consider whether the client "[met] the three different clusters of symptoms – meaning avoidance, . . . re-experiencing and hypervigilance, [and if so,] . . . move forward with the diagnosis." Ms. Cobb testified she used a "psychological [assessment] tool to help assist with asking a patient questions directly associated with [PTSD]. And . . . it's broken down into age ranges. So for [G.J.'s] age group, it directly asks questions related to those three clusters [of symptoms]." Ms. Cobb testified that, after conducting these assessments on G.J., she "diagnosed [G.J. with] PTSD." When asked by the State, Ms. Cobb agreed that, while PTSD requires a traumatic event, "that traumatic event could be anything traumatizing[.]"

Ms. Cobb and G.J. met for approximately eight counseling sessions. Each session focused on traumatic events in G.J.'s past. Ms. Cobb "only ask[ed] open-ended questions; no details in regards to [specific incidents] – it's all based on [the client's] memory and what they would like to discuss at that time." G.J. told Ms. Cobb she began drinking alcohol and engaging in recreational prescription drug use around the ninth grade, and that she had self-harmed by cutting herself. Ms. Cobb testified that "substance abuse is definitely associated with a child who has experienced a traumatic event[,]" and that "[c]utting is usually exhibited in children who do experience symptoms of depression, anxiety or trauma-related symptoms."

Defendant also presented witness testimony. Joyce Vargas ("Ms. Vargas"), Defendant's niece, testified she visited Defendant, Ms. Solace, and their children in Winston-Salem every summer from 2005 to 2009. Ms. Vargas said the bunk beds that G.J. and Y.J. slept in were noisy and hit the wall if anyone moved in them. Ms. Vargas testified that, during her visits, G.J. seemed happy. Ms. Vargas also never observed anything strange about Defendant's behavior.

Lizbeth Izquierdo ("Ms. Izquierdo"), who was Defendant's live-in girlfriend when he lived in Kannapolis, testified about Defendant's interactions with G.J. during the children's visits to their house in 2009 and 2010. Ms. Izquierdo testified G.J. appeared "happy" during those visits and Ms. Izquierdo never witnessed anything that would lead her to believe Defendant had raped G.J. Ms. Izquierdo did not recall Defendant spending time with G.J. outside Ms. Izquierdo's presence. Although Defendant would sometimes leave their bedroom at night to "make sure that [the children] were going to sleep[,]" Ms. Izquierdo never noticed him leaving for longer than a few minutes.

Defendant testified in his own defense. He denied ever having raped, inappropriately touched, or vaginally penetrated G.J.

Warrants for Defendant's arrest were issued on 30 May 2014 and 2 June 2014. A grand jury indicted Defendant on 27 October 2014 for multiple counts each of first-degree rape of a child, first-degree sexual offense, felonious child abuse by the commission of a sexual act, and taking indecent liberties with a child.

The State served notice of expert witnesses on 24 November 2014, indicating it would call Dr. Goodpasture, Ms. Stewart, and Ms. Cobb to testify. The State attached reports prepared by Dr. Goodpasture and Ms. Stewart regarding their evaluations of G.J. Defendant filed a "Motion for

Reports and Other Materials of State's Expert Witnesses" on 29 January 2015, seeking a court order

> requiring the State to produce to [Defendant] all expert reports, material and opinion basis discoverable pursuant to [N.C. Gen. Stat. §] 15A-903 and to specifically direct each such expert who is anticipated to testify to prepare a meaningful and detailed report concerning each expert's examination and opinion and the basis thereof.

The State produced additional discovery on 18 February 2015. Defendant filed a motion *in limine* to exclude Ms. Stewart and Ms. Cobb from testifying as expert witnesses "as a sanction for the [State's] violation of discovery rules[.]" At a hearing on the motion on 18 February 2015, Defendant sought "either to exclude the expert opinions of the two witnesses, [Ms. Cobb] and/or [Ms. Stewart], . . . or . . . a continuance . . . [to] prepare[] to defend those [opinions] . . . ." The trial court granted a continuance and the case was continued until 13 April 2015.

The jury found Defendant guilty on all counts on 20 April 2015.[2] The trial court sentenced Defendant as a Prior Record Level II to five consecutive sentences of 288 to 355 months' imprisonment. Defendant gave oral notice of appeal in open court.

## II. Ms. Stewart's Letters to the Editor

### A. *Standard of Review*

**[1]** Defendant first argues the trial court erred by not admitting into evidence three letters to the editor Ms. Stewart wrote and that were published in the *Winston-Salem Journal* in 2003. According to Defendant, "the letters represented [Ms.] Stewart's possible bias or prejudice in child advocacy matters[,]" and he should have been permitted to cross-examine Ms. Stewart about the content of the letters.

"In reviewing trial court decisions relating to the admissibility of expert testimony evidence, [our Supreme] Court has long applied the deferential standard of abuse of discretion. Trial courts enjoy wide latitude and discretion when making a determination about the admissibility of [expert] testimony." *State v. King*, 366 N.C. 68, 75, 733 S.E.2d 535, 539-40 (2012) (citation and internal quotation marks omitted). The trial court's

2. In total, Defendant was convicted of five counts of first-degree rape, two counts of first-degree sexual offense, two counts of felonious child abuse by the commission of a sexual act, and four counts of taking indecent liberties with a child.

decision will not be disturbed on appeal unless "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Ward*, 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010) (citation and internal quotation marks omitted).

Even when an abuse of discretion occurs, a defendant is not entitled to a new trial unless the error was prejudicial. *See State v. Cook*, 193 N.C. App. 179, 185, 666 S.E.2d 795, 799 (2008) (citation omitted). Prejudicial error exists "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2015). Defendant bears the burden of showing prejudice. *Id.*

B. *Analysis*

We note initially that Ms. Stewart's letters to the editor do not appear in the record on appeal. *See Fickley v. Greystone Enterprises, Inc.*, 140 N.C. App. 258, 259, 536 S.E.2d 331, 332 (2000) (observing that "[e]ffective appellate review . . . [is] made more difficult by the filing of an incomplete record on appeal."). The State failed to serve timely notice of approval or objections to Defendant's proposed record as required by North Carolina Rule of Appellate Procedure Rule 11(b). As a result, Defendant's proposed record became the settled record on appeal. *See* N.C.R. App. P. 11(b) (2016). It is unclear why Defendant did not include Ms. Stewart's letters in his proposed record.[3]

This Court's review is typically limited to the record on appeal, and "[m]atters discussed in the brief but outside the record will not be considered." *Hudson v. Game World, Inc.*, 126 N.C. App. 139, 142, 484 S.E.2d 435, 437-38 (1997). However, in the present case, we are able to conclude from the record before us that even if Ms. Stewart's letters were erroneously excluded, the error was harmless.

The trial court denied Defendant's motion to admit Ms. Stewart's letters based on its determination that "[the letters were] about a lot more than child abuse. . . . They're about newspapers and DSS and the like[.]" N.C. Gen. Stat. § 8C-1, Rule 403 states that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2015). Defendant

3. Defendant filed a motion with this Court on 4 May 2016 seeking to amend the record on appeal by adding the letters. The motion was denied on 12 September 2016.

contends the probative value of Ms. Stewart's letters exceeded any of the concerns set forth in Rule 403, because they were "the only evidence offered to show prejudice on the part of [Ms.] Stewart[,]" and

> regard[ed] [Ms.] Stewart's thoughts and outrage about child abuse, including her advocacy for children who had been abused and killed by their parents. [The letters] also evidence[d] [Ms. Stewart's] belief that not enough is being done to protect children . . . [and] reflect[ed] [Ms.] Stewart's beliefs, and potential prejudice and bias, about advocating for children.

Thus, Defendant argues, "the trial court abused its discretion by precluding . . . Defendant from cross-examining [Ms.] Stewart on her possible bias based on the letters." Moreover, Defendant submits that "but-for the trial court's denial of cross-examination, [Defendant] would have had the opportunity to confront [Ms.] Stewart about her potential prejudice and bias against him, possibly leading to a different result at trial[.]" These arguments are without merit.

Contrary to Defendant's contention, the trial transcript plainly reflects that he was permitted to cross-examine Ms. Stewart about her "possible bias or prejudice in child advocacy matters." Specifically, defense counsel cross-examined Ms. Stewart as follows:

> [DEFENSE]: Now, would you describe yourself more as a child advocate than a forensic interviewer?
>
> [MS. STEWART]: Uhm –
>
> [STATE]: Objection to the characterization, Your Honor.
>
> [COURT]: Well, she can answer it however she feels would be appropriate.
>
> [MS. STEWART]: In my role with medical evaluation of children, I do – I have a passion for what I do. I have a passion for doing it appropriately. I have a passion for following the standards that are set forth. I also have a passion for the safety and protection of children who have been hurt and abused.
>
> [DEFENSE]: Do you recall writing some letters to the editor in 2003 expressing that passion quite strongly?
>
> [MS. STEWART]: Sure.

> . . .
>
> [DEFENSE]: Ms. Stewart, did you write a series of letters to the editor on the subject of child abuse?
>
> [MS. STEWART]: I remember, but I don't remember exactly what I wrote.
>
> [DEFENSE]: May I approach the witness?
>
> [COURT]: I'm not going to allow those letters in. I'm sustaining the objection. I don't want anymore [sic] talk about them.
>
> [DEFENSE]: Well, would it be fair to say, then, you are strongly passionate on this subject?
>
> [MS. STEWART]: I have been working in the field of child abuse and neglect for 30 years. It would be hard to be doing my job for that long and not have some passion about what I do.

In light of Ms. Stewart's own testimony, it is difficult to see how admitting the letters — that, we note, predated Ms. Stewart's interview with G.J. by a decade — would have provided any necessary additional insight into "[Ms.] Stewart's thoughts and outrage about child abuse, including her advocacy for children who had been abused . . . by their parents." Defendant has failed to demonstrate a reasonable possibility of a different result at trial had the letters been admitted. *See State v. Beach*, 333 N.C. 733, 742, 430 S.E.2d 248, 253 (1993) (holding erroneous exclusion of relevant testimony was not prejudicial where "defendant was able to elicit substantial evidence of a similar nature[.]").

## III. Untimely Disclosure of Expert Testimony

### A. *Standard of Review*

**[2]** Defendant next argues the trial court erred by permitting Ms. Stewart to testify about information in her report and Ms. Cobb to testify about information in her treatment records. Defendant contends the State violated N.C. Gen. Stat. § 15A-903(a)(2) by not sending Ms. Stewart's report and Ms. Cobb's records to defense counsel until February 2015. According to Defendant, he was prejudiced by the admitted testimony because he "did not have time to adequately prepare to effectively cross-examine [Ms.] Stewart and [Ms.] Cobb on the undisclosed opinions." We review the trial court's decisions for abuse of discretion. *See State v. Blankenship*, 178 N.C. App. 351, 356, 631 S.E.2d 208, 211-12 (2006)

(holding trial court abused its discretion in permitting expert to testify, where State violated statutory disclosure requirements by "fail[ing] to provide any notice whatsoever to [the] defendant that it would be calling any law enforcement officer or expert to testify concerning the process of manufacturing methamphetamine.").

B. *Analysis*

N.C. Gen. Stat. § 15A-903(a)(2) provides that, upon motion of a criminal defendant, the trial court must order

> [t]he prosecuting attorney to give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court.

N.C. Gen. Stat. § 15A-903(a)(2) (2015). Where discovery is "voluntarily made in response to a request or written agreement, the discovery is deemed to have been made under an order of the court[.]" N.C. Gen. Stat. § 15A-902(b) (2015). Once a party has provided discovery, whether voluntarily or mandatorily, "there is a continuing duty to provide discovery and disclosure." *State v. Ellis*, 205 N.C. App. 650, 655, 696 S.E.2d 536, 539 (2010) (citation and quotation marks omitted); N.C. Gen. Stat. § 15A-907 (2015). If a party fails to comply with these statutory mandates, a trial court may, *inter alia*, "[g]rant a continuance" or "[p]rohibit the party from introducing [the] evidence not disclosed[.]" *See* N.C. Gen. Stat. §§ 15A-910(a)(2)-(3) (2015); *State v. Hodge*, 118 N.C. App. 655, 657, 456 S.E.2d 855, 856 (1995) ("N.C. Gen. Stat. § 15A-910 . . . empowers the court to apply sanctions for noncompliance . . . . Although the court has the authority to impose such discovery violation sanctions, it is not required to do so."). "The purpose of discovery under our [criminal] statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate." *Blankenship*, 178 N.C. App. at 354, 631 S.E.2d at 210 (citation and quotation marks omitted).

The State served notice of expert witnesses to Defendant on 24 November 2014. The notice listed Dr. Goodpasture, Ms. Stewart, and Ms. Cobb, and indicated the State would make the reports of

each expert regarding G.J. available to Defendant "during the regular course of discovery." The State attached curricula vitae ("CV") for Dr. Goodpasture and Ms. Stewart, and stipulated that Ms. Cobb's CV would be "forthcoming."

The State provided initial discovery to Defendant on 2 December 2014. This initial disclosure included Dr. Goodpasture's full report about her medical examination of G.J.; a two-page report prepared by Ms. Stewart after her interview with G.J., stating her impressions and recommendations; and "about a [thirty] page report" by Ms. Cobb regarding "her visits with [G.J.], which . . . detail[ed] [Ms. Cobb's] comprehensive clinical assessment."

Defendant filed a "Motion for Reports and Other Materials of State's Expert Witnesses" on 29 January 2015, in which he requested

> an [o]rder requiring the State to produce to the defendant all expert reports, material and opinion basis discoverable pursuant to [N.C.G.S. §] 15A-903 and to specifically direct each such expert who is anticipated to testify to prepare a meaningful and detailed report concerning each expert's examination and opinion and the basis thereof.

At a hearing on 4 February 2015, the trial court concluded the State had provided sufficient discovery with respect to Dr. Goodpasture, but instructed the State to "ask [Ms. Stewart and Ms. Cobb] to couch their diagnosis in the form of opinion and . . . in the report that they produce [to the defense] . . . be specific as to what their opinion is." The State subsequently provided Defendant with some further discovery, including additional therapy notes received from Ms. Cobb after the original discovery and "a revised letter [from Ms. Cobb] outlining the basis of her opinion[.]" These were produced to Defendant on 14 February 2015 and 16 February 2015, respectively. The State also provided Defendant with a DVD recording of Ms. Stewart's interview with G.J. on 16 February 2015.

At a hearing on 18 February 2015, defense counsel told the trial court Defendant

> would need either to exclude the expert opinions of the two witnesses, [Ms. Cobb] and/or [Ms. Stewart], on the grounds that we have not had time to prepare for those opinions provided to us on essentially Monday morning or we need a continuance on those because we simply are not prepared to defend those at this point without further investigation and possible experts that may need to be retained by the defense.

Pursuant to Defendant's request, and as authorized by N.C.G.S. § 15A-910(a)(2), the trial court continued the matter until 13 April 2015.

Although Defendant characterizes Ms. Stewart's and Ms. Cobb's testimony as "unanticipated," he does not identify which specific portions of either witness's testimony he contends were "undisclosed." Defendant observes generally that "[w]hile [Ms.] Stewart's report was not admitted into evidence, she still referred to [it] throughout [her] testimony. Likewise, [Ms.] Cobb testified about information in her treatment records." However, as Defendant concedes, both Ms. Stewart's report and Ms. Cobb's treatment records were made available to Defendant in February 2015, and the trial court granted Defendant approximately two additional months to review the evidence and prepare to cross-examine the witnesses at trial.

Defendant's argument that he "did not have time to adequately prepare to effectively cross-examine [Ms.] Stewart and [Ms.] Cobb on the undisclosed opinions" fails in light of the fact that the trial court granted a continuance upon Defendant's late receipt of additional materials from the State. Under N.C.G.S. § 15A-910(a), granting a continuance is as much a "sanction" as "prohibiting [a] party from introducing undisclosed evidence," and whether and which to impose are at the trial court's discretion. *See State v. Herring*, 322 N.C. 733, 747-48, 370 S.E.2d 363, 372 (1988) ("The sanction for failure to make discovery when required is within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion."); *State v. McDougald*, 38 N.C. App. 244, 258, 248 S.E.2d 72, 83 (1978) ("When a party to a criminal proceeding fails to comply with discovery requirements, the trial court may impose sanctions upon that party. These sanctions include holding the party in contempt, ordering discovery, granting a continuance or recess, prohibiting the party from introducing the evidence or entering other appropriate orders. The particular sanction to be imposed rests within the sound discretion of the trial court." (citations omitted)). Indeed, at the hearing on 18 February 2015, Defendant explicitly requested "*either* to exclude the expert opinions . . . or . . . a continuance[.]"

The cases Defendant cites are unavailing. In *State v. Cook*, 362 N.C. 285, 661 S.E.2d 874 (2008), the State provided the defendant with an expert's report one day prior to the date trial was set to begin. The defendant immediately sought a continuance, but the trial court denied the motion and allowed the trial to proceed as scheduled. Our Supreme Court held that the trial court abused its discretion by denying the defendant's request for a continuance, because "the State's last-minute piecemeal disclosure of its expert's . . . written report was not 'within a

reasonable time prior to trial' as required by N.C.G.S. § 15A-903(a)(2)." *Id.*, 362 N.C. at 292, 661 S.E.2d at 878. The Court was "satisfied that a continuance would have alleviated any 'unfair surprise' to [the] defendant, and would have afforded the defense [an] opportunity to meet [the State's] evidence." *Id.*, 362 N.C. at 295, 661 S.E.2d at 880 (citations and internal quotation marks omitted). In *State v. Moncree*, 188 N.C. App. 221, 655 S.E.2d 464 (2008), this Court held the trial court improperly permitted an agent for the State Bureau of Investigation ("SBI") to testify as a lay witness. We concluded that because the agent's testimony was in fact expert opinion testimony, it should have been disclosed to the defendant prior to trial pursuant to N.C.G.S. § 15A-903(a)(2).[4] *See id.*, 188 N.C. App. at 226-27, 655 S.E.2d at 468.

In contrast to *Moncree*, Defendant was aware that Ms. Stewart and Ms. Cobb would offer expert testimony at trial. Further, unlike in *Cook*, the trial court granted Defendant a continuance upon his late receipt of additional discovery from the State. Defendant has failed to demonstrate the trial court abused its discretion by permitting Ms. Stewart and Ms. Cobb to testify about expert opinions that were disclosed to Defendant "within a reasonable time prior to trial."

## IV. Cobb's PTSD Testimony

### *Preservation of Error*

**[3]** Defendant next argues the trial court committed prejudicial error by allowing Ms. Cobb to testify that she "diagnosed [G.J. with] PTSD." According to Defendant, Ms. Cobb "impermissibly vouched for [G.J.,] the prosecuting witness" by "corroborat[ing] G.J.'s testimony that the alleged sexual assault by [Defendant] was the *source* of the resulting PTSD."

The State responds that despite "challeng[ing] Ms. Cobb's overall qualifications to render testimony that G.J. suffered from PTSD[,]" Defendant "failed to challenge and preserve for appellate review the admissibility of the overall diagnosis of PTSD." We agree Defendant failed to preserve this argument for appellate review.

During Ms. Cobb's testimony, defense counsel stated in *voir dire* that Defendant

---

4. Although the *Moncree* trial court erred in admitting the expert testimony, we held the error was not prejudicial because the defendant was aware that two other witnesses would offer substantially similar testimony and therefore "should have anticipated this evidence and should not have been unfairly surprised by [the SBI agent's] testimony[.]" *Id.*, 188 N.C. App. at 227, 655 S.E.2d at 468.

> would lodge an objection to [Ms. Cobb] as an expert witness giving that opinion [that G.J. suffered from PTSD or had symptoms of PTSD]. We have no objection to her being – testifying that she's a therapist and testifying what she did [with G.J.] in the therapy, but to render the opinion that [G.J.] suffers from or suffered from post[-]traumatic stress disorder, *we would contend requires a medical diagnosis to be a medical opinion*.

The State responded that North Carolina law

> does not require the testimony of a medical doctor, but it does require the testimony of someone who is familiar with the criteria of the diagnosis of post[-]traumatic stress disorder and has, in fact, made that diagnosis and can testify as to what the particular criteria is [sic] that was present in the particular child that resulted in that diagnosis.

According to the State, Ms. Cobb would testify that she

> has a set criteria [for diagnosing PTSD] that is well accepted in the field of therapeutic services, that she, in fact, did an assessment [of G.J.], and based on her assessment, it was her opinion that the child was suffering from several criteria that were consistent with [PTSD].

The State also noted that

> the law does limit the State in how far we can go with that . . . . We are not allowed to ask what the cause of the trauma is, only that sexual abuse could be one of many factors. And the State certainly would request a limited instruction from the Court that this [testimony] is only to be considered for corroboration purposes[.]

Defense counsel agreed that "where an expert testifies the victim is suffering from PTSD, . . . the testimony must be limited to the corroboration of the victim and could not be admitted . . . for the sole purpose of proving that a rape or a sexual abuse has, in fact, occurred." When the trial court overruled Defendant's objection to Ms. Cobb's PTSD testimony, defense counsel requested in the absence of the jury that the court give the limiting instruction "at the time of [Ms. Cobb's] testimony regarding the corroboration purposes only so the jury doesn't get confused."

When the jury returned to the courtroom, the trial court instructed it as follows:

> Okay. Now, the testimony that you all are going to hear from this witness is what's called opinion testimony, and it's going to be admitted solely for the purpose of corroborating other testimony. You're going to hear evidence about post[-]traumatic stress disorder.
>
> You're not to consider any evidence of [PTSD] as evidence of whether or not the offense charged in this case actually occurred; but, rather, you can receive and consider that evidence solely for two purposes: One purpose is to corroborate the testimony of witnesses that you have previously heard testify in this case. And the second reason is to explain, if you so find, conduct or behavior of the alleged victim.
>
> So this . . . witness qualifies as an expert. She is an expert. I'll give you more instructions about how you're – what you are to do with expert testimony before you begin your deliberations.

Defendant did not object to the instruction as given. When Ms. Cobb subsequently testified that, after performing a psychological assessment "directly associated with post[-]traumatic stress disorder," she "diagnosed [G.J. with] PTSD," Defendant objected "[on the] same grounds as previously stated in this area."

At trial, although Defendant objected contemporaneously to Ms. Cobb's statement that she "diagnosed [G.J. with] PTSD," he did not do so on the basis that the testimony impermissibly vouched for G.J.'s credibility or the veracity of the sexual abuse allegations. Defendant's "previously stated" ground for objecting to Ms. Cobb's PTSD testimony was that "a licensed clinical social worker is not sufficiently qualified to give a medical opinion or a medical diagnosis of post[-]traumatic stress disorder, which is a documented psychiatric disorder[.]" Thus, when defense counsel objected to Ms. Cobb's statement that she "diagnosed PTSD" on "the same grounds as previously stated in this area," counsel was ostensibly referring to its earlier contention that Ms. Cobb was "not sufficiently qualified to give a medical opinion or a medical diagnosis of [PTSD]."[5]

This conclusion is consistent with defense counsel's statements at a 4 February 2015 hearing on Defendant's request that the State specify

5. On appeal, Defendant does not challenge Ms. Cobb's qualifications to give a medical opinion or diagnosis regarding PTSD.

the bases for the opinions of its expert witnesses. There, counsel said of Ms. Cobb: "[T]he only thing I can reference [as] an opinion is . . . the statement . . . that [G.J.] suffers from PTSD. If that in fact is [Ms. Cobb's] opinion I need to know that that's her opinion and how she comes to that diagnosis *because she's not a medical doctor* and there is nothing in her report that indicates that."

Defendant also submitted motions *in limine* on 16 February 2015 to exclude certain expert testimony. With respect to Dr. Goodpasture and Ms. Stewart *only*, Defendant argued the trial court should prohibit any opinion "to the effect that a finding of no physical evidence of molestation is not inconsistent with molestation" because "admission of this evidence could only be used *to improperly bolster the testimony of the prosecuting witness*, which is the sole evidence in this case of the alleged abuse." Defendant also asked that the court prohibit Ms. Cobb "from referencing in any way that the prosecuting witness has been diagnosed with post [-]traumatic stress disorder[;]" however, Defendant's only arguments in support of this request were that

> [Ms.] Cobb, a licensed social worker, is not qualified to make and the [S]tate has not offered any evidence through any other expert as to how such diagnosis was made or if it was made. The admission of such evidence without . . . a properly qualified expert witness would violate Rule 403 in that it would be more prejudicial than probative in its value. Further, the admission of such evidence . . . would violate [N.C.G.S. §] 15A-903 as no such evidence from any medical expert was proffered through discovery . . . . Further, the admission of such testimony . . . would violate Rule 703 of the Rules of Evidence in that [*Ms.*] *Cobb is not qualified as an expert in the area of post[-]traumatic stress disorder diagnosis*.

Defendant did not argue, as he did with respect to Dr. Goodpasture and Ms. Stewart, that Ms. Cobb's PTSD opinion testimony might "be used to improperly bolster the testimony of the prosecuting witness."

The argument Defendant makes on appeal – that Ms. Cobb's testimony about her PTSD diagnosis impermissibly "corroborated G.J.'s testimony that the alleged sexual assault by [Defendant] was the *source* of the resulting PTSD" – was never raised before the trial court. North Carolina Rule of Appellate Procedure 10(a)(1) requires that a criminal defendant present specific and detailed objections to a trial court's evidentiary rulings in order to preserve an issue for appellate review. *See*

*State v. Rayfield*, 231 N.C. App. 632, 637, 752 S.E.2d 745, 751 (2014). For example, in *State v. Rainey*, 198 N.C. App. 427, 680 S.E.2d 760 (2009), the defendant argued on appeal that certain evidence was barred by the Confrontation Clause. This Court held the defendant failed to properly preserve the issue for appellate review because, while defendant had objected at trial on general constitutional and due process grounds, he "did not specifically object on Confrontation Clause grounds." *Id.* at 433, 680 S.E.2d at 766-67. The general constitutional objections were insufficient under N.C.R. App. P. 10(a)(1) to preserve the more specific Confrontation Clause argument for appellate review. Likewise, "[a] party must make a specific objection to *the content of the testimony* or the qualifications of a witness as an expert in a particular field; a general objection will not preserve the matter for appellate review." *State v. Faulkner*, 180 N.C. App. 499, 512, 638 S.E.2d 18, 28 (2006) (emphasis added). In this case, Defendant's objections based on Ms. Cobb's qualifications to give a medical opinion were insufficient to preserve an argument that Ms. Cobb's PTSD testimony impermissibly vouched for G.J.'s credibility.

Defendant cites *State v. Mendoza-Mejia*, ___ N.C. App. ___, 780 S.E.2d 891, 2015 WL 7729215 (2015), a recent unpublished decision of this Court, that held certain witness testimony impermissibly vouched for the credibility of the prosecuting witness. This Court concluded that

> in juvenile sexual abuse cases where the State relies on the victim's testimony without any physical evidence, witnesses are not permitted to testify that they believe the victim's testimony or otherwise suggest that the victim is telling the truth. This Court has held that this type of vouching testimony is prejudicial and therefore reversible error.

*Id.*, ___ N.C. App. at ___, 780 S.E.2d at ___, 2015 WL 7729215 at *1. However, Defendant overlooks the fact that in *Mendoza-Mejia*, the defendant specifically "objected to [the two witnesses'] testimony *on the ground that* [it] . . . impermissibly vouched for [the victim's] credibility, but the trial court overruled the objection[s]." *Id.* (emphasis added). The same is not true in Defendant's case. Without specifically objecting to Ms. Cobb's PTSD testimony on the ground that it impermissibly vouched for G.J.'s credibility, Defendant failed to preserve this argument.

"Unpreserved error in criminal cases . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012); *see also State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002) (observing that "plain error analysis applies only to jury instructions

and evidentiary matters[.]"). "To have an alleged error reviewed under the plain error standard, the defendant must 'specifically and distinctly' contend that the alleged error constitutes plain error." *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333 (citing N.C.R. App. P. 10(a)(4)). Because Defendant "has not alleged plain error in his arguments to this Court, he has waived appellate review . . . on such grounds." *State v. Thibodeaux*, 352 N.C. 570, 582, 532 S.E.2d 797, 806 (2000) (citations omitted).

## V. G.J.'s Sexual History

### A. *Standard of Review*

**[4]** Defendant also contends the trial court erroneously precluded Defendant from cross-examining Ms. Stewart and Ms. Cobb about information in their treatment records regarding G.J.'s sexual activity with partners other than Defendant. Defendant argues this evidence was not barred by the "rape shield law" codified in N.C. Gen. Stat. § 8A-1, Rule 412, and that the trial court improperly concluded the evidence was more prejudicial than probative. "We review the trial court's rulings as to relevance with great deference. . . . [T]he same deferential standard of review [applies] to the trial court's determination of admissibility under Rule 412." *State v. Davis*, 237 N.C. App. 481, 488, 767 S.E.2d 565, 570 (2014) (quoting *State v. Khouri*, 214 N.C. App. 389, 406, 716 S.E.2d 1, 12-13 (2011)).

### B. *Analysis*

At trial, Defendant sought to cross-examine the State's expert witnesses about G.J.'s consensual sexual activity with other individuals. During Ms. Cobb's testimony, defense counsel argued in *voir dire* that the information was relevant

> first of all, because [Ms. Cobb] incorporated [the information] in the material she used to render an expert opinion. Anything that an expert has relied upon under [evidentiary] Rule 702 on the basis thereof of [evidentiary] Rule 705, when requested by counsel must be produced and is subject to cross-examination. And in this case, [Ms. Cobb has] very clearly incorporated it in her opinion. She's referred multiple times to the assessment and the factors in it in supporting her opinion of PTSD and all of which she's rendered an opinion upon. This would formulate an underlying basis of the opinion by her own testimony, so anything in that is entitled to be cross-examined on without relevance to Rule 412 or otherwise. The relevance is

> she's used it in formulating her opinion. And as an expert, anything considered by the expert is fair game to be cross-examined upon, whether or not it is actually incorporated –
>
> COURT: So you think [Rule] 412 – if it's her opinion, 412 doesn't even matter?
>
> [DEFENSE COUNSEL]: Correct . . . . Once an expert incorporates material like that into their review, . . . if you tender that person as an expert, then we're entitled to full and wide cross-examination on everything that expert considered whether they chose to incorporate it in their opinion or not.

The State contended that evidence of G.J.'s consensual sexual activity fell squarely within Rule 412's "rule of exclusion." The trial court then permitted both Defendant and the State to question Ms. Cobb about the extent to which G.J.'s sexual activity "assisted [her] in formulating [the] opinion that [G.J.] suffered from post[-]traumatic stress disorder[.]" Defense counsel had the following exchange with Ms. Cobb:

> [DEFENSE COUNSEL]: You said you wouldn't have taken that into account in doing your diagnosis of PTSD, correct?
>
> [MS. COBB]: I wouldn't have.
>
> [DEFENSE COUNSEL]: So in that case, you took this information and discarded it before incorporating your opinion, correct?
>
> [MS. COBB]: The fact that [G.J.] had any acts currently of consensual sexual acts, anything, that runs the gamut, from kissing on down the line, did not formulate my opinion in the diagnosis.
>
> [DEFENSE COUNSEL]: Okay. But you asked about it?
>
> [MS. COBB]: I did.
>
> [DEFENSE COUNSEL]: And so you took that information into account whether you chose to incorporate it in your opinion or not, correct?
>
> [MS. COBB]: I took it into account, and based on – and in that – taking into account, as it was not relevant, it did not sway my opinion.

> [DEFENSE COUNSEL]: So you, as an expert, made a determination that you did not feel it was relevant to your opinion, correct?
>
> [MS. COBB]: It was not relevant to the diagnosis I made.
>
> [DEFENSE COUNSEL]: But you did, in fact, seek that information in your form and obtained it and then chose, in formulating your opinion, not to incorporate it?
>
> [MS. COBB]: It's not relevant in the diagnoses [sic] of PTSD.
>
> [DEFENSE COUNSEL]: And that is what your opinion is, that it's not relevant, correct?
>
> [MS. COBB]: It's not anywhere in the criteria, so it's my opinion and multiple people's opinion.

The trial court ruled it would "exclude any evidence whatsoever as to any sexual activity by the victim." When defense counsel reasserted its desire to cross-examine Ms. Cobb about G.J.'s sexual activity, the trial court responded: "Well, [Ms. Cobb] just got through saying that she took nothing into account involving [G.J.'s] sexual history. . . . So . . . I don't even feel the need to do a balancing test . . . . [T]here's no relevance to it whatsoever."

Rule 412 provides that ordinarily, "sexual behavior of [a] complainant is irrelevant to any issue in the prosecution" and is thus inadmissible as evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 412 (2015); *Davis*, 237 N.C. App. at 488, 767 S.E.2d at 569-70. The statute also sets forth four exceptions to the otherwise categorical exclusion, none of which Defendant argues applied in this case. *See* N.C. Gen. Stat. § 8C-1, Rule 412(b) (2015). Pursuant to Rule 412, before a complaining witness may be questioned about sexual activity other than the sexual act(s) at issue in the trial,

> the proponent of such evidence shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates. . . . [T]he court shall conduct an *in camera* hearing . . . to consider the proponent's offer of proof and the argument of counsel, including any counsel for the complainant, to determine the extent to which such behavior is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence. . . . If the court finds that the evidence is relevant, it shall enter an order stating that the evidence

> may be admitted and the nature of the questions which will be permitted.

N.C. Gen. Stat. § 8C-1, Rule 412(d) (2015).

Defendant cites *State v. Martin*, ___ N.C. App. ___, 774 S.E.2d 330 (2015), for the unremarkable proposition that Rule 412's exceptions are "not confined to those listed in the statute." In *Martin*, this Court reversed a trial court's determination that "[certain] evidence was *per se* irrelevant because the evidence did not fit under any of the four exceptions provided in our Rape Shield Statute[.]" *Id.* at ___, 774 S.E.2d at 332. We noted that "our Court has [previously] held that there may be circumstances where evidence which touches on the sexual behavior of the complainant may be admissible even though it does not fall within one of the categories in the Rape Shield Statute." *Id.* at ___, 774 S.E.2d at 335-36 (citations omitted); *see also State v. Younger*, 306 N.C. 692, 698, 295 S.E.2d 453, 456 (1982) (holding that the four exceptions in the rape shield statute are not "the sole gauge for determining whether evidence is admissible in rape cases."). The *Martin* defendant sought to introduce evidence for the purpose of showing the victim had a motive to falsely accuse him of sexual assault. We held that the trial court

> should have looked beyond the four [exceptions in Rule 412] to determine whether the evidence was, in fact, relevant to show [the victim's] motive to falsely accuse [the defendant] and, if so, conducted a balancing test of the probative and prejudicial value of the evidence under Rule 403 or [whether it] was otherwise inadmissible on some other basis[.]

*Id.* at ___, 774 S.E.2d at 336; *see also State v. Mbaya*, ___ N.C. App. ___, ___ S.E.2d ___ (2016), WL 5030402 at *5-8 (discussing and distinguishing *Martin*).

In the present case, the trial court followed the precise approach prescribed in *Martin*. Although Defendant sought to introduce evidence about G.J.'s sexual history for a purpose that did not fit within any of Rule 412's four exceptions, the trial court nonetheless conducted a *voir dire* hearing on the matter, allowing arguments from both Defendant and the State regarding the purported relevancy of the evidence. After Ms. Cobb was questioned extensively regarding the extent to which G.J.'s sexual conduct with other individuals informed Ms. Cobb's PTSD diagnosis, the trial court concluded the evidence was not relevant. Having found the evidence irrelevant, the trial court was not required under *Martin* to proceed to a balancing test of the probative and prejudicial

value of the evidence. Pursuant to the "great deference" accorded to a trial court's determinations of relevancy under Rule 412, and in light of Ms. Cobb's repeated statements that G.J.'s sexual history had no bearing whatsoever on her PTSD diagnosis, we conclude the trial court did not err in excluding the evidence as irrelevant. Moreover, "we review errors committed by the trial court in excluding relevant evidence under Rule 412 for prejudice." *Davis*, 237 N.C. App. at 489, 767 S.E.2d at 570. Even if G.J.'s sexual conduct with other individuals was erroneously excluded, Defendant presents no plausible argument that, had the jury heard this evidence, there is a reasonable possibility it would have reached a different result.

## VI. Conclusion

For the reasons stated above, we find no error in Defendant's trial.

NO ERROR.

Judges DIETZ and TYSON concur.

---

STATE OF NORTH CAROLINA
v.
BARRY RANDALL REVELS, Defendant

No. COA16-318

Filed 6 December 2016

**1. Contempt—civil and criminal—distinct conduct with partially overlapping facts**

Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that the trial court erroneously found him in both civil and criminal contempt based on the same conduct. It was readily apparent from the trial court's order that defendant was in civil and criminal contempt for distinctly separate and discrete conduct based on a partially overlapping nucleus of facts.

**2. Contempt—criminal—punitive punishment**

Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that the trial court erred by finding him in criminal contempt

and imposing a civil punishment. The sentence imposed for the criminal contempt of court was clearly punitive in nature.

**3. Contempt—criminal—jurisdiction—show cause order**

Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that the trial court's show cause order failed to adequately allege that he was subject to being found in criminal contempt of court with sufficient specificity so as to confer jurisdiction upon the trial court. The trial court was fully authorized to find defendant in criminal contempt because it entered a show cause order requiring him to appear in court and explain why he had failed to comply with the temporary restraining order and preliminary injunction.

**4. Contempt—omission of term "guilty"**

Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that his conviction should be overturned because the trial court never expressly used the term "guilty" in finding him in contempt of court. Defendant could not show that but for the omission of such language the trial court would have reached a contrary result.

**5. Contempt—effective assistance of counsel**

Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that he received ineffective assistance of counsel due to his counsel's failure to object to the criminal contempt proceedings. Defendant could not show that the trial court erred procedurally in finding him in civil and criminal contempt of court, so he could not demonstrate that his trial counsel's failure to object to the proceedings affected the outcome.

Judge ELMORE dissenting.

Appeal by defendant from order entered 23 September 2015 by Judge Lisa C. Bell in Cleveland County Superior Court. Heard in the Court of Appeals 7 September 2016.

*Attorney General Roy Cooper, by Special Deputy Attorney General Keith Clayton, for the State.*

*Amanda S. Zimmer for defendant-appellant.*

ENOCHS, Judge.

Barry Randall Revels ("Defendant") appeals from the trial court's order finding him in criminal contempt of court. On appeal, Defendant contends that the trial court erred by (1) finding him in both civil and criminal contempt based on the same conduct; (2) finding him in criminal contempt of court; (3) relying upon a fatally defective show cause order thereby depriving it of jurisdiction; and (4) failing to enter a finding of guilty with regard to its determination that Defendant was in criminal contempt of court. Defendant also asserts that he received ineffective assistance of counsel. After careful review, we affirm.

## Factual Background

RST Global Communications, LLC ("RST") is a company located in Cleveland County, North Carolina which is in the business of installing and maintaining fiber optic networks and offering network communication services to third parties. Defendant is a 30% member and former head of day-to-day operations of RST. Defendant ran the company's daily operations from his home address located at 335 Magness Road in Shelby, North Carolina.

In early 2014, RST became aware that Defendant was improperly using company funds from RST's bank accounts for personal debts and expenditures. As a result, a meeting of RST's members was called by RST's Chief Executive Officer, Dan Limerick ("Limerick"). A series of unanimous resolutions were approved at the meeting including that (1) RST operations would be transferred to the company's headquarters at 1300 South Dekalb Street in Shelby, North Carolina; (2) Doug Brown ("Brown") would assume responsibility for RST's day-to-day operations; (3) Defendant would no longer be paid a salary; and (4) all company-issued credit and debit cards would be turned in and no longer used without the express authorization of RST's members.

Defendant refused to comply with these resolutions and retained RST records, data, and property at his personal residence. He also continued to communicate with other business entities on RST's behalf and refused to turn over his company issued credit and debit cards.

After several "actions without meetings" issued by Limerick and Brown demanding that Defendant (1) return items of RST's property including checkbooks, credit and debit cards, keys, lock combinations, account login and password information; (2) have all company mail being sent to his residence rerouted to the South Dekalb Street Office; and (3) remove himself from all company bank accounts, Defendant

still refused to comply. As a result, RST filed a verified complaint and motion for a temporary restraining order ("TRO") against Defendant in Cleveland County Superior Court on 30 April 2015.

A hearing on RST's motion for a TRO was held before the Honorable Forrest Donald Bridges on 4 May 2015, and on 5 May 2015, Judge Bridges granted RST's motion and entered a TRO against Defendant.

Judge Bridges continued the matter until 6 May 2015 in order to give Defendant the opportunity to obtain counsel. Defendant did not attend the 6 May 2015 hearing, and the court issued a second TRO on 8 May 2015 incorporating the terms of the 5 May 2015 TRO and adding several additional provisions thereto.

At a subsequent hearing on 18 May 2015, RST moved for a preliminary injunction and submitted the sworn affidavit of Brown delineating Defendant's failure to return RST's property or otherwise cooperate with Judge Bridges' TRO. The court entered an order for Defendant to show cause and a preliminary injunction that same day.

On 8 June 2015, a hearing on the show cause order was held before the Honorable Lisa C. Bell. At the outset of the proceedings, Judge Bell informed Defendant that the hearing would determine whether he would be found in criminal or civil contempt. The case was ultimately continued several times until 23 September 2015.

At the 23 September 2015 hearing, RST presented evidence that Defendant had not complied with the TRO or the preliminary injunction. As a result, Judge Bell found Defendant in both civil and criminal contempt of court and entered corresponding orders on that same day. On 23 October 2015, Judge Bell entered a detailed order of criminal and civil contempt laying out findings of fact supporting her conclusion that Defendant was in both civil and criminal contempt of court. Defendant gave oral notice of appeal of the 23 September 2015 criminal contempt order in open court.

## Analysis

### I. Finding Both Civil and Criminal Contempt Based Upon the Same Conduct

**[1]** Defendant first contends on appeal that the trial court found him to be in both civil and criminal contempt based upon the same conduct in violation of N.C. Gen. Stat. § 5A-12(d) (2015) and N.C. Gen. Stat. § 5A-21(c) (2015). We disagree.

> At the outset we note that contempt in this jurisdiction may be of two kinds, civil or criminal, although we have stated that the demarcation between the two may be hazy at best. Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties.
>
> A major factor in determining whether contempt is civil or criminal is the purpose for which the power is exercised. Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. The importance in distinguishing between criminal and civil contempt lies in the difference in procedure, punishment, and right of review.

*O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985) (internal citations omitted).

Defendant is correct as a general proposition that a person cannot be found in both civil and criminal contempt for the same conduct. *See* N.C. Gen. Stat. § 5A-12(d) ("A person held in criminal contempt under this Article shall not, for the same conduct, be found in civil contempt under Article 2 of this Chapter, Civil Contempt."); N.C. Gen. Stat. § 5A-21(c) ("A person who is found in civil contempt under this Article shall not, for the same conduct, be found in criminal contempt under Article 1 of this Chapter."). However, where divergent and distinct conduct arising from the same underlying nucleus of facts would give rise to independent findings of both civil and criminal contempt, a trial court does not err by finding a person in criminal contempt for certain conduct while also finding him in civil contempt for other separate and discrete conduct. *See, e.g.*, *Adams Creek Assocs. v. Davis*, 186 N.C. App. 512, 527, 652 S.E.2d 677, 687 (2007) ("Defendants argue that they were found in civil and criminal contempt for the same behavior, in violation of N.C. Gen. Stat. § 5A-21(c) and 5A-23(g), which prohibit finding a defendant in both civil and criminal contempt for the same behavior. . . . [D]efendants were found in civil contempt for failing to comply with the court's 2004 order, and were found in criminal contempt for their testimony threatening to

disobey future orders of the court. Thus, defendants were found in civil and criminal contempt on the basis of different acts.").

Indeed, in *Adams Creek Assocs.*, the defendants were found in criminal contempt for continuing to trespass upon the plaintiff's property in defiance of the trial court's order. They then testified at trial that they intended to continue to trespass on the property in the future because they erroneously believed that the property was theirs. *Id.* Despite the overlapping nucleus of facts — to wit, trespass on the plaintiff's real property — the trial court also found them in civil contempt. *Id.* On appeal, the defendants argued "that they were found in civil and criminal contempt for the same behavior, in violation of N.C. Gen. Stat. § 5A-21(c) and 5A-23(g), which prohibit finding a defendant in both civil and criminal contempt for the same behavior." *Id.* In rejecting this argument, this Court emphasized that "defendants were found in civil contempt for failing to comply with the court's 2004 order, and were found in criminal contempt for their testimony threatening to disobey future orders of the court." *Id.* Therefore, both the civil and criminal contempt orders were based upon the defendants' trespass on the exact same piece of land, but were deemed distinguishable based on the diverging *conduct* and intent of the defendants — that is the disobedience of a past trial court order on the one hand accounting for one type of conduct, and the intention to continue to disobey the court's orders in the future as a separate type of conduct. *Id.*

This is in line with the *O'Briant* line of cases which emphasize that " '[a] major factor in determining whether contempt is criminal or civil is the *purpose* for which the power is exercised.' " *Watson v. Watson*, 187 N.C. App. 55, 61, 652 S.E.2d 310, 315 (2007) (quoting *Bishop v. Bishop*, 90 N.C. App. 499, 503, 369 S.E.2d 106, 108 (1988)).

> Criminal contempt is imposed in order to preserve the court's authority and to punish disobedience of its orders. Criminal contempt is a crime, and constitutional safeguards are triggered accordingly. On the other hand, when the court seeks to compel obedience with court orders, and a party may avoid the contempt sentence or fine by performing the acts required in the court order, the contempt is best characterized as civil.

*Id.* (internal citations omitted).

In the present case, the trial court's 23 October 2015 order of criminal and civil contempt was divided into two parts. In the first section, the trial court, applying the beyond a reasonable doubt standard, found that

Defendant failed to (1) cause RST's mail to be delivered to the Dekalb Street address in violation of the TRO; (2) deliver all of RST's equipment to the Dekalb Street address including but not limited to at least two phones as required by the TRO; (3) provide account login and password information in violation of the TRO; and (4) relinquish RST's credit and debit cards in violation of the TRO and preliminary injunction.

In the second section of the order, the trial court, applying the greater weight of the evidence standard, found Defendant in civil contempt for (1) instructing third-parties to break RST's fiber optic cables and not to repair them until he got a new contract; (2) using RST's equipment and business connections to continue to appropriate business opportunities for his newly formed business; and (3) retaining RST's equipment detailed in the TRO and preliminary injunction.

Here, it is readily apparent that, in accord with *Adams Creek Assocs.*, the trial court found Defendant in civil contempt based on his continued conduct in violation of the TRO and preliminarily injunction in attempting to frustrate RST's business interests while simultaneously attempting to further his own at their expense, and found him in criminal contempt based upon his *past conduct*, that is, his refusal to obey the trial court's TRO and preliminary injunction in failing to adhere to their terms including the return of various company assets of RST. As a result, the trial court did not find Defendant in civil and criminal contempt for the same conduct, but instead for distinctly separate and discrete conduct based on a partially overlapping nucleus of facts. Therefore, Defendant's argument on this issue is overruled.

II. <u>Criminal Contempt</u>

**[2]** In a related argument, Defendant asserts that the trial court erred in finding him in criminal contempt because the punishment imposed upon him was civil in nature as opposed to the type of punitive punishment reserved for those found to be in criminal contempt. We disagree.

As noted above, the trial court is fully authorized to impose both civil and criminal contempt in the same proceeding as long as they are not imposed for the same conduct. Therefore, the trial court was within its authority to impose upon Defendant both (1) criminal contempt to punish Defendant's past conduct in failing to adhere to the TRO and preliminary injunction; and (2) civil contempt designed to compel Defendant to comply with its directives.

In the present case, the trial court ordered, in pertinent part, as follows:

> Effective immediately, Defendant will serve a 7-day active sentence in the Cleveland County jail of a total sentence of 30 days in jail for his willful criminal contempt of this Court. The remaining 23 days will be suspended, and Defendant will be on unsupervised probation for a period of 12 months.

This sentence was clearly punitive in nature and was imposed as punishment for Defendant's criminal contempt of court.

The trial court then further separately ordered the following: "Defendant will be and is indefinitely incarcerated in the Cleveland County jail for his willful civil contempt of this Court, which will begin immediately upon the conclusion, release, or other cessation of his 7-day active sentence until he complies with the following purge conditions . . . ." The trial court then imposed conditions that Defendant return RST's assets, complete a change of address causing RST's business mail to be sent to the Dekalb Street address instead of to his house, and surrender his company debit and credit cards to RST.

The latter portion of the trial court's order clearly imposes conditions for Defendant's release from imprisonment *after the conclusion* of his criminal contempt sentence. The punishment is indefinite and remedial in nature and designed to ensure compliance with the court's orders as opposed to a punishment for past violations of the TRO and preliminary injunction. As a result, both the sentence imposed for criminal contempt and the sentence imposed for civil contempt are consecutive in nature and do not overlap in the manner Defendant suggests. Consequently, Defendant's argument on this issue is without merit.

III. Jurisdiction

**[3]** Defendant next argues that the trial court's show cause order failed to adequately allege that he was subject to being found in criminal contempt of court with sufficient specificity so as to confer jurisdiction upon the trial court. We disagree.

N.C. Gen. Stat. § 5A-13(b) (2015) provides that "[a]ny 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-15(a) (2015) in turn provides, in pertinent part, that "[w]hen a judicial official chooses not to proceed summarily against a person charged with direct criminal contempt or when he may not proceed summarily, he may proceed by an order directing the person to appear before a judge at a reasonable time

specified in the order and show cause why he should not be held in contempt of court." *See State v. Coleman*, 188 N.C. App. 144, 149, 655 S.E.2d 450, 453 (2008) ("For indirect criminal contempt proceedings in which a trial court is not allowed to proceed summarily, a show cause order is analogous to a criminal indictment and is the means by which the defendant is afforded the constitutional safeguard of notice." (internal footnote omitted)). That is precisely what occurred in the present case.

Moreover, our caselaw has consistently held that a show cause order is sufficient to confer jurisdiction on a trial court for finding a defendant in indirect criminal contempt where it incorporates by reference a prior court order that a defendant has failed to comply with.

> When issuing a criminal contempt citation, the presiding judge need only enter an order directing the person to appear before a judge and show cause why he should not be held in contempt of court. Unlike a citation for *civil* contempt, which requires the judge's order be accompanied by a sworn affidavit and a finding of probable cause, there is no requirement that the judge make a finding of improper conduct upon the issuance of a criminal contempt citation.
>
> In this case, [the trial court judge's] order directed [d]efendant to appear and show cause why he should not be punished for contempt. This language has been construed to have reference to criminal contempt. Indeed, [d]efendant refers to the order as one for criminal contempt in his own motion to dismiss. Furthermore, the order seeks to punish [d]efendant for interfering with the administration of justice, a function of criminal contempt, rather than compel obedience to an order entered to benefit a private party, a function of civil contempt. Accordingly, [the judge] was not required to make a specific finding of improper conduct, and [the court] properly denied [d]efendant's motion to dismiss.

*State v. Pierce*, 134 N.C. App. 148, 151, 516 S.E.2d 916, 919 (1999) (internal citations, quotation marks, and ellipses omitted); *see also Bennett v. Bennett*, 71 N.C. App. 424, 322 S.E.2d 439 (1984) (outstanding show cause order upon which no action had been taken satisfied statutory requirement of N.C. Gen. Stat. § 5A-15 that a contempt hearing be held on a show cause order).

Consequently, because the trial court entered a show cause order requiring Defendant to appear in court and explain why he had failed to comply with the TRO and preliminary injunction, it was fully authorized to find him in criminal contempt of court. Defendant's argument that the trial court never gained jurisdiction over the criminal contempt proceedings should, as a result, be overruled.[1]

IV. Guilty Mandate

**[4]** Defendant next argues that because the trial court never expressly used the term "guilty" in finding him in contempt of court, his conviction must be overturned. We disagree.

It is apparent in the present case that the trial court found Defendant guilty of both civil and criminal contempt. Its order clearly stated that "Defendant is in civil and criminal contempt of this Court[.]" The trial court based this conclusion upon application of the beyond a reasonable doubt standard to the evidence before it, which is supported by the record.

Our Supreme Court has held that "insubstantial technical errors which could not have affected the result will not be held prejudicial. The judge's words may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred." *State v. Alexander*, 279 N.C. 527, 538, 184 S.E.2d 274, 282 (1971) (internal citation omitted); *see State v. Keyes*, 56 N.C. App. 75, 79, 286 S.E.2d 861, 863-64 (1982) ("Mere technical error is not sufficient to require the granting of a new trial. The error must be so prejudicial as to affect the result.").

Defendant's attempt to rely on this Court's decision in *State v. Phillips*, 230 N.C. App. 382, 750 S.E.2d 43 (2013), in arguing that the trial court's failure to state Defendant was "guilty" is misplaced. In that case, this Court found that the trial court's order was fatally defective because the trial court had failed to indicate that it had applied the beyond a reasonable doubt standard, thereby precluding this Court on appeal from being able to discern that it had actually done so in accordance with the law. *Id.* at 385, 750 S.E.2d at 45. Such is not the case here where the trial court — as set forth in the plain language of its order — correctly

---

1. Defendant also makes a brief argument that we should impute the requirements for a larceny indictment onto a show cause order alleging criminal contempt. Defendant has cited to no case law in support of this proposition and our research has revealed none. Consequently, this argument is without merit.

applied the beyond a reasonable doubt standard to the evidence before it and unambiguously determined that Defendant was, in fact, in criminal contempt of court. Defendant was then sentenced accordingly.

The fact that the trial court did not use the talismanic term "guilty" here does not affect the outcome of Defendant being found in criminal contempt of court. Defendant cannot show that "but for" the omission of such language, the trial court would have reached a contrary result. Consequently, Defendant cannot establish that he was prejudiced and his argument on this issue is overruled.

V. Ineffective Assistance of Counsel

**[5]** Defendant's final argument on appeal is that he received ineffective assistance of counsel due to his trial counsel's failure to object to the criminal contempt proceedings. Defendant's argument is without merit.

> In order to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense.
>
>> Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*State v. Edgar*, ___ N.C. App. ___, ___, 777 S.E.2d 766, 770-71 (2015) (internal citations and quotation marks omitted) (quoting *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006)).

Because, for the reasons stated above, Defendant cannot show that the trial court erred procedurally in finding him in civil and criminal contempt of court, it logically follows that he cannot demonstrate that his trial counsel's failure to object to the proceedings affected the outcome. Therefore, he cannot successfully establish an ineffective assistance of counsel claim.

Conclusion

For the reasons stated above, we affirm the trial court's criminal contempt order.

AFFIRMED.

Judge ZACHARY concurs.

Judge ELMORE dissents in a separate opinion.

ELMORE, Judge, dissenting.

I respectfully disagree with the majority's conclusion that the trial court found defendant in both civil and criminal contempt for "distinctly separate and discrete conduct." Defendant's same conduct—failing to return company property in willful violation of its orders—underlies both contempt adjudications, in direct violation of our general statutes. Accordingly, I respectfully dissent.

Because " '[d]efendant alleges a violation of a statutory mandate, and '[a]lleged statutory errors are questions of law[,]' " *State v. Reeves*, 218 N.C. App. 570, 576, 721 S.E.2d 317, 322 (2012) (quoting *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011)), we employ *de novo* review of defendant's challenge. *Id.*

Chapter 5A of our general statutes grants a court the power to punish a party for certain conduct by finding him or her in contempt of court, which comes in two forms: criminal contempt, governed by Article 1, *see* N.C. Gen. Stat. §§ 5A-11 to -17 (2105), and civil contempt, governed by Article 2, *see* N.C. Gen. Stat. §§ 5A-21 to -25 (2105). Under Article 1, N.C. Gen. Stat. § 5A-11(a)(1)–(10) enumerates conduct constituting criminal contempt, including "[w]illful disobedience of . . . a court's . . . order." *Id.* § 5A-11(a)(3). Under Article 2, N.C. Gen. Stat. § 5A-21(a) describes conduct constituting civil contempt and provides, in pertinent part:

> (a) Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> > (1) The order remains in force;
> >
> > (2) The purpose of the order may still be served by compliance with the order;
> >
> > (2a) The noncompliance by the person to whom the order is directed is willful; and
> >
> > (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

Generally, a trial court imposes criminal contempt to " 'punish[ ] for acts already committed that have impeded the administration of justice,' " and civil contempt " 'to coerce disobedient defendants into complying with orders of court.' " *Ruth v. Ruth*, 158 N.C. App. 123, 126, 579 S.E.2d 909, 912 (2003) (quoting *Brower v. Brower*, 70 N.C. App. 131, 133, 318 S.E.2d 542, 544 (1984)). However, by statute, a court cannot punish a party twice by imposing both criminal and civil contempt for the same conduct. *Compare* N.C. Gen. Stat. § 5A-12(d) ("A person held in criminal contempt under this Article *shall not, for the same conduct*, be found in civil contempt under Article 2 of this Chapter, Civil Contempt." (emphasis added)), *with* N.C. Gen. Stat. § 5A-21(c) ("A person who is found in civil contempt under this Article *shall not, for the same conduct*, be found in criminal contempt under Article 1 of this Chapter." (emphasis added)). Yet the trial court here did just this when it found defendant in civil and criminal contempt based in large part upon the same conduct—his failing to return company property in willful violation of its TRO and preliminary injunction orders.

The relevant provisions of both orders are identical except for paragraph subheadings. The relevant paragraphs of the TRO provide:

> h. Defendant shall . . . take the following actions . . . as stated below:
>
> > . . . .
> >
> > v. That all company-issued credit cards will be turned in and will not be used until and unless authorized by the Managers.
>
> i. Defendant shall . . . tak[e] the following actions within 24 hours of the entry of this order:
>
> > i. . . .[R]eturn to Company Headquarters . . . any and all [company] property, including . . . the items listed below:
> >
> > > 1. All office and other equipment purchased by or for the use of the Companies, including computers, tablets, phones, drones, audiovisual equipment, etc.;
> > >
> > > 2. All hardcopy and electronic Company files;
> > >
> > > 3. Keys and lock combinations to access Company property and equipment, including the Shelby Headend, Kings Mountain Headend, Simulsat, all

> runs completed or in progress (such as Ballantyne, Wake Forest, etc.), and other assets;
>
> 4. All Company vehicles along with keys or fobs;
>
> 5. All checkbooks, credit cards, and debit cards; and
>
> 6. All account, login and password access information.
>
> . . . .
>
> iii. . . . [H]ave all mail currently being delivered to [defendant's] residential address or UPS or USPS boxes now be delivered to Company Headquarters[.]

After the contempt proceeding, the trial court entered an order finding defendant in both civil and criminal contempt simultaneously for his willful noncompliance with its orders. In the criminal contempt section of its order, the trial court made the following findings regarding defendant's conduct:

> a. Defendant failed to cause the Plaintiffs' mail to be delivered to Plaintiffs' headquarters . . . as required by paragraph (i)(iii) of the TRO and [an identical paragraph] of the Preliminary Injunction;
>
> b. *Defendant failed to deliver . . . equipment to Plaintiffs' headquarters* . . . including but not limited to at least two phone devices . . . as required by paragraph (i)(i)(1) of the TRO and [an identical paragraph] of the Preliminary Injunction;
>
> c. *Defendant failed to provide all account, login and password access information* . . . as required by paragraph (i)(i)(6) of the TRO and [an identical paragraph] of the Preliminary Injunction; and,
>
> d. *Defendant failed to relinquish the Plaintiffs' credit card and debit cards* as required by paragraphs (i)(i)(5) and (h)(v) of the TRO and [identical paragraphs] of the Preliminary Injunction.

(Emphasis added.) Based upon these findings, the trial court held defendant in criminal contempt for willful noncompliance with the TRO and preliminary injunction:

> At all times relevant to this proceeding Defendant had the ability to comply with these provisions of the TRO and Preliminary Injunction and has willfully failed to do so in criminal contempt of this Court as set forth in N.C.G.S. § 5A-11(a).

In the civil contempt section of its order, the trial court made the following findings regarding defendant's conduct:

> a. Defendant's instruction to third parties to break Plaintiffs' fiber optic cables and re-splicing them upon renewal of a contract as illustrated in Plaintiffs' Exhibit 12;
>
> b. Defendant's actions in establishing through the North Carolina Secretary of State an LLC known as RST Wireless without the Plaintiffs' knowledge and the engaging in both the purchase of equipment as well as exploration of utilizing Plaintiffs' existing networks in Wake Forest, North Carolina in order to provide wireless communication services; and,
>
> c. *Defendant's failure to return certain of Plaintiffs' equipment (as listed in Plaintiffs' Exhibit 12) as required by paragraphs (i)(i) of the TRO and (j)(i) of the Preliminary Injunction.*

(Emphasis added.) Based upon these findings, the trial court held defendant in civil contempt for willful noncompliance with the TRO and preliminary injunction:

> At all times relevant to this proceeding Defendant had the ability to comply with these provisions of the TRO and Preliminary Injunction and has willfully failed to do so in civil contempt of this Court as set forth in N.C.G.S. § 5A-21 . . . .

As shown, the trial court's order establishes that it found defendant in civil and criminal contempt for willful noncompliance with its orders based upon, in large part, defendant's same exact conduct—failing to return company property. Yet the trial court punished defendant twice by imposing both civil and criminal contempt sanctions. Although willful noncompliance with a court order may constitute *either* criminal contempt under section 5A-11(a)(3), or civil contempt under section 5A-21(a), a contemnor shall not be punished under *both* statutes based upon the same conduct. *See* N.C. Gen. Stat. §§ 5A-12(d), -21(c). Accordingly, I agree with defendant that, in violation of sections 5A-12(d)

and 5A-21(c), the trial court improperly found him in both criminal and civil contempt, and I would vacate the entire order.

The majority, however, relies on our decision in *Adams Creek Associates v. Davis*, 186 N.C. App. 512, 652 S.E.2d 677 (2007), to hold that the trial court here properly punished defendant twice by imposing both forms of contempt for "distinctly separate and discrete conduct." I disagree with the majority's expansive reading of our holding in *Adams Creek Assocs.* and its application of the reasoning in that case to support its holding in this case. The majority attaches significance to the fact in that case that the contempt orders were "based upon the defendants' trespass on the exact same piece of land," rather than the more relevant fact that the orders were based upon separate, contemptible acts.

In *Adams Creek Assocs.*, we affirmed a trial court's simultaneous civil and criminal contempt adjudications against two trespassers over the exact same piece of land only because the defendants committed independently contemptible acts: (1) willfully violating the court's orders by continuing to live and otherwise trespass on the property; and (2) displaying disparaging behavior during the contempt proceeding by testifying that they intended to continue trespassing regardless of court orders directing them otherwise. *Adams Creek Assocs.*, 186 N.C. App. at 527, 652 S.E.2d at 687. In that case, the defendants were "charged with contempt of court for their continued trespass on [particular] property following the entry of several court orders directing them not to trespass thereon," *id.*, and, after the contempt proceeding, the trial court entered two orders finding them in both civil and criminal contempt. *Id.* at 520, 652 S.E.2d at 683.

On appeal, we rejected the defendants' argument that the trial court erred by finding them in civil and criminal contempt for the same behavior because, in fact, the sanctions were based upon separate, contemptible conduct. *Id.* at 526–27, 652 S.E.2d at 686–87. We observed that, during the contempt proceeding, the defendants testified they "had in fact been living on the subject property or otherwise trespassing on it" and "would not follow future court orders directing them to vacate the property." *Id.* at 527, 652 S.E.2d at 687. Thus, we explained, the "defendants were found in civil contempt for *failing to comply with the court's [previous] order*, and were found in criminal contempt for their *testimony threatening to disobey future orders* of the court." *Id.* (emphasis added). Because the defendants "were found in civil and criminal contempt on the basis of different acts," we rejected the defendant's argument and affirmed the trial court's contempt adjudications. *Id.*

To be sure, although the *Adams Creek Assocs.* decision does not specify which criminal contempt ground enumerated in N.C. Gen. Stat. § 5A-11(a) applied to the defendants, we can glean insight from the *Adams Creek Assocs.* Court's discussion addressing the trial court's "misnomer" in finding the defendants in indirect, rather than direct, criminal contempt:

> In the instant case, defendants testified in the trial court's presence, constituting direct criminal contempt. However, the trial court mistakenly held them in indirect criminal contempt:
>
>> The testimony of the Defendants stating that they are not going to obey the orders of the court is disrespectful and disparages the respect due to the court and its orders.

*Id.* at 528, 652 S.E.2d at 687; *see also* N.C. Gen. Stat. § 5A-11(a)(2) ("Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority."). Based on this discussion, it is apparent that the defendants in *Adams Creek Assocs.* were being held in criminal contempt not for willful noncompliance with a court order, as here, but for their disparaging testimony. Thus, the contempt adjudications were based upon two independently contemptible acts.

Yet the majority relies on *Adams Creek Assocs.* to support its conclusion that defendant here was found in criminal and civil contempt for "distinctly separate and discrete conduct based on a partially overlapping nucleus of facts." In reaching this conclusion, the majority points out that "both the civil and criminal contempt orders were based upon the defendants' trespass on the exact same piece of land" and reasons that the defendants' conduct differed in that one act was "the[ir] disobedience of a past . . . order" and another act was "th[eir] intention to continue to disobey the court's orders." Thus, in applying *Adams Creek Assocs.*, the majority concludes:

> Here, it is readily apparent that, in accord with *Adams Creek Assocs.*, the trial court found Defendant in civil *contempt based on his continued conduct in violation of the TRO and preliminary injunction* in attempting to frustrate RST's business interests while simultaneously attempting to further his own at RST's expense, and found him in criminal contempt *based upon his past conduct, that is, his refusal to obey the trial court's TRO and*

> *preliminary injunction* in failing to adhere to their terms including the return of various company assets of RST.

(Emphasis added.) I disagree with this expansive reading of *Adams Creek Assocs*. *Adams Creek Assocs.* held that a contemnor simultaneously may be found in civil and criminal contempt at the same proceeding, provided he or she is punished for different conduct. In my view, the emphasis should not be that both orders were "based upon the defendants' trespass on the exact same piece of land," but that both orders were based upon independently contemptible conduct—willful disobedience with a court order and disparaging testimony threatening to disobey future court orders.

Here, unlike the defendants in *Adams Creek Assocs.*, defendant neither testified that he intended to retain plaintiffs' property nor that he would disobey future orders of the court. Unlike in *Adams Creek Assocs.*, the record here does not reveal two forms of contemptible conduct. Rather, the trial court's order indicates that it imposed both forms of contempt against defendant for willful noncompliance with its orders, basing its decision, in large part, upon defendant's failure to return company property, *see* N.C. Gen. Stat. § 5A-11(a)(3) ("Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution."), which I believe runs afoul of our general statutes.

Furthermore, the majority's holding effectively nullifies the statutory mandates that a party "shall not, for the same conduct" be punished for both civil and criminal contempt, *see* N.C. Gen. Stat. §§ 5A-12(d), -21(c), as every party charged with willful noncompliance of a court order whose only conduct was leaving uncorrected a single directive in that order would nonetheless be subject to both criminal and civil contempt, on the basis that past and continued violations of that order constitute separate, contemptible conduct.

Because the trial court here punished defendant twice by imposing both civil and criminal contempt sanctions against him based, in large part, upon the same exact conduct—violating its orders by failing to return company property—I believe the trial court violated the statutory mandates prohibiting it from finding a party in both forms of contempt for the same conduct. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
JOSHUA ADAM STROESSENREUTHER

No. COA16-151

Filed 6 December 2016

**1. Satellite-Based Monitoring—facial challenge to statute rejected—Fourth Amendment**

Defendant's facial challenge to the satellite-based monitoring statute was rejected. Although the statute does not expressly authorize trial courts to consider the reasonableness of the monitoring under the Fourth Amendment, trial courts are free to address this issue and hold a hearing if necessary when defendants assert it.

**2. Satellite-Based Monitoring—as-applied challenge to statute—Fourth Amendment—reasonableness inquiry**

The satellite-based monitoring program was unconstitutional as applied to defendant. Under *Grady*, the trial court was required to consider the reasonableness of the satellite-based monitoring when defendant challenged the monitoring on Fourth Amendment grounds. The imposition of satellite-based monitoring was vacated and the case was remanded to the trial court to conduct the necessary reasonableness inquiry.

Appeal by defendant from order entered 29 October 2015 by Judge John E. Nobles, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 10 August 2016.

*Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.*

*The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant.*

DIETZ, Judge.

Defendant Joshua Stroessenreuther appeals from the trial court's order imposing satellite-based monitoring. Relying on the U.S. Supreme Court's recent decision in *Grady v. North Carolina*, 135 S. Ct. 1368 (2015), which held that satellite-based monitoring implicates the Fourth Amendment, Stroessenreuther argues that our State's satellite-based

monitoring laws are facially unconstitutional or, alternatively, unconstitutional as applied to him.

We reject Stroessenreuther's facial challenge. That challenge is premised on the notion that, because the satellite-based monitoring statute does not expressly authorize trial courts to consider the reasonableness of the monitoring under the Fourth Amendment, the law is facially unconstitutional. But the statute neither permits nor prohibits trial courts from addressing this constitutional argument—it is simply silent. As a result, trial courts are free to address this Fourth Amendment issue, and hold a hearing if necessary, when defendants assert it. Indeed, this Court has issued several recent decisions discussing the procedures trial courts should use when a Fourth Amendment argument is raised under *Grady*. These decisions confirm that trial courts can (and must) consider a Fourth Amendment challenge to satellite-based monitoring when a defendant raises it. Accordingly, Stroessenreuther's facial challenge is meritless.

The State concedes that Stroessenreuther's as-applied challenge is meritorious, and we agree. Under *Grady*, the trial court was required to consider the reasonableness of the satellite-based monitoring when Stroessenreuther challenged that monitoring on Fourth Amendment grounds. The trial court did not conduct that inquiry in this case, and we must therefore vacate the imposition of satellite-based monitoring. We remand this case for the trial court to conduct the necessary reasonableness inquiry described in our decisions in *State v. Blue*, __ N.C. App. __, __, 783 S.E.2d 524, 527 (2016) and *State v. Morris*, __ N.C. App. __, __, 783 S.E.2d 528, 530 (2016).

**Facts and Procedural History**

On 29 October 2015, Defendant Joshua Stroessenreuther entered an *Alford* plea to one count of indecent liberties with a child and one count of sex offense with a child as an adult offender. Stroessenreuther stipulated to a prior conviction for sex offense with a child as an adult offender. The trial court sentenced him to 300 to 420 months of imprisonment and ordered lifetime sex offender registration.

At the sentencing hearing, the State also requested lifetime satellite-based monitoring because Stroessenreuther had been convicted of a reportable offense under N.C. Gen. Stat. § 14–208.6 and qualified as a recidivist based on his prior conviction.

Stroessenreuther argued that "[t]he satellite-based monitoring statute violates the Federal and State Constitutions based both on their face

and as applied to this Defendant" because "[t]he imposition of satellite-based monitoring violates the defendant's right to be free from unreasonable searches and seizures." He relied on the U.S. Supreme Court's recent ruling in *Grady*. In *Grady*, the Supreme Court held that North Carolina's satellite-based monitoring program implicates the Fourth Amendment. 135 S. Ct. at 1371.

The State responded that there was no need to address the reasonableness of the monitoring under the Fourth Amendment because imposition of lifetime monitoring was required by the applicable statute. The trial court responded "I understand" and entered an order imposing lifetime satellite-based monitoring without addressing Stroessenreuther's Fourth Amendment argument. Stroessenreuther timely appealed.

## Analysis

### I. Facial Challenge

**[1]** Stroessenreuther first argues that our State's satellite-based monitoring statute is facially unconstitutional because it requires the trial court to impose satellite-based monitoring without permitting the trial court to consider whether that monitoring is reasonable under the Fourth Amendment. This, Stroessenreuther argues, violates the Supreme Court's holding in *Grady*, which held that satellite-based monitoring implicates the Fourth Amendment. As explained below, we reject this facial challenge because trial courts are capable of addressing any Fourth Amendment concerns raised by defendants before imposing satellite-based monitoring.[1]

"An individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the act would be valid." *State v. Whiteley*, 172 N.C. App. 772, 778, 616 S.E.2d 576, 580 (2005). "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).

1. Section 1–267.1(a1) of our General Statutes provides that "any facial challenge to the validity of an act of the General Assembly shall be transferred . . . to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County." But subsection (d) of the statute provides that this rule "applies only to civil proceedings" and "[n]othing in this section shall be deemed to apply to criminal proceedings." N.C. Gen. Stat. § 1–267.1(d). Although imposition of satellite-based monitoring is civil, not criminal, in nature, this satellite-based monitoring issue arose during a criminal sentencing proceeding. We interpret Section 1–267.1 to permit a criminal defendant to assert this type of constitutional challenge before a single trial judge during sentencing without having to transfer the issue to a three-judge panel.

Stroessenreuther contends that, in our State's satellite-based monitoring laws, "there is no opportunity provided for the state to present evidence to meet its burden of proving that the imposition of [satellite-based monitoring] is reasonable under the Fourth Amendment" and "no provision allowing the trial court to consider the reasonableness of [satellite-based monitoring] under the Fourth Amendment."

We agree with Stroessenreuther that the satellite-based monitoring statute does not expressly set out a procedure for hearing a Fourth Amendment argument challenging the reasonableness of the monitoring. *See* N.C. Gen. Stat. § 14–208.40A. But the statute also does not *prohibit* a trial court from hearing and considering that Fourth Amendment argument. This is a critical distinction. If the statute precluded trial courts from considering the reasonableness of the monitoring, the statute would be unconstitutional on its face. *Grady*, 135 S. Ct. at 1371. But merely lacking an express procedure for evaluating the reasonableness of the monitoring does not render the statute facially unconstitutional. There are countless examples of courts considering constitutional arguments despite no formal process for doing so. *See, e.g.*, *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015); *State v. Davis*, 96 N.C. App. 545, 386 S.E.2d 743 (1989).

Indeed, this Court has vacated and remanded several satellite-based monitoring cases to permit trial courts to engage in the proper analysis required by *Grady*. *See Blue*, __ N.C. App. at __, 783 S.E.2d at 527; *Morris*, __ N.C. App. at __, 783 S.E.2d at 530; *State v. Collins*, __ N.C. App. __, __, 783 S.E.2d 9, 16 (2016). These cases illustrate that trial courts can, and must, engage in that reasonableness inquiry when the defendant asserts a Fourth Amendment challenge, regardless of whether the statute sets out an express procedure for doing so. As a result, Stroessenreuther's facial challenge to our State's satellite-based monitoring statute is meritless.

## II. As-Applied Challenge

**[2]** Stroessenreuther next argues that the satellite-based monitoring program is unconstitutional as applied to him because the trial court imposed that monitoring without first considering whether it was reasonable under the Fourth Amendment. The State concedes that, in light of *Grady*, the trial court erred by failing to engage in a reasonableness inquiry once Stroessenreuther asserted his Fourth Amendment claim. We agree. As in *Blue* and *Morris*, we vacate the order imposing satellite-based monitoring and remand for a new hearing in which the trial court can engage in the analysis outlined by this Court in those cases. *See*

*Morris*, __ N.C. App. at __, 783 S.E.2d at 530; *Blue*, __ N.C. App. at __, 783 S.E.2d at 527.

## Conclusion

We vacate the trial court's order imposing satellite-based monitoring and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges ELMORE and DAVIS concur.

---

STATE OF NORTH CAROLINA
v.
CHRISTOPHER GLENN TURNER

No. COA16-656

Filed 6 December 2016

**Statutes of Limitation and Repose—driving while impaired—prosecution within two years**

The trial court did not err by dismissing the charge of driving while impaired. The express language of N.C.G.S. § 15-1 required the State to prosecute defendant's misdemeanor charge within two years. Because the State failed to take any action in that time, prosecution was barred by the statute of limitations.

Appeal by the State from order entered 15 January 2016 by Judge Michael D. Duncan in Caldwell County Superior Court. Heard in the Court of Appeals 18 October 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel L. Spiegel, for defendant-appellee.*

CALABRIA, Judge.

The express language of N.C. Gen. Stat. § 15-1 required the State to prosecute defendant's misdemeanor charge within two years. Because the State failed to take any action in that time, prosecution was barred

by the statute of limitations, and the trial court did not err in dismissing the charge.

## I. Factual and Procedural Background

On 7 August 2012, Christopher Glenn Turner ("defendant") received a citation for driving while impaired. Defendant was arrested and brought before a magistrate, who issued a magistrate's order. Defendant was never charged via indictment, presentment, or warrant.

On 26 November 2014, defendant moved to dismiss the charge, pursuant to N.C. Gen. Stat. §§ 15-1, 15A-953, and 15A-954, alleging the expiration of the statute of limitations. On 3 December 2014, defendant moved that he be charged in a new pleading, pursuant to N.C. Gen. Stat. § 15A-922(c). Judge Amy. S. Walker ("Judge Walker"), a District Court Judge in Caldwell County, held a hearing in response to defendant's motions. On 22 April 2015, Judge Walker entered a preliminary indication, holding that the statute of limitations barred prosecution of defendant. The State appealed to superior court.

On 1 October 2015, the superior court affirmed Judge Walker's preliminary indication, citing the explicit language of N.C. Gen. Stat. § 15-1, and our Supreme Court's decision in *State v. Underwood*, 244 N.C. 68, 92 S.E.2d 461 (1956). Thereafter, Judge Walker issued a final order of dismissal. The State appealed this dismissal, and on 15 January 2016, the Superior Court of Caldwell County entered an order affirming the dismissal.

The State appeals.

## II. Standard of Review

> " 'Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court. In conducting this review, we are guided by the following principles of statutory construction.' " *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009) (quoting *In Re Proposed Assessments v. Jefferson-Pilot*, 161 N.C. App. 558, 559-60, 589 S.E.2d 179, 180-81 (2003)). "Where the language of a statute is clear and unambiguous there is no room for judicial construction and the courts must give it its plain and definite meaning, and the courts are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Id.* (internal quotation marks and citations omitted).

*State v. Williams*, 218 N.C. App. 450, 451, 725 S.E.2d 7, 8-9 (2012).

"When reviewing the trial court's grant of a criminal defendant's motion to dismiss . . . [w]e review the trial court's conclusions of law *de novo*." *State v. Price*, 233 N.C. App. 386, 389, 757 S.E.2d 309, 312 (citations omitted), *writ denied*, *review denied*, *appeal dismissed*, 367 N.C. 508, 759 S.E.2d 90 (2014).

## III. Statute of Limitations

In its sole argument on appeal, the State contends that the trial court erred in dismissing defendant's driving while impaired charge because the citation tolled the statute of limitations. We disagree.

The General Statutes provide a statute of limitations with respect to misdemeanors such as the one at issue:

> The crimes of deceit and malicious mischief, and the crime of petit larceny where the value of the property does not exceed five dollars ($5.00), and all misdemeanors except malicious misdemeanors, *shall be presented or found by the grand jury within two years* after the commission of the same, and not afterwards: Provided, that if any indictment found within that time shall be defective, so that no judgment can be given thereon, another prosecution may be instituted for the same offense, within one year after the first shall have been abandoned by the State.

N.C. Gen. Stat. § 15-1 (2015) (emphasis added). By its explicit language, this statute establishes a two-year statute of limitations on the misdemeanors listed.

On appeal, however, the State contends that, pursuant to N.C. Gen. Stat. §§ 15A-921 and 15A-922, a citation constitutes a criminal pleading. Specifically, a "citation, . . . or magistrate's order serves as the pleading of the State for a misdemeanor prosecuted in the district court[.]" N.C. Gen. Stat. § 15A-922(a) (2015). The State contends that this tolled the statute of limitations.

The State cites several cases in support of its position. Primarily, the State relies upon our Supreme Court's decision in *State v. Underwood*, 244 N.C. 68, 92 S.E.2d 461 (1956). The State contends that *Underwood* stands for the principle that, upon the issuance of a criminal pleading, the statute of limitations is tolled. However, we hold that the State's reliance is misplaced.

*Underwood* is a successor case to *State v. Hedden*, 187 N.C. 803, 123 S.E. 65 (1924). In *Hedden*, the defendant was arrested and charged

with abandonment on 11 September 1921; a magistrate's warrant issued 25 October 1922, and an indictment issued on 1 November 1923, more than two years after the defendant's arrest. The defendant was subsequently tried, and his motion to dismiss was denied. On appeal, our Supreme Court held:

> There is no saving clause in this statute[1] as to the effect of preliminary warrants before a justice of the peace or other committing magistrate, and in our opinion on the facts of this record the law must be construed and applied as written. There must be a presentment or indictment within two years from the time of the offense committed and not afterwards.

*Id.* at 805, 123 S.E. at 65. The Supreme Court held that the trial court erred in denying the defendant's motion to dismiss, and reversed.

More than thirty years later, *Underwood* revisited *Hedden*. In *Underwood*, the defendant was tried upon a warrant, which was issued on 29 June 1953. He appealed the matter to superior court, and raised the issue of the statute of limitations, moving to dismiss. This motion was denied, and the defendant appealed. *Underwood*, 244 N.C. at 69, 92 S.E.2d at 461-62. Our Supreme Court distinguished *Underwood* from *Hedden*, noting that *Hedden* "involved an entirely different factual situation from that involved in the present appeal." *Id.* at 70, 92 S.E.2d at 463. The Court then went on to hold that, "[i]n criminal cases where an indictment or presentment is required, the date on which the indictment or presentment has been brought or found by the grand jury marks the beginning of the criminal proceeding and arrests the statute of limitations." *Id.* As a result, the Court found no error with the trial court's denial of the defendant's motion to dismiss.

In the roughly sixty years since *Underwood* was decided, that case has only been held to apply to indictments, presentments, and warrants; never once has it been applied to citations or other forms of criminal pleading. *See State v. Hundley*, 272 N.C. 491, 493, 158 S.E.2d 582, 583-84 (1968) (a warrant tolls the statute of limitations); *State v. Gamez*, 228 N.C. App. 329, 332, 745 S.E.2d 876, 878 (2013) (an indictment or presentment tolls the statute of limitations); *State v. Taylor*, 212 N.C. App. 238, 249-50, 713 S.E.2d 82, 90 (2011) (an indictment, presentment, or warrant

---

1. The statute in question was C.S. § 4512, a predecessor to N.C. Gen. Stat. § 15-1, which had substantially similar language.

tolls the statute of limitations); *State v. Whittle*, 118 N.C. App. 130, 134, 454 S.E.2d 688, 690 (1995) (an indictment or presentment tolls the statute of limitations).

The State's arguments to the contrary notwithstanding, the language of N.C. Gen. Stat. § 15-1 is explicit: misdemeanors, such as the matter in the instant case, "shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards[.]" N.C. Gen. Stat. § 15-1. "Where the language of a statute is clear and unambiguous there is no room for judicial construction and the courts must give it its plain and definite meaning, and the courts are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Williams*, 218 N.C. App. at 451, 725 S.E.2d at 8-9 (citations and quotations omitted). Further, *Hedden* explicitly held that "[t]here is no saving clause in this statute as to the effect of preliminary warrants before a justice of the peace or other committing magistrate, and in our opinion on the facts of this record the law must be construed and applied as written." *Hedden*, 187 N.C. at 805, 123 S.E. at 65. And despite the holding in *Underwood*, we note that that case was specifically limited to "those misdemeanor cases in which the defendant may be tried in the Superior Court on a warrant issued by an inferior court and without an indictment." *Underwood*, 244 N.C. at 69, 92 S.E.2d at 462.

We hold that *Underwood*, in which our Supreme Court considered whether a superior court could try a defendant based on a warrant issued by an inferior court, is distinguishable from the instant case. We further hold that the explicit language of N.C. Gen. Stat. § 15-1, as interpreted in *Hedden*, is binding upon this Court. The issuance of a citation did not toll the statute of limitations pursuant to N.C. Gen. Stat. § 15-1; the State had two years to either commence the prosecution of its case, or to issue a warrant, indictment, or presentment which would toll the statute of limitations. Because the State failed to do so, the statute of limitations expired, and the State was barred from prosecuting this action. The trial court did not err in dismissing the charge.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
JOSHUA RYAN WILSON

No. COA16-243

Filed 6 December 2016

**Search and Seizure—uniformed officer by marked car—gesture to stop—no seizure**

Where a uniformed police officer standing outside of his marked patrol car waved both of his arms above his head to gesture defendant to stop his vehicle, and the officer smelled alcohol coming from inside the vehicle when defendant rolled down his window, the trial court did not err by concluding that defendant was not seized and denying his motion to suppress. Considering the totality of the circumstances, the officer's hand motions were not so authoritative that a reasonable person would not have felt free to leave.

Judge DILLON dissenting.

Appeal by Defendant from judgment dated 24 September 2015 by Judge Michael O'Foghludha in Alamance County Superior Court. Heard in the Court of Appeals 23 August 2016.

*Attorney General Roy Cooper, by Associate Attorney General Marie H. Evitt, for the State.*

*Leslie Rawls for Defendant.*

STEPHENS, Judge.

Defendant Joshua Ryan Wilson appeals from the judgment entered on his guilty plea for impaired driving. Wilson argues that the trial court erred by failing to suppress evidence obtained during his seizure by a police officer. Because we conclude Wilson was not seized under the Fourth Amendment, we find no error in the court's refusal to suppress the evidence obtained from the police officer's encounter with Wilson.

*Factual and Procedural Background*

The evidence considered by the trial court pursuant to Wilson's motion to suppress tended to show the following:

On 25 September 2013, Officer Blake Johnson of the Burlington Police Department went to a residence at 402 Brooklyn Street to find a man who had outstanding warrants for his arrest. Officer Johnson was acting on an anonymous tip to the Burlington Police Department that the wanted individual would be at the residence. Officer Johnson parked his car on Brooklyn Street across from the residence and got out of the vehicle. He walked toward the residence.

Officer Johnson observed a pickup truck leaving the residence at 402 Brooklyn Street. Officer Johnson was in the road, but was not blocking it. The truck, driven by Wilson, moved toward Officer Johnson from a cross street adjacent to the residence. Officer Johnson waved his hands back and forth just above shoulder level to tell Wilson to stop the vehicle. The officer's intention was to question Wilson to see if he knew anything about the man with the outstanding warrants. Officer Johnson had no suspicion that Wilson was the man he was looking for nor did he observe any illegal behavior by Wilson. Officer Johnson was in uniform, but no weapon was drawn, neither police car was blocking the road, and the blue lights and sirens were not activated.

Wilson stopped the truck with the driver's side window next to Officer Johnson. Wilson was alone in the vehicle. Officer Johnson "smelled the odor of alcohol coming from inside the vehicle" almost immediately. He asked Wilson about his alcohol consumption. Wilson admitted that he had been drinking, but said that he could not remember how many drinks he had consumed.

Officer Johnson arrested Wilson for driving while subject to an impairing substance. Wilson pled guilty in Alamance County District Court on 4 August 2015, but appealed to the Superior Court. In Superior Court, Wilson moved to suppress the evidence resulting from his encounter with Officer Johnson. A hearing was held on 15 September 2015 before Judge Michael O'Foghludha, who denied Wilson's motion to suppress. Wilson subsequently pled guilty on 24 September 2015, reserving the right to appeal the order denying suppression of the evidence. Wilson gave notice of appeal the same day in open court.

*Discussion*

On appeal, Wilson argues that the trial court erred in denying his motion to suppress the evidence obtained from his encounter with Officer Johnson, because Officer Johnson unconstitutionally seized Wilson without reasonable suspicion or probable cause. Because the trial court's findings of fact are supported by competent evidence, and the findings support its conclusions of law that Wilson was not seized

under the Fourth Amendment, we find no error in the trial court's refusal to suppress the evidence obtained by Officer Johnson.

*1. 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). Unchallenged findings of fact are presumed to be supported by competent evidence. *See State v. Pickard*, 178 N.C. App. 330, 334, 631 S.E.2d 203, 206 (2006) (citations omitted). "[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (internal citations omitted). Findings of fact which are mislabeled as conclusions of law may be re-classified by the appellate court and subjected to the appropriate standard of review. *State v. Hopper*, 205 N.C. App. 175, 179, 695 S.E.2d 801, 805 (2010). "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).

*2. No Fourth Amendment seizure*

Wilson first argues that the trial court erred in finding as fact that a reasonable person would not have felt compelled to stop to talk to Officer Johnson. Although labelled as a finding of fact by the trial court, "whether a reasonable person would feel free to decline the officer['s] request[]" requires a legal analysis, *Florida v. Bostick*, 501 U.S. 429, 436, 115 L. Ed. 2d 389, 400 (1991), and the exercise of judgment. Thus, we treat the trial court's finding that a reasonable person would not have felt compelled to stop as a conclusion of law. Wilson does not challenge any other findings of fact. Therefore, the remaining findings of the trial court are presumed to be supported by competent evidence.

Wilson also argues that the trial court erred in concluding as a matter of law that he was not seized under the Fourth Amendment. Whether Wilson was seized turns on the same analysis as whether a reasonable person would have felt compelled to stop. *See id.*, 501 U.S. at 436, 115 L. Ed. 2d at 400. Therefore, we address these arguments together, and hold that each conclusion is supported by the trial court's findings of fact.

The Fourth Amendment to the United States Constitution guarantees to individuals the right to be free from unreasonable searches

and seizures. U.S. Const. amend. IV. "[T]he crucial test [to determine if a person is seized] is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " *Id.*, 501 U.S. at 437, 115 L. Ed. 2d at 400 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569, 100 L. Ed. 2d 565, 569 (1988)).

Wilson cites *Bostick* for the rule that a person is seized when his freedom of movement is terminated or restrained "by means of physical force or show of authority." 501 U.S. at 434, 115 L. Ed. 2d at 398 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 20 L. Ed. 2d 889, 905 n. 16 (1968)). However, Wilson omits the context in which the Court made this statement. The Court cited *Terry* while making the point that a "seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Id.* Rather, as the Court stated in *Terry*, a seizure occurs "[*o*]*nly* when the officer, by means of physical force or show of authority, has in some way *restrained the liberty of a citizen*." *Id.* (quoting *Terry*, 392 U.S. at 19 n.16, 20 L. Ed. 2d at 905 n.16) (emphasis added).

In *Bostick*, two police officers with visible badges boarded a bus and questioned the defendant "without articulable suspicion." *Id.* at 431, 115 L. Ed. 2d at 396. One officer carried a gun in a zipper pouch, but never brandished the weapon. *Id.* at 432, 115 L. Ed. 2d at 397. The officers asked the defendant for consent to search his luggage, which was given. *Id.* at 432, 115 L. Ed. 2d at 396-97. The defendant argued that he was unconstitutionally seized by the officers on the bus because he did not feel free to leave the encounter. *Id.* at 435, 115 L. Ed. 2d at 399. The Court reasoned that the restriction of the defendant's movements happened not because of the police, but because he chose to get on a bus. *Id.* at 436, 115 L. Ed. 2d at 399. This restriction, therefore, and the defendant's feeling that he could not leave the bus, did not necessarily render the encounter non-consensual. *Id.* The Court ultimately remanded the case to the Florida Supreme Court to analyze the voluntariness of the encounter based on the totality of the circumstances. *Id.* at 439-40, 115 L. Ed. 2d at 402.

Wilson also cites *United States v. Mendenhall* for the reasonable person test adopted by the Supreme Court in which a person is seized "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980). However, immediately after that holding, the Supreme Court explained:

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

*Id.* at 554-55, 64 L. Ed. 2d at 509 (internal citations omitted).

Finally, Wilson cites *Chesternut* for the proposition that Officer Johnson's hand motions were tantamount to a command to stop, and were thus a display of authority resulting in Wilson's seizure. Wilson mischaracterizes the holding of the Supreme Court. In *Chesternut*, the Supreme Court held that the defendant was not seized when police officers in a marked car followed him as he ran away from the car. 486 U.S. at 574-75, 100 L. Ed. 2d at 572-73. Rather than list behaviors that would constitute a seizure, in analyzing whether a reasonable person would have interpreted the police conduct as an attempt to restrict his movement, the Court stated, "The record does not reflect that the police activated a siren or flashers; or that they commanded respondent to halt, or displayed any weapons; or that they operated the car in an aggressive manner to block respondent's course or otherwise control the direction or speed of his movement." *Id.* at 575, 100 L. Ed. 2d at 573. The Court did not indicate that any one of these behaviors would constitute an authoritative display resulting in a Fourth Amendment seizure. To the contrary, the Court applied the test enumerated in *Mendenhall*, which requires evaluation of all the facts and circumstances surrounding the encounter. *Id.* at 573, 100 L. Ed. 2d at 571-72. In doing so, it concluded that the "presence of a police car driving parallel to a running pedestrian," while intimidating, was not sufficient on its own to constitute a seizure. *Id.* at 575, 100 L. Ed. 2d at 573.

Unlike the officers in *Bostick*, Officer Johnson did not approach Wilson in a confined space nor did Wilson see his weapon. Wilson's movement was not restricted the way a passenger on a bus would be restricted with a police officer standing above him. To the contrary, the fact that Wilson was in a truck while Officer Johnson was on foot and not blocking the road indicates that Wilson's movement was not restricted. Wilson's encounter was thus more voluntary than that of the defendant in *Bostick*, whose encounter on the bus was held to be consensual.

*Bostick v. State*, 593 So. 2d 494, 495 (Fla. 1992) (per curiam), *on remand from* 501 U.S. 429, 115 L. Ed. 2d 389.

Further, none of the examples illustrated by the Court in *Mendenhall* of circumstances indicating a seizure are present in this case. The trial court found that Officer Johnson was alone on the scene, he did not draw his weapon, and his lights and sirens were off. The officer also did not touch Wilson or use any language or tone which would indicate that compliance with his request would be compelled.

The facts of this case are more similar to those in *Chesternut*, where there was no evidence that the officers used lights and sirens, displayed a weapon, or blocked the defendant's movement with the patrol car. While Wilson argues that Officer Johnson's arm motions were tantamount to a command to stop, the motions occurred without any other display of police authority, such as lights, sirens, or a weapon, and while Wilson had the ability to continue driving on the road in front of him. Despite Wilson's argument that Officer Johnson at least partially blocked the road, the trial court made no finding that the road was blocked. To the contrary, the court found that "[t]here was no roadblock in place, and Officer Johnson's patrol car was not blocking traffic." Further, the presence of a single police officer waving his hands in the road is a less authoritative display than a patrol car driving parallel to a pedestrian, which was held insufficient to constitute a seizure.

Wilson argues that his case is distinguishable from North Carolina precedent based on the fact that Officer Johnson signaled to Wilson to stop rather than approaching the moving vehicle. Citing two cases, *State v. Farmer*, 333 N.C. 172, 424 S.E.2d 120 (1993), and *State v. Veal*, 234 N.C. App. 570, 760 S.E.2d 43 (2014), Wilson argues that Officer's Johnson's motions were a "directive" and a "summons" rather than a request.

In *Farmer*, two police officers in a car passed the defendant, who was walking on the side of the road. 333 N.C. at 180, 424 S.E.2d at 125. Because he matched the description of the person they were on their way to question, the officers backed up their car and parked about twenty feet in front of the defendant. *Id.* at 180, 424 S.E.2d at 125. The officers exited their vehicle and approached the defendant to question him. *Id.* After some questioning, the officers decided to call the local sheriff's department, and asked the defendant if he would wait in the police car. *Id.* at 182, 424 S.E.2d at 126. One officer opened the door for the defendant, who entered the vehicle without being touched. *Id.* The door to the vehicle was left open. *Id.* at 182-83, 424 S.E.2d at 126. While the defendant was in the vehicle, the officer asked him for biographical

information and subsequently why he had lied about his name. *Id.* at 183, 424 S.E.2d at 127. The defendant argued that he was unconstitutionally seized during the conversations on the street and in the car. *Id.* at 179, 424 S.E.2d at 124. While the North Carolina Supreme Court noted that one of the factors in its voluntariness analysis was that the officers approached the defendant rather than summoning him, the Court analyzed the totality of the circumstances, as dictated by the test set out in *Mendenhall*. *Id.* at 187-88, 424 S.E.2d at 129. The other factors the Court noted were that the encounter was on a public street, the officers did not wear uniforms or display weapons, and they requested but did not demand information. *Id.* at 188, 424 S.E.2d at 129. Based on all of these factors, the Court held that the defendant was not seized either during the initial questioning on the street or during questioning in the police vehicle, because he had no objective reason to believe he was not free to leave. *Id.* at 188, 424 S.E.2d at 129-30. Nothing in the Court's analysis indicates that a request for the defendant to stop and speak with the officers would be a determinative factor indicating a seizure. Further, Officer Johnson's hand motions were a less authoritative display than questioning a defendant inside of a police vehicle.

In *Veal*, an officer parked his car in a gas station parking lot and approached the defendant's stopped vehicle on foot. 234 N.C. App. at 571-72, 760 S.E.2d at 44. The officer asked to speak with the defendant. *Id.* at 571, 760 S.E.2d at 44. During the conversation, the officer smelled alcohol and noticed signs of intoxication. *Id.* The officer proceeded to have the defendant perform sobriety tests, and then placed him under arrest for driving while impaired. *Id.* The defendant argued that he was unconstitutionally seized when the officer questioned him at his vehicle. *Id.* at 573, 760 S.E.2d at 46. Applying the totality of the circumstances test as set forth in *Chesternut* and applied in *Bostick*, this Court held that the defendant was not seized. *Id.* at 575-76, 760 S.E.2d at 47. In reaching this conclusion, the Court noted that the officer did not park behind the defendant's car, activate his blue lights, or speak in a threatening tone. *Id.* at 575, 760 S.E.2d at 47. The Court did not consider the factor of approaching the vehicle as opposed to any other method of initiating conversation. However, all of the factors that the court did take into account in holding that the defendant was not seized are present in this case.

Finally, Wilson argues that he was compelled to stop by North Carolina traffic law, which obligated him to "comply with any lawful order or direction of any law-enforcement officer or traffic-control officer . . . which order or direction related to the control of traffic." N.C.

Gen. Stat. § 20-114.1(a) (2015). We disagree. Officer Johnson's hand motion was not related to the control of traffic nor were there any circumstances which would indicate to a reasonable person that Officer Johnson was acting as a traffic control officer. The trial court found that there was no roadblock and no blue lights were activated. Further, there was no evidence of any cones, construction, a visible accident, or any other indication that Officer's Johnson's motions were "related to the control of traffic." Thus, this is not a factor which would indicate to a reasonable person that he was not free to leave the encounter.

Considering the totality of the circumstances, Officer Johnson's hand motions were not so authoritative or coercive that a reasonable person would not have felt free to leave. This holding is in line with established North Carolina precedent in cases in which no lights or sirens were used, no weapon was brandished, no language or behavior was used indicating compliance was mandatory, and the defendant's movement was not blocked. *See Veal*, 234 N.C. App. at 575, 760 S.E.2d at 47; *State v. Williams*, 201 N.C. App. 566, 571-72, 686 S.E.2d 905, 909 (holding that the defendant was not seized when an officer parked his vehicle across the street without blocking the defendant's egress, did not brandish a weapon, did not activate the blue lights or sirens, questioned the defendant, and asked for consent to search the vehicle without using any language or behavior that would indicate the defendant was not free to leave), *disc. review denied*, 363 N.C. 859, 695 S.E.2d 450 (2009); *State v. Isenhour*, 194 N.C. App. 539, 544, 670 S.E.2d 264, 268 (2008) (holding that the defendant was not seized when two uniformed officers parked their marked car eight feet from the defendant's vehicle, approached the vehicle and questioned the defendant, but did not block the defendant from leaving, use threatening language, brandish a weapon, or turn on the lights or sirens). The trial court's findings therefore support its conclusions of law that Wilson was not seized under the Fourth Amendment and that a reasonable person would have believed he was free to leave when Officer Johnson waved his arms to signal Wilson to stop. The order of the trial court is

AFFIRMED.

Judge BRYANT concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

I believe that Defendant's encounter with the police officer was a Fourth Amendment seizure. However, I believe that the matter should be remanded for more findings on the issue of whether the seizure was constitutionally reasonable. Therefore, my vote is to vacate the order denying Plaintiff's motion to suppress and to remand the matter to the trial court for additional findings regarding the reasonableness of the seizure, in order to balance the public interest served by the stop with Defendant's right to be free from arbitrary interference by law enforcement officers. *Brown v. Texas*, 443 U.S. 47, 50 (1979).

A. The encounter was a seizure.

The trial court found as follows: A uniformed police officer arrived in a neighborhood in his marked patrol car to serve arrest warrants on the occupant of a particular house. While the officer was standing outside his car near the house, he saw Defendant approaching in a vehicle, whereupon he waved both of his arms above his head, gesturing Defendant to stop his vehicle. The officer's reason for stopping Defendant was to gather "intel" about the house and the person named in the arrest warrants from someone he thought might live nearby. However, once Defendant stopped his vehicle, the officer detected an odor of alcohol on Defendant's breath.

I believe that this encounter was a Fourth Amendment seizure. A seizure occurs where police conduct would " 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " *Florida v. Bostick*, 501 U.S. 429, 436 (1991) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)). And here, I believe that any reasonable motorist in Defendant's position – seeing a uniformed officer standing next to a marked patrol car waving his arms, gesturing to the motorist to stop – would feel compelled to stop, as Defendant did here. The *subjective* intent of the officer is irrelevant in this analysis. *State v. Davis*, 305 N.C. 400, 410, 290 S.E.2d 574, 581 (1982) (holding that the determination is based on "an objective test").[1]

Further, the seizure had not ended by the time the officer had detected the odor of alcohol. That is, nothing had occurred that would have lead a reasonable motorist in Defendant's position to believe that

1. Indeed, our law *requires* a motorist to comply with any lawful direction from an officer related to traffic control. N.C. Gen. Stat. § 20-114.1(a). In the present case, there is no finding to indicate that a reasonable motorist in Defendant's position would know that the officer's hand gestures were merely intended as a *request*, rather than a command, to stop or whether the officer was gesturing for the purpose of controlling traffic.

he was no longer compelled to remain.[2] Rather, as soon as Defendant stopped and before any meaningful communication had occurred, the officer smelled alcohol coming from inside Defendant's truck, leading to the charge for which Defendant was convicted. If, for example, *prior* to detecting the odor of alcohol, the officer had told Defendant that he had merely stopped Defendant to ask some questions about the neighborhood, then perhaps the seizure became a consensual encounter. Thus any subsequent detection of alcohol by the officer likely would have been admissible. But the findings do not suggest that the seizure had transformed into a consensual encounter at the time the officer detected the odor of alcohol. Therefore, I conclude, at that time, Defendant was still subject to a Fourth Amendment seizure.

B. Whether the seizure was reasonable requires more findings.

The fact that the officer had no reasonable suspicion that Defendant was involved in criminal activity does not necessarily mean that the seizure was unconstitutional. The United States Supreme Court has held that, in some circumstances, an officer may conduct an "information stop" of a random passing motorist as part of an investigation of the area. *See Illinois v. Lidster*, 540 U.S. 419, 426-27 (2004) (holding that a checkpoint set up to ask passing motorists about a killing which occurred on the same street was reasonable). The Court recognized in *Lidster* that a "[highway] stop [which] lack[s] individualized suspicion cannot by itself determine the constitutional outcome. . . . [S]pecial law enforcement concerns will sometimes justify highway stops without individualized suspicion." *Id.* at 424. The Court instructed that the reasonableness of such stops must be judged "on the basis of individual circumstances," and that in judging the circumstances, courts must "look to 'the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.' " *Id.* at 426-27 (quoting *Brown*, 443 U.S. at 50); *see also State v. Woldt*, 293 Neb. 265, 271, 876 N.W.2d 891, 896 (2016) (citing state and federal cases from around the country which have applied *Lidster* to non-checkpoint stop cases).

---

2. A seizure ends when a detainee would no longer feel obligated to remain. By way of example, our Court and the Fourth Circuit Court of Appeals have held that "[g]enerally, an initial traffic stop concludes and the encounter becomes consensual [] after an officer returns the detainee's driver's license and registration." *State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009). *See also United States v. Whitney*, 391 F. App'x. 277, 280-81 (4th Cir. 2010) (unpublished).

Here, the trial court made a number of findings concerning the officer's reasons for stopping Defendant. However, I believe that the matter needs to be remanded to allow the trial court to make additional findings concerning the reasonableness of the stop, giving consideration to the guidance provided in *Lidster*. Certainly, the safety of our law enforcement officers is a matter of grave public concern. So too is the proper and timely execution of arrest warrants. And the officer's stop of Defendant in this case might advance these public interests. The trial court needs to make additional findings to balance these public interests against Defendant's constitutionally protected interests. For example, it might be appropriate for the trial court to consider whether the officer was serving arrest warrants on someone who had committed a violent crime or on someone who merely failed to appear in court for a traffic ticket. Further, it might be appropriate for the trial court to consider the importance of the information the officer was seeking to obtain and the circumstances which led the officer to believe that Defendant might have such information.

Accordingly, my vote is to vacate the trial court's order and remand the matter for more findings concerning the reasonableness of the seizure.

---

TETRA TECH TESORO, INC., Plaintiff
v.
JAAAT TECHNICAL SERVICES, LLC, RICKEY B. BARNHILL, and
CLYDE E. CUMMINGS, II, Defendants

No. COA15-1369

Filed 6 December 2016

**1. Appeal and Error—motion to modify preliminary injunction—brought under Rules 59 and 60—did not toll time to appeal**

Where a subcontractor filed complaints against a contractor for various claims concerning payment for work on projects at Fort Bragg, and the trial court entered an order denying the contractor's motion to dismiss and granting the subcontractor's motion for a preliminary injunction, the Court of Appeals lacked jurisdiction to review the contractor's appeal from the preliminary injunction order. The contractor failed to appeal the order within 30 days, and its motion to modify the preliminary injunction order—purportedly

brought under Rules 59 and 60 of the N.C. Rules of Civil Procedure—did not toll the time to appeal.

**2. Pretrial Proceedings—preliminary injunction—modification**

Where a subcontractor filed complaints against a contractor for various claims concerning payment for work on projects at Fort Bragg, and the trial court entered an order denying the contractor's motion to dismiss and granting the subcontractor's motion for a preliminary injunction requiring the contractor to hold in escrow and not disburse or distribute any monies received from the federal government on the projects to any person or entity other than plaintiff subcontractor, the trial court did not abuse its discretion by denying the contractor's motion to alter or amend the preliminary injunction to allow the contractor to pay certain third parties. The trial court carefully considered the contractor's arguments and modified the injunction to permit the U.S. to pay the project surety, who could use the funds to pay subcontractors and suppliers on the project.

**3. Contempt—proceedings during pending appeal—no jurisdiction**

Where a subcontractor filed complaints against a contractor for various claims concerning payment for work on projects at Fort Bragg, and the trial court entered an order denying the contractor's motion to dismiss and granting the subcontractor's motion for a preliminary injunction, the Court of Appeals vacated the trial court's contempt order imposing sanctions on the contractor for violating the preliminary injunction order. The trial court lacked jurisdiction to conduct a contempt proceeding and impose sanctions because the contractor's appeal divested the trial court of jurisdiction to do so while the appeal was pending.

Judge BRYANT concurring in the result only.

Appeal by defendants from orders entered 6 May 2015, 16 July 2015 and 10 September 2015 by Judge Mary Ann L. Tally in Cumberland County Superior Court. Heard in the Court of Appeals 26 April 2016.

*Vandeventer Black LLP, by David P. Ferrell and Kevin A. Rust, for plaintiff-appellee.*

*Brooks, Pierce, McLendon, Humphrey & Leonard LLP, by Walter L. Tippett, Jr. and Charles E. Coble, and DurretteCrump PLC, by Wyatt B. Durrette, Jr. and J. Buckley Warden IV, for defendants-appellants.*

DIETZ, Judge.

This case came to the Court of Appeals posing as a complicated construction law dispute raising novel issues concerning who owns portions of the Fort Bragg military installation and whether the parties are covered by North Carolina law or instead by the federal laws that apply at Fort Bragg. The parties' appellate briefs deal exclusively with the merits of these contract, venue, and choice-of-law issues.

Unfortunately, this Court cannot reach these issues because the appeal also is plagued by jurisdictional problems stemming from the way in which it was appealed. Specifically, Appellant JAAAT Technical Services challenges a series of decisions by the trial court reaching all the way back to a preliminary injunction order, but the only orders from which JAAAT timely appealed are a motion seeking to modify certain language in the preliminary injunction, and a contempt order and corresponding sanctions order.

As explained below, even if styled as a "Rule 59" motion, a pretrial motion to modify a preliminary injunction does not toll the time in which to appeal the underlying preliminary injunction order. This Court has held that Rule 59 of the Rules of Civil Procedure, which governs motions to alter or amend a judgment, only applies to post-trial motions, and that holding is confirmed by the plain text of Rule 59. Moreover, separate provisions in Rule 54(b) and Rule 62(c) permit parties to move to modify a preliminary injunction at any time, even while the case is on appeal. Thus, the underlying purpose of Rule 59 and its corresponding tolling provision in the appellate rules is unnecessary in this context—a fact the drafters of the rules understood. In short, our review in this appeal is limited to the denial of the motion to modify the preliminary injunction because the appeal from the underlying preliminary injunction order is untimely.

We affirm the denial of that motion to modify, which is subject to a broad abuse-of-discretion standard of review. But we reverse the trial court's contempt and sanctions orders that came after JAAAT appealed the denial of its motion to modify. Once JAAAT appealed, the trial court was divested of jurisdiction over the order from which it appealed and all matters "embraced therein." N.C. Gen. Stat. § 1–294. Under long-standing precedent from our Supreme Court, the appeal prevented the trial court from conducting a contempt proceeding or imposing sanctions for violation of the injunction. *See Joyner v. Joyner*, 256 N.C. 588, 591, 124 S.E.2d 724, 726–27 (1962). Accordingly, we vacate the trial court's contempt orders and corresponding sanctions.

## Facts and Procedural History

Defendant JAAAT Technical Services, LLC was the general contractor on three construction projects located at Fort Bragg. JAAAT is a Virginia limited liability company. Defendants Rickey B. Barnhill and Clyde Cummings are employees of JAAAT.[1]

JAAAT subcontracted its Fort Bragg projects to Plaintiff Tetra Tech Tesoro, Inc. Tesoro is a Virginia corporation. All of the contracts between JAAAT and Tesoro contain a forum selection clause requiring any disputes over the contracts to be litigated in Virginia.

On 21 November 2014, Tesoro filed three complaints against JAAAT in Cumberland County Superior Court. The complaints contained various claims concerning payment for work on the Fort Bragg projects. Tesoro alleged that JAAAT failed to pay it in full for the subcontract work performed, and that JAAAT had misappropriated project funds.

JAAAT and Tesoro also contracted for similar work at U.S. military installations in other states, and similar disputes arose with respect to those projects. After Tesoro sued JAAAT in Cumberland County, JAAAT sued Tesoro in federal district court in Virginia in an action that also included the parties' claims concerning the other military bases outside North Carolina. During this appeal, the federal court in Virginia held that it has jurisdiction over that larger, more complete action and declined Tesoro's request to dismiss that action. *JAAAT Tech. Servs., LLC v. Tetra Tech Tesoro, Inc.*, No. 3:15cv235, 2016 WL 1271039 (E.D. Va. Mar. 29, 2016).

On 15 December 2014, in the Cumberland County action, Tesoro moved for a temporary restraining order and preliminary injunction that would require JAAAT to segregate funds related to the construction projects and not to pay those funds out without court approval. On 5 January 2015, JAAAT moved to dismiss Tesoro's claims based on the forum selection clause in the contracts at issue. The trial court granted the TRO and held a series of hearings.

The proper venue for this dispute was the key legal issue in these hearings. Under a relatively recent North Carolina statute, North Carolina courts cannot enforce a forum selection clause like the one in the parties' contracts. N.C. Gen. Stat. § 22B–2. But in a federal enclave, such as Fort Bragg, courts apply a special form of federal law that incorporates only the North Carolina law in existence when the federal enclave is

1. For ease of reference, this opinion refers to all Defendants collectively as JAAAT.

created. Thus, the central issue in determining the proper venue for this dispute was whether the projects at Fort Bragg actually were on property that was part of a federal enclave and thus governed by federal law that does not include this recently enacted North Carolina statute.

On 6 May 2015, the trial court entered an order denying JAAAT's motion to dismiss and granting Tesoro's motion for a preliminary injunction. The preliminary injunction required JAAAT "to hold in escrow and . . . not disburse or distribute any funds or monies . . . received . . . from the federal government on the Projects to any person(s) or entity(s) other than Plaintiff." It also required JAAAT to provide accountings to Tesoro of "monies received from the federal government on the Projects and the disbursement or other disposition of those monies."

On 21 May 2015, JAAAT moved to modify the preliminary injunction, purportedly under Rules 59 and 60 of the North Carolina Rules of Civil Procedure, on the ground that the preliminary injunction prevented JAAAT from paying its subcontractors and other innocent third parties who performed work on the project and were owed payment for their work.

On 27 May 2015, Tesoro moved for contempt, alleging that JAAAT had disbursed funds and failed to provide accountings in violation of the preliminary injunction order. In response to that motion, JAAAT continued to insist that the case was governed by federal law and that venue was proper only in Virginia.

On 7 July 2015, the trial court held a hearing on JAAAT's motion to modify the preliminary injunction order. On 16 July 2015, the court rejected JAAAT's motion to modify the preliminary injunction in the specific manner JAAAT requested, but entered an order modifying the injunction to allow the federal government to make payments to the project surety, who in turn could pay subcontractors. That same day, the trial court entered an order instructing JAAAT to "appear and show cause . . . why they should not be held in contempt of court."

On 20 July 2015, JAAAT filed a notice of appeal from the 16 July 2015 order denying JAAAT's motion to modify the preliminary injunction. JAAAT's notice of appeal also indicated that JAAAT appealed from the trial court's original 6 May 2015 preliminary injunction order on the ground that the time to appeal that order was "tolled" by its motion to modify, which purportedly was filed under Rules 59 and 60.

On 27 July 2015, Tesoro moved to dismiss JAAAT's counterclaims with prejudice as a sanction under North Carolina Rule of Civil Procedure 41(b) for non-compliance with the preliminary injunction. The court

held a joint contempt hearing and hearing on Tesoro's motion to dismiss JAAAT's counterclaims on 17 August 2015 and, on 10 September 2015, issued orders holding JAAAT in contempt for violating the preliminary injunction and dismissing JAAAT's counterclaims with prejudice as a sanction. JAAAT timely appealed those orders on 18 September 2015.

## Analysis

### I. Appeal from the Preliminary Injunction Order

**[1]** We begin our analysis by examining JAAAT's appeal from the underlying preliminary injunction order. The trial court entered that order on 6 May 2015 and JAAAT appealed it on 20 July 2015, well past the thirty-day jurisdictional deadline to appeal.

JAAAT argues that when it timely filed its Rule 59 motion to alter or amend the preliminary injunction on 21 May 2015, that motion tolled the time to file a notice of appeal. And, indeed, Rule 3(c)(3) of the Rules of Appellate Procedure states that "if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion." N.C. R. App. P. 3(c)(3).

But Rule 59, by its plain terms, does not apply to an interlocutory, pretrial order like the preliminary injunction order in this case. Rule 59(a) states:

> (a) Grounds.—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> (1) Any irregularity by which any party was prevented from having a fair trial;
>
> (2) Misconduct of the jury or prevailing party;
>
> (3) Accident or surprise which ordinary prudence could not have guarded against;
>
> (4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;
>
> (5) Manifest disregard by the jury of the instructions of the court;
>
> (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

> (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;
>
> (8) Error in law occurring at the trial and objected to by the party making the motion, or
>
> (9) Any other reason heretofore recognized as grounds for new trial.
>
> On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

N.C. R. Civ. P. 59(a).

All of the enumerated grounds in Rule 59(a), and the concluding text addressing "an action tried without a jury," indicate that this rule applies only after a trial on the merits or, at a minimum, a judgment ending a case on the merits. This is no surprise, as the express purpose of Rule 59(a) is to seek "a new trial." A preliminary injunction hearing, by definition, is not a trial. It is a hearing intended to secure preliminary relief to avoid irreparable harm that might occur while the case is decided on the merits. *See A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983).

Relying on the plain text of Rule 59, several decisions of this Court have held that Rule 59 only applies to "post-trial motions" and cannot be used to alter an interlocutory order made before a trial on the merits. *See Bodie Island Beach Club Ass'n, Inc. v. Wray*, 215 N.C. App. 283, 294, 716 S.E.2d 67, 76 (2011); *TD Bank N.A. v. Eagles Crest at Sharp Top, LLC*, No. COA15-807, 2016 WL 4367257, at *1 (N.C. Ct. App. Aug. 16, 2016) (unpublished) (holding that "Rule 59 is not a valid means to challenge pretrial orders").

This brings us to Rule 59(e). Rule 59(e) is titled "Motion to alter or amend a judgment" and states that "[a] motion to alter or amend the judgment *under section (a) of this rule* shall be served not later than 10 days after entry of the judgment." N.C. R. Civ. P. 59(e) (emphasis added). The text of this rule indicates that it applies, like Rule 59(a), only to final judgments, not to pretrial rulings.

Our interpretation of Rule 59(e) is bolstered by federal court decisions that address the similarly worded provision in Rule 59(e) of the Federal Rules of Civil Procedure. This Court has long held that federal

decisions interpreting the federal rules are persuasive authority when interpreting similar state rules. *See*, *e.g.*, *Crowley v. Crowley*, 203 N.C. App. 299, 305, 691 S.E.2d 727, 732 (2010). Federal courts have held that Rule 59(e) is "applicable only to a final judgment." *Fayetteville Inv'rs v. Commercial Builders*, *Inc.*, 936 F.2d 1462, 1469 (4th Cir. 1991). This is significant because Rule 59(e) of the Federal Rules of Civil Procedure arguably is broader than our State's counterpart: it permits a motion to "alter or amend a judgment" generally, unlike the State rule, which limits its application to a "motion to alter or amend the judgment under section (a) of this rule." *Compare* Fed. R. Civ. P. 59(e), *with* N.C. R. Civ. P. 59(e). If anything, this reinforces our conclusion that the State rule cannot reasonably be interpreted to cover interlocutory, pretrial orders.

This conclusion is further confirmed by the text of Rule 54(b). Rule 54 draws a distinction between final judgments and interlocutory rulings: "A judgment is either interlocutory or the final determination of the rights of the parties." N.C. R. Civ. P. 54(a). Rule 54(b) then describes the types of rulings that can be considered "final judgments" and states that "in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." N.C. R. Civ. P. 54(b). As the federal courts have observed, this language in Rule 54(b) is the source of authority for what litigants typically refer to as "motions to reconsider." *See*, *e.g.*, *Akeva*, *L.L.C. v. Adidas Am.*, *Inc.*, 385 F. Supp. 2d 559, 565 (M.D.N.C. 2005). Thus, if we were to apply the narrow Rule 59(e) standard for altering a judgment to pretrial, interlocutory orders, it would clash with the language of Rule 54(b), which grants broader discretion to trial courts to amend their interlocutory orders before entry of a final judgment.

Moreover, the key reason a party might desire to apply Rule 59(e) to a pretrial ruling—the tolling of the time to appeal until the motion is ruled upon—is inapplicable here. Ordinarily, once a party appeals from a judgment, it divests the trial court of jurisdiction over all matters embraced by the order appealed. *See* N.C. Gen. Stat. § 1–294. Thus, without the tolling provision in Rule 59, litigants would be forced either to immediately appeal a final judgment and forgo post-trial motions (over which the trial court would lack jurisdiction following the appeal) or to risk the time to appeal the original judgment expiring while awaiting a ruling on the post-trial motion. But this dilemma does not exist in appeals from preliminary injunction orders because Rule 62(c) of the Rules of Civil Procedure permits the trial court to modify a preliminary injunction even while an appeal is pending.

Likewise, a preliminary injunction order is immediately appealable only if the order affects a substantial right. *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 507, 606 S.E.2d 359, 361 (2004). Thus, it makes sense that litigants would be expected to immediately appeal the underlying injunction order and then file a motion to modify under Rule 62(c) if necessary because, for the preliminary injunction order to be appealable at all, it must be so damaging to the aggrieved party that it satisfies the substantial right test.

Finally, there are strong policy reasons for interpreting Rule 59 according to its plain text. The Rules of Civil Procedure are enacted by our General Assembly, often following careful review by experts in the Bar. It undermines the purpose of the rules if the appellate courts expand their meaning beyond the written text, forcing litigants to research case law or consult treatises to fully understand the procedures that apply in civil actions.

In sum, we reaffirm our holdings in *Bodie Island* and *TD Bank* that Rule 59, by its plain terms, does not apply to interlocutory, pretrial orders. Accordingly, we lack jurisdiction to review JAAAT's appeal from the preliminary injunction order because JAAAT did not appeal that order within thirty days and its motion to modify the preliminary injunction order, purportedly brought under Rules 59 and 60 of the Rules of Civil Procedure, did not toll the time to appeal.

## II. Appeal from the Denial of Motion to Modify the Injunction

**[2]** JAAAT next challenges the trial court's denial of its motion to alter or amend the preliminary injunction to permit JAAAT to pay certain third-party contractors.

Importantly, that preliminary injunction did not merely maintain the status quo during the litigation; instead, it forced JAAAT to place funds it received from an ongoing construction project in a separate account and severely restricted JAAAT's ability to use those funds to continue its operations. Indeed, even after the trial court modified the injunction by permitting the United States to pay the project surety, who in turn could pay certain vital third parties, the injunction prohibited JAAAT from using any funds it received to pay for its own operations. This Court has held that a preliminary injunction affects a substantial right where the injunction would prevent the defendant from continuing to conduct its business during the pendency of the action. *See Harris v. Pinewood Dev. Corp.*, 176 N.C. App. 704, 705, 627 S.E.2d 639, 641 (2006); *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 635, 568 S.E.2d 267, 271 (2002). Under *Harris* and *Precision Walls*, the preliminary injunction in this

case satisfies the substantial rights test. We thus have appellate jurisdiction to review this interlocutory order.

This Court reviews the denial of a motion to modify an injunction for abuse of discretion. *Wachovia Bank, Nat. Ass'n v. Harbinger Capital Partners Master Fund I, Ltd.*, 201 N.C. App. 507, 516, 687 S.E.2d 487, 493 (2009). A trial court abuses its discretion when its decision is so arbitrary that it cannot be the result of a reasoned decision. *Manning v. Anagnost*, 225 N.C. App. 576, 579, 739 S.E.2d 859, 861 (2013).

In the trial court, JAAAT argued that the interests of justice and equity required modification of the preliminary injunction so that JAAAT could pay its subcontractors, thereby avoiding "breach of ongoing contracts with innocent, third-party subcontractors" and possible violations of federal law requiring prompt payment to subcontractors on federal government projects. JAAAT asked the trial court to modify the language of the injunction to provide that it only applies to funds "received by JAAAT as payment by the federal government for work performed by Tesoro" and that it does not "apply to funds received by JAAAT after the last pay application that included Tesoro's work."

The trial court's order reflects its careful consideration of this argument. The trial court modified the injunction to permit the United States to pay the project surety, who in turn could use those funds to pay subcontractors and suppliers on the project. Limiting our review solely to the motion to modify the injunction, and not to the underlying merits of the injunction itself, we find no abuse of discretion in the trial court's denial of JAAAT's requested modifications to the preliminary injunction.

## III. Appeal from Contempt Orders

**[3]** Finally, JAAAT challenges the trial court's orders holding it in contempt and imposing sanctions for violating the preliminary injunction order.

These orders, like all the other orders in this appeal, are interlocutory. But this Court generally has concluded that a contempt order and corresponding sanctions for violating a court order or injunction affect a substantial right and are immediately appealable. *Wilson v. Wilson*, 124 N.C. App. 371, 375, 477 S.E.2d 254, 256 (1996). Under *Wilson*, the challenged orders in this case are immediately appealable.

JAAAT argues that the contempt sanctions were improper on the merits, but we need not address these arguments because the trial court lacked jurisdiction to conduct a contempt proceeding and impose sanctions. In *Joyner*, our Supreme Court held that, because an appeal divests

the trial court of jurisdiction over the subject matter of the order from which the appeal is taken, a trial court lacks the power to hold a party in contempt for violating an order that is the subject of a pending appeal. 256 N.C. at 591, 124 S.E.2d at 727. The Supreme Court cautioned that "taking an appeal does not authorize a violation of the order. One who willfully violates an order does so at his peril. If the order is upheld by the appellate court, the violation may be inquired into when the case is remanded to the superior court." *Id.*

After *Joyner*, the General Assembly enacted the Rules of Civil Procedure, which authorize a trial court to "suspend, modify, restore, or grant an injunction during the pendency of the appeal" from a preliminary injunction. N.C. R. Civ. P. 62(c). But the Rules of Civil Procedure do not authorize the trial court to conduct contempt proceedings while an appeal is pending, and thus we conclude that Joyner is still binding on this Court.[2]

Accordingly, we vacate the trial court's contempt order and corresponding sanctions order for lack of jurisdiction.[3]

## IV. Proceedings on remand

We leave it to the trial court, on remand, to determine how to proceed with this contentious litigation. The United States District Court for the Eastern District of Virginia has held (correctly, in our view) that if the disputed construction project took place on a federal enclave, then federal law applies. *JAAAT Tech. Servs., LLC*, 2016 WL 1271039, at *4. Federal enclave law incorporates state law in effect at the time the land becomes part of the federal enclave but not "future statutes of the state"

---

2. The General Assembly recently amended N.C. Gen. Stat. § 1–294 and the statute now permits the Supreme Court, through the Rules of Appellate Procedure, to create exceptions to the general rule that an appeal divests the trial court of jurisdiction to proceed with trial matters embraced by the order appealed. *See* N.C. Sess. Law 2015–25, § 2. The Supreme Court has not yet amended the Rules of Appellate Procedure in response to this statutory change.

3. This Court recently held that there is an exception to the *Joyner* rule: "a trial court properly retains jurisdiction over a case if it acts reasonably in determining that an interlocutory order is not immediately appealable." *SED Holdings, LLC v. 3 Star Prop., LLC*, __ N.C. App. __, __, __ S.E.2d __, __ (2016). The analysis in *SED Holdings* turned on the fact that the injunction at issue merely maintained the status quo. That is not the case here. This injunction was a mandatory one; it forced a business to segregate its funds, imposed controls on the business's operations, and forced the business to conduct an accounting and provide the results of that accounting to the opposing party. Thus, when JAAAT appealed the denial of its motion to modify that injunction, the trial court was divested of jurisdiction to enforce it.

enacted afterward. *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 100 (1940). This almost surely means that, if the construction project at Fort Bragg is on a federal enclave, the relatively recent North Carolina statute prohibiting enforcement of the parties' forum selection clause would not apply.

This case involves sophisticated parties who contracted for work on projects at U.S. military installations across the country and agreed in those contracts to litigate their disputes in Virginia. The federal district court in Virginia is hearing a more comprehensive action that includes not only the claims asserted in this action (or which could be asserted in this action) but also all claims from these other jurisdictions. Moreover, on the record before us, it appears the only evidence presented to the trial court (thus far) on the question of whether this project took place on a federal enclave is the affidavit of a surveyor who did not even visit the site.

We are mindful that the trial court has broad discretion to control the course of proceedings below.[4] But we wonder whether, in the interests of justice, the parties ought to be permitted to conduct discovery and present evidence to the court through which the central question in this case—who owns the land on which the projects took place—can be answered. For example, it seems likely that the United States government would know whether buildings purportedly constructed at "Fort Bragg" were constructed on land that is owned by the United States or that is owned by someone else.

Before the parties in this action pursue multiple, costly parallel suits in parallel jurisdictions, at considerable waste of judicial resources, it might be sensible for the trial court to permit the parties to conduct discovery and then present the court with evidence from which it can determine whose law applies at the site of these projects and thus whether the forum selection clause is enforceable or not.

## Conclusion

We dismiss the appeal from the trial court's 6 May 2015 order for lack of appellate jurisdiction. We affirm the trial court's 16 July 2015

---

4. The trial court's preliminary injunction order also stated that JAAAT "waived" and was "equitably estopped" from asserting its venue arguments. There is little, if any, support for these conclusions. In any event, after the trial court entered its preliminary injunction order, the federal district court in Virginia disagreed with the trial court's analysis of "judicial" versus "legislative" jurisdiction on a federal enclave (again, correctly, in our view) and held that a more complete action could proceed in that court. This changed circumstance authorizes the trial court to reconsider its earlier waiver and estoppel rulings.

order denying JAAAT's motion to alter or amend the preliminary injunction. We vacate the trial court's 10 September 2015 orders holding JAAAT in contempt and imposing corresponding sanctions.

DISMISSED IN PART; AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judge STROUD concurs.

Judge BRYANT concurs in result only.

---

RUI DONG ZHU, Plaintiff
v.
LINGLING DENG, CHANG ZHU & PING LI, Defendants

No. COA16-53

Filed 6 December 2016

**1. Contracts—immigration—Form I-864 Affidavit of Support—enforceable contract**

Where defendant-wife, a Chinese citizen, married plaintiff-husband, a U.S. citizen, and came to the U.S. on a K-1 visa, for which plaintiff-husband and his parents (defendant-parents) were the sponsors pursuant to a Form I-864 Affidavit of Support, the trial court did not err by concluding that defendant-wife was entitled to ongoing support based on the Form I-864A. The form was an enforceable contract against defendant-parents, and defendant-wife had no affirmative duty to mitigate her damages under the contract. Further, defendant-wife's assets did not reduce the amount of support she was entitled to receive.

**2. Appeal and Error—failure to support argument—abandoned**

Where defendant-parents argued that the trial court erred by awarding defendant-daughter a constructive trust in the proceeds from the sale of a tailor shop in the amount of 50 percent of the initial purchase money contributed by plaintiff-husband and defendant-wife, the Court of Appeals deemed their argument abandoned because defendant-parents failed to support their argument with any legal authority.

**3. Appeal and Error—failure to support argument—dismissed**

Where defendant-parents argued that the trial court erred by dismissing their counterclaim against defendant-wife for living expenses, the Court of Appeals dismissed their argument because defendant-parents failed to support their argument with any legal authority.

**4. Divorce—marital property—wedding gifts**

Where the trial court determined that $150,000 of money given as wedding gifts was marital property, the Court of Appeals held that the determination was supported by competent evidence and affirmed the trial court on the issue.

**5. Contracts—immigration—Form I-864 Affidavit of Support—no duty to mitigate damages**

Where defendant-wife, a Chinese citizen, married plaintiff-husband, a U.S. citizen, and came to the U.S. on a K-1 visa, for which plaintiff-husband and his parents (defendant-parents) were the sponsors pursuant to a Form I-864 Affidavit of Support, the trial court erred by concluding as a matter of law that defendant-wife had a continuing duty to mitigate her damages under the Form I-864A contract.

Appeal by defendants Chang Zhu and Ping Li and cross-appeal by defendant Lingling Deng from order and judgment entered 10 April 2015 by Judge Anna E. Worley in Wake County District Court. Heard in the Court of Appeals 23 August 2016.

*Yuanyue Mu PLLC, by Yuanyue Mu, for defendant-appellants Chang Zhu and Ping Li.*

*Nicholls & Crampton, P.A., by Nicholas J. Dombalis, II, for defendant cross-appellant Lingling Deng.*

BRYANT, Judge.

Where defendant-parents indicated they understood the contract they were signing and were not misled, defendant-parents are bound by the terms of the Form I-864 Affidavit of Support in which they agreed to provide support for defendant-wife. Further, where defendant-parents have not offered proof of either procedural or substantive unconscionability, we affirm the order of the trial court. Where the trial court's determination that the disputed $150,000.00 is marital property is supported

by competent evidence, we affirm. Lastly, where the trial court erred in concluding as a matter of law that defendant-wife has a continuing duty to mitigate her damages under the Form I-864 affidavit, we reverse.

Defendant Lingling Deng ("Lingling"), a Chinese citizen, married plaintiff Rui Dong Zhu ("plaintiff-husband"), a U.S. citizen, on 17 January 2012 in Wake County, North Carolina. Lingling is twenty-eight years old and lived in China prior to coming to the United States to live in January 2012. Lingling and plaintiff-husband dated for several years before Lingling moved to the U.S. Chang Zhu and Ping Li (collectively "defendant-parents," individually, "defendant-father" and "defendant-mother", respectively) are the parents of plaintiff-husband.

In December 2011 and January 2012, plaintiff-husband and Lingling had two wedding parties in their respective hometowns in China. Many guests gave cash gifts, and in February 2012, $150,000.00 was transferred in three separate transactions from Lingling's father, mother, and younger brother in China into a joint account in the United States in the name of Lingling and plaintiff-husband.

Lingling came to the United States on a K-1 visa. Defendant-parents and plaintiff-husband were the sponsors for Lingling when she immigrated to the United States. In order for Lingling to be admitted to the U.S. and become a permanent resident, plaintiff-husband and defendant-parents executed a Form I-864 Affidavit of Support ("Form I-864A").[1]

On 17 May 2012, $110,239.89 of the $150,000.00 in the joint account was transferred to defendant-parents to pay off the mortgage on their Raleigh home, where defendant-parents, plaintiff-husband, and Lingling all lived. Also from the $150,000.00, $25,000.00 was used to contribute to the purchase of a tailor shop located in Raleigh. The tailor shop, known as Lulu's Tailor Shop, was purchased in September 2012.

Less than a year and a half after being married, on 31 July 2013, defendant-mother forced Lingling to leave the Raleigh home. The two had argued when Lingling asked that the $150,000.00 be repaid. Thereafter, Lingling moved in with a friend and has not lived with plaintiff-husband or his parents since that time.

In September 2013, Lingling spoke with defendant-father, who indicated that they would sell the Raleigh home and the tailor shop and repay

---

1. The I-864, Affidavit of Support Form is referred to throughout federal and state case law interchangeably as "Form I-864," "Form I-864A," "I-864," and "I-864A." All designations refer to the same form.

her. He also told her they would pay for her living expenses. Defendant-parents paid Lingling two months' worth of support, $1,000.00 in August and $1,200.00 in September 2013. They paid no support after those dates. When the tailor shop sold for $40,000.00 in September 2013, Lingling received no portion of the proceeds from the sale.

On 13 September 2013, Lingling filed a complaint in Wake County Superior Court for money owed and a temporary restraining order ("TRO") against defendant-parents. Plaintiff-husband moved to intervene and stay the matter filed by Lingling in Superior Court, and both motions were granted. Meanwhile, plaintiff-husband also filed a complaint in Wake County District Court on 7 October 2013 for equitable distribution of the marital property which he claimed belonged to him and Lingling, *i.e.*, the $150,000.00 which Lingling claimed was owed to her by defendant-parents. On 31 December 2013, Lingling answered and counterclaimed for support and cross-claimed against defendant-parents for support and money owed. Defendant-parents cross-claimed for declaratory judgment.

The parties' claims came on for hearing before the Honorable Anna E. Worley during the 28 October 2014 civil session of Wake County District Court. Judge Worley entered an order and judgment on the parties' competing claims dated 10 April 2015, ordering, in relevant part, that Lingling was entitled to: (1) a constructive trust in the Raleigh home in the amount of $55,120.00; (2) a constructive trust in the proceeds from the sale of the tailor shop in the amount of $12,500.00; (3) a judgment against defendant-parents, jointly and severally, in the amount of $67,620.00; (4) a judgment against plaintiff-husband and defendant-parents, jointly and severally, in the amount of $18,341.00 for support owed from August 2013 through November 2014; and (5) monthly support payments in the amount of $1,215.00 from plaintiff-husband and defendant-parents. Defendant-parents filed notice of appeal and Lingling filed and served a cross-appeal on 21 May 2016. Plaintiff-husband did not appeal.

---

## *I. Defendant-Parents' Appeal*

On appeal, defendant-parents argue the trial court erred by (1) finding that the I-864A forms were an enforceable contract against defendant-parents; (2) finding Lingling was entitled to fifty percent of the proceeds from the sale of the tailor shop; and (3) dismissing defendant-parents' counterclaim against Lingling for the living expenses defendant-parents spent on her.

1. Form I-864A

**[1]** Defendant-parents first argue that the trial court erred in concluding that Lingling was entitled to ongoing support based on the Form I-864A defendant-parents executed and submitted to the United States Citizenship and Immigration Services ("USCIS"), as the contract is unconscionable and therefore unenforceable. In the alternative, even if the Form I-864A is enforceable, defendant-parents contend that Lingling is barred from claiming the full amount of support under the contract because she has unreasonably failed to mitigate her damages. Lastly, defendant-parents argue that even if the trial court correctly found Lingling was entitled to some support under the contract, the trial court erred by not setting off the award from support previously provided to Lingling. We disagree.

An immigrant who is likely to become a public charge is not eligible for admission into the United States unless her application for admission is accompanied by a Form I-864 Affidavit of Support. 8 U.S.C. § 1182(a)(4) (2015). Those persons petitioning for an immigrant to be admitted to the U.S. must sign a Form I-864A and, as signing sponsors, are obligated to provide the immigrant with whatever support is necessary to maintain the sponsored immigrant at an annual income that is at least 125% of the federal poverty level pursuant to the annual guideline. *Younis v. Farooqi*, 597 F. Supp. 2d 552, 554 (D. Md. 2009). A Form I-864A "is considered a legally enforceable contract between the sponsor and the sponsored immigrant." *Id.* (citation omitted). "The signing sponsor submits himself to the personal jurisdiction of any federal or state court in which a civil lawsuit to enforce the affidavit has been brought." *Id.* (citing 8 U.S.C. § 1183a(a)(1)(C) (2015)). "The sponsor's obligation under the affidavit does not terminate in the event of divorce." *Id.* (citation omitted).

Here, defendant-parents executed a Form I-864A which specifically states that, as signors, they "[p]romise to provide any and all financial support necessary to assist the sponsor [plaintiff-husband] in maintaining the sponsored immigrant(s) at or above [125 percent of the Federal Poverty Guidelines] during the period in which the affidavit of support is enforceable[,]" and "agree to be jointly and severally liable for payment of any and all obligations owed by the sponsor [plaintiff-husband] under the affidavit of support to the sponsored immigrant." Further, defendant-mother testified that she understood when she signed the contract that if Lingling could not support herself financially, defendant-mother would be obligated to help plaintiff-husband pay for Lingling's needs. Indeed, an accountant and an attorney both assisted with the preparation of

the immigration documents, and the attorney spoke Mandarin Chinese. Even so, our North Carolina jurisprudence makes very clear that "one who signs a paper writing is under a duty to ascertain its contents, and in the absence of a showing that he was willfully misled or misinformed . . . he is held to have signed with full knowledge and assent as to what is therein contained." *Martin v. Vance*, 133 N.C. App. 116, 121–22, 514 S.E.2d 306, 310 (1999) (quoting *Gas House, Inc. v. S. Bell Telephone Co.*, 289 N.C. 175, 180, 221 S.E.2d 449, 503 (1976)). As defendant-parents make no argument that their son, plaintiff-husband, misled them in any way, defendant-parents are bound by the terms of the Form I-864A which they signed and in which they agreed to provide support for Lingling.

Further, claims that I-864A forms are unconscionable have been explicitly rejected. *See, e.g.*, *Al-Mansour v. Shraim*, Civil No. CCB-10-1729, 2011 WL 345876, at *3 (D. Md. Feb. 2, 2011) (unpublished) ("While the Form I-864 may be a contract of adhesion under Maryland law, it is not unconscionable."); *Cheshire v. Cheshire*, No. 3:05-cv-00453-TJC-MCR, 2006 WL 1208010, at *4 (M.D. Fla. May 4, 2006) (unpublished) ("[T]he Court fails to find evidence that the affidavit of support Form I-864 was an unconscionable or illusory contract . . . ."). Under North Carolina law, a contract will be found to be unconscionable "only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense," and where the terms are "so one-sided that the contracting party is denied any opportunity for a meaningful choice[.]" *Brenner v. Little Red School House Ltd.*, 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981) (citation omitted). The party claiming unconscionability has the burden to prove both procedural and substantive unconscionability. *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 102, 655 S.E.2d 362, 370 (2008) (citations omitted). Defendant-parents have not offered proof of either procedural or substantive unconscionability, and accordingly, their argument is overruled.

Defendant-parents also argue that Lingling should be barred from claiming the full amount of support as she has failed to mitigate her damages under the Form I-864A contract. As Lingling has no affirmative duty to mitigate her damages under such a contract, *see, e.g.*, *Wenfang Liu v. Mund*, 686 F.3d 418, 422 (7th Cir. 2012) ("[W]e can't see much benefit to imposing a duty to mitigate on a sponsored immigrant."); *see also infra* § II.2 (addressing specifically a sponsored immigrant's duty to mitigate damages pursuant to Form I-864A), this argument is overruled.

Defendant-parents also argue that because the trial court awarded Lingling a judgment against defendant-parents in the amount of $67,620.00, this "large amount of cash" would render her no longer a

"public charge" under the terms of the Form I-864A. Thus, defendant-parents contend that the amount of support they may be required to pay Lingling should be set off by the judgment Lingling obtained against them. Defendant-parents cite to no authority to support their argument that a sponsored immigrant is not entitled to support under a Form I-864A because of any "assets" he or she has; rather, relevant case law suggests the contrary to be true. *See Al-Mansour*, 2011 WL 345876, at *4–5 (rejecting the sponsor's claim that he was not obligated to provide support under a Form I-864A contract where he had given his wife an apartment during their marriage).

Assets do not amount to income, and a judgment, even a monetary one, is not necessarily an asset for purposes of income. *See id.* (rejecting sponsor's argument that immigrant-spouse's income exceeded 125% of the poverty line where sponsor failed to demonstrate that proceeds from the sale of an apartment were transferred to the immigrant-spouse "or that she derived any other income from the property"). Notably, plaintiff-husband listed $150,000.00 under a heading titled "**Assets of the principal sponsored immigrant**" on his Form I-864A. This fact had no bearing or impact on the government's requirement that contracts of support were necessary for Lingling to become a permanent resident, and nor should a judgment against defendant-parents in the amount of $67,620. This argument is overruled.

2. Proceeds from Sale of Tailor Shop

**[2]** Defendant-parents contend the trial court erred in awarding Lingling a constructive trust in the proceeds from the sale of the tailor shop in the amount of $12,500, fifty percent of the initial purchase money contributed by plaintiff-husband and Lingling ($25,000.00). Defendant-parents argue that Lingling, as a 25%-owner of Lulu's Tailor Shop, is only entitled to twenty-five percent of the net proceeds ($40,000.00) from the sale of the tailor shop after winding up and accounting of the business, net proceeds being the sale price subtracted by the transaction cost and debts and liabilities to be paid by the company. We disagree.

In their appellant brief, defendant-parents fail to support this argument with any citation to legal authority. They state, "[u]pon the dissolution of the company, an owner of the company shall only get his or her share of the NET proceeds. The net proceeds shall be the sale price subtracted by the transaction cost and debts and liabilities to be paid by the company." Defendant-parents cite to no statute or case law to support these statements and, in turn, their argument. "A party's assignment of error is deemed abandoned in the absence of citation to supporting

authority." *Consol. Elec. Distribs., Inc. v. Dorsey*, 170 N.C. App. 684, 686–87, 613 S.E.2d 518, 520 (2005) (citing *State v. Walters*, 357 N.C. 68, 85, 588 S.E.2d 344, 355 (2003)); *see id.* at 686, 613 S.E.2d at 520 (quoting N.C. R. App. P. 28(b)(6)) (deeming appeal abandoned where defendant only quoted one statute and made reference to another). Accordingly, as defendant-parents have failed to support their argument with stated or cited authority, we deem their argument abandoned.

3. Dismissal of Defendant-Parents' Counterclaim

**[3]** Defendant-parents argue that the trial court erred in dismissing their counterclaim against Lingling for living expenses. We disagree.

Defendant-parents' argument is limited to contending that their provision of lodging and living expenses for Lingling and plaintiff-husband was conditioned on Lingling and plaintiff-husband paying off defendant-parents' mortgage on the Raleigh home in which all parties lived. However, defendant-parents have again failed to provide any citation to authority which would support their proposition that the trial court erred in dismissing their counterclaim where the trial court found and concluded that defendant-parents "have failed to prove by the greater weight of the evidence that they have a claim against [Lingling] for the monies they allegedly spent on [Lingling]." "Under our appellate rules, it is the duty of appellate counsel to provide sufficient legal authority to this Court, and failure to do so will result in dismissal." *Moss Creek Homeowners Ass'n, Inc. v. Bissette*, 202 N.C. App. 222, 233, 689 S.E.2d 180, 187 (2010) (citing N.C. R. App. P. 28(b)(6)). Accordingly, this Court will not endeavor to construct an argument for defendant-parents (represented by appellate counsel), and we dismiss this argument on appeal.

*II. Lingling's Cross-Appeal*

**[4]** On cross-appeal, Lingling argues the trial court erred in its (1) Finding of Fact No. 14 that Lingling failed to rebut the presumption that the $150,000.00 was marital property, and Findings of Fact Nos. 23 and 24, and Conclusions of Law Nos. 3, 7, and 8; and (2) finding and conclusion that Lingling has a duty to mitigate her damages.

1. Finding of Fact No. 14

Lingling argues the trial court erred in making its Finding of Fact No. 14 that she failed to rebut the presumption that the $150,000.00 that was transferred into the joint account of plaintiff-husband and Lingling was marital property. As a result, Lingling also argues that Findings of Fact Nos. 23 and 24, and Conclusions of Law Nos. 3, 7, and 8, which

depend on the trial court's Finding of Fact No. 14, are also erroneous. We disagree.

"A trial court's determination that specific property is to be characterized as marital, divisible, or separate property will not be disturbed on appeal 'if there is competent evidence to support the determination.' " *Brackney v. Brackney*, 199 N.C. App. 375, 381, 682 S.E.2d 401, 405 (2009) (quoting *Holterman v. Holterman*, 127 N.C. App. 109, 113, 488 S.E.2d 265, 268 (1997)). "Ultimate, the court's equitable distribution award is reviewed for abuse of discretion and will be reversed 'only upon a showing that it [is] so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (alteration in original) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

Lingling's main dispute in challenging Findings of Fact Nos. 14, 23, and 24 and Conclusions of Law Nos. 3, 7, and 8, *see infra*, is with the trial court's classification of the $150,000.00 transferred into the joint account by Lingling's father and other relatives as marital property:

> 14. The $150,000 that was transferred into the joint account of [Lingling] and Plaintiff by [Lingling's] father and other relatives belonged to both [Lingling] and Plaintiff. [Lingling] has failed to rebut the presumption that this money was marital as it was acquired during the marriage. Irrespective of the source of the money—i.e., whether it was money that [Lingling's] father gave her to use as she saw fit or whether it was cash given to [Lingling] and Plaintiff by the guests at the parties in China that was collected by [Lingling's] father, or a combination of the two, [Lingling] and Plaintiff treated the money as marital money intended for the use of both of them.
>
> . . .
>
> 23. The money used to pay off the mortgage on [the] Raleigh home belonged to both Plaintiff and [Lingling]. The $25,000 used to contribute to the purchase of the tailor shop belonged to both Plaintiff and [Lingling]. Thus any obligation owing to [Lingling] and Plaintiff on the part of [defendant-parents] in connection with these transactions is a marital asset. Any such marital asset should be divided equally between Plaintiff and [Lingling]. However Plaintiff has continued to live with his parents and thus has and continues to receive financial benefit from his

share of the money which was used to pay off his parents' mortgage. Plaintiff never expected his parents to repay him for the money used to pay off the mortgage on [the] Raleigh home. [Defendant-parents] never expected to repay Plaintiff for the money used to pay off the mortgage. Plaintiff is therefore not entitled to a constructive trust in [the] Raleigh home nor a judgment against his parents. Plaintiff has received some of the proceeds from the money paid for the tailor shop. He also got the benefit of income from the business during the period of time it was operated by him and [defendant-mother]. Plaintiff is therefore not entitled to a constructive trust against the proceeds of the tailor shop.

24. [Lingling] is entitled to a constructive trust in the Raleigh Home and the equity in [the] Raleigh Home equivalent to 50% of the monies that were used to pay off the mortgage on [the] Raleigh home. [Lingling] is thus entitled to a constructive trust in [the] Raleigh Home and in her favor in the amount of $55,120. In addition, [Lingling] is entitled to a constructive trust in the proceeds from the sale of the tailor shop in the amount of $12,500 representing 50% of those funds coming from [Lingling] and Plaintiff and used to purchase Lulu's Tailor Shop.

. . .

**CONCLUSIONS OF LAW**

. . .

3. During the course of their marriage [Lingling] and Plaintiff acquired $150,000. [Lingling] and Plaintiff used $110,239.89 of this money to pay the mortgage of Defendants Zhu and Li on the home which they own as tenants by the entireties. They also contributed $25,000 to the purchase of a tailor shop.

. . .

7. [Lingling] is entitled to a constructive trust in the Raleigh Home equivalent to 50% of the monies that were used to pay off the mortgage on [the] Raleigh home. The constructive trust in the Raleigh Home would thus be for $55,120. In addition, [Lingling] is entitled to a constructive

> trust in the proceeds from the sale of the tailor shop in the amount of $12,500 representing 50% of those funds coming from [Lingling] and Plaintiff used to purchase Lulu's Tailor Shop.
>
> 8. [Lingling] is also entitled to a judgment against [defendant-parents], jointly and severally, in the amount of $67,620.

"Marital property" is defined as "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned[.]" N.C. Gen. Stat. § 50-20(b)(1) (2015). In contrast, "[s]eparate property" includes

> all real and personal property acquired by a spouse before marriage or acquired by a spouse by devise, descent, or gift during the course of the marriage. . . . Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance.

*Id.* § 50-20(b)(2); *see also Wade v. Wade*, 72 N.C. App. 372, 381, 325 S.E.2d 260, 269 (1985) (rejecting the theory of transmutation, which holds that "affirmative acts of augmenting separate property by commingling it with marital resources is viewed as indicative of intent to transmute . . . the separate property to marital property" (citations omitted)) ("[W]e discern from the statute a clear legislative intent that separate property brought into the marriage or acquired by a spouse during the marriage be returned to that spouse, if possible, upon dissolution of the marriage."). "In equitable distribution proceedings, the party claiming a certain classification has the burden of showing, by a preponderance of the evidence, that the property is within the claimed classification." *Brackney*, 199 N.C. App. at 383, 682 S.E.2d at 406 (citing *Joyce v. Joyce*, 180 N.C. App. 647, 650, 637 S.E.2d 908, 911 (2006)).

"[W]hen property is acquired during marriage by one spouse from his or her parent(s), a rebuttable presumption arises that the transfer is a gift to that spouse." *Caudill v. Caudill*, 131 N.C. App. 854, 857, 509 S.E.2d 246, 249 (1998) (citing *Burnett v. Burnett*, 122 N.C. App. 712, 714, 471 S.E.2d 649, 651 (1996)). "In such a case, the presumption must be rebutted by the spouse resisting the separate property classification

by showing a lack of donative intent." *Id.* (citation omitted). However, "[t]he trial judge [in an equitable distribution action] is the sole arbiter of credibility and may reject the testimony of any witness in whole or in part." *Joyce*, 180 N.C. App. at 650, 637 S.E.2d at 911 (alterations in original) (quoting *Fox v. Fox*, 114 N.C. App. 125, 134, 441 S.E.2d 613, 619 (1994)).

Additionally, "[t]he deposit of funds into a joint account, standing alone, is not sufficient evidence to show a gift or an intent to convert the funds from separate property to marital property." *Manes v. Harrison-Manes*, 79 N.C. App. 170, 172, 338 S.E.2d 815, 817 (1986) (citation omitted) (holding bank account and annuity purchased by husband with separate assets remained separate property of husband, even where husband added wife's name to bank account and annuity); *see also Fountain v. Fountain*, 148 N.C. App. 329, 333, 559 S.E.2d 25, 29 (2002) ("Commingling of separate property with marital property, occurring during the marriage and before the date of separation, does not necessarily transmute separate property into marital property." (citations omitted)). *But see Langston v. Richardson*, 206 N.C. App. 216, 222–23, 696 S.E.2d 867, 872 (2010) (finding that bank accounts were marital property where wife's name was added to the accounts during her marriage to husband and prior to their separation).

In the instant case, the property in dispute is $150,000, which was transferred from Lingling's father "and other relatives" into a joint account in the name of both Lingling and plaintiff-husband. Lingling concedes that "[t]he evidence as to the original source of the $150,000 is quite controverted." Indeed, the trial court did not make an explicit finding as to the ultimate source of the $150,000. It is clear from the record, however, that the $150,000 was transferred into the joint account in three separate transactions of $50,000 each, by three separate individuals, all relatives of Lingling: on 10 February 2012, $50,000.00 was wired from "Zhang Limei," Lingling's mother; on 13 February 2012, $100,000.00 was wired in $50,000 increments from "Jinhong Deng," Lingling's father, and "Binbin Deng," Lingling's younger brother, respectively.

At the hearing, plaintiff-husband testified the $150,000 was "our wedding gift[,]" that the money "came from wedding gifts given -- cash wedding gifts given at the celebration of [their] marriage in [Lingling's] hometown[.]" Plaintiff-husband testified, in relevant part, as follows:

> Q. After the ceremony in January 2012, did Lingling and you have a discussion about how much cash was given as gifts?

A. About $150,000.

Q. Okay. And did you and Lingling have a discussion about what should happen to this money?

A. At that time we didn't.

. . .

Q. On the second page of the document, do you see where $150,000 was deposited into the [joint] account?

A. Yes, I saw it.

Q. Okay. And what was your understanding as to where this 150,000 came from?

A. It should be the wedding money we got from the ceremony.

Q. Okay. During the time that you and Lingling were together and living with your parents, did she ever describe this money as a loan to you?

A. Yeah. It's almost like until we started like separated and she started saying that.[2]

. . .

Q. Was there any time during the period of time that you and Lingling were living together in your parents' household that she described this 150,000 as a loan?

A. No, never.

Q. Okay. When did you first hear from Lingling that this $150,000 was a loan from her family?

A. After I overheard -- after I overheard her telling her friend that she married me was just for immigration, after that.

. . .

2. All the parties to this action spoke Chinese as a first language and very little or no English, and the trial court appointed an interpreter who translated in real time. In many instances throughout the transcript, witnesses' statements seem to have been very roughly translated.

> Q. When approximately did you overhear her make this statement?
>
> A. About June 2013.
>
> Q. Okay. And prior to June of 2013, had Lingling ever characterized this $150,000 as a loan from her family?
>
> A. No.

Lingling testified, on the other hand, that she could "guarantee you in [her] life this is not wedding gift money[,]" and that the $150,000.00 was intended to be her money as "the control of the [$150,000.00] was given to me by my parents." She also testified that not only was it "[un]reasonable to believe that $150,000 in cash would have been given as gifts at the second wedding celebration," but also that it was "impossible." Further, she testified the $150,000.00 was wired into a joint account "[b]ecause I just came to United States and I did not have my separate account."

However, it remains that the trial judge in an equitable distribution action is the sole arbiter of credibility and may reject the testimony of any witness, *see Joyce*, 180 N.C. App. at 650, 637 S.E.2d at 911 (citation omitted), and this Court reviews a trial court's classification of property for abuse of discretion, *Brackney*, 199 N.C. App. at 381, 682 S.E.2d at 405 (citations omitted). Thus, as the trial court's determination that the $150,000 is marital property is supported by competent evidence, that determination will not be disturbed on appeal, and we affirm the trial court on this issue. Lingling's argument is overruled.

2. Duty to Mitigate Damages

**[5]** Lingling also contends the trial court erred in finding and concluding that she has a continuing duty to mitigate her damages under the contract of support, as laid out in Finding of Fact No. 37 and Conclusions of Law Nos. 16 and 17. We agree.

"Conclusions of law drawn by the trial court form its findings of fact are reviewable *de novo* on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) (citation omitted).

Here, as an initial matter, the trial court's findings which Lingling challenges within Finding of Fact No. 37—that Lingling "has mitigated her damages under the [Form I-864A] contract of support and has a continuing duty to mitigate her damages"—are essentially conclusions of law, and they will be treated as conclusions of law which are reviewable

*de novo* on appeal. *See Smith v. Beaufort Cnty. Hosp. Ass'n, Inc.*, 141 N.C. App. 203, 214, 540 S.E.2d 775, 782 (2000) (citation omitted).

The Form I-864A is required for a person who wants to sponsor an alien for admission to the United States. 8 C.F.R. § 213a.2(a), (b) (2016); *see also* 8 U.S.C. § 1182(a)(4)(C)(ii). The Form I-864A's contents are specified in 8 U.S.C. § 1183a, and as such, this is essentially an issue of statutory interpretation. *See Wenfang Liu*, 686 F.3d at 421 ("But the question is whether reading a duty of mitigation into the immigration statute and the regulations and the affidavit-contract would serve or disserve statutory and regulatory objectives." (citation omitted)).

"The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Martin v. N.C. Dep't of Health & Human Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990)). "This intent 'must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied.' " *Burgess*, 326 N.C. at 209, 388 S.E.2d at 137 (quoting *Milk Comm'n v. Food Stores*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967)).

Finding of Fact No. 37 and Conclusions of Law Nos. 16 and 17 are as follows:

> 37. [Lingling] speaks no English. She has very little in the way of work skills to obtain employment in the United States. [Lingling] has mitigated her damages under the contract of support and has a continuing duty to mitigate her damages. She has attempted to obtain a job but has been unsuccessful given her speech limitations and her lack of work skills. [Lingling] has had no income since she and Plaintiff separated other than the $2200 paid by [defendant-parents] in August and September, 2013 (see below). [Lingling] is entitled to judgment against Plaintiff, [and defendant-parents], jointly and severally, for $4976 ($7176 for supported owed from August 2013 through January 201[4] less $2200 for the two months of support that was paid) and for $13,365 for support owed from February 2014 through November, 2014.
>
> . . .

> 16. [Lingling] has had no income since she and Plaintiff separated. [Lingling] has attempted to obtain employment but due to the language barrier and her lack of skills she has been unable to find employment.
>
> 17. [Lingling] has mitigated her damages under the contract of support and she has a continuing obligation to mitigate her damages.

Pursuant to North Carolina common law, "[t]he duty placed on an injured party to mitigate damages is well established." *Thermal Design, Inc. v. M & M Builders, Inc.*, 207 N.C. App. 79, 89, 698 S.E.2d 516, 523 (2010). "The general rule is that where there has been a breach of contract, the injured party must do 'what fair and reasonable prudence requires to save himself and reduce the damage[.]' " *Turner Halsey Co., Inc. v. Lawrence Knitting Mills, Inc.*, 38 N.C. App. 569, 572, 248 S.E.2d 342, 344 (1978) (quoting *Little v. Rose*, 285 N.C. 724, 728, 708 S.E.2d 666, 669 (1974)); *see also Blakely v. Town of Taylortown*, 233 N.C. App. 441, 450, 756 S.E.2d 878, 884–85 (2014) ("Under the law in North Carolina, an injured plaintiff must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. If plaintiff fails to mitigate his damages, for any part of the loss incident to such failure, no recovery can be had." (quoting *Lloyd v. Norfolk S. Railway Co.*, 231 N.C. App. 368, 371, 752 S.E.2d 704, 706 (2013))).

In looking first to the text of the statute in question, 8 U.S.C. § 1183a, the Form I-864A requires the sponsor to agree to provide the sponsored immigrant with "any support necessary to maintain him or her at an income that is at least 125 percent of the Federal Poverty Guidelines . . . ." *See* 8 U.S.C. § 1183a(a)(1)(A) (2015). The form also notes that a sponsor's obligations end only in the event the sponsored immigrant:

- Becomes a U.S. citizen;
- Has worked, or can be credited with, 40 quarters of coverage under the Social Security Act;
- No longer has lawful permanent resident status, and has departed the United States;
- Becomes subject to removal, but applies for and obtains in removal proceedings a new grant of adjustment of status, based on a new affidavit of support, if one is required; or
- Dies.

> Note that divorce **does not** terminate your obligations under this Form I-864.

*Id.* § 1183a(a)(2). Notably, the above list does not include a sponsored immigrant's duty to mitigate damages under such a contract. *See Wenfang Liu*, 686 F.3d at 420 (noting the Form I-864 "specifies several excusing conditions," but "does not mention . . . failing to mitigate his or her damages").

In an opinion written by Judge Posner, the Seventh Circuit held that a Form I-864A beneficiary has no duty to mitigate damages by seeking employment because, *inter alia*, the federal regulations and the form itself were all silent as to whether the beneficiary had a duty to seek employment:

> Recall that the obligation is to support the sponsored alien at 125 percent of the poverty income level; the [I-864] affidavit must include this requirement. 8 U.S.C. § 1183(a)(1)(A). The affidavit also, however, specifies several excusing conditions, such as the sponsor's death or the alien's being employed for 40 quarters (also specified as an excusing condition in the statute, 8 U.S.C. § 1183(a)(3)(A)). But the list of excusing conditions does not mention the alien's failing to seek work or otherwise failing to mitigate his or her damages.

*Id.* (holding no federal common law duty to mitigate and that underlying policy behind Form I-864A was only to prevent the noncitizen from becoming a public charge); *see also Ainsworth v. Ainsworth*, No. Civ.A. 02-1137-A., 2004 WL 5219037, at *2–3 (M.D. La. May 27, 2004) (unpublished) (finding obligation of support fully enforceable against defendant in accordance with Form I-864A), *rev'g in part* No. Civ.A. 02-1137-A-M2, 2004 WL 5219036, at *2 (M.D. La. Apr. 29, 2004) (unpublished) ("[I]f the sponsored immigrant is earning, or is capable of earning, [125% of the poverty guidelines] or more, there obviously is no need for continued support."). *But see Naik v. Naik*, 944 A.2d 713, 717 (N.J. Super Ct. A.D. 2007) ("[T]he sponsored immigrant is expected to engage in gainful employment, commensurate with his or her education, skills, training and ability to work in accordance with the common law duty to mitigate damages.").

With regard to legislative intent, the Seventh Circuit wrote as follows:

> So far as we can tell, neither the Congress that enacted sections 1182 and 1183a of the Immigration and

> Nationality Act nor the immigration authorities that promulgated implementing regulations and have drafted successive versions of Form I-864 ever thought about mitigation of damages. . . .
>
> . . .
>
> The Justice Department argues as we noted that to impose a duty to mitigate would encourage immigrants to become self-sufficient. But self-sufficiency, though mentioned briefly in the House Conference Report on the 1996 statute as a goal, see H.R. Rep. No. 104–828, p. 241 (1996), is not the goal stated in the statute; the stated statutory goal, remember, is to prevent the admission to the United States of any alien who "is likely at any time to become a public charge." The direct path to that goal would involve imposing on the sponsor a duty of support with no excusing conditions. Some such conditions are specified; but why should the judiciary add to them—specifically why should it make failure to mitigate a further excusing condition? The only beneficiary of the duty would be the sponsor—and it is not for his benefit that the duty of support was imposed; it was imposed for the benefit of federal and state taxpayers and of the donors to organizations that provide charity for the poor.

*Wenfang Liu*, 686 F.3d at 421 (internal citations omitted).

An opinion out of federal court in Maryland, on the other hand, concluded that "[a]ssuming the plaintiff ha[d] an obligation to mitigate her damages by seeking employment, she need not apply for every available job in order to mitigate her losses; she need only make reasonable efforts." *Younis*, 597 F. Supp. 2d at 556 (citation omitted). Further, "[i]t is the [sponsor's] burden to prove that the [sponsored immigrant] did not make reasonable efforts[.]" *Id.* (citation omitted). The court in *Younis* noted that regardless of whether the sponsored immigrant obtains employment, or even where the sponsored immigrant is *unwilling* to obtain employment, a sponsor continues to remain liable under the Form I-864A, as this is not a terminating condition. *Id.* at 557 n.5 (citing 8 U.S.C. § 1183a).

The *Younis* court appears to equivocate where it "assumes" a sponsored immigrant has a duty to mitigate under a Form I-864A, while at the same time acknowledging in a footnote that a sponsor is likely

liable regardless of whether a sponsored immigrant even tries to obtain employment. *See id.* at 556, 557 n.5. Such hedging seems to indicate the *Younis* court's reticence to read an explicit duty to mitigate into the statute at issue. *See Wenfang Liu*, 686 F.3d at 423 ("And if the government is serious about wanting to impose a duty of mitigation, why hasn't it revised Form I-864 to include such a duty? It revised the affidavit . . . to make explicit that 'divorce **does not** terminate your obligations under this Form I-864' (boldface in original), which before had merely been implicit.").

> The support obligation that the law imposes on the sponsor is limited. The poverty-line income is meager, even when enhanced by 25 percent, and a sponsored immigrant has therefore a strong incentive to seek employment, quite apart from having any legal duty to do so in order to secure the meager guaranty.

*Id.* at 422. In the instant case, the trial court found that, for the relevant time period, "[t]he federal poverty guidelines in effect beginning January 24, 2013 established $11,490 (x125% = $1,196/mo) as the annual poverty threshold. Beginning January 22, 2014, the threshold [was] $11,670 (x125% = $1,215/mo)." This is indeed a "meager guaranty." *See id.*

Based on the plain language of the Form I-864A, the contents of which are specified in 8 U.S.C. § 1183a, and the legislative history surrounding it, we agree with the Seventh Circuit's reasoning that reading a duty of mitigation into the immigration statute and the Form I-864A would disserve the stated statutory goal: "to prevent the admission to the United States of any alien who 'is likely at any time to become a public charge.' " *Id.* Accordingly, the trial court erred in concluding as a matter of law that Lingling has a continuing duty to mitigate her damages under the Form I-864A contract. The trial court's order is reversed so far as the court's imposition of a duty of mitigation.

AFFIRMED IN PART; REVERSED IN PART.

Judges STEPHENS and DILLON concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 6 December 2016)

| | | |
|---|---|---|
| CAROLINA VISION INVS. I, LLC v. VACCARO<br>No. 16-147 | Iredell<br>(13CVS1431) | Affirmed |
| DOSS v. ADAMS<br>No. 16-446 | Nash<br>(15CVS1753) | Affirmed |
| GOODWIN v. CITY OF CHARLOTTE<br>No. 16-551 | N.C. Industrial Commission<br>(808512) | Affirmed |
| HASHEMI v. HASHEMI-NEJAD<br>No. 16-358 | Wake<br>(10CVD18622) | Dismissed |
| IN RE A.S.<br>No. 16-472 | Wake<br>(14JA177) | Affirmed |
| IN RE B.M.A.<br>No. 16-419 | Transylvania<br>(14JT22) | Affirmed |
| IN RE B.S.<br>No. 16-438 | Robeson<br>(12JT375)<br>(12JT376) | Affirmed |
| IN RE D.L.P.<br>No. 16-468 | Rutherford<br>(13JA93-94) | Affirmed |
| IN RE H.B.<br>No. 16-482 | Alleghany<br>(13JA16-17) | Affirmed |
| IN RE H.H.<br>No. 16-550 | Duplin<br>(13JT80) | Affirmed |
| IN RE J.T.O.<br>No. 16-383 | Greene<br>(14JT1-2) | Vacated and Remanded |
| IN RE K.D.I.<br>No. 16-467 | Sampson<br>(14JA7) | Vacated and Remanded |
| IN RE L.M.C.<br>No. 16-661 | Yadkin<br>(14JT37-38) | Affirmed |
| IN RE T.A.T.<br>No. 16-688 | Davidson<br>(15JT28)<br>(15JT29) | Affirmed |

| | | |
|---|---|---|
| KOEHN v. HOLLEY<br>No. 16-586 | Wake<br>(16CVD309) | Affirmed |
| LENNON v. N.C. JUDICIAL DEP'T<br>No. 16-476 | N.C. Industrial<br>Commission<br>(14-706512) | Affirmed |
| LENOIR CTY. v. DAVIS<br>No. 16-298 | Lenoir<br>(14CVD452) | Dismissed |
| McADAMS v. N.C. DEP'T<br>OF COMMERCE<br>No. 16-196 | Wake<br>(15CVS4792) | Affirmed |
| McKNIGHT v. LOWE'S<br>HOME CTRS., LLC<br>No. 16-391 | N.C. Industrial<br>Commission<br>(X27737) | Vacated and<br>Remanded |
| McLEAN v. BAKER SAND & GRAVEL<br>No. 15-1377 | N.C. Industrial<br>Commission<br>(X74819) | Remanded |
| McVICKER v. BOGUE SOUND<br>YACHT CLUB, INC.<br>No. 16-456 | Carteret<br>(14CVS421) | Dismissed |
| RANDALL v. CLOUD<br>& WILLIAMS, PLLC<br>No. 16-477 | Mecklenburg<br>(15CVS16879) | Affirmed |
| SPRUILL v. WESTFIELD INS. CO.<br>No. 15-1329 | Currituck<br>(14CVS396) | Affirmed |
| STATE v. ALLEN<br>No. 16-539 | Lincoln<br>(13CRS53150) | No Error |
| STATE v. BANKS<br>No. 16-308 | Transylvania<br>(15CRS50377-78) | No Error |
| STATE v. BANKS<br>No. 16-402 | Transylvania<br>(15CRS51516) | No Error |
| STATE v. BATTLE<br>No. 16-355 | Duplin<br>(14CRS50827) | VACATE AND<br>REMAND IN PART;<br>NO ERROR IN PART. |
| STATE v. BEARY<br>No. 16-433 | Wake<br>(14CRS201449) | No Error |
| STATE v. CHILES<br>No. 16-612 | Martin<br>(12CRS50657) | Affirmed |

| | | |
|---|---|---|
| STATE v. CROSBY<br>No. 16-172 | Forsyth<br>(14CRS110)<br>(14CRS54254) | No error |
| STATE v. CURTIS<br>No. 16-458 | Caldwell<br>(12CRS1563) | Affirmed |
| STATE v. GARRISON<br>No. 16-565 | Forsyth<br>(14CRS58437) | No Error |
| STATE v. JOHNSON<br>No. 16-509 | Wake<br>(11CRS220929) | NO ERROR IN PART,<br>VACATED IN PART,<br>REVERSED IN PART,<br>AND REMANDED<br>FOR RESENTENCING.<br>IAC CLAIM DENIED. |
| STATE v. JOHNSON<br>No. 16-193 | Mecklenburg<br>(14CRS224978)<br>(14CRS38519) | No Error |
| STATE v. LAXTON<br>No. 16-386 | Davie<br>(13CRS51539-40)<br>(13CRS51542-44) | No Error |
| STATE v. LOGAN<br>No. 16-418 | Dare<br>(13CRS949)<br>(15CRS278) | No error in part;<br>Dismissed in part. |
| STATE v. MANNING<br>No. 16-442 | Wake<br>(15CR220382-84) | No prejudicial error |
| STATE v. MEEKER<br>No. 16-552 | Pamlico<br>(13CRS50199) | Reversed |
| STATE v. MITHAMO<br>No. 16-519 | Wake<br>(12CRS216306) | No Error |
| STATE v. MOORE<br>No. 16-422 | Cabarrus<br>(14CRS50611) | Remanded |
| STATE v. NEAL<br>No. 16-510 | Mecklenburg<br>(14CRS207102-03)<br>(14CRS207496) | Affirmed |
| STATE v. PARKER<br>No. 16-524 | Pitt<br>(13CRS57177) | No Error |
| STATE v. ROBINSON<br>No. 16-567 | Columbus<br>(14CRS52858-59) | No Error |

| | | |
|---|---|---|
| STATE v. ROUSSEAU<br>No. 16-380 | Forsyth<br>(14CRS1642)<br>(14CRS51004)<br>(14CRS51233) | No Error |
| STATE v. SELLERS<br>No. 15-1309 | Wake<br>(12CRS224404)<br>(13CRS368) | No Error |
| STATE v. SIMMONS<br>No. 16-255 | Duplin<br>(11CRS51393) | No Error |
| STATE v. SPIVEY<br>No. 16-455 | Hertford<br>(14CRS51495-96)<br>(15CRS101)<br>(15CRS14) | Remanded for Resentencing |
| STATE v. STROESSENREUTHER<br>No. 16-511 | New Hanover<br>(14CRS52404)<br>(15CRS8129) | Affirmed in Part, Remanded for Correction of Clerical Error in Part, Vacated and Remanded in Part |
| STATE v. STUBBS<br>No. 16-411 | Pender<br>(14CRS50033-34)<br>(14CRS52008)<br>(15CRS884-886) | No prejudicial error |
| STATE v. THOMPSON<br>No. 16-607 | Durham<br>(13CRS5783) | Affirmed; Remanded for the correction of clerical errors. |
| STATE v. TOLLIVER<br>No. 16-500 | Haywood<br>(14CRS50262-63) | No Error |
| STATE v. WALKER<br>No. 16-423 | Forsyth<br>(13CRS55263-64) | Affirmed |
| STATE v. WATKINS<br>No. 16-434 | Cabarrus<br>(13CRS54969-70) | Affirmed |
| STATE v. WHATLEY<br>No. 16-284 | Mecklenburg<br>(14CRS233477-78) | New trial in part; no error in part; no prejudicial error in part |
| STATE v. WHITEHEAD<br>No. 16-294 | Nash<br>(13CRS54109) | No Error in Part, No Plain Error in Part, Vacated in Part and Remanded |

| | | |
|---|---|---|
| STATE v. WILLIAMS<br>No. 16-432 | New Hanover<br>(14CRS57145) | No Error |
| STATE v. YORK<br>No. 16-170 | Guilford<br>(14CRS94941-42) | No Error |
| TOWNSEND v. N.C. DEP'T<br>OF TRANSP.<br>No. 16-478 | N.C. Industrial<br>Commission<br>(TA-22209)<br>(TA-22210) | Affirmed |
| TURNIP INVS., LLC v. DEUTSCHE<br>BANK TR. CO. AMS.<br>No. 16-246 | Jackson<br>(15CVS227) | Dismissed |
| UTLEY v. SMITH<br>No. 16-463 | Wake<br>(14CVS13728) | Affirmed |
| WILLIAMS v. PERRY<br>No. 16-372 | Rowan<br>(15CVS777) | Affirmed |

# HEADNOTE INDEX

## TOPICS COVERED IN THIS INDEX

ACCORD AND SATISFACTION
ADMINISTRATIVE LAW
APPEAL AND ERROR
ARBITRATION
ARSON
ATTORNEY FEES
ATTORNEYS

CHILD ABUSE, DEPENDENCY, AND NEGLECT
CHILD CUSTODY AND SUPPORT
CHILD VISITATION
CIVIL PROCEDURE
CIVIL RIGHTS
CONSTITUTIONAL LAW
CONTEMPT
CONTRACTS
CONVERSION
CORPORATIONS
CRIMINAL LAW

DAMAGES AND REMEDIES
DECLARATORY JUDGMENTS
DEEDS
DISCOVERY
DIVORCE
DRUGS

EMOTIONAL DISTRESS
EVIDENCE

FIDUCIARY RELATIONSHIP
FRAUD

IMMUNITY
INDEMNITY

JURISDICTION
JURY
JUVENILES

LIBEL AND SLANDER

NEGLIGENCE

PARTIES
PLEADINGS
PRETRIAL PROCEEDINGS
PUBLIC ASSISTANCE
PUBLIC OFFICERS AND EMPLOYEES

RAPE

SATELLITE-BASED MONITORING
SEARCH AND SEIZURE
SENTENCING
SERVICE OF PROCESS
SEXUAL OFFENDERS
STATUTES OF LIMITATION AND REPOSE

TERMINATION OF PARENTAL RIGHTS

UNFAIR TRADE PRACTICES

VENUE

WORKERS' COMPENSATION
WRONGFUL DEATH

## ACCORD AND SATISFACTION

**Rescission of notice of satisfaction—for any reason**—In a case of first impression involving N.C.G.S. § 45-36.6(b)—a statute that permits rescission of a notice of satisfaction for a security instrument if that instrument was "erroneously satisfied"—the Court of Appeals held that an instrument "erroneously satisfied of record" is one for which the certificate of satisfaction was erroneously or mistakenly filed for *any* reason, even a unilateral mistake having nothing to do with whether the underlying obligation actually was fully paid off. **Wells Fargo Bank, N.A. v. Am. Nat'l Bank & Tr. Co., 280.**

**Rescission of notice of satisfaction—summary judgment improper—**In a case involving rescission of a notice of satisfaction for a security instrument, the trial court erroneously granted summary judgment in favor of plaintiff bank where plaintiff bank forecast evidence that its filing of the satisfaction was a mistake but defendant bank forecast other, conflicting evidence suggesting that plaintiff bank intended to file the satisfaction because it believed the underlying loan had been paid off. This conflict in the forecasted evidence created a genuine issue of material fact for a jury to resolve. **Wells Fargo Bank, N.A. v. Am. Nat'l Bank & Tr. Co., 280.**

## ADMINISTRATIVE LAW

**Exhaustion of administrative remedies—remittance statement—findings of fact—**The trial court erred by dismissing plaintiffs' complaint for unpaid Medicaid claims based on lack of subject matter jurisdiction for failure to exhaust the available administrative remedies prior to filing suit. The remittance statement was not the notice of a final agency decision that is required by N.C.G.S. § 150B-23(f). Further, the trial court also erred in findings nos. 32 and 33 by including a reconsideration review as a mandatory step in the process by which a provider seeks to exhaust administrative remedies prior to filing suit. **Abrons Family Practice & Urgent Care, PA v. N.C. Dep't of Health & Human Servs., 1.**

## APPEAL AND ERROR

**Driving while impaired—motion to suppress granted—State's failure to timely file writ of certiorari—**In an impaired driving case, where defendant's motion to suppress was granted and the State delayed filing its petition for a writ of certiorari beyond the date that the case was calendared for its final hearing, it was proper for the district court to dismiss the charge sua sponte because the State failed to dismiss the charge. In addition, when the State appealed the district court's dismissal, the superior court did not err when it dismissed the State's appeal because the State's notice of appeal did not specify a basis for its appeal. **State v. Loftis, 449.**

**Failure to support argument—abandoned—**Where defendant-parents argued that the trial court erred by awarding defendant-daughter a constructive trust in the proceeds from the sale of a tailor shop in the amount of 50 percent of the initial purchase money contributed by plaintiff-husband and defendant-wife, the Court of Appeals deemed their argument abandoned because defendant-parents failed to support their argument with any legal authority. **Zhu v. Deng, 803.**

**Failure to support argument—dismissed—**Where defendant-parents argued that the trial court erred by dismissing their counterclaim against defendant-wife for living expenses, the Court of Appeals dismissed their argument because defendant-parents failed to support their argument with any legal authority. **Zhu v. Deng, 803.**

**APPEAL AND ERROR—Continued**

**Interlocutory orders and appeals—appeal of injunction—contempt orders—jurisdiction—**Given these particular facts and the procedural context in which the contempt orders were entered, the trial court acted reasonably in continuing to exercise jurisdiction over the case while defendants' appeal of the injunction was pending in the Court of Appeals. Because the injunction was ultimately upheld, the contempt orders entered to enforce it did not prejudice defendants. **SED Holdings, LLC v. 3 Star Props., LLC, 215.**

**Interlocutory orders and appeals—denial of motion for summary judgment—substantial right—governmental and public official immunity—**Although the denial of a motion for summary judgment is generally a nonappealable interlocutory order, orders denying dispositive motions based on the defenses of governmental and public official immunity affect a substantial right and are immediately appealable. **Fullwood v. Barnes, 31.**

**Interlocutory orders and appeals—denial of motion to dismiss—no substantial right—certified order—**Defendants' appeal from the denial of their motions to dismiss were from interlocutory orders and dismissed for failure to demonstrate the existence of a substantial right. However, the trial court's certified order on plaintiff's motion for partial judgment on the pleadings was immediately appealable. **Jamestown Pender, L.P. v. N.C. Dep't of Transp., 203.**

**Interlocutory orders and appeals—denial of motion to dismiss—personal jurisdiction—subject matter jurisdiction—**Although a party challenging a trial court's order as to personal jurisdiction under Rule 12(b)(2) has the right of immediate appeal from an adverse ruling, the denial of a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is not immediately appealable. **Hedden v. Isbell, 189.**

**Interlocutory orders and appeals—failure to give notice of appeal—no substantial right—**Defendant failed to preserve for appellate review the denial of her motion for consolidation of cases where she failed to give notice of appeal from the denial of her motion. Further, the denial did not involve the merits of plaintiff's claim for money owed and did not affect the judgment in that case in order to allow immediate appeal from the interlocutory order. **Judith M. Daly Att'y at Law, P.A. v. McKenzie, 611.**

**Interlocutory orders and appeals—preliminary injunction—failure to demonstrate substantial right—**Plaintiffs' appeal from an interlocutory order by the trial court enforcing a preliminary injunction previously entered against them in this action was dismissed. Plaintiffs failed to satisfy their burden of demonstrating the loss of a substantial right absent immediate appeal of the order. **Bolier & Co., LLC v. DECCA Furniture (USA), Inc., 323.**

**Mootness—motion to continue—**Although respondent mother contended that the trial court erred by denying her a continuance to prepare for a hearing on the issue of whether the trial court was required to cease reasonable reunification efforts, this argument was moot since the trial court's dispositional determination ceasing reunification efforts was reversed. **In re G.T., 50.**

**Motion to modify preliminary injunction—brought under Rules 59 and 60—did not toll time to appeal—**Where a subcontractor filed complaints against a contractor for various claims concerning payment for work on projects at Fort Bragg, and the trial court entered an order denying the contractor's motion to dismiss

**APPEAL AND ERROR—Continued**

and granting the subcontractor's motion for a preliminary injunction, the Court of Appeals lacked jurisdiction to review the contractor's appeal from the preliminary injunction order. The contractor failed to appeal the order within 30 days, and its motion to modify the preliminary injunction order—purportedly brought under Rules 59 and 60 of the N.C. Rules of Civil Procedure—did not toll the time to appeal. **Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC, 791.**

**Notice of appeal not timely—petition for writ of certiorari granted—**Where defendant stated during his sentencing hearing that he did not want to appeal his convictions and where he did not file written notice of appeal within 14 days after his sentence was imposed in accordance with Rule of Appellate Procedure 4, defendant's notice of appeal was not timely and the Court of Appeals granted the State's motion to dismiss the appeal. The Court did, however, elect to grant defendant's petition for writ of certiorari in order to reach the merits of his appeal. **State v. McGill, 121.**

**Preservation of issues—equitable distribution—**Although defendant husband contended that the trial court lacked jurisdiction in an equitable distribution case to distribute the Bank of America checking account, vehicles, and cash on hand since Rush Auto held legal title to these assets and was not joined as a party to the action, this argument was not preserved. Defendant raised this argument for the first time on appeal and without evidentiary support. **Chafin v. Chafin, 19.**

**Preservation of issues—failure to argue—**Although plaintiffs argued that the negligence and negligent infliction of emotional distress claims were not "medical malpractice" claims and did not require a Rule 9(j) certification, plaintiffs failed to challenge the trial court's dismissal of these negligence claims pursuant to Rule 12(b)(6) for failure to state a claim. Any argument challenging the trial court's dismissal of those claims under Rule 12(b)(6) was abandoned. **Norton v. Scotland Mem'l Hosp., Inc., 392.**

**Preservation of issues—failure to argue at trial—post-traumatic stress disorder—**Although defendant argued that the trial court committed prejudicial error in a child sexual abuse case by allowing an expert witness to testify that she diagnosed the minor child with post-traumatic stress disorder and thus impermissibly vouched for the child, defendant failed to preserve this argument by failing to raise this issue at trial. **State v. Mendoza, 731.**

**Preservation of issues—failure to object at trial—guardian ad litem—**Respondent mother failed to object to the lack of a guardian ad litem (GAL) for her minor child during the parental termination proceedings, and the issue was therefore not preserved for appellate review. Further, there was nothing to suggest it was unreasonable for the trial court to forego GAL assistance in determining the minor child's best interests. **In re P.T.W., 589.**

**Writ of certiorari—procedural process—Rule 1—Rule 2—Rule 21—**Defendant's petition for writ of certiorari to review her motion to dismiss in a driving while impaired case, prior to entry of her guilty plea, did not assert any of the procedural grounds set forth in Rule 21 to issue the writ. Although the statute provides jurisdiction, the Court of Appeals is without a procedural process under either Rule 1 or 21 to issue the discretionary writ under these facts, other than by invoking Rule 2. **State v. Ledbetter, 692.**

**ARBITRATION**

**Motion to confirm arbitration award—motion to vacate denied—**The trial court erred by failing to confirm an arbitration award upon plaintiff's motion. After denying defendants' motion to vacate, the trial court was required to enter an order confirming the arbitration award and a judgment in conformity with the order. **Flynn v. Schamens, 337.**

**ARSON**

**Indictment language—"willfully"—**Where defendant was convicted of burning certain buildings in violation of N.C.G.S. § 14-62, the Court of Appeals rejected his argument that the indictment was fatally defective for failure to contain the essential element that he "wantonly" set fire to burn. "Willfully" and "wantonly" are essentially the same, so the indictment charged the essential elements of the offense in words that are substantially equivalent to those used in section 14-62 with sufficient particularity to apprise defendant of the specific accusations against him. **State v. Hunt, 238.**

**ATTORNEY FEES**

**Vacated order—new hearing—**The Court of Appeals vacated the Fees Order and remanded the attorney fees issue to the trial court for a new hearing. **In re Garrett, 358.**

**ATTORNEYS**

**Discipline by the State Bar—suspension of law license—challenges to findings and conclusions—**Where the Disciplinary Hearing Commission (DHC) of the North Carolina State Bar entered an order of discipline suspending defendant's law license for a period of five years after determining that he had committed numerous violations of the North Carolina Rules of Professional Conduct, the Court of Appeals rejected various challenges by defendant to the validity of certain findings of fact and conclusions of law made by the DHC. **N.C. State Bar v. Sutton, 85.**

**Discipline by the State Bar—suspension of law license—constitutional and procedural challenges—**Where the Disciplinary Hearing Commission (DHC) of the North Carolina State Bar entered an order of discipline suspending defendant's law license for a period of five years after determining that he had committed numerous violations of the North Carolina Rules of Professional Conduct, the Court of Appeals rejected various constitutional and procedural arguments made by defendant on appeal, relating to the constitutionality of the DHC's disciplinary authority, due process, freedom of speech, the right to counsel, an amendment to the complaint by the State Bar, the signatures on the complaints, the notice of factors to be considered at the dispositional phase, the adequacy of the findings and conclusions at the dispositional phase, and the assessment of fees and costs. **N.C. State Bar v. Sutton, 85.**

**CHILD ABUSE, DEPENDENCY, AND NEGLECT**

**Ceasing reunification efforts—sufficiency of findings of fact—**The trial court erred in a child neglect and dependency case by ceasing reunification efforts under N.C.G.S. § 7B-901(c) at a permanency planning hearing subsequent to the initial dispositional hearing. Further, the trial court's additional findings failed to support the decision. The permanency planning order was vacated insofar as it provided that reunification efforts were not required and remanded for further proceedings. **In re T.W., 68.**

**CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued**

**Child abuse—motion to stay proceedings—Responsible Individuals List—pending criminal charge arising out of same occurrence—**The trial court did not abuse its discretion in a child abuse case by failing to grant appellant stepmother's motion to stay the proceedings regarding the Department of Social Services' administrative decision to place appellant's name on the Responsible Individuals List. Prior resolution of the pending criminal charge of felonious assault arising out of the same transaction or occurrence as the juvenile petition was not required. Further, the trial court was not required to make findings of fact or conclusions of law. **In re Patron, 375.**

**Child abuse—Responsible Individuals List—sufficiency of findings—**The trial court did not err in a child abuse case by affirming the Department of Social Services' administrative decision to place appellant stepmother's name on the Responsible Individuals List. The findings of fact were supported by competent evidence, and the conclusions of law were supported by those findings. **In re Patron, 375.**

**Child neglect—permanency planning order—jurisdiction—mootness—**Respondent mother's challenge in a child neglect case to a permanency planning order on the basis of its failure to comply with N.C.G.S. § 7B-1000 lacked merit. Further, the trial court's entry of both an order ending the jurisdiction of juvenile court and of a civil custody order rendered moot the merits of a permanency planning order. **In re J.S., 370.**

**Legal custody of aunt—failure to verify adequate resources for care—**The trial court violated N.C.G.S. § 7B-906.1(j) (2015) in a child neglect and dependency case by placing a minor child in the legal custody of his maternal aunt without verifying she would have adequate resources to care appropriately for the juvenile. This issue was remanded for further proceedings. **In re T.W., 68.**

**Motion to proceed pro se—likelihood of criminal charges and coercive influence—**Where the Rutherford County Department of Social Services filed juvenile petitions alleging that respondent-mother's children were abused, neglected, and dependent based on repeated physical abuse by respondent-mother's boyfriend, the trial court did not abuse its discretion by denying respondent-mother's requests to proceed pro se. The trial court was not required, either by statute or the Constitution, to allow respondent-mother to proceed pro se, and the trial court clearly considered her situation—including the likelihood of criminal charges and the boyfriend's coercive influence—in determining that self-representation was not in her best interest. **In re J.R., 195.**

**Neglect—chronic or toxic exposure to alcohol or controlled substances—required findings at disposition—**The trial court erred in a child neglect case by ceasing reasonable reunification efforts based on respondent mother's chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile. N.C.G.S. § 7B-901(c)(1)(e) required the trial court to make findings at disposition that a court of competent jurisdiction had already determined that the parent allowed the continuation of chronic or toxic exposure. This portion of the trial court's disposition order was reversed. **In re G.T., 50.**

**Neglect—sufficiency of findings of fact—**The trial court did not err by adjudicating a minor child as neglected. The findings were sufficient for the trial court to conclude that the child did not receive proper care, supervision, or discipline from respondent mother and that he lived in an environment injurious to his welfare. It is proper for a trial court to adjudicate a juvenile neglected, even if the juvenile never actually resided in the parent's home. **In re G.T., 50.**

**CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued**

**Waiver of further review hearings—required findings of fact—**Although defendant mother claimed in a child neglect and dependency case that the trial court erred by waiving further review hearings without making the findings of fact required by N.C.G.S. § 7B-906.1(n), it was undisputed that the trial court did not make these findings. If on remand the court chooses to waive subsequent permanency planning hearings, it must comply with this requirement. **In re T.W., 68.**

**CHILD CUSTODY AND SUPPORT**

**Attorney fees—insufficient findings—**In an action initiated by plaintiff-mother in 2001 to obtain child custody and support, the trial court erred by ordering plaintiff to pay attorney fees where the trial court's order contained no findings of fact indicating that the action was frivolous or, alternatively, that defendant was acting in good faith and defendant did not have sufficient means to defray the costs and expenses of the matter. **Williams v. Chaney, 476.**

**Child custody—Uniform Child-Custody Jurisdiction and Enforcement Act—subject matter jurisdiction—**The trial court had subject matter jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act to issue the 8 March 2016 order granting custody of the minor child to her father. All of the requirements of N.C.G.S. § 50A-201(a)(2) were satisfied. Further, the Illinois court determined that North Carolina would be a more convenient forum. **In re T.R., 386.**

**Child support—calculation—tax returns—**The trial court did not err by its calculation of defendant mother's income for purposes of calculating her child support obligations. Although plaintiff dad proffered an alternative income computation model, the trial court chose to give greater weight to the information contained in defendant's tax returns. **Sergeef v. Sergeef, 404.**

**Custody modification—primary physical custody—best interest of child—**The trial court did not err in a child custody modification case by awarding primary physical custody of the children to plaintiff father. Defendant mother failed to make a persuasive argument that it was not in the best interest of the children. **Scoggin v. Scoggin, 115.**

**Custody modification—written judgment different from oral pronouncement—**The court did not err in a child custody modification case by entering an order that reached a conclusion that differed from its oral pronouncement. Entry of judgment based upon oral rendition of judgments is no longer allowed in civil matters. Judgments and orders are only entered when they are reduced to writing, signed by the judge, and filed with the clerk of court. **Scoggin v. Scoggin, 115.**

**Order not to make derogatory statements—ambiguous—willfulness—**Where the trial court issued an order modifying plaintiff-mother's visitation and directing plaintiff not to make derogatory statements about the child or the child's family members, it was ambiguous whether the order proscribed the comments that plaintiff subsequently posted on Facebook. Thus, it could not be said that plaintiff's actions were willful, and it was error for the trial court to find her in contempt of the order. **Williams v. Chaney, 476.**

**Retroactive child support—calculation—extraordinary expenses—**The trial court erred by failing to follow the North Carolina Child Support Guidelines when computing defendant mom's child support obligation to plaintiff dad. The trial court failed to enter the basic child support obligation required by line item 4. Further, the

**CHILD CUSTODY AND SUPPORT—Continued**

trial court's order regarding the minor son's extraordinary expenses was vacated and remanded to the trial court to make additional findings of fact and to recalculate the amount of retroactive child support in light of its additional findings. **Sergeef v. Sergeef, 404.**

**Retroactive child support—findings of fact—shared custody—**The trial court erred in a child support case by its finding of fact that since August 2013, the parties have shared custody of their minor daughter equally. This portion of the order was remanded to the trial court for the limited purpose of recalculating the amount of retroactive child support plaintiff dad was entitled to recover from defendant mother. **Sergeef v. Sergeef, 404.**

**CHILD VISITATION**

**Denial—sufficiency of findings of fact—**The trial court did not abuse its discretion in a child neglect and dependency case by denying visitation to a respondent mother. The court made the necessary findings to deny visitation. **In re T.W., 68.**

**CIVIL PROCEDURE**

**Summary judgment—voluntary dismissal—rested case—**The trial court did not err in a case involving alleged false and misleading representations regarding a lease agreement by granting summary judgment in favor of defendants following plaintiff's filing of a notice of voluntary dismissal. Plaintiff had rested its case and lost its absolute right to voluntarily dismiss the case. **Allied Spectrum, LLC v. German Auto Ctr., Inc., 308.**

**CIVIL RIGHTS**

**Section 99D-1 claim—standing—only individuals or Human Relations Commission—**Where the Town of Belhaven recorded a deed in 1948 granting a 100-foot strip of land to the Pungo District Hospital Corporation (PDHC), PDHC thereafter constructed a hospital on the land, PDHC in 2011 entered an agreement transferring full control of PDHC to Vidant Health, Inc. (Vidant), Vidant closed the hospital in 2014 and deeded it to Pantego Creek, LLC (Pantego Creek), and plaintiffs (Belhaven, the Pungo District Hospital Community Board, and several NAACP branches) filed a complaint against defendants (Pantego Creek and Vidant), the trial court did not err by granting defendants' motion to dismiss pursuant to Rule 12(b)(6) as to the NAACP's Section 99D-1 claim against defendants. The General Assembly only intended individually aggrieved persons or the North Carolina Human Relations Commission to have standing to bring an action under Section 99D-1. **Town of Belhaven, N.C. v. Pantego Creek, LLC, 459.**

**CONSTITUTIONAL LAW**

**Effective assistance of counsel—failure to object and to renew motion to dismiss—**Where defendant was convicted of burning certain buildings in violation of N.C.G.S. § 14-62, the Court of Appeals rejected his argument that he received ineffective assistance of counsel because his attorney did not object to the investigator's testimony and failed to renew the motion to dismiss at the close of all the evidence. There was nothing to suggest that the decision not to object was erroneous such that defense counsel provided unconstitutionally deficient performance. Further,

**CONSTITUTIONAL LAW—Continued**

defendant could not establish prejudice in trial counsel's failure to move to dismiss the charge at the close of all evidence. **State v. Hunt, 238.**

**Effective assistance of counsel—knowing, intelligent, and voluntary waiver—**The trial court did not err by allowing defendant to represent himself at a probation revocation hearing allegedly without making a valid determination that defendant's decision to proceed pro se was knowing, intelligent, and voluntary. The trial court properly conducted the inquiry required under N.C.G.S. § 15A-1242. **State v. Faulkner, 412.**

**Right to counsel—trial strategy—impasse—**The trial court did not err in a statutory rape and indecent liberties with a child case by settling an impasse between defendant and defense counsel. Defense counsel's trial strategy determined whether a witness would be cross-examined despite defendant's objection to counsel's strategy. **State v. Ward, 254.**

**CONTEMPT**

**Civil and criminal—distinct conduct with partially overlapping facts—**Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that the trial court erroneously found him in both civil and criminal contempt based on the same conduct. It was readily apparent from the trial court's order that defendant was in civil and criminal contempt for distinctly separate and discrete conduct based on a partially overlapping nucleus of facts. **State v. Revels, 754.**

**Criminal—jurisdiction—show cause order—**Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that the trial court's show cause order failed to adequately allege that he was subject to being found in criminal contempt of court with sufficient specificity so as to confer jurisdiction upon the trial court. The trial court was fully authorized to find defendant in criminal contempt because it entered a show cause order requiring him to appear in court and explain why he had failed to comply with the temporary restraining order and preliminary injunction. **State v. Revels, 754.**

**Criminal—punitive punishment—**Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that the trial court erred by finding him in criminal contempt and imposing a civil punishment. The sentence imposed for the criminal contempt of court was clearly punitive in nature. **State v. Revels, 754.**

**Effective assistance of counsel—**Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that he received ineffective assistance of counsel due to his counsel's failure to object to the criminal contempt proceedings. Defendant could not show that the trial court erred procedurally in finding him in civil and criminal contempt of court, so he could not demonstrate that his trial counsel's failure to object to the proceedings affected the outcome. **State v. Revels, 754.**

**Omission of term "guilty"—**Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that his conviction should be overturned because the trial court never expressly used the term "guilty" in finding him in contempt of court. Defendant could not show that but for the omission of such language the trial court would have reached a contrary result. **State v. Revels, 754.**

**CONTEMPT—Continued**

**Proceedings during pending appeal—no jurisdiction—**Where a subcontractor filed complaints against a contractor for various claims concerning payment for work on projects at Fort Bragg, and the trial court entered an order denying the contractor's motion to dismiss and granting the subcontractor's motion for a preliminary injunction, the Court of Appeals vacated the trial court's contempt order imposing sanctions on the contractor for violating the preliminary injunction order. The trial court lacked jurisdiction to conduct a contempt proceeding and impose sanctions because the contractor's appeal divested the trial court of jurisdiction to do so while the appeal was pending. **Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC, 791.**

**CONTRACTS**

**Breach of contract—breach of lease agreement—summary judgment—sufficiency of evidence—**The trial court did not err in a case involving alleged false and misleading representations regarding a lease agreement by granting summary judgment in favor of defendants. Plaintiff failed to meet its burden of demonstrating the existence of a genuine issue of material fact. **Allied Spectrum, LLC v. German Auto Ctr., Inc., 308.**

**Immigration—Form I-864 Affidavit of Support—enforceable contract—**Where defendant-wife, a Chinese citizen, married plaintiff-husband, a U.S. citizen, and came to the U.S. on a K-1 visa, for which plaintiff-husband and his parents (defendant-parents) were the sponsors pursuant to a Form I-864 Affidavit of Support, the trial court did not err by concluding that defendant-wife was entitled to ongoing support based on the Form I-864A. The form was an enforceable contract against defendant-parents, and defendant-wife had no affirmative duty to mitigate her damages under the contract. Further, defendant-wife's assets did not reduce the amount of support she was entitled to receive. **Zhu v. Deng, 803.**

**Immigration—Form I-864 Affidavit of Support—no duty to mitigate damages—**Where defendant-wife, a Chinese citizen, married plaintiff-husband, a U.S. citizen, and came to the U.S. on a K-1 visa, for which plaintiff-husband and his parents (defendant-parents) were the sponsors pursuant to a Form I-864 Affidavit of Support, the trial court erred by concluding as a matter of law that defendant-wife had a continuing duty to mitigate her damages under the Form I-864A contract. **Zhu v. Deng, 803.**

**CONVERSION**

**Improper dismissal of claim—collateral estoppel—federal court dismissal not an adjudication on merits—**The trial court erred by dismissing plaintiff-appellant's conversion claim on the basis of collateral estoppel based on the dismissal of the same claim in federal court. The federal court's dismissal pursuant to Federal Rule 12(b)(6) was not an adjudication on the merits for purposes of collaterally estopping plaintiff from raising the same or related claim under North Carolina state law in our State's courts. **Bishop v. Cty. of Macon, 519.**

**CORPORATIONS**

**Electrical cooperative—fiduciary duty—capital credits—**The trial court did not err by granting defendant electric cooperative's second motion for summary judgment. Defendant did not owe plaintiff members a fiduciary duty with regard to the discounting of capital credits. **Lockerman v. S. River Elec. Membership Corp., 631.**

**CRIMINAL LAW**

**Guilty plea—factual basis—**On appeal from the trial court's order denying his motion to withdraw his guilty plea and his convictions for two counts of common law robbery and attaining habitual felon status, the Court of Appeals rejected defendant's argument that the trial court erred by accepting his guilty plea. There was sufficient factual basis to support his convictions. **State v. McGill, 121.**

**Jury instructions—acting alone or in together with another—**Where defendant was convicted in 2015 of sexual offenses committed in 1991 against three women, the trial court did not commit plain error by instructing the jury in such a manner that defendant could be found guilty either by acting by himself or acting together with another. **State v. Thompson, 158.**

**Motion seeking funds to hire expert to retest DNA samples—**Where defendant was convicted in 2015 of sexual offenses committed in 1991 against three women, the trial court did not abuse its discretion by denying defendant's motion seeking funds with which to hire an expert to retest the DNA samples. **State v. Thompson, 158.**

**Motion to withdraw guilty plea—denied—**On appeal from the trial court's order denying his motion to withdraw his guilty plea and his convictions for two counts of common law robbery and attaining habitual felon status, the Court of Appeals held that defendant failed to establish any of the factors from *State v. Meyer*, 330 N.C. 738 (1992) as weighing in his favor, and so the trial court did not err by denying his motion to withdraw his guilty plea. **State v. McGill, 121.**

**Restitution—unsworn statement of prosecutor—**Where defendant was convicted of burning certain buildings in violation of N.C.G.S. § 14-62, the Court of Appeals held that the trial court erred by ordering defendant to pay $5,000 in restitution to the apartment complex he set on fire based on the unsworn statement by the prosecutor that the apartment complex had to pay an insurance deductible of $5,000. Unsworn statements of a prosecutor cannot support an order of restitution. **State v. Hunt, 238.**

**DAMAGES AND REMEDIES**

**Recoupment—breach of contract—**The trial court's order granting summary judgment was reversed and remanded to determine the amount of recoupment, if any, defendant may recover from plaintiffs on its claim for breach of contract after deduction of any damages proven by plaintiffs. **Settlers Edge Holding Co., LLC v. RES-NC Settlers Edge, LLC, 645.**

**Restitution—issue foreclosed on remand—**The trial court did not err in a larceny after breaking and entering and injury to real property case by failing to find a restitution award should be reduced in light of the new evidence defendant introduced at the resentencing hearing. *Hardy I* resolved and foreclosed any reconsideration by the trial court of the restitution award entered against defendant on remand. **State v. Hardy, 225.**

**DECLARATORY JUDGMENTS**

**North Carolina Uniform Declaratory Judgment Act—no award of attorney fees—**The trial court's order awarding attorney fees under the Declaratory Judgment Act was vacated. The North Carolina Uniform Declaratory Judgment Act does not permit a trial court to award attorney fees. **Swaps, LLC v. ASL Props., Inc., 264.**

## DEEDS

**Beach property—unreasonable restraint on alienation of life estate—**The trial court did not err in a family dispute over beach property by granting summary judgment in favor of defendant mother. The deed language preventing the mother from renting out the property during her life tenancy created an unreasonable restraint on the alienation of defendant's life estate and was therefore void. **Davis v. Davis, 185.**

**Foreclosure—substitute trustee—motion to set aside—improper notice—** The trial court did not err in granting STS' motion to set aside and vacate the Household Foreclosure and substitute trustee's deed. STS was the owner of the property and was not noticed in the Household Foreclosure. **In re Garrett, 358.**

**Wish for land to be used for hospital—no reversionary interest—**Where the Town of Belhaven recorded a deed in 1948 granting a 100-foot strip of land to the Pungo District Hospital Corporation (PDHC), PDHC thereafter constructed a hospital on the land, PDHC in 2011 entered an agreement transferring full control of PDHC to Vidant Health, Inc. (Vidant), Vidant closed the hospital in 2014 and deeded it to Pantego Creek, LLC (Pantego Creek), and plaintiffs (Belhaven, the Pungo District Hospital Community Board, and several NAACP branches) filed a complaint against defendants (Pantego Creek and Vidant), the trial court did not err by granting defendants' motion to dismiss pursuant to Rule 12(b)(6) as to Belhaven's breach of contract claim against Vidant and by failing to enter declaratory judgment against Vidant and Pantego Creek. The Court of Appeals rejected plaintiffs' argument that defendants were successors in interest to the 1948 deed and therefore subject to language included therein that amounted to a reversionary interest held by Belhaven that the granted property be used for the operation of a hospital for the benefit of the town. Belhaven did not include any language creating a reversionary interest in the 1948 deed—and language expressing Belhaven's wishes did not create such an interest—and the deed gave PDHC and its successors in interest a title in fee simple absolute. **Town of Belhaven, N.C. v. Pantego Creek, LLC, 459.**

## DISCOVERY

**Motion for continuance—no request for 11 months—**The trial court did not abuse its discretion by denying defendant's request for a continuance. Even if defendant had informed the trial court of specific relevant and admissible matters on which she wanted to conduct discovery, defendant failed to file any motion or request for discovery during the 11 months that the case was pending. **Judith M. Daly Att'y at Law, P.A. v. McKenzie, 611.**

## DIVORCE

**Equitable distribution—ability to pay—**The trial court did not abuse its discretion in an equitable distribution case by allegedly failing to consider defendant's ability to pay. The trial court specifically found that defendant was employed and had adequate assets and income from said employment to pay the distributive award. **Chafin v. Chafin, 19.**

**Equitable distribution—findings of fact—distribution of marital debt—**The trial court did not abuse its discretion in an equitable distribution case by making finding number 14. The evidence supported the trial court's finding that the parties stipulated to the distribution of the marital debt to plaintiff. **Chafin v. Chafin, 19.**

**DIVORCE—Continued**

**Equitable distribution—marital property valuation—vehicles—**The trial court did not err in an equitable distribution case by finding that the vehicles were marital property worth $36,350.00. The record showed that the trial court allowed defendant's motion to preserve the record with excluded evidence and testimony, and that it ultimately considered the evidence. **Chafin v. Chafin, 19.**

**Equitable distribution—valuation—business interest—reasonable estimate—** The trial court did not err in an equitable distribution case by distributing Rush Auto to defendant husband without assigning a value to the business interest. While the trial court distributed Rush Auto without explicitly valuing the company, the findings ultimately reflected a reasonable estimate of the parties' interest. **Chafin v. Chafin, 19.**

**Marital property—wedding gifts—**Where the trial court determined that $150,000 of money given as wedding gifts was marital property, the Court of Appeals held that the determination was supported by competent evidence and affirmed the trial court on the issue. **Zhu v. Deng, 803.**

**DRUGS**

**Acting in concert—presence in home where marijuana burning in oven—** Where defendant and another man were present in a house in which marijuana was burning in the oven and causing smoke to come out of the house, the trial court plainly erred by instructing the jury on acting in concert. The State presented no evidence that defendant had a common plan or purpose to possess marijuana or drug paraphernalia with the other man. At most, the State showed that defendant and the man were acquainted and that defendant was present in the house on the day the drugs were found. **State v. Holloway, 674.**

**Constructive possession—presence in home where marijuana burning in oven—**Where defendant and another man were present in a house in which marijuana was burning in the oven and causing smoke to come out of the house, the trial court erred by denying defendant's motion to dismiss the charges related to possession of marijuana and drug paraphernalia. Defendant did not live or admit to living in the house, no identifying documents of his were found in the house, and the most incriminating circumstance presented by the State, besides defendant's presence in the house on the day of fire, was a photograph of defendant found face down in a plastic storage bin in one of the bedrooms. **State v. Holloway, 674.**

**Maintaining a dwelling—presence in home where marijuana burning in oven—**Where defendant and another man were present in a house in which marijuana was burning in the oven and causing smoke to come out of the house, the trial court erred by denying defendant's motion to dismiss the charge of maintaining a dwelling. There was no evidence that defendant was the owner or the lessee of the dwelling, and there was no evidence that defendant paid for its utilities or upkeep. Further, there was no evidence that defendant had been seen in or around the dwelling before or that he lived there. **State v. Holloway, 674.**

**EMOTIONAL DISTRESS**

**Intentional infliction of emotional distress—dismissal—**The trial court did not err by dismissing plaintiffs' intentional infliction of emotional distress claim against Duke Hospital. **Norton v. Scotland Mem'l Hosp., Inc., 392.**

**EMOTIONAL DISTRESS—Continued**

**Intentional infliction of emotional distress—premature dismissal—**The trial court's dismissal under Rule 12(b)(6) of plaintiffs' intentional infliction of emotional distress allegation against Scotland Memorial was premature and was reversed. **Norton v. Scotland Mem'l Hosp., Inc., 392.**

**EVIDENCE**

**Consensual sexual activity between husband and wife—child sex abuse prosecution—pattern or modus operandi—**In defendant's prosecution for child sexual abuse, the trial court abused its discretion by overruling defendant's Rule 401 and 404(b) objections to the admission of evidence regarding consensual sexual activity between defendant and his wife. The evidence of the unique sexual act showed defendant's pattern or modus operandi and was not outweighed by its prejudicial effect. **State v. Godbey, 424.**

**Deceased victims—statements to medical personnel—corroborated by statements to police officer—**Where defendant was convicted in 2015 of sexual offenses committed in 1991 against three women—two of whom (Alice and Patricia) had died of natural causes in the intervening time—the trial court did not err by admitting the statements made by Alice and Patricia to a police officer to corroborate the women's statements to medical personnel who treated them at the time of the assaults. The statements were admissible for corroboration purposes, and there was sufficient evidence to support submission of the various charges to the jury based on the witnesses' statements to medical personnel and on the overwhelming statistical likelihood that defendant's DNA matched that found on the victims. **State v. Thompson, 158.**

**Driving while impaired—results of roadside sobriety test—officer's interpretation—**Where defendant was convicted of impaired driving, the Court of Appeals rejected his argument that the trial court committed plain error by admitting testimony from the law enforcement officer who arrested him regarding the officer's interpretation of the results of a specific roadside sobriety test. Although the challenged testimony was admitted in error, in light of the overwhelming unchallenged evidence of defendant's impairment, he was not prejudiced by the admission of the challenged testimony. **State v. Killian, 443.**

**Expert testimony—sexual child abuse—report and treatment records—late discovery—additional time to review—**The trial court did not abuse its discretion in a child sexual abuse case by admitting certain expert testimony over defendant's objections. Defendant conceded, both the report and treatment records were made available to defendant in February 2015, and the trial court granted defendant approximately two additional months to review the evidence and prepare to cross-examine the witnesses at trial. **State v. Mendoza, 731.**

**Expert witness—letters—bias or prejudice—child advocacy—sexual child abuse—**The trial court did not abuse its discretion in a child sexual abuse case by failing to admit into evidence three letters the expert witness wrote that were published in the Winston-Salem Journal in 2003. Defendant failed to demonstrate a reasonable possibility of a different result at trial had the letters been admitted since defendant was still permitted to cross-examine the expert about her possible bias or prejudice in child advocacy matters. **State v. Mendoza, 731.**

**Expert witnesses—treatment records—sexual child abuse—minor child's sexual activity—**The trial court did not abuse its discretion in a child sexual abuse

**EVIDENCE—Continued**

case by not allowing defendant to cross-examine two expert witnesses about information in their treatment records regarding the minor child's sexual activity with partners other than defendant father even though it did not fall within one of the categories in the Rape Shield Statute. **State v. Mendoza, 731.**

**Non-expert opinion testimony—proving fire was intentionally set—plain error review—**Where defendant was convicted of burning certain buildings in violation of N.C.G.S. § 14-62, the Court of Appeals rejected his argument that the trial court committed plain error by allowing non-expert opinion testimony into evidence to prove the fire at issue was intentionally set. Given the unchallenged evidence in the form of direct testimony and video recordings depicting that an accelerant was used to start or accelerate the fire, defendant failed to demonstrate that any presumed error in the trial court's performance of its gatekeeping function would have had a probable impact on the jury's guilty verdict. **State v. Hunt, 238.**

**Privileged communications—consensual sexual activity between husband and wife—child sex abuse prosecution—**In defendant's prosecution for child sexual abuse, the trial court did not err by admitting privileged evidence over objection about consensual sexual activity between defendant and his wife pursuant to N.C.G.S. § 8-57.1. **State v. Godbey, 424.**

**FIDUCIARY RELATIONSHIP**

**Alleged—agreement not intended for benefit of third parties—**Where the Town of Belhaven recorded a deed in 1948 granting a 100-foot strip of land to the Pungo District Hospital Corporation (PDHC), PDHC thereafter constructed a hospital on the land, PDHC in 2011 entered an agreement transferring full control of PDHC to Vidant Health, Inc. (Vidant), Vidant closed the hospital in 2014 and deeded it to Pantego Creek, LLC (Pantego Creek), and plaintiffs (Belhaven, the Pungo District Hospital Community Board, and several NAACP branches) filed a complaint against defendants (Pantego Creek and Vidant), the trial court did not err by granting defendants' motion to dismiss pursuant to Rule 12(b)(6) as to Belhaven's breach of fiduciary duty claim against Pantego Creek. By the 2011 agreement's plain terms, it was not intended for the benefit of third-party beneficiaries and was exclusively between Pantego Creek, PDHC, and Vidant. No fiduciary relationship ever existed between Pantego Creek and plaintiffs. **Town of Belhaven, N.C. v. Pantego Creek, LLC, 459.**

**FRAUD**

**Mediation agreement—not beneficiaries to agreement—no particularity in allegations—**Where the Town of Belhaven recorded a deed in 1948 granting a 100-foot strip of land to the Pungo District Hospital Corporation (PDHC), PDHC thereafter constructed a hospital on the land, PDHC in 2011 entered an agreement transferring full control of PDHC to Vidant Health, Inc. (Vidant), Vidant closed the hospital in 2014 and deeded it to Pantego Creek, LLC (Pantego Creek), and plaintiffs (Belhaven, the Pungo District Hospital Community Board, and several NAACP branches) filed a complaint against defendants (Pantego Creek and Vidant), the trial court did not err by granting defendants' motion to dismiss pursuant to Rule 12(b)(6) as to plaintiffs' claim against Vidant for fraud. Belhaven breached the mediation agreement when its community board was unable to assume operational responsibility for the hospital, so Vidant was entitled to close the hospital according to the mediation agreement. In addition, plaintiffs were not parties or third-party beneficiaries to the 2011 agreement and 2014 deed between Vidant, PDHC, and Pantego

**FRAUD—Continued**

Creek, and therefore plaintiffs were incapable of suffering damages based on the 2011 agreement or 2014 deed. Further, plaintiffs failed to allege with any particularity how Vidant's exercise of its express option to close the hospital contained in the mediation agreement constituted fraud. **Town of Belhaven, N.C. v. Pantego Creek, LLC, 459.**

**IMMUNITY**

**Governmental immunity—official capacity—failure to allege waiver—**The trial court erred by denying defendant police officer's motion for summary judgment on the affirmative defense of governmental immunity for plaintiff's claims in his official capacity. Plaintiff failed to allege waiver of this affirmative defense. **Fullwood v. Barnes, 31.**

**Public official immunity—individual capacity—malice—**The trial court did not err by denying defendant police officer's motion for summary judgment on the affirmative defense of public official immunity concerning plaintiff's tort claims against defendant in his individual capacity. Plaintiff's complaint and affidavit forecasted triable issues of fact that existed on whether defendant's actions were improperly motivated by malice. **Fullwood v. Barnes, 31.**

**INDEMNITY**

**Motion for partial judgment on pleadings—taking of property—**The trial court did not err by granting plaintiff's motion for partial judgment on the pleadings. Based upon the pleadings and the precedent established in *Kirby I* and *Kirby II*, plaintiff's complaint and defendants' answers established that a taking had occurred. **Jamestown Pender, L.P. v. N.C. Dep't of Transp., 203.**

**JURISDICTION**

**Conditional use permit—outsider appeal—petition for writ of certiorari—failure to include applicant as respondent—**The trial court did not err by concluding that it lacked jurisdiction based on petitioners' failure to properly perfect their appeal under N.C.G.S. § 160A-393. When an applicant is granted a conditional use permit and an outsider appeals the decision through a petition for writ of certiorari but does not include the applicant as a respondent in the appeal, the superior court is without jurisdiction to review the merits. **Hirschman v. Chatham Cty., 349.**

**Personal jurisdiction—personally served in North Carolina—**The trial court did not err in an alienation of affections and criminal conversation case by denying defendant's motion to dismiss based on lack of personal jurisdiction. Defendant was personally served while physically present in North Carolina. The trial court acquired *in personam* jurisdiction over defendant and the need for a minimum contacts analysis was rendered unnecessary. **Hedden v. Isbell, 189.**

**Rule 2.1 of General Rules of Practice for Superior and District Courts—designation as exceptional case—**Where the Town of Belhaven recorded a deed in 1948 granting a 100-foot strip of land to the Pungo District Hospital Corporation (PDHC), PDHC thereafter constructed a hospital on the land, PDHC in 2011 entered an agreement transferring full control of PDHC to Vidant Health, Inc. (Vidant), Vidant closed the hospital in 2014 and deeded it to Pantego Creek, LLC (Pantego Creek), and plaintiffs (Belhaven, the Pungo District Hospital Community Board, and

**JURISDICTION—Continued**

several NAACP branches) filed a complaint against defendants (Pantego Creek and Vidant), the Court of Appeals found meritless and granted defendants' motion to dismiss plaintiffs' argument that the Senior Resident Superior Court Judge for the Second Judicial District and the Chief Justice of the Supreme Court of N.C. deprived plaintiffs of their right to a fair and impartial hearing when the Chief Justice designated the case as an exceptional case under Rule 2.1 of the General Rules of Practice for the Superior and District Courts upon the formal recommendation of the Senior Resident Superior Court Judge for the Second Judicial District and appointed Judge Albright to adjudicate the matter. **Town of Belhaven, N.C. v. Pantego Creek, LLC, 459.**

**Standing—homeowners associations—compliance with bylaws—**Where the plaintiff homeowners associations (HOAs) filed a lawsuit challenging the validity of a zoning ordinance that permitted multifamily housing on parcels of land abutting property owned by plaintiffs, the Court of Appeals held that plaintiff HOAs' failure to comply with various provisions in their corporate bylaws when their respective boards of directors initiated litigation prevented them from having standing to bring the lawsuit. **Willomere Cmty. Ass'n, Inc. v. City of Charlotte, 292.**

**Subject matter jurisdiction—child abuse—age of child at time of abuse—**The trial court had jurisdiction in a child abuse case to hear appellant stepmother's petition for judicial review of the Department of Social Services' administrative decision to place appellant's name on the Responsible Individuals List. Although the child was 18 years old at the time of the hearing, he was under the age of 18 at the time appellant struck him. **In re Patron, 375**.

**JURY**

**Statement by trial court—futility of requesting to review witness testimony—** The trial court erred in defendant's trial for offenses stemming from a robbery and murder by making comments prior to closing arguments that suggested it would be futile for the jury to request to review witness testimony. The error, however, was not prejudicial, as defendant failed to identify any particular testimony by the accomplice witnesses which, if reviewed by the jury, would suggest a reasonable probability of a different result at his trial. **State v. Lyons, 698.**

**JUVENILES**

**Waiver of right to have parent present during interrogation—wrong box initialed on form—**Where the trial court found that juvenile defendant initialed the box on the Juvenile Waiver of Rights form indicating that his mother was present and he wished to answer questions, that the indication of the mother's presence was an error on the part of both the officer and defendant, and that defendant did not request the presence of his mother, there was sufficient support for the conclusion that defendant did not invoke his right to have his mother present and validly waived his right to have a parent present during the interrogation. **State v. Watson, 173.**

**LIBEL AND SLANDER**

**Defamation—libel—slander per se—motion to dismiss—**The trial court erred by dismissing plaintiffs' complaint for failure to state a claim for defamation. Plaintiffs stated a claim for libel and slander *per se* sufficient to withstand defendant's motion to dismiss. **Eli Global, LLC v. Heavner, 534.**

**NEGLIGENCE**

**Contributory—auto collision at stoplight—**The evidence at trial was not sufficient to show that plaintiff was contributorily negligent in a case in which plaintiff proceeded straight through an intersection while defendant turned left at the same time in the same intersection. There was nothing in the record to suggest that plaintiff acted unreasonably in assuming that defendant would yield and would not turn her vehicle into plaintiff's path after he entered the intersection. **Daisy v. Yost, 530.**

**PARTIES**

**Motion to intervene—remand for reconsideration—**The Court of Appeals vacated the portion of the trial court's 17 November 2015 order denying movants' motion to intervene and remanded this matter to the trial court for reconsideration of the motion under Rule 24. **Hinton v. Hinton, 340.**

**PLEADINGS**

**Rule 11 sanctions—attempt to delay hearing—**A de novo review revealed that the trial court did not err in an equitable distribution case by ordering Rule 11 sanctions against defendant husband. There was sufficient evidence in the record to support the trial court's finding that defendant filed the challenged motions in an attempt to delay the hearing. **Chafin v. Chafin, 19.**

**Sanctions—sufficiency of evidence—**The trial court did not err by denying defendants' motion to impose sanctions. There was no evidence in the record to support a legal conclusion that sanctions were proper on the basis asserted by defendants. **Bishop v. Cty. of Macon, 519.**

**PRETRIAL PROCEEDINGS**

**Preliminary injunction—modification—**Where a subcontractor filed complaints against a contractor for various claims concerning payment for work on projects at Fort Bragg, and the trial court entered an order denying the contractor's motion to dismiss and granting the subcontractor's motion for a preliminary injunction requiring the contractor to hold in escrow and not disburse or distribute any monies received from the federal government on the projects to any person or entity other than plaintiff subcontractor, the trial court did not abuse its discretion by denying the contractor's motion to alter or amend the preliminary injunction to allow the contractor to pay certain third parties. The trial court carefully considered the contractor's arguments and modified the injunction to permit the U.S. to pay the project surety, who could use the funds to pay subcontractors and suppliers on the project. **Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC, 791.**

**PUBLIC ASSISTANCE**

**Workers' Compensation Medicare Set-Aside Account—not counted from determining Medicaid eligibility—**The trial court erred by affirming the agency decision of the N.C. Department of Health and Human Services that treated petitioner's Workers' Compensation Medicare Set-Aside Account (WCMSA) as a countable resource for purposes of determining petitioner's eligibility for Medicaid. Petitioner established that the terms of a legally binding agreement—a Settlement Agreement incorporated into an order of the Industrial Commission—imposed legal restrictions on her use of the WCMSA funds, and therefore those funds could not be counted for purposes of determining her eligibility for Medicaid. **Williford v. N.C. Dep't of Health & Human Servs., 491.**

**PUBLIC OFFICERS AND EMPLOYEES**

**Career state employee—procedural requirements for dismissal—**The administrative law judge (ALJ) erred by granting petitioner career state employee's motion for summary judgment since respondent met the procedural requirements of N.C.G.S. § 126-35 prior to dismissing petitioner. The case was remanded to the ALJ pursuant to N.C.G.S. § 150B-51(d) with instructions to recommence proceedings in order for respondent to complete its case-in-chief regarding petitioner's dismissal for just cause. **Heard-Leak v. N.C. State Univ. Ctr. for Urban Affairs, 41.**

**Career status achieved—position declared managerial exempt from N.C. Human Resources Act—statutory right to hearing before Office of Administrative Hearings—**Where plaintiff was employed by the N.C. Department of Public Safety as a Special Assistant to the Secretary for Inmate Services, attained career status, was notified that the Governor had declared his position as managerial exempt from the provisions of the N.C. Human Resources Act, and two months later received a letter terminating him from employment, the plain language of N.C.G.S. § 126-5(h) provided plaintiff with a statutory right to a hearing before OAH as to whether he was subject to the Act and whether his exempt designation was proper. **Vincoli v. State, 269.**

**RAPE**

**Statutory rape—requested jury instructions—mistake of age—consent—**The trial court did not err in a statutory rape and indecent liberties with a child case by denying defendant's request for a jury instruction for mistake of age or consent as defenses. Neither instruction is a defense to statutory rape. **State v. Ward, 254.**

**SATELLITE-BASED MONITORING**

**As-applied challenge to statute—Fourth Amendment—reasonableness inquiry—**The satellite-based monitoring program was unconstitutional as applied to defendant. Under *Grady*, the trial court was required to consider the reasonableness of the satellite-based monitoring when defendant challenged the monitoring on Fourth Amendment grounds. The imposition of satellite-based monitoring was vacated and the case was remanded to the trial court to conduct the necessary reasonableness inquiry. **State v. Stroessenreuther, 772.**

**Facial challenge to statute rejected—Fourth Amendment—**Defendant's facial challenge to the satellite-based monitoring statute was rejected. Although the statute does not expressly authorize trial courts to consider the reasonableness of the monitoring under the Fourth Amendment, trial courts are free to address this issue and hold a hearing if necessary when defendants assert it. **State v. Stroessenreuther, 772**.

**No evidence of prior offenses—**Where the trial court ordered that defendant be subject to satellite-based monitoring for the remainder of his natural life, the Court of Appeals vacated the order and remanded for an evidentiary hearing because no evidence was presented to the trial court that defendant had obtained the required prior sexual offense convictions to be classified as a recidivist, and defense counsel's statements and arguments did not stipulate to the prior convictions. **State v. Moore, 136.**

**SEARCH AND SEIZURE**

**Affidavit—good faith of affiant—**Where the trial court denied defendant's motion to suppress evidence seized during the execution of a search warrant, the Court of

**SEARCH AND SEIZURE—Continued**

Appeals rejected his argument on appeal that the affidavit attached to the application for the search warrant contained material omissions and statements made in reckless disregard for the truth. The officer relied in good faith on information that other officers provided to her. **State v. Parson, 142.**

**Affidavit—nexus between objects sought and place to be searched—**Where the trial court denied defendant's motion to suppress evidence seized during the execution of a search warrant, the Court of Appeals held that the affidavit attached to the application for the search warrant failed to include facts or circumstances to sufficiently connect the address to be searched with any illegal activity or Defendant's purported operation of a clandestine methamphetamine laboratory. **State v. Parson, 142.**

**Good faith exception to exclusionary rule—not applicable to violations of N.C. Constitution—**Where the trial court denied defendant's motion to suppress evidence seized during the execution of a search warrant and the search warrant was invalid due to lack of probable cause, the good faith exception to the exclusionary rule did not apply for the violation to the N.C. Constitution. **State v. Parson, 142.**

**Intoxicated driver—totality of circumstances—**Where the Grifton Police Department received an anonymous tip regarding an intoxicated driver; a police lieutenant subsequently observed a car matching the description from the tip; and the lieutenant followed the car and observed it driving well below the speed limit, stopping for an unusual period of time before making a right turn, and stopping for fifteen or twenty seconds before crossing railroad tracks, the trial court properly denied defendant's motion to suppress evidence obtained as a result of the stop of his vehicle. The trial court's findings of fact were supported by competent evidence, its conclusions of law were supported by the findings of fact, and, based on the totality of the circumstances, the police lieutenant had reasonable, articulable suspicion to stop defendant. **State v. Mangum, 714.**

**Investigatory stop—motion to suppress evidence—driving while impaired—resisting public officer—driving while license revoked—exigent circumstance—hot pursuit—**The Court of Appeals invoked Rule 2 and held that the trial court did not err by denying defendant's motion to suppress. Hot pursuit is an exigent circumstance sufficient to justify a warrantless entry and arrest. The officers here were in hot pursuit when they initiated an investigatory stop for driving while license revoked in front of defendant's residence and then pursued defendant into his residence to arrest him for resisting a public officer when he did not obey their orders to stop. **State v. Adams, 664.**

**Tip from confidential informant—suspicious packages—shipped from Arizona with Utah return address—**Where Clayton Police Department officers received a tip from a confidential informant regarding suspicious packages that defendant had retrieved from a local UPS store and, based on that tip, officers intercepted defendant's vehicle and discovered illegal drugs inside the packages, the trial court erred in denying defendant's motion to suppress. The only suspicious factor found by the trial court was the Utah return address on the packages shipped from Arizona, and that factor alone was not sufficient to support the trial court's conclusion that the police had reasonable suspicion to detain defendant. **State v. Watson, 455.**

**Uniformed officer by marked car—gesture to stop—no seizure—**Where a uniformed police officer standing outside of his marked patrol car waved both of his arms above his head to gesture defendant to stop his vehicle, and the officer smelled

**SEARCH AND SEIZURE—Continued**

alcohol coming from inside the vehicle when defendant rolled down his window, the trial court did not err by concluding that defendant was not seized and denying his motion to suppress. Considering the totality of the circumstances, the officer's hand motions were not so authoritative that a reasonable person would not have felt free to leave. **State v. Wilson, 781.**

**SENTENCING**

**De novo hearing—resentencing—independent evaluation of evidence—**The trial court did not err in a larceny after breaking and entering and injury to real property case by allegedly depriving defendant of his right to a de novo sentencing hearing. A second judge conducted his own independent evaluation of the evidence and did not merely defer to the prior judge's original sentence. Further, defendant did not present any new evidence at resentencing. **State v. Hardy, 225.**

**Enhancement based on prior conviction and habitual felon status—**The trial court erred by enhancing defendant's sentence for misdemeanor possession of marijuana to a Class I felony based on a prior conviction and then to a Class E felony based on defendant's habitual felon status. Status as a habitual felon cannot be used to further enhance a sentence that is not itself a substantive offense. **State v. Howell, 686.**

**SERVICE OF PROCESS**

**New York address—same address on deed—used on prior occasions—**The trial court did not err by denying petitioner Household's motion to set aside the HOA Foreclosure under Rule 60(b)(4) based on alleged improper service. Given the use of the New York address on the deed and to serve Household on other occasions, service on Household in the HOA Foreclosure was not improper. Further, the Court of Appeals was not persuaded by either of Household's arguments against application of N.C.G.S. § 47F-3-116.1. **In re Garrett, 358.**

**SEXUAL OFFENDERS**

**Sex offender registration—improper reconsideration—**The trial court erred by reconsidering the termination of defendant's sex offender registration and in entering an amended order. The trial court lacked jurisdiction to reconsider petitioner's request to terminate his registration requirement after the State did not oppose termination during the initial hearing and did not appeal the initial order. **In re Timberlake, 80.**

**STATUTES OF LIMITATION AND REPOSE**

**Conversion—unjust enrichment—unfair or deceptive trade practices—breach of contract—equitable estoppel—**The trial court did not err by granting defendant electric cooperative's third motion for summary judgment on the issues of conversion, unjust enrichment, unfair or deceptive trade practices, breach of contract, and equitable estoppel. Plaintiffs' claims were barred by the statute of limitations or were released pursuant to N.C.G.S. § 28A-25-6(e). **Lockerman v. S. River Elec. Membership Corp., 631.**

**Driving while impaired—prosecution within two years—**The trial court did not err by dismissing the charge of driving while impaired. The express language

**STATUTES OF LIMITATION AND REPOSE—Continued**

of N.C.G.S. § 15-1 required the State to prosecute defendant's misdemeanor charge within two years. Because the State failed to take any action in that time, prosecution was barred by the statute of limitations. **State v. Turner, 776.**

**Wrongful death—loss of consortium—**The trial court's unchallenged dismissal of the wrongful death and loss of consortium actions under Rule 12(b)(6) for failure to file the claims within the statute of limitations remained undisturbed. **Norton v. Scotland Mem'l Hosp., Inc., 392.**

**TERMINATION OF PARENTAL RIGHTS**

**Best interests of children—findings of fact—**The trial court did not abuse its discretion in a termination of parental rights case by determining that termination of the mother's parental rights was in the best interests of the two minor children. The trial court made the requisite findings and respondent failed to show that the court's decision was so arbitrary that it could not have been the result of a reasoned decision. **In re A.H., 546.**

**Care and supervision of child—findings—**An order terminating the respondent's parental rights was reversed and the matter was remanded for further proceedings. Respondent's parental rights were terminated on the ground that he was incapable of providing the proper care and supervision of the child. The court's finding to that effect was based on drug use, the inability to care for the child's daily needs, poor decision-making, failure to comply with the case plan, and the lack of an appropriate child care placement arrangement. Those findings were not supported by the evidence and did not support the conclusion that respondent was incapable of providing proper care and supervision. **In re D.T.N.A., 582.**

**Cessation of reunification efforts—sufficiency of findings of fact—**The trial court did not err by entering an order ceasing reunification efforts and an order terminating respondent mother's parental rights. Although the trial court's finding that respondent had not reengaged in therapy since moving to Pitt County was not supported by the evidence presented at the hearing, the remaining findings of fact supported the trial court's ultimate decision to cease reunification efforts. **In re P.T.W., 589.**

**Grounds—abandonment—findings of fact—willfulness—**The trial court erred by terminating respondent mother's parental rights on the ground of abandonment where the trial court failed to make findings of willfulness. The trial court's order was vacated and remanded for further findings of fact and conclusions of law regarding N.C.G.S. § 7B-1111(a)(7). **In re D.M.O., 570.**

**Hearing—right to present evidence—**The trial court did not abuse its discretion in a termination of parental rights case by allegedly restricting respondent mother's right to present evidence at the termination hearing. The trial court applied the same evidentiary standards to all parties and respondent had the right to participate and present relevant evidence at the disposition hearing. **In re A.H., 546.**

**Psychologist testimony—weight of evidence—**The trial court did not err by terminating respondent mother's parental rights. The trial judge was the trier of fact and determined that under the unique circumstances of this case and the characteristics of this juvenile, an expert evaluation by a psychologist who had not worked with the juvenile and who lacked experience in juvenile court matters was not helpful. **In re K.G.W., 62.**

**UNFAIR TRADE PRACTICES**

**Failure to allege fraud or deception—no business relationship—**Where the Town of Belhaven recorded a deed in 1948 granting a 100-foot strip of land to the Pungo District Hospital Corporation (PDHC), PDHC thereafter constructed a hospital on the land, PDHC in 2011 entered an agreement transferring full control of PDHC to Vidant Health, Inc. (Vidant), Vidant closed the hospital in 2014 and deeded it to Pantego Creek, LLC (Pantego Creek), and plaintiffs (Belhaven, the Pungo District Hospital Community Board, and several NAACP branches) filed a complaint against defendants (Pantego Creek and Vidant), the trial court did not err by granting defendants' motion to dismiss pursuant to Rule 12(b)(6) as to Belhaven's and the Community Board's unfair and deceptive trade practices claim against Vidant. Belhaven and the Community Board failed to allege any fraud or deception on the part of Vidant. Further, there was no business relationship between Vidant and plaintiffs. **Town of Belhaven, N.C. v. Pantego Creek, LLC, 459**.

**In or affecting commerce—misappropriation of funds—unlawful acts within a corporation—**The trial court erred by concluding that defendant Alexander's actions were in or affecting commerce, and there was no legal basis for finding defendant liable under North Carolina's Unfair and Deceptive Trade Practices Act. Defendant misappropriated Otto Trucking, Inc. funds through payments made directly to himself and his family members as well as payments made to cover personal expenses. The case involved unlawful actions within a single market participant, not outside businesses, distinct corporate entities, or the interruption of a commercial relationship between two market participants. **Alexander v. Alexander, 511.**

**Motion to dismiss—defamation—attorney fees—**The trial court erred by dismissing plaintiffs' claim for unfair and deceptive practices. The trial court's dismissal of this claim was predicated on its erroneous determination that plaintiffs had failed to state a claim for defamation. Further, the court erred by awarding attorney fees to defendant under N.C.G.S. § 75-16.1. **Eli Global, LLC v. Heavner, 534.**

**VENUE**

**Non-fatal drowning—cause of action based on events in Lenoir County—venue improper in Edgecombe County—**In a case involving the non-fatal drowning of a child at a day camp operated by the City of Rocky Mount, where the only cause of action after the voluntary dismissal of numerous defendants was against defendant-appellants based on what allegedly occurred in Lenoir County, venue was improper in Edgecombe County and should have been transferred to Lenoir County. **Williams v. Woodmen Found., 482.**

**WORKERS' COMPENSATION**

**Additional medical compensation—expiration of statute of limitations—correction of underpayment—**The trial court did not err by denying plaintiff's request for additional medical compensation for expiration of the statute of limitations where a corrective payment was made for underpayment of indemnity compensation after the original statute of limitations had expired. Although plaintiff argued that the corrective payment was actually the last payment, so that the statute of limitations had not run, the corrective payment had not yet been made at the time of the Industrial Commission's decision and could not have been the last payment. **Lewis v. Transit Mgmt. of Charlotte, 619.**

**WORKERS' COMPENSATION—Continued**

**Corrective payment—laches—remedy at law—**The doctrine of laches was not available as an alternative in a workers' compensation case where a corrective payment for an underpayment was ordered after the statute of limitations had initially run. Equitable doctrines are not available in a workers' compensation case where there is a remedy at law; here, both N.C.G.S. § 97-25.1 and 97-47 supplied remedies at law to bar claims where there had been a delay in the case. **Lewis v. Transit Mgmt. of Charlotte, 619.**

**Indemnity compensation corrected—request for additional medical payments—**It was not clear whether the Industrial Commission erred by denying plaintiff's request for additional medical benefits following a corrective payment for indemnity compensation. Because the corrective payment had not yet been made to restart the limitations, the issue of how to treat such corrective payments under N.C.G.S. § 97-25 did not need to be decided and was left to the legislature. **Lewis v. Transit Mgmt. of Charlotte, 619.**

**WRONGFUL DEATH**

**Loss of consortium—failure to comply with Rule 9(j)—**The trial court did not err by dismissing plaintiffs' wrongful death and loss of consortium claims based on failure to comply with Rule 9(j). **Norton v. Scotland Mem'l Hosp., Inc., 392.**