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TABLE OF CONTENTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

LINDA M. McGEE

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WANDA G. BRYANT
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RALPH A. WALKER

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BURLEY B. MITCHELL. JR.
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E. MAURICE BRASWELL
WILLIS P. WHICHARD
DONALD L. SMITH
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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.
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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]
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[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.

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CASES REPORTED

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CASES REPORTED WITHOUT PUBLISHED OPINIONS

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JEFFREY EUGENE BEAL, EMPLOYEE, AND LAWRENCE CRAIGE, GUARDIAN OF THE ESTATE OF JEFFREY EUGENE BEAL, PLAINTIFFS

v.

COASTAL CARRIERS, INC., (ALLEGED) EMPLOYER, AND ZURICH AMERICAN INSURANCE COMPANY, (ALLEGED CARRIER); DEFENDANTS; AND THE WAREHOUSING COMPANY, LLC, (ALLEGED) EMPLOYER AND KEY RISK INSURANCE COMPANY, (ALLEGED) CARRIER, DEFENDANTS

No. COA16-420

Filed 20 December 2016

1. Workers' Compensation—jurisdiction—last act—phone conversation with worker physically present in North Carolina

The Industrial Commission had jurisdiction over plaintiff's workers' compensation claim. The last act making the employment arrangement between plaintiff and The Warehousing Company, LLC (TWC) "a binding obligation" was plaintiff's agreement during his telephone conversation to work on the Florida project for TWC. Because plaintiff was physically present in North Carolina during this conversation, the contract of employment was made in North Carolina.

2. Workers' Compensation—base of operation—principal employment

The Industrial Commission erred in a workers' compensation case by determining that Key Risk's policy provided coverage for plaintiff's workplace accident. Throughout plaintiff's employment with The Warehousing Company, LLC, his "base of operation" was Florida. Accordingly, he was neither "principally employed" in

South Carolina nor was South Carolina the state where his employment was located.

Appeal by defendant-appellant Key Risk Insurance Company from opinion and award entered 15 December 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 October 2016.

Stiles, Byrum & Horne, L.L.P., by Henry C. Byrum, Jr., and B. Jeanette Byrum, for defendants-appellees Coastal Carriers, Inc. and Zurich American Insurance Company.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Erica B. Lewis, Shelley W. Coleman, and M. Duane Jones, for defendant-appellant Key Risk Insurance Company.

DAVIS, Judge.

This workers' compensation insurance coverage dispute arises from a workplace accident that occurred in Florida and injured an employee who lived in North Carolina and had been lent to an employer based in South Carolina. Key Risk Insurance Company ("Key Risk") appeals from an opinion and award of the North Carolina Industrial Commission ordering Key Risk to (1) pay temporary total disability compensation to Jeffrey Eugene Beal ("Plaintiff") pursuant to the North Carolina Workers' Compensation Act; and (2) pay all indemnity benefits owed on Plaintiff's claim. After careful review, we reverse and remand.

Factual Background

The facts giving rise to this case involve two furniture moving and installation companies — Coastal Carriers, Inc. ("Coastal") and The Warehousing Company, LLC ("TWC"). On 20 July 2010, TWC — a company based in South Carolina — entered into an agreement with Winter Park Construction Company ("Winter Park") to provide furniture, fixtures, and electronics installation services at Plantation Beach Club Condominiums in Stuart, Florida (the "Florida Project"). Because TWC did not have enough manpower to perform the job, TWC's owner, Sidney Baird, contacted Gordon Ray — Baird's longtime friend who was the president of Coastal — to see about the possibility of TWC hiring four of Coastal's employees to temporarily work for TWC on the Florida Project.

In 2010, Plaintiff was working for Coastal, which was based in North Carolina. At a safety meeting of Coastal employees, Ray shared with them the information regarding the Florida Project. Upon learning of

the employment opportunity from Ray, Plaintiff and three other Coastal employees — Michael Porter, Anthony Brown, and Randy Wallace — contacted Baird to inform him of their interest in working on the Florida Project. Baird offered each of the four employees the job — which they each accepted — and told all of them that upon completion of the job, they would be paid by TWC.

Plaintiff worked on the Florida Project under the on-site supervision of his fellow Coastal employee, Porter, and a TWC employee named David Fleener. Baird kept in contact with Porter and Fleener on a daily basis from his home in South Carolina.

On 26 September 2010, while working at the Florida job site, Plaintiff was injured when he fell while lifting furniture to the second floor of the building where the TWC crew was working. As a result of the fall, he sustained multiple injuries.

On 22 October 2010, Plaintiff filed a Form 18 "Notice of Accident" with the Industrial Commission, seeking compensation for his injuries from Coastal's workers' compensation insurance carrier, Zurich American Insurance Company ("Zurich"), due to his need for medical care for which TWC's insurance carrier, Key Risk, had refused to pay. Zurich paid Plaintiff's medical compensation of $350,799.25 and disability compensation of $44,068.85.

On 16 September 2011, Coastal filed a motion to add TWC as a defendant to Plaintiff's workers' compensation action. The motion was granted on 27 October 2011. On 2 January 2013, Coastal filed a Form 33 "Request That Claim be Assigned for Hearing" requesting that "[TWC] and its workers' compensation carrier [Key Risk] pay benefits pursuant to the North Carolina Workers' Compensation Act." On 25 February 2013, Key Risk filed a Form 33R "Response to Request That Claim Be Assigned for Hearing" contending that Key Risk was not a party and "would be prejudiced if added into this claim as a party" more than two years after it was removed from a hearing docket.

On 9 July 2013, a hearing was held before Deputy Commissioner Melanie Wade Goodwin. Deputy Commissioner Goodwin issued an opinion and award providing that Coastal, Zurich, and TWC were jointly liable for indemnity and medical benefits paid by Zurich and ordering that Key Risk be dismissed with prejudice as a party-defendant in the matter. Coastal and Zurich filed a notice of appeal from the deputy commissioner's dismissal of Key Risk on 18 June 2014.

On 15 December 2015, the Full Commission issued an opinion and award containing the following pertinent findings of fact:

> 1. On September 26, 2010, Jeffrey Eugene Beal (hereinafter, "Jeffrey Beal" or "Mr. Beal" or "Plaintiff") was injured when he fell approximately 10-20 feet from a piece of equipment called a lull which was being used to lift furniture to the second floor of the building where The Warehousing Company, LLC (hereinafter, "TWC") crew was working. As a result of his fall, Mr. Beal sustained multiple injuries, including fractures of the left sphenoid wing, left lateral orbital wall, left maxillary sinus, and left zygomatic arch; a comminuted right distal radius and ulna fracture; a left elbow comminuted intra-articular olecranon fracture; multiple left rib fractures; a ruptured spleen and a mild subarachnoid hemorrhage.
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> 2. On October 22, 2010, Jeffrey Beal filed a Form 18 Notice of Accident with the North Carolina Industrial Commission seeking compensation for his injuries. The named Defendant was Coastal Carriers, Inc. (hereinafter, "Coastal"). Plaintiff's claim was accepted and paid by Coastal and Zurich American Insurance Company (hereinafter "Zurich") due to the emergent need for medical care which Key Risk Insurance Company (hereinafter, "Key Risk"), the workers' compensation carrier for TWC, would not address.
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> 5. On September 16, 2011, Defendant Coastal filed a Motion to Add Party-Defendant, seeking to add TWC, as a party Defendant. This Motion was granted by the Executive Secretary on October 27, 2011.
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> 6. On September 26, 2010, Gordon Wayne Ray, Jr. (hereinafter Mr. Ray) was the President of Coastal, which was located in Wilmington, North Carolina. Coastal was a mover of household goods regulated by state and federal tariffs.
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> 7. On September 26, 2010, Sidney "Skip" Baird (hereinafter, "Mr. Baird") was the owner of TWC located at 122 Watergate Drive, Myrtle Beach, South Carolina. TWC's business included the warehousing of and the installation of furniture, fixtures, and electronics at resort properties,

installing furniture, fixtures, and electronics which was commercial work which was not regulated by state and federal tariffs.

. . . .

11. On July 20, 2010, TWC (through Mr. Baird) entered into a "Subcontract Agreement" with Winter Park Construction Company (hereinafter; "Winter Park") to provide furniture, fixture and electronics installation services at Plantation Beach Club Condominiums in Stuart, Florida. This contract was negotiated entirely by Mr. Baird on behalf of TWC and did not involve Mr. Ray or Coastal in any way.

12. Under the terms of the contract, TWC had eight days to complete the installation of furniture, fixtures and electronics in thirty-two units. At the time in question, TWC had multiple projects underway in various parts of the United States and did not have the manpower to complete all of these jobs. Mr. Baird's situation was further complicated by the fact that he was awaiting the birth of his daughter, which required him to remain in Myrtle Beach, South Carolina. Mr. Baird contacted Mr. Ray indicating he was "in a jam" and that he wanted to hire four of Mr. Ray's employees to work for TWC on a Florida job where all of the furniture, fixture and electronics installation had to be completed in eight days.

13. Sometime prior to September 19, 2010, Mr. Ray announced at a safety meeting of Coastal employees that Mr. Baird wanted to hire workers for a Florida project and since the work for his company was in a slow period, he instructed any of his interested workers to contact Mr. Baird directly. Mr. Ray did not select or designate any of his workers for the Florida job. His workers were free to accept or reject the offer of employment.

. . . .

15. Following this meeting, which occurred in North Carolina, four Coastal employees -- Michael Porter, Anthony Brown, Randy Wallace and Jeffrey Beal -- arranged with Mr. Baird to go to Florida to work for TWC. Prior to these workers leaving North Carolina, Mr. Baird spoke by telephone with each of these four men -- Michael

Porter, Anthony Brown, Randy Wallace and Jeffrey Beal -- to give a "pep talk["] and discuss payment or wages at the completion of the job in Florida. Mr. Baird informed them they would be paid by TWC. Each one of these four men accepted Mr. Baird's offer of employment while still in North Carolina.

16. Plaintiff testified that he agreed to work the Florida job while he was in North Carolina.

17. The four individuals who agreed to work on the Florida project did not have reliable transportation. When informed of their transportation problems, Mr. Ray loaned the men a Coastal sales van to drive and gave them a gas card to purchase fuel. He expected to be reimbursed by TWC for these expenses.

. . . .

19. When the four individuals hired by TWC -- Michael Porter, Anthony Brown, Randy Wallace and Jeffrey Beal -- arrived in Florida, they went to a motel room that was paid for by Mr. Baird. Mr. Porter supervised the work for the first couple of days until David Fleener, an employee of TWC arrived on the site. Mr. Fleener then instructed the workers on what to do. Mr. Baird communicated with TWC workers multiple times on a daily basis while they were in Florida and personally supervised them through Michael Porter and David Fleener. This included setting working hours and monitoring progress on the job. Mr. Ray never supervised the work of the TWC crew.

20. Prior to September 26, 2010, Mr. Ray had a conference in West Palm Beach and he decided to stop by the Florida jobsite for a visit on his way to the conference. During the period of about thirty minutes when he was at the site, he cautioned the TWC workers to "be careful" but did not offer supervision or instruct them on their work. While Mr. Ray was present, he was approached by Mr. Porter about loaning Mr. Brown, Mr. Wallace, Mr. Beal and him money for food. Mr. Baird had promised to send the TWC crew money, but had failed to do so. Mr. Ray loaned each man $100.00 out of his personal funds.

21. When TWC's project in Florida was completed, Mr. Baird paid Michael Porter, Anthony Brown, Randy Wallace and Jeffrey Beal for the work they did for TWC in Florida. These workers (other than Plaintiff) collected their money in Myrtle Beach, South Carolina. The offices for TWC remained in Myrtle Beach, South Carolina the entire time the company was in existence.

22. Plaintiff was performing the work of TWC when his accident occurred.

23. Anthony Brown gave a statement under oath on February 17, 2012, which was included in the record, stating he was one of four individuals who traveled from North Carolina to Florida to work for TWC and was working on the project for a man named "Skip." Mr. Porter was the contact person with Mr. Baird, and the two were constantly talking. Mr. Brown considered himself to be an employee of TWC. When the job was completed, the TWC employees drove to Mr. Baird's apartment in Myrtle Beach, South Carolina where they collected their checks for the project.

24. Plaintiff testified by deposition on October 9, 2012 in a civil action he filed in Florida as a result of the September 26, 2010 accident. Plaintiff testified that he received $100.00 from Mr. Ray so he would have food when Mr. Ray visited the Florida jobsite with his wife and took a "tour through the motel." Plaintiff testified that he took orders from Michael Porter on the job and that Mr. Porter kept his hours. He was paid by Skip Baird for the work he performed in Florida. Mr. Ray never directed his work on the project.

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26. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Jeffrey Beal was not an independent contractor for TWC. He was expressly hired pursuant to an oral contract to leave North Carolina and go to work in Florida for a job that was to be completed in eight days. He did not possess any special skills in performing the type of work done by TWC. He did not have control over any aspects of the work that he

performed for TWC. Mr. Beal obtained his work directions from persons designated by Mr. Baird to be onsite supervisors. He had no power to hire or fire anyone. The work he did was part of the trade or business of TWC. He was paid wages and trip expenses by TWC.

27. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Jeffrey Beal was an employee of TWC at the time of his injury. Mr. Baird, owner of TWC, expressly made a contract of hire with Plaintiff. The work Mr. Beal did for TWC was entirely the work of Mr. Baird and TWC and benefitted TWC and not Coastal. Mr. Baird and TWC had the right, and did in fact, control the details of the work done by Mr. Beal during the period he worked for TWC, including the date of his injury by accident. During the period Mr. Beal was hired to work for TWC, he did not do any work for Coastal and the work that he did for TWC was not part of the trade or business of Coastal. Mr. Beal and Mr. Baird on behalf of TWC agreed upon the employment terms. Coastal was not involved in the employment contract agreement, Mr. Ray did not assign employees to TWC; he only announced the availability of a temporary job with TWC and left the decision of whether to seek the job entirely up to any of his interested employees.

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32. The Full Commission finds that both Coastal and TWC are liable for all of the compensable consequences of Plaintiff's September 26, 2010 injury by accident in proportion to the wage liability of each employer.

33. At the time of Plaintiff's injury on September 26, 2010, TWC was insured by Key Risk. There is a dispute, however, over whether the policy of insurance between Key Risk and TWC covered Plaintiff's claim herein.

34. Mr. Baird arranged workers' compensation insurance for the Florida project on behalf of TWC through Associated Insurors (hereinafter "Associated") in Myrtle Beach, South Carolina. In doing so, he explained to the agent the nature of his business and that TWC worked outside South Carolina. At the time of Plaintiff's injury, TWC had more projects outside South Carolina than within

the State. It was Mr. Baird's understanding that TWC had workers' compensation coverage for each jobsite, including the jobsite in Florida where Plaintiff was injured.

35. As part of its Subcontract Agreement with Winter Park for the project in Stuart, Florida, TWC had to provide proof of workers' compensation insurance. Mr. Baird arranged for his insurance agent (Associated) to contact Winter Park to verify the required coverage. After that contact occurred, Associated sent Winter Park a certificate of insurance verifying workers' compensation insurance for TWC. The "Certificate Holder" was listed as Winter Park Construction, 221 Circle Drive, Maitland, Florida. After that contact occurred, Winter Park sent TWC the Subcontract Agreement to execute, and TWC went to work.

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61. Key Risk contends that the language of TWC's insurance policy provides for workers' compensation insurance coverage in South Carolina only, with additional coverage only if Plaintiff was hired in South Carolina or principally employed in South Carolina.

62. Based upon a preponderance of the evidence of record, the Full Commission finds that Plaintiff's employment was located in South Carolina because it is the only state in which he had any "base of operation." The only place of business ever maintained by TWC was located in Myrtle Beach, South Carolina. Plaintiff was hired from TWC's office in Myrtle Beach, South Carolina. Mr. Baird provided work assignments to the employees, including Plaintiff, working on the Winter Park project from his place of business in South Carolina and Plaintiff was paid out of South Carolina for the work he performed in Florida. The other three lent employees from Coastal -- Michael Porter, Anthony Brown and Randy Wallace -- traveled to Myrtle Beach, South Carolina to receive payment from TWC for the work they performed (along with Plaintiff) in Stuart, Florida upon completion of the job.

63. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's claim for compensation is covered under the Key Risk policy issued to TWC.

> 64. Coastal and TWC are jointly liable for medical payments made consequent of Plaintiff's September 26, 2010 injury. Since Coastal had no "wage liability" to Plaintiff for the Florida project, TWC owes all of Plaintiff's indemnity compensation. As a result of Plaintiff's injuries, Zurich has paid as carrier for Coastal, medical compensation in the amount of $350,799.25 and indemnity compensation in the amount of $44,068.85. TWC's carrier, Key Risk, has paid nothing. TWC and Key Risk are obligated to reimburse Zurich for TWC's and Key Risk's (50%) share of the joint amount of the medical compensation due as a result of Plaintiff's claim. TWC and Key Risk are obligated to reimburse Zurich for all the indemnity compensation due Plaintiff that Zurich has paid. Since the matter in controversy before the Full Commission is between the Defendants, the amount of Plaintiff's average weekly wage is not being determined.

Based on these findings of fact, the Commission made the following pertinent conclusions of law:

> 1. On September 26, 2010, Plaintiff, Jeffrey Beal, sustained a compensable injury by accident due to a fall which arose out of and in the course of his employment with TWC and involved the interruption of his work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences. N.C. Gen. Stat. §§ 97-2(5); 97-2(6).
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> 2. At the time of Plaintiff's injury on September 26, 2010, four employees, Michael Porter, Anthony Brown, Randy Wallace and Plaintiff, were employees of TWC who had been lent by Coastal to TWC. N.C. Gen. Stat. § 97-2; S.C. Code Ann. § 42-1-360(2).
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> 3. The Full Commission concludes that the North Carolina Industrial Commission has jurisdiction over Plaintiff's claim. . . .
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> 6. The Full Commission concludes that Plaintiff was an employee of TWC, not an independent contractor, at the time of his injury on September 26, 2010. . . .

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9. The Full Commission concludes, based upon a preponderance of the evidence of record, that the employment relationship Plaintiff had with TWC met all three of the conditions to establish a "special employer" relationship . . . . The preponderance of the evidence of record establishes that Plaintiff made a contract of hire with TWC; the work Plaintiff was doing for TWC on the Florida project was work involving furniture, fixture and electronics installations that TWC subcontracted with Winter Park to perform and was different from the type of work Plaintiff did for Coastal, a household moving company; Coastal had no part in negotiating the subcontract agreement that TWC made with Winter Park and there was no agreement between TWC and Coastal for Coastal to share the profits from the project; the work being done by Plaintiff was essentially that of TWC, the special employer; and TWC, the special employer, had the right to control, and did control, the details of the work that Plaintiff did on the Florida project. *Anderson v. Demolition Dynamics, Inc.*, 136 N.C. App. 603, 607, 525 S.E.2d 471, 473 (2000).

10. The Full Commission concludes that Coastal remained Plaintiff's general employer while he was working for TWC since the preponderance of the evidence and the reasonable inferences therefrom, indicate that Coastal was the general employer of Plaintiff while he was working for TWC, as Plaintiff and the three other workers Coastal lent to TWC had an expectation of returning to work with Coastal when the job with TWC was completed. Therefore, the legal presumption that the general employment with Coastal continued is not rebutted by a "clear demonstration." *Collins v. James Paul Edwards, Inc.*, 21 N.C. App. 455, 204 S.E.2d 873 (1974); *Anderson v. Demolition Dynamics, Inc.*, 136 N.C. App. 603, 607, 525 S.E.2d 471, 473 (2000).

11. Based upon a preponderance of the evidence of record, the Full Commission concludes that Plaintiff was lent by Coastal to TWC and that at the time of his injury on September 26, 2010, he was jointly employed by both TWC and Coastal and both employers are jointly liable for Plaintiff's injuries. N.C. Gen. Stat. § 97-51; *Collins*

v. James Paul Edwards, Inc., 21 N.C. App. 455, 204 S.E.2d 873 (1974); *Anderson v. Demolition Dynamics, Inc.*, 136 N.C. App. 603, 607, 525 S.E.2d 471, 473 (2000).

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14. The Commission has the inherent power in this case to order TWC and Key Risk to reimburse Coastal and Zurich for benefits paid or to be paid on Plaintiff[']s claim. . . .

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17. Key Risk further contends that Key Risk's obligation under a policy must be defined by the terms of the policy itself and that in construing policy language, basic contract rules apply. If the terms of a contract are unambiguous, the contract must be enforced. *South Carolina Ins. Co. v. White*, 301 S.C. 133, 390 S.E.2d 471 (1990). Key Risk argues that coverage cannot be extended to Plaintiff under the "Other State Insurance" portion of the policy because Plaintiff's claim does not meet the following conditions of the policy: "The employee claiming benefits was either hired under a contract of employment made in a state listed in Item 3.A. of the Information Page or was, at the time of the injury, principally employed in a state listed in Item 3.A. of the Information Page. . . ."

18. It is undisputed that the substantive law of South Carolina applies to this case. . . .

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21. Coastal relies on the provisions of S.C. Code Ann. § 42-[1]5-10, which state: "Any employee covered by the provisions of this Title is authorized to file his claim under the laws of the state where he is hired, the state where he is injured, or the state where his employment is located.["] S.C. Code Ann. § 42-15-10 does not specifically use the term "principally employed," and instead refers to where an employee's employment is "located." S.C. Code Ann. § 42-15-10.

22. Key Risk contends, however, that Plaintiff must first show that his claim comes under the jurisdiction of the South Carolina Workers' Compensation Act before South Carolina statutory law can be applied to Plaintiff's claim.

23. The Full Commission concludes that South Carolina could have exercised jurisdiction over Plaintiff's claim had he chosen to file his claim in South Carolina because South Carolina is the state where Plaintiff's employment was located. To determine where a worker's employment is located, South Carolina follows the "base of operation rule." *Hill v. Eagle Motor Lines*, 373 S.C. 422, 429-30, 645 S.E.2d 424, 427 (2007) (quoting *Holman v. Bulldog Trucking Co.*, 311 S.C. 341, 346, 428 S.E.2d 889, 892 (1993)). Under this rule, "the worker's employment is located at the employer's place of business to which he reports, from which he receives his work assignments, and from which he starts his road trips, regardless of where the work is performed." *Id.* at 373 S.C. [sic] at 429, 373 S.E.2d at 432. Where the work is performed is irrelevant on the issue of where an employee's employment is located. *Id.* In the present case, the only place of business ever maintained by TWC was located in Myrtle Beach, South Carolina. Plaintiff was hired from TWC's office in Myrtle Beach, South Carolina. Mr. Baird (TWC) provided detailed and specific work assignments to the employees, including Plaintiff, working on the Winter Park project from his place of business in South Carolina and Plaintiff was paid out of South Carolina for the work he performed in Florida. The other three lent employees from Coastal -- Michael Porter, Anthony Brown and Randy Wallace -- traveled to Myrtle Beach, South Carolina to receive payment from TWC for the work they performed in Stuart, Florida upon completion of the job. S.C. Code Ann. § 42-15-10; *Hill v. Eagle Motor Lines*, 373 S.C. 422, 429-30, 645 S.E.2d 424, 427 (2007). The Court of Appeals of South Carolina in *Voss v. Ramco, Inc.*, 325 S.C. 560, 482 S.E.2d 582 (1997), held that the legislature did not intend to exclude all transient employment that did not fit neatly within the base of operations test set out in *Holman*. *Id.* The concept of "base of operation" rule presupposes that all employees have a fixed base of operation [to] which jurisdiction over a workers' compensation claim will attach. *Id.* The Court of Appeals in *Voss* ultimately held that South Carolina was the state where the employee's employment was located, given the amount of control exerted over the employee by his employer, who operated out of South Carolina, even though the employee received his daily assignments from

wherever his employer was located that day and he started his road trips from wherever the group was located, but never from South Carolina. *Voss v. Ramco, Inc.*, 325 S.C. 560, 482 S.E.2d 582 (1997). The Supreme Court of South Carolina agreeing with the Court of Appeals' analysis in *Voss*, held in *Oxendine v. Davis*, 373 S.C. 438, 646 S.E.2d 143 (2007), that the base of operations rule is to "determine the location of nomadic employment based on the employer's place of business," and used other factors outside of those defined in *Holman*, such as the employee reporting to the employer's business in South Carolina to be paid, to determine the employee's location of employment. *Id.* The Supreme Court in *Oxendine* ultimately held that an employer's base of operations was in South Carolina when the employer clearly operated his business in South Carolina. *Id.* at 445, [646] S.E.2d at 150. Thus, even if the facts of the present case do [not] have all of the factors under the base of operations test set out in *Holman*, following the analysis of *Oxendine* and *Voss*, Plaintiff's employment would still be located in South Carolina, given the amount of the control exerted over Plaintiff by Mr. Baird (TWC), who clearly operated his business out of South Carolina. *Oxendine v. Davis*, 373 S.C. 438, 646 S.E.2d 143 (2007); *Voss v. Ramco, Inc.*, 325 S.C. 560, 482 S.E.2d 582 (1997).

24. Applying the applicable provisions of the South Carolina law to the current claim, the Full Commission finds that the Key Risk policy provided coverage for Plaintiff's claim filed in North Carolina. Pursuant to S.C. Code Ann. § 42-5-60, "Every policy for the insurance of the compensation provided in this Title or against liability therefore shall be deemed to be made subject to provisions of this Title . . . ." Therefore, the statutory provisions of the South Carolina Workers' Compensation Code are a required part of the Key Risk policy for workers' compensation insurance issued to TWC. Also, S.C. Code Ann. § 42-5-70 provides that jurisdiction of the insured for the purpose of this Title shall be jurisdiction of the insurer and S.C. Code Ann. § 42-5-60 requires that the Key Risk policy conform to South Carolina law. These statutory requirements are reflected in the language of the Key Risk workers' compensation insurance policy issued to TWC.

> The policy states, "Jurisdiction over you is jurisdiction over us for purposes of workers' compensation law. We are bound by decisions against you under the law, subject to the provisions of this policy that are not in conflict with the law." The policy also provided that, "Terms of this insurance that conflict with the workers' compensation law are changed by this statement to conform to that law." S.C. Code Ann. § 42-5-70. Key Risk, in issuing its workers' compensation policies, has submitted to the jurisdiction of South Carolina and its statutory provisions governing workers' compensation claims. Based upon the "base of operation" analysis above, the employment for the other three lent employees from Coastal was also located in South Carolina. Therefore, TWC had four or more employees in South Carolina for the purposes of jurisdiction under South Carolina Workers' Compensation Act. S.C. Code Ann. § 42-1-360(2).
>
> 25. The Full Commission concludes that the preponderance of the evidence of record establishes that South Carolina has jurisdiction over TWC, the insured, and that the workers' compensation insurance policy issued by Key Risk to TWC covered Plaintiff's injury, requiring Key Risk to reimburse Coastal and Zurich pursuant to N.C. Gen. Stat. § 97-86.1(d). . . .

Key Risk filed written notice of appeal from the Commission's 15 December 2015 Opinion and Award.[1]

Analysis

Appellate review of an opinion and award of the Industrial Commission is "limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Philbeck v. Univ. of Mich.*, 235 N.C. App. 124, 127, 761 S.E.2d 668, 671 (2014) (citation and quotation marks omitted). "The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is also evidence that would support a contrary finding. The Commission's conclusions of law, however, are reviewed *de novo*." *Morgan v. Morgan Motor Co. of Albemarle*, 231 N.C. App. 377, 380, 752 S.E.2d 677, 680

1. The appellees in this appeal are Coastal and Zurich. At times in this opinion, we refer to them jointly as "Coastal."

(2013) (internal citations omitted), *aff'd per curiam*, 368 N.C. 69, 772 S.E.2d 238 (2015).

[1] Before addressing Key Risk's arguments, we must first determine whether the Commission had jurisdiction over Plaintiff's workers' compensation claim. North Carolina's Workers' Compensation Act provides, in pertinent part, as follows:

> Where an accident happens while the employee is employed elsewhere than in this State and the accident is one which would entitle him or his dependents or next of kin to compensation if it had happened in this State, then the employee or his dependents or next of kin shall be entitled to compensation (*i*) *if the contract of employment was made in this State*, (ii) if the employer's principal place of business is in this State, or (iii) if the employee's principal place of employment is within this State; provided, however, that if an employee or his dependents or next of kin shall receive compensation or damages under the laws of any other state nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this Article.

N.C. Gen. Stat. § 97-36 (2015) (emphasis added).

In order to determine where a contract of employment was made, we apply the "last act" test. *Murray v. Ahlstrom Indus. Holdings, Inc.*, 131 N.C. App. 294, 296, 506 S.E.2d 724, 726 (1998). "For a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here." *Id.* (citation, quotation marks, and brackets omitted).

Here, the Commission found that the last act making the employment arrangement between Plaintiff and TWC "a binding obligation" was Plaintiff's agreement during his telephone conversation with Baird to work on the Florida Project for TWC. Because Plaintiff was physically present in North Carolina during this conversation, the contract of employment was made in North Carolina.

"To be entitled to maintain a proceeding for workers' compensation, the claimant must be, in fact and in law, an employee of the party from whom compensation is claimed." *Youngblood v. N. State Ford Truck Sales*, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988) (citations omitted). If no employer-employee relationship exists, the Commission lacks jurisdiction to hear the claim. *See Lucas v. Li'l Gen. Stores*, 289 N.C.

212, 218, 221 S.E.2d 257, 261 (1976) (citations omitted). "The issue of whether the employer-employee relationship exists is a jurisdictional one." *Youngblood*, 321 N.C. at 383, 364 S.E.2d at 437.

Here, the parties do not contest the Commission's finding that an employer-employee relationship existed between Plaintiff and TWC at the time of the 26 September 2010 accident. The record establishes that — as the Commission found — TWC was a "special employer," Plaintiff was a "borrowed employee," and Coastal remained Plaintiff's "general employer."

"The North Carolina Supreme Court has determined that the Industrial Commission has jurisdiction to . . . hear and determine questions of fact and law respecting the existence of insurance coverage and liability of the insurance carrier." *Smith v. First Choice Servs.*, 158 N.C. App. 244, 248, 580 S.E.2d 743, 747 (2003) (citation and quotation marks omitted); *see also Harrison v. Tobacco Transp., Inc.*, 139 N.C. App. 561, 564-65, 533 S.E.2d 871, 873-74 (2000) (determining that Industrial Commission had jurisdiction to determine whether Kentucky's workers' compensation statutes expanded insurance policy's coverage so as to provide benefits to employee of Kentucky employer).

[2] Having determined that the Commission had jurisdiction to hear this matter, we next turn to Key Risk's argument that its policy does not provide coverage for Plaintiff's injuries. Specifically, Key Risk argues that (1) Plaintiff was not "principally employed" in South Carolina, and therefore, no coverage for his injuries exists under the terms of the policy it issued to TWC; and (2) South Carolina's Workers' Compensation Act does not require that such coverage be provided under Key Risk's policy.

The Information Page of Key Risk's policy states, in pertinent part, as follows:

> 3.A. Workers' Compensation Insurance: Part One of the policy applies to the Workers' Compensation Law of the states listed here:
>
> SC
>
> . . . .
>
> C. Other States Insurance: Part Three of the policy applies to the states, if any, listed here:
>
> [none listed]

The policy also contained a Residual Market Limited Other States Insurance Endorsement (the "Endorsement"), the relevant language of which provides as follows:

> "Part Three-Other States Insurance" of the policy is replaced by the following:
>
> PART THREE OTHER STATE INSURANCE
>
> A. How This Insurance Applies:
>
> 1. We will pay promptly when due the benefits required of you by the workers' compensation law of any state not listed in Item 3.A. of the Information Page if all of the following conditions are met:
>
> a. The employee claiming benefits was either hired under a contract of employment made in a state listed in Item 3.A. of the Information Page *or was*, *at the time of injury*, *principally employed in a state listed in Item 3.A. of the Information Page*[.]
>
> . . . .
>
> IMPORTANT NOTICE!
>
> If you hire any employees outside those states listed in Item 3.A. on the Information Page or begin operations in any such state, you should do whatever may be required under that state's law, as this endorsement does not satisfy the requirements of that state's workers' compensation law.

(Emphasis added.)

Thus, when the Endorsement is read in conjunction with Item 3.A. of the Information Page, the policy provides that Key Risk will pay benefits required by the workers' compensation law of a state other than South Carolina *only if* the employee claiming benefits was either (1) hired under a contract of employment made in South Carolina; or (2) principally employed in South Carolina at the time of injury. Neither party contends that Plaintiff was hired under a contract of employment made in South Carolina. However, the parties disagree as to whether Plaintiff was "principally employed" in South Carolina at the time of his injury.

Key Risk contends that Plaintiff was principally employed in Florida — rather than South Carolina — because his work on the project took

place exclusively in Florida. Coastal, conversely, contends that South Carolina was the state in which Plaintiff was principally employed because TWC was based in South Carolina and exercised control from South Carolina over the Florida Project.

"With insurance contracts the principle of *lex loci contractus* mandates that the substantive law of the state where the last act to make a binding contract occurred, usually delivery of the policy, controls the interpretation of the contract." *Harrison*, 139 N.C. App. at 565, 533 S.E.2d at 874 (citation and quotation marks omitted). Here, Baird, a resident of South Carolina, sought workers' compensation coverage for TWC, a South Carolina business, through an agent in South Carolina. He received coverage through a policy issued by Key Risk, and the policy was delivered to him at his South Carolina address. Thus, the last act to make a binding insurance contract between Key Risk and TWC occurred in South Carolina. As such, the Commission correctly determined that South Carolina's substantive law governs the interpretation of Key Risk's policy.

Under South Carolina law,

> [i]nsurance policies are subject to the general rules of contract construction. This Court must give policy language its plain, ordinary, and popular meaning. When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used.

B.L.G. Enters. v. First Fin. Ins. Co., 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (internal citations omitted).

In the present case, the Commission held — and the parties agree — that the term "principally employed" in the Endorsement cannot be read in isolation but instead must be construed in conjunction with South Carolina's Workers' Compensation Act. *See* S.C. Code Ann. § 42-5-60 (2015) ("Every policy for the insurance of the compensation provided in this title or against liability therefor shall be deemed to be made subject to provisions of this title. No corporation, association, or organization shall enter into any such policy of insurance unless its form shall have been approved by the Director of the Department of Insurance.").

Coastal argues that § 42-15-10 of South Carolina's Workers' Compensation Act "extended jurisdiction over South Carolina employers beyond state lines by specifically authorizing employees to assert claims against employers domiciled in South Carolina in any state where the employee was hired, injured or his employment was located." Even

assuming *arguendo* that this is correct, however, we conclude that the Commission erred in determining that Key Risk's policy provided coverage for Plaintiff's accident.

S.C. Code Ann. § 42-15-10 states as follows:

> Any employee covered by the provisions of this title is authorized to file his claim under the laws of the state where he is hired, the state where he is injured, or the state *where his employment is located*. If an employee shall receive compensation or damages under the laws of any other state, nothing contained in this section shall be construed to permit a total compensation for the same injury greater than that provided in this title.

S.C. Code Ann. § 42-15-10 (2015) (emphasis added).

Based on this statute, Coastal contends that the phrase "principally employed" as used in Key Risk's policy must be interpreted as having the same meaning as the phrase "where . . . employment is located" as contained in the statute. For this reason, Coastal asserts that it is appropriate to examine South Carolina caselaw interpreting this language in § 42-15-10.

In determining where a worker's employment is located for purposes of § 42-15-10, South Carolina courts apply the "base of operation" rule, a doctrine originating from the decision by the South Carolina Court of Appeals in *Holman v. Bulldog Trucking Co.*, 311 S.C. 341, 428 S.E.2d 889 (Ct. App. 1993). Under this rule, "the worker's employment is located at the employer's place of business to which he reports, from which he receives his work assignments and from which he starts his road trips, regardless of where the work is performed." *Id.* at 346, 428 S.E.2d at 892. South Carolina's appellate courts have made clear that "the location of employment can only be in one state." *Voss v. Ramco, Inc.*, 325 S.C. 560, 572, 482 S.E.2d 582, 588 (Ct. App. 1997).

In the present case, the Commission made the following finding of fact, which Key Risk challenges in this appeal:

> 62. Based upon a preponderance of the evidence of record, the Full Commission finds that Plaintiff's employment was located in South Carolina because it is the only state in which he had any "base of operation." The only place of business ever maintained by TWC was located in Myrtle Beach, South Carolina. Plaintiff was hired from TWC's office in Myrtle Beach, South Carolina. Mr. Baird provided

> work assignments to the employees, including Plaintiff, working on the Winter Park project from his place of business in South Carolina and Plaintiff was paid out of South Carolina for the work he performed in Florida. The other three lent employees from Coastal -- Michael Porter, Anthony Brown and Randy Wallace -- traveled to Myrtle Beach, South Carolina to receive payment from TWC for the work they performed (along with Plaintiff) in Stuart, Florida upon completion of the job.

The Commission then purported to apply the principles set forth in *Holman* and *Voss* as well as in two other South Carolina cases — Oxendine v. Davis, 373 S.C. 438, 646 S.E.2d 143 (2007), and *Hill v. Eagle Motor Lines*, 373 S.C. 422, 645 S.E.2d 424 (2007). Because of the significant amount of attention that the Commission and the parties give these four cases, we address each of them in turn.

In *Holman*, the employee, a truck driver, lived in South Carolina, but he would report to Georgia for his assignments. *Holman*, 311 S.C. at 343, 428 S.E.2d at 891. While driving his truck in Georgia, the employee was killed in an accident on the highway. The employee's mother filed for benefits under South Carolina's Workers' Compensation Act. Her claim was denied, and she appealed the decision to the South Carolina Court of Appeals. *Id.* at 344, 428 S.E.2d at 891.

The court held that in order to determine whether the truck driver's employment was located in South Carolina for purposes of § 42-15-10, an application of the "base of operation" test was required. *Id.* at 346, 428 S.E.2d at 892. In applying this test, the court relied on the fact that although the employee lived in South Carolina, he had reported to Georgia for duty, picked up and returned his company truck in Georgia, received his work assignments from Georgia, and made calls to his employer in Georgia. Therefore, the court concluded that his "base of operation" was in Georgia, meaning that his "employment was located" in Georgia for purposes of § 42-15-10 such that his workers' compensation claim had been correctly denied. *Id.* at 346-47, 428 S.E.2d at 893.

In *Voss*, the South Carolina Court of Appeals revisited this issue. In that case, a company called Ramco, Inc. that manufactured small industrial equipment was located in South Carolina. Voss, 325 S.C. at 563, 482 S.E.2d at 583. Another company, NATCO, which sold Ramco's equipment, was also located in South Carolina. *Id.* NATCO's owner hired the plaintiff — who lived in Texas — to sell Ramco's equipment across the country. The plaintiff would travel from city to city selling Ramco

equipment by the truckload. *Id.* at 563, 482 S.E.2d at 583-84. The agreement between Ramco and NATCO provided that Ramco would deliver its equipment to the city in which the group of salesmen — including the plaintiff — were selling the equipment, and NATCO's owner would then supervise the sales team in each city to which the team traveled. *Id.*

The plaintiff was injured selling Ramco equipment while in the state of Washington. *Id.* at 570, 482 S.E.2d at 587. During the time in which he worked for Ramco, he never sold equipment in South Carolina and made only one trip to South Carolina to pick up equipment. *Id.* at 565, 482 S.E.2d at 584. He filed a workers' compensation claim in South Carolina, but Ramco denied the claim, asserting that the South Carolina Workers' Compensation Commission lacked subject matter jurisdiction over the plaintiff's claim. *Id.* at 563, 482 S.E.2d at 583. The commission ruled in favor of the plaintiff, and its decision was ultimately affirmed by the circuit court. Ramco appealed to the South Carolina Court of Appeals. *Id.*

The court invoked the "base of operation" test set out in *Holman* to determine whether South Carolina had jurisdiction over the plaintiff's claim, noting that "all types of transient employment . . . do not fit neatly within the employment ritual of the employee truck driver in [*Holman*]." *Id.* at 571, 482 S.E.2d at 588. The court observed that a traveling salesman would not have the same work routine as a truck driver, stating the following:

> [I]t was not this Court's intention [in *Holman*] to hold that a class of transient employees could never have a "base of operation" and therefore be limited under section 42-15-10 to the benefits available in two states (the state where the employee [was] hired and the state where the employee was injured), while other transient employees could choose the most advantageous of three states.

Id.

The court reiterated its previous statement in *Holman* that "the location of employment can only be in one state" and that, logically, "the location of employment must be in *some* state." *Id.* at 572, 482 S.E.2d at 588. The court proceeded to hold that although the plaintiff lived in Texas and was injured in Washington, his employment was located in South Carolina. *Id.* The court ruled that regardless of the fact that the plaintiff received work assignments from a supervisor who was often physically present in multiple states, the plaintiff's employer was Ramco, and Ramco was permanently located in South Carolina. *Id.*

The court reasoned that

> although Voss started his road trips from wherever the group was located, but never from South Carolina, he nevertheless is principally employed in South Carolina because it is the only state in which he has any "base of operation." . . . [A]s a practical matter, South Carolina is the state where Voss was employed, given the amount of control exerted over Voss by [his employers], both of whom operated out of South Carolina.

Id.

In 2007, the Supreme Court of South Carolina issued two decisions applying the "base of operation" test. In *Oxendine*, the plaintiff was a construction worker living in North Carolina who did seasonal work for a construction company that was based in South Carolina. *Oxendine*, 373 S.C. at 440, 646 S.E.2d at 144. His employer hired him to work at a jobsite in North Carolina on a project that lasted for six weeks. The plaintiff had previously performed work for the employer in South Carolina and had regularly traveled to South Carolina to receive his payment. *Id.*

During the six-week period prior to his injury, the plaintiff worked solely at the jobsite in North Carolina. *Id.* At one point, the plaintiff visited his employer's home in South Carolina for social purposes and fixed the employer's water pump — a task for which he was not paid. *Id.* He also traveled to the employer's home in South Carolina to receive payment at least once during the time he worked on the North Carolina project. *Id.*

The plaintiff was injured in an accident while working on the North Carolina jobsite. *Id.* He filed a workers' compensation claim in North Carolina, which was denied. *Id.* He then filed a claim under South Carolina's Workers' Compensation Act, and the South Carolina Workers' Compensation Commission determined that it had jurisdiction over the plaintiff's claim. *Id.* at 440-41, 646 S.E.2d at 144. The employer ultimately appealed to the Supreme Court of South Carolina. *Id.*

The court held that South Carolina was the plaintiff's "base of operation." *Id.* at 445, 646 S.E.2d at 146. In making this determination, the court relied on multiple factors, noting that while none was "individually determinative, they all lend support to the conclusion[.]" *Id.* at 444, 646 S.E.2d at 146.

> (1) Respondent regularly worked for Employer in South Carolina during warm months for a number of years; (2) Respondent went to Employer's home/office in South Carolina on occasions to be paid, including at least once during the last interval of his work; (3) Respondent often met co-workers at the place of employment to go to jobs; and (4) Respondent performed work at Employer's home immediately before his injury.

Id.

The court then stated the following:

> In reaching this conclusion, we look not only at Respondent's six-week employment term, but also at his broad employment history with Employer. Respondent's regular and recurring employment with Employer for several years prior to his injury was nearly entirely based in South Carolina. The fact that Respondent was working in North Carolina on this particular occasion does not transport the Employer's base of operations from South Carolina to North Carolina.

Id.

The court further noted that "[t]his conclusion is underscored by the amount of control exerted over Respondent by Employer who was located in South Carolina." *Id.* In explaining its ruling, the court clarified the principles it drew from *Holman* and *Voss*:

> Appellants also argue that if the base of operations rule applies, the relevant base of operation was North Carolina because it is the employee's base, and not the employer's base, that should be considered. Appellants' reasoning directly contradicts both *Voss* and *Holman*[,] cases which apply the base of operations rule to determine the location of nomadic employment based on the employer's place of business, "regardless of where work is performed."

Id. at 445, 646 S.E.2d at 146.

Hill concerned a plaintiff truck driver who lived in South Carolina and was injured while driving through Virginia. *Hill*, 373 S.C. at 427, 645 S.E.2d at 426. The plaintiff's employer was based in Alabama. After his accident, the plaintiff successfully filed a claim under South Carolina's Workers' Compensation Act. His employer appealed the decision in

favor of the plaintiff to the Supreme Court of South Carolina. *Id.* at 427-28, 645 S.E.2d at 426.

Because the plaintiff had been hired in South Carolina, the court held that South Carolina had jurisdiction over the plaintiff's claim. *Id.* at 430, 645 S.E.2d at 428. However, the court also ruled that in addition to being the state where the plaintiff was hired, South Carolina was likewise the state where plaintiff's employment was "located" for purposes of § 42-15-10. The court determined that the plaintiff's "base of operation" was in South Carolina because the plaintiff began his road trips from South Carolina, kept his truck at his South Carolina home on the weekends, and received his paycheck at his home in South Carolina. *Id.* at 432-33, 645 S.E.2d at 429. The court further noted that although the plaintiff called the Alabama office at the end of each delivery to find out where to pick up his next load, he was not required to report to the Alabama office for duty or return to Alabama after completing his assignments. *Id.* at 432, 645 S.E.2d at 429. Nor was the plaintiff's truck licensed in Alabama. *Id.*

Holman, *Voss*, *Oxendine*, and *Hill* demonstrate the fact-specific nature of the "base of operation" test's application and the difficulty of determining where a worker's employment is "located" when his employment is nomadic in nature. In such cases, the employee works on multiple jobs for a particular employer in more than one state, making it difficult to pinpoint one specific state as the location of his employment.

In the present case, conversely, Plaintiff's employment was not nomadic. He worked *at one location* for his employer during the entire period of his employment. He had no prior history of working on jobs — in South Carolina, Florida, or anywhere else — for TWC, and the record is devoid of any indication that he was likely to work on future projects for TWC. He was not a traveling salesman or a truck driver whose job duties for his employer required him to travel to multiple states. Nor was he akin to the worker in *Oxendine* who performed multiple jobs for his employer in one state prior to being dispatched by the employer to perform a job in another state.

Instead, Plaintiff was a lent employee who was hired by TWC to perform one specific job in one specific place. TWC required that he perform all of his work in Florida, and he lived in Florida for the entire duration of the job, commuting from a motel in Florida to the Florida jobsite throughout the duration of his employment with TWC. Plaintiff reported to work each day in Florida and received assignments from on-site supervisors in Florida.

Standing in stark contrast to his numerous connections with Florida during his employment with TWC is the utter lack of contacts Plaintiff had with South Carolina. Plaintiff never reported to South Carolina for duty either before the project began or after it was completed. Indeed, the record is devoid of any indication that Plaintiff visited South Carolina for any purpose — except when he drove through that state as a matter of geographical necessity between North Carolina and Florida.

For these reasons, the present case requires nothing more than a commonsense application of the "base of operation" test to conclude that Plaintiff's employment with TWC was "located" in Florida. The courts in *Holman*, *Voss*, *Oxendine*, and *Hill* were required to balance competing factors in applying this test given that each of those cases involved employees who performed work for a single employer in multiple states. The facts of this case simply do not require us to do so here.

We are unpersuaded by Coastal's argument that Plaintiff's job assignments actually came from Baird in South Carolina. The record shows only two instances of direct contact between Baird and Plaintiff — the telephone call during which Baird offered him the job and a subsequent call in which he gave Plaintiff a "pep talk." Both of these telephone calls occurred while Plaintiff was still in North Carolina and before he had left the state to start work on the Florida Project.

Plaintiff had on-site supervisors at the Florida jobsite — initially Porter and later Fleener — who gave him his work assignments and instructions for the work to be performed. The record clearly indicates that these supervisors were both in Florida when they instructed Plaintiff as to his duties on the Florida Project. While Coastal argues that these on-site supervisors were relaying orders that had been given to them by Baird from South Carolina, we do not believe that any such indirect control over Plaintiff's work by Baird serves as a sufficient substitute for direct connections between Plaintiff and South Carolina given the circumstances of Plaintiff's employment with TWC.

Therefore, we conclude that throughout Plaintiff's employment with TWC, his "base of operation" was Florida. Accordingly, he was neither "principally employed" (for purposes of the Endorsement) in South Carolina nor was South Carolina the state "where his employment [was] located" (for purposes of § 42-15-10). Thus, the Commission erred in determining that Key Risk's policy provided coverage for Plaintiff's workplace accident.[2]

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2. On appeal, Key Risk also raises as an alternative argument that the Commission erred in ordering Key Risk to pay *all* indemnity benefits owed on Plaintiff's claim as a

Conclusion

For the reasons stated above, we reverse the Commission's Opinion and Award to the extent it determined that Key Risk's policy provides any coverage for the 26 September 2010 accident and remand this matter for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges INMAN and ENOCHS concur.

BRADLEY WOODCRAFT, INC., Plaintiff
v.
CHRISTINE BODDEN a/k/a Christine Dryfus, Defendant

No. COA16-692

Filed 20 December 2016

1. Fraud—directed verdict—misapprehension of law

The trial court erred by entering a directed verdict against defendant on the fraud claim. The trial court operated under a misapprehension of the law as it applied to fraud claims, which are brought by a plaintiff where a valid contract exists between the litigants. A new trial was ordered on all issues.

2. Evidence—expert witness—qualifications—weight of testimony—cabinets

The trial court did not abuse its discretion in qualifying Haddock as an expert witness on cabinetry. Any lingering questions or controversy concerning the quality of the expert's conclusions went to the weight of the testimony rather than its admissibility.

Appeal by defendant from judgment entered 4 February 2016 by Judge G. Bryan Collins, Jr. in Wake County Superior Court. Heard in the Court of Appeals 28 November 2016.

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result of his injury based on the theory that "the proportion of the responsibility of [Plaintiff's] wages [was] equal between Coastal and [TWC]." However, in light of our holding that Key Risk's policy does not provide any coverage regarding Plaintiff's accident, we need not address this issue.

John M. Kirby for defendant-appellant.

Morningstar Law Group, by Shannon R. Joseph, for plaintiff-appellee.

ENOCHS, Judge.

Christine Bodden a/k/a Christine Dryfus ("Defendant") appeals from the trial court's judgment against her, and the trial court's order awarding costs to Bradley Woodcraft, Inc. ("Plaintiff"). On appeal, she contends that the trial court erred in (1) entering a directed verdict against her as to her fraud claim; (2) entering a directed verdict against her as to her unfair and deceptive trade practices claim; (3) entering judgment where the verdicts were inconsistent; (4) admitting the testimony of a purported expert witness; (5) awarding costs to Plaintiff; and (6) denying her motion for costs. After careful review, we reverse the trial court's judgment and order and remand for a new trial on all issues.

Factual Background

In 2013, Defendant and her husband, Chris Dryfus ("Chris"), bought a house in Raleigh, North Carolina. The house was approximately 20 years old and Defendant and Chris decided to renovate certain parts of it.

Toward this end, in July 2013, Defendant contacted Plaintiff, a contracting company which is owned and operated by Joey Bradley ("Bradley"), and employed it to build custom archways and to do select trim work around the house. Bradley represented to Defendant that he was qualified to carry out these projects. Shortly after beginning his work at Defendant's and Chirs' home, Bradley submitted a proposal to Defendant for additional renovations in her kitchen that he claimed he could perform as well — including installing new cabinetry and an island cabinet. Defendant agreed to this proposal.

As work on the home renovations progressed, Defendant became dissatisfied with Plaintiff's work, believing that it did not conform to the specifications they had agreed to. As a result, Defendant communicated to Bradley on multiple occasions that the renovations were not being done correctly and were unacceptable. Specifically, Defendant informed Bradley, among other deficiencies in Plaintiff's work, that the island was not plumb, the ends of the cabinets were unfinished, the hutches for the archways were not flush with the wall, the quality of the cabinets

was poor, the refrigerator was not plumb, and the dishwasher opening was too large.

In late June 2014, Defendant and Bradley met to discuss the progress of the various renovation projects. During this meeting, Defendant made the final two agreed to payments for Plaintiff's work with her American Express card in the amounts of $19,000.00 and $7,000.00 respectively. Defendant believed that at the time she made these payments it was understood that Plaintiff would complete its work on her home to the agreed upon specifications and correct any errors in the work that had already been done. Bradley, conversely, had a different recollection of this meeting believing that he and Defendant had resolved that all of the renovations were complete and satisfactory and that no further work was necessary.

Thereafter, Bradley did not perform any further work on Defendant's house and did not return her phone calls or respond to other attempts by her to contact him. Defendant, believing that Plaintiff had breached their agreement by failing to finish the agreed to renovation projects, contacted American Express and disputed the $26,000.00 in payments she had made to Plaintiff. American Express ultimately reversed the charges based upon Defendant's representations.

On 14 November 2014, Plaintiff filed a complaint in Wake County Superior Court alleging causes of action for breach of implied and express contract against Defendant seeking to recover the $26,000.00 amount that Defendant had American Express reverse, plus interest, as well as court costs. On 20 January 2015, Defendant filed an answer, motion to dismiss Plaintiff's breach of implied contract claim, and counterclaims for (1) breach of contract; (2) fraudulent misrepresentation; (3) negligent misrepresentation; (4) wrongful interference with contractual rights; (5) wrongful interference with prospective contract; and (6) unfair and deceptive trade practices.

On 13 August 2015, Plaintiff filed a motion for summary judgment on all of Defendant's counterclaims except for her claim for breach of contract. A hearing on Plaintiff's motion for summary judgment and Defendant's motion to dismiss was held on 7 December 2015 before the Honorable G. Bryan Collins, Jr. in Wake County Superior Court. That same day, Judge Collins entered an order denying Defendant's motion to dismiss.

On 11 December 2015, Judge Collins entered an order granting Plaintiff's motion for summary judgment as to Defendant's wrongful

interference with contract rights counterclaim and wrongful interference with prospective contract counterclaim. Judge Collins denied Plaintiff's motion, however, as to Defendant's fraudulent misrepresentation, negligent misrepresentation, and unfair and deceptive trade practices counterclaims.

A trial was subsequently held before Judge Collins in Wake County Superior Court from 4 January 2016 through 8 January 2016. At trial, Plaintiff moved for a directed verdict on Defendant's fraud, negligent misrepresentation, and unfair and deceptive trade practices claims on the theory that because a valid contract was in effect between the parties, the economic loss rule limited Defendant's possible remedies to those arising under the law of contract. After hearing the arguments of the parties, the trial court ultimately granted Plaintiff's motion and directed verdict in its favor on these claims.

Defendant presented evidence at trial tending to establish that Bradley fraudulently represented to her that he was a licensed general contractor when he was not in order to induce Defendant to hire him to perform the renovations to her home. She also stated that Bradley billed her for items which were never delivered and promised that he would complete the work when he had no intention of doing so.

At the conclusion of trial, the jury found Defendant had breached her contract with Plaintiff and determined that she was liable to Plaintiff for $26,000.00. The jury also found Plaintiff had breached the contract as well, however, and awarded Defendant $19,400.00.

On 19 January 2016, Defendant filed a motion for reconsideration and for a new trial pursuant to Rules 54(b), 59, and 60 of the North Carolina Rules of Civil Procedure. Defendant additionally filed a motion for judgment notwithstanding the verdict pursuant to Rule 50. That same day, Plaintiff filed a motion for costs and attorneys' fees. Defendant, in turn, filed her own motion for costs on 1 February 2016.

The trial court entered judgment on 4 February 2016 offsetting the two verdicts resulting in a net judgment against Defendant in the amount of $6,600.00. The trial court also entered an order on 22 February 2016 (1) granting Plaintiff's motion for costs and awarding costs to Plaintiff in the amount of $4,599.87; (2) denying Plaintiff's motion for attorneys' fees; (3) denying Defendant's motion for reconsideration and for a new trial; (4) denying Defendant's motion for judgment notwithstanding the verdict; and (5) denying Defendant's motion for costs. Defendant filed notice of appeal of the trial court's judgment and 22 February 2016 order

on 7 March 2016. Plaintiff also filed notice of appeal of the trial court's judgment and 22 February 2016 order, but subsequently withdrew its appeal on 17 June 2016.

Analysis

I. Economic Loss Doctrine

[1] Defendant first argues on appeal that the trial court erred in entering a directed verdict against her as to her claim for fraud. Specifically, she contends that the trial court incorrectly applied the economic loss doctrine in directing its verdict on this issue. We agree.

> When considering a motion for a directed verdict, a trial court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable inference arising from the evidence. Any conflicts and inconsistencies in the evidence must be resolved in favor of the non-moving party. If there is more than a scintilla of evidence supporting each element of the non-moving party's claim, the motion for a directed verdict should be denied.

Maxwell v. Michael P. Doyle, Inc., 164 N.C. App. 319, 322, 595 S.E.2d 759, 761 (2004) (internal citations omitted). "[T]his Court must determine whether plaintiff's evidence, when considered in the light most favorable to plaintiff, was legally sufficient to withstand defendants' motion for a directed verdict as to plaintiff's claims. The motion for directed verdict should be denied if there is more than a scintilla of evidence supporting each element of plaintiff's claim." *Merrick v. Peterson*, 143 N.C. App. 656, 661, 548 S.E.2d 171, 175 (2001). Also, "[b]ecause the trial court's ruling on a motion for a directed verdict addressing the sufficiency of the evidence presents a question of law, it is reviewed *de novo*." *Maxwell*, 164 N.C. App. at 323, 595 S.E.2d at 761.

Furthermore, it is well settled that "[r]eversal is warranted where a trial court acts under a misapprehension of the law. Our Supreme Court has held that 'where it appears that the judge below has ruled upon [a] matter before him upon a misapprehension of the law, the cause will be remanded to the Superior Court for further hearing in the true legal light.' " *In re M.K. (I)*, __ N.C. App. __, __, 773 S.E.2d 535, 541 (2015) (quoting *Capps v. Lynch*, 253 N.C. 18, 22, 116 S.E.2d 137, 141 (1960)); *see also Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 206 N.C. App. 192, 204, 696 S.E.2d 559, 567 (2010) ("When the trial court exercises

its discretion under a misapprehension of the law, it is appropriate to remand for reconsideration in light of the correct law."). Consequently, in the present case, the dispositive question before us is whether the trial court correctly interpreted and applied the economic loss rule in granting Plaintiff's motion for a directed verdict on Defendant's counterclaim for fraud.

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

Lord v. Customized Consulting Specialty, Inc., 182 N.C. App. 635, 639, 643 S.E.2d 28, 30-31 (2007) (citation and alteration omitted).

The economic loss rule was first recognized by our Supreme Court in *N.C. State Ports Authority v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978). In that case, the plaintiff entered into a contract with a general contractor to construct two buildings. The general contractor was negligent in his construction of the buildings' roofs, however, and, as a result, they ultimately leaked causing significant damage to the structures. The plaintiff brought suit against the general contractor for breach of contract and for negligence. *Id.* at 81, 250 S.E.2d at 350.

Our Supreme Court held that the plaintiff was barred from bringing a negligence action against the general contractor pursuant to the economic loss rule given that the existence of the contract between the parties limited the plaintiff's remedies to those arising under the law of contract. *Id.* at 81-82, 250 S.E.2d at 350-51.

Significantly, however, *Ports Authority* and its progeny — despite the use of the broad term "tort" in *Ports Authority's* discussion of the economic loss rule — have been limited in their application to merely barring negligence claims. Indeed,

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

Beaufort Builders, Inc. v. White Plains Church Ministries, Inc., __ N.C. App. __, __, 783 S.E.2d 35, 40-41 (2016) (emphasis added).

Significantly, the case relied upon by the trial court and Plaintiff, *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 42, 587 S.E.2d 470, 476 (2003), is such a case where the plaintiff brought a negligence action where a valid contract existed between it and a general contractor. Applying the economic loss rule, this Court, in accord with *Ports Authority*, determined that no cause of action in negligence could lie and the plaintiff's remedies instead were limited to those arising under the law of contract. *Id.* at 44, 587 S.E.2d at 477. Critically, however, *Kaleel Builders, Inc.* did not contemplate a claim for fraud.

This is significant in light of this court's holding in *Jones v. Harrelson & Smith Contr'rs, LLC*, 194 N.C. App. 203, 670 S.E.2d 242 (2008), *aff'd per curiam*, 363 N.C. 371, 677 S.E.2d 453 (2009). In *Jones*, among other claims, the plaintiff brought a fraud claim against the defendant home mover where a contract existed between the parties. *Id.* at 214-15, 670 S.E.2d at 250. After initially denying the defendant's motion for a directed verdict, the trial court subsequently granted the defendant's motion for judgment notwithstanding the verdict on the plaintiff's fraud claim. *Id.* at 214, 670 S.E.2d at 250.

This Court stated on appeal the following:

> According to [the defendant], [the plaintiff] was . . . limited to suing for breach of contract. [The defendant], however,

> cites no authority supporting its assumption that a plaintiff cannot sue for fraud if she has a breach of contract claim. The law is, in fact, to the contrary: a plaintiff may assert both claims, although she may be required to elect between her remedies prior to obtaining a verdict.

Id. at 215, 670 S.E.2d at 250.

In the present case, the trial court stated the following:

> THE COURT: All right. I understand your arguments, they're very well-made, they're - but *Kaleel* disagrees with you. The North Carolina Court of Appeals and the *Kaleel* decision is (inaudible) So, a tort action and all these other things that you've planned are tort action does not lie against the party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was intentional when the injury resulting from the breach is damage to the subject matter of the contract.

In light of this colloquy, we are convinced that the trial court operated under a misapprehension of the law as it applies to fraud claims which are brought by a plaintiff where a valid contract exists between the litigants. Such claims are, in fact, allowable as has been clearly established by *Jones*.

Moreover, as noted above, *Ports Authority* and analogous cases applying the economic loss rule are limited in scope to claims for negligence and have never applied the doctrine to claims for fraud brought contemporaneously with claims for breach of contract. Therefore, we hold that *Jones*, *Ports Authority*, and *Kaleel Builders, Inc.* are in accord and establish that while claims for negligence are barred by the economic loss rule where a valid contract exists between the litigants, claims for fraud are not so barred and, indeed, "[t]he law is, in fact, to the contrary: a plaintiff may assert both claims[.]" *Jones*, 194 N.C. App. at 215, 670 S.E.2d at 250.

Consequently, the trial court erred in entering a directed verdict against Defendant on her counterclaim for fraud. As a result, we must reverse the trial court's entry of directed verdict as to this cause of action.

Moreover, because Defendant's fraud counterclaim is factually interwoven with her remaining counterclaims and directly touches and concerns Plaintiff's overall liability, our reversal of the trial court's entry of directed verdict as to this counterclaim directly impacts the jury's

verdict in its entirety to the extent that we cannot narrowly remand for a new trial on Defendant's fraud counterclaim alone, but rather are compelled to remand for a new trial on all issues. It is well settled that "[i]n ordering a new trial, it is within the discretion of this Court whether to grant a new trial on all issues." *Cicogna v. Holder*, 345 N.C. 488, 490, 480 S.E.2d 636, 637 (1997); *see also Mesimer v. Stancil*, 45 N.C. App. 533, 535, 263 S.E.2d 32, 33 (1980) ("In our discretion, we order a new trial on all issues.").

We have consistently maintained that

> [a] partial new trial should be ordered when the error is confined to one issue, which is entirely separable from the others and it is perfectly clear that there is no danger of complication. . . . Where it appears that the verdict was the result of a compromise, such error taints the entire verdict and requires a new trial as to all of the issues in the case. . . . a new trial as to damages alone should not be granted where there is ground for a strong suspicion that the jury awarded inadequate damages to the plaintiff as a result of a compromise involving the question of liability.

Hous., Inc. v. Weaver, 305 N.C. 428, 442-43, 290 S.E.2d 642, 650-51 (1982) (internal citations, quotation marks, and brackets omitted); *see Robertson v. Stanley*, 285 N.C. 561, 569, 206 S.E.2d 190, 196 (1974) ("In our opinion, the issues of negligence, contributory negligence, and damages are so inextricably interwoven that a new trial on all issues is necessary."); *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 292 N.C. 557, 566, 234 S.E.2d 605, 610 (1977) ("[W]e find that on the present record the question of damages on defendant's counterclaim is so intertwined with the issue of liability that to grant a new trial on the issue of damages only might well result in confusion and uncertainty and in injustice to one or both of the parties. For these reasons and to insure that all the facts bearing on the issue of damages are fully developed and the issue itself more clearly presented, we are constrained to award a new trial on the entire counterclaim."); *Handex of Carolinas, Inc. v. Cnty. of Haywood*, 168 N.C. App. 1, 20, 607 S.E.2d 25, 37 (2005) ("In light of the single-figure jury verdict, we cannot determine whether the jury awarded damages pursuant to any of the four claims properly submitted to the jury, and we are therefore constrained to grant a new trial to determine both the question of liability and damages as to these four claims.").

Because we cannot say that had Defendant's fraud counterclaim been submitted to the jury the result as to liability or the amount of

damages awarded would have been the same, we are compelled to order a new trial on all issues. In addition, in light of our disposition on this issue, we do not reach Defendant's remaining issues on appeal. *See Roberts v. Edwards*, 48 N.C. App. 714, 719, 269 S.E.2d 745, 748 (1980) ("In light of our disposition of this case, it is not necessary to consider the remaining assignments of error. Although the error in excluding the witnesses' testimony relates to the damages issue, in our discretion, we order a new trial on all the issues."); *see also Hobson Const. Co. v. Great Am. Ins. Co.*, 71 N.C. App. 586, 591, 322 S.E.2d 632, 635 (1984) ("Our resolution of the first assignment of error disposes of the appeal and makes it unnecessary to consider appellants' remaining assignments of error.").

II. Expert Opinion Testimony

[2] While, for the reasons stated above, we grant Defendant a new trial on all issues, thereby foreclosing the need to discuss the remaining issues brought on appeal, we nevertheless elect to address, in our discretion, the issue of whether Shane Haddock was properly qualified as an expert witness in cabinetry given the potential likelihood that this issue may again arise below.

Rule 702(a) of the North Carolina Rules of Evidence provides that

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> > (1) The testimony is based upon sufficient facts or data.
> >
> > (2) The testimony is the product of reliable principles and methods.
> >
> > (3) The witness has applied the principles and methods reliably to the facts of the case.

It is well settled that "[t]he trial court has broad discretion in the determination and admission of expert testimony. The decision to qualify a witness as an expert is ordinarily within the exclusive province of the trial judge or hearing officer." *Stark v. N.C. Dep't of Env't & Nat. Res., Div. of Land Res.*, 224 N.C. App. 491, 498-99, 736 S.E.2d 553, 559 (2012) (internal citations and quotation marks omitted). Moreover, " '[a] finding by the trial court that the witness is qualified will not be reversed unless

there was no competent evidence to support it or the court abused its discretion.' " *Id.* at 499, 736 S.E.2d at 559 (quoting *State v. Love*, 100 N.C. App. 226, 232, 395 S.E.2d 429, 433 (1990)).

Here, Plaintiff tendered Haddock as an expert witness in cabinetry who testified as follows:

> Q. Mr. Haddock, please introduce yourself to the jury.
>
> A. I'm Shane Haddock, uh, I've been doing cabinets for 17 years.
>
> Q. What do you currently do?
>
> A. I'm still doing cabinets, but, uh, at the time, whenever I was asked, I was with Knowles Cabinets, outside president of operation. First of last year, I left and went with, uh, Reward Builders and we started our own line of cabinets.
>
> Q. You said you've got 17 years of experience doing cabinets?
>
> A. Yes, sir.
>
> Q. Um, was – who was that for?
>
> A. That was for Knowles Cabinets.
>
> Q. Uh, and what type of cabinets did you, um, work with?
>
> A. We did custom cabinets, which were called European Cabinets. You have (inaudible) frame cabinets and you have European Cabinets and we opted to build the European Cabinets.
>
> Q. Do you have any special, uh, training outside of on the job training, um, for those – for working with cabinets?
>
> A. Outside training meaning what?
>
> Q. Uh, college courses, anything like that?
>
> A. Well, I mean, we went – I went to school to learn how to run all the equipment that we had, but as far as training, no. It's pretty much you – you learn as you go.

Haddock then went on to testify that he personally examined Plaintiff's cabinetry work at Defendant's home and evaluated whether the work had been performed adequately.

As our Supreme Court has recently maintained,

> [e]xpertise can come from practical experience as much as from academic training. Whatever the source of the witness's knowledge, the question remains the same: Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject? The rule does not mandate that the witness always have a particular degree or certification, or practice a particular profession. . . . As is true with respect to other aspects of Rule 702(a), the trial court has the discretion to determine whether the witness is sufficiently qualified to testify in that field.

State v. McGrady, 368 N.C. 880, 889-90, 787 S.E.2d 1, 9 (2016) (internal citations omitted).

In *Kenney v. Medlin Const. & Realty Co.*, 68 N.C. App. 339, 315 S.E.2d 311 (1984), this Court addressed the qualifications of a witness as an expert in residential construction. In determining that the witness was properly qualified as an expert we stated the following: "We find no abuse of discretion in the trial court determination that Jones, who had been involved in building more than 200 residences, including eight to twelve in plaintiff's subdivision, was an expert, better qualified than the jury to form an opinion as to the quality of workmanship and damage resulting from the construction of plaintiff's house. That Jones was not a licensed contractor does not render his opinion testimony inadmissible." *Id.* at 342-43, 315 S.E.2d at 314.

In light of the above cited authority, we are satisfied that there was competent evidence in the present case, based upon his testimony, that Haddock possessed the requisite level of experience and expertise to testify as an expert witness in cabinetry. While Haddock did testify that he was "not really going to say there are any standards" regarding the cabinet industry in Wake County, he went on to clarify that he was not aware of any licensure requirements to perform cabinetry work. Additionally, he provided a follow-up response to the question of whether there were industry standards for cabinetry in Wake County as to the "accepted practice of the way people would build custom cabinets," however, his answer was inaudible and was consequently not transcribed by the court reporter. In any event, these statements are more properly characterized as speaking not to Haddock's qualifications as an expert, but rather as to his credibility — which is appropriately attacked not through seeking exclusion by the trial court, but rather by

means of cross-examination by opposing counsel. *See State v. Turbyfill*, __ N.C. App. __, __, 776 S.E.2d 249, 258 (" '[O]nce the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable (and, of course, relevant), any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility.' " (quoting *State v. Taylor*, 165 N.C. App. 750, 756, 600 S.E.2d 483, 488 (2004))), *disc. review denied*, 368 N.C. 603, 780 S.E.2d 560 (2015); *see also Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 244, 311 S.E.2d 559, 571 (1984) ("It is the function of cross-examination to expose any weaknesses in [expert witness] testimony[.]").

Consequently, we find that the trial court did not abuse its discretion in qualifying Haddock as an expert witness on cabinetry. *See Stark*, 224 N.C. App. at 499, 736 S.E.2d at 559 (" 'A finding by the trial court that the witness is qualified will not be reversed unless there was no competent evidence to support it or the court abused its discretion.' " (quoting *State v. Love*, 100 N.C. App. 226, 232, 395 S.E.2d 429, 433 (1990))).

Conclusion

For the reasons stated above, the judgment and 22 February 2016 order of the trial court are reversed, and we remand for a new trial on all issues.

NEW TRIAL.

Chief Judge McGEE and Judge BRYANT concur.

CORBETT v. LYNCH

[251 N.C. App. 40 (2016)]

MOLLY PAIGE CORBETT, PLAINTIFF
v.
TRACEY LYNCH, DEFENDANT

No. COA16-221

Filed 20 December 2016

Guardian and Ward—Chapter 35A guardianship proceeding—dismissal of child custody action—mootness

The trial court did not err by dismissing plaintiff stepmother's custody petition in this action due to the award of guardianship of the children to decedent father's sister. The appointment of a general guardian by the clerk of superior court in the Chapter 35A guardianship proceeding rendered stepmother's Chapter 50 custody action moot.

Appeal by Plaintiff from order entered 2 November 2015 by Judge April C. Wood in Davidson County District Court. Heard in the Court of Appeals 6 September 2016.

Black, Slaughter & Black, P.A., by Carole R. Albright and T. Keith Black, for the Plaintiff-Appellant.

Allman Spry Davis Leggett & Crumpler, P.A., by Kim R. Bonuomo and Bennett D. Rainey, for the Defendant-Appellee.

DILLON, Judge.

Plaintiff Molly Paige Corbett ("Stepmother") commenced this action in district court seeking custody of her stepchildren, "Max" and "Allison,"[1] who had been orphaned after the recent death of Stepmother's husband, their father, Jason Corbett.[2] On appeal, Plaintiff challenges the district court's order dismissing her *custody* petition in this action due to the award of *guardianship* of the children to Mr. Corbett's sister, Defendant Tracey Lynch ("Aunt"), in a separate superior court proceeding. We affirm.

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1. Pseudonyms.

2. Stepmother was indicted for second-degree murder and voluntary manslaughter in connection with Mr. Corbett's death. At the time of this appeal, she is still awaiting trial.

I. Background

Max and Allison spent their early years living with their biological parents in Ireland, where they are citizens. In 2006, their biological mother passed away. In 2008, Stepmother traveled from the United States to Ireland to serve as the children's *au pair*. In 2011, Mr. Corbett and Stepmother moved to the United States with the children. Shortly thereafter, Mr. Corbett and Stepmother were married. However, despite Stepmother's desire to adopt Max and Allison, Mr. Corbett did not consent to a stepparent adoption. In 2015, Mr. Corbett died, leaving Max and Allison orphaned. In his will, Mr. Corbett named Aunt and Aunt's husband as testamentary guardians for both minor children.

On 4 August 2015, Stepmother filed a petition for guardianship and a petition for stepparent adoption in superior court.

The following day, on 5 August 2015, Stepmother filed *this action* in district court for custody of the children, pursuant to N.C. Gen. Stat. § 50-13.5. Stepmother obtained an *ex parte* order for temporary emergency custody pursuant to N.C. Gen. Stat. § 50-13.5(d)(3), based on her allegation that Aunt was coming to the United States to take the children back to Ireland with her.

On 7 August 2015, Aunt filed (1) applications for guardianship of the children in the proceeding before the clerk of superior court and (2) an answer, motions to dismiss, and a counterclaim for child custody in this district court action.

On 17 August 2015, the clerk of superior court awarded guardianship of Max and Allison to Aunt and her husband.[3] Following a hearing in this district court action, the district court dismissed Stepmother's custody complaint based on the clerk's prior award of guardianship. Stepmother timely appealed the district court's dismissal of her custody action.

II. Analysis

On appeal, Stepmother argues that the district court erred in granting Aunt's motion to dismiss her Chapter 50 custody action, contending that the district court did, in fact, have subject matter jurisdiction. The resolution of this matter requires this Court to consider the jurisdictional relationship between Chapter 35A guardianship proceedings before a clerk of superior court and a Chapter 50 custody action before a district

3. The guardianship orders entered by the clerk of court were subsequently affirmed by Superior Court Judge Theodore S. Royster on 10 February 2016.

court judge. We conclude that the appointment of a general guardian by the clerk of superior court in the Chapter 35A guardianship proceeding rendered Stepmother's Chapter 50 custody action moot. Therefore, we affirm the district court's order dismissing Stepmother's Chapter 50 custody petition.

Our guardianship statutes, codified in Chapter 35A, allow "any person or corporation, including any State or local human services agency[,]" to file an application with the clerk of superior court "for the appointment of a guardian of the person or general guardian *for any minor who [does not have a] natural guardian*."[4] N.C. Gen. Stat. § 35A-1221 (2015) (emphasis added).[5] In such proceeding, the clerk conducts a hearing to determine whether the appointment of a guardian is required, and, if so, considers the child's best interest in determining who the guardian(s) should be. N.C. Gen. Stat. § 35A-1223. An award of general guardianship entitles the guardian to *custody* of the child. N.C. Gen. Stat. § 35A-1241(a)(1).

Chapter 50, on the other hand, provides the *district court* with jurisdiction to enter orders providing for the *custody* of a minor child. N.C. Gen. Stat. § 50-13.5(c)(2) (2015). Any "parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child." N.C. Gen. Stat. § 50-13.1. Chapter 50 custody actions generally involve a dispute between two parents *or* between the parent(s) and a non-parent. In certain emergency situations, the district court is authorized to enter a temporary child custody order *ex parte*, for example, when "there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts." N.C. Gen. Stat. § 50-13.5(d)(3).

Our Supreme Court has stated that parents, as "natural guardians," have a "constitutionally-protected paramount right [] to custody, care, and control of their children." *Petersen v. Rogers*, 337 N.C. 397, 406, 445 S.E.2d 901, 906 (1994). And if a person is appointed as the "general

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4. North Carolina has long recognized that a child's biological mother and father are the "natural guardians" of the child. *See Bright v. Wilson*, 1 N.C. 251, 252 (1800); *Buchanan v. Buchanan*, 207 N.C. App. 112, 119, 698 S.E.2d 485, 489 (2010). Adoptive parents, too, are "natural guardians" as they have the same rights to the adopted child as to any child born to them. N.C. Gen. Stat. § 48-1-106(c).

5. A general guardian is defined as a guardian of both the ward's person and the ward's estate. N.C. Gen. Stat. § 35A-1202(7).

guardian" or as "guardian of the person" of a minor child, that guardianship necessarily includes physical custody of the minor. *See* N.C. Gen. Stat. § 35A-1202(10) (" 'Guardian of the person' means a guardian appointed . . . for the purpose of performing duties relating to the . . . custody . . . of a ward."). This relationship between guardianship and custody was articulated by the Supreme Court of Rhode Island as follows:

> Permanent custody, so called, with its attendant responsibilities, is an incident of guardianship and parents are the natural guardians of their children. . . . Where, as here, a child has been orphaned, the appointment of a guardian supersedes that of a custodian since the latter is contained within the former.

Petition of Loudin, 101 R.I. 35, 38-39, 219 A.2d 915, 917-18 (1966) (internal citations omitted).

Our General Assembly has generally followed the logic articulated in *Loudin* in crafting our custody and guardianship laws. Indeed, our statutes provide for an override of a Chapter 50 custody determination by the appointment of a general guardian or guardian of the person: Chapter 35A allows for an eligible party to obtain guardianship of a minor child with no living parents even if the issue of the child's custody has *already been resolved* by the district court in a Chapter 50 custody proceeding. Chapter 35A provides that an applicant for guardianship is to include "a copy of any . . . custody order" for the clerk's consideration in making a decision regarding guardianship of the child. N.C. Gen. Stat. § 35A-1221(4).

Following appointment of a guardian, Chapter 35A provides that "[t]he clerk shall retain jurisdiction . . . in order to assure compliance with the clerk's orders and those of the superior court." N.C. Gen. Stat. § 35A-1203(b). In addition, the clerk retains jurisdiction to "determine disputes between guardians." N.C. Gen. Stat. § 35A-1203(c). Indeed, we have held that in the context of a dispute over the custody of an incompetent adult child, "the district court obtains jurisdiction . . . to determine custody only when the disabled adult child at issue has not been declared incompetent and had a guardian appointed." *McKoy v. McKoy*, 202 N.C. App. 509, 515, 689 S.E.2d 590, 594 (2010). In *McKoy*, we also held that "the clerk of superior court is the proper forum for determining custody disputes regarding a person previously adjudicated an incompetent adult and who has been provided a guardian under Chapter 35A." *Id.* at 513, 689 S.E.2d at 593.

Thus, in the present case, the clerk properly exercised jurisdiction under Chapter 35A to consider the application for guardianship of Max and Allison, as the children had no natural guardian. The clerk's jurisdiction was not divested by the *ex parte* temporary custody order already entered by the district court because Chapter 35A contemplates the clerk giving due consideration of custody awards entered by other courts. *See* N.C. Gen. Stat. § 35A-1221(4) (providing that an application for guardianship is to include a copy of any order awarding custody). Accordingly, the clerk had jurisdiction to appoint Aunt and her husband as general guardians for Max and Allison, an incident of which is physical custody of the children. Thus, any modification of the clerk's guardianship arrangement, including modification of custody, would "require[] filing a motion . . . with the clerk under Chapter 35A rather than filing an action for custody action in district court under Chapter 50." *McKoy*, 202 N.C. App. at 511, 689 S.E.2d at 592.

Further, we note that once the clerk of superior court entered the order awarding general guardianship of Max and Allison to Aunt and her husband, the Chapter 50 custody action became moot. A final determination by the district court in Stepmother's Chapter 50 custody action would have no practical effect on the controversy regarding custody of the minor children, as custody was decided as part of the guardianship proceeding. *Roberts v. Madison Cnty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398–99, 474 S.E.2d 783, 787 (1996) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy."). The "proper procedure for a court to take upon a determination that a case has become moot is dismissal of the action[.]" *Id.*

Accordingly, we conclude that the district court properly dismissed Stepmother's Chapter 50 custody action.

Our holding today, however, does not affect any jurisdiction the district court may have to issue *ex parte* orders under Chapter 50 for temporary custody arrangements where the conditions of N.C. Gen. Stat. § 50-13.5(d)(2)-(3) are met.[6]

AFFIRMED.

Judges BRYANT and STEPHENS concur.

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6. We note that Chapter 35A does provide the clerk with authority to enter a temporary, *ex parte* custody order when "an emergency exists which threatens [either] the physical well-being of the ward or constitutes a risk of substantial injury to the ward's estate." N.C. Gen. Stat. § 35A-1207.

CORWIN v. BRITISH AM. TOBACCO PLC

[251 N.C. App. 45 (2016)]

DR. ROBERT CORWIN AS TRUSTEE FOR THE BEATRICE CORWIN LIVING IRREVOCABLE TRUST, ON BEHALF OF A CLASS OF THOSE SIMILARLY SITUATED, PLAINTIFF
v.
BRITISH AMERICAN TOBACCO PLC; REYNOLDS AMERICAN, INC.; SUSAN M. CAMERON; JOHN P. DALY; NEIL R. WITHINGTON; LUC JOBIN; SIR NICHOLAS SCHEELE; MARTIN D. FEINSTEIN; RONALD S. ROLFE; RICHARD E. THORNBURGH; HOLLY K. KOEPPEL; NANA MENSAH; LIONEL L. NOWELL III; JOHN J. ZILLMER; AND THOMAS C. WAJNERT, DEFENDANTS

No. COA15-1334

Filed 20 December 2016

1. Corporations—minority shareholder exercising actual control—controlling shareholder—fiduciary duty

The trial court erred by dismissing plaintiff's claim against defendant British American pursuant to Rule 12(b)(6). The amended complaint alleged facts sufficient, if proven true, to allow for the reasonable inference that defendant exercised actual control over the transaction and breached its fiduciary duty to the other shareholders. A minority shareholder exercising actual control over a corporation may be deemed a "controlling shareholder" with a concomitant fiduciary duty to the other shareholders.

2. Jurisdiction—standing—shareholder—derivative action—special duty

Plaintiff had standing to bring a direct claim against defendant British American. Although the general rule in North Carolina is that a shareholder may not bring suit against third parties except in a derivative action on behalf of the corporation, there are two exceptions to this rule including: (1) defendant owed plaintiff a special duty or (2) plaintiff suffered an injury separate and distinct from other shareholders. The amended complaint included allegations sufficient to support the conclusion that defendant owed a fiduciary duty.

3. Jurisdiction—standing—breach of fiduciary duty—aiding and abetting

The trial court did not err by dismissing plaintiff's claim against defendant board of directors for breach of fiduciary duty. Plaintiff did not have standing because plaintiff failed to allege facts necessary to establish either exception to the general rule requiring actions against the directors to be brought derivatively.

4. Conspiracy—aiding and abetting—lack of standing—breach of fiduciary duty

The trial court did not err by dismissing plaintiff's claim of aiding and abetting a breach of fiduciary duty with respect to defendant Reynolds. Plaintiff lacked standing to bring the underlying breach of fiduciary duty claim against defendant board of directors.

Appeal by Plaintiff from Order and Opinion entered 6 August 2015 by Chief Special Superior Court Judge for Complex Business Cases James L. Gale in Guilford County Superior Court. Heard in the Court of Appeals 27 April 2016.

Mullins Duncan Harrell & Russell PLLC, by Alan W. Duncan and Stephen M. Russell, Jr.; and Block & Leviton LLP, by Jason M. Leviton, pro hac vice, for Plaintiff-Appellant.

Robinson & Lawing, LLP, by H. Brent Helms; and Cravath, Swaine & Moore LLP, by Gary A. Bornstein, pro hac vice, for Defendant-Appellee British American Tobacco p.l.c.

Womble Carlyle Sandridge & Rice, LLP, by Ronald R. Davis, W. Andrew Copenhaver, and James A. Dean; and Jones Day, by Robert C. Micheletto, pro hac vice, for Defendant-Appellees, Reynolds American, Inc., Susan M. Cameron, John P. Daly, Sir Nicholas Scheele, Martin D. Feinstein, Ronald S. Rolfe, and Neil R. Withington.

Moore & Van Allen PLLC, by James P. McLoughlin, Jr., Mark A. Nebrig, and Johnathan M. Watkins, for Defendant-Appellees, Luc Jobin, Holly K. Koeppel, Nana Mensah, Lionel L. Nowell, Richard E. Thornburgh, Thomas C. Wajnert, and John J. Zillmer.

INMAN, Judge.

In this case of first impression, reviewing the sufficiency of the pleadings to state a claim for relief, we hold that a minority shareholder which owns shares eight times greater than any other shareholder, is the sole source of equity financing for a transformative corporate transaction, has a contractual right to prohibit the issuance of shares and the sale of intellectual property necessary for the transaction, and which pledges support for the transaction contingent on terms more favorable to it than to other shareholders may owe a fiduciary duty to other

shareholders who claim they were harmed by the transaction. We also hold that claims for diminished share value and diluted voting power, as alleged in this case, cannot be the basis for a direct claim against a board of directors.

Dr. Robert Corwin ("Plaintiff"), acting as trustee for the Beatrice Corwin Living Irrevocable Trust, on behalf of a Class of Shareholders so similarly situated, appeals from an Order and Opinion in favor of Defendants—British American Tobacco PLC ("Defendant-Shareholder" or "BAT" or "British American") and Reynolds American, Inc. ("Defendant-Corporation" or "RAI" or "Reynolds") and Susan M. Cameron, John P. Daly, Neil R. Withington, Luc Jobin, Sir Nicholas Scheele, Martin D. Feinstein, Ronald S. Rolfe, Richard E. Thornburgh, Holly K. Koeppel, Nana Mensah, Lionel L. Nowell III, John J. Zillmer, and Thomas C. Wajnert (collectively "Defendant-Directors" or "Reynolds Board of Directors") dismissing Plaintiff's claims for breach of a fiduciary duty and aiding and abetting a breach of fiduciary duty.

This appeal presents three issues: (1) whether a minority shareholder may be a controlling shareholder, and thus, owe a fiduciary duty to other shareholders; (2) whether a shareholder is permitted to bring a direct suit against a board of directors for the loss of value and voting power of the shareholder's shares; and (3) whether a shareholder may bring a claim for aiding and abetting a breach of fiduciary duty against a corporation based on the actions of the corporation's board of directors. After careful review, we hold that a minority shareholder may in certain circumstances control a corporation, and thus, owe the other shareholders a fiduciary duty. We also hold that Plaintiff does not have standing to bring a direct suit against the corporation's board of directors for his shares' loss of value and voting power alone. Finally, we hold that without an underlying claim against the board of directors for a breach of fiduciary duty, Plaintiff cannot assert a claim of aiding and abetting for breach of a fiduciary duty against the corporation. Accordingly, we reverse and remand the trial court's order in part and affirm the trial court's order in part.

Factual and Procedural History

This dispute arises out of a merger (the "Transaction") between Reynolds and Lorillard, Inc. ("Lorillard"), funded in part by an equity financing share purchase by Defendant-Corporation's largest shareholder, British American. The following facts are alleged in Plaintiff's Amended Complaint and are accepted as true for purposes of our review.

In 2004, R.J. Reynolds Tobacco Company acquired British American's U.S. subsidiary, Brown & Williamson, and formed a successor entity, Reynolds American Inc., in which British American took a forty-two percent stake. In connection with this acquisition, British American and Reynolds adopted a Governance Agreement (the "Governance Agreement") on 30 July 2004. The Governance Agreement included a standstill provision ("the Standstill provision"), which prevented British American from increasing its percentage ownership in Reynolds for ten years, until 30 July 2014. The Governance Agreement also limited British American's ability to control Reynolds by: (1) permitting British American to designate no more than five of the thirteen board members of Reynolds, (2) requiring British American to vote its shares in favor of any board candidates selected by a Corporate Governance and Nominating Committee, comprised solely of non-British American designees, and (3) requiring non-British American designees to approve of any entrance into a contract between British American and Reynolds or any of their subsidiaries. The Governance Agreement also provided contractual rights to British American, including granting British American the right to prohibit the sale or transfer of certain intellectual property, veto amendments to the Articles of Incorporation and By-laws and adoptions of any takeover defenses, and approve the issuance of equity securities in an amount of five percent or more of the voting power of outstanding shares. The Governance Agreement terminates when British American's ownership share in Reynolds reaches one-hundred percent, drops below fifteen percent, or if a third party acquires a majority stake in Reynolds.

In or around September 2012, the Reynolds board of directors, together with Reynolds senior management, began contemplating a merger with Lorillard as a means of alternative strategic growth. Before approaching Lorillard, the president and chief executive officer and a director of Reynolds met with representatives of British American to discuss, among other things, the potential merger. On 15 November 2012, Reynolds formally expressed to Lorillard its interest in a merger, and negotiations ensued.

Throughout the negotiations process, British American insisted that it would support the Transaction only on terms that would allow it to maintain its forty-two percent ownership in Reynolds. British American also insisted—and Reynolds agreed—that neither British American nor Reynolds would seek to amend the Governance Agreement in connection with the Transaction. The Standstill provision in the Governance Agreement was scheduled to expire on 30 July 2014; without changing

that provision or extending the expiration date, Reynolds ultimately could not prevent British American from taking control of Reynolds through the purchase of the remaining fifty-eight percent of Reynolds's outstanding shares.

In February 2014, Lorillard expressed concerns over the proposed terms of the Transaction and sought an additional ownership percentage for the Lorillard shareholders following the merger. Reynolds directors not designated by British American (the "Other Directors") expressed that any additional equity provided to Lorillard should come from a reduction of British American's ownership as opposed to a reduction of the non-British American shareholders' ownership. However, the Other Directors acknowledged that British American's ownership share would not be decreased without British American's consent.

By March 2014, the Lorillard Board of Directors determined the proposed terms did not reflect a "merger-of-equals," decided not to proceed with the Transaction, and terminated the related discussions with Reynolds. Reynolds senior management then explored the possibility of acquiring Lorillard at a premium. With British American as the equity financing source, Reynolds and Lorillard reopened negotiations for the Transaction.

In July 2014, the Reynolds Board of Directors unanimously approved the Transaction. Lorillard's shares were to be purchased for a price per share of $50.50 in cash, plus 0.2909 shares of Reynolds stock. The cash portion of the Transaction was financed by the sale of Reynolds stock to British American at a price of $60.16 per share for a total of approximately $4.7 billion. This price was $3.02 less than the fair market value of the shares on the date of approval by the Reynolds Board of Directors. This sale assured that British American would maintain its forty-two percent ownership share in the remaining company following the Transaction.

When the Transaction closed in June 2015, Reynolds stock was publicly trading at $72 per share, or $11.84 greater per share than the price British American paid for its additional stock as part of the Transaction. The post-closing value constituted a profit of approximately $920 million for British American, a profit no other shareholder enjoyed.

Plaintiff filed suit in August 2014 in Guilford County Superior Court, just after the Reynolds Board of Directors approved the Transaction. The case was assigned to the North Carolina Business Court ("trial court") with Chief Special Superior Court Judge for Complex Business Cases James L. Gale presiding. Following Reynolds's filing of a Form S-4 (the "Proxy Statement") with the Securities and Exchange Commission

describing the Transaction, Plaintiff filed its First Amended Class Action Complaint ("Amended Complaint"), which is the operative pleading at issue on appeal.

The Amended Complaint alleged two theories seeking relief, "Fairness Claims" and "Disclosure Claims." The Fairness Claims alleged that British American and Defendant-Directors breached their fiduciary duties to the Public Shareholders, and the Disclosure Claims alleged that Defendant-Directors breached their duties of candor by failing to disclose certain material facts in the Proxy Statement. The Fairness Claims also included an aiding and abetting a breach of fiduciary duty claim against Reynolds for the actions of Defendant-Directors.

In December 2014, Defendants moved to dismiss the case pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The parties settled the Disclosure Claims in a Memorandum of Understanding filed in January 2015. However, the Fairness Claims remained pending.

Following a hearing, in an Order and Opinion entered 6 August 2015, the trial court dismissed Plaintiff's Fairness Claims. The trial court held that (1) the Amended Complaint did not sufficiently plead facts necessary to establish British American as a controlling shareholder, and consequently did not sufficiently plead that British American owed a fiduciary duty to the other shareholders; (2) regardless of whether Plaintiff had standing to bring a direct suit against Defendant-Directors, Plaintiff's Amended Complaint failed to overcome the Business Judgment Rule and therefore the claim against Defendant-Directors did not survive; and (3) because the underlying fiduciary duty claims had been dismissed, the aiding and abetting claim against Reynolds necessarily failed.

Plaintiff timely appealed.

Analysis

Plaintiff contends that the trial court erred in granting Defendants' motions to dismiss under Rules 12(b)(1) and 12(b)(6) for lack of standing and failure to state a claim upon which relief may be granted. After careful examination of the Amended Complaint and documents incorporated therein, we reverse the trial court's order dismissing Plaintiff's claim against British American and affirm the trial court's dismissal of Plaintiff's remaining claims.

A. Standard of Review

> The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which

> relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Legal conclusions, however, are not entitled to a presumption of validity. 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.

Wells Fargo Bank, N.A. v. Corneal, 238 N.C. App. 192, 195, 767 S.E.2d 374, 377 (2014) (quoting *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 33, 681 S.E.2d 465, 469 (2009)). We review the pleadings *de novo* to determine whether Plaintiff has stated a claim for which relief can be granted. *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 429 (2007) (citation omitted).

Included in the pleadings reviewed for purposes of deciding a motion to dismiss are documents attached to and incorporated by reference in the plaintiff's complaint. N.C. Gen. Stat. § 1A-1, Rule 10(c) (2015) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."). In this case, incorporated documents include the Governance Agreement and the Proxy Statement. Central to the parties' dispute is the interpretation of these documents.

B. Minority Shareholder Liability

1. Controlling Shareholder

[1] Plaintiff's claim raises an issue of first impression in North Carolina: whether and under what circumstances a minority shareholder can be classified as a "controlling shareholder" owing a fiduciary duty to other shareholders.[1] We hold that a minority shareholder exercising actual control over a corporation may be deemed a "controlling shareholder" with a concomitant fiduciary duty to the other shareholders.

In North Carolina, an individual shareholder generally does not owe a fiduciary duty to the corporation or to the other shareholders. *Freese v. Smith*, 110 N.C. App. 28, 37, 428 S.E.2d 841, 847 (1993) (citation

1. Neither party challenges the application of North Carolina law.

omitted). "An exception to this rule is that a controlling shareholder owes a fiduciary duty to minority shareholders." *Kaplan v. O.K. Techs., LLC*, 196 N.C. App. 469, 473, 675 S.E.2d 133, 137 (2009) (citation omitted) (comparing members of a limited liability company to shareholders of a corporation); *Freese*, 110 N.C. App. at 37, 428 S.E.2d at 847 ("[I]t is well established that a controlling shareholder owes a fiduciary duty to minority shareholders.").

North Carolina courts have held that shareholders owning a controlling number of shares in a corporation owe a special duty to other shareholders in the same corporation. In *Gaines v. Long Mfg. Co.*, 234 N.C. 340, 67 S.E.2d 350 (1951), the North Carolina Supreme Court upheld a minority shareholder's ability to sue majority shareholders for breach of a fiduciary duty arising from a disputed corporate transaction. The court explained:

> The holders of the majority of the stock of a corporation have the power, by the election of directors and by the vote of their stock, to do everything that the corporation can do. Their power to . . . direct the action of the corporation places them in its shoes and constitutes them the actual, if not the technical, trustees for the holders of the minority of the stock. . . . It is *the fact of control* of the common property held and exercised, and *not the particular means* by which or manner in which the control is exercised, that creates the fiduciary obligation on the part of the majority stockholders in a corporation for the minority holders.

Gaines, 234 N.C. at 344-45, 67 S.E.2d at 353-54 (first alteration in original) (quoting Am. Jur., Corporations, sections 422 and 423, pp 474-76) (emphasis added).

Gaines relied on a North Carolina Supreme Court decision holding: " 'the directors of these corporate bodies are to be considered and dealt with as trustees in respect to their corporate management, and [] this same principle has been applied to a majority, *or other controlling number*, of stockholders in reference to the rights of the minority . . . when they are as a body in the exercise of this control, in the management and direction of corporate affairs . . . .' " *Id.* at 345, 67 S.E.2d at 353 (emphasis added) (quoting *White v. Kincaid*, 149 N.C. 415, 63 S.E. 109, 111 (1908)). The Court in *White* reasoned that a fiduciary duty arises when a "controlling number of stockholders are exercising their authority in dictating the action of the directors, thereby causing a breach of

fiduciary duty." *White*, 149 N.C. at 420, 63 S.E.2d at 111 (internal quotation marks omitted).[2]

Our courts have not previously classified a numerical minority shareholder, acting alone in either a closely held or publicly traded company, as a "controlling shareholder" for the purpose of imposing a fiduciary duty. However, this Court has held that individual minority shareholders working in concert as a majority to exercise control over a corporation to the detriment of the other shareholders could be held liable as fiduciaries. *Loy v. Lorm Corp.*, 52 N.C. App. 428, 278 S.E.2d 897 (1981). In *Loy*, this Court held the trial court erred in directing a verdict for the defendants—three shareholders with an aggregate seventy-five percent interest in a corporation—who were sued by the fourth shareholder after transferring corporate assets to another corporation owned solely by the defendants themselves. *Id.* at 435, 278 S.E.2d at 902-03. The court in *Loy* looked beyond the percentage of shares owned by each of the three defendants to consider the control each of them derived from their concerted action. *Id.*

No North Carolina appellate court decision or statute has determined if and when a single minority shareholder can become a "controlling shareholder" with an accompanying fiduciary duty. So we consider other authorities.

North Carolina courts often look to Delaware courts for guidance regarding unsettled business law issues. *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 334, 525 S.E.2d 441, 443 (2000) (following Delaware courts' proposition "that shareholders and limited partners hold similar positions within their respective entities[]"); *Ehrenhaus v. Baker*, 216 N.C. App. 59, 88, 717 S.E.2d 9, 28 (2011) (finding "the Delaware courts' articulation of the non-disclosure principle persuasive[,]" and adopting this articulated principle in North Carolina).

Delaware decisional law allows a minority shareholder who exercises actual control over a corporation or a corporation's affairs to be classified as a "controlling shareholder." However, this law includes the rebuttable presumption that a minority shareholder does not control

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2. Before it was incorporated in Gaines, the holding in *White* was *dicta*, because the court in *White*, reviewing an order restraining the dissolution of the defendant corporation, concluded that the plaintiff had failed to produce evidence sufficient to support his claim. *White*, 149 N.C. at 422-23, 63 S.E. at 111.

a corporation or a challenged corporate transaction. "[A] shareholder who owns less than [fifty percent] of a corporation's outstanding stocks does not, *without more*, become a controlling shareholder of that corporation, with a concomitant fiduciary status." *Citron v. Fairchild Camera and Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989) (first alteration in original) (emphasis added) (internal quotation marks and citations omitted). It therefore becomes necessary for the plaintiff to "allege domination by a minority shareholder through actual control of corporate conduct." *Id.*; *see also Kahn v. Lynch Commc'n Systems, Inc.*, 638 A.2d 1110, 1115 (Del. 1994) (holding that a minority shareholder with an approximate forty-three percent interest in a company exercised control sufficient to impose a fiduciary duty).

When determining if a shareholder has exercised control over a corporation, our courts and Delaware courts have considered, among other things, the shareholder's percentage of voting shares, the relationship between the shareholder and the corporation, the shareholder's ability to appoint directors, and the shareholder's ability to affect the outcome of particular transactions. *See, e.g.*, *Kaplan*, 196 N.C. App. at 473, 675 S.E.2d at 137; *Kahn*, 638 A.2d at 1113-15; and *Williams v. Cox Commc'ns, Inc.*, 2006 Del. Ch. LEXIS 111 *1, *22 (Del. Ch. June 5, 2006). The plaintiff in *Kahn* appealed from a final judgment in which the Delaware Chancery Court concluded a minority shareholder owed a fiduciary duty to the plaintiff, but that the evidence did not demonstrate that the defendant breached this duty. *Kahn*, 638 A.2d at 1111-12. The Delaware Supreme Court, affirming the Chancery Court, held that a minority shareholder whose designated director told the other board members that "[y]ou must listen to us. We are 43 percent owner. You have to do what we tell you[,]" and persuaded the board members to abandon their opposing votes in a "watershed vote," was a controlling shareholder who owed a fiduciary duty to the other shareholders. *Id.* at 1114 (first alteration in original).

A review of secondary authorities supports treating a minority shareholder as a "controlling shareholder" under certain circumstances. Black's Law Dictionary defines a controlling shareholder as "[a] shareholder who can influence the corporation's activities because the shareholder either owns a majority of outstanding shares or *owns a smaller percentage but a significant number of the remaining shares are widely distributed among many others*." *Black's Law Dictionary* 1586 (10th ed. 2014) (emphasis added). The American Law Institute, in its *Principles of Corporate Governance*, applies the following definition:

> (a) A "controlling shareholder" means a person [§ 1.28] who, either alone or pursuant to an arrangement or understanding with one or more persons:
>
> (1) Owns and has the power to vote more than 50 percent of the outstanding voting equity securities [§ 1.40] of a corporation; or
>
> (2) *Otherwise exercises a controlling influence over the management or policies of the corporation or the transaction or conduct in question by virtue of the person's position as a shareholder.*
>
> (b) A person who, either alone or pursuant to an arrangement or understanding with one or more other persons, owns or has the power to vote more than 25 percent of the outstanding voting equity securities of a corporation is presumed to exercise a controlling influence over the management or policies of the corporation, unless some other person, either alone or pursuant to an arrangement or understanding with one or more other persons, owns or has the power to vote a greater percentage of the voting equity securities. A person who does not, either alone or pursuant to an arrangement with one or more other persons, own or have the power to vote more than 25 percent of the outstanding voting equity securities of a corporation is not presumed to be in control of the corporation by virtue solely of ownership of or power to vote voting equity securities.

American Law Institute, *Principles of Corporate Governance* § 1.10 (1994) (emphasis added). We note that the American Law Institute applies the presumption of control at a lower threshold, *i.e.*, when a shareholder owns twenty-five percent of the corporation. *Id.* This is in contrast to our precedents and the decisions by Delaware courts in which control is presumed only where the shareholder holds a numerical majority interest.

Defendants argue that *Gaines* and our other precedents support the bright line rule that a "controlling shareholder" must have a numerical majority of the outstanding shares. However, these decisions hold only that a majority shareholder is presumed to be a "controlling shareholder." *See Gaines*, 234 N.C. at 344-45, 67 S.E.2d at 353-54; *Kaplan*, 196 N.C. App. at 473-74, 675 S.E.2d at 137. We find persuasive

Delaware's rule that a minority shareholder exercising actual control over a corporation or a corporation's affairs may be classified as a "controlling shareholder."

At the pleading stage, we must accept as true all of Plaintiff's allegations without regard to whether Plaintiff can produce evidence to support those allegations. But we begin with the general presumption that a minority shareholder is not in control of a corporation's conduct. *Cirton*, 569 A.2d at 70; *see Kaplan*, 196 N.C. App. at 473-74, 675 S.E.2d at 137; *Freese*, 110 N.C. App. at 37-38, 428 S.E.2d at 847-48. This presumption may be rebutted if a plaintiff alleges facts from which it is reasonable to infer that a minority shareholder exercised actual control over the corporation's actions. *Kahn*, 638 A.2d at 1113-14; *see Gaines*, 234 N.C. at 344-45, 67 S.E.2d at 353-54; *White*, 149 N.C. at 420, 63 S.E.2d at 111.

When tested by a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff's complaint for a claim based upon shareholder liability must allege specific facts demonstrating or allowing for the reasonable inference of actual control by that shareholder. "The bare conclusory allegation that a minority stockholder possessed control is insufficient. Rather, the Complaint must contain well-pled facts allowing for a reasonable inference that the minority stockholder 'exercised actual domination and control over . . . [the] directors.' " *In re Morton's Restaurant Grp., Inc.*, 74 A.3d 656, 664-65 (Del. Ch. 2013) (alterations in original) (citations omitted).

Plaintiff argues that the Amended Complaint is not subject to dismissal because it alleges a "nexus of facts" that allows for a reasonable inference of corporate control by British American. Plaintiff relies on *Williams v. Cox Commc'ns, Inc.*, 2006 Del. Ch. LEXIS 111 *1, *22 (Del. Ch. June 5, 2006), an unpublished decision by the Chancery Court of Delaware, to support the "nexus of facts" standard. The court in *Williams* noted that with respect to claims alleging wrongful control by corporate shareholders, the line between whether certain actions amount to influence or control "is highly contextualized and is difficult to resolve based solely on the complaints[,]" and that while "[n]o single allegation in [the] plaintiff's complaint is sufficient on its own . . . [t]he complaint succeeds because it pleads a nexus of facts all suggesting that the [defendants] were in a controlling position and that they exploited that control for their own benefit." *Id.* at *23-24. This Court and the North Carolina Supreme Court routinely dismiss the precedential value of unpublished decisions. But absent any North Carolina precedent on the issue, we find the analysis in *Williams* helpful. We likewise agree

that a complaint alleging minority shareholder liability should survive a 12(b)(6) motion to dismiss if it pleads a "nexus of facts" allowing for a reasonable inference that the minority shareholder exercised actual control over material corporate affairs.

2. Sufficiency of the Pleadings

After careful review of the Amended Complaint and all inferences that may be drawn from its allegations, we hold that Plaintiff has pleaded facts sufficient to allow for a reasonable inference that British American exercised actual control over the Transaction and thus owed a fiduciary duty to Plaintiff.

To plead most civil claims in North Carolina, a complaint must contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]" N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (2015). "Thus, a complaint is sufficient where no insurmountable bar to recovery appears on the face of the complaint and the complaint's allegations give adequate notice of the nature and extent of the claim." *Pastva v. Naegele Outdoor Advers., Inc.*, 121 N.C. App. 656, 659, 468 S.E.2d 491, 493 (1996) (internal quotation marks and citations omitted).

The purpose behind this pleading standard, generally referred to as notice pleading, "is to resolve controversies on the merits, after an opportunity for discovery, instead of resolving them based on the technicalities of pleadings." *Ellison v. Ramos*, 130 N.C. App. 389, 395, 502 S.E.2d 891, 895 (1998) (citation omitted). Therefore, "[p]leadings must be liberally construed to do substantial justice, and must be fatally defective before they may be rejected as insufficient." *Fournier v. Haywood Cnty. Hosp.*, 95 N.C. App. 652, 654, 383 S.E.2d 227, 228-29 (1989) (citing *Smith v. N.C. Farm Bureau Mut. Ins. Co.*, 84 N.C. App. 120, 123, 351 S.E.2d 774, 776 (1987)).

The North Carolina legislature has designated several matters in which heightened pleading requirements must be met. N.C. Gen. Stat. § 1A-1, Rule 9 (2015). These matters include, among others, claims asserting capacity, fraud, duress, mistake, and libel and slander. *Id.* For these delineated situations, the legislature sought to provide guidance in areas "which have traditionally caused trouble when no codified directive existed." N.C. Gen. Stat. § 1A-1, Rule 9 N.C. cmt. (2015). Absent a specific designation by statute or precedent, we see no reason to adopt a stricter pleading standard for suits against minority shareholders for a

breach of a fiduciary duty. North Carolina's pleading standard requires a plaintiff to plead facts sufficient to overcome the presumption that a minority shareholder is not in control of a corporation's conduct. A complaint against a minority shareholder must therefore allege facts from which a trier of fact could reasonably infer that the minority shareholder exercised actual control over the corporation.

To survive a 12(b)(6) motion to dismiss, a complaint for breach of fiduciary duty claim must allege, in addition to the existence of a fiduciary relationship, a breach of that duty. *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 70, 614 S.E.2d 328, 337 (2005) (internal quotation marks and citations omitted) ("To state a claim for breach of fiduciary duty, a plaintiff must allege that a fiduciary relationship existed and that the fiduciary failed to act in good faith and with due regard to [the] [plaintiff's] interests.") (second alteration in original).

a. Limitations Preventing British American from Controlling Reynolds

Defendants argue that Plaintiff's Amended Complaint disclosed facts that necessarily defeated his claim—the limitations on British American's control of Reynolds contained within the Governance Agreement. The Governance Agreement provides, *inter alia*:

- British American has the right to designate only five of the thirteen directors on the Reynolds Board of Directors, with the number of directors designated by British American decreasing incrementally if British American's ownership drops below certain thresholds. Additionally, three of the directors designated by British American must be independent as defined by the rules of the New York Stock Exchange.
- With respect to the eight directors which it cannot designate, British American must vote all of its shares in favor of any Board of Director candidates selected by a committee comprised solely of directors not designated by British American.
- A majority of the directors not designated by British American must approve Reynolds's entrance into any contract involving Reynolds and its subsidiaries and British American and its subsidiaries.
- The Standstill provision prevented British American from purchasing additional shares in Reynolds until 30 July 2014.

b. Circumstances Allowing British American to Control Reynolds

Plaintiff asserts that events and circumstances surrounding the Transaction, including those described in the Proxy Statement, allowed British American to exercise actual control over the Transaction notwithstanding the terms of the Governance Agreement. Plaintiff cites the following allegations to support this assertion: (1) British American's outsized shareholding constituted a *de facto* veto power over any matter put to a shareholder vote—British American owned a forty-two percent stake of the voting shares, while the next largest block was five percent; (2) the Governance Agreement's granting to British American "veto power," in the form of contractual rights to prohibit the issuance of shares and the divestment of intellectual property necessary for the Transaction; (3) deal terms allowing British American to profit at the expense of—and to the exclusion of—the non-British American shareholders; and (4) the failure by the Other Directors to counter British American's control over the Transaction.

Our review has identified the following specific facts alleged or contained in the Governance Agreement or Proxy Statement from which a reasonable trier of fact could infer that British American exercised actual control over Reynolds with respect to the Transaction:

- In late 2012, the Reynolds Board of Directors considered a merger with Lorillard. Representatives of British American "expressed their support, on behalf of BAT as an RAI shareholder, for approaching Lorillard with an indication of interest."
- With the support of British American, Reynolds approached Lorillard and discussions between the two corporations ensued.
- In January 2013, British American's representatives reiterated, in discussions with the Reynolds Board of Directors, British American's support for the Transaction conditioned upon deal terms including British American maintaining its forty-two percent ownership of the surviving company following the merger.

> BAT's representatives also stated that decisions as to whether and how to pursue a business combination between RAI and Lorillard were to be made by the RAI board of directors, but that BAT, in its capacity as a substantial financing source and holder of contractual approval rights, would cooperate with combining the

> companies only on transactional terms and with an execution strategy of which it approved.

- Negotiations between Reynolds, Lorillard, and British American continued throughout the following months. Included among the negotiated terms was, "at the insistence of BAT, that neither BAT nor RAI would seek any changes in the governance agreement in connection with the possible acquisition of Lorillard."

- On 18 January 2014, the Reynolds Board of Directors met with, among others, representatives of Lazard, Reynold's financial advisors. "A representative of Lazard . . . introduce[ed] an alternative approach [to the Transaction] in which cash available as consideration would be distributed on a pro rata basis to Lorillard shareholders and to RAI shareholders other than BAT." The Lazard representatives also reported on discussions between

  > [Reynolds] management and Lazard, on the one hand, and BAT and its financial advisors, on the other, during which the parties discussed potential solutions that would be in the best interests of RAI shareholders other than BAT and continue to meet the objectives of both Lorillard and BAT. These discussions included the possibility that BAT and/or RAI shareholders other than BAT could have decreased post-closing ownership interest in the combined company.

  Following this meeting, the Other Directors discussed with Reynolds's outside legal advisors their fiduciary duties.

- The Other Directors reached a consensus "that RAI shareholders other than BAT should receive at least 30% of the equity ownership of the combined company and receive a pro rata portion of the cash distribution." The Other Directors also discussed the need to engage independent legal counsel.

- During a meeting on 12 February 2014 between the Other Directors and legal and financial advisers for Reynolds as well as independent counsel for the Other Directors, "[t]here was extensive discussion regarding the consideration to be received by RAI shareholders other than BAT and BAT's willingness to move from its initial position regarding post-transaction equity ownership."

- On 18 February 2014, the Reynolds Board of Directors discussed a counter-proposal by Lorillard seeking a higher percentage of post-transaction ownership. "The Other Directors considered the impact of increased ownership for Lorillard shareholders on RAI

shareholders other than BAT[,]" and "expressed their preference that any additional equity to Lorillard shareholders come from decreased ownership by BAT."

- By 20 February 2014, British American indicated, consistent with its earlier position that it "was not prepared to extend the standstill covenant in the governance agreement in connection with the proposed business combination transaction . . . ."
- On 13 March 2014, the Lorillard Board of Directors, fearing the Transaction was not a "merger-of-equals," determined not to proceed and terminated discussions.
- Reynolds's senior management then considered acquiring Lorillard at a premium—*i.e.*, purchasing Lorillard—as opposed to the previous "merger-of-equals" approach. Reynolds's Board of Directors began discussions with Lazard and Lorillard concerning this newly structured approach to the Transaction. This Transaction was to be funded by equity financing from British American, by which British American would purchase Reynolds shares and maintain its forty-two percent interest in the remaining company following the acquisition.
- On 17 June 2014, Jones Day—legal counsel for Reynolds—received a draft subscription and support agreement from British American proposing the terms of equity financing for the new Transaction. In the subscription and support agreement, British American pledged to vote its shares in favor of the Transaction, regardless of whether the Reynolds Board of Directors recommended proceeding with the Transaction.
- On 2 July 2014, Moore & Van Allen—independent legal counsel for the Other Directors—reviewed the proposed subscription and support agreement. Moore & Van Allen "requested that BAT's draft provision for an unconditional commitment to vote the shares of RAI common stock it beneficially owned in favor of the transaction (regardless of any change in recommendation of the RAI board of directors) be deleted."
- On 5 July 2014, Representatives of Lorillard notified Jones Day

> that Lorillard was insistent, as a condition of proceeding, on having a commitment from BAT to vote the shares of RAI common stock it beneficially owned in favor of the transaction even if the RAI board of directors changed its recommendation of the transaction. [BAT's legal counsel]

> advised Jones Day that BAT would consider this demand but would not give such a commitment over the objections of the Other Directors. The Other Directors agreed to accept that commitment.

The Proxy Statement does not provide any explanation regarding how or why the Other Directors determined to depart from the advice of their independent legal counsel in this respect.

- On 9 July 2014, "several news media speculated that BAT was seeking to acquire the remaining outstanding shares of RAI common stock that it did not currently own."
- On 14 July 2014, the Reynolds Board of Directors unanimously approved the Transaction.

The information summarized above is but a drop in the bucket of the detailed financial and historical data included within the Proxy Statement and endemic to corporate mergers and acquisitions. A multitude of inferences can be drawn from this information. However, our task is to consider whether the facts alleged allow for any reasonable inference that can support Plaintiff's claim.

When reviewing a 12(b)(6) motion, "the complaint must be liberally construed and should not be dismissed for insufficiency unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Zenobile v. McKecuen*, 144 N.C. App. 104, 110, 548 S.E.2d 756, 760 (2001). Plaintiff's Amended Complaint alleged facts that support the reasonable inference that British American exercised actual control over Reynolds's Board of Directors' approval of the Transaction, despite the restrictions of the Governance Agreement.

This is a close case, even under the liberal standard of notice pleading. We acknowledge that one reasonable inference to be drawn from the events and circumstances is that the Other Directors believed that the Transaction was valuable enough to all shareholders that it was worth proceeding even on terms that disproportionately enriched British American. Another reasonable inference could be that the Other Directors did not seek funding for the Transaction from any other source because they had investigated prospects and determined that funding on the same or better terms was not available elsewhere. It is also reasonable to infer that British American earned the increased value of the shares it purchased by incurring the financial risk inherent in the Transaction, a risk not incurred by other shareholders. However, these

possible inferences do not preclude other reasonable inferences that support Plaintiff's claim that British American was a controlling shareholder with an accompanying fiduciary duty.

Defendants note that the strategic advantages British American enjoyed, such as its role as equity financer of the Transaction, have been dismissed by our courts as insufficient to establish a fiduciary duty. *Kaplan*, 196 N.C. App. at 474-77, 675 S.E.2d at 137-39 (holding that the plaintiff did not allege sufficient control of a limited liability company by a forty-one percent owner who was the company's sole source of financing). Defendants also argue that British American's contractual rights to prohibit the issuance of shares and transfer of intellectual property necessary to complete the Transaction do not constitute control. *See Superior Vision Servs. v. ReliaStar Life Ins. Co.*, 2006 Del. Ch. LEXIS 160 *1, *19-20 (Del. Ch. Aug. 25, 2006) (holding the defendant's exercise of its contractual right to prevent the distribution of dividends did not render it a "controlling shareholder" with an accompanying fiduciary duty). But unlike the facts alleged in any of the cases relied upon by Defendants, Plaintiff's Amended Complaint alleged a combination of facts which in the aggregate support a reasonable inference of actual control.

Defendants urge us to follow the Delaware Chancery Court's decision in *Thermopylae Capital Partners, L.P. v. Simbol, Inc.*, 2016 Del. Ch. LEXIS 15 *1 (Del. Ch. Jan. 29, 2016), which distinguished potential control from actual control and held that potential control is insufficient to impose a fiduciary duty. In *Thermopylae*, the plaintiff's complaint failed to allege "the number of directors at the time of the transaction, their identity, facts showing control by [the defendant], and details regarding the terms of the transaction itself[.]" *Id.* at *44-45. In contrast, Plaintiff's Amended Complaint alleges detailed facts, which we hold allow for the reasonable inference that British American exercised actual control over the Transaction.

Defendants also contrast the circumstantial allegations in this case with more explicit facts shown in cases upholding controlling shareholder liability. For example, Plaintiff has not alleged that any director designated by British American told other directors, "[y]ou have to do what we tell you." *Cf. Kahn*, 638 A.2d at 1114. However, the lack of more explicit facts at the pleading stage, before a plaintiff can obtain discovery, is not fatal if less than explicit facts allow for a reasonable inference of the essential elements of the claim.

Here, Plaintiff's allegations allow for a reasonable inference that the Other Directors agreed to the terms of the Transaction dictated by

British American at the expense of other shareholders in order to avoid the risk of a corporate takeover by British American. The Amended Complaint alleged not only that British American conditioned its support for the Transaction on terms disfavoring the other shareholders, but that the Other Directors capitulated to British American's terms against the advice of their independent legal counsel. The aggregate of these allegations along with the size of British American's shareholding, British American's contractual rights under the Governance Agreement, the impending expiration of the Standstill provision, and the lack of explanation surrounding the Other Director's decision to abandon advice by their independent legal counsel allows for the reasonable inference of actual control.

We conclude these allegations comprise a sufficient nexus of facts from which it is reasonable to infer that British American exercised actual control over the Transaction and the actions taken by the Other Directors. Therefore, Plaintiff has sufficiently pleaded that British American is a controlling shareholder with a concomitant fiduciary duty owed to Plaintiff, as a non-British American minority shareholder.

Having established that the Amended Complaint alleged facts sufficient to support the reasonable inference that British American owed a fiduciary duty to Plaintiff, we next consider whether the Amended Complaint includes allegations sufficient to establish, for the purposes of withstanding a 12(b)(6) challenge, that British American breached this duty and did not act in good faith with regard to Plaintiff's interests. We hold it does.

The relevant facts alleged include: conflicts of interests between British American and the non-British American shareholders noted by Reynolds's Board of Directors, the Other Directors' failure to obtain outside financial advice to resolve the conflicts, British American's potential pressuring of the Other Directors to act contrary to the interests of the non-British American shareholders, and British American's purchase of Reynolds stock below the fair market value on the closing date of the Transaction. These facts allow for a reasonable inference that British American breached its fiduciary duty to the other shareholders by acting contrary to their interest for its own pecuniary gain.

We conclude that Plaintiff alleged a nexus of facts that permits the reasonable inference that British American controlled the conduct of Reynolds for its pecuniary benefit to the detriment of the other shareholders. We do not hold that Plaintiff has presented evidence sufficient to prove that British American was a controlling shareholder, to prove

that British American breached a fiduciary duty, or even sufficient to raise disputed issues of fact in this regard. We simply hold the Amended Complaint alleges facts sufficient, if proven true, to allow for the reasonable inference that British American exercised actual control over the Transaction and breached its fiduciary duty to the other shareholders. Whether Plaintiff is able to produce evidence necessary to support his claims is a question to be answered after discovery.

Accordingly, we reverse the trial court's dismissal of Plaintiff's claim against British American pursuant to Rule 12(b)(6).

3. Standing

[2] The general rule in North Carolina is that a shareholder may not bring suit against third parties except in a derivative action on behalf of the corporation. *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (1997). There are two exceptions to this rule: when a plaintiff can show either (1) the defendant owed the plaintiff a special duty, or (2) the plaintiff suffered an injury separate and distinct from other shareholders. *Barger*, 346 N.C. at 658-59, 488 S.E.2d at 219-20. A fiduciary duty may constitute a "special duty" when owed directly to a party. *See id.* at 658-59, 488 S.E.2d at 220.

Here, Plaintiff's standing to bring a direct claim against British American turns on whether Plaintiff's Amended Complaint has alleged a special duty and thus a claim for relief. Because the Amended Complaint included allegations sufficient to support the conclusion that British American owed a fiduciary duty, Plaintiff has standing to bring a direct claim against British American.

C. Claims against Boards of Directors

[3] Plaintiff next contends the trial court erred by dismissing his claim against Defendant-Directors for breach of fiduciary duty. The trial court did not determine whether Plaintiff had standing to sue Defendant-Directors, but instead dismissed Plaintiff's claims on the merits. We hold that Plaintiff does not have standing and therefore affirm the trial court's dismissal on this alternative ground.

"The well-established general rule is that shareholders cannot purse individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock." *Barger*, 346 N.C. at 658, 488 S.E.2d at 219 (citations omitted). Such third parties include the directors of a corporation. *See Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 268 (2013). "The General Assembly has expressly indicated its intent 'to avoid an interpretation

[of N.C. Gen. Stat. § 55-8-30] . . . that would give shareholders a direct right of action on claims that should be asserted derivatively' and to avoid giving creditors a generalized fiduciary claim." *Id.* (quoting N.C. Gen. Stat. § 55-8-30 N.C. cmt. (2011)). Two exceptions to this rule allow shareholders to bring direct actions against either a third party or the directors: (1) "if the shareholder can show that the wrongdoer owed him a special duty or [(2)] that the injury suffered by the shareholder is separate and distinct from the injury sustained by the other shareholders or the corporation itself." *Barger*, 346 N.C. at 658-59, 488 S.E.2d at 219 (citations omitted).

To establish the first exception, a plaintiff "must allege facts from which it may be inferred that defendants owed plaintiffs a special duty. The special duty may arise from contract or otherwise." *Id.* at 659, 488 S.E.2d at 220 (citation omitted). The North Carolina Supreme Court has recognized as illustrative of a special duty, "when a party violate[s] its fiduciary duty to the shareholder." *Id.* (citing *FTD Corp. v. Banker's Trust Co.*, 954 F. Supp. 106, 109 (S.D.N.Y. 1997)). However, North Carolina has established that a director's fiduciary duty is owed to the corporation itself and not to the shareholders individually. *Estate of Browne v. Thompson*, 219 N.C. App. 637, 640-41, 727 S.E.2d 573, 576 (2012). Because the legislature intended shareholders to bring derivative actions, as opposed to direct actions, and a directors' fiduciary duty is to the corporation generally and not the shareholder individually, a shareholder's action against a director should be brought derivatively unless he or she can allege facts that the director owed him or her a special duty beyond that of the general fiduciary duty to the corporation. *Barger*, 346 N.C. at 660, 488 S.E.2d at 220 ("Plaintiffs have alleged no facts from which it may be inferred that defendants owed plaintiffs in their capacities as shareholders a duty that was personal to them and distinct from the duty defendants owed the corporation.").

Under the second exception, a plaintiff must "present evidence that they suffered an injury peculiar or personal to themselves." *Green*, 367 N.C. at 144, 749 S.E.2d at 269 (citing *Barger*, 346 N.C. at 661, 488 S.E.2d at 221). "An injury is peculiar or personal to the shareholder if 'a legal basis exists to support plaintiffs' allegations of an individual loss, separate and distinct from any damage suffered by the corporation.' " *Barger*, 346 N.C. at 659, 488 S.E.2d at 220 (quoting *Howell v. Fisher*, 49 N.C. App. 488, 492, 272 S.E.2d 19, 23 (1980)). The general diminution of stock value is not considered an injury "peculiar or personal" as it is felt by the corporation itself. *Green*, 367 N.C. at 144, 749 S.E.2d at 269 ("The loss of an investment is identical to the injury suffered by the corporate entity as a whole.") (internal quotations and citations omitted).

Here, Plaintiff asserts standing to bring his claim against Defendant-Directors under the second exception. Plaintiff frames his injuries as the inadequate compensation for the stock sold to British American and the dilution of voting power that resulted from this sale of shares to British American. Plaintiff argues these injuries were suffered uniquely by Plaintiff and the other non-British American shareholders, and thus satisfies the "peculiar or personal" requirement. We disagree.

Plaintiff's claimed injury from the inadequate compensation is the exact loss contemplated by the legislature when it drafted the requirement that plaintiffs must assert derivative claims where the injury is felt by the corporation itself. This injury does not satisfy the "peculiar or personal" requirement, and therefore standing for Plaintiff's direct claim may not be based on this injury.

Plaintiff's alternative framing for the injury, *i.e.*, the dilution of voting power, requires further consideration, but ultimately is not sufficient to satisfy the "peculiar or personal" requirement. Recognizing such dilution as a basis for standing to sue directly could allow any minority shareholder who opposes an equity financing agreement to bring a direct suit against the corporation's directors. Such injury is at its core a diminution of value of the stock held. While it is less directly felt by the corporation itself, it is felt generally by the shareholders and is thus not peculiar or personal to any one shareholder. Therefore, we hold that a dilution of voting power, standing alone, is an insufficient injury to base standing for a shareholder's direct claim against a board of directors.

Because we hold that Plaintiff has failed to allege facts necessary to establish either exception to the general rule requiring actions against the directors to be brought derivatively, we affirm the trial court's dismissal of Plaintiff's claim.

D. Claims against Corporation

[4] Plaintiff's final issue on appeal challenges the trial court's dismissal of his claim against Reynolds for aiding and abetting a breach of fiduciary duty.

The validity of an aiding and abetting a breach of fiduciary duty claim brought against a corporation for the actions of its directors is unsettled in North Carolina. *Bottom v. Bailey*, 238 N.C. App. 202, 211-12, 767 S.E.2d 883, 889 (2014). However, we need not address this issue today, because Plaintiff lacks standing to bring the underlying breach of fiduciary duty claim as against Defendant-Directors. *See*, *e.g.*, *Id.* at 211, 767 S.E.2d at 889. Accordingly, we hold the trial court did not err in

dismissing Plaintiff's claim of aiding and abetting a breach of fiduciary duty with respect to Reynolds.

Conclusion

Plaintiff's Amended Complaint, taken as true, supports the conclusion that British American acted as a "controlling shareholder," and therefore owed Plaintiff, as a minority shareholder, a fiduciary duty. The Amended Complaint, however, failed to establish that Defendant-Directors owed Plaintiff a special duty or that Plaintiff's injury was separate and distinct, and therefore Plaintiff failed to establish standing to bring a direct claim against Defendant-Directors. Because the complaint failed to plead the underlying fiduciary duty against Defendant-Directors, Plaintiff's claim against Reynolds for aiding and abetting a breach of fiduciary duty must also fail. Accordingly, the trial court erred in dismissing Plaintiff's claim against British American but did not err in dismissing Plaintiff's claims against Defendant-Directors and Reynolds. Therefore, we reverse and remand the trial court's order dismissing Plaintiff's claim against British American and affirm the trial court's order dismissing Plaintiff's claims against the Director Defendants and Reynolds.

REVERSED AND REMANDED IN PART AND AFFIRMED IN PART.

Judges ELMORE and McCULLOUGH concur.

DELVON R. GOODWIN, BY AND THROUGH HIS GUARDIAN AD LITEM, MELISSA I. HALES, PLAINTIFF

v.

FOUR COUNTY ELECTRIC CARE TRUST, INC , A/K/A FOUR COUNTY ELECTRIC MEMBERSHIP CORPORATION, DEFENDANT

No. COA16-481

Filed 20 December 2016

1. Appeal and Error—appealability—denial of motion to amend—intent inferred from notice of appeal

The Court of Appeals had jurisdiction to review the trial court's denial of plaintiff's motion to amend along with the trial court's grant of the Non-Profit Trust's motion to dismiss. Plaintiff's intent could be inferred from the notice of appeal and there was no indication that the Non-Profit Trust had been misled by plaintiff's inadvertent omission of the motion to amend ruling from the notice of appeal.

2. Pleadings—motion to amend—wrong party—not a misnomer

The trial court did not err in a personal injury case by denying plaintiff's motion to amend and dismissing claims against the Non-Profit Trust. There was no genuine issue of fact as to the Non-Profit Trust's lack of responsibility for plaintiff's injuries. Plaintiff's error was not a misnomer, but instead, plaintiff sued the wrong party.

Judge HUNTER, JR., concurring in the result.

Appeal by Plaintiff from order entered 4 January 2016 by Judge Charles H. Henry in Sampson County Superior Court. Heard in the Court of Appeals 5 October 2016.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Patricia P. Shields and Joshua D. Neighbors, and Law Offices of Wade E. Byrd, P.A., by Wade E. Byrd, for Plaintiff-Appellant.

Young Moore and Henderson, P.A., by Dana H. Hoffman, for Defendant-Appellee.

DILLON, Judge.

Plaintiff appeals from the trial court's order denying his motion to amend the summons and complaint and granting Four County Electric

Care Trust, Inc.'s motion to dismiss the action. For the following reasons, we affirm.

I. Background

The issues on appeal in this matter concern the North Carolina Rules of Civil Procedure. The crux of this matter is whether Plaintiff sued the right entity for injuries sustained on 30 October 2012 after he came into contact with a power line regulator owned by "Four County Electric Membership Corporation," an electric membership cooperative (the "Membership Co-Op").

On 29 October 2015, almost three years after the accident, a guardian *ad litem* was appointed for Plaintiff, who commenced this action that same day.[1] In the body of the complaint, Plaintiff did *not* allege that the regulator was owned by the Membership Co-Op; rather, Plaintiff alleged that the regulator was owned by a different entity, "Four County Electric Care Trust, Inc." (the "Non-Profit Trust" or "Defendant"). In the caption of the summons and the complaint, Plaintiff designated the defendant as a single entity, using an assumed name which incorporated the names of *both* the Membership Co-Op and the Non-Profit Trust as follows: "Four County Electric Care Trust, Inc. a/k/a Four County Electric Membership Corporation."

Defendant, the Non-Profit Trust, moved to dismiss Plaintiff's action pursuant to Rule 12(b)(2), (4), (5), and (6) of the North Carolina Rules of Civil Procedure, contending that it did *not* own the regulator, but rather Membership Co-Op owned it. At the Rule 12 motions hearing, Plaintiff orally moved to amend the complaint and summons to alter the assumed name in the caption to "Four County Electric Membership Corporation," averring that the amendment constituted the correction of a misnomer, not the addition of a new party. The Membership Co-Op never made an appearance in this action.

By order entered 4 January 2016, the trial court granted the Non-Profit Trust's motion to dismiss and denied Plaintiff's motion to amend its complaint and summons. Plaintiff timely filed a notice of appeal.

II. Appellate Jurisdiction over Ruling Denying Oral Motion to Amend

Plaintiff contends on appeal that the trial court erred in its 4 January 2016 order by (1) granting the Non-Profit Trust's motion to dismiss and (2) denying Plaintiff's motion to amend the summons and complaint.

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1. The complaint alleged that Plaintiff was incompetent at the time of the accident.

[1] Before addressing Plaintiff's arguments on appeal, we must first determine whether Plaintiff properly noticed an appeal from *both* portions of the trial court's order. Though Plaintiff states in his notice that he was appealing the 4 January 2016 order, he only references that portion granting Defendant's motion to dismiss. The notice fails to reference the portion denying Plaintiff's motion to amend. Specifically, Plaintiff's notice of appeal states as follows:

> [Plaintiff] hereby gives notice of appeal to the Court of Appeals of North Carolina from the Order signed on December 22, 2015 and file-stamped/entered on January 4, 2016 in the Superior Court of Sampson County, granting Defendant's Motion to Dismiss the above-captioned matter.

Accordingly, Defendant argues that we lack jurisdiction to consider any issue concerning the denial of Plaintiff's motion to amend. Guided by our decision in *Evans v. Evans*, 169 N.C. App. 358, 610 S.E.2d 264 (2005), we conclude that *both* portions of the 4 January 2016 order are properly before us.

Our Court has interpreted Rule 3 of our Rules of Appellate Procedure to require that "an appellant . . . appeal from each part of the judgment or order appealed from which appellant desires the appellate court to consider." *Foreman v. Sholl*, 113 N.C. App. 282, 291, 439 S.E.2d 169, 175 (1994) (internal quotation marks omitted). However, we have also held that "a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can *be fairly inferred from the notice* and the appellee is not mislead [sic] by the mistake." *Smith v. Indep. Life Ins. Co.*, 43 N.C. App. 269, 274, 258 S.E.2d 864, 867 (1979) (emphasis added) (internal quotation marks omitted).

Our *Evans* decision is remarkably similar to the present case. In *Evans*, the appellant gave notice of appeal from "the Order entered on December 18, 2001 . . . denying Defendant's claim for child custody and child support." *Evans*, 169 N.C. App. at 363, 610 S.E.2d at 269 (internal quotation marks omitted). On appeal, the appellant also sought review of the portion of the same order denying her request for post-separation support. *Id.* The appellee argued that we lacked jurisdiction to consider the post-separation determination since the appellant's notice only referenced the child custody/support portion of the order. *Id.* We held that, based on these facts, "it is readily apparent that [the appellant] is appealing from the order dated 18 December 2001 which addresses

not only child custody and support but also post-separation support. . . . Therefore, this Court has jurisdiction to consider [the appellant's] appeal of these additional issues." *Id.*

Here, we can infer from Plaintiff's notice of appeal his intent to challenge the denial of his motion to amend the complaint and summons. His notice of appeal specifically references the 4 January 2016 order which addressed *both* the Non-Profit Trust's motion to dismiss *and* Plaintiff's motion to amend. *See id.* There is no indication that the Non-Profit Trust has been misled by Plaintiff's inadvertent omission of the motion to amend ruling from the notice of appeal. *See Smith*, 43 N.C. App. at 274, 258 S.E.2d at 867. Nor could there be as Plaintiff's sole, viable ground for appeal is that he should be allowed to amend the complaint and summons to include the defendant's proper name. Accordingly, we conclude that we have jurisdiction to review the trial court's denial of Plaintiff's motion to amend along with the trial court's grant of the Non-Profit Trust's motion to dismiss.

III. Analysis

A. Plaintiff's Motion to Amend

[2] We first address whether the trial court erred in denying Plaintiff's oral motion to amend the summons and complaint to change the designation of the defendant in the caption from "Four County Electric Care Trust, Inc. a/k/a Four County Electric Membership Corporation" to "Four County Electric Membership Corporation." Plaintiff argues that this erroneous designation is merely a misnomer of the Membership Co-Op.

The Non-Profit Trust essentially argues that the designation in the caption, at best, identifies *it* as the sole defendant and that the summons was directed at and served upon it alone, and not upon the Membership Co-Op. Therefore, the Non-Profit Trust contends that the trial court was correct in its ruling because the trial court could not obtain jurisdiction over an entity that was not named or served (the Membership Co-Op) merely by amending the moniker on the summons and complaint. Indeed, both the summons and complaint identify and were served upon a different entity (the Non-Profit Trust).

Our Supreme Court has stated that an amendment to the summons and complaint may be allowed to correct a misnomer or mistake in the name of the party, but that such motion to amend must be denied "where the amendment amounts to a substitution or entire change in parties." *Bailey v. McPherson*, 233 N.C. 231, 235, 63 S.E.2d 559, 562 (1951). *See also Harris v. Maready*, 311 N.C. 536, 546, 319 S.E.2d 912, 918 (1984) (restating same general principle).

Here, we hold that the amendment sought by Plaintiff amounted to a substitution of parties. The summons was directed to the Non-Profit Trust, not the Membership Co-Op; specifically, the summons contained additional language which erroneously provided that the Non-Profit Trust was *also known* as the "Four County Electric Membership Corporation." Further, the body of the complaint never alleges any facts concerning the Membership Co-Op, but rather alleges that the power line regulator was owned, operated, and maintained by the Non-Profit Trust. We conclude that there is no confusion that the summons and complaint were directed to the Non-Profit Trust. Therefore, the trial court did not err in denying Plaintiff's motion to amend.

Our resolution of this issue is controlled by *Crawford v. Aetna Cas. & Sur. Co.*, 44 N.C. App. 368, 261 S.E.2d 25 (1979). In *Crawford*, the plaintiff sued "Michigan Tool Company, a Division of Ex-Cell-O Corporation" under the erroneous belief that Michigan Tool Company was part of Ex-Cell-O Corporation instead of a separate legal entity. *Id.* at 368, 261 S.E.2d at 26. After the statute of limitations had expired, the plaintiff then learned that Michigan Tool Company was in fact a *subsidiary* of Ex-Cell-O Corporation and that Ex-Cell-O Corporation and Michigan Tool Company were in fact *two separate entities*. *Id.* at 369, 261 S.E.2d at 26. The plaintiff then sought to amend the summons and complaint to reflect that Ex-Cell-O Corporation was the proper defendant, contending that the designation in the original summons and complaint was a mere misnomer. *Id.* However, this Court, relying on precedent from our Supreme Court, held that the designation was not a misnomer and that the amendment should not be allowed even if the summons and complaint in fact reached the hands of someone at Ex-Cell-O Corporation:

> In the case before us, we are dealing with two separate legal entities, Michigan Tool Company and Ex-Cell-O Corporation. Complaint and summons directed to a defendant named as "MICHIGAN TOOL COMPANY, A Division of Ex-Cell-O Corporation" is not service on the entity Ex-Cell-O Corporation even if the complaint and summons reach the hands of someone obligated to receive service in behalf of Ex-Cell-O.

Id. at 370, 261 S.E.2d at 27 (alteration in original).

Much like the plaintiff in *Crawford*, Plaintiff believed that the Non-Profit Trust was also known by the name of "Four County Electric Membership Corporation," when in fact the Non-Profit Trust and the Membership Co-Op are two separate legal entities. Accordingly,

based on our holding in *Crawford*, we conclude that the amendment sought by Plaintiff would have had the effect of adding the Membership Co-Op as a new party.

We are also persuaded by our Supreme Court's decision in *McLean v. Matheny*. 240 N.C. 785, 84 S.E.2d 190 (1954). In that case, the plaintiff sued "W.B. Matheny, trading as Matheny Motor Company." *Id.* at 785, 84 S.E.2d at 190. The plaintiff later moved to amend his complaint to add "Matheny Motor Company, Inc.," realizing that the Company was a legal entity, separate and distinct from Mr. Matheny. *Id.* at 786, 84 S.E.2d at 191. The Supreme Court held that the plaintiff could not add the corporation by merely amending the moniker used in the summons and complaint since the proposed amendment would add a new party. *Id.* at 787, 84 S.E.2d at 191-92. In the same way, here, Plaintiff is not seeking to correct a moniker, but rather is seeking to add a different entity.

In conclusion, Plaintiff sought to bring in the Membership Co-Op as a defendant by amending the summons and complaint which were issued and served on the Non-Profit Trust. Plaintiff's motion to amend was filed on the basis that the Membership Co-Op was already a named party, and that any potential error in the designation of the defendant in the summons and complaint was merely a misnomer. Plaintiff characterized his motion as such – rather than as a motion to add a new party – presumably out of concern that the Membership Co-Op, as a new party, would have a statute of limitations defense if the Membership Co-Op challenged Plaintiff's allegations of incompetency. Were the motion to amend be on the basis of a misnomer, rather than the addition of a new party, such motion would relate back to 29 October 2015, the date of filing for the original complaint. We make no determination as to whether the statute of limitations has indeed run on Plaintiff's claims against the Membership Co-Op. We simply conclude that the Membership Co-Op has not been sued in this action, nor has Plaintiff made any attempt to add the Membership Co-Op through any motion *to add it as a party*.

B. Defendant's Motion to Dismiss

The trial court granted the Non-Profit Trust's motion to dismiss pursuant, in part, to Rule 12(b)(6) of our Rules of Civil Procedure. In granting the motion, the trial court not only considered the four corners of Plaintiff's complaint, but also two affidavits offered by the Non-Profit Trust which established that (1) the Membership Co-Op and the Non-Profit Trust are two separate, distinct legal entities and (2) the power line regulator is owned, operated, and maintained by the Membership Co-Op and *not* by the Non-Profit Trust.

Rule 12 provides that if matters outside the pleading are presented and considered by the court on a Rule 12(b)(6) motion, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.]" N.C. Gen. Stat. § 1A-1, Rule 12(b). In the hearing below, Plaintiff did not object to the introduction of the affidavits. We note that the complaint alleging that the Non-Profit Trust owns the regulator was not verified. Further, Plaintiff presented no evidence to contradict the affidavits, but rather sought to amend his summons and complaint to reflect that the Membership Co-Op was the correct entity. Moreover, on appeal, Plaintiff concedes that the power line regulator is owned, operated, and maintained by the Membership Co-Op and that the Non-Profit Trust was not the correct party. Therefore, the only evidence before the trial court concerning the ownership of the power line regulator was in the form of the affidavits offered by Defendant. Accordingly, the trial court did not err in dismissing the claims against the Non-Profit Trust as there was no genuine issue of fact as to the Non-Profit Trust's lack of responsibility for Plaintiff's injuries.

IV. Conclusion

Plaintiff's error was not a misnomer; rather, Plaintiff sued the wrong party. The trial court properly denied Plaintiff's motion to amend based on a misnomer. Further, the trial court did not err in granting Defendant's motion to dismiss.

AFFIRMED.

Judge ELMORE concurs. Judge HUNTER, JR., concurs in the result and writes separately.

HUNTER, JR., Robert N., Judge, concurring in the result.

When a litigant has been adjudged incompetent, he becomes a ward of the court. *Perry v. Jolly*, 259 N.C. 305, 314 130 S.E.2d 654, 661 (1963); *In re Estate of Armfield*, 113 N.C. App. 467, 439 S.E.2d 216 (1994). Here, it is alleged the plaintiff was mentally incompetent before the occurrence leading to his injury and was further catastrophically injured after the accident. On this basis, the Clerk appointed a guardian ad litem for him as "an Incompetent Person." This finding is uncontroverted.

Plaintiff's status as an incompetent commits his legal rights "to the care of the court" as well as their attorneys. *Elledge v. Welch*, 238 N.C. 61, 68, 76 S.E.2d 340, 345 (1953). The duty to protect those who have been adjudged incompetent extends beyond the trial courts to

the appellate courts. *See id.* (exercising supervisory power to assume jurisdiction without an appeal and review errors committed against an incompetent defendant).

Because judges have an obligation to incompetents to ensure their legal rights, so as to avoid additional needless litigation in the future, I write separately to question why this case is before us.

Plaintiff does not dispute he named the wrong defendant in his complaint. However, the parties and the trial court appear to have proceeded under the misimpression of law that the statute of limitations on Plaintiff's claim had expired, leaving Plaintiff unable to file a new complaint against the proper defendant. Because the majority declines to address the statute of limitations issue, not only does it leave Plaintiff's underlying negligence claim, like Schrödinger's cat, in a state where it may be alive or dead,[1] but it fails to disabuse all concerned of the notion that an amendment to Plaintiff's complaint would need to relate back to the date of filing under North Carolina Rule of Civil Procedure 15(c).

While the majority focuses on whether Plaintiff's error constituted a mere misnomer or a fatal defect, it elides the fact that this analysis is appropriate only when the statute of limitations has expired. *See Franklin v. Winn Dixie Raleigh*, 117 N.C. App. 28, 38, 450 S.E.2d 24, 31 (1994), *aff'd per curiam*, 342 N.C. 404, 464 S.E.2d 46 (1995). Thus, I would like to make it clear the cat is alive; the statute of limitations has not yet expired on Plaintiff's negligence claim. As a result, the trial court was free to exercise its discretion to grant Plaintiff's motion to amend. However, neither the trial court's judgment nor our affirmance should not bar future litigation on the merits of his claim.

Under the North Carolina Rules of Civil Procedure, a party may amend a pleading after the opposing party files a responsive pleading "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a) (2015). Motions to amend are addressed to the discretion of the trial court. *Henry v. Deen*, 310 N.C. 75, 82, 310 S.E.2d 326, 331 (1984). In exercising its discretion, the trial court "should be liberal in . . . allowance and application." *Roper v. Thomas*, 60 N.C. App. 64, 68, 298 S.E.2d 424, 427 (1982). Generally, "[a]mendments should be freely allowed unless some material prejudice to the other party is demonstrated[.]" *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1986).

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1. *See* Ervin Schrödinger, Die gegenwärtige Situation in der Quantenmechanik, Die Naturwissenschaften, Vol 23, Issue 48, pp. 807-812 (1935).

Amendment to substitute a party is within the scope of the rule, although doing so represents the creation of "a new and independent [cause] of action and cannot be permitted when the statute of limitations has run." *Callicut v. American Honda Motor Co.*, 37 N.C. App. 210, 212, 245 S.E.2d 558, 560 (1978) (quoting *Kerner v. Rockmill*, 111 F. Supp. 150, 151 (M.D. Pa. 1953)).

If the statute of limitations has expired in the interim between the filing and the amendment, a plaintiff may preserve his claim only if the amendment can be said to relate back to the date of the original claim, under Rule 15(c):

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C. Gen. Stat. § 1A-1, Rule 15(c) (2015); *Winn Dixie Raleigh*, 117 N.C. App. at 38, 450 S.E.2d 30. A complaint will relate back with respect to a new defendant "if that new defendant had notice of the claim so as not to be prejudiced by the untimely amendment." *Winn Dixie Raleigh*, 117 N.C. App. at 39, 450 S.E.2d at 31 (citation omitted). Where the plaintiff has merely made a "mistake in name; giving incorrect name to person in accusation, indictment, pleading, deed or other instrument," *Liss v. Seamark Foods*, 147 N.C. App. 281, 285, 555 S.E.2d 365, 368 (2001), we have found it is permissible to amend the complaint to correct such a misnomer. *Piland v. Hertford County Bd. of Comm'rs*, 141 N.C. App. 293, 299, 539 S.E.2d 669, 673 (2000). Otherwise, the statute of limitations will bar the new claim. *Winn Dixie Raleigh*, 117 N.C. App. at 39, 450 S.E.2d at 31. Thus, the question of whether the plaintiff's error constitutes a misnomer or a fatal error need be reached only if the statute of limitations has expired.

N.C. Gen. Stat. § 1-52(16) sets the statute of limitations at three years for personal injury cases. No period of repose applies to personal injury cases. *See* N.C. Gen. Stat. § 1-15(c) (2015) (setting periods of repose for certain malpractice cases).

State law tolls the statute of limitations for plaintiffs who were disabled when the cause of action accrued:

> A person entitled to commence an action who is under a disability at the time the cause of action accrued may

> bring his or her action within the time limited in this Subchapter, after the disability is removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the real property, when the person must commence his or her action, or make the entry, within three years next after the removal of the disability, and at no time thereafter.

N.C. Gen. Stat. § 1-17(a) (2015). *See also* N.C. Gen. Stat. § 1-20 (2015) ("No person may avail himself of a disability except as authorized in G.S. 1-19, unless it existed when his right of action accrued.")

A person is considered disabled if they meet one or more of the following conditions: (1) the person is within the age of 18 years; (2) the person is insane; or (3) the person is incompetent as defined in N.C. Gen. Stat. § 35A-1101(7) or (8). N.C. Gen. Stat. § 1-17(a) (2015). An "incompetent adult" is one who "lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C. Gen. Stat. § 35A-1101(7) (2015).

If the statute of limitations has been tolled due to the plaintiff's disability, it "begins to run upon the appointment of a guardian or upon the removal of his disability as provided by G.S. 1-17, whichever shall occur first." *First-Citizens Bank & Trust Co. v. Willis*, 257 N.C. 59, 62, 125 S.E.2d 359, 361 (1962). *See also Bryant v. Adams*, 116 N.C. App. 448, 459, 448 S.E.2d 832, 837 (1994).

Here, according to his complaint, Plaintiff "was a deaf, mentally incompetent individual without any other physical impairment" when his action against Four County Electric Membership Corporation accrued. The trial court must assume the facts in the pleading are true when ruling on a motion to dismiss under Rule 12(b)(6). *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979). Thus, "a statute of limitation or repose may be the basis of a 12(b)(6) dismissal [only] if on its face the complaint reveals the claim is barred." *Forsyth Memorial Hosp. v. Armstrong World Indus.*, 336 N.C. 438, 442, 444 S.E.2d 423, 426 (1994). As a result, when there is an evidentiary dispute, the statute of limitations defense is not properly within the trial court's scope of review on a 12(b)(6) motion to dismiss. *White*, 296 N.C. at 667, 252 S.E.2d at 702.

Thus, because the trial court was required to assume that the statute of limitations was tolled in this case, it need not have considered whether Plaintiff's amendment related back to the date of filing. The relevant inquiry was only whether Plaintiff's amendment was proper under Rule 15(a). Consequently, the trial court was free to exercise its discretion to grant or deny Plaintiff's motion to amend without deciding whether the amendment related back to the original complaint.

Nevertheless, the trial court's decision to deny the motion and dismiss the complaint against Four County Electric Care Trust with prejudice does not prevent Plaintiff from refiling his complaint against the proper defendant. Under North Carolina Rule of Civil Procedure 41(b), dismissal with prejudice operates as an adjudication on the merits unless otherwise specified by the trial court. N.C. Gen. Stat. § 1A-1, Rule 41(b) (2015). Moreover, "[d]ismissal with prejudice ends the lawsuit and precludes subsequent litigation on the same controversy between the parties under the doctrine of res judicata." 2 G. Gray Wilson, *North Carolina Civil Procedure* § 41-5 (3d ed. 2007). When a case is dismissed with prejudice under Rule 41(b), the trial court must make findings of fact and state conclusions of law so as to "make definite what was decided for the purpose of res judicata and estoppel." *Helms v. Rea*, 282 N.C. 610, 619, 194 S.E.2d 1, 7 (1973). While the trial court's order does state findings of fact and conclusions of law, its language is incomplete as to future litigation against the true property owner.

The doctrine of res judicata provides "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." 2 G. Gray Wilson, *North Carolina Civil Procedure* § 88-1 (3d ed. 2007). In order to invoke res judicata as a defense, the proponent must show: "(1) a final judgment on the merits in an earlier suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privities in the two suits." *State ex rel. Utilities Com. v. Thornburg*, 325 N.C. 463, 468, 385 S.E.2d 451, 453-54 (1989) (citation omitted).

Thus, res judicata will only prevent "a second suit based on the same cause of action *between the same parties or those in privity with them*." *Thomas M. McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986) (emphasis added). This Court has recently held in the context of res judicata, "privity involves a person so identified in interest with another that he represents the same legal right." *Williams v. Peabody*, 217 N.C. App. 1, 8, 719 S.E.2d 88, 94 (2011). More specifically, "privity denotes a mutual or successive relationship to the

same rights of property." *Id.* (quoting *Whitacre P'Ship v. BioSignia, Inc.*, 358 N.C. 1, 36, 591 S.E.2d 870, 893 (2004)).

In the instant case, although the trial court dismissed the suit with prejudice, they did so precisely because the wrong defendant had been sued, noting in its order "Four County Electric Care Trust, Inc. does not own any property or electric equipment and the regulator identified in Plaintiff's complaint was owned, operated and maintained by a different company." As a result, the trial court's order makes clear the Four County Electric Care Trust and the Four County Electric Membership Corporation are two separate entities who have no "mutual or successive relationship" with regard to the equipment at hand. Thus, the Corporation cannot invoke res judicata as a defense to a suit alleging the same cause of action in this case.

Similar to res judicata, collateral estoppel "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E. 2d 799, 805 (1973). Thus, "the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Whitacre P'Ship v. BioSignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004).

A party asserting collateral estoppel must show (1) the earlier suit resulted in a final judgment on the merits; (2) the "issue in question was identical to an issue *actually litigated* and necessary to the judgment;" and (3) both parties or their privities were parties in the earlier suit. *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 414, 474 S.E.2d 127, 128-29 (1996) (emphasis added) (citation omitted).

Traditionally, as with res judicata, collateral estoppel applied only between the parties or those in privity with them. *McInnis*, 318 N.C. at 429, 349 S.E.2d at 557. However, for "defensive" uses of collateral estoppel, our courts have rejected the "mutuality" requirement that both parties must be bound by the prior judgment. *Id.* at 434-35, 349 S.E.2d at 560. Thus, collateral estoppel may apply even where only the plaintiff is bound by a prior judgment on the merits.

However, an issue is only "actually litigated, for purposes of collateral estoppel or issue preclusion, if it is properly raised in the pleadings or otherwise submitted for determination and [is] in fact determined." *City of Asheville v. State*, 192 N.C. App. 1, 17, 665 S.E.2d 103, 117 (2008), *appeal dismissed*, *disc. review denied*, 363 N.C. 123, 672 S.E.2d 685

(2009). This determination requires "[a] very close examination of matters actually litigated . . . . If they are not identical, then the doctrine of collateral estoppel does not apply." *Id.*

In the instant case, although the dismissal of the suit against the Trust operates as a decision on the merits, the trial court's findings of fact and conclusions of law pertain only to the identity of the defendant. Thus, the court's order is clear these two parties are not "in privity." Had they been, a different result would have obtained. Further, the language of the order demonstrates the parties have not "actually litigated" the substance of Plaintiff's negligence claim. As a result, if Plaintiff were to bring suit against the Corporation, rather than the Trust, the Corporation could not use collateral estoppel to bar the suit, as the plaintiff's negligence claim has not yet been litigated.

KAREN HEAD, PLAINTIFF
v.
GOULD KILLIAN CPA GROUP, P.A., G. EDWARD TOWSON, II, CPA, DEFENDANTS

No. COA16-525

Filed 20 December 2016

1. Appeal and Error—interlocutory orders and appeals—substantial right—common factual nexus—potential for inconsistent verdicts

Plaintiff's appeal from an interlocutory order affected a substantial right and was immediately appealable. The present appeal presented overlapping factual issues concerning plaintiff's business relationship with defendants. There was a potential for inconsistent verdicts based upon a common factual nexus.

2. Statutes of Limitation and Repose—statute of repose—summary judgment—dates and facts disputed—professional negligence

The trial court's conclusions in a professional negligence case that the statute of repose applied as a matter of law to affirm summary judgment under these facts was error when the dates and facts constituting defendants' last acts or omissions were in dispute. Genuine issues of material fact existed as to whether defendants were responsible for delivering, mailing, or providing plaintiff with her tax returns, and whether and when they did so.

3. Accountants and Accounting—professional negligence—tax preparation and filing—summary judgment

Plaintiff sufficiently alleged and pled the elements of professional negligence to defeat defendants' motion for summary judgment. Viewing the evidence in the light most favorable to plaintiff, a reasonable fact finder could determine defendants negligently failed to file, deliver, or provide plaintiff with her completed tax returns for her to timely file, and their failure resulted in plaintiff's inability to claim a tax refund or credit.

4. Fraud—fraudulent concealment—sufficiency of evidence—punitive damages

The trial court did not err by granting summary judgment in defendants' favor on the claim of fraudulent concealment. Plaintiff failed to proffer evidence demonstrating that a pre-existing duty to disclose existed and also failed to advance all of the elements of a fraudulent concealment claim. The grant of summary judgment in defendants' favor on the punitive damages claim was also affirmed.

Judge ENOCHS concurring in part and dissenting in part.

Appeal by plaintiff from order entered 31 December 2015 by Judge William H. Coward in Buncombe County Superior Court. Heard in the Court of Appeals 17 October 2016.

Erwin, Bishop, Capitano & Moss, PA, by J. Daniel Bishop and Matthew M. Holtgrewe, for plaintiff-appellant.

Sharpless & Stavola, P.A., by Brenda S. McClearn, for defendants-appellees.

TYSON, Judge.

Karen Head ("Plaintiff") appeals from the trial court's order granting Gould Killian CPA Group, P.A.'s and G. Edward Towson, II, CPA's ("Towson") (collectively "Defendants") motion for partial summary judgment and amended motion for partial summary judgment We affirm in part, reverse in part, and remand for trial on Plaintiff's professional negligence claim.

I. Factual Background

Plaintiff hired Defendants to prepare her tax returns for the 2005 tax year and subsequently employed them to prepare her taxes for tax years

2006, 2007, 2008 and 2009 respectively. Upon Defendants' completion of the preparation of Plaintiff's 2005 returns, Plaintiff came to Defendants' office, met with Towson, reviewed and signed her returns, tendered a check in the amount of taxes she owed, and requested that Towson mail her taxes to the Internal Revenue Service ("IRS") and several state tax agencies for her. Towson agreed to do so as a courtesy to Plaintiff, and deposited her completed returns in the mail.

For each of the ensuing four tax years, 2006 through 2009, Defendants were engaged to prepare Plaintiff's tax returns. However, these returns were not timely filed, as neither Defendants nor Plaintiff submitted them to or filed them with the IRS as required by the applicable deadlines.

On 4 November 2013, Plaintiff filed a complaint and alleged causes of action against Defendants for professional negligence and fraudulent concealment. Plaintiff also asserted a claim for punitive damages in connection with her fraudulent concealment claim. Plaintiff's complaint asserted Defendants had willfully and wantonly deceived Plaintiff by concealing from her the fact that they had failed to ensure her tax returns for tax years 2006 through 2009 were timely filed. As a result, she incurred tax penalties and interest.

Defendants filed a motion to dismiss and motion for attorneys' fees pursuant to Rules 9(b) and 12(b)(6) of the North Carolina Rules of Civil Procedure. On 14 July 2014, the trial court entered an order denying this motion.

On 23 November 2015, Defendants filed a motion for partial summary judgment, and filed an amended motion for partial summary judgment on 9 December 2015. Defendants' amended motion sought summary judgment on Plaintiff's claims for professional negligence regarding her 2006 and 2007 tax returns, as well as her fraudulent concealment and punitive damages claims. Defendants did not move for summary judgment on Plaintiff's professional malpractice claims relating to her 2008 and 2009 tax returns.

In support of their motion for partial summary judgment, Defendants submitted the following for consideration by the trial court: (1) a brief in support of their motion; (2) Plaintiff's complaint; (3) a document entitled "2006 Individual Income Tax Cover Sheet" along with an accompanying document entitled "Filing Instructions Individual Income Tax Return Taxable Year Ended December 31, 2006" provided to Plaintiff explaining the steps she needed to take in order to submit her prepared tax returns to the IRS; (4) a document entitled "2007 Individual Income Tax Cover Sheet" along with an accompanying document entitled

"Filing Instructions Individual Income Tax Return Taxable Year Ended December 31, 2007" similar in all material respects to the 2006 cover sheet provided to Plaintiff for her 2007 prepared tax returns; (5) a deposition of Plaintiff; (6) IRS documents detailing Plaintiff's penalties and interest incurred in connection with her returns; (7) excerpts from a deposition of Defendants' expert, Michael Gillis, explaining Defendants' tax preparation procedures; and (8) a tolling agreement executed in 2013. Defendants additionally submitted various cases and statutes in support of their position.

Plaintiff, in response, submitted: (1) a brief in support of her position; (2) a series of emails between Towson, Plaintiff, and her assistant; (3) various correspondence and documents from the IRS; (4) Defendants' responses to interrogatories; (5) the deposition of Edward Towson affirmatively stating that Plaintiff's prepared tax returns and accompanying instructions had been provided to her along with instructions on how to file them and the importance of doing so in a timely fashion; and (6) the log of IRS Revenue Officer Rosa Shade indicating she had never had certain discussions with Towson concerning Plaintiff's taxes despite his assertion to the contrary. Plaintiff additionally submitted various cases and statutes in support of her position.

The "2006 Individual Income Tax Cover Sheet" and accompanying "Filing Instructions Individual Income Tax Return Taxable Year Ended December 31, 2006" document submitted to the trial court stated, in pertinent part, the following:

> Sign and date the return on Page 2. Initial and date the copy, and retain it for your records.
>
> Mail the Form 1040 return by October 15, 2007 to:
>
> Internal Revenue Service
> Atlanta, GA 39901-0002
>
> Your required federal estimated tax payments are shown below. . . . Make each check payable to the United States Treasury, write your social security number and "2007 Form 1040-ES" on the check.
>
> . . . .
>
> Mail the Form 1040-ES payment voucher and check by the due date indicated above to

Internal Revenue Service
P.O. Box 105225
Atlanta, GA 30348-5225

At the bottom of the cover sheet after "How Delivered:" the following was written: "By Hand to Karen." The corresponding 2007 cover sheet and instructions, in turn, also similarly state: "How Delivered: Mailed to K. Head . . . Picked up on 12/12/08."

On 31 December 2015, the trial court entered an order granting Defendants' motions. Plaintiff filed notice of appeal on 19 January 2016.

II. Issues

Plaintiff argues the trial court erred in granting Defendants' motion for summary judgment and amended motion for partial summary judgment. She asserts genuine issues of material fact exist concerning her professional negligence and fraudulent concealment claims regarding her tax returns. We agree with Plaintiff that a genuine issue of material fact exists as to her professional negligence claim, and disagree with Plaintiff that the trial court erred in granting Defendants' partial summary judgment motion concerning her fraudulent concealment and punitive damages claims.

III. Appellate Jurisdiction

[1] Initially, we address whether this Court possesses jurisdiction over the present appeal. It is undisputed the present appeal is interlocutory. *See Mecklenburg Cnty. v. Simply Fashion Stores, Ltd.*, 208 N.C. App. 664, 667, 704 S.E.2d 48, 51 (2010) (citations omitted) ("An order is interlocutory when it does not dispose of the entire case but instead, leaves outstanding issues for further action at the trial level."). Generally, there is no right of immediate appeal from an interlocutory order. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990).

> An interlocutory order may be appealed, however, if the order implicates a substantial right of the appellant that would be lost if the order was not reviewed prior to the issuance of a final judgment. It is the appealing party's burden to establish that a substantial right would be jeopardized unless an immediate appeal is allowed.

Radcliffe v. Avenel Homeowners Ass'n, Inc., __ N.C. App. __, __, 789 S.E.2d 893, 901 (2016) (internal citations, quotation marks, and footnote omitted).

It is well settled that a substantial right is affected " 'where a possibility of inconsistent verdicts exists if the case proceeds to trial.' " *Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, 219 N.C. App. 623, 627, 727 S.E.2d 311, 314 (2012) (quoting *Country Club of Johnston Cnty., Inc. v. U.S. Fidelity & Guar. Co.*, 135 N.C. App. 159, 167, 519 S.E.2d 540, 546 (1999), *disc. review denied*, 351 N.C. 352, 542 S.E.2d 207 (2000)).

> To demonstrate that a second trial will affect a substantial right, [the appellant] must show not only that one claim has been finally determined and others remain which have not yet been determined, but that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.

Id. at 627-28, 727 S.E.2d at 314-15 (citation, internal quotation marks, and brackets omitted).

" '[S]o long as a claim has been finally determined, delaying the appeal of that final determination will ordinarily affect a substantial right *if* there are overlapping factual issues between the claim determined and any claims which have not yet been determined.' " *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 168, 684 S.E.2d 41, 47 (2009) (quoting *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 26, 376 S.E.2d 488, 492, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989)). "Issues are the 'same' if the facts relevant to their resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 79, 711 S.E.2d 185, 190 (2011) (citing *Davidson*, 93 N.C. App. at 25, 376 S.E.2d at 491).

The present appeal presents overlapping factual issues concerning Plaintiff's business relationship with Defendants, which speak directly not only to her claims ruled upon by the trial court, but also her remaining professional negligence claims concerning her 2008 and 2009 returns. With the potential for inconsistent verdicts based upon a common factual nexus, we hold Plaintiff's appeal of the trial court's order affects a substantial right and is properly before us.

IV. Standard of Review

Entry of summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show no genuine issue exists concerning any material fact and that any party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c). "When considering a motion for summary

judgment, the [court] must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted).

> The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.
>
> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.
>
> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial.
>
> We review an order allowing summary judgment de novo. If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal.

Wilkins v. Safran, 185 N.C. App. 668, 672, 649 S.E.2d 658, 661 (2007) (internal citations and quotations omitted).

"Summary judgment is a drastic measure and it should be used with caution, especially in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case." *Harrison v. City of Sanford*, 177 N.C. App. 116, 121, 627 S.E.2d 672, 676 (2006) (citation omitted).

V. Statute of Repose

[2] Plaintiff argues the trial court erred in granting summary judgment in favor of Defendants regarding professional negligence claims relating to her 2006 and 2007 tax returns. The trial court based its determination on finding Plaintiff's professional negligence claim is barred by N.C. Gen. Stat. § 1-15(c), the applicable statute of repose.

"[I]n no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action[.]" N.C. Gen. Stat. § 1-15(c) (2015).

Furthermore,

> [u]nlike the statute of limitations, the statute of repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce.
>
> In order to decide whether the statute of repose bars plaintiffs' claim we must determine when the last act of alleged negligence took place. To determine when the last act or omission occurred we look to factors such as the contractual relationship between the parties, when the contracted-for services were complete, and when the alleged mistakes could no longer be remedied.

Carle v. Wyrick, *Robbins*, *Yates & Ponton*, *LLP*, 225 N.C. App. 656, 661, 738 S.E.2d 766, 770-71 (2013) (internal citations, quotation marks, and footnote omitted).

In arguing Plaintiff's professional negligence claim is barred by the statute of repose, Defendants assert, as undisputed fact, the final act taken by Defendants in regards to Plaintiff's 2006 and 2007 tax returns occurred on 12 December 2008, when Defendants purportedly hand delivered Plaintiff her prepared 2007 returns. We disagree.

Defendants characterize the evidence, regarding if and when Plaintiff received her tax returns from Defendants, as unrebutted fact. However, when viewed in the light most favorable to Plaintiff, as the non-moving party, the 2006 and 2007 Income Tax Cover Sheets and internal tracking presented by Defendants as evidence that Defendants provided and delivered to Plaintiff her tax returns on the dates signified in those documents is challenged and rebutted by Plaintiff's deposition testimony.

Reading Plaintiff's testimony from her deposition in the light most favorable to her as the non-moving party, she was unsure about even being present in Defendants' office in 2007 and 2008, when the returns were purportedly hand delivered, but she emphatically denies receiving either prepared returns or written instructions. This evidence directly contradicts Defendants' testimonial and documentary evidence purporting Defendants hand delivered and Plaintiff received in Defendants' office her 2006 returns on 8 October 2007 and 2007 returns on 12 December 2008.

Viewing the Defendants' evidence as conclusive fact Defendant delivered and Plaintiff physically received her returns is error and does not view all the record evidence, and every reasonable inference therefrom, in the light most favorable to Plaintiff as the non-moving party. *Dalton*, 353 N.C. at 651, 548 S.E.2d at 707.

Genuine issues of material fact exist of whether Defendants were responsible for filing, mailing, or providing Plaintiff with her completed returns, and whether, if and when, Defendants did, in fact, provide Plaintiff with her returns. Defendants contend that the *preparation* of the returns were the Defendants' last acts pertaining to Plaintiff's 2006 and 2007 returns to accrue the statute of repose. However, Defendants' assertions are rebutted by the testimony of an expert witness, Michael Gillis, on the standard of care, which shows the delivery of the completed returns to the client, not completion of preparation, marks the conclusion of a tax preparation engagement:

> Q. So by your testimony, then, for each year, the engagement of Gould Killian ended when they delivered a prepared return to Karen Head?
>
> A. Delivered, mailed, she picked up, whatever process it was in which she *received* her returns, then it's her responsibility to sign and file at that point. (emphasis supplied).

Generally, the start of the running of the statute of repose for professional negligence occurs when a prospective defendant has completed the transaction he was hired to complete, which concludes his professional obligation to his client. *See Carle*, 225 N.C. App. at 665, 738 S.E. 2d at 772-73 (holding that defendants' obligation to plaintiffs was complete and statute of repose began to run when defendants structured the completed transaction of stock into employee stock ownership plan); *Hargett v. Holland*, 337 N.C. 651, 654, 447 S.E.2d 784, 787 (1994) (holding that last act of defendants triggering the running of the statute of repose was the preparation, delivery and supervised execution of a will); *Babb v. Hoskins*, 223 N.C. App. 103, 108, 733 S.E.2d 881, 885 (2012) (holding that the last act of defendants triggering the running of the statute of repose was the preparation, delivery, and execution of trust documents).

In this case, Plaintiff alleges a disputed issue of fact exists of whether the tax returns were to be delivered to her or filed by Defendants. *See Wilkins*, 185 N.C. App. at 672, 649 S.E.2d at 661. The facts are in dispute whether Defendants were responsible for delivering or filing Plaintiff's

tax returns and whether they did, in fact, deliver or file Plaintiff's completed tax returns. The resolution of this disputed fact is the basis to determine when the last act by Defendants occurred to trigger and commence the running of the statute of repose.

If the parties' understanding was that Defendants were responsible for delivering, filing, or mailing Plaintiff's 2006 and 2007 returns, and Defendants failed to do so as alleged by Plaintiff, then the last act of Defendants for statute of repose purposes would be their failure to provide Plaintiff with her returns at the times immediately prior to the deadlines for which refunds could be claimed by Plaintiff on those returns. Those points in time would be when "the alleged mistakes could no longer be remedied." *Carle*, 225 N.C. App. at 661, 738 S.E. 2d at 771. The statute of repose would not have commenced to run until those points in time for each return had passed. *See id.*

Genuine issues of material fact exist of whether Defendants were responsible for delivering, mailing, or providing Plaintiff with her tax returns, and whether and when they did so. These are classic issues of fact reserved for the jury to resolve. The trial court's conclusions that the statute of repose applies as a matter of law to affirm summary judgment under these facts is error, when the dates and facts constituting Defendants' last acts or omissions are in dispute.

VI. Professional Negligence

[3] Due to the trial court's determination that Plaintiff's professional negligence claim is barred by the applicable statute of repose, it declined to address whether Plaintiff has sufficiently alleged and pled the elements of professional negligence to defeat Defendants' motion for summary judgment. Our *de novo* review shows Plaintiff has alleged and shown genuine issues of fact exist, which overcomes Defendants' motion for summary judgment on Plaintiff's professional negligence claim.

"In order to establish a claim of professional negligence, a plaintiff must show: '(1) the nature of the defendant's profession; (2) the defendant's duty to conform to a certain standard of conduct; and (3) a breach of the duty proximately caused injury to the plaintiffs.' " *Michael v. Huffman Oil Co.*, 190 N.C. App. 256, 271, 661 S.E.2d 1, 11 (2008) (emphasis omitted) (quoting *Associated Indus. Contr'rs, Inc. v. Fleming Eng'g, Inc.*, 162 N.C. App. 405, 413, 590 S.E.2d 866, 872 (2004)).

"It is generally recognized that an accountant may be held liable for damages naturally and proximately resulting from his failure to use that degree of knowledge, skill and judgment usually possessed by members

of the profession in a particular locality." *Snipes v. Jackson*, 69 N.C. App. 64, 73, 316 S.E.2d 657, 662, *disc. rev. denied*, 312 N.C. 85, 321 S.E.2d 899 (1984) (citation omitted).

Viewed in the light most favorable to Plaintiff, as the non-moving party, the evidence tends to show genuine issues of material fact exist regarding Defendants' alleged professional negligence which precludes summary judgment. *Wilkins*, 185 N.C. App. at 672, 649 S.E.2d at 661. Defendant, Edward Towson, agrees in his testimony that he and his co-Defendant firm owe a duty of care to Plaintiff.

The fact is undisputed that Defendants did timely submit, mail, and file Plaintiff's 2005 tax returns at her request. Even though the record shows Plaintiff did not ask Defendants to mail her 2006 and 2007 tax returns, a genuine issue of fact is raised by Plaintiff's testimony about her understanding regarding whether Defendants would file or mail her tax returns for 2006 and 2007 based on their prior willingness to mail her returns in 2005.

Whether Defendants should have made it clearer, and did make it clear to Plaintiff that they allegedly did not intend to file or mail her tax returns in those years is a factual dispute. Having filed her returns the previous year, it would be reasonable for Plaintiff to presume and expect Defendants would do the same in succeeding years, particularly where federal and multiple state returns were required to be prepared, signed, and filed.

Taking Plaintiff's allegations and testimony as true, together with the undisputed fact that Plaintiff's 2005 tax returns were timely filed and her 2006 and 2007 returns were not filed when due, a genuine issue of material fact exists for the jury to determine whether Defendants breached their duty of care by not timely filing or by physically providing Plaintiff with her completed tax returns.

On the matter of injury incurred, the record shows Plaintiff's 2006 and 2007 returns were not filed within three years of their original due date, which cost her the ability to claim a refund or tax credit for overpayment. I.R.C. § 6511(b)(2)(A) (2010). Plaintiff's 2006 return reflected an overpayment of $60,019 to be applied to the 2007 return. Based upon I.R.C. § 6511(b)(2)(A), Plaintiff could have claimed the overpayment credit, if the 2006 return had been timely filed by October 15, 2007.

Viewing the evidence in the light most favorable to Plaintiff, a reasonable fact-finder could determine Defendants negligently failed to file, deliver, or provide Plaintiff with her completed tax returns for her to

timely file, and their failure resulted in Plaintiff's inability to claim a tax refund or credit.

VII. Fraudulent Concealment

[4] Plaintiff next contends the trial court erred by granting summary judgment in Defendants' favor as to her claim for fraudulent concealment. We disagree.

> Fraudulent concealment is generally asserted as a claim for damages. It is a form of fraudulent misrepresentation entitling the claimant to damages or rescission of [a] contract. To assert a claim for fraudulent concealment, there must be a showing that the opposing party knew a material fact, and failed to fully disclose that fact in violation of a pre-existing duty to disclose.

Friedland v. Gales, 131 N.C. App. 802, 807, 509 S.E.2d 793, 797 (1998) (internal citations and quotation marks omitted).

Plaintiff cites to portions of her deposition testimony, as well as a series of emails including emails between her, Towson, and her assistant, and the log of Rosa Shade, beginning on or around 28 March 2012. She asserts this evidence supports her position that a genuine issue of material fact exists concerning her fraudulent concealment claim. Significantly, however, these emails were exchanged *after* Plaintiff had already terminated her employment of Defendants on 27 September 2011.

> A cause of action for fraud is based on an affirmative misrepresentation of a material fact, or a failure to disclose a material fact relating to a transaction which the parties had a duty to disclose. . . .
>
> A duty to disclose arises in three situations. The first instance is where a fiduciary relationship exists between the parties to the transaction. . . .
>
> . . . .
>
> The two remaining situations in which a duty to disclose exists arise outside a fiduciary relationship, when the parties are negotiating at arm's length. The first of these is when a party has taken affirmative steps to conceal material facts from the other. . . .
>
> A duty to disclose in arm's length negotiations also arises where one party has knowledge of a latent defect in the

> subject matter of the negotiations about which the other party is both ignorant and unable to discover through reasonable diligence.

Harton v. Harton, 81 N.C. App. 295, 297-98, 344 S.E.2d 117, 119 (1986) (internal citations omitted).

"We have found no case stating that the relationship between accountant and client is *per se* fiduciary in nature." *Harrold v. Dowd*, 149 N.C. App. 777, 784, 561 S.E.2d 914, 919 (2002); *see also CommScope Credit Union v. Butler & Burke, LLP*, __ N.C. __, __, 790 S.E.2d 657, 660-61 (2016) (holding that there is no *per se* fiduciary relationship between an independent auditor and its audit client). "For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton v. Camp*, 353 N.C. at 651, 548 S.E.2d at 707 (citations omitted).

Consequently, Defendants owed no *per se* fiduciary duty to Plaintiff at the time the emails were sent because Defendants had already been terminated by Plaintiff and replaced by another accountant. Furthermore, Defendants and Plaintiff were in no way "negotiating at arm's length" about "the subject matter of [a] negotiation" at the time the emails were sent. *Harton*, 81 N.C. App. at 298, 344 S.E.2d at 119.

No relationship, fiduciary or otherwise, existed between the parties at that point in time, as Plaintiff had already terminated her relationship with Defendants, hired a new CPA, and was not attempting to hire or pay Defendants for any new work engagement.

We hold that Plaintiff has failed to proffer evidence demonstrating that a pre-existing duty to disclose existed. She has failed to advance all of the elements of a fraudulent concealment claim and to rebut Defendants' evidence in support of their motions for summary judgment and partial summary judgment. Plaintiff's arguments on this issue are overruled.

Because the trial court properly granted summary judgment in Defendants' favor on Plaintiff's fraudulent concealment claim, we also affirm its grant of summary judgment in Defendants' favor on Plaintiff's claim for punitive damages. *See Watson v. Dixon*, 352 N.C. 343, 348, 532 S.E.2d 175, 178 (2000) (citations omitted) ("As a rule you cannot have a cause of action for punitive damages by itself. If the complainant fails to plead or prove his cause of action, then he is not allowed an award of punitive damages because he must establish his cause of action as a prerequisite for a punitive damage award.").

VIII. Conclusion

The trial court's order granting partial summary judgment to Defendants on Plaintiff's fraudulent concealment claim and punitive damages claim is affirmed. The trial court's order granting Defendant partial summary judgment on the Plaintiff's professional negligence claim is reversed. We remand for trial on Plaintiff's professional negligence claim. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

Chief Judge McGEE concurs.

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

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

Although I agree with my colleagues that the trial court properly granted Defendants' motion for partial summary judgment on Plaintiff's fraudulent concealment claim, I respectfully dissent from the majority's position that the trial court erroneously granted partial summary judgment on Plaintiff's professional negligence claims concerning her 2006 and 2007 tax returns. Because I believe that Plaintiff's professional negligence claims were properly barred by the applicable statute of repose, I would affirm the trial court's grant of partial summary judgement on these claims as well.

Plaintiff contends that the trial court erred in granting summary judgement in favor of Defendants as to her professional negligence claims relating to her 2006 and 2007 tax returns. "In order to establish a claim of professional negligence, a plaintiff must show: '(1) the nature of the defendant's profession; (2) the defendant's duty to conform to a certain standard of conduct; and (3) a breach of the duty proximately caused injury to the plaintiffs.' " *Michael v. Huffman Oil Co.*, 190 N.C. App. 256, 271, 661 S.E.2d 1, 11 (2008) (emphasis omitted) (quoting *Associated Indus. Contr'rs, Inc. v. Fleming Eng'g, Inc.*, 162 N.C. App. 405, 413, 590 S.E.2d 866, 872 (2004)).

However, in the present case, the issue of whether Plaintiff successfully established the elements of a professional negligence claim need not be reached as her professional negligence claims relating to her 2006 and 2007 tax returns are barred by the applicable statute of repose. N.C. Gen. Stat. § 1-15(c) (2015) states, in pertinent part, that "in no event shall

an action be commenced more than four years from the last act of the defendant giving rise to the cause of action[.]"

It is well established that

> statutes of repose are intended to mitigate the risk of inherently uncertain and potentially limitless legal exposure. Accordingly, such a statute's limitation period is initiated by the defendant's last act *or omission* that at some later point gives rise to the plaintiff's cause of action. *The time of the occurrence or discovery of the plaintiff's injury is not a factor in the operation of a statute of repose.*

Christie v. Hartley Constr., Inc., 367 N.C. 534, 539, 766 S.E.2d 283, 287 (2014) (internal citations and quotation marks omitted) (emphasis added).

Moreover,

> [u]nlike the statute of limitations, the statute of repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce.
>
> In order to decide whether the statute of repose bars plaintiffs' claim we must determine when the last act of alleged negligence took place. To determine when the last act or omission occurred we look to factors such as the contractual relationship between the parties, when the contracted-for services were complete, and when the alleged mistakes could no longer be remedied.

Carle v. Wyrick, Robbins, Yates & Ponton, LLP, 225 N.C. App. 656, 661, 738 S.E.2d 766, 770-71 (2013) (internal citations, quotation marks, and footnote omitted).

Here, the unrebutted evidence reveals that the final act taken by Defendants in regard to Plaintiff's 2006 and 2007 tax returns occurred on 12 December 2008, when Defendants hand delivered Plaintiff her 2007 prepared returns. Plaintiff filed her complaint asserting professional negligence relating to the preparation of her 2006 and 2007 tax returns on 4 November 2013 — nearly 11 months after the limitations period imposed by N.C. Gen. Stat. § 1-15(c) had expired as to the 2007 returns, and well after the limitations period relating to her 2006 returns had run.

It is important to note that Defendants' preparation of Plaintiff's returns for each tax year were separate and distinct transactions for the purposes of the statute of repose. Indeed, this is evidenced by Michael Gillis' unrebutted deposition testimony:

> Q. So by your testimony, then, for each year, the engagement of Gould Killian ended when they delivered a prepared return to Karen Head?
>
> A. Delivered, mailed, she picked up, whatever process it was in which she received her returns, then it's her responsibility to sign and file at that point.

Moreover, the treatment of Plaintiff's professional negligence claims by the parties and the trial court below indicate that each prepared return was considered to be a separate and distinct transaction. This is made even more apparent by the fact that Plaintiff's professional negligence claims for tax years 2008 and 2009 — which were brought within the four-year window for statute of repose purposes — were allowed by the trial court to advance to trial. Consequently, preparation of each of the tax returns for tax years 2006, 2007, 2008, and 2009 constitute four separate completed transactions for which the four-year statute of repose began to run at the time they were delivered — or were erroneously not delivered due to an omission by Defendants — to Plaintiff.

Plaintiff nevertheless contends on appeal, however, that Defendants' final act was not the delivery of the 2006 and 2007 tax returns to her — or Defendants' omission in delivering them to her — but rather was the failure on the part of Defendants to later cure any failure to file the returns by subsequently alerting Plaintiff that she needed to file them before the assessment of interest and penalties by the IRS. Significantly though, "[t]he issue, however, is not whether defendants continued to represent plaintiffs after the transaction . . . . The issue is when the last act alleged to have caused plaintiffs harm occurred." *Carle*, 225 N.C. App. at 664, 738 S.E.2d at 772.

This Court addressed a similar situation in *Carle*, where we analyzed what constituted a completed transaction triggering the start of the running of the statute of repose. In that case, the plaintiffs brought a professional negligence action against the law firm and attorney who created an employee stock ownership trust for them in 2004. *Id.* at 656-57, 738 S.E.2d at 768. The transaction was supposed to be structured so that the plaintiffs would be able to monetize their corporate stock while avoiding the capital gains taxes normally associated with doing so. *Id.* at 657, 738 S.E.2d at 768. However, the defendants improperly structured the

trust and the plaintiffs were later assessed with tax deficiencies by the IRS on the basis that the plaintiffs did, in fact, owe capital gains taxes. *Id.* at 657-58, 738 S.E.2d at 768.

Significantly, as in the present case, the defendants in *Carle* continued to work with the plaintiffs towards resolving issues with the transaction *after* its completion:

> In August 2005, after the deal had closed, concerns were raised regarding the transaction . . . which defendants then investigated at plaintiffs' request. Defendants later helped prepare for plaintiffs' 2007 IRS inquiry relating to the tax implications of this transaction. Thus, it is clear that although they considered these matter[s] separate and billed plaintiffs for each matter[] separately, defendants continued to represent plaintiffs well after 10 June 2005 and to assist plaintiffs with matters arising from the transaction, even without any subsequent engagement letter.

Id. at 663-64, 738 S.E.2d at 772.

The plaintiffs filed suit for, among other claims, professional negligence on 25 January 2010. *Id.* at 658, 738 S.E.2d at 769. The defendants moved for summary judgment asserting the statute of repose. *Id.* The trial court granted the defendants' motion and the plaintiffs appealed arguing that the statute of repose did not apply as "their cause of action did not accrue until the IRS proceedings were completed on or about 26 May 2010." *Id.* at 659, 738 S.E.2d at 769.

On appeal, this Court affirmed the trial court's grant of summary judgment, holding that

> [c]onsidering the evidence in the light most favorable to plaintiffs, the last act giving rise to plaintiffs' claim took place on 10 June 2005 because at that point defendants' role in the transaction was complete and nothing could have been done to remedy the alleged omissions. Plaintiffs commenced this action on 25 January 2010, more than four years after the last act of defendants giving rise to plaintiff's cause of action. Even if plaintiffs are correct that their action did not accrue until the IRS issued its final assessment, the action would still be barred by the statute of repose. If the action is not brought within the specified period, the plaintiff literally has no cause of

> action. Therefore, defendants are entitled to judgment as a matter of law and we affirm the trial court's order granting defendants' motion for summary judgment.

Id. at 665, 738 S.E.2d at 772-73 (internal citations and quotation marks omitted); *see also Hargett v. Holland*, 337 N.C. 651, 656, 447 S.E.2d 784, 788 (1994) (holding plaintiffs' professional negligence claim barred by statute of repose where plaintiffs' claim brought more than four years after defendant drafted will and "plaintiffs' complaint allege[d] a contractual relationship between defendant and testator to draft a will and that defendant supervise[] execution of the will. After defendant completed these acts, he had performed his professional obligations; and his professional duty to testator was at an end"); *Babb v. Hoskins*, 223 N.C. App. 103, 108, 733 S.E.2d 881, 885 (2012) ("Because the 'nature of the services he agreed to perform' was solely limited to the drafting of three [trust] documents, we conclude that [the defendant-attorney's] professional duty to [the plaintiffs] ended upon completion of the Trust restatement on 9 October 2006, and, consistent with the above authority, [the defendant-attorney] owed no continuing fiduciary duty beyond that date[.] . . . Therefore, plaintiffs' claim for breach of fiduciary duty by [the defendant-attorney] for actions before 31 May 2007 was properly dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) because those actions are beyond the four year statute of repose provision contained in N.C.G.S. § 1-15(c)." (internal citation omitted)).

Therefore, whether Defendants delivered Plaintiff her 2006 and 2007 tax returns to file — as their evidence tends to show — or whether Defendants *never* delivered Plaintiff's 2006 and 2007 tax returns to her after their preparation through an omission on their part — as Plaintiff claims — the statute of repose would have begun to run in either scenario on 12 December 2008 as to her 2007 returns and well before that for her 2006 returns at the time these individual transactions were deemed completed. It is immaterial that Towson later purported to help Plaintiff to resolve issues surrounding her 2006 and 2007 tax returns in light of *Carle*, as those transactions, based on the unrebutted evidence, were already deemed to be completed.

Furthermore, even assuming *arguendo* as Plaintiff's evidence tends to show that Defendants had affirmatively agreed and represented to Plaintiff that they would *file* her 2006 and 2007 tax returns for her on her behalf and had failed to do so, this would, at the most, amount to an omission by Defendants occurring — at the latest — on 12 December 2008 given that a statute of repose's "limitation period is initiated by the defendant's last act *or omission* that at some later point gives rise

to the plaintiff's cause of action." *Christie*, 367 N.C. at 539, 766 S.E.2d at 287 (internal quotation marks omitted) (emphasis added). Therefore, Plaintiff's claims would be barred on statute of repose grounds on this basis as well even when taking her evidence as true.

In sum, either Defendants (1) properly delivered Plaintiff's 2006 and 2007 tax returns to her; or (2) omitted to do so despite their obligation to do so. Either way the "statute's limitation period is initiated by the defendant's last act *or omission* that *at some later point* gives rise to the plaintiff's cause of action. *The time of the occurrence or discovery of the plaintiff's injury is not a factor in the operation of a statute of repose*" *Id.* (internal citations and quotation marks omitted) (emphasis added), and "[u]nlike the statute of limitations, the statute of repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action *even before his cause of action may accrue*[.]" *Carle*, 225 N.C. App. at 661, 738 S.E.2d at 770 (citation and quotation marks omitted) (emphasis added).

As a result, for all of the above reasons, I would affirm the trial court's grant of partial summary judgment on Plaintiff's professional negligence claims concerning her 2006 and 2007 tax returns based upon the applicable statute of repose. I therefore respectfully dissent from the majority's opinion on this issue.

IN THE MATTER OF THE ESTATE OF JAMES JUNIOR PHILLIPS, DECEASED
MARY PHILLIPS, CAVEATOR & DIANE BOSWELL, PROPOUNDER

No. COA16-613

Filed 20 December 2016

1. Jurisdiction—standing—caveat to will

The trial court erred by ruling the caveator lacked standing to bring the caveat to the 2007 Will. That portion of the trial court's order was reversed.

2. Pleadings—affidavits—timeliness—North Carolina Dead Man's Statute

The trial court abused its discretion by granting the propounder's motion to strike the caveator's submitted affidavits made in opposition to the propounder's motion for summary judgment. The affidavits were served by hand delivery before the two-day limit proscribed by Rule 56(c). Further, North Carolina's Dead Man's Statute,

N.C.G.S. § 8C-1, Rule 601(c), was not at issue since none of the affiants were interested witnesses.

3. Wills—caveat proceeding—testamentary capacity—undue influence and duress—proper execution of will

The trial court erred by granting summary judgment in favor of the propounder. There were genuine issues of material fact regarding decedent's testamentary capacity, undue influence and duress, and proper execution of the will.

Appeal by caveator from order entered 2 February 2016 by Judge Eric C. Morgan in Alamance County Superior Court. Heard in the Court of Appeals 17 November 2016.

Ronald Barbee for caveator-appellant.

Holt, Longest, Wall, Blaetz & Moseley, PLLC, by W. Phillip Moseley, for propounder-appellee.

TYSON, Judge.

Mary Phillips ("caveator") appeals from an order granting summary judgment in favor of Diane Boswell ("propounder"). We reverse and remand for trial.

I. Factual Background

James Junior Phillips ("decedent") was born 20 September 1925 and died 2 May 2007. The decedent was the father of two children from two separate marriages, including the caveator. The decedent also fathered other children out of wedlock, including the propounder. His death certificate lists the cause of his death as general malnutrition and dementia. The death certificate lists the propounder as the informant.

Shortly after decedent's death, the propounder submitted a paper writing as the purported last will of the decedent signed on 3 April 2007 ("2007 Will"). The 2007 Will was signed less than a month prior to decedent's death and left all of his property to the propounder. The 2007 Will was admitted to probate and Letters Testamentary were issued to the propounder.

On 3 February 2010, the caveator filed a caveat to the 2007 Will. First, the caveator asserted at the time the decedent allegedly signed the 2007 Will, he suffered from dementia and lacked sufficient mental capacity to execute the will or any other legal document. Second, she asserted

the 2007 Will was procured by undue influence and duress over the decedent by the propounder and possibly others. Finally, she asserted, upon information and belief, that the 2007 Will was not properly executed as required by law for a valid attested will.

On 29 October 2012, the propounder filed a response to the caveat to the probate of the will. The response alleged an ongoing conflict between the caveator and the decedent. The decedent was alleged to have had little contact with the caveator for more than fifteen years prior to his death. The propounder referenced and attached another will, which the decedent had purportedly executed in 1993 ("1993 Will"). The 1993 Will left the majority of the decedent's property to the propounder and his nephew. The decedent also left a remaining vehicle to his girlfriend at the time, as well as a life estate in a house, with the remainder to the propounder and the decedent's nephew. The 1993 Will specifically made no bequest or devise to the caveator.

The propounder's response to the caveat also notes the decedent and attorney who executed the 2007 Will agreed to tear the 1993 Will in order to revoke it, pursuant to the execution of the 2007 Will. The caveator asserted neither the caveator nor her attorney had received a copy of the response, along with the certificate of service and exhibits. The trial court denied the caveator's motion to strike the response from being included in the record on appeal.

On 6 January 2016, the propounder filed a motion for summary judgment with six affidavits and two depositions in support of her motion. Two of the affidavits were from the two attorneys who had prepared the 1993 Will and 2007 Will. Each attorney separately stated the decedent was competent to execute each respective will. The affidavit regarding the 2007 Will asserts it was executed outside of the attorney's office.

Two of the propounder's other affidavits were submitted by a married couple, Herman and Shirley Long, who were long-time friends of the decedent. Their affidavits asserted Mrs. Long had suggested to the decedent that he prepare a will due to his declining health. Their affidavits asserted decedent responded that he already had a will, but was thinking of changing it to give the propounder all of his property. Mrs. Long's affidavit also stated she knew the caveator and noted the caveator had an estranged relationship with the decedent.

The propounder's final two affidavits were submitted by one of decedent's ex-wives and from a former girlfriend. Both women's affidavits stated they knew the propounder and caveator, and the propounder's and caveator's respective relationships with their father. Both women

noted the caveator had a contentious relationship with the decedent, but that the decedent loved the propounder, and she had looked after him during his illness. After visiting the decedent during the last year of his life, both women believed him to be in good mental health and aware of his property holdings. Overall, all six of the propounder's affidavits asserted the decedent was competent to make a will, had a good relationship with the propounder, and had a strained relationship with the caveator.

On 21 January 2016, the caveator responded with four affidavits made in opposition to the propounder's motion. These affidavits were sworn by blood relatives of the decedent, including his brother, two nieces, and grandniece. None of these affiants were interested parties in the estate.

These affidavits directly contradict the claims asserted in the propounder's affidavits, asserting decedent was in good mental health and that he wanted the propounder to inherit all his property. Three of the affiants stated they had visited the decedent almost daily from March 2007 until his death; the fourth affiant visited him frequently during that time frame. The affiants all assert decedent told them he did not trust the propounder, thought she was trying to poison him, and that she had stolen money from him. Three of the affiants assert that on one occasion the propounder refused to let the caveator see her father and had pushed her out of the house. These affiants also assert they had never seen Herman or Shirley Long at decedent's house.

The affiants allege the decedent stated, both before and after his admission to the hospital, that the propounder "was trying to get him to sign some papers that would give her all of his property" and he did not want to leave her any of his property. Specifically upon his return from the hospital, decedent told them he had refused to sign any papers and did not want the propounder to have any of his property. The affiants also assert they knew decedent's signature, and the signature on the 2007 Will was not that of the decedent.

The propounder moved to strike these affidavits on the grounds they (1) were not based upon personal knowledge, (2) contained hearsay, (3) were barred by Rule 601 of the North Carolina Rules of Civil Procedure, and (4) the statements regarding the decedent's signature raised issues not pled by the caveator. The trial court heard arguments on the propounder's motion to strike the affidavits and motion for summary judgment on 25 January 2016.

The trial court granted the propounder's motion to strike the caveator's affidavits and held the tendered affidavits were not timely served pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure, they violated Rule 802 of the North Carolina Rules of Evidence, and the holding of *In re Will of Ball*, 225 N.C. 91, 33 S.E.2d 619 (1945). The trial court also granted the propounder's motion for summary judgment and concluded the caveator did not have standing to bring the action. The trial court further stated that even if the caveator did have standing, no genuine issue concerning any material fact existed and the propounder was entitled to summary judgment as a matter of law. The caveator appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1), which provides for an appeal of right from any final judgment of a superior court. N.C. Gen. Stat. § 7A-27(b)(1) (2015).

III. Issues

The caveator contends the trial court erred by (1) granting the propounder's motion to strike her submitted affidavits made in opposition to the propounder's motion for summary judgment, and (2) granting the propounder's motion for summary judgment.

IV. Standard of Review

A caveat is an in rem proceeding and operates as "an attack upon the validity of the instrument purporting to be a will." *In re Will of Cox*, 254 N.C. 90, 91, 118 S.E.2d 17, 18 (1961) (citation omitted). This Court has noted:

> When a caveat is filed the superior court acquires jurisdiction of the whole matter in controversy, including both the question of probate and the issue of devisavit vel non. Devisavit vel non requires a finding of whether or not the decedent made a will and, if so, whether *any of the scripts* before the court is that will. Thus, in a case such as this one, where there are presented multiple scripts purporting to be the decedent's last will and testament, the issue of devisavit vel non should be resolved in a single caveat proceeding in which the jury may be required to answer numerous sub-issues[.]

In re Will of Dunn, 129 N.C. App. 321, 325-26, 500 S.E.2d 99, 102 (1998) (emphasis original) (citations and quotation marks omitted), *disc. review denied*, 348 N.C. 693, 511 S.E.3d 645 (1998).

Summary judgment may be entered in a caveat proceeding in factually appropriate cases. *See, e.g.*, *In re Will of Jones*, 362 N.C. 569, 573-74, 669 S.E.2d 572, 576-77 (2008) (analyzing the case under traditional summary judgment standards to determine whether genuine issues of material fact existed). While we review an order striking an affidavit in support of or in opposition to summary judgment for abuse of discretion, *Blair Concrete Servs., Inc. v. Van-Allen Steel Co.*, 152 N.C. App. 215, 219, 566 S.E.2d 766, 768 (2002), we review the trial court's ultimate determination of the summary judgment motion *de novo*. *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

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 nonmoving party and resolves all inferences against the moving party. *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576. "Nevertheless, if there is any question as to the weight of evidence summary judgment should be denied." *Id.* at 573-74, 669 S.E.2d at 576 (citation, brackets, and quotation marks omitted).

Because of the factual nature of issues presented during caveat proceedings, "[s]ummary judgment should be entered cautiously." *Seagraves v. Seagraves*, 206 N.C. App. 333, 338, 698 S.E.2d 155, 161 (2010); *see In re Will of Jones*, 362 N.C. at 582-83, 669 S.E.2d at 582 (reversing summary judgment on undue influence); *In re Will of Priddy*, 171 N.C. App. 395, 402, 614 S.E.2d 454, 460 (2005) (reversing summary judgment on testamentary capacity, undue influence, and proper execution of the will).

V. Standing

[1] The propounder asserts the caveator, although an heir-at-law, did not have standing to bring the caveat to the 2007 Will. The propounder argues the caveator would not take under the 1993 Will, which the propounder submitted to the trial court for consideration in her response to the caveat. We disagree.

"Standing to sue means simply that the party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 140, 544 S.E.2d 821, 824 (2001) (citations and quotation marks omitted). The parties in a caveat proceeding "are not parties in the usual sense

but are limited classes of persons specified by the statute who are given a right to participate in the determination of probate of testamentary script." *In re Ashley*, 23 N.C. App. 176, 181, 208 S.E.2d 398, 401, *cert. denied*, 286 N.C. 335, 210 S.E.2d 56 (1974).

N.C. Gen. Stat. § 31-32 allows any person "interested in the estate" to file such an action, which includes anyone "who has a direct pecuniary interest in the estate of the alleged testator which will be defeated or impaired if the instrument in question is held to be a valid will." *In re Ashley*, 23 N.C. App. at 180, 208 S.E.2d at 401 (citation and quotation marks omitted).

North Carolina courts have determined that heirs-at-law, next of kin, and persons claiming under a prior will are all considered as a person "interested in the estate" under the statute. *See e.g.*, *Sigmund Sternberger Foundation, Inc. v. Tannenbaum*, 273 N.C. 658, 674, 161 S.E.2d 116, 127 (1968) (persons claiming under a prior will); *Brissie v. Craig*, 232 N.C. 701, 705, 62 S.E.2d 330, 333 (1950) (heirs-at-law); *Randolph v. Hughes*, 89 N.C. 428, 431 (1883) (next of kin).

In *In re Will of Barnes*, 157 N.C. App. 144, 162, 579 S.E.2d 585, 597 (2003), *rev'd per curiam for reasons stated in the dissent*, 358 N.C. 143, 592 S.E.2d 688-89 (2004), beneficiaries under a prior will, who were not heirs-at-law, filed a caveat to the probated will. While the jury found the probated will had been procured by undue influence, it also found that the prior will had been revoked by the testator. *Id.* at 146, 579 S.E.2d at 587.

The majority's opinion held that, in managing the litigation of the caveat to the probated will, the trial judge should have first ordered the jury to determine whether the prior will had been revoked, prior to deciding the validity of the probated will. *Id.* at 158-59, 579 S.E.2d at 594-95. The majority reasoned that in order to determine whether the beneficiaries of the prior will had standing to caveat the probated will, it was first necessary to determine whether the prior will had been revoked. *Id.* If the prior will had been revoked, then the caveators did not have standing and the trial court lacked jurisdiction over the matter. *Id.*

The dissenting judge, and subsequently the Supreme Court, disagreed. *Id.* at 163, 579 S.E.2d at 597 (Hudson, J., concurring in part and dissenting in part). The dissenting judge argued the caveators, as beneficiaries under a previous will, had standing to bring the caveat against the probated will, and such caveat properly invoked the jurisdiction of the court. *Id.* Most significantly, the dissenting judge stated:

> because the will caveat is a proceeding *in rem*, I do not believe that the jury's ultimate determination that the [previous] will had been revoked should be held to erase the subject matter jurisdiction of the superior court over the entire proceeding *ab initio*. . . .
>
> . . . Whenever persons claiming under a prior will institute a caveat, they are potential, not certain, beneficiaries of the estate in question. Even if their claimed interest in the estate ultimately is not upheld, they nonetheless have standing to litigate the issues.

Id.

The dissent's analysis, adopted by our Supreme Court, in *In re Will of Barnes* is applicable here. While the propounder argues the caveator lacks standing, because the caveator does not take under the 1993 Will, our courts' precedents indicate otherwise. In this case, the caveator is a potential, but not certain, beneficiary of the estate in question as the decedent's heir-at-law. *See id.*; *Brissie v. Craig*, 232 N.C. at 705, 62 S.E.2d at 333. As such, she had standing to bring the initial caveat against the 2007 Will. Upon bringing the caveat, the court obtained jurisdiction over the whole controversy, which eventually included the 1993 Will submitted by the propounder. *See id.*

One of the purposes of a caveat proceeding is for the jury to determine if "any of the scripts" before the court are, in fact, the decedent's will. *In re Will of Dunn*, 129 N.C. App. at 325, 500 S.E.2d at 102 (emphasis and citation omitted). Whether the caveator's claimed interest is ultimately upheld, as an heir-at-law she had standing to challenge the 2007 Will. *See In re Will of Barnes*, 157 N.C. App. at 163, 579 S.E.2d at 597. (Hudson, J., concurring in part and dissenting in part). The propounder's subsequent submission of the 1993 Will does not change her status as such nor dissolve the court's jurisdiction. Even if the 2007 Will is held to be invalid and the 1993 Will upheld, because the caveator is an heir-at-law, this determination would not deprive the trial court of jurisdiction *ab initio*. *See id.* The trial court erred in ruling the caveator lacked standing to bring the caveat to the 2007 Will. That portion of the trial court's order is reversed.

VI. Motion to Strike

[2] The caveator argues the trial court erred in granting the propounder's motion to strike her submitted affidavits made in opposition to the propounder's motion for summary judgment. The trial court granted

the motion to strike the affidavits pursuant to: (1) Rule 56 of the North Carolina Rules of Civil Procedure; and, (2) Rule 802 of the North Carolina Rules of Evidence, along with *In re Will of Ball*, 225 N.C. 91, 33 S.E.2d 619. We address both of these grounds.

1. Timing of the Affidavits

The trial court first determined the affidavits were not timely served in accordance with Rule 56(c) of the North Carolina Rules of Civil Procedure. We disagree.

In response to a motion for summary judgment, the adverse party may submit opposing affidavits at least two days prior to the hearing. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). Here, the caveator's response to the propounder's motion for summary judgment and attached affidavits were served 21 January 2016. The summary judgment hearing was held on 25 January 2016, four days later. The affidavits were clearly served by hand delivery before the two day limit proscribed by Rule 56(c). The trial court abused its discretion by striking caveator's four affidavits on that ground. *See id.*

2. Substance of the Affidavits

The trial court found the caveator's four tendered affidavits "do not set forth such facts as would be admissible and contain hearsay and do not address the issues of Undue Influence, Duress or proper execution of the will." Based upon this finding of fact, the trial court concluded the propounder's objection to and motion to strike the caveator's affidavits in opposition to summary judgment should be allowed pursuant to Rule 802 of the North Carolina Rules of Evidence and the holding of *In re Will of Ball*. We disagree.

Affidavits submitted in opposition to a motion for summary judgment must be: (1) made on personal knowledge; (2) set forth such facts as would be admissible in evidence; and, (3) affirmatively show the affiant is competent to testify to the matters stated therein. N.C. Gen. Stat. §1A-1, Rule 56(e) (2015). The key issue in this case is whether the statements in any or all of the caveator's four affidavits "would be admissible in evidence." *Id.*

Our courts have long and consistently allowed a testator's declarations to be admitted into evidence for certain purposes during a caveat proceeding. *See In re Will of Brown*, 194 N.C. 583, 595-96, 140 S.E. 192, 199 (1927); *In re Will of Ball*, 225 N.C. at 94-95, 33 S.E.2d at 621-22. For example, the Supreme Court of North Carolina has stated:

> [i]t has been generally held that declarations, oral or written, by the deceased may be shown in evidence upon the trial of an issue involving his mental capacity, whether such declarations were made before, at or after the date on which it is contended that the deceased was of unsound mind.

In re Will of Brown, 194 N.C. at 595, 140 S.E. at 199 (citation omitted).

Our Supreme Court has also allowed a testator's declarations to be admitted for the purpose of showing undue influence:

> Evidence of declarations of the testator which disclose his state of mind at the time of the execution of the paper writing or the circumstances under which it was executed, tending to show he did or did not act freely and voluntarily, is competent as substantive proof of undue influence. *Other declarations*, *when relevant*, *may be admitted as corroborative or supporting evidence*, but alone they are not sufficient to establish the fact at issue.

In re Will of Ball, 225 N.C. at 94-95, 33 S.E.2d at 622 (internal citation omitted) (emphasis supplied).

Here, each of the affidavits in opposition to the propounder's motion for summary judgment include statements, which were allegedly made by the decedent to the affiants between March and April 2007. The affiants assert the decedent told them he did not trust the propounder, thought she was trying to poison him, and that the propounder had stolen money from him.

The affiants also assert decedent told them, both before and after his admission to the hospital, that the propounder was trying to get him to sign some papers that would give her all of his property and decedent did not want to leave the propounder any of his property.

The propounder asserts these statements were almost entirely confined to those made after the execution of the will, and as such the holding in *In re Will of Ball* prohibits them from being admitted into evidence. We disagree.

First, based upon the record, it appears these statements were made sometime between March 2007 and April 2007. The decedent's 2007 Will was allegedly signed on 3 April 2007, which means some of these statements were necessarily made prior to the purported execution of the 2007 Will. Second, even if some of the statements were made after

the execution of the will, nothing in *In re Will of Ball* requires their exclusion. *See In re Will of Ball*, 225 N.C. at 94-95, 33 S.E.2d at 622.

The Court in *In re Will of Ball* specifically allows other declarations, including those not made at the time of the execution of the will, or which demonstrate the circumstances under which it was executed, to be admitted into evidence, when relevant. *Id.*; *see* James B. McLaughlin, Jr. and Richard T. Bowser, *Wiggins Wills and Administration of Estates in North Carolina* § 6:3(b) (4th ed. 2005) ("North Carolina appears to . . . admit the testator's post-testamentary declarations as substantive proof of undue influence." (citing *Caudill v. Smith*, 117 N.C. App. 64, 450 S.E.2d 8 (1994); *In re Will of Hall*, 252 N.C. 70, 113 S.E.2d 1 (1960); *In re Will of Ball*, 225 N.C. 91, 33 S.E.2d 619).

While these statements may not establish all the facts at issue, that question was not before the court on the motion to strike the affidavits. Rather, the question was whether these statements were admissible into evidence. *See* N.C. Gen. Stat. § 1A-1, Rule 56(e). The decedent's declarations included in the affidavits are relevant to support the caveator's argument that the propounder exerted undue influence over the decedent, and, as such, are admissible into evidence, which defeats their exclusion.

Other information contained in the excluded affidavits outline the decedent's deteriorating health and memory based upon the times the affiants spent with him in the two months prior to his death. They also assert the propounder did not allow the caveator to see her father on one occasion. These affidavits meet the requirements of N.C. Gen. Stat. §1A-1, Rule 56(e) and do not violate Rule 802 or the case law outlined in *In re Will of Ball.* The trial court also erred by striking the affidavits on those grounds.

We note that North Carolina's Dead Man's Statute, N.C. Gen. Stat. § 8C-1, Rule 601(c), is not at issue here; as none of the affiants are interested witnesses. *See Taylor v. Abernethy*, 174 N.C. App. 93, 96, 620 S.E.2d 242, 246 (2005) (noting that to be disqualified as a interested witness under the statute, the witness must have "a direct legal or pecuniary interest in the outcome of the litigation . . . a pecuniary interest alone is insufficient to disqualify a witness under Rule 601." (internal quotation marks and citations omitted)), *cert. denied*, 360 N.C. 367, 630 S.E.2d 454 (2006).

VII. Summary Judgment

[3] After granting the motion to strike the caveator's affidavits in opposition to summary judgment, the trial court found there was no standing

for the caveator to bring the case and no genuine issue of material fact existed. The court granted the propounder summary judgment as a matter of law. We disagree.

In her caveat, the caveator asserted the decedent lacked capacity to execute the will, the will was procured by undue influence and duress, and that "upon information and belief" the will was not executed according to the legal requirements for a valid attested will. We address each contention.

1. Testamentary Capacity

The presumption is that "every individual has the requisite capacity to make a will, and those challenging the will bear the burden of proving, by the greater weight of the evidence, that such capacity was wanting." *In re Will of Sechrest*, 140 N.C. App. 464, 473, 537 S.E.2d 511, 517 (2000). "A testator has testamentary capacity if he comprehends the natural objects of his bounty; understands the kind, nature and extent of his property; knows the manner in which he desires his act to take effect; and realizes the effect his act will have upon his estate." *In re Will of Buck*, 130 N.C. App. 408, 412, 503 S.E.2d 126, 130 (1998), *aff'd*, 350 N.C. 621, 516 S.E.2d 858 (1999) (citing *In re Will of Shute*, 251 N.C. 697, 111 S.E.2d 851 (1960)).

To establish lack of testamentary capacity, s caveator need only show that any one of the essential elements of testamentary capacity is lacking. *In re Will of Kemp*, 234 N.C. 495, 499 (1951). A caveator cannot "establish lack of testamentary capacity where there [is] no specific evidence 'relating to testator's understanding of his property, to whom he wished to give it, and the effect of his act in making a will at the time the will was made.' " *In re Estate of Whitaker*, 144 N.C. App. 295, 298, 547 S.E.2d 853, 856 (quoting *In re Will of Buck*, 130 N.C. App. at 413, 503 S.E.2d at 130), *disc. review denied*, 354 N.C. 218, 555 S.E.2d 278 (2001). It is not sufficient for a caveator to present "only general testimony concerning testator's deteriorating physical health and mental confusion in the months preceding the execution of the will, upon which [a caveator's] witnesses based their opinions as to [the testator's] mental capacity." *In re Will of Buck*, 130 N.C. App. at 412, 503 S.E.2d at 130.

Here, the caveator's affidavits allege the decedent was suffering from cancer and dementia, and was taking strong pain medications in the months preceding his death and when he purportedly executed the 2007 Will less than one month prior to his death. Although the propounder asserted in her response to the caveat that the decedent did not have dementia, the decedent's death certificate, submitted as an

attachment to the caveat, lists "dementia" as a cause of death. The propounder is listed as the informant on the death certificate. As noted, decedent executed the purported 2007 Will on 3 April 2007 and died 2 May 2007. Viewed in the light most favorable to the caveator, as the nonmoving, genuine issue of material fact exists concerning decedent's testamentary capacity.

2. Undue Influence and Duress

In the context of a will caveat,

> [u]ndue influence is a fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result.

In re Estate of Loftin, 285 N.C. 717, 722, 208 S.E.2d 670, 674-75 (1974).

Our courts consider a number of factors to determine whether undue influence was exerted on the testator:

> 1. Old age and physical and mental weakness;
>
> 2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision;
>
> 3. That others have little or no opportunity to see him;
>
> 4. That the will is different from and revokes a prior will;
>
> 5. That it is made in favor of one with whom there are no ties of blood;
>
> 6. That it disinherits the natural objects of his bounty;
>
> 7. That the beneficiary has procured its execution.

In re Will of McNeil, 230 N.C. App 241, 245-46, 749 S.E.2d 499, 503 (2013) (citation omitted).

Caveators are not required to demonstrate the existence of every factor to prove undue influence, because "undue influence is generally proved by a number of facts, each one of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence." *Id.* (citation and quotation marks omitted). This Court has further clarified, "[w]hether these or other factors exist and whether executor unduly influenced decedent in the execution of the Will are

material questions of fact." *In re Will of Smith*, 158 N.C. App. 722, 727, 582 S.E.2d 356, 360, *review denied*, 357 N.C. 506, 588 S.E.2d 474 (2003).

While not synonymous, undue influence and duress are "related wrongs, and to some degrees overlap." *Link v. Link*, 278 N.C. 181, 191, 179 S.E.2d 697, 703 (1971). "Duress is the result of coercion and may be described as the extreme of undue influence and may exist even when the victim is aware of all facts material to his decision." *In re Estate of Loftin*, 285 N.C. at 722-23, 208 S.E.2d at 675. A caveator's allegations underlying her claims of undue influence and duress may be the same. *See In re Will of McNeil*, 230 N.C. App at 249 n.5, 749 S.E.2d at 505.

The caveator's affidavits, as submitted, create a genuine issue of material fact of whether the purported 2007 Will was procured by undue influence or duress. The affidavits assert the decedent's physical and mental weakness around the time of the 2007 Will's purported execution; the propounder's status as decedent's primary caregiver, and her refusal to allow the caveator to see the decedent on one occasion prior to his death; and the decedent's stated fear of the propounder and how he did not trust her.

Viewed in the light most favorable to the nonmoving party, the affidavits also emphasize the propounder's continued insistence that the decedent sign papers to give her all of his property. The affidavits assert that the decedent did not want to leave the propounder any of his property, and actually refused to do so. Whether the factors pertaining to undue influence exist and whether the propounder "unduly influenced decedent in the execution of the [w]ill are material questions of fact." *See In re Will of Smith*, 158 N.C. App. at 727, 582 S.E.2d at 360. When viewed in the light most favorable to the caveator, genuine issue of material fact exists to preclude summary judgment on the issues of undue influence and duress.

3. Proper Execution of the Will

For an attested written will to be valid, it must comply with the statutory requirements as set forth in N.C. Gen. Stat. § 31-3. *In re Will of Priddy*, 171 N.C. App. at 400, 614 S.E.2d at 458. "In a caveat proceeding, the burden of proof is upon the propounder to prove that the instrument in question was executed with the proper formalities required by law." *In re Will of Coley*, 53 N.C. App. 318, 320, 280 S.E.2d 770, 772 (1981). N.C. Gen. Stat. § 31-3, as effective in the present case, required:

> (a) An attested written will is a written will signed by the testator and attested by at least two competent witnesses as provided by this section.
>
> (b) The testator must, with intent to sign the will, do so by signing the will himself or by having someone else in the testator's presence and at his direction sign the testator's name thereon.
>
> (c) The testator must signify to the attesting witnesses that the instrument is his instrument by signing it in their presence or by acknowledging to them his signature previously affixed thereto, either of which may be done before the attesting witnesses separately.
>
> (d) The attesting witnesses must sign the will in the presence of the testator but need not sign in the presence of each other.

N.C. Gen. Stat. § 31-3 (2011) (subsequently amended by N.C. Gen. Stat. § 31-3.3, effective 1 January 2012).

This Court has allowed caveators to challenge whether a will was properly executed, even where self-proving affidavits accompanied the notarized and signed will. *In re Will of Priddy*, 171 N.C. App. at 400-01, 614 S.E.2d at 458-59 (holding material issue of fact existed as to whether the testator complied with the will formalities where caveator presented evidence the testator did not sign in the presence of an attesting witness or acknowledge his signature to that witness, and the attesting witness did not sign in the presence of the testator).

Here, along with the allegations of lack of testamentary capacity, undue influence, and duress, three of the caveator's affidavits by blood relatives, stated the affiant was familiar with the decedent's signature, and that the signature on the 2007 Will was not the decedent's. Viewed in the light most favorable to the caveator, as the nonmoving party, genuine issue of material fact exists regarding whether the 2007 Will complied with the statutorily required formalities of execution. *Id.*

VIII. Conclusion

The trial court erred in ruling the caveator lacked standing to bring the caveat to the 2007 Will and by striking the caveator's four affidavits.

Because of the factual nature of issues presented during caveat proceedings, "[s]ummary judgment should be entered cautiously."

Seagraves, 206 N.C. App. at 338, 698 S.E.2d at 161. After our review and consideration of all the affidavits and other evidence presented in the record, and based upon our *de novo* review, genuine issues of material fact exist to render summary judgment improper. The trial court's order is reversed and this cause is remanded for trial. *It is so ordered.*

REVERSED AND REMANDED.

Judges McCULLOUGH and DILLON concur.

IN THE MATTER OF J.A.M.

No. COA16-563

Filed 20 December 2016

Child Abuse, Dependency, and Neglect—child neglect—sufficiency of findings of fact

The trial court erred by adjudicating a minor as a neglected juvenile. The trial court's findings of fact were not supported by clear, cogent, and convincing evidence.

Appeal by respondent from order entered 30 March 2016 by Judge Louis A. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 5 December 2016.

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

Richard Croutharmel for respondent-appellant.

Poyner Spruill LLP, by Caroline P. Mackie, for guardian ad litem.

TYSON, Judge.

Respondent-mother appeals from an order adjudicating her minor child, J.A.M., to be a neglected juvenile. We reverse.

I. Factual Background

Respondent-mother has a long history of prior involvements with the Mecklenburg County Department of Social Services, Youth and Family

Services Division ("YFS") dating back to 2007. This history is primarily related to reports of domestic violence with the fathers of six prior children. YFS filed juvenile petitions regarding Respondent-mother's other six children. Her parental rights to those children were terminated by order entered in April 2014. Respondent-mother began a relationship with J.A.M.'s father, which resulted in J.A.M.'s birth in late January 2016. J.A.M.'s father also had a prior history with YFS due to domestic violence, which led to the removal of a child from his custody in 2012.

YFS received a report of J.A.M.'s birth on 24 February 2016. A social worker went to Respondent-mother's home. The social worker found Respondent-mother's home to be appropriate for J.A.M. and that J.A.M. seemed to be healthy and well cared for. The social worker subsequently learned that police had not been called to the home.

Based solely upon the parents' prior histories with YFS, the social worker developed a Safety Assessment in an attempt to determine whether their previous issues had been addressed. Respondent-mother and J.A.M.'s father refused to sign the Safety Assessment. Respondent-mother asserted that they did not need involvement of services from YFS, because J.A.M. was being properly cared for and there were no on-going acts of domestic violence. Respondent-mother also declined to attend a meeting at YFS to determine how YFS would proceed on the report.

Despite the results of the home visit and investigation, YFS subsequently took nonsecure custody of J.A.M. and, on 29 February 2016, filed a petition alleging J.A.M. was a neglected juvenile. YFS alleged J.A.M. was not safe in the care of her parents based solely upon their prior histories. After a hearing on 30 March 2016, the trial court entered an order adjudicating J.A.M. to be a neglected juvenile. At the time of the hearing, Respondent-mother and J.A.M.'s father were no longer living together or involved in a relationship. The court continued custody of J.A.M. with YFS, ordered the parents to "address the issues that led their prior kids and this child [being removed from their] custody," granted the parents twice-weekly supervised visitation with J.A.M., ceased reunification efforts with Respondent-mother due to the termination of her parental rights to her prior children, and set the primary plan of care for J.A.M. as reunification with the father with a secondary plan of guardianship or adoption. Respondent-mother filed timely notice of appeal from the court's order.

II. Jurisdiction

Jurisdiction lies in this Court of right by timely appeal from final judgment of the court in a juvenile matter pursuant to N.C. Gen. Stat. § 7B-1001 (2015).

III. Issue

Respondent-mother argues the trial court erred in adjudicating J.A.M. to be a neglected juvenile, because the court's conclusions of law are not supported by findings of fact that are supported by clear, cogent and convincing evidence. We agree.

IV. Standard of Review

This Court reviews a trial court's adjudication of a child to be a neglected juvenile to determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations and quotation marks omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re K.J.D.*, 203 N.C. App. 653, 657, 692 S.E.2d 437, 441 (2010) (citation and quotation marks omitted).

V. Analysis

A neglected juvenile is defined in relevant part as:

> A juvenile . . . who lives in an environment injurious to the juvenile's welfare . . . . In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where . . . another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15) (2015).

To support an adjudication of neglect, the trial court's findings of fact must show "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 re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (citation and quotation marks omitted).

A. Findings of Fact

The trial court made the following findings of fact in its order:

> Clear and convincing evidence juv. [sic] is neglected. [Respondent-mother]'s testimony was telling today. Additionally, parents failed to make any substantive progress in their prior cases which resulted in TPR for [Respondent-mother] and [Father]'s child was placed in the custody of that child's mother. Dept. [sic] attempted

> to engage parents when it received a referral and both parents declined to work [with] Dept. and reported not needing any services. [Respondent-mother] testified. MGM and SW Sup. West [sic] all testified. Previously [Respondent-mother]'s children were returned to her care and ended up back in [YFS'] custody due to the abuse of one of the juveniles and it appeared [Respondent-mother] was not demonstrating skills learned by service providers. [Father] did not dispute allegations in the petition. [Respondent-mother] has a [history] of dating violent men and [Father] in this case has been found guilty at least twice for assault on a female. [Respondent-mother] acknowledged being aware [Father] had been charged [with] assaulting his sister but [Respondent-mother] said she never asked [Father] if he assaulted his sister despite testifying about the "red flags" she learned in DV servs. [Respondent-mother] testified to having a child [with] the man who abused one of her kids. Dept. [sic] received a total of 12 referrals regarding the [Respondent-mother] and at least 11 referrals pertained to domestic violence. Ct. [sic] took into consideration all the exhibits (1-4) submitted by YFS when making its decision. To date, [Respondent-mother] failed to acknowledge her role in the juvs. [sic] entering custody and her rights subsequently being terminated.

The referenced exhibits attached were a certified copy of the father's criminal record, adjudication orders from 2012 and 2013 involving each parent's prior children, and the 2014 order terminating Respondent-mother's parental rights to her prior children.

Based on these findings, the court concluded:

> The child(ren) is/are neglected in that Juv. [sic] resides in an environment in which both parents have a [history] of domestic violence/assault and each parent had a child enter [YFS] custody that was deemed abused while in the care of each parent. All of juveniles' siblings were adjudicated neglected. No evidence the parents have remedied the injurious environment they created for the other children.

The last two sentences of this paragraph are conclusions instead of findings of fact and will be treated as such. *In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 892-93 (citations and quotation marks omitted), *disc. review denied* 359 N.C. 321, 611 S.E.2d 413 (2004) (holding where

a finding of fact is essentially a conclusion of law, it will be treated as a conclusion of law which is reviewable *de novo* on appeal).

The court's "findings," which are more akin to abbreviated trial notes than actual findings, do not support its conclusion that J.A.M. is a neglected juvenile. The court's first finding, "[c]lear and convincing evidence juv. [sic] is neglected" is a conclusion of law, and the second finding, "[Respondent-mother]'s testimony was telling today" is meaningless, in that the court does not explain how Respondent-mother's testimony was "telling." Several of the court's other findings are simply procedural statements that cannot support any legal conclusion, including: "[Respondent-mother] testified. MGM and SW Sup. West [sic] all testified," "[Father] did not dispute the allegations in the petition," and "Ct. [sic] took into consideration all the exhibits (1-4) submitted by YFS when making its decision."

The trial court made three findings regarding J.A.M.'s current living situation: (1) YFS conducted a home visit, visited with J.A.M.'s parents, and that Respondent-mother and father stated they did not need services and declined to work with YFS; (2) although Respondent-mother knew J.A.M.'s father had been charged with assaulting his sister, she had never asked him about the assault; and, (3) Respondent-mother had never acknowledged her role in the termination of her parental rights to her prior children.

Respondent-mother does not challenge the first two findings, but contends the trial court's finding that she never acknowledged her role in the prior termination of her parental rights is unsupported by the evidence. We agree. While Respondent-mother testified that she was not personally involved in the physical abuse of one of her prior children, because she was upstairs asleep at the time, she admitted the termination of her parental rights to her prior children involved poor decisions and choices she made, and she was not trying to defend those past decisions and choices. This evidence directly contradicts the finding and there is no evidence in the record to the contrary. This finding cannot support the trial court's conclusion that J.A.M. is a neglected juvenile.

Other than the finding involving Respondent-mother's failure to ask J.A.M.'s father about his alleged assault on his sister, the only findings of fact made by the trial court which tend to support its conclusion J.A.M. is a neglected juvenile all pertain to the parents' history with their prior children. These findings include: (1) J.A.M.'s siblings were adjudicated neglected; (2) Respondent-mother and J.A.M.'s father did not make any substantive progress in their prior cases, leading to the termination of Respondent-mother's parental rights and the permanent placement

of the father's child with her mother; (3) Respondent-mother's prior children were returned to her care during the previous case, but subsequently removed due to the abuse of one child and Respondent-mother's failure to make progress on her case; (4) Respondent-mother has a history of dating violent men; (5) J.A.M.'s father has two prior convictions for assault on a female; (6) 11 of 12 referrals to YFS in Respondent-mother's previous juvenile case involved domestic violence; and, (7) Respondent-mother had a child with a man who had abused one of her children.

B. Lack of Evidence or Findings

The trial court failed to make any findings of fact regarding any current domestic violence. No evidence was presented of any instances of domestic violence between Respondent-mother and J.A.M.'s father or that either parent had engaged in domestic violence while in J.A.M.'s presence. Moreover, the father's last proven incident of domestic violence occurred more than 42 months prior to J.A.M.'s birth.

Similarly, Respondent-mother's most recent documented instance of domestic violence occurred in June 2012, more than 43 months prior to J.A.M.'s birth. Respondent-mother and J.A.M.'s father maintained an appropriate home, and both denied they needed services to alleviate concerns YFS had regarding their home. YFS presented no evidence such services were needed. No evidence supports the lack of suitability of J.A.M.'s current home environment.

The court's findings of fact are also notably silent regarding whether, in the intervening years since the conclusion of the parents' prior juvenile cases, the parents have remedied the injurious environments of their prior children.

The court found no evidence had been presented that the parents had remedied the issues that caused the prior injurious environments. Nevertheless, the burden of proof rests upon YFS to prove its allegations by clear, cogent, and convincing evidence. *In re K.J.D.*, 203 N.C. App. at 657, 692 S.E.2d at 441. The absence of evidence cannot support usurpation of parental rights. YFS must introduce relevant clear, cogent, and convincing evidence supporting any allegation of neglect, or any other dereliction of parental responsibility which it failed to do. *See* N.C. Gen. Stat. § 7B-805 (2015) ("The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence."). Additionally, the court's findings do not show J.A.M. suffered from or is at a substantial risk to suffer from any physical, mental, or emotional impairment as a consequence of living in Respondent-mother's home.

Due to the intervening years between the prior cases and the facts before us, we conclude the parents' past histories, coupled only with Respondent-mother's failure to inquire about an alleged incident of prior domestic violence by J.A.M.'s father, do not support a legal conclusion that J.A.M. is a neglected juvenile. *See In re A.K.*, 178 N.C. App. 727, 732, 637 S.E.2d 227, 230 (2006) (holding the trial court erred in relying solely on nine- and fifteen-month-old orders concluding a juvenile's sibling was neglected to support a conclusion that the juvenile was also neglected). No evidence supports the trial court's findings of fact. The findings do not support its conclusion that J.A.M. is a neglected juvenile because she lives in an environment injurious to her welfare.

VI. Conclusion

The trial court's findings of fact are not supported by clear, cogent, and convincing evidence. These findings do not support the trial court's conclusion that J.A.M. was neglected. The order appealed from is reversed. *It is so ordered.*

REVERSED.

Judges BRYANT and McCULLOUGH concur.

IN THE MATTER OF M.Z.M., T.Q.N.C.

No. COA16-705

Filed 20 December 2016

Constitutional Law—effective assistance of counsel—trial tactics

Respondent mother received effective assistance of counsel in a termination of parental rights case. While counsel's choice of tactics was "troublesome," respondent-mother failed to show prejudice or that counsel's conduct undermined the fundamental fairness of the proceeding.

Appeal by respondent from order entered 18 April 2016 by Judge Keith Gregory in Wake County District Court. Heard in the Court of Appeals 5 December 2016.

Wake County Attorney's Office, by Deputy County Attorney Roger A. Askew and Senior Assistant County Attorney Allison Pope Cooper, for petitioner-appellee Wake County Human Services.

J. Thomas Diepenbrock for respondent-appellant.

Cranfill Sumner & Hartzog LLP, by Katherine Barber-Jones, for guardian ad litem.

TYSON, Judge.

Respondent-mother appeals from an order terminating her parental rights as to the minor children "M.Z.M." and "T.Q.N.C." We affirm the trial court's order.

I. Factual Background

On 25 March 2014, Wake County Human Services ("WCHS") filed a juvenile petition alleging that two-year-old M.Z.M. was abused and neglected and six-year-old T.Q.N.C. was neglected. Both children lived with Respondent-mother until WCHS took them into nonsecure custody on 25 March 2014. At the time the petition was filed, Respondent-mother was under arrest and detained in Wake County Detention Center on a charge of felonious child abuse. M.Z.M.'s biological father was alleged to be incarcerated in Pitt County, North Carolina, and the whereabouts of T.Q.N.C.'s putative father were unknown.

Pursuant to a stipulation of facts entered by Respondent-mother and WCHS, the trial court adjudicated M.Z.M. and T.Q.N.C. as abused and neglected juveniles as defined by N.C. Gen. Stat. § 101(1) and (15) (2015). While inconsequential to Respondent-mother's appeal of the termination of her parental rights, we note the trial court adjudicated T.Q.N.C. abused and neglected where WCHS's petition alleged T.Q.N.C. was neglected and did not allege abuse of T.Q.N.C. The court found:

> 5. [T.Q.N.C.] is of school age and has not been regularly enrolled in school by the parents.
>
> 6. The mother was living in a hotel for the four months prior to the filing of the petition while working and looking for permanent housing but otherwise the parents have not provided stable housing for the children and have had insufficient income to meet the needs of the children.
>
> 7. The children have been exposed to domestic violence in the home between the mother and her boyfriend, Carlos [A].
>
> 8. On or about March 19, 2014 [M.Z.M.] was seriously burned on his thigh, ear and buttocks and was in need

> of medical treatment for second degree burns that were causing pain and discomfort for the child. The mother is alleged to have caused these burns intentionally and has been charged with child abuse regarding these burns.
>
> 9. A serious physical injury was inflicted on [M.Z.M.] by other than accidental means while in the mother's home with Carlos [A]. There was a substantial risk of serious physical injury to [T.Q.N.C.] by other than accidental means.
>
> 10. The mother does not admit to intentionally causing these injuries but would stipulate that there is sufficient evidence from which the Court could find by clear and convincing evidence that the burns were not as a result of excusable neglect, happened while the children were in her care and that the mother did not seek medical treatment for the child as a result of being fearful of Carlos [A.] who was in the home when the injuries occurred. . . .
>
> . . . .
>
> 12. The mother remains in custody for the pending charges related to [M.Z.M.'s] abuse and neither putative father has stepped forward at this time to submit to be considered for placement of the children.
>
> . . . .
>
> 18. [M.Z.M. and T.Q.N.C.] do not receive proper care, supervision, or discipline from their parents and live in an injurious environment.

The trial court suspended Respondent-mother's visitation with the children while she remained incarcerated. It ordered Respondent-mother to enter into an Out of Home Services Agreement with WCHS to include a visitation plan and the following additional requirements: (1) obtain and maintain housing and income sufficient for herself and the children; (2) obtain a psychological evaluation and substance abuse assessment and follow any treatment recommendations; (3) abstain from drug use and submit to random drug screens; (4) complete a parenting class and "demonstrate skills learned;" and (5) maintain regular contact with her WCHS social worker.

Respondent-mother remained incarcerated pending trial at the time of the ninety-day review hearing on 14 July 2014. In its resulting order

entered 1 August 2014, the court noted that M.Z.M. "has been able to point to his burn and without prompting state that his mother's boyfriend Carlos did it." The court reiterated the requirements of Respondent-mother's case plan.

On 29 July 2014, Respondent pled guilty to felonious child abuse by grossly negligent omission, which resulted in serious bodily injury to M.Z.M. She received a suspended prison sentence and was released onto probation.

At a hearing on 12 January 2015, Respondent-mother did not appear and the trial court established a permanent plan of adoption for M.Z.M. and T.Q.N.C. The court found that Respondent-mother's whereabouts were unknown, she had failed to contact WCHS, and that WCHS had been unable to contact her. It further found that Respondent-mother had "failed to comply with her treatment plan and has made no progress in correcting the conditions that brought the children into foster care." The court relieved WCHS of further reunification efforts and directed Respondent-mother to comply with the conditions of her case plan "if she is interested in reunification."

WCHS filed a motion to terminate Respondent-mother's parental rights on 2 June 2015. Respondent-mother was arrested in September 2015 on new criminal charges of felonious obtaining property under false pretenses and possession of a counterfeit instrument, misdemeanor resisting a pubic officer, and for violating her probation. On 16 December 2015, the superior court revoked Respondent-mother's probation. The superior court activated her minimum 25 months to maximum 42 months sentence for felonious child abuse.

After a termination of parental rights hearing, and the court terminated Respondent-mother's parental rights on 18 April 2016. As grounds for termination, the court found that Respondent-mother had (1) "abused and neglected the children . . . and it is probable that there would be a repetition of the neglect if the children were returned to the care of the mother," (2) "willfully left the children in foster care for more than twelve (12) months without showing to the satisfaction of the court reasonable progress . . . in correcting the conditions which led to the removal of the children," and (3) "willfully abandoned the children for at least six months immediately preceding" WCHS's filing of the motion to terminate her parental rights. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (2) and (7) (2015). The court further found that termination of Respondent-mother's parental rights to be in M.Z.M. and T.Q.N.C.'s best interests.

II. Jurisdiction

Jurisdiction lies in this Court of right by timely appeal from final judgment of the court in a juvenile matter pursuant to N.C. Gen. Stat. § 7B-1001 (2015).

III. Issue

On appeal, Respondent-mother claims she received ineffective assistance of counsel ("IAC") at the termination hearing.

IV. Standard of Review

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 692-93 (1984).

Pursuant to N.C. Gen. Stat. §§ 7B-1101.1 and 7B-1109(b) (2015), "[p]arents have a statutory right to counsel in all proceedings dedicated to the termination of parental rights. This statutory right includes the right to effective assistance of counsel." *In re Dj.L.*, 184 N.C. App. 76, 84, 646 S.E.2d 134, 140 (2007) (citations and quotation marks omitted).

IV. Analysis

A. Ineffective Assistance of Counsel

"A claim of ineffective assistance of counsel requires the respondent to show that counsel's performance was deficient and the deficiency was so serious as to deprive the represented party of a fair hearing." *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996). Where an IAC claim is based on an allegation of defective performance by counsel, the respondent must show she was prejudiced by counsel's supposed deficiencies. *See In re L.C.*, 181 N.C. App. 278, 283, 638 S.E.2d 638, 641, *disc. review denied*, 361 N.C. 354, 646 S.E.2d 114 (2007); *see also In re Bishop*, 92 N.C. App. 662, 665-66, 375 S.E.2d 676, 679 (1989).

"The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698.

Respondent-mother faults counsel for failing to present any evidence or argument during the adjudicatory phase of the termination hearing. She asserts counsel's failure to advocate in any way whatsoever during the grounds phase of the termination proceeding denied her a fair hearing.

B. Phases of Hearing

A hearing to terminate parental rights includes an adjudicatory phase and, if necessary, a dispositional phase. *See* N.C. Gen. Stat. §§ 7B-1109, -1110(a), (c) (2015). In the adjudicatory phase, the trial court determines whether the petitioner has met its burden to show by "clear and convincing" evidence that grounds authorizing the termination of parental rights exist. N.C. Gen. Stat. § 7B-1111(b) (2015). "If the trial court concludes that the petitioner has met its burden of proving at least one ground for termination, the trial court proceeds to the dispositional phase and decides whether termination is in the best interests of the child." *In re L.A.B.*, 178 N.C. App. 295, 299, 631 S.E.2d 61, 64 (2006). "Under N.C. Gen. Stat. § 7B-1111(a), the trial court need only find that one statutory ground for termination exists in order to proceed to the dispositional phase and decide if termination is in the child's best interests." *Id.* at 298-99, 631 S.E.2d at 64.

C. Testimony

WCHS called two witnesses during adjudication: Respondent-mother and WHCS social worker Jeanette Johnson, who had been assigned to Respondent-mother's case since September 2014. Respondent-mother testified at length regarding the fathers' lack of involvement with M.Z.M. and T.Q.N.C.; her own conduct after absconding probation in July 2014; and her subsequent decisions to avail herself of substance abuse treatment, mental health services, and GED and parenting classes following her incarceration in September 2015. Ms. Johnson described the circumstances that led to M.Z.M. and T.Q.N.C.'s adjudications as abused and neglected juveniles in 2014; the requirements of Respondent-mother's court-ordered case plan; and her failure to contact WCHS, to visit or inquire about her children, or to work on her case plan. Ms. Johnson testified she had no contact with Respondent-mother prior to November 2015, when she learned through the Department of Public Safety and from Respondent-mother's mother that Respondent-mother was arrested and jailed in Edgecombe County.

Respondent-mother correctly asserts her counsel asked no questions of WCHS's witnesses, nor presented any evidence or argument

during adjudication, and told the trial court that he did not "wish to be heard." At disposition, however, counsel called Respondent-mother to testify and argued to the court that terminating her parental rights would be contrary to M.Z.M. and T.Q.N.C.'s best interests.

In its adjudicatory findings, the trial court recounted M.Z.M. and T.Q.N.C.'s prior adjudications as abused and neglected juveniles and listed the requirements of Respondent's case plan. In support of its conclusion that grounds exist to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (7), the court made the following additional findings:

> 16. The mother pled guilty to felony child abuse for the injuries [M.Z.M.] suffered. She was given probation and released from incarceration. The mother absconded from probation almost immediately upon her release from incarceration and she did not participate in case services or visits with the children.
>
> 17. The mother absconded from probation to use marijuana, cocaine, and alcohol and did not visit with the children for fear of being arrested at a visit. The mother was not regularly employed and lived from place to place without appropriate housing. She did not call to inquire into the well being of the children and did not provide gifts, letters, or financial support for the children.
>
> 18. The mother remained an absconder from probation until September 2015 when she was arrested on new charges. The mother did not contact the social worker when she was arrested. The social worker found that mother was incarcerated and sought the mother out.
>
> 19. The mother's probation was revoked and she is now serving an active sentence and has a projected release date of June 2017.
>
> 20. The mother has not visited with either child since they were removed from her care in March 2014. The mother has not had housing or income since March 2014. The mother never submitted to a psychological evaluation, never participated in parenting education, never had a Substance Abuse Assessment, and had no contact with the social worker.

Respondent-mother does not contest any of these adjudicatory findings. They are binding on appeal. *In re S.N.*, 194 N.C. App. 142, 147, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

With regard to counsel's lack of advocacy during the adjudicatory phase, Respondent-mother specifically cites counsel's failure to question her about the services she had accessed and utilized in prison, her "changed perspective on life" since September 2015, and the "likely" fact that she "was no longer in a relationship with" Carlos A. Respondent-mother suggests counsel should have "prepared [her] to testify" on these issues prior to the hearing. She further faults counsel for failing to subpoena her prison case manager to testify about the services she had accessed or to obtain a printout of her accomplishments from the case manager.

Regarding counsel's failure to cross-examine Ms. Johnson, Respondent-mother argues counsel could have asked the social worker about the services Respondent-mother had obtained while in prison and about M.Z.M.'s statements attributing his burns to Carlos A. Respondent-mother contends counsel should have argued that she was unlikely to repeat her prior neglect of her children, she had shown reasonable progress in correcting the conditions that led to their removal from the home, and her lack of involvement with the children or WCHS was not willful but the result of "unwise choices" caused by stress and depression. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (7).

"It is well established that attorneys have a responsibility to advocate on the behalf of their clients." *In re S.N.W.*, 204 N.C. App. 556, 560, 698 S.E.2d 76, 79 (2010). It is also true "[i]neffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy and trial tactics." *State v. Brindle*, 66 N.C. App. 716, 718, 311 S.E.2d 692, 693-94 (1984). The reviewing " 'court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (quoting *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694). Furthermore, "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

In *State v. Taylor*, 79 N.C. App. 635, 636-37, 339 S.E.2d 859, 860-61, *disc. review denied*, 317 N.C. 340, 346 S.E.2d 146 (1986), the defendant's counsel remained silent during the defendant's sentencing hearing,

a critical stage of criminal proceedings to which the right to effective assistance of counsel applies. While this Court found an "absence of positive advocacy" by counsel at sentencing, we concluded this conduct did not "constitute[ ] deficient performance prejudicial to the defendant." *Id.* Based upon the record, we found no reason to conclude that counsel's decision to remain silent was anything other than "strategy and trial tactics." *Id.* at 638, 339 S.E.2d at 861.

We reviewed the transcript of Respondent-mother's termination hearing in its entirety. It appears counsel's decision to essentially concede the existence of grounds for termination under N.C. Gen. Stat. § 7B-1111(a) was a tactical concession similar to counsel's silence in *Taylor*. The existence of these grounds had been previously stipulated to by Respondent-mother. While counsel's choice of tactics was "troublesome," Respondent-mother has failed to show prejudice or that counsel's conduct undermined the fundamental fairness of the proceeding. *Taylor*, 79 N.C. App. at 637, 339 S.E.2d at 861.

Among the statutory grounds for termination alleged by WCHS was that Respondent had "willfully abandoned the juvenile[s] for at least six consecutive months immediately preceding the filing of the . . . motion[.]" N.C. Gen. Stat. § 7B-1111(a)(7). The following standard applies when assessing the existence of grounds for termination under subdivision (a)(7):

> 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. The word "willful" encompasses more than an intention to do a thing; there must also be purpose and deliberation.

In re Adoption of Searle, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) (citations omitted). "Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *Id.* at 276, 346 S.E.2d at 514.

WCHS filed its motion to terminate Respondent-mother's parental rights on 2 June 2015, making the period between 2 December 2014 and 2 June 2015 the determinative six months for purposes of N.C. Gen. Stat. § 7B-1111(a)(7). During her testimony at the termination hearing, Respondent-mother acknowledged: (1) she did no work on her case plan, (2) absconded and did not contact her WCHS social worker, and (3) never visited either M.Z.M. or T.Q.N.C. while she was free on probation, from 29 July 2014 to 20 September 2015.

Respondent-mother claimed, without supporting documentation, that she was employed during the first half of 2015. By her own admission, Respondent-mother chose not to visit her children or contact her social worker, for fear of being arrested. In light of her actions during the relevant six-month period, Respondent-mother has failed to show any reasonable probability the trial court's adjudication of grounds to terminate her parental rights under N.C. Gen. Stat. § 7B-1111(a)(7) would have been avoided, if counsel had proffered additional evidence or argument regarding Respondent-mother's access to services after being imprisoned in September 2015. *See*, *e.g.*, *In re B.S.O.*, 234 N.C. App. 706, 713, 760 S.E.2d 59, 65 (2014) (finding of fact that respondent-father willfully abandoned the children was not error where he made only one phone call to respondent-mother and his children during the six months immediately preceding the filing of the petition to terminate his parental rights); *In re Hendren*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 376 (2003) (holding an incarcerated parent "will not be excused from showing interest in the child's welfare by whatever means available").

M.Z.M.'s attribution of his injuries to Respondent-mother's boyfriend was subordinate to her subsequent wholesale abandonment of her two children. The trial court's 1 August 2014 review order includes a finding that M.Z.M. had identified Carlos A. as the person who inflicted his burns. However, Respondent-mother pled guilty to felonious child abuse, she deliberately failed to disclose M.Z.M.'s injuries to her family, or to seek medical care for her seriously burned toddler.

Respondent-mother argues counsel acted unreasonably by withholding evidence and argument until the dispositional phase of the hearing. Counsel elicited testimony from Respondent-mother regarding her efforts to "better [her]self as a person and as a mother" by seeking out services while in prison, her plan to live with her parents following her release, and her desire to re-establish her relationship with M.Z.M. and T.Q.N.C. and "be the mother that [she] need[s] to be."

Counsel presented a thoughtful and reasoned argument in opposition to terminating Respondent-mother's parental rights during disposition. Describing Respondent-mother as on the cusp of a "profound change," counsel reviewed in detail each of the educational, substance abuse, and mental health services Respondent-mother had obtained during her most current incarceration. Counsel asked the court to allow M.Z.M. and T.Q.N.C. an "opportunity get to know that mother that they don't have today." To deny these children their "mother figure," he asserted, would deny them the "foundation" of knowing "who they came

from," how they came to live in foster care, and why "that's the best place for them" at this time.

Counsel recognized Respondent-mother was not prepared to take custody of her sons, but argued their best interests would be served by allowing them to develop a relationship with their mother, while "living in a safe stable positive foster family." At the conclusion of counsel's argument, the trial court commended counsel for an "excellent job" in representing Respondent-mother.

Respondent-mother allows that counsel's argument may have been "creative." She asserts the evidence presented by counsel had no relevance to the dispositional phase of a termination hearing. We disagree. "After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest." N.C. Gen. Stat. § 7B-1110(a). The court enjoys broad discretion in assessing a child's interests, *see In re L.M.T.*, 367 N.C. 165, 171, 752 S.E.2d 453, 457 (2013), and "may consider any 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). Moreover, the statutory criteria to be considered by the court include "[a]ny relevant consideration." N.C. Gen. Stat. § 7B-1110(a)(6).

The potential value to M.Z.M. and T.Q.N.C. of maintaining a relationship with Respondent-mother, as well as Respondent-mother's efforts and desire to remain a part of her children's lives, were thus plainly "relevant" to the court's dispositional determination under N.C. Gen. Stat. § 7B-1110(a). Although grounds may be found to exist at adjudication to support termination of parental rights, the trial court is not compelled to do so at disposition, if the "best interests" of the children would be served by continuing reunification efforts. N.C. Gen. Stat. § 7B-1110(b) (2015). The record shows the trial court thoughtfully weighed all factors in its order.

V. Conclusion

Respondent-mother's IAC claim is without merit and is overruled. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges BRYANT and McCULLOUGH concur.

IN RE S.A.A.

[251 N.C. App. 131 (2016)]

IN THE MATTER OF S.A.A.[1, 2]

No. COA16-540

Filed 20 December 2016

Juveniles—delinquency—sexual battery—simple assault

A juvenile's adjudication of delinquency based on sexual battery was vacated and remanded for entry of a new disposition order. The State failed to introduce sufficient evidence that the juvenile touched the tops of the girls' breasts for a sexual purpose. The simple assault charge was affirmed.

Appeal by Juvenile from orders entered 22 July 2015 by Judge Beverly Scarlett in Orange County District Court and order entered 22 October 2015 by Judge Kathryn W. Overby in Alamance County District Court. Heard in the Court of Appeals 1 November 2016.

Attorney General Roy Cooper, by Assistant Attorney General Janelle E. Varley, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for Juvenile.

STEPHENS, Judge.

This appeal arises from Juvenile's adjudication as delinquent based upon petitions alleging he committed two counts each of simple assault and sexual battery against two female schoolmates by draping his arms around the girls' shoulders in order to smear a glowing liquid on them during an evening of Halloween trick-or-treating. Because the State failed to introduce sufficient evidence that Juvenile touched the tops of the girls' breasts for a sexual purpose, we vacate the adjudication of sexual battery and remand the case for entry of a new disposition order.

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1. As noted *infra*, this matter originated in Orange County District Court, where the adjudication order was entered, but was transferred to Alamance County District Court in August 2015 where the disposition order was entered.

2. Pursuant to North Carolina Rule of Appellate Procedure 3.1(a), we use initials or pseudonyms to refer to all juveniles discussed in this opinion.

Factual and Procedural Background

On 20 April and 26 May 2015, the State filed petitions against Juvenile S.A.A. ("Scott"), alleging that he had committed two counts each of sexual battery and simple assault. On 21 July 2015, Scott appeared in Orange County Juvenile Court for an adjudication hearing before the Honorable Beverly Scarlett, Judge presiding. Evidence at the adjudication hearing tended to show the following: The petitions arose from events that took place on Friday, 31 October 2014, in Chapel Hill. On that Halloween evening, Scott, then a 13-year-old student at Culbreth Middle School, and three of his male friends went to the Southern Village neighborhood where many other Culbreth students were walking around, trick-or-treating, trying to scare each other, and acting "crazy." Scott was wearing a "crazy" costume, including a black body suit, "LED light teeth," and "glow gloves." After one of his gloves "busted," Scott began wiping glowing green liquid from the glove[3] on trees, signs, and "tons" of people.

Sixth-grade Culbreth students "Lauren" and "Melissa," both then age eleven, were trick-or-treating in Southern Village when they saw Scott walking with some other boys. Melissa testified that Scott asked the girls if they wanted drugs. As Lauren and Melissa walked away, Scott followed, coming up between the girls and draping an arm over each girl's shoulder. Lauren testified that Scott "rubbed this green glow stick stuff on" her, leaving glowing liquid on her shirt near her collar bone. Melissa testified that Scott reached his arm around her shoulder and "put this weird green glowing stuff" on her arm and back, also touching her "boobs" over her sweatshirt.

After the incident, Lauren and Melissa ran to the nearby home of Joe Rice, a friend of their parents. Lauren was upset that the glowing liquid was on her clothes, and Rice used wet paper towels to wipe off the material. Rice believed that "the glow stick was the primary way that [the girls] had been harassed." Lauren and Melissa then "trick or treated some more," returning to Lauren's house between 8:30 and 9:00 p.m.

When Melissa's father picked her up at about 10:00 p.m., she reported that a boy with glow paint on his hands had tried to grab her "chest or boobs." That night, Lauren told her mother that something had happened, but did not provide many details until the next morning, when she reported that a boy had "grabbed her from behind with glow stick material . . . on his hand and touched her." Neither Lauren's nor Melissa's parents contacted the police over the weekend.

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3. Some witnesses referred to the liquid as coming from Scott's glove, while others referred to it as coming from a "glow stick."

However, when Lauren and Melissa returned to school the following Monday, they reported the incident to school resource officer Stan Newsome of the Chapel Hill Police Department. Newsome called Lauren's mother, explained that he would prepare an incident report, and discussed possible charges against Scott. About a month later when Newsome told Scott he was investigating an incident on Halloween, Scott responded, "Oh, the thing with the glow in the dark stuff." Newsome testified that Scott admitted wiping the glowing liquid on Melissa's and Lauren's shoulders, but denied touching their breasts.

At the adjudication hearing, Scott admitted putting the glow glove liquid on trees, signs, and some people. When asked why he did so, Scott replied, "Because it was Halloween." Scott testified that he did not remember seeing Lauren and Melissa on Halloween night. However, Scott's friend "Brandon," who had been trick-or-treating with Scott, testified that Scott touched a girl's shoulder with his leaking glow glove, and the girl asked Scott to get away from her. According to Brandon, in response, Scott apologized and walked away.

At the conclusion of the hearing, Judge Scarlett adjudicated Scott delinquent on all charges. In August 2015, Judge Scarlett transferred the case to Alamance County where Scott and his family had moved. On 10 September 2015, Scott appeared in Alamance County District Court for a dispositional hearing before the Honorable Kathryn W. Overby, Judge presiding. Judge Overby imposed a Level 1 sentence and ordered Scott to be placed on probation for 12 months. The disposition order was based upon the most serious offense before the district court, to wit, sexual battery. Scott gave notice of appeal at the hearing.

Discussion

On appeal, Scott argues that the district court erred by (1) denying his motion to dismiss the sexual battery petitions, (2) adjudicating him delinquent on a theory of sexual battery not stated in the petitions, (3) failing to make findings of fact in support of its dispositional order, and (4) imposing probation and drug and alcohol screenings. We vacate the court's adjudication of sexual battery as based on insufficient evidence, affirm the district court's adjudication of simple assault, and remand the case for entry of a new disposition order.

I. Motion to dismiss sexual battery petitions

Scott first contends that the district court should have allowed his motion to dismiss the sexual battery petitions because the State failed

to prove that Scott touched the breasts of Lauren and Melissa for the purpose of sexual arousal or sexual gratification. We agree.

As an initial matter, we address the State's contention that Scott failed to preserve this issue for appellate review. As Scott concedes, at the adjudication hearing, his attorney moved to dismiss the sexual battery petitions at the close of the State's evidence, but failed to renew the motion after Scott presented his case. To preserve an argument of error in a trial court's denial of his motion to dismiss, a juvenile must move to dismiss the petitions against him at the close of the State's evidence and again at the close of all the evidence. *In re Hodge*, 153 N.C. App. 102, 107, 568 S.E.2d 878, 881 (2002) ("[I]f a [juvenile] fails to move to dismiss the action . . . at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged." (citation and internal quotation marks omitted)).

> We may suspend th[e] prohibition under [Appellate] Rule 2, however, to prevent manifest injustice to a party. When this Court firmly concludes, as it has here, that the evidence is insufficient to sustain a criminal conviction . . . it will not hesitate to reverse the conviction, *sua sponte*, in order to prevent manifest injustice to a party.

In re K.C., 226 N.C. App. 452, 455, 742 S.E.2d 239, 242 (citations and internal quotation marks omitted), *disc. review denied*, 367 N.C. 218, 747 S.E.2d 530 (2013). We exercise our discretion under Rule 2 to review the merits of Scott's appeal in order to prevent manifest injustice because we conclude that the evidence against Scott is insufficient to support an adjudication of delinquency as to sexual battery.

> We review a court's denial of a juvenile's motion to dismiss *de novo*. Where the juvenile moves to dismiss, the court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) of the juvenile's being the perpetrator of such offense. The evidence must be such that, when it is viewed in the light most favorable to the State, it is sufficient to raise more than a suspicion or possibility of the respondent's guilt.

Id. (citations, internal quotation marks, ellipses, and brackets omitted). However, if the evidence raises only a suspicion that the juvenile committed the offense, the motion to dismiss should be granted. *In re R.N.*, 206 N.C. App. 537, 540, 696 S.E.2d 898, 901 (2010). "This is true even though the suspicion so aroused by the evidence is strong." *In re Vinson*, 298 N.C. 640, 657, 260 S.E.2d 591, 602 (1979) (citation omitted).

The elements of sexual battery are met if a juvenile, (1) for the purpose of sexual arousal, sexual gratification, or sexual abuse, (2) engages in sexual contact with another (3) by force and against the will of the other person. N.C. Gen. Stat. § 14-27.5A(a) (2013).[4] In criminal cases involving adult defendants, the element of acting for the purpose of sexual arousal, sexual gratification, or sexual abuse may be inferred "from the very act itself[.]" *In re T.S.*, 133 N.C. App. 272, 275, 515 S.E.2d 230, 232 (citations omitted), *disc. review denied*, 351 N.C. 105, 540 S.E.2d 751 (1999). "However, . . . intent to arouse or gratify sexual desires may [not] be inferred in children under the same standard used to infer sexual purpose to adults." *Id.* at 276, 515 S.E.2d at 233. Rather, this Court has held that a sexual

> purpose does not exist without some evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting. Otherwise, sexual ambitions must not be assigned to a child's actions. The element of purpose may not be inferred solely from the act itself. . . . The mere act of touching is not enough to show purpose.

In re K.C., 226 N.C. App. at 457, 742 S.E.2d at 242-43 (citations and internal quotation marks omitted).

In *In re T.C.S.*, an almost-twelve-year-old juvenile was seen coming out of the woods holding hands with the five-year-old victim who "looked 'roughed up' with twigs and branches in her hair, barefoot, clothes on backwards, and tags hanging out[,]" and a witness saw the juvenile "appear[] to put his hands on his private parts while [the victim] was taking off her clothes." 148 N.C. App. 297, 302-03, 558 S.E.2d 251, 254 (2002). In addition, when another witness confronted the juvenile about what he was doing, the juvenile "smarted off" and told the adult witness his actions with the victim were "none of [her] business." *Id.* at 303, 558 S.E.2d at 254. This Court held that

> [t]he age disparity, the control by the juvenile, the location and secretive nature of their actions, and the attitude of the juvenile is evidence of the maturity and intent of the juvenile. Taking all of the circumstances in the light most favorable to the State, there is sufficient evidence of maturity and intent to show the required element of "for the purpose of arousing or gratifying sexual desire."

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4. Section 14-27.5A was recodified as N.C. Gen. Stat. § 14-27.33 by Session Laws 2015-181, s. 15, effective 1 December 2015, and applicable to offenses committed on or after that date.

Id. In contrast, in *In re K.C.*, this Court considered an adjudication of delinquency on the basis of sexual battery where the fifteen-year-old juvenile, "Keith," was alleged to have touched and squeezed the buttocks of a fifteen-year-old classmate, "Karen," during school. 226 N.C. App. at 454, 742 S.E.2d at 241. Karen reported that, on a day when a substitute teacher was present, Keith had seated himself, not in his assigned place, but at a desk near a classroom bookshelf. *Id.* When Karen stood near Keith and bent over to re-shelve a book, "Keith 'touched and grabbed her.' Karen reacted by informing Keith: 'Don't do that.' Keith did not respond." *Id.* (brackets omitted). The evidence about Keith's intent and purpose in touching Karen's buttocks was conflicting:

> . . . Keith . . . admitted to touching Karen on the buttocks, "but he said it was an accident."
>
> Testifying in his own defense, Keith largely corroborated Karen's testimony leading up to the moment of contact. He explained that he had been sitting in his seat and "I had dropped my pencil and when I picked my pencil up, I accidentally hit [Karen's] butt, but I didn't squeeze it." Keith stated that he was seated during the entire event, having come into contact with Karen during the process of leaning down to get his pencil.
>
> . . . .
>
> When Karen was asked why she believed the contact was intentional, she responded: "You can't touch and grab someone and not be accident [sic] and especially if you're a boy." She also testified that Keith had said certain "nasty stuff" to her at the beginning of the school year. Specifically, Karen described an instance in which Keith purportedly asked her, "When are you going to let me hit?," which Karen took to mean, "When are you going to let me have sex with you?" When Keith was asked if he had ever "talked to Karen about anything in a sexual nature," he avowed that he had not.

Id. at 454, 457, 742 S.E.2d at 241, 243 (some brackets omitted). In holding this evidence insufficient "to raise more than a suspicion or possibility that Keith committed sexual battery[,]" we noted that

> Keith and Karen [were] the same age and there [was] no evidence that Keith exercised any particular control over the situation. The incident occurred in a public school

> room during the school day. Keith contends that the touching was accidental and also made a statement to that effect directly after the event. Further, Keith's alleged request to "hit" was made months before the moment of contact between him and Karen, with no evidence of any contact of any sort between the two of them from the beginning of the school year, presumably in late August, through late February.

Id. at 457-58, 742 S.E.2d at 243.

Here, we conclude that the evidence supporting an inference that Scott acted with "the purpose of arousing or gratifying sexual desire" when he touched Melissa's and Lauren's breasts is far weaker than that in *In re T.C.S.* and falls short even of the evidence held insufficient in *In re K.C.* At the time of the incident, Scott was 13 years old and the girls 11 years old, and all three were students at the same middle school. Scott consistently denied touching either girls' breast, instead contending that he had only put his hands around their shoulders. This account was supported by testimony from one of Scott's male friends who witnessed the incident and described Scott touching a girl's shoulder but not her breast. Neither the location nor the alleged manner of the touching was secretive in nature. Rather, Scott and the girls were on a public street with numerous other juveniles who were trick-or-treating, and many other young people were acting "crazy," running around, and generally behaving as children and young teens might be expected to do on Halloween night. The evidence was undisputed that Scott had been wiping the green glowing liquid from his glove on trees, signs, and other young people during the night—annoying, possibly even distressing and obnoxious, behavior—but not an obviously sexual act. Similarly, nothing about Scott's attitude suggested a sexual motivation in rubbing the glowing liquid on the girls. Neither girl testified that Scott made any sexual remarks to them, either on Halloween night or in any previous interactions with him. Further, according to Brandon, when another young girl—apparently neither Lauren nor Melissa—told Scott to stop putting the liquid on her on Halloween night, Scott stopped, apologized, and walked away. Finally, when the girls ran away after Scott touched them, Scott did not pursue or try to stop them, or attempt to exert control over them in any way. This evidence, even taken in the light most favorable to the State, does not support an inference that Scott touched Lauren's and Melissa's breasts for "the purpose of arousing or gratifying sexual desire." Accordingly, we vacate the adjudication of sexual battery, affirm the adjudication of simple assault, and remand for a new dispositional

order, the previous disposition having been based upon sexual battery as the most serious offense before the district court. In light of this result, we do not address Scott's additional arguments.

VACATED IN PART AND REMANDED.

Judges BRYANT and CALABRIA concur.

IN THE MATTER OF MARY ELLEN BRANNON THOMPSON

No. COA15-1380

Filed 20 December 2016

Abatement—incompetency proceeding—death of respondent

The trial court lacked subject matter jurisdiction in an incompetency proceeding to enter the Hinnant order and any other substantive orders after respondent's death because the matter abated upon respondent's death on 2 October 2014. The orders entered after respondent's death were vacated.

Appeal by guardian from order entered 20 April 2015 by Judge Patrice A. Hinnant in Forsyth County Superior Court. Heard in the Court of Appeals 11 August 2016.

Reginald D. Alston for appellee.

Sharpless & Stavola, P.A., by Molly A. Whitlatch, Frederick K. Sharpless, and Pamela S. Duffy, for appellant.

McCULLOUGH, Judge.

Bryan C. Thompson (appellant) appeals from an order entered in the incompetency proceedings of Mary Ellen Brannon Thompson (respondent) following respondent's death. For the following reasons, we vacate the orders entered after respondent's death.

I. Background

The history of this case includes a prior appeal to this Court which set out the background of this case up to that appeal. *See In re Thompson*, 232 N.C. App. 224, 754 S.E.2d 168 (2014). Those facts are as follows:

On 4 April 2007, a Petition for Adjudication of Incompetence and Application for Appointment of Guardian or Limited Guardian was filed by Leslie Poe Parker [(petitioner)] in Forsyth County Superior Court. The petition alleged that respondent lacked the capacity to manage her own affairs or to make important decisions concerning her "person, family [sic] or property[.]" The same day, a notice of "Hearing on Incompetence and Order Appointing Guardian Ad Litem" was filed. A hearing was conducted on 26 April 2007 by Theresa Hinshaw, assistant clerk of Forsyth County Superior Court (clerk Hinshaw). Numerous individuals were present at the hearing, including [Calvin Brannon (Brannon)], who is the brother of respondent. After the hearing, clerk Hinshaw announced in open court that she found respondent to be incompetent, and she orally appointed [appellant] as guardian of the estate. On 3 May 2007, clerk Hinshaw signed and dated an order (incompetency order) finding "by clear, cogent, and convincing evidence that the respondent [was] incompetent." Additionally, clerk Hinshaw signed and dated an order authorizing issuance of letters appointing [appellant] guardian of the estate.

Thereafter, [Brannon] filed a "Petition for Removal of Guardianship of the Person" and a "Motion to Set Aside the Adjudication of Incompetence Order and Ask For a Rehearing[.]" Lawrence G. Gordon, Jr., Forsyth County Superior Court Clerk (clerk Gordon), signed and dated an order on 8 December 2009 denying the motions and concluded that the matters were time barred because appellant failed to timely appeal clerk Hinshaw's incompetency order. [Brannon] then appealed clerk Gordon's order to superior court. In an order entered 6 April 2010, Forsyth County Superior Court Judge James M. Webb (Judge Webb) dismissed both motions with prejudice.

On 27 March 2012, [Brannon] filed four motions giving rise to [the first] appeal. These motions were:

(a) for relief in the cause from a guardianship granted to [appellant] dated May 1, 2007;

(b) to declare that [petitioner] did not have the capacity to represent respondent in the filings of motions and petitions on April 4, 2007;

(c) to declare that [appellant] was not appointed the guardian of respondent after an adjudication of incompetence under G.S. 35A[-]1112(e) and G.S. 35A-1120[;]

(d) to declare [appellant's] act of filing a voluntary bankruptcy petition under 11 U.S.C. 301 as a state court guardian of the estate of respondent invalid.

These motions were heard before Susan Frye (clerk Frye), Forsyth Superior Court Clerk, and she entered an order on 4 May 2012 denying [Brannon's] motions. She also granted [appellant's] motion for sanctions. In her order, clerk Frye denied motions (a), (b), and (c) because clerk Gordon and Judge Webb had previously "clearly ruled" on [Brannon's] motions, "no appeals were ever entered[,]" "no new evidence was presented[,]" and "[t]he pleadings filed . . . [were] repetitious[.]" Clerk Frye declined to rule on motion (d) because she "[did] not have jurisdiction to hear this matter as the jurisdiction is presently under the Federal Bankruptcy Court." [Brannon] appealed clerk Frye's order to Forsyth County Superior Court. For the same reasons decreed by clerk Frye, Judge [Anderson D.] Cromer [(Judge Cromer)] entered an order on 20 November 2012 denying and dismissing with prejudice [Brannon's] motions (a), (b), and (c). Judge Cromer denied [Brannon's] motion (d) with prejudice because it was "baseless." He also granted [appellant's] motion for sanctions.

Id. at 225-26, 754 S.E.2d at 169-70. Brannon appealed the superior court order to this Court on 14 December 2012.

This Court heard the appeal on 20 November 2013 and issued its opinion on 4 February 2014 reversing and remanding to the superior court. *In re Thompson*, 232 N.C. App. 224, 754 S.E.2d 168 (2014). This Court agreed with Brannon's argument that "the incompetency order was invalid because judgment was never entered, and therefore the trial court erred in concluding that the incompetency order was the law of the case." *Id.* at 226, 754 S.E.2d at 170. Specifically, this Court held that the incompetency order was invalid because, although reduced to writing and signed, there was nothing in the record to indicate the order was filed with the clerk of court as required by N.C. Gen. Stat. § 1A-1, Rule 58, and therefore it was not entered. *Id.* at 228, 754 S.E.2d at 171. "Accordingly, the time period to file notice of appeal of clerk Hinshaw's order has not yet commenced. Furthermore, because clerk Hinshaw's

incompetency order is effective only after its entry, the order cannot be the law of the case." *Id.* (internal citation omitted). This Court then held that because the incompetency order was never entered, clerk Hinshaw had no jurisdiction to appoint Thompson as guardian of the estate because "[o]nly once the order is entered shall 'a guardian or guardians . . . be appointed[.]' " *Id.* at 228-29, 754 S.E.2d at 172 (quoting N.C. Gen. Stat. § 35A-1120). The sanctions on Brannon were also reversed. *Id.* at 232, 754 S.E.2d at 174.

After further remand of the matter to the clerk of superior court, Brannon filed a motion and supporting affidavit seeking an order that appellant's actions on behalf of the estate were without legal authority and to prevent appellant from taking further action on behalf of the estate. Brannon also asserted allegations of fraud by Thompson and the clerk's office, specifically clerk Hinshaw and clerk Frye.

A notice of hearing to be held on 10 April 2014 "to address the issuance of orders of incompetency and appointment of guardians" was filed on 3 April 2014 by clerk Frye. A guardian ad litem was appointed to represent respondent on 8 April 2014. On 8 April 2014, appellant filed a motion for continuance and a motion for the recusal of clerk Frye. Prior to the scheduled hearing, on 9 April 2014, clerk Frye entered an order (the Frye Order) that ordered as follows:

1. Order On Petition For Adjudication of Incompetence, dated and originally signed May 3, 2007, and attached hereto is entered *nunc pro tunc* effective May 3, 2007.

2. Order On Application for Appointment of Guardian [o]f [t]he Person, Joe Raymond, Director for the Forsyth County Department of Social Services dated and originally signed May 3, 2007, and attached hereto is entered *nunc pro tunc* effective May 3, 2007.

3. Order Authorizing Issuance of Letters To Bryan C. Thompson, dated and originally signed May 1, 2007, and attached hereto is entered *nunc pro tunc* effective May 3, 2007.

On the same day, petitioner filed a notice of voluntary dismissal. The notice of voluntary dismissal, however, was filed after the Frye Order. In an affidavit filed by petitioner on 15 April 2014, petitioner averred that she attempted to file the notice earlier but it was initially refused by the clerk's office. Petitioner contends the clerk's office refused her notice so that clerk Frye could file the Frye Order before the notice.

On 21 April 2014, Brannon filed two separate notices of appeal and requests for stay—the first from the Frye Order and the second from the individual orders that the Frye Order entered *nunc pro tunc*. Brannon's appeal came on for hearing in Forsyth County before the Honorable William Z. Wood, Jr. (Judge Wood), on 18 August 2014. After the hearing, but before Judge Wood entered a written order, respondent died on 2 October 2014. Judge Wood then entered a written order (the Wood Order) on 24 October 2014. In the Wood Order, Judge Wood found procedural deficiencies in the Frye Order and in Brannon's notices of appeal and requests for stay. Consequently, Judge Wood ordered that "the matter should be remanded to the Clerk of Superior Court to hear evidence and to make appropriate findings as to [respondent's] medical state, both now and if possible, from the medical records as they presently exist in April, 2007."

In a memo to clerk Frye dated 14 November 2014 and filed 17 November 2014, Brannon asserted there was no basis for any further hearings in the matter because guardianship terminated upon the death of respondent. Without mention of Brannon's memo, on 20 November 2014, clerk Frye ordered that Rockingham County Clerk of Superior Court J. Mark Pegram (clerk Pegram) conduct the hearing ordered by Judge Wood in Forsyth County Superior Court on 18 December 2014. Notice of the hearing was given and a guardian ad litem appointed. An amended notice of hearing and order for hearing signed by both clerk Frye and Judge Wood were entered prior to the matter coming on for hearing before clerk Pegram on 18 December 2014. During the hearing, clerk Pegram heard testimony of what witnesses recalled from the 26 April 2007 incompetency hearing. Based on the testimony, clerk Pegram entered an order on 5 February 2015 (the Pegram Order) in which he concluded "that as of April 26, 2007, [respondent], was in fact incompetent."

Brannon filed notice of appeal from the Pegram Order on 12 February 2015 and the appeal came on for hearing in Forsyth County Superior Court before the Honorable Patrice A. Hinnant (Judge Hinnant) on 19 March 2015. On 20 April 2015, Judge Hinnant entered an order (the Hinnant Order) that the Pegram Order "is stricken and has no force or effect[]" and, "[a]s a result of the abatement and lack of a filed stamped order of incompetence, the matter remains at the status determined by the Court of Appeals in its Opinion dated February 4, 2014, and all matters before the Court are dismissed." The Hinnant Order was based on the following findings:

> 1. All parties stipulated in open Court that Mary Ellen Brannon Thompson died on October 2, 2014;

2. On February 4, 2014, the North Carolina Court of Appeals Opinion was entered in this matter wherein the Court of Appeals decision determined that the Order of Incompetency dated May 3, 2007 was not effective or enforceable because it was never entered and therefore it could not be the law of the case. (See COA Feb 4, 2014 Opinion pp 8-9);

3. On April 9, 2015, the Honorable Susan Frye entered an Order that was subsequently overturned on appeal in a hearing on August 18, 2014, by the Honorable William Z. Wood, Jr.;

4. Judge Wood announced his decision in open court on the record and it was entered on October 24, 2014;

5. As stipulated above, Mary Ellen Brannon Thompson died on October 2, 2014;

6. This matter abated on October 2, 2014;

7. The Order pertaining to this matter entered on February 5, 2015 by the Honorable J. Mark Pegram, Rockingham County Clerk of Superior Court, is moot pursuant to N.C. Gen. Stat. Section 35A-1295 which states: (a) Every guardianship shall be terminated and all powers and duties of the guardian provided in Article 9 of this Chapter shall cease when the ward: (3) Dies. (See also: *In re Higgins* 160 N.C. App. 704 (2003)).

8. In accordance with the Court of Appeals February 4, 2014 decision, the May 3, 2007 Order of Incompetency is not the law of the case because it was not entered pursuant to the Court of Appeals decision or prior to the matter abating on October 2, 2014.

Following the entry of the Hinnant Order, on 21 April 2015, Brannon filed a "Notice of Claim on Bond for Bryan Thompson" with the clerk's office. The notice asserted that appellant "was never authorized to act as guardian of [respondent's] estate[,]" notified the clerk's office that the estate was seeking payment for the unbonded balance of the estate, and indicated the estate was willing to discuss resolution prior to suit.

On 20 May 2015, appellant filed notice of appeal from the Hinnant Order.

II. Discussion

Now on appeal, appellant challenges the orders entered after respondent died on 2 October 2014. Specifically, appellant argues that the trial court lacked subject matter jurisdiction to enter the Hinnant Order, and any other substantive orders, after respondent's death because the matter abated upon respondent's death on 2 October 2014. We agree and note that even the Hinnant Order, whether or not proper, ordered the Pegram Order "stricken" based on findings that the Pegram Order, entered 5 February 2015, was moot because the matter abated on 2 October 2014. In the Hinnant Order, the trial court cited N.C. Gen. Stat. § 35A-1295, which provides, in pertinent part, that "[e]very guardianship shall be terminated and all powers and duties of the guardian provided in Article 9 of this Chapter shall cease when the ward . . . [d]ies." N.C. Gen. Stat. § 35A-1295 (2015).

In addition to the mandate in N.C. Gen. Stat. § 35A-1295, this Court has addressed the abatement of incompetency proceedings in both *In re Higgins*, 160 N.C. App. 704, 587 S.E.2d 77 (2003), and *In re Nebenzahl*, 193 N.C. App. 752, 671 S.E.2d 71 (2008) (unpublished), available at 2008 WL 4911269.

In *Higgins*, the petitioner sought to have the respondent, her brother, declared incompetent. 160 N.C. App. at 705, 587 S.E.2d at 77. The petition for adjudication of incompetence, however, was dismissed by both the clerk and the superior court and the petitioner appealed to this Court. *Id.* Yet, during the pendency of the appeal, the respondent died. *Id.* at 706, 587 S.E.2d at 78. Instead of addressing the petitioner's arguments, this Court found "the dispositive issue [was] whether, when the trial court dismisses a petition for adjudication of incompetence, the action abates upon the death of the respondent during the pendency of the petitioner's appeal." *Id.* We held that the action did not survive. *Id.* In so holding, this Court first noted that " '[n]o action abates by reason of the death of a party while an appeal may be taken or is pending, if the cause of action survives.' " *Id.* (quoting N.C. R. App. P. 38(a)). This Court then looked to N.C. Gen. Stat. § 28A-18-1 to determine whether the cause of action survived the respondent's death. *Id.* That statute, which remains the same in all material respects, now provides as follows:

> (a) Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of the person's estate.

(b) The following rights of action in favor of a decedent do not survive:

(1) Causes of action for libel and for slander, except slander of title;

(2) Causes of action for false imprisonment;

(3) Causes of action where the relief sought could not be enjoyed, or granting it would be nugatory after death.

N.C. Gen. Stat. § 28A-18-1 (2015). After deciding the third exception in subsection (b) was the only applicable exception, this Court looked to the purpose of incompetency proceedings to determine whether the relief could not be enjoyed, or granting it would be nugatory after death. *Higgins*, 160 N.C. App. at 706-707, 587 S.E.2d at 78. Recognizing that the purpose of incompetency proceedings is to adjudicate an individual incompetent and to appoint a guardian to help the incompetent individual exercise their rights, this Court determined "the result that the petition seeks to accomplish is no longer necessary after a respondent dies." *Id.* at 707, 587 S.E.2d at 79. Thus, this Court held "a petition to declare a respondent incompetent does not survive the death of the respondent under N.C. Gen. Stat. § 28A-18-1. Thus, the appeal [in *Higgins*] abated upon the . . . death of the respondent . . . [and] has become moot and [was] accordingly dismissed." *Id.*

Similarly, in *Nebenzahl*, the petitioner sought to have the respondent, her husband, declared incompetent. 2008 WL 4911269, at *1. After the respondent's son's motion to dismiss the petition was stricken by the clerk, the respondent was determined to be incompetent. *Id.* The son's appeal to superior court was dismissed and the son appealed again to this Court. *Id.* Yet, the respondent died during the pendency of the appeal. *Id.* In dismissing the appeal as moot, this court relied on *Higgins*, but also addressed the son's argument "that either (1) vacating the order adjudicating [the r]espondent incompetent and appointing [the p]etitioner as guardian or (2) reversing the order dismissing [the son's] appeal would render the appointment of the guardian void *ab initio*, as if the guardianship never existed[,]" and "would subject any action taken by [the p]etitioner while acting as [the r]espondent's guardian to legal challenge." *Id.*, at *3. This Court, however, found no support for the son's arguments and "conclude[d], as [it] held in *Higgins*, that [the son's] appeal of the order adjudicating [the r]espondent incompetent abated with [the r]espondent's death." *Id.*, at *3. Although *Nebenzahl* is unpublished, we find it persuasive in the present case where it appears

respondent's estate seeks to recover for the actions of appellant while acting as guardian of the estate.

What is clear from the holdings of *Higgins* and *Nebenzahl* is that the incompetency proceedings abate upon the death of respondent because the proceedings no longer serve the purpose of protecting respondent's rights and are moot. *See Cumberland Cnty. Hosp. Sys., Inc. v. N.C. Dept. of Health and Human Servs.*, __ N.C. App. __, __, 776 S.E.2d 329, 333 (2015) ("A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.") (internal quotation marks and citation omitted). Thus, in the present case, the incompetency proceedings abated upon respondent's death on 2 October 2015 when the matter became moot. The trial court did not retain subject matter jurisdiction over the moot proceedings after that time. *See Id.* ("[A] moot claim is not justiciable, and a trial court does not have subject matter jurisdiction over a non-justiciable claim[.] Moreover, [i]f the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action for lack of subject matter jurisdiction.") (internal quotation marks and citations omitted).

The last order entered before respondent died and the matter abated was the Frye Order entered 9 April 2014. Although the hearing before Judge Wood occurred prior to respondent's death, applying this Court's analysis from the prior appeal in this case, it is clear the Wood Order was not entered until it was signed, dated, and filed with the clerk on 24 October 2014, after the matter abated. *Thompson*, 232 N.C. App. at 228, 754 S.E.2d at 171 (discussing the requirements of N.C. Gen. Stat. § 1A-1, Rule 58). Because the trial court lacked jurisdiction following the abatement of the incompetency proceedings, all orders entered after respondent's death—the Wood Order, the Pegram Order, and the Hinnant Order—are invalid and of no consequence.

Brannon does not argue that the matter did not abate, or that the trial court had jurisdiction, in response to appellant's argument that the trial court lacked jurisdiction to enter orders in the incompetency proceedings following respondent's death. Instead, Brannon asserts that this Court lacks subject matter jurisdiction and the appeal should be dismissed because appellant lacks standing to challenge the Hinnant Order. *See Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) ("Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction.") (internal quotation marks and citation omitted). Brannon contends appellant lacks standing because this Court's 4 February 2014 opinion in the prior

appeal in this case determined that appellant's appointment as guardian of the estate was without legal authority because the incompetency order dated 3 May 2007 was never entered and, therefore, not the law of the case.

Brannon's initial argument, however, ignores the Frye Order that re-entered the incompetency and guardianship orders *nunc pro tunc* 3 May 2007 after this Court's 4 February 2014 opinion. This is because Brannon further asserts that the Frye Order is invalid *ab initio*. In support of his assertion, Brannon alleges the clerk's office acted with bias and in dereliction of its duties to perpetuate fraud. However, Brannon's allegations of fraud were not litigated below and will not be decided for the first time on appeal.

Both parties recognize that the trial court has the inherent authority to correct clerical errors in the record to make it "speak the truth." *State v. Dixon*, 139 N.C. App. 332, 337-38, 533 S.E.2d 297, 302 (2000). Furthermore, both parties include the following statement of the law, verbatim, in their appellate briefs:

> In any case where a judgment has been actually rendered, or decree signed, but not entered on the record, in consequence of accident or mistake or the neglect of the clerk, the court has power to order that the judgment be entered *nunc pro tunc*, provided the fact of its rendition is satisfactorily established and no intervening rights are prejudiced. *State v. Trust Co. v. Toms*, 244 N.C. 645, 650, 94 S.E.2d 806, 810 (1956) (internal citations omitted); *Elmore v. Elmore*, 67 N.C. App. 661, 665, 313 S.E.2d 904, 908 (1984); *In re Watson*, 70 N.C. App. 120, 318 S.E.2d 544 (1984) (describing Clerk's authority under G.S. § 7A-103(9) as a "broad grant" of power which necessarily includes entry of orders *nunc pro tunc*.).

Brannon, however, contends that the error in the case is legal in nature and not clerical because this Court previously held the incompetency order dated 3 May 2007 was not the law of the case and, therefore, the clerk lacked jurisdiction to appoint appellant as guardian of the estate.

While Brannon is correct that we held the clerk lacked jurisdiction to appoint appellant as guardian of the estate, *Thompson*, 232 N.C. App. at 228-29, 754 S.E.2d at 172, that determination was solely the result of this Court's holding that the incompetency order was not the law of the case. But this Court's decision that the incompetency order was not the law of the case was based solely on the fact that the incompetency

order was never filed and, therefore, never properly entered. *Id.* at 228, 754 S.E.2d at 171. We hold that failing to properly enter the incompetency order is a clerical error that the clerk has the authority to correct, *nunc pro tunc*. Thus, the clerk did not err, or act contrary to this Court's 4 February 2014 opinion, when it entered the Frye Order on 9 April 2014. *See In re English*, 83 N.C. App. 359, 363, 350 S.E.2d 379, 382 (1986) ("[T]he [c]lerk is authorized by statute to [o]pen, vacate, modify, set aside, or enter as of a former time, decrees or orders of his court. This broad grant includes the power to correct orders entered erroneously, whenever the [c]lerk's attention is directed to the error by motion or *by other means*.") (internal quotation marks and citations omitted). Once the incompetency order is properly filed and entered, jurisdiction to appoint a guardian certainly follows.

Because the Frye Order re-entered the incompetency and guardianship orders, appellant was guardian of the estate and had standing to appeal the Hinnant Order.

Appellant also raises substantive issues with the Hinnant Order on appeal. Yet, because we have held that the Hinnant Order is invalid because the matter abated upon respondent's death, we need not address the merits of appellant's other arguments. We simply take this opportunity to reiterate that the Wood Order, the Pegram Order, and the Hinnant Order were all entered after the incompetency proceedings became moot and abated. Consequently, the trial court lacked jurisdiction to enter the orders and the orders must be vacated.

III. Conclusion

For the reasons discussed above, all orders entered after the matter abated upon the death of respondent on 2 October 2014 are vacated. The last valid order is the Frye Order, which entered the incompetency and guardianship orders, *nunc pro tunc* 3 May 2007, on 9 April 2014.

VACATED.

Judges STEPHENS and ZACHARY concur.

KANELLOS v. KANELLOS

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

STASIE KANELLOS, PLAINTIFF
v.
IOANNIS JOHN KANELLOS, DEFENDANT

No. COA16-416

Filed 20 December 2016

1. Appeal and Error—interlocutory orders and appeals—final child custody and visitation order

Plaintiff's appeal from an interlocutory child custody order was immediately appealable under N.C.G.S. § 50-19.1. The child custody order was permanent since all issues relating to child custody and visitation had been resolved.

2. Child Custody and Support—order compelling mother to live in specific county and house—abuse of discretion

The trial court abused its discretion in a child custody case by requiring plaintiff mother to relocate to the former marital residence in Union County. The order was vacated to the extent it purported to compel plaintiff to reside in a specific county and house, because those matters fell outside the scope of authority granted to the district court in a child custody action.

Appeal by Plaintiff from order entered 2 February 2016 by Judge Joseph Williams in Union County District Court. Heard in the Court of Appeals 4 October 2016.

J. Clark Fischer for Plaintiff.

John T. Burns for Defendant.

STEPHENS, Judge.

Plaintiff appeals from an interlocutory order making an initial permanent child custody determination, contending that the district court erred in ordering Plaintiff and the parties' children to move back to the county where the parties lived before their separation, and to reside there in the former marital residence. We vacate the challenged order to the extent it purports to compel Plaintiff to reside in a specific county and house, because those matters fall outside the scope of authority granted to the district court in a child custody action.

Factual and Procedural Background

On 1 July 2014, Plaintiff Stasie Kanellos filed a complaint for child custody, child support, postseparation support, alimony, equitable distribution, and attorney's fees against Defendant Ioannis "John" Kanellos. The parties were married on 27 March 2007, and the union produced two children, a boy and a girl. On 25 June 2014, John moved out of the residence. The child custody matter came on for hearing on 23 September 2015, in Union County District Court, the Honorable Joseph Williams, Judge presiding. On 2 February 2016, the district court entered its child custody order.

Before the marriage, John owned a restaurant in Monroe and a house located at 8220 Sunset Hill Road in Waxhaw. Both towns are located in Union County. Following their marriage in May 2007, the parties resided in the Sunset Hill Road residence. Following the birth of her children, Stasie did not work outside of the home, and, although Stasie's mother would travel from her home in Lewisville to assist with child care, attend doctor's appointments, and clean the home, Stasie provided "90% of the child care for the two children." The evidence indicated that a frequent daily routine was for John to arrive home after work, take a short nap, spend one hour with the children, and then leave to go work out at the gym. Stasie also regularly took the children to Lewisville for several days at a time. During the course of the marriage, John was discovered to be having an extra-marital relationship, and, after first trying to repair the marriage though counseling, Stasie asked John to leave the marital residence. The parties agreed that John could spend time with the children on Wednesdays and alternating weekends, Fridays to Sundays. Still, the parties' relationship was strained: Stasie texted John that "the kids do not give a sh*t about you and are dead to you," told John that he did not deserve the kids, and told the eldest child that his father did not want to talk to him and that John was not his father. At the time of the 23 September 2015 hearing, Stasie and the children lived with Stasie's mother in Lewisville, the children were enrolled in school there, and Stasie had obtained employment in nearby Winston-Salem. Prior to relocating to Lewisville, Stasie had discussed the move with John, who objected. John asked Stasie to allow the children to stay with him every other week during the summer, but Stasie refused. Stasie also rejected John's request for additional visitation time for beach weekends. At some point after the parties' separation, John also relocated, moving from Waxhaw, in Union County, to Charlotte, in Mecklenburg County.[1]

1. At the hearing, John testified that he and the children would live in the former marital residence if he gained primary custody, but in his brief to this Court, John's

John testified that the three-hour travel time to the Lewisville area made it difficult for John to attend his son's 8:30 a.m. Saturday soccer games.

In its 2 February 2016 order, the district court concluded that both parties were fit and proper persons to have custody of the children, and thus, awarded the parties joint legal custody, with Stasie having primary physical custody and John enjoying visitation on alternating weekends. The court further determined that it was in the best interest of the children that they reside in Union County. Accordingly, the court ordered that Stasie and the children move back to Union County and live in the former marital residence, and that John continue to pay the mortgage and utilities for the home. From the custody order, Stasie appeals, arguing that the trial court abused its discretion by requiring that she relocate to the former marital residence in Union County. Stasie emphasizes that, at the time of the custody hearing, neither she nor John had resided in Union County for over a year, and contends that, where the children were settled in Forsyth County, the move would be highly disruptive to them.

Grounds for Appellate Review

[1] Initially, we must consider whether this interlocutory appeal is properly before us. Our review of the record in this matter and pertinent case law indicates that the 2 February 2016 order from which Stasie appeals is a permanent or "final" order as to child custody, and, thus, immediately appealable under our General Statutes.

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (citation omitted), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). "Generally, there is no right to appeal from an interlocutory order." *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002) (citations omitted). However, in 2013, our General Assembly enacted section 50-19.1, which provides:

> *Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for* absolute divorce, divorce from bed and board, *child custody*, child support, alimony, or equitable distribution *if the order or judgment*

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appellate counsel states that John lived with his own parents in Charlotte at the time of the hearing.

> *would otherwise be a final order or judgment within the meaning of* [*section*] *1A-1, Rule 54(b), but for the other pending claims in the same action.*

N.C. Gen. Stat. § 50-19.1 (2015). In turn, under Rule 54(b) of our Rules of Civil Procedure, "[w]hen more than one claim for relief is presented in an action, . . . the court may enter a final judgment as to one or more but fewer than all of the claims . . . only if there is no just reason for delay and it is so determined in the judgment." N.C. Gen. Stat. § 1A-1, Rule 54(b) (2015). A judgment with a Rule 54(b) certification from the trial court is then immediately appealable. *Id.* The initial question for this Court is thus whether the order from which Stasie appeals is a final order as to child custody.

> In one sense, all child custody orders are temporary: they are subject to modification, and they terminate once the child reaches the age of majority. Yet a distinction is drawn in our statutes and in our case law between temporary or interim custody orders and permanent or final custody orders.
>
> A permanent custody order establishes a party's present right to custody of a child and that party's right to retain custody indefinitely. Permanent custody orders arise in one of two ways. If the necessary parties have entered into an agreement for permanent custody, and the trial court enters a consent decree which contains that agreement, the consent decree is a permanent custody order. In all other cases, permanent custody orders are those orders that resolve a contested claim for permanent custody of a child by granting permanent custody to one of the parties. They are issued after a hearing of which all parties so entitled are notified and at which all parties so entitled are given an opportunity to be heard.
>
> In contrast, temporary custody orders establish a party's right to custody of a child pending the resolution of a claim for permanent custody—that is, pending the issuance of a permanent custody order.

Regan v. Smith, 131 N.C. App. 851, 852-53, 509 S.E.2d 452, 454 (1998) (citations and internal quotation marks omitted).

"There is no absolute test for determining whether a custody order is temporary or final. A temporary order is not designed to remain in

effect for extensive periods of time or indefinitely." *Miller v. Miller*, 201 N.C. App. 577, 579, 686 S.E.2d 909, 911 (2009) (citations, internal quotation marks, and ellipses omitted). Generally, a child custody "order is temporary if either (1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003) (citations omitted). "If the order does not meet any of these criteria, it is permanent." *Peters v. Pennington*, 210 N.C. App. 1, 14, 707 S.E.2d 724, 734 (2011) (citation omitted). Further, it is the satisfaction of these criteria, or lack thereof, and not any designation by a district court of an order as temporary or permanent which controls. *See Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000); *see also Woodring v. Woodring*, 227 N.C. App 638, 643, 745 S.E.2d 13, 18 (2013) ("A trial court's designation of an order as 'temporary' or 'permanent' is neither dispositive nor binding on an appellate court.") (citation omitted).

Where this Court has determined that a child custody order is temporary because it did not "determine all the issues[,]" the remaining, undecided issues were child custody matters such as legal custody, ongoing holiday schedules, and the scope of visitation for the noncustodial parent. *See*, *e.g.*, *id.* at 644, 745 S.E.2d at 18 ("[The] order [appealed from] did not address [the] father's ongoing visitation, but rather provided [the] father with only three specific instances of *visitation* in 2010. Nor did the . . . order explicitly address *legal custody*. Thus, the order [did] not determine all the issues and was a temporary order." (citation and internal quotation marks omitted; emphasis added); *Sood v. Sood*, 222 N.C. App. 807, 809, 732 S.E.2d 603, 606 (holding a custody order was temporary and did not determine all the issues because "it did not resolve *holidays* for the indefinite future") (emphasis added), *cert. denied*, *disc. review denied*, *and appeal dismissed*, 366 N.C. 417, 735 S.E.2d 336 (2012); *Simmons v. Arriola*, 160 N.C. App. 671, 675, 586 S.E.2d 809, 811 (2003) ("The initial order in the present case does not specify *visitation* periods and, therefore, is incomplete and cannot be considered final." (emphasis added)); *see also Anzures v. Walbecq*, 781 S.E.2d 531 (2016) (unpublished), *available at* 2016 N.C. App. LEXIS 26 (holding a custody order was temporary because it did not resolve holiday schedules indefinitely and covered visitation only for a brief period). On the other hand, the Court has concluded that a custody order was permanent if all issues relating to child custody had been resolved, even if other matters remained pending. *See*, *e.g.*, *Brewer*, 139 N.C. App. at 228, 533 S.E.2d at 546 (holding that an order was permanent because, *inter alia*, "the

court resolved *every issue dealing with custody*"). Likewise, the plain language of section 50-19.1 permits immediate appeal where an order "would otherwise be a final order . . . , but for the other pending claims in the same action." N.C. Gen. Stat. § 50-19.1. Thus, the clear intent of our General Assembly in enacting the statute was to permit immediate appeal of, *inter alia*, permanent child custody orders *despite the existence of still-pending claims* in the matter not related to custody.

The order here resolves *all issues related to child custody*, providing for the parties to share joint custody, with primary physical custody to Stasie, and sets out a detailed schedule for visitation and holidays that covers the indefinite future:

> A. The parties are awarded Joint Custody and [the children] shall reside primarily with the Plaintiff/Mother.
>
> B. The Defendant/Father shall have visitation on alternating weekends from Friday when school is out until Monday when school takes back in and on each Wednesday evening from the time school let[s] out until 8:00pm.
>
> C. The Defendant/Father shall have four non-consecutive weeks summer visitation and select his weeks by February 1 of each year.
>
> D. The Defendant/Father is to have the children in odd numbered years from 2pm Christmas [D]ay to 2pm New Year's [D]ay; the Plaintiff/Mother is to have the children for a like time period in the odd numbered years and Defendant/Father shall have the children in even numbered years from the time school is out for the Christmas break until 2pm Christmas Day; the Plaintiff/Mother is to have the children for a like period of time in the odd numbered years.
>
> E. The Defendant/Father is to have the children on Union County Spring/Easter school break during even numbered years and odd years the fall break for [the] Union County school system.
>
> F. The children are to be with the Plaintiff/Mother Thanksgiving from [the] time school is out until 3pm Friday and the remainder of the Thanksgiving weekend with the Defendant/Father.

> G. The Defendant/Father shall in addition have the following:
>
> Visitation in odd years
>
> 1. Martin Luther King, Jr. Holiday from Friday-Monday; to begin at school recess on Friday and continue until 6pm on Monday.
>
> 2. Memorial Day from school recess on Friday before holiday until 6pm of Memorial Day.
>
> 3. Independence Day/4th of July school recess (if school is in session) until 6pm of night before school is back in session[.]
>
> 4. Minor child's birthday from school recess (if school is in session) until 8:30pm.
>
> Visitation in even years
>
> 1. Easter break from school recess until 6pm of the night before school resumes.
>
> 2. Labor Day from school recess until 6pm the night before school resumes.
>
> H. Mother's Day to the Mother in all years from 10am until 6pm to supersede any other Visitation. Father's Day to the Father in all years from 10am until 6pm to supersede any other Visitation.

Because the order resolves *all issues regarding custody and visitation*, was not "entered without prejudice to either party[,]" and does not "state[] a clear and specific reconvening time[,]" *see Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677, it is a permanent order and therefore immediately appealable under section 50-19.1. Accordingly, Stasie's appeal is properly before this Court on the merits.

Merits of Stasie's Appeal

[2] On appeal, Stasie argues that the district "court abused its discretion by requiring [Stasie] to relocate to the former marital residence in Union County, when the undisputed evidence was that neither party had lived in Union County for over a year and the move would be highly disruptive to the children who were settled in Forsyth County with [Stasie] and her family." We agree that the portion of the district court's order purporting

to order Stasie to reside in Union County in the former marital residence must be set aside.

Following the custody, visitation, and holiday provisions quoted above, the court ordered:

> I. Until the remaining issues are heard on the merits, the children are to live in Union County, North Carolina and the Defendant/Father is to continue to pay the mortgage and utilities at the former marital residence. The Plaintiff shall return to live with the children on or before March 1, 2016.

By its plain language, this portion of the order purports to order Stasie and the children to move back to Union County from their current home in Forsyth County.[2] Although the issue of whether our district courts can order a party in a child custody proceeding to relocate to a specific location is a matter of first impression in this State, the pertinent statutory and case law leads us to conclude that the district court here acted in excess of its powers. Accordingly, we vacate paragraph I of the order.

Resolution of this appeal requires disentanglement of two closely related, yet distinct matters: the authority of a court in a child custody case (1) to award primary custody of a child and order visitation and (2) to control where a parent involved in a child custody matter may live. While the former is within the court's discretion, the latter is beyond the scope of the district court's authority.

Chapter 50 of our General Statutes provides: "An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a) (2015). In fulfilling this directive, a district court retains significant discretion:

> The statute expresses the policy of the State that the best interest and welfare of the child is the paramount and controlling factor to guide the judge in determining the custody of a child. . . .
>
> In upholding the order of the [district] court we recognize that custody cases generally involve difficult decisions.

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2. As noted *supra*, at the time the order was entered, no party lived in Union County: the children resided with Stasie in Forsyth County and John resided in Mecklenburg County.

> The [district court] judge has the opportunity to see the parties in person and to hear the witnesses. It is mandatory, in such a situation, that the [district court] judge be given a wide discretion in making his determination, and it is clear that his decision ought not to be upset on appeal absent a clear showing of abuse of discretion.

In re Stancil, 10 N.C. App. 545, 548, 179 S.E.2d 844, 847 (1971) (citation and internal quotation marks omitted).

However, while

> [i]t is well established that [district court] judges are vested with wide discretion in determining matters concerning child custody[,] . . . . [t]he . . . judge's discretion . . . can extend no further than the bounds of the authority vested in the . . . judge. *In proceedings involving the custody . . . of a minor child, the . . . judge is authorized to determine the party or parties to whom custody of the child shall be awarded, whether and to what extent a noncustodial person shall be allowed visitation privileges, . . . whether an order for child custody or support shall be modified or vacated based on a change in circumstances, and certain other related matters*. In addition, . . . judges have authority to enforce orders concerning child custody . . . by the methods set forth in [our General Statutes].

Appert v. Appert, 80 N.C. App. 27, 34, 341 S.E.2d 342, 346 (1986) (citations omitted; emphasis added) (holding that "trial judges in this State do not have authority to condition the receipt or payment of child support upon compliance with court-ordered visitation"). In other words, in child custody cases, the General Assembly has granted our district courts broad discretion and authority to (1) award custody of a child (and enforce such awards), (2) order visitation for the noncustodial parent,[3] and (3) resolve "certain other related matters." *Id.*; *see also* N.C. Gen. Stat. § 50-13.2(b) ("Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child.").

Here, the district court determined, in its discretion, that the best interest of the children was served by awarding primary physical

3. Chapter 50 also contains provisions for custody and visitation for nonparent parties, such as grandparents, in certain circumstances, but because those provisions are neither relevant nor informative in this matter, we do not discuss them herein.

custody to Stasie, with significant visitation provided to John. That decision is not contested by either party. The question before this Court is whether ordering Stasie and the children to relocate to Union County is the type of "related matter" or "term" that forms the third major prong of a district court's authority in resolving a child custody dispute.

Certainly, child custody orders may include directives that facilitate an ordered custody and visitation plan. *See*, *e.g.*, *Meadows v. Meadows*, __ N.C. App. __, __, 782 S.E.2d 561, 569 (2016) (approving term that a parent's visits be supervised and take place at a specific location to facilitate that supervision); *Burger v. Smith*, __ N.C. App. __, __, 776 S.E.2d 886, 894 (2015) (approving a trial court's ruling that, during periods of scheduled visitation, the noncustodial parent could travel with the child to Malawi where he worked as a missionary); *Gerhauser v. Van Bourgondien*, 238 N.C. App. 275, 277, 767 S.E.2d 378, 381 (2014) (noting in passing that a custody order "included provisions regarding payment for the children's travel expenses for visitation"); *Anderson v. Lackey*, 166 N.C. App. 279, 603 S.E.2d 168 (2004) (unpublished), *available at* 2004 N.C. App. LEXIS 1711 (reviewing an order of contempt where a custodial parent allegedly violated terms of a custody order requiring, *inter alia*, that she deliver the child to the other parent for visits and discuss those visits in a positive manner with the child). Further, district court judges regularly resolve disputes that directly implicate a child's relationship with each parent or academic and other activities. *See*, *e.g.*, *Cunningham v. Cunningham*, 171 N.C. App. 550, 561, 615 S.E.2d 675, 683 (2005) (approving a restriction barring the mother from using a specific babysitter who had been "interfering" with the children's relationship with their father); *Elrod v. Elrod*, 125 N.C. App. 407, 411, 481 S.E.2d 108, 111 (1997) (holding that a district "court in a child custody proceeding is not precluded from prohibiting in some circumstances, as a condition of the custody grant, the home schooling of the children") (citations omitted); *MacLagan v. Klein*, 123 N.C. App. 557, 565, 473 S.E.2d 778, 787 (1996) (affirming the district court's ruling regarding disputes over a child's religious training), *disc. review denied*, 345 N.C. 343, 483 S.E.2d 170 (1997). However, we have found no case in this State wherein a district court judge purported to order a custodial parent and the minor children to move from one county to another and to live in a specific house.

To be sure, our courts regularly consider the relocation (or proposed relocation) of custodial parents when deciding whether to modify existing child custody orders.[4]

4. Modification of child custody awards is a two-step process. "A court order for custody of a minor child may be modified. . . . [if] the moving party shows there has been a

> In these . . . instances the question arises whether the person having custody of a child or to whom custody would otherwise be granted is to be tied down permanently to the state which awards custody. . . . The . . . court must make a comparison between the two applicants considering all factors that indicate which of the two is best-fitted to give the child the home-life, care, and supervision that will be most conducive to its well-being.
>
> In evaluating the best interests of a child in a proposed relocation, the . . . court may appropriately consider several factors including: The advantages of the relocation in terms of its capacity to improve the life of the child; the motives of the custodial parent in seeking the move; the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina; the integrity of the noncustodial parent in resisting the relocation; and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent.

Evans v. Evans, 138 N.C. App. 135, 141-42, 530 S.E.2d 576, 580 (2000) (citation and internal quotation marks omitted). As reflected in this language from *Evans*, where a custodial parent has moved or plans to do so and the noncustodial parent objects, our district courts have the authority to consider the factors quoted above and make an award of custody accordingly. That is, a court may determine either (1) that custody should remain with a parent who has relocated or (2) that it is in the child's best interest to switch custody to the parent who has not relocated. *See, e.g.*, *Green v. Kelischek*, 234 N.C. App. 1, 17, 759 S.E.2d 106, 116 (2014) (finding no abuse of discretion in a district "court's decision to modify the existing custody order such that [the former noncustodial parent] is entitled to school year custody of [the child] if [the former custodial parent] moves to Oregon"); *O'Connor v. Zelinske*, 193 N.C. App. 683, 691, 668 S.E.2d 615, 620 (2008) (finding no abuse of discretion in declining to change primary custody while allowing the custodial parent "the option to relocate to Minnesota. . . . [where] the advantages to

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substantial change in circumstances affecting the welfare of the minor child. . . . Once . . . a substantial change in circumstances [is shown] . . ., the . . . court must determine whether a change in custody is in the best interest of the child." *Browning v. Helff*, 136 N.C. App. 420, 423-24, 524 S.E.2d 95, 98 (2000) (citations, internal quotation marks, some ellipses, and some brackets omitted).

the children outweigh the disadvantages"); *Cunningham*, 171 N.C. App. at 561-62, 615 S.E.2d at 684 (finding no abuse of discretion in declining to change primary custody where the custodial parent planned a possible move out of state in the future). Thus, if a court with jurisdiction in a child custody matter believes that a parent's relocation is not in the child's best interest, its recourse is to award primary custody to the other parent, as did the court in *Green*. 234 N.C. App. at 17, 759 S.E.2d at 116. However, district courts do not have authority to order that *a parent relocate* (or refrain from doing so).

Our district courts may consider *where each parent lives*, along with any other pertinent circumstances, in determining which parent should be awarded primary custody to facilitate the child's best interest. *See Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974) (noting that the district court "judge's concern is to place the child in an environment which will best promote the full development of his physical, mental, moral and spiritual faculties") (citations omitted). Put simply, a district court must consider the pros and cons of ordering primary custody with each parent, contemplating the two options *as they exist*, and then choose which is in the child's best interest. *See Stanback v. Stanback*, 266 N.C. 72, 76, 145 S.E.2d 332, 335 (1965) ("A judgment awarding custody is *based upon the conditions found to exist at the time it is entered.*") (emphasis added). However, a court cannot order a parent to relocate in order to create a "new and improved" third option, even if the district court sincerely believes it would be in the child's best interest.

In sum, the district court here was free to make findings of fact regarding the relative benefits to the children of living with John in Mecklenburg County or with Stasie in Forsyth County, and to rely on those factual findings in deciding which parent should have primary physical custody. If the court believed Stasie's residence in Forsyth County rendered her the less beneficial choice to have primary custody of the children, it had the discretion to award primary custody to John. However, the court acted outside the scope of its authority in purporting to compel Stasie and the children to move back to Union County and reside in the former marital residence. Accordingly, we vacate paragraph I of the order.

VACATED IN PART.

Judge CALABRIA concurs.

Judge BRYANT concurs in result only.

LOPP v. ANDERSON

[251 N.C. App. 161 (2016)]

FREDERICK SAMUEL LOPP, Plaintiff
v.
JOEL ANDERSON, Individually and in his Official Capacity; KENT WINSTEAD, SHERIFF OF FRANKLIN COUNTY, in his Official Capacity; FRANKLIN COUNTY; GARRETT STANLEY, Individually and in his Official Capacity; ANDY CASTANEDA, Individually and in his Official Capacity; SHERRI BRINKLEY, Individually and in her Official Capacity; LOUISBURG POLICE DEPARTMENT; and THE TOWN OF LOUISBURG, Defendants

Nos. COA16-111 and COA16-112

Filed 20 December 2016

1. Appeal and Error—preservation of issues—failure to argue—sovereign immunity

Because plaintiffs failed to properly argue that relevant insurance policies served to waive sovereign immunity with respect to defendants Franklin County, Town of Louisburg, Louisburg Police Department, or defendants Joel Anderson, Garrett Stanly, Andy Castaneda, Sherri Brinkley, and Kent Winstead, acting in their official capacities, any such arguments were abandoned.

2. Appeal and Error—preservation of issues—failure to argue

Plaintiffs abandoned additional arguments including that Franklin County can be held liable for the acts of its elected sheriff or his deputies and any issues regarding defendant Louisburg Police Department based on failure to argue.

3. Police Officers—individual capacity claims—malice—public official immunity

The trial court erred by granting summary judgment in favor of defendant officers Garrett Stanly, Andy Castaneda, Sherri Brinkley, and Joel Anderson, in their individual capacities. The evidence raised an issue of material fact concerning whether defendant officers acted with malice in regard to Roddie's claims. However, the trial court did not err by granting summary judgment in favor of defendant officers Brinkley and Castaneda, in their individual capacities, based upon public official immunity, for Frederick's claims.

4. Police Officers—individual capacity claims—assault—battery—false imprisonment—malicious prosecution—sufficiency of evidence

The trial court erred by granting summary judgment in favor of all defendant officers. There was sufficient evidence, when viewed in the light most favorable to plaintiffs, to survive defendants' motions

for summary judgment on the individual capacity claims of assault and battery, false imprisonment, and malicious prosecution against all defendant officers in Roddie's action, and against Officer Stanly and Deputy Anderson in Frederick's action.

Appeal by Plaintiffs from orders entered 3 November 2015 by Judge Robert H. Hobgood in Superior Court, Franklin County. Heard in the Court of Appeals 22 August 2016.

Stainback, Satterwhite & Zollicoffer, PLLC, by Paul J. Stainback, for Plaintiffs-Appellants.

Womble Carlyle Sandridge & Rice, LLP, by Christopher J. Geis, for Defendants-Appellees Joel Anderson, Sheriff Kent Winstead, and Franklin County.

Pinto Coates Kyre & Bowers, PLLC, by Richard L. Pinto and Andrew G. Pinto, for Defendants-Appellees Garrett Stanley, Andy Castaneda, Sherri Brinkley, Louisburg Police Department, and Town of Louisburg.

McGEE, Chief Judge.

I. *Facts*

The events relevant to this appeal occurred on 28 June 2009. On that date, Roddie McKinley Lopp ("Roddie") lived with his parents, Mary Lopp and Frederick Samuel Lopp ("Frederick") (Frederick together with Roddie, "Plaintiffs") in Louisburg. Roddie had two young children ("the children"), whose mother was Jodie Braddy ("Jodie"). Roddie and Jodie never married, and Jodie subsequently married Doug Braddy ("Doug"). On 28 June 2009, Roddie and Jodie shared custody of the children under the terms of a custody order. Pursuant to this custody order, Roddie was to deliver the children to Jodie by 6:00 p.m. on 28 June 2009. Deviation from established transfer times could only be made by the "mutual consent" of Roddie and Jodie. Roddie contends his attorney spoke with Jodie's attorney prior to 28 June 2009, and an agreement was reached whereby Roddie would keep the children past 28 June 2009 to make up for times when Jodie had kept the children during Roddie's custodial periods. The record includes nothing beyond Roddie's testimony and affidavit supporting the existence of this agreement.

According to Jodie, after Roddie failed to appear by 6:00 p.m. on 28 June 2009, Jodie decided to drive to the Louisburg Police Department for assistance in retrieving the children. Jodie brought the custody order with her, which she showed to police officers. Jodi asked for assistance from the officers because she was worried that Roddie "could possibly get violent because [she and Roddie] had had such a physical history." Jodie also informed the officers that Roddie kept firearms in his house. After speaking with the on-duty magistrate, an officer informed Jodie that the Louisburg police would assist her.

Officers Garrett Stanly[1] ("Officer Stanly"), Andy Castaneda ("Officer Castaneda"), and Sherri Brinkley ("Officer Brinkley") were in the parking lot of the police station preparing to leave for Plaintiffs' house when Deputy Joel Anderson ("Deputy Anderson") of the Franklin County Sheriff's Department (Deputy Anderson, along with the above three officers "Defendant Officers"), passed by and agreed to join them. Defendant Officers headed to Plaintiffs' house, and Jodie and Doug followed in their own automobile.

The following is Roddie's account of the events that occurred at his home on 28 June 2009. Defendant Officers approached Roddie in his yard and "proceeded to confront him and insisted upon the return of the children to Jodi[e.]" Roddie told Defendant Officers that he wanted to call his attorney so his attorney could explain that an agreement had been reached allowing Roddie to keep the children for some extra period of time. According to Roddie's deposition testimony, he told Defendant Officers: " 'Well, I'm going to go in and call . . . my attorney and then get a copy of the consent order and show you.' " Roddie testified: "There was [sic] no words after that. All four of them took me down, beat me, kicked me, assaulted me." Roddie testified that he had done nothing to provoke Defendant Officers, and that all four Defendant Officers "assaulted" him. Roddie testified that all four Defendant Officers punched and kicked him as he was lying on the ground and already handcuffed. Roddie further testified that he believed Deputy Anderson attempted to shock him with a stun gun as Roddie was "getting into the [police] car[,]" even though he was not resisting. According to Roddie, Deputy Anderson placed his stun gun on him, and he felt a small "jolt," but "not like what

1. Although his name is written as "Garrett Stanley" on the complaint, orders granting summary judgment, and on notices of appeal, in his affidavit Officer Stanly struck out the spelling of "Stanley," and hand-wrote "Stanly," underneath his signature. We will use the spelling "Stanly" throughout the body of this opinion.

I'm used to seeing on TV[.]" Roddie believed the stun gun didn't "work[] completely right."

Concerning the treatment of Frederick, Roddie testified that, after he had been helped off the ground, he "looked back and [Frederick] was down" on the ground. Roddie testified that Officer Stanly and Deputy Anderson "were roughing [Frederick] up and cuffing him." Roddie further testified that by "roughing up" he meant Officer Stanly and Deputy Anderson were punching Frederick in the face and upper body. In an affidavit, Roddie stated:

> [A]s I was led away and taken to the police vehicle I saw my father, Frederick Lopp, who was then 83 years of age, thrown to the ground and assaulted in much the same manner as me, and he [had] to be taken to the hospital later that same night.

In his verified complaint, Frederick alleged that when he "saw his son . . . being wrongfully harmed and assaulted by" Defendant Officers, he asked Defendant Officers if they had a warrant and told Defendant Officers they had no right to be there. Frederick then walked toward Roddie and Defendant Officers, "but [Frederick] was thereafter thrown to the ground by [Defendant Officers]" and "beaten, handcuffed and generally assaulted[.]" Defendants have included in the record testimony and affidavits contradicting Plaintiffs' recitation of the events.

Plaintiffs filed complaints on 22 April 2014 alleging assault and battery, false imprisonment, and malicious prosecution against Defendant Officers, in both their official and individual capacities; and against Defendants Franklin County, the Town of Louisburg, the Louisburg Police Department, and Jerry Jones, as Sheriff of Franklin County, in both his official and individual capacity. By consent order entered 1 June 2015, Jerry Jones was dismissed as a Defendant in this matter, and Kent Winstead was substituted as a Defendant for Jerry Jones, solely in his official capacity as Sheriff of Franklin County. Defendants moved for summary judgment by motions filed 14 September 2015 and 16 September 2015.

Defendants argued that Defendant Officers, acting in their individual capacities, were entitled to public official immunity; and that the municipal Defendants, along with the individual Defendants acting in their official capacities, were protected from suit by governmental immunity. The trial court granted summary judgment in favor of all Defendants by orders entered 3 November 2015. Plaintiffs appeal.

II. *Analysis*

In Plaintiffs' sole arguments on appeal they contend that the trial court erred in allowing Defendants' motions for summary judgment "based upon issues of sovereign immunity and public officer immunity." We agree in part and disagree in part.

"Our standard of review of a trial court's order granting or denying summary judgment is *de novo*. Under a *de novo* review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Bryson v. Coastal Plain League, LLC*, 221 N.C. App. 654, 656, 729 S.E.2d 107, 109 (2012) (citations and quotation marks omitted).

> "On appeal from summary judgment, the applicable standard of review is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." 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 judgment as a matter of law." If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. "[W]e review the record in a light most favorable to the party against whom the order has been entered to determine whether there exists a genuine issue as to any material fact."

Smith v. Harris, 181 N.C. App. 585, 587, 640 S.E.2d 436, 438 (2007) (citations omitted). However, this Court will only consider those arguments properly set forth in an appellant's brief. *Bryson*, 221 N.C. App. at 655, 729 S.E.2d at 108.

A. *Sovereign Immunity*

[1] The trial court granted summary judgment in favor of the municipal Defendants and the individual Defendants in their official capacities based upon sovereign immunity. The trial court based its orders granting summary judgment on the following:[2]

2. The orders granting summary judgment in Roddie's case and Frederick's case are identical in every relevant way, though there are some minor wording differences.

> 1. Defendants Joel Anderson, Sheriff Kent Winstead, Garrett Stanley, Andy Castaneda, and Sherri a/k/a Shari Brinkley, in their official capacities, by reason of sovereign and/or governmental immunity, because there was no liability insurance providing indemnity coverage because the only policy of insurance for Franklin County and the only policy of insurance for the Town of Louisburg for the time in question did not provide liability coverage for the alleged actions of Defendants Anderson, Winstead, Stanley, Castaneda, and Brinkley against Plaintiff.
>
> 2. Franklin County and the Town of Louisburg are entitled to sovereign and/or governmental immunity because the only policy of insurance for Franklin County and the only policy of insurance for the Town of Louisburg for the time in question preserves sovereign and/or governmental immunity for Plaintiff's claims, and, additionally, under North Carolina Law, a county may not be liable for the acts or omissions of a sheriff or his deputies.
>
> 3. Defendants Joel Anderson, Garrett Stanley, Andy Castaneda, and Sherri a/k/a Shari Brinkley, in their individual capacities, are entitled to public officer immunity in that said defendants did not act with malice, were not corrupt, and were not acting outside of or beyond the scope of their duties. Furthermore, Defendants Stanley, Castaneda, and Brinkley conducted the arrest of Plaintiff based on probable cause for acts committed in their presence which would induce a reasonable police officer to arrest Plaintiff. Additionally, because there was probable cause for the arrest of Plaintiff, none of the Plaintiff's North Carolina State Constitutional Rights have been violated as Defendants Anderson, Stanley, Castaneda, and Brinkley used the minimum amount of force necessary to safely arrest Plaintiff.
>
> 4. Defendant Louisburg Police Department is not a public entity that can be sued.

Concerning the issue of sovereign immunity, Plaintiffs make identical arguments. Their entire arguments are as follows:

> The Defendants have all asserted governmental immunity, and contend that they are entitled to immunity unless it is waived through the purchase of insurance. It is clear

> that both Franklin County and the City of Louisburg had acquired insurance, but the Defendants all contend that the acquisition of this insurance purportedly did not waive as a defense the defense of governmental immunity, and therefore the County and City are still entitled to that defense. That is absurd, in that it is a fallacy and contrary to public policy. Why would you purchase insurance which had a provision in it that it would allow the County to not waive governmental immunity as a defense? If that is the case, the County and City are spending money for feckless reasons.

Plaintiffs' arguments consist of declaratory statements unsupported by any citation to authority. Plaintiffs do not discuss the provisions of the insurance policies and, subsequently, Plaintiffs also fail to make any argument concerning the specific provisions of the policies that they contend served to waive sovereign immunity. Plaintiffs further fail to cite to any authority in support of any contention that the relevant insurance policies served to waive sovereign immunity. Plaintiffs' arguments violate Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, and these arguments are therefore abandoned. *McKinnon v. CV Indus., Inc.*, 228 N.C. App. 190, 196, 745 S.E.2d 343, 348 (2013) (citation omitted) ("Although plaintiff makes a passing reference to these statutes in his brief, he makes no specific argument that the trial court erred in denying his motion for attorney's fees under them. We therefore deem these issues abandoned. N.C.R. App. P. 28(b)(6) ('Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.')"); *N.C. Farm Bureau Mut. Ins. Co. v. Smith*, 227 N.C. App. 288, 292, 743 S.E.2d 647, 649 (2013) ("[Appellant] fail[s] to cite any controlling authority in support of this contention or otherwise explain why it has merit, and we accordingly deem the issue abandoned. *See* N.C.R. App. P. 28(b)(6) (2013) (providing that an appellant's argument 'shall contain citations of the authorities upon which the appellant relies').").

Because Plaintiffs fail to properly argue that relevant insurance policies served to waive sovereign immunity with respect to Defendants Franklin County, Town of Louisburg, Louisburg Police Department, or Defendants Joel Anderson, Garrett Stanly, Andy Castaneda, Sherri Brinkley, and Kent Winstead, acting in their official capacities, any such arguments are abandoned. *McKinnon*, 228 N.C. App. at 196, 745 S.E.2d at 348. We affirm the grant of summary judgment in favor of the municipal Defendants, and the individual Defendants in their official capacities.

Because Plaintiffs agreed, by consent order, to pursue Defendant Kent Winstead in his official capacity only, no claims remain against Defendant Kent Winstead.

B. *Additional Abandoned Arguments*

[2] Further, Plaintiffs do not argue on appeal that Franklin County can be held liable for the acts of its elected Sheriff or his deputies, so any such arguments are also abandoned. *Id.* In addition, Plaintiffs make no arguments in their briefs concerning Defendant Louisburg Police Department. Plaintiffs have therefore abandoned any arguments that the trial court erred in granting summary judgment in favor of Defendant Louisburg Police Department. *Id.*

C. *Public Official Immunity*

[3] Plaintiffs also contend the trial court erred in granting summary judgment in favor of Defendant Officers Garrett Stanly, Andy Castaneda, Sherri Brinkley, and Joel Anderson, in their individual capacities.

Defendants contend that, because the individual Defendants were public officials conducting their public duties, their actions were protected by public official immunity. Police officers engaged in performing their duties are public officials for the purposes of public official immunity: "a police officer is a public official who enjoys absolute immunity from personal liability for discretionary acts done without corruption or malice." *Campbell v. Anderson*, 156 N.C. App. 371, 376, 576 S.E.2d 726, 730 (2003) (citations omitted).

> The North Carolina rule is that a public official engaged in the performance of governmental duties involving the exercise of judgment and discretion may not be held liable unless it is alleged and proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties.

Showalter v. N.C. Dep't of Crime Control & Pub. Safety, 183 N.C. App. 132, 136, 643 S.E.2d 649, 652 (2007) (citation omitted). Plaintiffs have specifically alleged that Defendant Officers acted with malice.

> "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." As the moving party, defendants had "the burden of showing that no material issues of fact

> exist, such as by demonstrating through discovery that the opposing party cannot produce evidence to support an essential element of his claim or defense."

Id. (citations omitted).

1. *Roddie McKinley Lopp*

As discussed in greater detail above, Roddie testified and averred that all four Defendant Officers participated in taking him to the ground and punching and kicking him even though he was not resisting. Roddie further testified he was treated in that manner simply because he stated he was going to call his attorney to help clear up a misunderstanding about the custody agreement and his right to keep the children on 28 June 2009. There are multiple accounts from other witnesses who contradict Roddie's description of the events surrounding his arrest, but we must view the evidence in the light most favorable to Plaintiffs, since they are the non-moving parties. *Smith*, 181 N.C. App. at 587, 640 S.E.2d at 438. This Court previously addressed a similar fact situation in *Showalter*, where this Court held that denial of the police officer defendant, Trooper Emmons', motion for summary judgment was proper based upon the following evidence:

> In support of their motion for summary judgment, defendants offered the deposition testimony of plaintiff and his wife, and the affidavit of Trooper Emmons. Although Trooper Emmons averred in his affidavit that he did not act maliciously or with reckless indifference toward plaintiff, and that all of his actions were "based on probable cause," plaintiff testified in his deposition that the officer was angry, was "very loud and spitting," and that when he opened his car door in response to the officer's command, Trooper Emmons "maced" him, with some of the spray going inside plaintiff's car and contacting his wife. Plaintiff also testified that he told the officer that he needed his crutches, but the officer jerked him out of the car and handcuffed him, notwithstanding plaintiff's wife telling the trooper that plaintiff was disabled. The court must consider the evidence "in a light most favorable to the nonmoving party," and "[a]ll inferences of fact must be drawn against the movant and in favor of the nonmovant." When so considered, the foregoing evidentiary materials are sufficient to create a genuine issue of fact, material

> to the issue of immunity, as to whether Trooper Emmons actions were done with malice.

Showalter, 183 N.C. App. at 136, 643 S.E.2d at 652 (citations omitted).

In the present case, Roddie's deposition testimony was as follows: Defendant Officers came to his home and informed him that they were going to take his children from him and arrest him. Roddie tried to explain that his attorney and Jodie's attorney had reached an agreement whereby Roddie would keep the children for a few days beyond 28 June 2009, to make up for extra time Jodie had kept the children in the past. Defendant Officers were not interested in listening to Roddie, so Roddie said he was going to go inside and call his attorney so his attorney could explain the situation to Defendant Officers. At that moment, according to Roddie: "They took me down and assaulted me." Roddie testified that all four Defendant Officers "took him down" and then punched and kicked him in front of his children. Roddie was handcuffed and placed in the back of a police vehicle. Roddie testified that a stun gun was deployed for no reason while Defendant Officers were attempting to place him in the vehicle, but he did not think the stun gun functioned properly.

Although there is both affidavit and deposition testimony challenging Roddie's recitation of events, we must look at the evidence in the light most favorable to Roddie, as the non-moving party. We hold that, similar to the facts in Showalter, the record evidence raises an issue of material fact concerning whether Defendant Officers acted with malice. *See also Thompson v. Town of Dallas*, 142 N.C. App. 651, 656–57, 543 S.E.2d 901, 905–06 (2001) (unnecessarily rough treatment of the plaintiff by defendant officer, as forecast in the plaintiff's complaint, sufficient to survive summary judgment even though defendant forecast evidence to the contrary). Therefore, relevant to Roddie's complaint, it was error for the trial court to grant Defendants' motion for summary judgment in favor of Defendant Officers, acting in their individual capacities, based upon public official immunity.[3]

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3. We also note that much of Roddie's argument in his brief before this court focuses on his contention that the officers had no legal authority to assist Jodie in retrieving the children according to the custody order, so the officers were acting "outside of and beyond the scope of [their] duties" simply by entering his property to assist Jodie in retrieving the children. The forecast of evidence does not show that the officers were acting outside or beyond the scope of their duties simply by assisting Jodie according to an existing custody order; it shows only that the officers may have used inappropriate force in dealing with Roddie and Frederick.

2. *Frederick Samuel Lopp*

Defendants tried to depose Frederick on two occasions — 15 January 2015 and 8 September 2015. Unfortunately, Frederick, who turned eighty-nine years old on 26 June 2015, was unable to answer coherently the questions asked of him on either occasion. Therefore, the only evidence in support of Frederick's claims consists of his verified complaint, and the deposition testimony and affidavit of Roddie.

Although Frederick could not participate in his attempted depositions, Frederick's verified complaint alleges that he was "thrown to the ground[,]" then "beaten, handcuffed and generally assaulted[.]" Frederick's complaint alleges that he suffered "severe injuries" including "lacerations to his face, head, back, knees, legs and wrists" that required medical attention. Further, Roddie's testimony and affidavit include testimony that Roddie witnessed Frederick being assaulted by Deputy Anderson and Officer Stanly and, more specifically, that these two officers were punching Frederick in the head and upper body as he was subdued on the ground.

For the same reasons discussed above concerning Roddie, we hold that, because there is a material conflict in the evidence asserted by Plaintiffs and Defendants, summary judgment in favor of Deputy Anderson and Officer Stanly based upon public official immunity relating to Frederick's complaint, was error. We further hold, however, that Frederick failed to present the trial court sufficient facts to support a finding of malice on the part of Officers Brinkley and Castaneda. Roddie's deposition testimony only implicated Deputy Anderson and Officer Stanly in the alleged mistreatment of Frederick, and Frederick was unable to give any testimony at all. We affirm the trial court's grant of summary judgment in favor of Officers Brinkley and Castaneda, in their individual capacities, based upon public official immunity, for Frederick's claims.

D. *Specific Individual Capacity Claims*

[4] We must now consider whether summary judgment should have been granted in favor of the individual Defendants for any of the specific claims Plaintiffs filed against them. *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (citation omitted) ("If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered."). We reiterate that none

of the following analysis applies to Officers Castaneda or Brinkley for Frederick's individual capacity claims because, as held above, they were protected by public official immunity from Frederick's individual capacity claims.

1. *Assault and Battery*

A law enforcement officer may be held liable for assault and battery in the course of an arrest if he or she uses excessive force in the course of that arrest.

> [A] civil action for damages for assault and battery is available at common law against one who, for the accomplishment of a legitimate purpose, such as justifiable arrest, uses force which is excessive under the given circumstances.
>
> Under the common law, a law enforcement officer has the right, in making an arrest and securing control of an offender, to use only such force as may be reasonably necessary to overcome any resistance and properly discharge his duties. "[H]e may not act maliciously in the wanton abuse of his authority or use unnecessary and excessive force." Although the officer has discretion, within reasonable limits, to judge the degree of force required under the circumstances, "when there is substantial evidence of unusual force, it is for the jury to decide whether the officer acted as a reasonable and prudent person or whether he acted arbitrarily and maliciously." Further, an assault and battery need not necessarily be perpetuated with maliciousness, willfulness or wantonness, and actual physical injury need not be shown in order to recover.

Myrick v. Cooley, 91 N.C. App. 209, 215, 371 S.E.2d 492, 496 (1988) (citations omitted). There are questions of material fact concerning whether Defendant Officers used excessive force, such as punching or kicking Plaintiffs, or deploying a stun gun, while facilitating the arrest of Plaintiffs. The trial court erred in granting summary judgment in favor of all Defendant Officers in their individual capacities for Roddie's assault and battery claims, and further erred in granting summary judgment in favor of Deputy Anderson and Officer Stanly in their individual capacities for Frederick's assault and battery claims.

2. *False Imprisonment*

Defendant Officers did not have a warrant to arrest Plaintiffs and, according to Defendants' evidence, they were not intending to arrest

Plaintiffs when they arrived at Plaintiffs' residence. Defendants' evidence suggests that Roddie "aggressively initiated contact with the [individual Defendants.]" However, Roddie's evidence, if believed, suggests that immediately after Roddie indicated that he wanted to call his attorney in order to clear up the custody issue, Defendant Officers "surrounded [Roddie], threw him to the ground, handcuffed him, [and] arrested him[.]" Roddie claims he did not initiate contact with Defendant Officers. Roddie further claims that he was beaten by Defendant Officers. Frederick, in his verified complaint, contended that, when he saw Defendant Officers assaulting Roddie, he "asked the said Defendants if they had a warrant and stated they had no right to be at said premises without a warrant." "Thereupon [Frederick] turned to walk toward the location within his yard where all of said persons were located, but [Frederick] was thereafter thrown to the ground by the individual Defendants[,]" and then "assaulted."

> False imprisonment is the illegal restraint of a person against his will. A restraint is illegal if not lawful or consented to. A false arrest is an arrest without legal authority and is one means of committing a false imprisonment. The existence of legal justification for a deprivation of liberty is determined in accordance with the law of arrest, which is set forth in Chapter 15A of the General Statutes.
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> N.C.G.S. § 15A–401(b)(1) (Cum. Supp. 1994) provides that an officer may arrest a person without a warrant if the officer has probable cause to believe that the person has committed a criminal offense in the officer's presence. A warrantless arrest without probable cause is unlawful. Thus, the dispositive issue is whether defendant had probable cause to believe that plaintiffs had committed assaults upon him.
>
> The existence or nonexistence of probable cause is a mixed question of law and fact. If the facts are admitted or established, it is a question of law for the court. However, if the facts are in dispute, the question of probable cause is one of fact for the jury. In this case, the material facts surrounding the incident are in dispute, and therefore the existence or nonexistence of probable cause is for the jury to determine. Accordingly, defendant was not entitled to summary judgment on this ground.

Marlowe v. Piner, 119 N.C. App. 125, 129, 458 S.E.2d 220, 223 (1995) (citations omitted). As in *Marlowe*, in the present case the facts are

in dispute concerning probable cause to arrest Plaintiffs on 28 June 2009. The trial court erred in granting summary judgment in favor of all Defendant Officers in their individual capacities for Roddie's false imprisonment claims, and further erred in granting summary judgment in favor of Deputy Anderson and Officer Stanly in their individual capacities for Frederick's false imprisonment claims.

3. *Malicious Prosecution*

As this Court explained in *Moore v. Evans*, 124 N.C. App. 35, 476 S.E.2d 415 (1996):

> In order to maintain an action for malicious prosecution, the plaintiff must demonstrate that the defendant "(1) instituted, procured or participated in the criminal proceeding against [the] plaintiff; (2) without probable cause; (3) with malice; and (4) the prior proceeding terminated in favor of [the] plaintiff." "[M]alice can be inferred from the want of probable cause alone." As it is undisputed that defendant Evans initiated the criminal prosecution against Mr. Moore and that the prosecution ended with a dismissal of the charges against him, the only issue as to Mr. Moore's claim for malicious prosecution is whether defendant Evans had probable cause to initiate the criminal prosecution against him. Hence, a common element of each of the state claims alleged (false imprisonment and malicious prosecution) is the absence of probable cause.
>
> The test for whether probable cause exists is an objective one—whether the facts and circumstances, known at the time, were such as to induce a *reasonable* police officer to arrest, imprison, and/or prosecute another. In *Pitts*, our Supreme Court stated:
>
> > The existence or nonexistence of probable cause is a mixed question of law and fact. If the facts are admitted or established it is a question of law for the court. Conversely, when the facts are in dispute the question of probable cause is one of fact for the jury.

Id. at 42–43, 476 S.E.2d at 421–22 (citations omitted). Defendants do not dispute that the criminal proceedings were subsequently terminated in Plaintiffs' favor. We hold there is sufficient evidence to survive summary judgment on the fourth element of malicious prosecution.

Concerning the first element, Officers Stanly, Castaneda, and Brinkley do not dispute that they were involved in instituting the criminal proceedings. Deputy Anderson argues that he did not "institute" the criminal proceedings because neither he nor the Franklin County Sheriff's Office brought charges against Plaintiffs. However, it is not necessary that an individual be directly involved in charging a person, or filing civil claims against that person, in order to have participated sufficiently in "institut[ing], procur[ing] or participat[ing] in the criminal proceeding against [the] plaintiff[.]" *Id.* at 42, 476 S.E.2d at 421. "[W]here 'it is unlikely there would have been a criminal prosecution of [a] plaintiff' except for the efforts of a defendant, this Court has held a genuine issue of fact existed and the jury should consider the facts comprising the first element of malicious prosecution." *Becker v. Pierce*, 168 N.C. App. 671, 675, 608 S.E.2d 825, 829 (2005) (citation omitted). Because Deputy Anderson is identified by Plaintiffs as having participated in the subduing and arrests of both Roddie and Frederick, we hold there is sufficient evidence to survive summary judgment that Deputy Anderson instituted, procured or participated in the criminal charges brought against Plaintiffs.

Concerning the third element – probable cause:

> Our Supreme Court has defined probable cause with respect to malicious prosecution as:
>
> > "the existence of such facts and circumstances, known to [the defendant] at the time, as would induce a reasonable man to commence a prosecution." Whether probable cause exists is a mixed question of law and fact, but where the facts are admitted or established, the existence of probable cause is a question of law for the court.
>
> The test for determining probable cause is " 'whether a man of ordinary prudence and intelligence under the circumstances would have known that the charge had no reasonable foundation.' "

Id. at 677, 608 S.E.2d at 829–30 (citations omitted). When we take the evidence in the light most favorable to Plaintiffs, as we must, *Smith*, 181 N.C. App. at 587, 640 S.E.2d at 438, we hold there is sufficient evidence, as set out above, for a trier of fact to determine that the charges against Plaintiffs "had no reasonable foundation." *Becker*, 168 N.C. App. at 677, 608 S.E.2d at 830.

Concerning the second element, Defendants argue there was insufficient evidence of malice to survive summary judgment. " 'Malice' in a malicious prosecution claim may be shown by offering evidence that defendant 'was motivated by personal spite and a desire for revenge' or that defendant acted with 'reckless and wanton disregard' for plaintiffs' rights." *Id.* at 676, 608 S.E.2d at 829 (citations and quotation marks omitted). If Plaintiffs' allegations are taken as true, Defendant Officers' actions could be found to have been done with " 'reckless and wanton disregard' for plaintiffs' rights." *Id.*

We hold there was sufficient evidence, when viewed in the light most favorable to Plaintiffs, to survive Defendants' motions for summary judgment on the individual capacity claims of assault and battery, false imprisonment, and malicious prosecution against all Defendant Officers in Roddie's action, and against Officer Stanly and Deputy Anderson in Frederick's action. We stress that our holdings should not be taken as the opinion of this Court concerning the relative strength of Plaintiffs' evidence as compared to the evidence supporting Defendant Officers. We simply hold that Plaintiffs have sufficiently forecast evidence creating issues of material fact, which must be decided by the trier of fact. We remand for further action on Plaintiffs' individual capacity claims against Defendant Officers, excepting Frederick's individual capacity claims against Officers Castaneda and Brinkley, which were properly disposed of on summary judgment.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges STROUD and INMAN concur.

MAUNEY v. CARROLL

[251 N.C. App. 177 (2016)]

NOLAN RUDOLPH MAUNEY, JR., PLAINTIFF
v.
STEPHANIE BROWN CARROLL, DEFENDANT

No. COA16-594

Filed 20 December 2016

1. Motor Vehicles—car accident—diminution of value—leased vehicle

The trial court did not err by granting summary judgment in favor of defendant on the "diminution in value" claim. Plaintiff failed to present competent evidence concerning the diminution in value of his lease interest in the Porsche.

2. Motor Vehicles—car accident—loss of use

The trial court erred by granting summary judgment in favor of defendant on the "loss of use" claim. Plaintiff presented evidence sufficient to create a material issue of fact.

Appeal by Plaintiff from order entered 28 March 2016 by Judge Yvonne Mims-Evans in Burke County Superior Court. Heard in the Court of Appeals 2 November 2016.

Law Offices of Jason E. Taylor, PC, by Lawrence B. Serbin and Jason E. Taylor, for the Plaintiff-Appellant.

Ball Barden & Cury, P.A., by Ervin L. Ball Jr., and Alexandra Cury, for the Defendant-Appellee.

DILLON, Judge.

Nolan Mauney, Jr., ("Plaintiff") appeals from the trial court's order of partial summary judgment in his suit against Stephanie Carroll ("Defendant") arising from a traffic accident which caused damages to a car Plaintiff was leasing.

I. Background

In March 2013, Plaintiff leased a new 2013 Porsche Boxter S from a dealership ("Lessor") for a period of 27 months. In October 2013, Plaintiff and Defendant were involved in a traffic accident. The accident caused damage to the Porsche. After the accident, Plaintiff had the Porsche repaired. The repairs were completed in November 2013, a little

over five weeks after the accident. Thereafter, Plaintiff continued driving the Porsche for approximately fifteen (15) months before trading it in to the Lessor for a newer Porsche model.

Plaintiff filed this action against Defendant seeking (1) "repair cost" damages, (2) "loss of use" damages for the time the Porsche was being repaired, and (3) damages for the "diminution in value" of the Porsche as a result of the accident.

Defendant moved for summary judgment. Following a hearing on the matter, the trial court granted Defendant *partial* summary judgment on Plaintiff's claim for (1) "loss of use" damages and (2) "diminution in value" damages.[1] Plaintiff timely appealed.

II. Analysis

On appeal, we review a trial court's grant of a motion for summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is appropriate when, viewed in a light most favorable to the non-moving party, the evidence presents "no genuine issue of material fact" and it is clear that "any party is entitled to a judgment as a matter of law." *Id.*; *see also* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015).

Here, Plaintiff challenges the trial court's grant of summary judgment for Defendant on Plaintiff's claims for "diminution in value" damages and "loss of use" damages. We conclude that Plaintiff failed to present competent evidence concerning the diminution in value of his lease interest in the Porsche; therefore, we affirm the trial court's grant of summary judgment in favor of Defendant on Plaintiff's "diminution in value" claim. However, Plaintiff *did* present evidence sufficient to create a material issue of fact regarding his entitlement to "loss of use" damages; therefore, we reverse the trial court's grant of summary judgment with respect to Plaintiff's "loss of use" claim and remand the matter for action consistent with this opinion. We address our resolution of each claim below.

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1. Although Plaintiff appeals from an order for partial summary judgment, this appeal is not interlocutory. The record shows that Plaintiff subsequently took a voluntary dismissal with prejudice of his remaining claim. *See Goodman v. Holmes & McLaurin Attorneys at Law*, 192 N.C. App. 467, 471, 665 S.E.2d 526, 530 (2008) (holding that a plaintiff's voluntary dismissal of "[a] remaining claim . . . has the effect of making the trial court's grant of partial summary judgment a final order").

A. Diminution of Value Claim

[1] In the action, Plaintiff seeks "diminution in value" damages, that is, the difference in the fair market value of the Porsche before the accident and the fair market value of the Porsche after the accident. On appeal, Plaintiff argues that the trial court erred in granting Defendant's motion for summary judgment on this claim. We disagree.

It was Plaintiff's burden at the summary judgment hearing to present sufficient evidence to establish his claim for diminution in value damages. Plaintiff argues that although he is not the title owner of the Porsche, he is entitled to recover the diminution of value of the Porsche. As a lessee, Plaintiff does not have standing to seek damages for the diminution in value of the full ownership interest in the Porsche, as damages for this loss would be properly asserted by Lessor. *See Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002) (noting that standing is a "necessary prerequisite to a court's proper exercise of subject matter jurisdiction"). Further, Plaintiff admitted at his deposition that Lessor did not charge him for any diminution of value when Plaintiff traded in the Porsche.

Plaintiff also argues that he is entitled to recover for diminution in value of his leasehold interest. Even assuming that Plaintiff had a valid claim for diminution in value *of his lease interest*, Plaintiff failed to present competent evidence of the diminution in value of this interest. Rather, Plaintiff only offered evidence showing a diminution in value of the *full ownership interest* in the Porsche. Specifically, he offered the opinion of Collision Safety Consultants ("CSC"), a self-described "diminished value and post collision repair inspector," that the Porsche's total value was $68,000 before the accident and $60,000 after the accident.

Therefore, we conclude that the trial court properly granted summary judgment on Plaintiff's "diminution in value" claim.

B. Loss of Use Damages

[2] Plaintiff also seeks "loss of use" damages, contending that he is entitled to damages for the time he was deprived of use of the Porsche during the 37 days it was being repaired. We conclude that there was enough evidence to create a genuine issue of fact on this issue. Accordingly, we reverse the grant of summary judgment on this claim and remand the matter for further proceedings consistent with this opinion.

Our Supreme Court has held that *the owner* of a vehicle damaged by the negligence of another may recover damages for loss of use of

a vehicle during the time it is being repaired. *Roberts v. Pilot Freight Carriers, Inc.*, 273 N.C. 600, 606, 160 S.E.2d 712, 717 (1968). Specifically, in *Roberts* the Court held that *if* the damaged vehicle "can be repaired at a reasonable cost and within a reasonable time," the owner of the vehicle is "entitled to recover such special damages as he has properly pleaded and proven for the loss of its use during the time he was necessarily deprived of it." *Id.* The Court also held that the cost of renting a substitute vehicle "during the time reasonably necessary to . . . repair the [damaged vehicle] is the measure of [loss of use] damage *even though no other vehicle was [actually] rented.*" *Id.* at 607, 160 S.E.2d at 718 (emphasis added). *Roberts* involved damages to a business vehicle. Our Court has held that this same rule applies to personal and pleasure vehicles, stating that an owner is entitled to "loss of use" damages of a personal vehicle even if he did not actually rent a substitute vehicle while the damaged vehicle was being repaired:

> A loss of use recovery is generally allowed as to pleasure vehicles as well as business vehicles. Even though loss of use is allowed for pleasure vehicles, some courts have denied recovery unless an actual substitute is obtained. *We decline to hold that plaintiffs must actually rent a substitute to recover for loss of use of a pleasure vehicle.*

Martin v. Hare, 78 N.C. App. 358, 364-65, 337 S.E.2d 632, 636 (1985) (citations omitted) (emphasis added).

In the present case, Plaintiff is not the title owner of the Porsche. Plaintiff admitted this fact in his deposition testimony and by failing to respond to a request for admission which established that he was not the owner. Defendant therefore argues that Plaintiff lacks standing to seek "loss of use" damages. We disagree.

While Plaintiff is not the title owner, he did own a lease interest in the Porsche. Thus, it was Plaintiff who was deprived of his right to use the Porsche while it was being repaired. Lessor, the title owner, did not suffer any loss of use damage during this period because it had no right to use the Porsche for the duration of Plaintiff's lease.

We conclude that there was sufficient evidence before the trial court to create a genuine issue of material fact as to whether Plaintiff is entitled to "loss of use" damages based on whether the Porsche was repaired at a reasonable cost and within a reasonable time. *See Roberts*, 273 N.C. at 607, 160 S.E.2d at 718. Specifically, there was evidence that the Porsche was repaired in 38 days after the accident and that the

repairs cost $6,311.00. It is for a jury to determine whether the repair time and costs were reasonable.

We further conclude that there is a genuine issue of material fact regarding the *amount* of Plaintiff's "loss of use" damages. For example, Plaintiff offered a report showing that it would have cost him $400 per day to lease the identical make and model car, evidence which our Supreme Court held in *Roberts* is competent to measure "loss of use" damages. Further, the lease contract between Plaintiff and Lessor – which shows that Plaintiff had agreed to lease the Porsche for twenty-seven (27) months for a total cost of approximately $33,000, or about $40 per day – is some evidence of the cost to rent a replacement car. *See Sprinkle v. N.C. Wildlife Res. Comm'n*, 165 N.C. App. 721, 728-29, 600 S.E.2d 473, 478 (2004) (concluding that evidence of monthly finance payments made by the owner of a boat was appropriate to consider in measuring loss of use damages).

This is not to say that Plaintiff has established as a matter of law that he is, in fact, entitled to "loss of use" damages. For instance, Plaintiff has a duty to mitigate his damages, and there is evidence that Plaintiff refused offers from the insurance companies involved to provide a rental car while the Porsche was being repaired. Further, there was evidence that Plaintiff actually used another vehicle available to him while the Porsche was being repaired, evidence which a jury could consider in calculating "loss of use" damages. It is for a jury to wade through this evidence and other competent evidence that might be introduced at trial to determine what amount, if any, Plaintiff is entitled to recover for "loss of use" damages.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges ELMORE and HUNTER, JR., concur.

SUE MILLS, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA16-487

Filed 20 December 2016

1. Appeal and Error—Medicaid disability—agency decision—insufficiently detailed for review

In a case involving Medicaid disability benefits, the decision by the Department of Health and Human Services to deny benefits was remanded because the decision lacked the detailed analysis necessary for meaningful appellate review.

2. Public Assistance—Medicaid disability—provider's opinions—Social Security disability hearing

In a Medicaid disability benefit case in which benefits were denied and the case was remanded, the Department of Health and Human Services was directed to clarify the specific providers' opinions from the Social Security hearing that it relied upon and the weight which it gave the those opinions. While it would have been proper for the State Hearing Officer to consider the medical and psychological testimony produced during the Social Security hearing, it was error to make the blanket assertion that it was relying on the Social Security decision as a whole.

3. Public Assistance—Medicaid disability—nonexertional impairments

In a Medicaid disability benefits case in which disability was denied and the case was remanded, the Department of Health and Human Services was directed to evaluate petitioner's nonexertional impairments as compared to her exertional impairments. If her nonexertional impairments diminished her capacity to perform a full range of light work beyond the diminishment caused by her exertional impairments, vocational expert testimony would be used to determine whether jobs existed in significant numbers in the national economy that petitioner could do.

Appeal by petitioner from order entered 4 January 2016 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 19 October 2016.

Hyler & Lopez, P.A., by Robert J. Lopez, for petitioner-appellant.

Roy Cooper, *Attorney General*, *by Brenda Eaddy*, *Assistant Attorney General*, *for respondent-appellee.*

DAVIS, Judge.

This appeal requires us to address the analysis that must be undertaken in evaluating a claimant's application for Medicaid disability benefits. Sue Mills ("Petitioner") appeals from the trial court's order affirming a determination by the North Carolina Department of Health and Human Services ("DHHS") that she was not disabled and, therefore, not entitled to such benefits. After careful review, we vacate the trial court's order and direct the court to remand this case to DHHS for further proceedings consistent with this opinion.

Factual Background

Petitioner is a 54-year-old woman who has a history of illnesses and symptoms that began in the 1990s. During her thirties, she was employed as a housekeeper, resulting in "some deterioration" in her lower back. During her early forties, her lower back pain worsened, and she experienced anxiety, nerves, and depression. By the time she turned fifty, Petitioner was suffering from migraine headaches, continued anxiety and depression, pain in her lower back, problems using her hands, strain on her neck and shoulders, weakness in her legs, and a variety of other health-related issues.

Petitioner applied to the Social Security Administration ("SSA") for Social Security disability benefits in 2013. An administrative law judge (the "ALJ") conducted a disability hearing, and on 24 October 2013, the ALJ issued a decision (the "Social Security Decision") determining that Petitioner was not disabled. Petitioner appealed the Social Security Decision, and her appeal is currently pending in federal court.

Approximately eight months after the Social Security Decision was issued, Petitioner applied to the Haywood County Department of Social Services (the "DSS") for Medicaid disability benefits. On 23 July 2014, her application was denied. Petitioner appealed the decision to DHHS, and a hearing was held before State Hearing Officer Linda Eckert (the "SHO") on 8 October 2014.

On 16 October 2014, the SHO issued a Notice of Decision (the "Agency Decision"), which determined that: (1) Petitioner was 51 years of age and had obtained a GED; (2) she was not presently working and had not worked since May 2014; (3) Petitioner had no "relevant past

work"; (4) she had "a medical history of chronic pain, degenerative disc disease, thoracic compression fracture, vitamin D deficiency, chronic obstructive pulmonary disease, migraine headaches, esophageal reflux, hyperlipidemia, lumbar radiculopathy, lumbar spondylosis, osteopenia, varicose veins, carpal tunnel syndrome, [and] anxiety and depression"; and (5) "[b]y May 2015, the [Petitioner] will retain the ability to engage in light work . . . ."

The SHO then summarized Petitioner's medical history and made the following pertinent findings of fact:

> 6. In an October 2013 decision, the [SSA] Administrative Law Judge opined that the Appellant has the residual functional capacity to perform light work with occasional posturals; no climbing of ladders, ropes or scaffolds; frequent bilateral fingering; and avoidance of concentrated exposure to hazards. Appellant was also limited to simple, routine, repetitive work with occasional public contact. This opinion is given great weight as it is consistent with and supported by the objective evidence.
>
> 7. The Appellant's medically determinable impairments are at least theoretically capable of producing at least some of the general subjective symptoms alleged by the Appellant. However, the Appellant's testimony as to the specific intensity, persistence, and limiting effects of the pain and other subjective symptoms is not persuasive in view of the inconsistencies with the medical evidence. For example, the Appellant testified she experiences migraine headaches twice a month which are at a pain level of 20/10; however, the medical evidence does not reflect that the Appellant reported to the treating or examining physicians that she experiences such extreme symptoms. It is not credible that the Appellant could experience such extreme symptoms but fail to report them to the treating physicians.

Based on these findings of fact, the SHO made the following conclusions:

> 1. Appellant is not engaging in Substantial Gainful Activity as defined in 20 CFR 416.910.
>
> 2. Appellant's impairments of chronic pain, degenerative disc disease, vitamin D deficiency, chronic obstructive

pulmonary disease, migraine headaches, esophageal reflux, hyperlipidemia, lumbar radiculopathy, lumbar spondylosis, osteopenia, varicose veins, carpal tunnel syndrome, anxiety and depression are severe but do not meet or equal the level of severity specific in 20CFR [sic] Part 404, Appendix 1 to Subpart P (Listing of Impairments). Appellant's impairment of thoracic compression fracture is currently at a disabling severity, but is not expected to meet the duration requirement of remaining at a disabling severity for a period of twelve continuous months as specified in 20 CFR 416.909.

3. Considering the combination of all impairments and related symptoms, by May 2015 the Appellant will have the residual functional capacity . . . to engage in light work with occasional stooping and crouching; no climbing of ladders, ropes or scaffolds; frequent but not constant fingering; avoidance of concentrated exposure to heights and hazards; avoidance of concentrated exposure to dust and fumes; and to work that is low stress, nonproduction in nature and does not require extensive interaction with the general public. The effects of pain have been evaluated under 20 C.F.R. 404.1529 and Fourth Circuit law as set forth in Hyatt v. Sullivan, 899 F. 2d 329 (4th Cir. 1990)[.]

4. The Appellant's non-exertional limitations of occasional stooping and crouching; no climbing of ladders, ropes and scaffolds; frequent but not constant fingering; avoidance of concentrated exposure to heights and hazards; avoidance of concentrated exposure to dust and fumes; and to work that is low stress, nonproduction in nature and does not require extensive interaction with the general public do not significantly reduce the occupational base of light work available in the economy . . . . Considering the Appellant's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy as specified in 20 CFR 416.966 that the Appellant can perform as Vocational Rule 202.13 being used as a framework directs a finding of "not disabled". . . .

5. Appellant does not meet the disability requirement specified in 20 CFR 416.920(g) and therefore is not found disabled or eligible for Medicaid.

As a result of these findings and conclusions, the SHO determined that the DSS had properly denied Petitioner's application for disability benefits. The Agency Decision became final on 16 October 2014 pursuant to N.C. Gen. Stat. § 108A-79(b).

On 19 November 2014, Petitioner filed a petition for judicial review in Haywood County Superior Court pursuant to N.C. Gen. Stat. § 108A-79(k). On 19 December 2014, DHHS filed a response along with a motion to dismiss the petition. Petitioner filed an amended petition on 29 July 2015.

On 2 November 2015, a hearing was held before the Honorable Bradley B. Letts. The trial court entered an order on 4 January 2016 containing the following findings of fact:

> 1. The issue before the administrative agency was whether petitioner qualified for Medicaid for the Disabled.
>
> 2. [DHHS] applied the Supplemental Security Income Standard found in the Social Security Act in order to determine whether Petitioner was qualified for Medicaid for the Disabled.
>
> 3. [DHHS] reviewed and analyzed the medical records contained in the official record before making its final decision. Petitioner has several chronic medical conditions, some of which [DHHS] recognized as severe.
>
> 4. [DHHS] reviewed and gave some weight to the functional capacity test result reported in the Social Security Administration Office of Disability Adjudication and Review decision of October 24, 2013. This decision found Petitioner was not under a disability and had the ability to work.
>
> 5. Based on evidence in the record, [DHHS] determined that Petitioner did not qualify for Medicaid for the Disabled.
>
> 6. This Court was informed in open court that Petitioner would not present additional testimony at the judicial review hearing.
>
> 7. Petitioner's additional evidence consists of medical records of physician appointments that Petitioner attended after her hearing before [DHHS]'s Hearing

Officer. These medical records contain the same or similar review of systems, assessments, diagnosis and/or prognosis as the medical records contained in the official record. As such, this additional evidence is merely cumulative of the medical records contained in the official record.

8. Petitioner has not established that any evidence presented to the hearing officer at the time of the hearing had been excluded.

The court then made the following conclusions of law:

1. This matter is properly before this court pursuant to N.C. Gen. Stat. §108A-79(k).

2. North Carolina Medicaid for the Disabled qualification standards are found in the federal Social Security Act. N.C. Gen. Stat. §108A-56.

3. This Court's standard of review for questions of law are *de novo*. The standard of review where petitioner has alleged the final decision was arbitrary, capricious, or unsupported by substantial evidence is the whole record standard of review. N.C. Gen. Stat. §150B-51.

4. [DHHS] correctly applied the five step sequential evaluation in its assessment of Petitioner's application for Medicaid for the Disabled. 20 CFR Part 416 *et seq*.

5. Substantial evidence exist[ing] in the official record show[s] that while some of Petitioner's illnesses are chronic and severe, a review of Petitioner's medical, social, vocational, and functional capacity evidence does not establish that she qualifies for Medicaid for the Disabled. [DHHS]'s determination of such does not indicate a lack of careful consideration.

6. A matter may be remanded back to the administrative agency if additional evidence is presented to the judicial review court that is material to the issues, not merely cumulative, and could not reasonably have been presented at the administrative hearing. In this matter the additional evidence was merely cumulative. Thus, remand to the agency for review of those records is not required. N.C. Gen. Stat. §150B-49.

> 7. The hearing officer did not exclude any evidence presented by Petitioner at the hearing. N.C. Gen. Stat. §108A-79(k).

Based on these findings and conclusions, the trial court affirmed the Agency Decision. Petitioner filed written notice of appeal on 2 February 2016.

Analysis

I. Standard of Review

Chapter 108A of the North Carolina General Statutes provides a claimant with the right to appeal an initial decision by a local department of social services denying her application for Medicaid disability benefits. *See* N.C. Gen. Stat. § 108A-79(a) (2015). Pursuant to the statute, the director (or the director's designated representative) is required to forward the claimant's request for an appeal to DHHS, which must then designate a hearing officer to conduct a *de novo* administrative hearing in accordance with Chapter 150B of the North Carolina General Statutes. *See* N.C. Gen. Stat. § 108A-79(d). If the claimant is dissatisfied with DHHS's final decision upon the agency's review of her claim, she may file a petition for judicial review in the superior court of the county in which the claim arose. N.C. Gen. Stat. § 108A-79(k).

Chapter 150B of the North Carolina General Statutes provides, in pertinent part, as follows:

> The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2015).

"The standard of review for an appellate court upon an appeal from an order of the superior court affirming or reversing an administrative agency decision is the same standard of review as that employed by the superior court." *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 62-63, 468 S.E.2d 557, 560 (1996) (citation omitted). In reviewing an agency decision, this Court applies the "whole record" test. *Fehrenbacher v. City of Durham*, 239 N.C. App. 141, 146, 768 S.E.2d 186, 191 (2015) (citation omitted). "The whole record test requires the reviewing court to examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *Id.* (citation and quotation marks omitted). This "test does not allow the reviewing court to replace the [agency'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*." *Id.* (citation and quotation marks omitted).

II. Medicaid Disability Benefits

> Medicaid, established by Congressional enactment of Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., is a cooperative federal-state program providing medical assistance and other services to certain classes of needy persons. States which adopt the program and administer it in conformity with federal laws and regulations receive federal funds which defray a substantial portion of the program costs. Participation by a state in the Medicaid program is entirely optional. However, once an election is made to participate, the state must comply with the requirements of federal law. North Carolina adopted the Medicaid program through the enactment of Part 5, Article 2, Chapter 108 of the General Statutes, amended and recodified effective 1 October 1981 at Part 6, Article 2, Chapter 108A.

Lackey v. N.C. Dep't of Human Resources, 306 N.C. 231, 235, 293 S.E.2d 171, 175 (1982) (internal citations omitted).[1]

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1. In addressing Petitioner's arguments on appeal, we therefore look for guidance to federal Social Security regulations and decisions by federal courts interpreting those regulations. *See Henderson v. N.C. Dep't of Human Resources*, 91 N.C. App. 527, 531-32, 372 S.E.2d 887, 890 (1988) ("Although federal court decisions interpreting the applicable

[1] In order to qualify for both Medicaid and Social Security disability benefits, a claimant must show that she is "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A) (2012).

> [A]n individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

42 U.S.C. § 1382c(a)(3)(B).

The following five-step sequential evaluation process is used to determine whether a claimant is disabled:

> If we can find that you are disabled or not disabled at a step, we make our determination or decision and we do not go on to the next step. If we cannot find that you are disabled or not disabled at a step, we go on to the next step. Before we go from step three to step four, we assess your residual functional capacity. . . . We use this residual functional capacity assessment at both step four and at step five when we evaluate your claim at these steps. These are the five steps we follow:
>
> (i) At the first step, we consider your work activity, if any. If you are doing substantial gainful activity, we will find that you are not disabled. . . .

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statutes and regulations are not binding on North Carolina courts . . . we deem the well-reasoned federal decisions discussed herein to be persuasive authority." (internal citation omitted)); *see also Lackey*, 306 N.C. at 236, 293 S.E.2d at 175 ("These federal decisions . . . are not necessarily controlling on this court. However, we do deem them to be persuasive authority on the relevant issues." (internal citations omitted)).

> (ii) At the second step, we consider the medical severity of your impairment(s). If you do not have a severe medically determinable physical or mental impairment that meets the duration requirement in § 416.909, or a combination of impairments that is severe and meets the duration requirement, we will find that you are not disabled. . . .
>
> (iii) At the third step, we also consider the medical severity of your impairment(s). If you have an impairment(s) that meets or equals one of our listings in appendix 1 to subpart P of part 404 of this chapter and meets the duration requirement, we will find that you are disabled. . . .
>
> (iv) At the fourth step, we consider our assessment of your residual functional capacity and your past relevant work. If you can still do your past relevant work, we will find that you are not disabled. . . .
>
> (v) At the fifth and last step, we consider our assessment of your residual functional capacity and your age, education, and work experience to see if you can make an adjustment to other work. If you can make an adjustment to other work, we will find that you are not disabled. If you cannot make an adjustment to other work, we will find that you are disabled. . . .

20 C.F.R. § 416.920(a)(4) (2016).

This Court has previously summarized this evaluation process as follows:

> (1) Is the individual engaged in substantial gainful activity? (2) If not, does the individual suffer from a severe impairment, i.e., an impairment that significantly limits his ability to engage in the basic work activities outlined in 20 C.F.R. Sec. 416.921? (3) Assuming the individual meets this threshold severity requirement, is the impairment so severe as to render the individual disabled without inquiry into vocational factors such as age, education, and work experience, i.e., does the impairment meet or equal those listed in 20 C.F.R. Part 404, Subpart P, Appendix 1? (4) If the severe impairment does not meet or equal those listed

> in Appendix 1, does it prevent the individual from doing past relevant work in light of his "residual functional capacity?" and, (5) If the severe impairment does prevent the individual from doing past relevant work, can the individual do other work, given his age, education, residual functional capacity, and past work experience?

Lowe v. N.C. Dep't of Human Resources, 72 N.C. App. 44, 48, 323 S.E.2d 454, 457 (1984).

"If the first three steps do not lead to a conclusive determination, the ALJ then [moves on to Step 4 to] assess[ ] the claimant's residual functional capacity, which is the most the claimant can still do despite physical and mental limitations that affect her ability to work." *Mascio v. Colvin*, 780 F.3d 632, 635 (4th Cir. 2015) (citation and quotation marks omitted). Once the claimant meets either Step 3 or Step 4, "[t]he burden then shifts to the agency to show that the claimant can perform alternative work existing in the national economy under [Step 5]." *Henderson*, 91 N.C. App. at 533, 372 S.E.2d at 891*; see also Mascio*, 780 F.3d at 635.

"[A] necessary predicate to engaging in substantial evidence review is a record of the basis for the [agency's] ruling." *Radford v. Colvin*, 734 F.3d 288, 295 (4th Cir. 2013) (citation omitted). This record "should include a discussion of which evidence the [agency] found credible and why, and specific application of the pertinent legal requirements to the record evidence." *Id.* (citation omitted). The agency's decision must "include a narrative discussion describing how the evidence supports each conclusion[.]" *Monroe v. Colvin*, 826 F.3d 176, 190 (4th Cir. 2016) (citation and quotation marks omitted). Moreover, the decision must "build an accurate and logical bridge from the evidence to [its] conclusion." *Id.* at 189.

In the present case, Petitioner contends that the SHO did not provide any "meaningful explanation" in how it reached its conclusion. Specifically, Petitioner argues that the Agency Decision lacked (1) a "function by function narrative discussion" to explain "how [her] residual functional capacity was established[;]" (2) a "discussion related to [the SHO's] evaluation of the effects of pain[;]" (3) a valid basis for attaching significant weight to the Social Security Decision; and (4) the use of vocational expert testimony to aid the SHO in determining whether Petitioner could find substantial gainful work in the national economy. As discussed more fully below, we agree with Petitioner that the Agency Decision is deficient in several material respects and that this case must be remanded for further proceedings.

A. Function-by-Function Narrative Discussion

Petitioner contends that the SHO was required to conduct a function-by-function narrative discussion to establish her residual functional capacity. We find instructive on this issue the Fourth Circuit's decision in *Mascio*. In that case, an agency decision denying a claimant's application for Social Security benefits determined at Step 4 that the claimant could no longer perform her past work based on her residual functional capacity. *Mascio*, 780 F.3d at 635-36. However, at Step 5 of the evaluation process, the agency determined that the claimant could perform other work and therefore was not disabled. *Id.* at 640.

On appeal, the claimant argued that during Step 4 of the evaluation process, the ALJ had erred in failing to conduct a function-by-function analysis in determining her residual functional capacity. She asserted that federal SSA regulations required such a "narrative discussion describing how the evidence supports each conclusion, citing specific medical facts (e.g., laboratory findings) and nonmedical evidence (e.g., daily activities, observations)." *Id.* at 636 (citation and quotation marks omitted).

While declining to adopt a *per se* rule that a function-by-function analysis is necessary in every case, the Fourth Circuit held that "remand may be appropriate where an ALJ fails to assess a claimant's capacity to perform relevant functions, despite contradictory evidence in the record, or where other inadequacies in the ALJ's analysis frustrate meaningful review." *Id.* at 636 (citation, quotation marks, brackets, and ellipsis omitted). The court stated the following:

> Here, the ALJ has determined what functions he believes [the claimant] can perform, but his opinion is sorely lacking in the analysis needed for us to review meaningfully those conclusions. In particular, although the ALJ concluded that [the claimant] can perform certain functions, he said nothing about [her] ability to perform them for a full workday. The missing analysis is especially troubling because the record contains conflicting evidence as to [the claimant's] residual functional capacity—evidence that the ALJ did not address.

Id. at 636-37.

For these reasons, the court observed that it was "left to guess about how the ALJ arrived at his conclusions" regarding the claimant's ability to perform "relevant functions" and that it "remain[ed] uncertain as to what the ALJ intended[.]" *Id.* at 637. Thus, the court concluded that

remand was necessary to cure these deficiencies in the agency's decision. *Id.*

While the facts of the present case are not identical to those in *Mascio*, the Fourth Circuit's opinion nevertheless demonstrates why the SHO's analysis here was inadequate. In conducting what was apparently intended to be Step 4 of the sequential evaluation process,[2] the SHO stated as follows:

> 3. Considering the combination of all impairments and related symptoms, by May 2015 the Appellant will have the residual functional capacity . . . to engage in light work with occasional stooping and crouching; no climbing of ladders, ropes or scaffolds; frequent but not constant fingering; avoidance of concentrated exposure to heights and hazards; avoidance of concentrated exposure to dust and fumes; and to work that is low stress, nonproduction in nature and does not require extensive interaction with the general public. The effects of pain have been evaluated under 20 C.F.R. 404.1529 and Fourth Circuit law as set forth in Hyatt v. Sullivan, 899 F. 2d 329 (4th Cir. 1990)[.]

In reaching this conclusion, however, the SHO did not explain with any degree of specificity at all the processes it used to conclude that Petitioner was able to engage in light work.[3] Thus, we believe that — as in *Mascio* — this is a case where "inadequacies in the [agency]'s analysis

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2. It is not entirely clear from the Agency Decision whether the SHO found that Petitioner had met Steps 1 through 4. However, because the SHO proceeded to Step 5, we assume that the SHO first determined that Step 4 had been satisfied. We note that in its brief DHHS states that "the [SHO] found Petitioner had met her burden at step four." On remand, we direct DHHS to clearly articulate its application of each step of the sequential evaluation process.

3. 20 C.F.R. § 404.1567(b) provides the following definition of "light work":

> Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

20 C.F.R. § 404.1567(b) (2016).

frustrate meaningful review." *See Mascio*, 780 F.3d at 636 (citation and quotation marks omitted). Because the Agency Decision lacks the sort of detailed analysis necessary for meaningful appellate review, we direct DHHS on remand to provide a narrative discussion of whether Petitioner's limitations will prevent her from performing the full range of light work.

B. Evaluation of Credibility of Petitioner's Testimony as to Severity of Her Symptoms

[2] Petitioner next argues that the Agency Decision lacks a discussion of how the SHO weighed the credibility of Petitioner's testimony as to the intensity, persistence, and limiting effects of her symptoms. In *Mascio*, the claimant also asserted that the ALJ failed to properly analyze the credibility of her testimony as to the intensity, persistence, and limiting effects of her pain. *Id.* at 639. The claimant argued that the only grounds set out in the agency decision for rejecting her statements as to her pain were findings that she "(1) had not complied with follow-up mental health treatment; (2) had lied to her doctor about using marijuana; and (3) had been convicted for selling her prescription pain medication." *Id.*

The Fourth Circuit found that this lack of analysis as to the claimant's credibility constituted an additional error warranting remand. The court stated that "[n]owhere . . . does the ALJ explain how he decided which of [the claimant's] statements to believe and which to discredit, other than the vague (and circular) boilerplate statement that he did not believe any claims of limitations beyond what he found when considering [the claimant's] residual functional capacity." *Id.* at 640.

Here, the sole finding of fact in the Agency Decision regarding Petitioner's credibility was the following:

> 7. The Appellant's medically determinable impairments are at least theoretically capable of producing at least some of the general subjective symptoms alleged by the Appellant. However, the Appellant's testimony as to the specific intensity, persistence, and limiting effects of the pain and other subjective symptoms is not persuasive in view of the inconsistencies with the medical evidence. For example, the Appellant testified she experiences migraine headaches twice a month which are at a pain level of 20/10; however, the medical evidence does not reflect that the Appellant reported to the treating or examining physicians that she experiences such extreme

> symptoms. It is not credible that the Appellant could experience such extreme symptoms but fail to report them to the treating physicians.

This finding indicates that the SHO found Petitioner's testimony regarding her symptoms "not persuasive" because there were "inconsistencies with the medical evidence." However, the record reveals that Petitioner testified as to a number of other symptoms besides migraine headaches, including — without limitation — severe lower back pain, weakness in her legs, anxiety, and depression. Yet Finding No. 7 solely discusses Petitioner's testimony regarding her migraine headaches. Therefore, to the extent the Agency Decision attempted to impute the lack of credibility it attached to her testimony regarding the migraine headaches to her testimony regarding all of her remaining impairments, the agency erred.

C. Reliance on the Social Security Decision

Petitioner also challenges the degree of reliance the SHO placed on the Social Security Decision. Finding No. 6 of the Agency Decision states as follows:

> 6. In an October 2013 decision, the [SSA] Administrative Law Judge opined that the Appellant has the residual functional capacity to perform light work with occasional posturals; no climbing of ladders, ropes or scaffolds; frequent bilateral fingering; and avoidance of concentrated exposure to hazards. Appellant was also limited to simple, routine, repetitive work with occasional public contact. This opinion is given great weight as it is consistent with and supported by the objective evidence.

SSA regulations provide that "[a]dministrative law judges . . . are not bound by findings made by State agency or other program physicians and psychologists, but they may not ignore these opinions and must explain the weight given to the opinions in their decisions." SSR 96-6p, 1996 SSR LEXIS 3, 1996 WL 374180 (July 2, 1996). Thus, while it would have been proper for the SHO to consider the medical and psychological testimony produced during Petitioner's Social Security hearing, it was error for the SHO to simply make the blanket assertion that it was relying on the Social Security Decision *as a whole* as opposed to (1) identifying opinions from specific providers that were obtained during the Social Security hearing; and (2) explaining why it was according weight to those opinions. Therefore, we direct DHHS on remand to clarify which specific providers' opinions from the Social Security hearing

that it is relying upon — if any — and to explain the weight it is giving those opinions.

D. Vocational Expert Testimony

[3] Finally, Petitioner argues that DHHS erred in failing to produce vocational expert testimony at the 8 October 2014 hearing. She asserts that because she suffered from nonexertional impairments, such expert testimony was required and that the SHO erred in instead relying solely on the medical-vocational guidelines (commonly known as the "grids").[4]

20 C.F.R. § 404.1560 provides that "[w]e *may* use the services of vocational experts or vocational specialists, or other resources . . . to obtain evidence we need to help us determine whether you can do your past relevant work, given your residual functional capacity." 20 C.F.R. § 404.1560 (2016) (emphasis added). A review of federal caselaw applying 20 C.F.R. § 404.1560 reveals that vocational expert testimony is necessary only in certain circumstances during Step 5 of the evaluation process. *See*, *e.g.*, *Boylan v. Astrue*, 32 F.Supp.3d 238, 251-52 (N.D.N.Y. 2012) ("If the claimant has nonexertional impairments, the ALJ must determine whether those impairments 'significantly' diminish the claimant's work capacity beyond that caused by his or her exertional limitations. . . . [and if so], then the use of the Grids *may* be an inappropriate method of determining a claimant's residual functional capacity and the ALJ *may* be required to consult a vocational expert." (citations omitted and emphasis added)); *Sherby v. Astrue*, 767 F.Supp.2d 592, 595 (D.S.C. 2010) ("While not every nonexertional limitation or malady rises to the level of a nonexertional impairment, so as to preclude reliance on the grids, the proper inquiry is whether the nonexertional condition affects an individual's residual functional capacity to perform work of which he is exertionally capable." (citation, quotation marks, and ellipsis omitted)).

On remand, we direct DHHS to evaluate Petitioner's nonexertional impairments as compared to her exertional impairments. If it determines that Petitioner's nonexertional impairments significantly diminish her capacity to perform the full range of light work beyond the degree caused by her exertional impairments, DHHS shall use vocational

4. The "grids" are the Medical-Vocational Guidelines located in Appendix 2 of 20 C.F.R. § 404, subpart P. Appendix 2 provides information from the Dictionary of Occupational Titles regarding jobs that exist in the national economy that are classified by exertional and skill requirements. *See* 20 C.F.R. § 404.1569 (2016). Appendix 2 provides rules that determine whether a person is engaged in substantial gainful activity and whether the person is prevented by a severe medically determinable impairment from doing vocationally "relevant past work." *Id.*

expert testimony in order to determine whether jobs exist in significant numbers in the national economy that Petitioner can perform given her residual functional capacity.[5]

Conclusion

For the reasons stated above, we vacate the trial court's 4 January 2016 order and direct the court to remand this matter to DHHS for additional proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges INMAN and ENOCHS concur.

KENNETH I. MOCH, PLAINTIFF
v.
A.M. PAPPAS & ASSOCIATES, LLC, ART M. PAPPAS, AND
FORD S. WORTHY, DEFENDANTS

No. COA16-642

Filed 20 December 2016

1. Unfair Trade Practices—communications from an attorney—not covered by Act

The trial court did not err by dismissing plaintiff's claim for unfair or deceptive trade practices for failure to state a claim where there were underlying claims by defendants of libel but the actions complained of by plaintiff were taken by defendants' attorneys. N.C.G.S. § 75-1.1(b) does not include professional services within its purview; plaintiff may not bring a claim based upon letters sent by defendants' counsel.

2. Appeal and Error—preservation of issues—issue not raised below

Plaintiff was not entitled to relief on appeal on the basis of an abuse of process claim where the alleged abuse consisted of the

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5. While DHHS argues that Petitioner was, in fact, examined by a vocational expert in connection with the Social Security hearing, the Agency Decision — as noted above — merely references the Social Security Decision as a whole rather than referring to any specific expert testimony elicited during that hearing. Moreover, we note that the Social Security hearing took place in 2013.

letters sent by counsel and subpoenas. Plaintiff did not make this argument below; moreover, plaintiff did not articulate on appeal how the facts would support a claim for abuse of process.

Appeal by plaintiff from order entered 25 February 2016 by Judge James E. Hardin, Jr. in Orange County Superior Court. Heard in the Court of Appeals 15 November 2016.

Spilman Thomas & Battle, PLLC, by Jeffrey D. Patton, Nathan B. Atkinson, and Erin Jones Adams, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael W. Mitchell, Christopher G. Smith, and Clifton L. Brinson; and Tharrington Smith, LLP, by Wade M. Smith, for defendants-appellees.

ZACHARY, Judge.

Kenneth I. Moch (plaintiff) appeals from an order dismissing his claims against A.M. Pappas & Associates, LLC, Art M. Pappas, and Ford S. Worthy (defendants) for abuse of process and unfair or deceptive trade practices. Plaintiff's complaint was dismissed pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief can be granted. On appeal plaintiff argues that the trial court erred and that his complaint included factual allegations that established all of the elements of both claims. We conclude that the trial court's order should be affirmed.

I. Factual and Procedural History

Defendant A.M. Pappas & Associates, LLC, is a company that manages investment funds and specializes in investments in the life sciences sector. Defendant Art M. Pappas is the company's managing partner, and defendant Ford S. Worthy is the company's chief financial officer. Beginning in 2011, defendants managed funds that included investments in Chimerix, Inc., a corporation involved in the development of anti-viral medical treatments. Plaintiff was the president and CEO of Chimerix, Inc. from April 2010 until April 2014, when he left Chimerix.

On 22 October 2014, plaintiff sent an anonymous email to the North Carolina State Treasurer, using an email account that plaintiff had created under the name "pappasventureswhistleblower@gmail.com." The email stated the following:

> To whom it may concern:
>
> I am writing this because of my concerns about the activities of Arthur Pappas at Pappas Ventures. I want to bring 3 things to your attention:
>
> 1. Potential misuse and misappropriation of funds. I have reason to believe that Mr. Pappas has diverted somewhere around $2 million of funds over the course of time, via expenses and payments to others. Mr. Worthy may know of this and be involved. I believe this would require an audit of the Pappas Ventures financials, as Mr. Pappas is skilled in hiding this misuse.
>
> 2. High employee turnover at Pappas Ventures. This is due to the instability and unpredictability of Mr. Pappas. There has been a very high turnover of personnel - partners and investment professionals, more than other venture funds. People leave this fund and do not trust him.
>
> 3. Perhaps not relevant, but there have been whispers of issues of domestic violence/hitting women. This would further damage the viability of the fund. I do not wish to be a gossip, but this is relevant to Mr. Pappas's moral code.
>
> Since there is no whistleblower hotline, I felt an obligation to contact people involved with Pappas Ventures and A.M. Pappas. I have now done all that I can to bring these issues to light, and my conscience is clear. What those of you copied on this email do individually or collectively is up to you.

Plaintiff later exchanged follow-up emails with an employee of the Department of State Treasurer and forwarded his email to others whom plaintiff describes as "investors in or collaborators with the funds managed by" defendants.

On 4 June 2015, defendants filed suit against the sender of the anonymous emails, whom defendants identified as "John Doe or Jane Doe," seeking damages for libel *per se* and libel *per quod*. On 12 October 2015, the law firm of Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P. (hereafter "Smith Anderson") sent a letter to plaintiff on the law firm's letterhead. The letter bore the heading "CONFIDENTIAL" and "FOR PURPOSES OF SETTLEMENT ONLY." (use of all capital letters and underlining in original). The letter stated the following:

Re: *A.M. Pappas & Associates, LLC, et al. v. John Doe or Jane Doe*

In the Superior Court of Durham County, North County; 15 CVS 3383

Dear Mr. Moch:

This law firm represents Pappas Capital, LLC (f/k/a A. M. Pappas & Associates, LLC), its affiliates, Arthur Pappas and Ford Worthy. We obtained evidence demonstrating that you are responsible for the defamatory and malicious emails from the previously anonymous email account: pappasventureswhistleblower@gmail.com, as described in the "Doe" lawsuit that we filed June 4 in Durham County Superior Court. A copy of that lawsuit is enclosed.

We will amend the "Doe" Complaint and name you as a defendant and immediately commence public litigation against you unless you agree to the following material settlement terms in principle by Friday, October 16, 2015:

[1.] A written retraction and apology;

[2.] Payment of $10 million, which is a figure discounted for settlement purposes of the net present value of the economic harm done to our clients. At trial, we will seek at least $25 million;

[3.] Complete disclosure and sharing of information that identifies anyone else involved with you in the defamatory emails. Based on the nature and quality of this information, we may be willing to compromise the financial settlement demand; and

[4.] Our clients will refrain from reporting you to law enforcement authorities or regulatory agencies for violation of [N.C. Gen. Stat. §] 14-196.3 and all other potential criminal violations, including federal violations.

Also enclosed with this letter is a document subpoena to you. That subpoena requires you to produce certain materials to us at our offices on October 20, 2015. You *may not destroy or alter any evidence* identified in the subpoena or that is relevant to this matter. You are *obligated by law* to preserve all relevant evidence. Failure to comply with

> this obligation is a criminal offense. You are on notice of this duty by virtue of receipt of this correspondence. We are, however, willing to work with you on the timing, scope, and method of production to ensure that the subpoena does not impose any undue burden and to protect the confidentiality of your personal information.
>
> Also enclosed is a testimony subpoena requiring you to appear at our offices on Saturday, October 24, 2015 to give your testimony in the lawsuit under oath.
>
> Separately, we are serving your spouse with a document subpoena for any relevant electronic and documentary evidence she may possess.
>
> This is a very serious matter.
>
> The defamatory, baseless accusations have caused serious damage to our clients and their business partners and they will be made whole.
>
> I urge you or your counsel to contact me immediately to begin the process of addressing this matter. My office number is on the letterhead. My cellphone is [omitted].

(emphasis in original).

On 19 October 2015, the law firm of Nelson Mullins Riley & Scarborough LLP (hereafter "Nelson Mullins") sent a letter to a Smith Anderson attorney, stating that the Nelson Mullins firm represented plaintiff, and objecting to the subpoenas issued by defendants on various grounds, including attorney-client privilege, spousal privilege, and an assertion that the subpoenas' production requests were unduly burdensome. On 6 November 2015, defendants filed a motion to compel plaintiff's production of the documents sought in their subpoenas. On the same day, Smith Anderson sent a letter to an attorney with the law firm Spilman Thomas & Battle, PLLC.[1] The letter was headed "SETTLEMENT CONFIDENTIAL" and "FOR YOUR EYES AND YOUR CLIENTS' EYES ONLY" and stated that:

> Re: *A.M. Pappas & Associates, LLC, et al. v. John Doe or Jane Doe*
>
> Durham County - 15 CVS 3383

1. The contents of the letter indicate that on 6 November 2015 plaintiff was represented by this law firm.

Dear Jeff:

Thank you for our conversation Wednesday afternoon. Our clients are very frustrated at the pace and the missed expectations and were prepared to take decisive action prior to your last minute phone call. But you provided meaningful information which has altered our trajectory in a way that preserves for a very short period the possibility of keeping the horse in the barn. In particular, you confirmed that Mr. Moch is the malicious emailer and that he will acknowledge that.

From here, there are two possible paths forward. The first is the settlement path which to be successful must be completed by November 30th. We are willing to meet November 17 and the incentive to Mr. Moch and Ms. Stolzman is that our clients will negotiate a significant reduced cap on damages -- including potentially a minimal settlement amount -- if you will provide the information that I mentioned to you on the phone. The document that I previously mentioned when we first spoke is Exhibit C to the complaint filed in the business court. You will want to look at paragraph 11. You and I can arrive at a method to ensure that your clients will receive the value for the information if it is disclosed and that they will not be in the position of giving information without receiving any promised value, nor us giving value for information that is not valuable.

That is the basic path to settlement. What follows is the immediate litigation alternative.

We have noticed your motion to quash the Google subpoena before Judge Hudson in Durham Superior Court on Monday, November 16. That notice is enclosed. That notice makes no reference to your client. Upon receiving your motion, we reviewed the Tolling Agreement to see if your action constituted a breach and concluded as you must have that the Tolling Agreement has no effect whatsoever on the *Doe* litigation.

Accordingly, we also enclose with this letter our motions to compel on the subpoenas to Mr. Moch and Ms. Stolzman, which do reference your clients. We have not filed these with the Court, but if we do not receive a

satisfactory response from your clients by close of business Wednesday of next week, we will file them with the Court and bring these on for hearing also.

At the hearing on the 16th, we will definitively identify Mr. Moch as the malicious emailer using cyber-fingerprints that definitively place him at the FedEx Kinko's at 114 West [Franklin Street,] Chapel Hill[,] on January 23 and accessing the Gmail account from that location, as well as the bevy of AT&T geolocation data placing Mr. Moch's cellphone in The Siena Hotel and the Durham South Regional Library when he conducted his malicious email activities from those locations.

We are pursuing every option and will exhaust them all. I also include the subpoena for video surveillance of the Public Storage self-storage facility at 515 S. Greensboro Road visited by Ms. Stolzman the day after she and her husband received their subpoenas, and the day before one of their vehicles went to Eubanks Road, the location of the Chapel Hill dump. I previously raised a concern about document preservation with your clients' prior counsel. If there is an issue, we will pursue every remedy.

We will also report Mr. Moch to the appropriate law enforcement authorities for cyberstalking. As we've discussed, Mr. Moch's email campaign, which was intended to harass and embarrass Mr. Pappas and Mr. Worthy, constitutes criminal cyberstalking in violation of N.C. Gen. Stat. 14-196.3. Mr. Pappas and Mr. Worthy have thus far refrained from reporting Mr. Moch to law enforcement. And, consistent with 2008 Formal Ethics Opinion 15, Mr. Pappas and Mr. Worthy are prepared as part of a settlement permanently to refrain from reporting Mr. Moch to law enforcement. If, however, we are unable to agree on the next steps in the settlement process as set forth in this letter, Mr. Moch's conduct will immediately be reported to the proper authorities.

In addition to all of the foregoing, by at latest November 30 we will have no choice but to file a complaint publicly identifying Mr. Moch as the anonymous emailer and describing in detail his malicious intent and

> his failed attempts to hide his tracks. At that point, we will bring this matter to the attention of Chimerix for indemnity to which Mr. Pappas is entitled, and Mr. Moch is contractually obligated to respond to Chimerix' requests for information. So we will be able to get by right through the Court or potentially Chimerix all information for which we presently are willing to give your clients significant value in order to avoid full litigation.
>
> We will stand down on all these immediate litigation issues for the Tolling Period and withdraw our notice of hearing for November 16 on all issues if we can follow the roadmap that we initially discussed, i.e., (i) you provide fulsome document production as we have discussed before our November 17 meeting, which includes third party involvement (indicating and fully disclosing whether you have the Linsley information we are requesting, but not producing the information yet); (ii) we simultaneously give [you] our detailed damages disclosure; (iii) we meet November 17 and discuss a method to ensure value is received for third-party information to be provided by Mr. Moch by both Mr. Moch and us, and we address the required acknowledgement.
>
> All of this would be settlement confidential disclosures and discussions.

On 18 November 2015, defendants filed an amended complaint naming plaintiff as the defendant instead of "John Doe or Jane Doe." On the same date, plaintiff filed suit against defendants, asserting claims for abuse of process and unfair or deceptive trade practices. On 30 November 2015, defendants filed a motion to dismiss plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1 Rule 12(b)(6). Plaintiff filed an amended complaint on 7 January 2016 and defendants filed an amended motion for dismissal on 8 January 2016. Following a hearing conducted on 13 January 2016, the trial court entered an order on 25 February 2016, granting defendants' motion and dismissing plaintiff's claims with prejudice. Plaintiff noted a timely appeal to this Court.

II. Standard of Review

N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2015) allows a party to move for dismissal of a claim or claims based on the complaint's "[f]ailure to state a claim upon which relief can be granted[.]" "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). "[T]he well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (internal quotation omitted). "When the complaint on its face reveals that no law supports the claim, reveals an absence of facts sufficient to make a valid claim, or discloses facts that necessarily defeat the claim, dismissal is proper." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 7-8 (2015) (citing *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (other citation omitted)). "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, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

"When documents are attached to and incorporated into a complaint, they become part of the complaint and may be considered in connection with a Rule 12(b) (6) motion without converting it into a motion for summary judgment." *Schlieper v. Johnson*, 195 N.C. App. 257, 261, 672 S.E.2d 548, 551 (2009). Moreover:

> Although it is true that the allegations of [the plaintiff's] complaint are liberally construed and generally treated as true, the trial court can reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint. Furthermore, the trial court is "not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences."

Laster v. Francis, 199 N.C. App. 572, 577, 681 S.E.2d 858, 862 (2009) (citing *Schlieper* and quoting *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008)). "When reviewing pleadings with documentary attachments on a Rule 12(b)(6) motion, the actual content of the documents controls, not the allegations contained in the pleadings[.]" *Schlieper* at 265, 672 S.E.2d at 552 (citing *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001)).

III. Plaintiff's UDTPA Claim

[1] N.C. Gen. Stat. § 75-1.1 (2015) provides in relevant part that:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

"In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001) (citation omitted). In the present case, we conclude that plaintiff's complaint discloses on its face that the acts upon which plaintiff rests his claim were not "in or affecting commerce."

As noted above, N.C. Gen. Stat. § 75-1.1(b) provides that, for purposes of the statute, "commerce" "does not include professional services rendered by a member of a learned profession." "[T]he practice of law has traditionally been considered a learned profession, as indeed it is. Furthermore, this Court has . . . applied the exemption in the context of a law firm. Thus, we conclude that . . . a law firm and its attorneys . . . are members of a learned profession." *Reid v. Ayers*, 138 N.C. App. 261, 266, 531 S.E.2d 231, 235 (2000) (citing *Sharp v. Gailor*, 132 N.C. App. 213, 217, 510 S.E.2d 702, 704 (1999). "Although no bright line exists, we think that the exemption applies anytime an attorney or law firm is acting within the scope of the traditional attorney-client role." *Reid*, 138 N.C. App. at 267, 531 S.E.2d at 236.

We have carefully examined the allegations of plaintiff's complaint and have accepted as true the factual allegations in the complaint. We have, however, disregarded conclusory allegations that state legal conclusions or unwarranted inferences of fact, such as plaintiff's assertion that defendants acted "in retaliation for [plaintiff's] exercising his First Amendment rights[.]" We have also disregarded allegations with no obvious relevance to the issue of whether plaintiff's complaint states a claim for unfair or deceptive trade practices. For example, the complaint contains a number of allegations that appear to be included in order to establish matters such as (1) the basis for plaintiff's alleged concerns about defendants' business practices; (2) the fact that the policies of the North Carolina State Treasurer support transparency and accountability; (3) the sufficiency of an audit conducted by defendants in response

to plaintiff's anonymous emails; (4) plaintiff's speculations as to the amount of damages that defendants incurred as a result of the emails; and (5) whether defendants' counsel acted in violation of the Code of Professional Responsibility. Allegations addressed to these issues or to similarly peripheral matters do not contribute to the determination of whether the material factual allegations of plaintiff's complaint state a claim for relief.

Moreover, we have disregarded allegations that are directly contradicted by the documents attached to or referenced in plaintiff's complaint. For example, plaintiff's complaint alleges that the letters from defendants' counsel regarding settlement negotiations "falsely threaten[ed]" plaintiff that failure to obey their subpoenas would "be a criminal offense." In fact, the letters do not state that "failure to obey" a subpoena is a criminal offense, but only that the *destruction of evidence* that had been subpoenaed is a violation of criminal law. Having conducted a detailed review of plaintiff's complaint, accepting its well-pleaded factual allegations as true while disregarding other allegations as discussed above, we conclude that plaintiff's claim for unfair or deceptive acts rests entirely upon the contents of the two letters sent from defendants' counsel to plaintiff or plaintiff's counsel.

This Court has held that a party may not bring a claim for unfair or deceptive practices based upon the actions of the defendant's counsel. In *Davis Lake Community Ass'n v. Feldmann*, 138 N.C. App. 292, 530 S.E.2d 865 (2000), the plaintiff, the homeowners' association of a planned development community, sued residents of the community to recover delinquent homeowners' assessments. The homeowners filed a counterclaim against the plaintiff for unfair debt collection and later sought to amend their counterclaim to join plaintiff's counsel as a required party. The *Davis Lake* opinion reviewed *Reid v. Ayers*, in which this Court held that in order to state a claim for unfair debt collection, a complaint must not only allege facts stating a violation of the specific regulations applicable to debt collection but must also satisfy "the more generalized requirements of all unfair or deceptive trade practice claims," which exclude from the definition of "commerce" the "professional services rendered by a member of a learned profession." *Davis Lake*, 138 N.C. App. at 296, 530 S.E.2d at 868-69. The *Davis Lake* Court held that the exception for learned professions stated in N.C. Gen. Stat. § 75-1.1 precluded the defendants from joining plaintiff's counsel in their counterclaim. We then held that:

> We again emphasize that defendants only have a valid claim against plaintiff, not its counsel. Thus, in proceeding

> with their claim, defendants must focus on those alleged unfair debt collection practices employed exclusively by plaintiff. Any acts engaged in by plaintiff's counsel, even if cloaked in terms of a principal-agent relationship, fall within the learned profession exemption and thus outside the purview of the NCDCA.

Davis Lake, 138 N.C. App. at 297, 530 S.E.2d at 869 (emphasis added). We conclude that *Davis Lake* is controlling on the issue of whether plaintiff can bring a claim against defendants based upon letters sent by defendants' counsel, and that plaintiff may not do so.

In arguing for a different result, plaintiff does not cite controlling authority to the contrary. Plaintiff makes the conclusory assertion that the holding of *Davis Lake* "was not unbridled or without limits," but fails to articulate how the present case exceeds the "limits" of that case. Plaintiff also identifies factual differences between the alleged actions of the counsel in *Davis Lake* and those of counsel in the present case, without proffering a basis upon which these factual differences would change our legal analysis. In addition, plaintiff cites *Huff v. Gallagher*, 521 B.R. 107 (Bankr. E.D.N.C. 2014), in support of his position. "We note initially that a decision of the Bankruptcy Court is not binding on this Court." *In re Foreclosure of Bass*, 217 N.C. App. 244, 254, 720 S.E.2d 18, 26 (2011), *rev'd on other grounds*, 366 N.C. 464, 738 S.E.2d 173 (2013). Furthermore, the opinion in *Huff* fails to acknowledge our holding in *Davis Lake*, or to distinguish it. As a result, *Huff* is neither controlling nor persuasive authority.

Moreover, plaintiff fails to identify any specific acts alleged in his complaint that (1) were undertaken by defendants alone and not by defendants' counsel, and (2) could support a claim for unfair or deceptive practices. In his reply brief, plaintiff states that his complaint "asserted various acts undertaken directly by Defendants that underlie his claims," citing paragraphs Nos. 1, 26, 38, 41, 45, 46, 59, 72, 81, 82, and 86. We have examined these allegations and conclude that they consist of general background information, the discussion of irrelevant matters such as plaintiff's speculation on the extent of the damages suffered by defendants, conclusory assertions that are not supported by factual allegations, and the merits of the terms of settlement that were offered by defendants' counsel in their letters. We hold that plaintiff's complaint failed to allege facts that, if true, would establish that the acts complained of were "in commerce" as the term is defined in N.C. Gen. Stat. § 75-1.1(b), and that the trial court did not err by dismissing this claim. As a result, we need not address the parties' arguments regarding

whether plaintiff's complaint stated facts supporting the other elements of a claim for unfair or deceptive trade practices.

IV. Plaintiff's Claim for Abuse of Process

[2] "Abuse of process is the misapplication of civil or criminal process to accomplish some purpose not warranted or commanded by the process." *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 602, 646 S.E.2d 826, 831 (2007) (internal quotation omitted). "Two elements must be proved to find abuse of process: (1) that the defendant had an ulterior motive to achieve a collateral purpose not within the normal scope of the process used, and (2) that the defendant committed some act that is a 'malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ.' " *Id.* (quoting *Stanback*, 297 N.C. at 200, 254 S.E.2d at 624) (emphasis in original). However, "[t]here is no abuse of process where it is confined to its regular and legitimate function in relation to the cause of action stated in the complaint." *Stanback* at 201, 254 S.E.2d at 624.

On appeal, plaintiff makes a number of arguments to support his contention that the letters sent by defendants' counsel and defendants' issuance of subpoenas constitute "abuse of process in violation of North Carolina law." Plaintiff asserts that defendants should not have issued subpoenas in connection with their "John Doe" lawsuit, given that defendants had information indicating that plaintiff was the person who had sent the emails; that the subpoenas were issued with the "ulterior motive" of "forc[ing plaintiff] to the negotiating table," or, alternatively, were issued with the "ulterior purpose" of pressuring plaintiff to provide testimony for defendants in another civil case. However, at the hearing on this matter, plaintiff's counsel made the following argument regarding plaintiff's claim for abuse of process:

> PLAINTIFF'S COUNSEL: To touch on the abuse of process very quickly: The defendants want to characterize it as a mere issuance of a subpoena. That's not the im-- that's not the abuse of the process. It's the totality of the circumstances and the idea that you have to appear within -- appear on a Saturday for a deposition, produce some 55 subsets of documents and, oh, yeah, by the way, this is all coming under the context of a letter which will demand money again as we have alleged that you're not entitled to. That's the abuse of the process.

"Our appellate courts have 'long held that where a theory argued on appeal was not raised before the trial court, the law does not permit

parties to swap horses between courts in order to get a better mount [on appeal].' " *State v. Portillo*, __ N.C. App. __, __, 787 S.E.2d 822, 832 (2016) (quoting *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (internal quotation omitted)). Before the trial court, plaintiff argued that the "totality of the circumstances" of the issuance of subpoenas constituted an abuse of process, based on the facts that the subpoenas required the taking of a deposition on a Saturday, the subpoenas requested the production of numerous documents, and the subpoenas were attached to a letter that conditioned an offer to settle upon plaintiff's payment of money to defendants. Having relied upon this argument at trial, plaintiff may not raise new arguments on appeal, to which defendants had no chance to respond at trial and on which the trial court had no opportunity to rule. On appeal, plaintiff fails to articulate how the facts noted above would support a claim for abuse of process, and we conclude that plaintiff is not entitled to relief on the basis of this argument.

For the reasons discussed above, we conclude that the trial court did not err by dismissing plaintiff's complaint, and that its order should be

AFFIRMED.

Judges CALABRIA and INMAN concur.

THE NEWS AND OBSERVER PUBLISHING COMPANY, ET AL., PLAINTIFFS
v.
PAT MCCRORY, AS GOVERNOR OF NORTH CAROLINA, ET AL., DEFENDANTS

No. COA16-725

Filed 20 December 2016

Appeal and Error—preservation of issue—sovereign immunity

An appeal in a public record case was dismissed as interlocutory where defendants contended that the trial court order involved sovereign immunity but did not properly plead, raise, or argue the affirmative defense. Sovereign immunity was raised only obliquely, at best, in a hearing on a motion for partial summary judgment. The record on appeal made clear that plaintiffs were taken completely by surprise when the order resulting from the hearing included an ambiguous reference to the issue.

Appeal by Defendants from order entered 29 April 2016 by Judge John O. Craig, III in Wake County Superior Court. Heard in the Court of Appeals 1 November 2016.

Southern Environmental Law Center, by Kimberley Hunter and Douglas William Hendrick; Stevens Martin Vaughn & Tadych, PLLC, by Hugh Stevens, C. Amanda Martin, and Michael J. Tadych; and North Carolina Justice Center, by Carlene McNulty, for Plaintiffs.

Robinson, Bradshaw & Hinson, P.A., by David C. Wright, III and Erik R. Zimmerman; and Robert F. Orr, for Defendants; Office of General Counsel, by General Counsel Robert C. Stephens, Jr., Deputy General Counsel Jonathan R. Harris, and Deputy General Counsel Lindsey E. Wakeley, for Defendant McCrory.

STEPHENS, Judge.

This appeal arises from a partial grant of judgment on the pleadings in favor of Plaintiffs. Defendants argue that Plaintiffs' claims are barred by the doctrine of sovereign immunity, or, in the alternative, that Plaintiffs' claims are either precluded under the principles of declaratory and mandamus relief in this State, or are moot. In light of our well-established precedent regarding interlocutory appeals, only Defendants' sovereign immunity contentions could provide them a path to immediate appellate review. However, because the record in this matter reveals that Defendants did not properly plead or argue sovereign immunity in the trial court, we dismiss this appeal as not properly before us.

Factual and Procedural Background

Although we do not reach the merits of this interlocutory appeal, a brief review of the origins of the case provides helpful context in understanding this matter of significant public import. Defendants Pat McCrory, as Governor of North Carolina; John E. Skvarla, II, as Secretary of the North Carolina Department of Commerce; Donald R. van der Vaart, as Secretary of the North Carolina Department of Environment and Natural Resources; Dr. Aldona Z. Wos, as Secretary of the North Carolina Department of Health and Human Services; Frank L. Perry, as Secretary of the North Carolina Department of Public Safety; William G. Daughtridge, Jr., as Secretary of the North Carolina Department of Administration; Anthony J. Tata, as Secretary of the North Carolina Department of Transportation; Susan W. Kluttz, as Secretary of the North Carolina Department of Cultural Resources; and Lyons Gray, as

Secretary of the North Carolina Department of Revenue (collectively, "the Administration") are our State's governor and his appointees, either currently or formerly[1] serving as the heads of various State agencies. Plaintiffs The News and Observer Publishing Company ("N&O"); The Charlotte Observer Publishing Company ("The Observer"); Capitol Broadcasting Company, Incorporated ("WRAL"); Boney Publishers d/b/a The Alamance News; ZM INDY, Inc. d/b/a Indy Week ("Indy"); and Media General Operations, Inc., are media entities that provide news services to the citizens of our State via print and online newspapers, broadcast television stations, and online news websites. Plaintiffs The Southern Environmental Law Center ("SELC") and The North Carolina Justice Center d/b/a NC Policy Watch are not-for-profit corporations chartered in our State that, *inter alia*, seek to inform the public about various matters of public concern and to advocate for policies that they believe will benefit the people and environment of North Carolina.

As part of their regular activities, Plaintiffs frequently make requests for access to and copies of government documents, records, and other information pursuant to our State's Public Records Act ("the Act"). *See* N.C. Gen. Stat. § 132-1(b) (2015) (providing that, because "public records and public information compiled by the agencies of [our] government . . . are the property of the people[,] . . . . it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law"). Each Defendant, in his or her official capacity, is a public "agency" as defined in the Act and a custodian of public records under the Act. *See* N.C. Gen. Stat. § 132-1(a). The essence of Plaintiffs' claims is that, since Defendant McCrory took office in January 2013, the Administration has implemented policies and procedures in order to frustrate the purpose of the Act by (1) intentionally delaying or wrongfully denying access to public records so that Plaintiffs cannot provide timely and thorough information to the public about the Administration's decisions, actions, and policies, and (2) imposing or requesting unreasonable and unjustified fees and charges in connection with requests made under the Act.

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1. Some of the named Defendants have left the Administration since the commencement of this lawsuit. As of the date this opinion is filed, McCrory, Skvarla, van der Vaart, Perry, and Kluttz are still serving in their positions, while Vos, Daughtridge, Tata, and Gray have been replaced. Rick Brajer is the current Secretary of the Department of Health and Human Services, Kathryn Johnston is the current Secretary of the Department of Administration, Nick Tennyson is the current Secretary of the Department of Transportation, and Jeff Epstein is the current Secretary of the North Carolina Department of Revenue.

Plaintiffs allege several examples of the Administration's delaying tactics, including, *inter alia*:

> • That Indy requested copies of Defendant McCrory's travel records on 8 November 2013, spent the next 17 months narrowing and refining the scope of its request, engaged an attorney to pursue the request, and yet still received no records until 13 March 2015, when redacted records were turned over with no explanation then or now regarding the redactions.
>
> • That WRAL requested travel records from Defendant McCrory in February 2015, but had not received the records as of July 2015.
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> • That N&O requested certain correspondence between members of the Administration regarding the State's sale of the Dorothea Dix property to the City of Raleigh in July 2014, but received no records until 9 June 2015. N&O's subsequent request for additional records connected to the Dix sale has resulted in no records being turned over. WRAL requested similar records in October 2014 but also received no records until 9 June 2015.
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> • That SELC requested records from the Department of Transportation about a possible expansion of Interstate 77 to include High Occupancy Toll ("HOT") lanes in January 2014 and did not receive records until May 2015—after a contract to construct the HOT lanes had already been signed.
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> • That WRAL requested email from Defendant McCrory's office related to the proposed move of the State Bureau of Investigation from the Office of the Attorney General in May 2014, but the request was not fulfilled until June 2015, after WRAL threatened litigation over the Administration's nonresponse.
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> • That NC Policy Watch submitted a public records request in August 2013 to the North Carolina Department of Health and Human Services ("HHS") for records related to a departmental salary freeze and certain subsequent salary increases, but these records have never been provided.
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> • That The Observer requested a database from the Office of the State Medical Examiner ("OSME")—part of

HHS—that included information compiled by the OSME about every death investigated by medical examiners since 2001, and, in response, HHS provided inaccurate and incomplete data, only turning over the complete database after a one-year delay and threats of legal action.

• That The Alamance News requested records from the Department of Commerce on 11 July 2014 related to certain economic development projects in Alamance and Orange counties, but no records were received as of July 2015.

On 21 July 2015, Plaintiffs commenced this action by the filing of a complaint and issuance of summonses in Wake County Superior Court. Plaintiffs filed an amended complaint ("the Complaint") on 22 July 2015. The Complaint seeks entry of orders (1) "in the nature of a writ of mandamus requiring [the Administration] to comply" with the Act; (2) compelling the Administration to provide any public records requested under the Act, but not yet provided; (3) declaring that certain of the Administration's policies and procedures violate the Act; (4) declaring that, under the Act, the Administration may not collect fees for inspection of public records absent a request for copies of the records; and (5) awarding reasonable attorney fees as permitted under the Act. The Administration filed its answer on 25 September 2015, and, on 17 February 2016, moved for partial judgment on the pleadings pursuant to Rule of Civil Procedure 12(c). *See* N.C. Gen. Stat. § 1A-1, Rule 12(c) (2015). On 26 February 2016, Plaintiffs moved for partial judgment on the pleadings and to compel discovery. The motions came on for hearing at the 23 March 2016 session of Wake County Superior Court, the Honorable John O. Craig, III, Judge presiding.

By order entered 29 April 2016 ("the order"), the trial court denied in part and granted in part the Administration's motion for partial judgment on the pleadings, granted in part Plaintiffs' motion to compel discovery, and postponed ruling on Plaintiffs' motion for partial judgment on the pleadings. Specifically, the trial court dismissed Plaintiffs' claims "pertaining to any public records requests made by any persons other than Plaintiffs . . . to Defendants named" in the complaint, but denied the Administration's motion to dismiss Plaintiffs' claims for declaratory relief under the Act, and relief in the nature of a writ of mandamus with regard to public records requests "that have not yet been acted upon in whole or in part"—that is, where the Administration has not yet produced requested public records. The court also denied the Administration's motion to dismiss "to the extent [it] attempt[ed] to dismiss Plaintiffs' claims on grounds that the General Assembly did not authorize Plaintiffs

to assert such claims against [the Administration], including as set forth particularly in the sovereign immunity discussion in *Nat Harrison Assocs., Inc. v. North Carolina State Ports Authority*, 280 N.C. 251, 258 (1972) and related cases."[2] In connection with this portion of its ruling, the court noted that, while "the procedures and remedies prescribed by [the Act] are exclusive[,] . . . . a request for declaratory relief appears to be the best, if not the only, procedural method [by] which the provisions of [the Act] can be interpreted and construed." Finally, the trial court denied the motions of both parties with regard to Plaintiffs' claims that the Act does not permit the assessment of special service fees where only *inspection* of public records—rather than *copies* of the records—is sought.[3]

On 3 May 2016, four days after the order was filed, the trial court advised counsel for Plaintiffs and the Administration that it was considering filing a supplemental order to clarify that any issue regarding sovereign immunity would not be ruled upon at that time and requesting that the Administration refrain from filing a notice of appeal until the supplemental order could be filed. On 5 May 2016, the trial court provided Plaintiffs and the Administration with a draft of its supplemental order which clarified that the issue of sovereign immunity had not been properly raised in the trial court. The following morning, the Administration gave written notice of appeal from the order. On 12 May 2016, the Administration filed in the trial court a motion to stay proceedings pending appeal.

On the same day the Administration moved for a stay, the trial court filed its supplemental order denying the Administration's motion for a stay and seeking "to clarify [the order] by modifying a specific portion of said order to reflect the [c]ourt's original intent, as well as to clarify the [c]ourt's position as to a recent defense asserted by the" Administration. Specifically, the supplemental order stated:

> Paragraph One of the [o]rder denied a portion of the [Administration's] motion for judgment on the pleadings, insofar as it pertained to the defense of sovereign

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2. The meaning and effect of this portion of the order is discussed in greater detail *infra*.

3. Thus, the record reflects that the trial court did not postpone ruling on all aspects of Plaintiffs' motion for partial judgment on the pleadings, having denied the motion in regard to the special service charge "[a]t this juncture . . . ."

> immunity, but stated that the question of sovereign immunity could be revisited after completion of the limited discovery permitted in the [o]rder. Upon further reflection, the [c]ourt stated in an email to counsel for the parties, on May 3, 2016, that it would have been more appropriate to take the matter under advisement during the pendency of discovery, rather than characterizing the matter as a provisional denial. However, after conducting additional research, the [c]ourt finds it would be inaccurate to consider the matter as "under advisement" and that the defense of sovereign immunity is not yet ripe for the [c]ourt's consideration [because] . . . .
>
> . . . . while the [Administration] reserved the right "to assert additional affirmative defenses as discovery warrants and to the extent permitted by law" in their Answer . . . , they have not filed a motion to amend their Answer under Rule 15 of the Rules of Civil Procedure. North Carolina case law is clear that sovereign immunity must be raised as an affirmative defense under Rule 8(c) of the Rules. . . . The [c]ourt is aware of the line of appellate cases which hold that the defense of sovereign immunity is more than a mere affirmative defense, as it shields a defendant entirely from having to answer for its conduct at all in a civil suit. . . . *But the action before this* [c]*ourt is one in which the North Carolina General Assembly has expressly waived sovereign immunity . . . . The* [*Administration is*] *decidedly not immune from an action brought under* [*Section*] *132-9*. If this [c]ourt ultimately finds sovereign immunity to be applicable concerning certain pleadings raised by [P]laintiffs (*e.g.*, because Chapter 132 does not waive sovereign immunity in such a fashion), the defense would only narrowly apply to a mere portion of the Plaintiffs' [c]omplaint. . . . When combined with the [Administration's] decision not to raise the defense of sovereign immunity via a motion to amend their Answer up to this point, the [c]ourt is of the opinion that an appeal is premature and that discovery should go forward.

(Emphasis added). Thus, in addition to denying the Administration's motion to stay discovery pending resolution of this appeal, the supplemental order sought to either "clarify" or "modify" the order to explain there was no trial court ruling on sovereign immunity because the

trial court did not believe that the Administration had properly raised that matter.

Grounds for Appellate Review

All parties agree that this appeal is interlocutory. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (citation omitted), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). "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). "However, N.C. Gen. Stat. § 1-277 . . . allows a party to immediately appeal an order that either (1) affects a substantial right or (2) constitutes an adverse ruling as to personal jurisdiction." *Can Am S., LLC v. State*, 234 N.C. App. 119, 122, 759 S.E.2d 304, 307, *disc. review denied*, 367 N.C. 791, 766 S.E.2d 624 (2014).

As appellant, it is the Administration's burden to establish an exception that will permit immediate review of the order. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) ("It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.") (citations omitted). The only basis for immediate appellate review asserted by the Administration is that the order involved a ruling on a claim of sovereign immunity. An interlocutory order ruling on a motion for judgment on the pleadings pursuant to Rule 12(c) based upon "sovereign immunity affects a substantial right and warrants immediate appellate review." *Webb v. Nicholson*, 178 N.C. App. 362, 363, 634 S.E.2d 545, 546 (2006) (citation omitted).

This aspect of our State's jurisprudence is clear: in an appeal from an interlocutory order denying a Rule 12 (c) motion based upon sovereign immunity,[4] this Court may reach the merits of arguments grounded in

4. "[I]n most immunity-related interlocutory appeals, we have declined requests that we consider additional non-immunity-related issues on the merits." *Bynum v. Wilson Cty.*, 228 N.C. App. 1, 7, 746 S.E.2d 296, 300 (2013) (citing *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 764-65 (2010); *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 384-85, 677 S.E.2d 203, 207-08 (2009), *disc. review denied*, 363 N.C. 806, 690 S.E.2d 705 (2010); *Boyd v. Robeson Cty.*, 169 N.C. App. 460, 464-65, 621 S.E.2d 1, 4, *disc. review denied*, 359 N.C. 629, 615 S.E.2d 866 (2005)), *rev'd in part on other grounds*, 367 N.C. 355, 758 S.E.2d 643 (2014).

sovereign immunity where that issue was properly pled and argued in the trial court. Our review of the record here reveals that the Administration did neither in this case, and, accordingly, we dismiss this appeal.

I. When and how sovereign immunity must be raised in the trial court

Our Supreme Court has held that sovereign immunity "is more than a mere affirmative defense, as it shields a defendant entirely from having to answer for its conduct at all in a civil suit . . . ." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation omitted).

> It is an established principle of jurisprudence, resting on grounds of sound public policy, that a state may not be sued in its own courts or elsewhere unless it has consented by statute to be sued or has otherwise waived its immunity from suit. By application of this principle, a subordinate division of the state or an agency exercising statutory governmental functions may be sued only when and as authorized by statute.

Can Am S., LLC, 234 N.C. App. at 125, 759 S.E.2d at 309 (citations and internal quotation marks omitted). As the Administration concedes, "[o]rdinarily, the failure to plead an affirmative defense results in a waiver [of that defense] unless the parties agree to try the issue by express or implied consent." *Burwell v. Giant Genie Corp.*, 115 N.C. App. 680, 684, 446 S.E.2d 126, 129 (1994) (citation omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 8(c) (2015); *see also Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 598, 394 S.E.2d 643, 649 (1990) (noting that "failure to plead [an affirmative defense] is a bar to this issue being raised on appeal") (citation omitted), *disc. review denied*, 328 N.C. 89, 402 S.E.2d 824 (1991). The Administration did not plead sovereign immunity in its answer[5] and does not contend that Plaintiffs agreed—either implicitly or explicitly—to try the issue of sovereign immunity by consent.

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5. At oral argument before this Court, the Administration observed that sovereign immunity may be raised via Rule of Civil Procedure 12(b)(6) and noted that its answer stated as an affirmative defense that Plaintiffs "fail[ed] to state a claim upon which relief may be granted." *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2015). However, the Administration did not mention sovereign immunity as the basis for a Rule 12(b)(6) dismissal in its answer, in its motion for partial judgment on the pleadings, or during oral argument at the motion hearing. Accordingly, case law permitting immediate appellate review of interlocutory Rule 12(b)(6) dismissals based upon sovereign immunity claims is inapplicable here. *See Murray v. Univ. of N.C. at Chapel Hill*, __ N.C. App. __, __, 782 S.E.2d 531, 536 ("[A]lthough [the] defendant's motion to dismiss referred to Rule 12(b)(6) as well as Rule 12(b)(1), the motion did not mention sovereign immunity. During the oral argument, where [the] defendant raised the sovereign immunity doctrine for the first time,

Instead, the Administration cites case law holding that, although "the better practice [is] to require a formal amendment to the pleadings[,]" generally, "unpleaded defenses, when raised by the evidence, should be considered in resolving a motion for summary judgment[,]" *N.C. Nat'l Bank v. Gillespie*, 291 N.C. 303, 306, 230 S.E.2d 375, 377 (1976), and specifically, that an unpled defense of sovereign immunity should be considered in ruling on a motion for summary judgment where "both parties knew or should have known that an action against a governmental entity . . . raises a question of sovereign immunity." *Mullis v. Sechrest*, 126 N.C. App. 91, 96, 484 S.E.2d 423, 426 (1997) (citing *Dickens v. Puryear*, 45 N.C. App. 696, 698, 263 S.E.2d 856, 857-58, *rev'd in part on other grounds*, 302 N.C. 437, 276 S.E.2d 325 (1981)), *rev'd on other grounds*, 347 N.C. 548, 495 S.E.2d 721 (1998). The Administration asserts that the holdings in these appeals from summary judgment orders should apply equally to a ruling on a motion for judgment on the pleadings. Assuming *arguendo* that the Administration is correct on that point, the factual circumstances and procedural posture of each cited case renders it inapplicable to this matter.

The above-quoted language from *Mullis*, for example, was part of this Court's analysis of whether the trial court abused its discretion in allowing the "defendants to amend their answer to assert the defense of sovereign immunity." 126 N.C. App. at 94, 484 S.E.2d at 425. Here, in contrast, the Administration did not move to amend its answer, and nothing in the record suggests that either party contemplated sovereign immunity as a possible defense prior to or at the motion hearing. The Administration also cites *Craig* for the proposition that the order here affects a substantial right and is thus immediately appealable, but in that case unlike in the matter at bar, the defendant explicitly asserted the defense of governmental immunity in its answer. 363 N.C. at 335, 678 S.E.2d at 352. Accordingly, *Craig*, like *Mullis*, is inapposite.

The Administration's reliance on *Gillespie* and *Dickens* is similarly misplaced. The *Gillespie* appeal arose from a suit by a bank against a debtor to collect on promissory notes, and the bank's "evidence and

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[the] defendant relied only on Rules 12(b)(1) and 12(b)(2) in arguing that the complaint was barred by sovereign immunity and did not rely upon Rule 12(b)(6). . . . Further, since neither [the] defendant's written motion nor its oral argument at the hearing relied on Rule 12(b)(6) in connection with the sovereign immunity defense, the case law authorizing interlocutory appeals for denial of a Rule 12(b)(6) motion based on sovereign immunity does not apply."), *disc. review as to additional issues allowed*, __ N.C. __, 787 S.E.2d 22 (2016). Review of *Murray* on the basis of a dissent is currently pending in our Supreme Court.

[and the debtor's] admissions establish that [the debtor] executed the five notes upon which this action rests, thereby establishing a *prima facie* case." 291 N.C. at 306, 230 S.E.2d at 377-78. "Nowhere in his answer did [the debtor] assert the defenses[, to wit, that he had an oral agreement with the bank regarding repayment of the notes,] *raised by his affidavits filed in opposition to the motion for summary judgment*." *Id.* at 306, 230 S.E.2d at 377 (emphasis added). In that limited circumstance, our Supreme Court held that,

> in light of the policy favoring liberality in the amendment of the pleadings, either the answer should be deemed amended *to conform to the proof offered by the affidavits* or a formal amendment permitted, the affidavits considered, and the motion for summary judgment decided under the usual rule pertaining to the adjudication of summary judgment motions.

Id. at 306, 230 S.E.2d at 377 (citations, internal quotation marks, and brackets omitted; emphasis added).

Here, in contrast, it is undisputed that the Administration did not raise the defense of sovereign immunity in its motion for partial judgment on the pleadings or in any affidavit attached thereto. The Administration asserts that sovereign immunity *was* raised at the motion hearing, but there is a critical difference between raising an unpled affirmative defense that would operate as a complete bar to an action in an affidavit attached to a motion and raising such a defense *at the hearing on the motion*. In the former situation, the opposing party is made aware of, and given an opportunity to prepare a response to, the unpled defense, by both written response in opposition to the motion and at the hearing. Thus, the holding in *Gillespie* is explicitly aimed at preventing an overly technical exclusion of a possibly valid affirmative defense from being considered even though the opposing party has been made aware of it. On the other hand, where, as here, the matter of sovereign immunity—a *complete* defense to the entire lawsuit—is raised at best only obliquely in the midst of the hearing on a motion for *partial* judgment on the pleadings, the opposing party is denied any chance to prepare a response.

Our Supreme Court has directly addressed whether a party may raise an unpled affirmative defense for the first time at a motion hearing. In *Dickens v. Puryear*, although the defendant did not plead the statute of limitations—an affirmative defense—in his answer and did not refer to the statute of limitations in his motion for summary judgment, the Court noted that the

> *plaintiff was not surprised by the limitations defense and had full opportunity to argue and present evidence relevant to the limitations questions.* The [p]laintiff's complaint [was] cast in terms of the tort of intentional infliction of mental distress rather than assault and battery. This demonstrates [the] plaintiff's awareness that the statute of limitations was going to be an issue. [The p]laintiff did present evidence and briefs on the question before [the trial court]. Thus, . . . [the] affirmative defense was clearly before the trial court. . . . [The] defendants' failure expressly to mention this defense in their motions [was] not held to bar the court's granting the motions on the limitations ground.

302 N.C. 437, 443, 276 S.E.2d 325, 329-30 (1981) (internal quotation marks omitted; emphasis added). However, our Supreme Court cautioned that

> if an affirmative defense required to be raised by a responsive pleading is sought to be raised for the first time in a motion for summary judgment, *the motion must ordinarily refer expressly to the affirmative defense relied upon.* Only in *exceptional circumstances where the party opposing the motion has not been surprised and has had full opportunity to argue and present evidence* will movant's failure expressly to refer to the affirmative defense not be a bar to its consideration on summary judgment.

Id. at 443, 276 S.E.2d at 329 (emphasis added). Simply put, the circumstances in *Dickens* indicated that the plaintiff was not prejudiced by the technical failure of the defendant to plead and reference an affirmative defense because it was clear that the plaintiff understood the issue was contested and not only had the opportunity to respond, but *had* responded.

Here, on the other hand, rather than an elevation of substance over form—the goal noted in both *Dickens* and *Gillespie*—the result urged by the Administration would be to allow a technicality of form—the passing mention of an affirmative defense at a hearing—to utterly bar the majority of Plaintiffs' claims without providing them the opportunity to make *any* substantive response. This type of "gotcha" result is not due to a mere technical failure to comply with Rule 8. It is precisely the type of unjust and inequitable outcome about which our Supreme Court cautioned in *Dickens*. It is undisputed that the Administration's answer did not assert sovereign immunity as an affirmative defense,

the issue was not mentioned in its motion for partial judgment on the pleadings or any of the Administration's other filings in the trial court, neither party briefed the issue of sovereign immunity, and Plaintiffs were not prepared to and did not argue the issue at the motion hearing. Indeed, the record on appeal makes clear that Plaintiffs did not believe that the issue of sovereign immunity was raised at all at the hearing and were taken completely by surprise when the resulting order included an ambiguous reference to the issue, ultimately causing the trial court to file its supplemental order to clarify that the question had not been properly raised or argued at the hearing.

In sum, precedent reveals that the affirmative defense of sovereign immunity must generally be raised in a defendant's answer or by motion, and the circumstances here do not fall into any of the narrow exceptions to that rule permitted in the cases cited by the Administration.[6] Thus, the affirmative defense of sovereign immunity was not before the trial court because the "failure expressly to refer to the affirmative defense [was] a bar to its consideration on" the Administration's motion for partial judgment on the pleadings. *See id.*

Despite having failed to plead the defense in its answer or motion or briefs in support of its position on its motion, and notwithstanding the undisputed fact that Plaintiffs were thus denied any opportunity to respond to the defense, the Administration contends that it did raise and argue the issue of sovereign immunity during the motion hearing. The transcript of the hearing belies this assertion.

At the hearing, the Administration began by making extensive arguments on mootness and exclusivity of the Act's remedies, after which counsel for the Administration informed the trial court that he "want[ed] to raise one other point[:]"

> So you start from the proposition that there—that we say that *these really are exclusive remedies*. And, again, I told you I would remind you of a statement in *Shella vs. Moon* . . . . But if it were not apparent that these remedies

6. The Administration also cites cases in which trial court rulings on Rule 12(b)(6) motions to dismiss based upon a plaintiff's failure to allege the defendant's waiver of sovereign immunity have been approved. *See, e.g.*, *Paquette v. Cty. of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (noting that our appellate courts have "consistently disallowed claims based on tort against governmental entities *when the complaint failed to allege a waiver of immunity*") (citations omitted; emphasis added), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). However, the Administration did not move to dismiss Plaintiffs' complaint on this basis and makes no argument in this regard in its effort to establish a ground for appellate review of the order.

were limited, as we said, and comprehensive, the Court in *Shella* says—and this is right in the wheelhouse of the court[']s case. It deals with *the mootness issue*.

So if you're dealing with a mootness issue, you're having to ask a question what are the remedies? So have the remedies been satisfied? So this is not dicta. This is not—they're not side stepping, they're not commenting for the good of the populous [sic]. They are making a decision in a case about mootness.

In the *Shella* case, dealing with a 132-9 issue where the documents have been produce[d], is this quote: "The only recovery provided for by this statute is the opportunity to inspect public records."

And from our standpoint, not to be cute, but "only" means "only." So we know when it's indisputable that there's no declaratory relief that is available under that statute. Now, I told you I was going to hand up that case; the only case I'm going to hand you.

I want to raise one other point that we did not directly raise in our brief, but I think it's important here.

[The trial court accepted a case handed up by counsel.]

And this case, this proposition has been cited in several cases. As best I can tell it began with this case[,] this *North Carolina Port Authorities* case in 1972. It's this principle which is located on Page 4 of the opinion. I've highlighted it. If you'll see that highlighted provision.

But, if court is with me, what that says is that, in this case, it says the [S]tate is immune from suit unless and until it is expressly consented to be sued. It is for the [G]eneral [A]ssembly to determine when and under what circumstances the [S]tate may be sued.

And when statutory provision—and we think this is what the public records law is—*when statutory provision has been made for an action against the* [*S*]*tate, the procedure described by the statute must be* [*followed and*] *the remedies thus supported* [sic] *are, they underlined this word, "exclusive."*

> So if you considered the fact the way the statute has set out the remedies, you consider then the judicial statement of the Court of [A]ppeals in *Shella* that this is all that they are; *the only remedy is* [*to compel*] *inspection*.[7] And you considered this line of cases *where because* [*of*] *a waiver of sovereign immunity there must be exclusivity* unless you risk a balance and create a cause of action the legislature didn't authorize *when it waived immunity*.
>
> [For a]ll of those reasons[,] we say we would urge the [c]ourt strongly to consider to say [sic] that declaratory judgment in this context really isn't a[] judicial add on that was not authorized. That's the first part of what we would urge the [c]ourt to reconsider or consider further with respect to that issue.

(Emphasis and italics added). This excerpt makes clear that trial counsel did not assert sovereign immunity as a bar to the entire action, but rather, argued only that, *because the Act is a waiver of sovereign immunity*, its remedy provisions are exclusive and do not include declaratory judgments. This understanding of counsel's argument is further supported by a review of the case referred to—*Nat Harrison Assocs., Inc. v. N.C. State Ports Auth.*, 280 N.C. 251, 185 S.E.2d 793, *reh'g denied*, 281 N.C. 317 (1972). The section of that case to which the

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7. In *Shella v. Moon*, the plaintiff sought release of documents related to a condemnation proceeding against her by filing an order to compel disclosure pursuant to section 132-9. 125 N.C. App. 607, 608-09, 481 S.E.2d 363, 364 (1997). After all litigation connected to the condemnation was concluded, a representative of our State's Department of Transportation offered the records for the plaintiff's review. *Id.* at 609, 481 S.E.2d at 364. After the State defendants moved for summary judgment, the "plaintiff moved to amend [her] complaint to add certain [additional] defendants and request compensatory and punitive damages." *Id.* The trial court granted summary judgment to the defendants, thereby denying the plaintiff's motions, and from that ruling, the plaintiff appealed. *Id.* This Court noted that "the only recovery provided for by this statute [section 132-9] is the opportunity to inspect public records" and held that, because "she has been granted the relief she sought by initiating this action under [section] 132-9[,] . . . her case must be dismissed [as moot]." *Id.* at 610, 481 S.E.2d at 364-65. In citing *Shella* in support of the Administration's exclusive *remedy* argument, its trial counsel appears to be conflating the concepts of recovery and remedy. "Recovery" is defined as "[t]he regaining or restoration of something lost or taken away[;] [t]he obtainment of a right to something (esp. damages) by a judgment or decree[; or a]n amount awarded in or collected from a judgment or decree[,]" while a "remedy" is a "means of enforcing a right or preventing or redressing a wrong; legal or equitable relief." *Black's Law Dictionary* 1302, 1320 (Deluxe 8th ed. 2004). Plaintiffs here, unlike the plaintiff in *Shella*, are not asking to *recover* damages from the Administration. Rather, Plaintiffs seek the *remedy* of a declaratory judgment. As such, while *Shella* may be pertinent regarding the Administration's mootness argument, it is unavailing in connection with its exclusive remedies contention.

Administration's trial counsel referred is the following:

> An action against a commission or board created by statute as an agency of the State where the interest or rights of the State are directly affected is in fact an action against the State. The State is immune from suit unless and until it has expressly consented to be sued. It is for the General Assembly to determine when and under what circumstances the State may be sued. *When statutory provision has been made for an action against the State, the procedure prescribed by statute must be followed, and the remedies thus afforded are exclusive.* The right to sue the State is a conditional right, and the terms prescribed by the Legislature are conditions precedent to the institution of the action.

Id. at 258, 185 S.E.2d at 797 (quoting *Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 172, 118 S.E.2d 792, 795 (1961)) (citations, internal quotation marks, and ellipsis omitted). No issue regarding sovereign immunity was presented to our Supreme Court in *Nat Harrison Assocs.*, which concerned a contractor's suit against a State agency, seeking to recover damages after the agency retained the contractor's final payment as liquidated damages for construction delays. *Id.* at 255, 185 S.E.2d at 795. The question before the Court was whether "the trial judge correctly found that there was no provision in the contracts for recovery of damages for delays or for losses by reason of the devaluation of the German mark." *Id.* at 259, 185 S.E.2d at 797. Thus, the quotation from *Great Am. Ins. Co.* was cited not in regard to any issue of sovereign immunity, but instead, as part of the analysis of whether the statute permitting suits by contractors against the State for monies owed would allow the contractor to recover for damages not provided for in its individual contract with the State agency. *See id.* at 258-59, 185 S.E.2d at 797. The Court answered that the contractor could not so recover because,

> [u]nder the provisions of [section] 143-135.3, the plaintiff is only entitled to recover 'such settlement as he claims to be entitled to under terms of his contract' and since [the] plaintiff's claims as set out in the second and third counts of its complaint did not arise under the terms of its contracts, the court properly entered summary judgment on these two counts.

Id. at 259, 185 S.E.2d at 797-98. Neither the case nor language cited by the Administration to the trial court concerned sovereign immunity,

but rather supported its contention regarding *exclusivity of remedies where sovereign immunity has been waived*, the very argument the Administration had all along advanced here in the court below. The trial court appreciated that the Administration was making an exclusivity argument, not a sovereign immunity argument, as reflected by its response that it was "fully aware of the limitations that the case law imposes on the *exclusivity* question." (Emphasis added). Thus, the record on appeal and the hearing transcript demonstrate that the Administration did not raise and argue sovereign immunity as a basis for partial judgment on the pleadings, instead advancing only arguments on mootness and exclusivity of remedies.

In conclusion, the Administration's failure to properly plead, raise, or argue the affirmative defense of sovereign immunity below was "a bar to its consideration on" the motions being heard in the trial court, and, to the extent the order purported to address that matter,[8] it is of no effect. The interlocutory order appealed from presents no issue of sovereign immunity entitling the Administration to immediate appellate review, and, accordingly, this appeal is

DISMISSED.

Judges BRYANT and CALABRIA concur.

8. While no party took appeal from the supplemental order, we note that it appears the trial court did not intend to rule on the question of sovereign immunity for precisely the reasons discussed in this opinion.

PATILLO v. GOODYEAR TIRE & RUBBER CO.

[251 N.C. App. 228 (2016)]

SHAWN F. PATILLO, PLAINTIFF
v.
GOODYEAR TIRE AND RUBBER COMPANY, EMPLOYER, LIBERTY MUTUAL INSURANCE GROUP, CARRIER, DEFENDANTS

No. COA16-636

Filed 20 December 2016

1. Workers' Compensation—effort to find suitable employment—conclusion not supported by evidence

The Industrial Commission erred by concluding that plaintiff had failed to make a reasonable effort to find suitable employment where that conclusion was not supported by competent evidence. There is no general rule for determining the reasonableness of an employee's job search, but the Commission must explain its basis for its determination of reasonableness.

2. Workers' Compensation—futility of employment search—advisory opinion not given

In a worker's compensation case remanded on other grounds, the Court of Appeals declined plaintiff's request to instruct the Commission to consider whether it would be futile for him to seek other employment in light of the decision in his Social Security Disability claim. It is not the proper function of courts to give advisory opinions.

3. Workers' Compensation—Form 22 not filed—not necessary

The Industrial Commission did not err in a workers' compensation case by not making a finding regarding defendant's failure to submit a Form 22 (used in calculating wages). The Commission's findings were sufficient to address all matters in controversy; the Commission denied plaintiff's request for indemnity compensation, and a Form 22 was not necessary.

4. Workers' Compensation—Parsons presumption—properly applied

In a workers' compensation case, the presumption in *Parsons v. Pantry*, 126 N.C. App. 540, was properly applied to plaintiff's continuing back pain. The presumption applied only to the "very injury" determined to be compensable; plaintiff's continuing back pain was a future symptom allegedly related to the original compensable injury.

5. Workers' Compensation—Parsons presumption—not rebutted

The Industrial Commission did not err in a workers' compensation case by concluding that defendants failed to rebut the *Parsons* presumption (that further medical treatment is directly related to a compensable injury that has been shown initially). Defendants failed to present evidence showing that the medical treatment was not directly related to the compensable injury; the medical testimony did not show that plaintiff's low back pain was separate and distinct from his work injury.

6. Workers' Compensation—findings—testimony

The Industrial Commission in a worker's compensation case made sufficient findings of fact concerning the testimony of two medical witnesses. The Commission made no findings regarding one witness's testimony but did not wholly ignore or disregard the evidence. The other witness did not incorrectly opine on causation; rather, he did not testify on causation, and the Commission's findings about his testimony were not in error.

Appeals by Plaintiff and Defendants from an Opinion and Award filed 28 April 2016 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 16 November 2016.

Law Offices of Kathleen G. Sumner, *by Kathleen G. Sumner and Law Office of David P. Stewart*, *by David P. Stewart*, *for Plaintiff-Appellant.*

Hedrick Gardner Kincheloe & Garofalo, *LLP*, *by Matthew J. Ledwith and M. Duane Jones*, *for Defendant-Appellants.*

HUNTER, JR., Robert N., Judge.

Shawn F. Patillo ("Plaintiff") and Goodyear Tire & Rubber Company ("Employer") and Liberty Mutual Insurance Company (collectively, "Defendants") appeal from an Opinion and Award filed 28 April 2016 by the Full North Carolina Industrial Commission. We reverse and remand in part and affirm in part.

I. Factual and Procedural Background

On 16 February 2011, Employer filed a Form 19 (Employer's Report of Employee's Injury or Occupational Disease to the Industrial Commission). On 7 October 2011, Plaintiff filed a Form 18 (Notice of Accident to Employer and Claim of Employee, Representative, or

Dependent), stating he was injured as a result of a flatbed accident at his place of employment on 16 February 2011. On the same day, Plaintiff filed a Form 33 (Request that Claim be Assigned for Hearing), requesting compensation for days missed, disability pay, payment of medical expenses/treatment, and attorney's fees and costs.

The parties executed a consent order on 28 March 2012. The Defendants admitted an accident occurred at Goodyear and Plaintiff sustained "some level of contusion to the lower back as a result of [the] accident[,]" but disputed the extent of injury beyond the contusion.

On 24 October 2013, Deputy Commissioner Keischa M. Lovelace heard Plaintiff's case. The parties stipulated to the employee-employer relationship, the insurance carried by Employer, and that Employer should provide a Form 22 for wage calculation. Deputy Commissioner Lovelace issued an Opinion and Award on 18 December 2014. The Opinion and Award found and concluded Plaintiff sustained a compensable injury, which was causally related to Plaintiff's lower back pain. Deputy Commissioner Lovelace awarded Plaintiff temporary total disability compensation beginning 6 March 2012 until the time of the hearing, but denied Plaintiff's request for temporary total disability compensation from 13 May 2011 to 6 March 2012. Employer gave proper notice of appeal to the Full Commission ("the Commission") on 23 December 2014.

On 8 July 2015, the Commission filed an Interlocutory Order and reopened the record for the receipt of additional evidence. The Commission ordered the parties to confer and agree on a physician to conduct Plaintiff's medical evaluation.

On 22 July 2015, Plaintiff filed a motion with the Commission, proposing seven physicians to conduct Plaintiff's medical evaluation. On 23 July 2015, Employer filed a Motion to Amend, Clarify, and/or Consideration, asking the Commission to allow both parties to depose medical providers who examined Plaintiff. On 3 August 2015, Employer filed a response to Plaintiff's motion, arguing Plaintiff's motion was moot. On the same day, Plaintiff filed a response, arguing there was no need for evidence on the issue of disability and additional evidence was only needed regarding causation.

In response, Commissioner Bernadine S. Ballance issued an order on 27 August 2015, holding Employer's 23 July 2015 motion in abeyance. Commissioner Ballance also ordered the parties to comply with the 8 July 2015 order by 30 September 2015. On 29 August 2015, Plaintiff

filed a Motion for Additional Direction regarding the 8 July 2015 Order. On 30 September 2015, Plaintiff filed a response to the 8 July 2015 Order.

The Commission filed its Opinion and Award on 28 April 2016. The Commission found the following facts.

Plaintiff, a forty-nine year old male at the time of the hearing, worked at Employer since August 2007. At the time of the incident, Plaintiff worked as a press operator. As a press operator, Plaintiff transferred uncured[1] tires from a flatbed trailer onto the loader pan of the press machine for curing. Plaintiff monitored fifteen presses, ensuring the machines operated properly and removing tires after they cured.

In the early morning of 16 February 2011, Plaintiff unloaded tires from a stationary, unattached flatbed to a press machine loader pan. Nearby, a trucker drove a powered industrial truck with an attached flatbed down the press row. The flatbed attached to the truck "jackknifed" the unattached flatbed, which hit Plaintiff in his lower back and knocked Plaintiff to the floor. Plaintiff immediately felt pain from his back to his hips and legs, and Plaintiff was unable to stand up.

Immediately following the collision, a "Code Blue" was called, indicating an accident occurred. Workers from the onsite medical clinic arrived and transported Plaintiff to the clinic. Plaintiff complained of pain in his left lower back, groin, and hip area. The onsite medical clinic treated Plaintiff, scheduled him for an evaluation the next day, and recommended Plaintiff only perform "off-standard"[2] work. Plaintiff arrived at the onsite medical clinic before his shift on the evening of 16 February 2011 for his examination. Plaintiff informed his evaluator the pain had worsened since the night before and Plaintiff would not be capable of lifting tires due to the pain. The onsite medical clinic team recommended "off-standard" work.

On 17 February 2011, Leslie A. Byrne ("Nurse Byrne"), a nurse practitioner at the onsite medical clinic, evaluated Plaintiff. Plaintiff, once again, complained of pain in the left side of his back, left hip, and left knee. Plaintiff displayed contusions. Nurse Byrne restricted Plaintiff to

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1. "Curing" a tire is the cooking process for tires. Before a tire enters the pressing machine, it is a "green tire." A press operator removes the green tires from a flatbed and places them on a loader pan, to be placed into a presser, where the tires are cooked. After the tire is pressed, it is considered a cured tire.

2. "Off-standard" means Plaintiff did not fully perform all of his job functions and received assistance with performing his job.

"off-standard" work with help with large tires. Plaintiff worked "off-standard" until 4 April 2011.

From 16 February 2011 to 13 May 2011, Plaintiff received treatment from the onsite medical clinic. The treatment included pain medication and physical therapy. Physical therapy ended on 22 March 2011, when Plaintiff reported less frequent and less intense pain.

On 5 April 2011, Plaintiff returned to on-standard work. While performing his regular job duties, Plaintiff's back pain increased. Plaintiff told Nurse Byrne he wanted a second opinion regarding his back injury. Although Nurse Byrne prescribed various medications, Plaintiff still reported back pain.

Not only did Plaintiff seek medical care at Employer's onsite clinic, he also went to Physician's Express urgent care on 20 February 2011. The next day, Plaintiff sought treatment at Northside Urgent Care for pain resulting from the injury.

Plaintiff applied for a wind-up operator position at Employer. Employer hired Plaintiff for this position. However, after training, Plaintiff failed the certification test to be a wind-up operator because he could not physically perform the job tasks.[3] Consequently, Plaintiff returned to his press operator position on 5 April 2011.

While visiting Northside Urgent Care on 30 April 2011 for his asthma, Plaintiff complained of lower back pain. Physician Assistant Aubrey Reid ordered a Magnetic Resonance Image ("MRI") of Plaintiff's lumbar spine. On 12 May 2011, Plaintiff received an MRI. On 13 May 2011, Physician Assistant Kerry Clancy saw a small meningioma or nerve sheath tumor in Plaintiff's lumbar spine. As a result, Clancy restricted Plaintiff to two weeks of sit-down work and scheduled a neurosurgical evaluation. Employer received notice of Plaintiff's restriction to sit-down work, but Employer indicated on its "Modified Work Authorization Form Medical Department" no modified work was available. Notably, Employer indicated on the form Plaintiff's injury was "non-occupational."[4] Employer did not assign Plaintiff to a sit-down work only position. Plaintiff has not worked since 13 May 2011. On 14 June 2011, Physician Assistant

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3. The Opinion and Award did not address why Plaintiff could not physically perform the job tasks. However, Plaintiff testified a wind-up operator must work the crane and bend down to cut plywood with a saw. Due to Plaintiff's back pain, he could not perform these tasks.

4. "Non-occupational" means the injury was not related to Plaintiff's job.

Clancy treated Plaintiff for lower back pain. Plaintiff's medical provider restricted him to sit-down work only for two weeks.

Plaintiff reported to Dr. David Jones on 1 November 2011. Dr. Jones reviewed Plaintiff's lumbar spine MRIs. Dr. Jones was concerned about lesions on Plaintiff's lumbar spine and put the work-related back pain "on the back burner." On 21 December 2011, Dr. Jones referred Plaintiff to Dr. Gabriel Pantol, a neurologist.

Dr. Pantol evaluated Plaintiff on 6 March 2012 and 11 May 2012. Dr. Pantol opined Plaintiff's spine lesions were asymptomatic and Plaintiff's back pain was not related to the lesions or sarcoidosis. Dr. Pantol recommended Plaintiff be evaluated by a pain specialist for his back pain.

On 13 May 2011, Plaintiff reported to Dr. Robert Ferguson, an expert in internal medicine. Based on Dr. Ferguson's testimony, the Commission found Plaintiff's restriction to "sit-down work" related to his injury and low back pain and he needed to be evaluated for the spinal lesions. Additionally, Plaintiff had complained of back pain, which limited his capacity to perform his job duties continuously from the date of injury.

Employer never filed an Industrial Commission form to admit or deny Plaintiff's claim. Additionally, Employer never indicated to the Industrial Commission whether Plaintiff's claim was being treated as "medical only." With regard to the parties' consent order, the Commission found the consent order resulted in a rebuttable presumption Plaintiff's lower back injury was related to his compensable 16 February 2011 injury and resulting back contusion.

By consent of the parties, Plaintiff reported to Dr. John Buttram, a neurosurgeon, on 25 April 2012. Dr. Buttram diagnosed Plaintiff with non-mechanical back pain and recommended conservative treatment from a physiatrist. Dr. Buttram did not address restrictions for Plaintiff's non-mechanical back pain. Dr. Buttram opined to a reasonable degree of medical certainty "a contusion to the paraspinous musculature[5] is a reasonable assumption for Plaintiff's non-mechanical back pain, and if severe enough, his injury could prevent him from returning to the kind of work that he did before."

The Commission found Plaintiff's work-related injury caused his contusion and resulting non-mechanical back pain. The Commission

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5. "Paraspinous musculature" is defined as the muscles adjacent to the spinal column. Paraspinal, Merriam-Webster, http://www.merriam-webster.com/medical/paraspinal (last visited Nov. 30, 2016).

explicitly relied on, and gave great weight to, Dr. Buttram's, Dr. Pantol's, and Dr. Ferguson's opinion testimonies. The Commission further found Defendants failed to rebut the presumption that Plaintiff's need for medical treatment was causally related to the 16 February 2011 injury. Moreover, even without the presumption, the Commission found Plaintiff proved the 16 February 2011 injury caused his lower back contusion and continuing non-mechanical back pain.

Turning to the issue of disability compensation, on 13 May 2011, Plaintiff's medical providers assigned him to sit-down work only. However, Employer was unable to accommodate Plaintiff's work restrictions, and Plaintiff did not return to work on 13 May 2011.[6] Plaintiff was restricted to "sit-down only" work until 6 March 2012, when he reported to Dr. Pantol. At his deposition on 21 March 2014, Dr. Pantol first opined, to a reasonable degree of medical certainty, Plaintiff was disabled and unable to work when Dr. Pantol saw him on 6 March 2012 and May 2012. However, on cross examination, Dr. Pantol limited his opinion of Plaintiff's disability to the 11 May 2012 visit. Dr. Pantol did not think the 6 March 2012 visit was a basis to remove Plaintiff from work.

Based upon Dr. Pantol's testimony and a review of the record, the Commission found Plaintiff failed to prove he was totally incapable of working in any employment since 6 March 2012. The Commission further found since 6 March 2012, Plaintiff failed to show he made a reasonable effort to find suitable employment, or due to preexisting conditions and his work related restrictions, a search would have been futile.[7] The Commission noted Plaintiff's testimony indicating he still considered himself an employee of Employer, which means Plaintiff may have been on a leave of absence or a non-work related disability.

Regarding the 8 July 2015 Order, the Commission found the parties failed to comply with the order, and also failed to comply with the 28 August 2015 Order. Specifically, the parties failed to agree on a physician or a letter to send to a physician for a medical evaluation of Plaintiff. As such, the Commission reconsidered the record and found the 8 July 2015 and 28 August 2015 Orders should be vacated.

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6. There are no findings in the record regarding *why* Employer was unable to accommodate Plaintiff's work restrictions.

7. There are no findings in the Opinion and Award regarding why the Commission found Plaintiff failed to show he made a reasonable effort to find suitable employment, or due to preexisting conditions and his work related restrictions, a search would have been futile. The lack of findings is at issue on appeal.

Accordingly, the Commission concluded based on a preponderance of the evidence, the *Parsons* presumption applied to Plaintiff's injury, due to the parties' Consent Order. Defendants failed to rebut the *Parsons* presumption. The Commission further concluded, even without the presumption, Plaintiff proved the 16 February 2011 injury caused the contusion and the continuing non-mechanical back pain. The Commission awarded payment for all related medical treatment for Plaintiff's contusion and causally related injuries.

Turning to disability, the Commission concluded Plaintiff failed to prove he had been totally incapable of working since 6 March 2012. Additionally, the Commission concluded Plaintiff failed to show he made a reasonable effort to find suitable employment, or due to preexisting conditions and his work related restrictions, a search would have been futile.

Plaintiff filed notice of appeal of the Commission's Opinion and Award to this Court on 4 May 2016. Defendants filed notice of appeal on 2 June 2016.

II. Jurisdiction

This Court has jurisdiction over appeals from the Industrial Commission pursuant to N.C. Gen. Stat. § 7A-29(a) and N.C. Gen. Stat. § 97-86 (2016).

III. Standard of Review

Review of an Opinion and Award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law . . . . This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

"The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274. "This Court does not weigh the evidence; if there is any competent evidence which supports the Commission's findings, we are bound by their findings even though there may be evidence to the contrary." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 597, 532 S.E.2d 207, 210 (2000) (citing *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981)).

IV. Analysis

A. Plaintiff's Appeal

We review Plaintiff's contentions in three parts: (1) the conclusion of law regarding whether Plaintiff made a reasonable effort to find suitable employment; (2) findings regarding the Form 22; and (3) Plaintiff's motion to dismiss Defendants' appeal.

1. Conclusion of Law Number Nine

[1] On appeal, Plaintiff contends the Commission erred by concluding Plaintiff failed to make a reasonable effort to find suitable employment. We agree.

Under North Carolina Workers' Compensation Law, an employee must prove three factual elements to support the legal conclusion of disability:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Medlin v. Weaver Cooke Constr., LLC, 367 N.C. 414, 420, 760 S.E.2d 732, 735 (2014) (quoting *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982)). An employee can establish disability in one of four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted). An employee can prove the first

two statutory elements through any of the four methods listed in *Russell*, "but these methods are neither statutory nor exhaustive." *Medlin*, 367 N.C. at 422, 760 S.E.2d at 737.

Regarding an employee's efforts to obtain employment, there is no general rule for determining the reasonableness of an employee's job search. *Gonzalez v. Tiny Maids, Inc.*, ___ N.C. App. ___, ___, 768 S.E.2d 886, 894 (2015). Rather, "[t]he Commission [is] free to decide" whether an employee "made a reasonable effort to obtain employment under the second Russell option." *Perkins v. U.S. Airways*, 177 N.C. App. 205, 214, 628 S.E.2d 402, 408 (2006).

"Further, the Commission 'must make specific findings of fact as to each material fact upon which the rights of the parties in a case involving a claim for compensation depend. Thus, the Commission must find those facts which are necessary to support its conclusions of law.' " *Salomon v. Oaks of Carolina*, 217 N.C. App. 146, 152, 718 S.E.2d 204, 208 (2011) (quoting *Johnson v. Herbie's Place*, 157 N.C. App. 168, 172, 579 S.E.2d 110, 113 (2003)).

Here, Plaintiff contends Conclusion of Law Number Nine is not supported by the Commission's findings of fact. Specifically, Plaintiff argues the Commission failed to make the requisite findings of fact regarding Plaintiff's search for employment. The crux of Plaintiff's argument is Plaintiff was not required to search for employment outside of Employer for his search to be considered "reasonable". Defendants contend Plaintiff's search for employment was insufficient to establish disability under *Russell*.

Regarding Plaintiff's employment, the Commission found the following:

> 49. On the issue of disability, on May 13, 2011, Plaintiff was assigned the following restrictions: "sit down work only . . . two weeks; scheduling neurosurgery." Defendant-Employer was unable to accommodate Plaintiff's sedentary restrictions and Plaintiff did not return to work on or about May 13, 2011. Plaintiffs "sit down only" work restrictions were continued by various medical providers until March 6, 2012, when Plaintiff presented to Dr. Pantol for a neurosurgical evaluation. On March 6, 2012, Dr. Pantol ruled out neuro-sarcoidosis and determined that Plaintiff's non-work related spinal lesions were asymptomatic. During his examination and treatment of Plaintiff, Dr. Pantol also addressed Plaintiff's ongoing non-mechanical

back pain related to his compensable February 16, 2011 injury by accident.

50. Plaintiff is not seeking disability compensation prior to his March 6, 2012 evaluation with Dr. Pantol.

51. Plaintiff contends, based upon the deposition testimony of Dr. Pantol and the evidence presented, that he has proven he was temporarily totally disabled as of March 6, 2012 and continues to be temporarily totally disabled. At his March 21, 2014 deposition, Dr. Pantol was asked to give an opinion on the issue of whether Plaintiff's non-mechanical back pain was disabling. During direct examination, Dr. Pantol was asked: "Okay. And do you have an opinion within a reasonable degree of medical certainty whether Mr. Patillo was disabled and unable to work at the time you saw him on March 6, 2012 and May 2012?" Dr. Pantol answered, "Yes, from the description, that pretty much any type of activity would worsen his pain." However, during cross-examination, Dr. Pantol was asked, "Okay. So then your opinion regarding the work only involves the May 11, 2012, visit, correct?" He answered, "That would be it exactly." During re-direct examination, Dr. Pantol was again asked his opinion regarding Plaintiff's disability and testified, "Based on my first visit [March 6, 2012] . . . with a pain level of one or two, I don't think is a basis [to remove Plaintiff from work]. On the second visit [May 11, 2012], I would probably take him out of work for at least a couple of days of rest." Considering the totality of his testimony, the Full Commission finds that Dr. Pantol opined that he would have removed Plaintiff from work due to his non-mechanical back pain for a period of approximately three days.

52. Dr. Buttram testified that he did not assign any work restrictions to Plaintiff and it would have been speculative for him to assign retroactive restrictions as of the date of his deposition.

53. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that, except for the three days in May 2012 when Dr. Pantol felt Plaintiff should have been removed from work, Plaintiff has not proven on this record that he has been totally incapable of working in any employment since March 6, 2012.

> Plaintiff is not seeking indemnity compensation prior to March 6, 2012, the date of his evaluation with Dr. Pantol. Since March 6, 2012, Plaintiff has not shown that he made a reasonable effort to find suitable employment, or that due to preexisting conditions and his work related restrictions, it would have been futile for him to seek suitable employment. Plaintiff testified at the hearing before the Deputy Commissioner that he still considered himself to be an employee of Defendant-Employer. The evidence indicates that he may have been on a leave of absence or a non-work related disability.

Based on these findings, the Commission concluded:

> 9. On the issue of disability, the Full Commission concludes that, except for the three days in May 2012 when Dr. Pantol felt Plaintiff should have been removed from work, Plaintiff has not proven on this record that he has been totally incapable of working in any employment since March 6, 2012. Plaintiff is not seeking indemnity compensation prior to March 6, 2012, the date of his evaluation with Dr. Pantol. Since March 6, 2012, Plaintiff has not shown that he made a reasonable effort to find suitable employment, or that due to preexisting conditions and his work related restrictions, it would have been futile for him to seek suitable employment. Plaintiff testified at the hearing before the Deputy Commissioner that he still considered himself to be an employee of Defendant-Employer. N.C. Gen. Stat. § 97-29; *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762,425 S.E.2d 454 (1993).

We conclude the Commission's Conclusion of Law Number Nine is not supported by competent evidence. The order and opinion contains no explanation for the Commission's determination of "reasonableness." *Franklin v. Broyhill Furniture Indus. Inc.*, No. COA10-1334, 2011 WL 3890989, at *6-*7 (unpublished) (N.C. Ct. App. Sept. 6, 2011) (requiring the Commission to explain the basis for its determination of "reasonableness"). *See also Freeman v. Rothrock*, 202 N.C. App. 273, 277-79, 689 S.E.2d 569, 572-74 (2010) (affirming an award of disability when the Commission explained the basis for its determination of "reasonableness").

In *Franklin*, this Court reversed and remanded in part an Opinion and Award where the Commission failed to explain its determination

of "reasonableness." 2011 WL 3890989, at *6-*7, *12. The Commission found the following in regards to the reasonableness of a job search:

> At the hearing before the Deputy Commissioner, Plaintiff testified that he has attempted to obtain employment as a truck driver since his termination with Defendant. Plaintiff's job search log was introduced into evidence and indicated that since his termination on May 29, 2008, Plaintiff made weekly contacts to various companies that employ truck drivers. Plaintiff testified that any available positions were not within his physical restrictions. The undersigned finds by the greater weight of the evidence that Plaintiff has conducted a reasonable job search without success and that Plaintiff's inability to find or hold other employment is related to his work injury.

Id. at *5. The *Franklin* court relied on *Freeman v. Rothrock*, 202 N.C. App. 273, 689 S.E.2d 569, and held "the Commission's finding that Plaintiff had conducted a reasonable search for employment was not supported by sufficient factual findings." *Id.* at *7. The Court characterized the Commission's determination of reasonableness as "unsupported" and "conclusory." *Id.* at *7. The Court concluded:

> the Commission was required to make findings of fact explaining the reason that it deemed Plaintiff's job search to be "reasonable" and that its failure to make such findings constituted an error of law requiring us to reverse this portion of the Commission's order and remand this case to the Commission for further proceedings not inconsistent with this opinion, including the making of adequate findings of fact . . . .

Id. at *7.

We note *Franklin* is not a published decision. However, we hold the *Franklin* Court's requirement for an explanation of the determination of "reasonableness" is persuasive. As such, we hold the Commission must explain its basis for its determination of "reasonableness." Here, the Commission's finding regarding Plaintiff's search is merely a conclusion that Plaintiff's search for employment was unreasonable. Such a conclusory finding is insufficient to support the Commission's conclusion regarding Plaintiff's failure to establish his disability because he failed to make a "reasonable" job search. Accordingly, we reverse this portion of the Opinion and Award and remand to the Commission

for further proceedings not inconsistent with this opinion. *See Munns v. Precision Franchising, Inc.*, 196 N.C. App. 315, 319, 674 S.E.2d 430, 434 (2009) (remanding to Commission when the Commission failed to make necessary findings).

[2] In Plaintiff's brief, he asks this Court to instruct the Commission on remand "to consider whether, in light of the fully favorably decision in his Social Security Disability claim, he has met his burden of proving that it would futile for him to seek other employment under the third prong of *Russell*."

However, "it is not a proper function of courts 'to give advisory opinions . . . .' " *Martin v. Piedmont Asphalt & Paving*, 337 N.C. 785, 788, 448 S.E.2d 380, 382 (1994) (quoting *Adams v. N. Carolina Dep't of Natural and Econ. Res.*, 295 N.C. 683, 704, 249 S.E.2d 402, 414 (1978)). It is the Commission's role to determine whether Plaintiff meets the third prong of *Russell*. Thus, instructing the Commission on remand whether Plaintiff has met his burden under *Russell* would result in this Court issuing an advisory opinion. As such, we decline Plaintiff's invitation to advise the Commission on this issue.

2. Form 22

[3] Plaintiff next argues the Commission committed reversible error by failing to make a finding regarding Defendants' failure to submit a Form 22. We disagree.

It is well established the Commission is required to address all issues necessary to resolve a Plaintiff's claim. *See Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988). A Form 22 (Statement of Days Worked and Earnings of Injured Employee) is an aid in calculating average weekly wages, pursuant to N.C. Gen. Stat. § 97-2(5), when indemnity compensation is granted.

In this case, the parties stipulated Defendants would provide a Form 22. Deputy Commissioner Lovelace ordered Defendants to provide a Form 22 within thirty days of the order. In the Commission's order, the Commission found and concluded the following:

> The parties stipulated that Defendants would provide a Form 22 for calculation of Plaintiff's wages. The Industrial Commission file does not contain a Form 22. This Opinion and Award does not address Plaintiff's average weekly wage and compensation rate. Defendants shall provide a Form 22 to Plaintiff.

In its Award, the Commission denied Plaintiff's claim for indemnity compensation. Additionally, the Commission stated the following: "This Opinion and Award does not address Plaintiff's average weekly wage and compensation rate. Defendants shall provide a Form 22 to Plaintiff."

Plaintiff argues he is entitled to a specific finding acknowledging Defendants failed to comply with the order. Plaintiff contends the Commission's duty to "resolve all matters in controversy before it" requires the finding. *Joyner*, 92 N.C. App. at 482, 374 S.E.2d at 613. Plaintiff points to several opinions and awards, in which either a deputy commissioner or the Commission found an employer failed to submit a Form 22. *See Thompson v. N.C. Centel Tel.*, 2000 WL 1562940 at *2, I.C. No. 706622 (2000); *McLaughlin v. Sandoz Chem. Corp.*, 1998 WL 710019 at *5, I.C. No. 371437 (1998).

Defendants argue a Form 22 was not required because disability was not awarded by the Commission. Thus, Defendants contend, the Commission did properly determine all issues in controversy before it.

In this case, the Commission's findings are sufficient to address all matters in controversy. A Form 22 is used for wage calculation upon the grant of indemnity compensation. *See* N.C. Gen. Stat. § 97-2(5). Here, the Commission denied Plaintiff's request for indemnity compensation. Thus, a Form 22 was not necessary pursuant to the Commission's Award, and Plaintiff was not entitled to a specific finding regarding Defendants' failure to submit a Form 22. Accordingly, this assignment of error is without merit.[8]

3. Motion to Dismiss Defendants' Appeal

Lastly, Plaintiff contends Defendants failed to timely file notice of appeal. In his argument, Plaintiff reasserts the arguments included in his Motions to Dismiss, filed 20 July 2016 and 26 July 2016. This Court denied Plaintiff's motions to dismiss in orders entered 5 August 2016.

B. Defendants' Appeal

We review Defendants' contentions in three parts: (1) applicability of the *Parsons* presumption; (2) whether Defendants rebutted the *Parsons* presumption; and (3) whether the Commission properly considered the entirety of the medical expert testimony.

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8. Although a Form 22 was not required because the Commission denied Plaintiff's request for indemnity compensation, a Form 22 would be necessary if the Commission awards indemnity compensation upon remand.

1. Whether the *Parsons* Presumption Applies

[4] Defendants argue the *Parsons* presumption does not apply because "Plaintiff's non-mechanical back condition is not 'the very injury' Defendants accepted pursuant to the consent order." We disagree.

In *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), this Court held after a workers' compensation claimant meets the initial burden of proving the compensability of an injury, there arises a presumption that further medical treatment is directly related to the compensable injury. 126 N.C. App. at 541-42, 485 S.E.2d at 869. *See also Miller v. Mission Hosp., Inc.*, 234 N.C. App. 514, 519, 760 S.E.2d 31, 35 (2014). The presumption exists because "[t]o require plaintiff to reprove causation each time [he] seeks treatment for the very injury that the Commission has previously determined to be the result of a compensable accident is unjust and violates our duty to interpret the Act in favor of injured employees." *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869.

However, the *Parsons* presumption is not without limits. The presumption applies only to "the very injury" determined to be compensable. *Clark v. Sanger Clinic, P.A.*, 175 N.C. App. 76, 79, 623 S.E.2d 293, 296 (2005); *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128,135-36, 620 S.E.2d 288, 292-94 (2005). Although limited to the very injury of compensability, "[t]he presumption of compensability applies to future symptoms allegedly related to the original compensable injury." *Perez*, 174 N.C. App. at 136-37, 620 S.E.2d at 293 n.1.

Here, the parties' consent order stated:

> Defendants, in this Consent Order, agree to admit that Employee was involved in an accident during the course and scope of his employment with Employer-Defendant on February 16, 2011, and admit that Employee sustained some level of contusion to the lower back as a result of such accident. The parties continue to dispute the extent of injury beyond a contusion.

At the outset, we note the *Parsons* presumption applies to the parties' consent order. *See id.* at 135-36, 620 S.E.2d at 293 (applying the *Parsons* presumption where employer admitted compensability of the plaintiff's injury). The dispute here regards the extent of the *Parsons* presumption.

Defendants contend the *Parsons* presumption does not apply to Plaintiff's ongoing back pain because the parties only consented to the

compensability of a contusion on Plaintiff's back, not to Plaintiff's continuing back pain. Plaintiff argues "[w]hether the presumption of compensability is limited to the 'very injury' previously determined to be compensable is irrelevant in this case, because [Plaintiff] alleged (and the Full Commission ultimately found) that his current low back pain is related to the 'very injury' determined to be compensable in the Consent Order."

Here, the Full Commission properly applied the *Parsons* presumption to Plaintiff's continuing back pain. The parties' consent order resolved the compensability of Plaintiff's contusions. Plaintiff's continuing back pain is a "future symptom allegedly related to the original compensable injury[,]" with Plaintiff's contusions being the compensable injury. *Id.* at 136-37, 620 S.E.2d at 293 n.1. As such, Plaintiff was entitled to a rebuttable presumption that his continuing back pain was directly related to the original compensable injury. Therefore, our next inquiry is whether Defendants rebutted the *Parsons* presumption.

2. Whether Defendants Rebutted the *Parsons* Presumption

[5] Defendants next argue the Commission erred in concluding Defendants failed to rebut the *Parsons* presumption. We disagree.

Once the *Parsons* presumption applies, the burden rests on the Defendants to rebut the presumption. "The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury." *Id.* at 135, 620 S.E.2d at 292 (citing *Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999)).

Regarding whether Defendants rebutted the *Parsons* presumption, the Commission concluded:

> 3. The *Parsons* presumption is rebuttable. In order to rebut this presumption, Defendants have the burden of producing evidence showing Plaintiff's non-mechanical back pain and his need for medical treatment for his non-mechanical back pain are unrelated to the compensable injury. Defendants must present expert testimony or affirmative medical evidence tending to show that the treatment Plaintiff seeks for his current low back condition is not directly related to his admittedly compensable back injury. *Id.*; *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 136-37, 620 S.E.2d 288, 293 (2005).

> 4. Where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury. *Click v. Pilot Freight Carriers*, 300 N.C. 164, 265 S.E.2d 389 (1980). Additionally, the entirety of causation evidence must meet the reasonable degree of medical certainty standard necessary to establish a causal link. *Holley v. ACTS. Inc.*, 357 N.C. 228, 581 S.E.2d 750 (2003); *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 538 S.E.2d 912 (2000). Defendants did not present sufficient medical evidence to rebut the *Parsons* presumption. *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997); *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 620 S.E.2d 288 (2005); *Carr v. HHS (Caswell Ctr.)*, 218 N.C. App. 151, 720 S.E.2d 869 (2012).

Defendants point to testimony from Physical Therapist Frank Murray and Dr. David Jones. First, regarding Dr. Murray's testimony, Dr. Murray did not testify to a reasonable degree of medical certainty regarding causation between Plaintiff's back pain and his work injury. Defendants point to the following piece of testimony from the cross-examination of Dr. Murray:

> A. [O]n the 22nd of March he had been feeling better overall, is what he reported. So, I discharged him. And then when he returned on April 5th, he had had an increase in pain.
>
> Q. Okay. And when he reported the increasing pain, he reported that it occurred the prior weekend, when he was not working. Is that correct?
>
> A. Yes.
>
> Q. And do you have an opinion or would you agree that the presentation on April 5th of 2011 was secondary to the reported activities or the reported flare-up at home the weekend prior to that examination?
>
> A. Would I agree that that was -- what it was related to, in other words?
>
> Q. Correct.
>
> A. Yes.

However, this testimony does not adequately show Plaintiff's current low back pain is separate and distinct from his work injury. As such, the testimony from Dr. Murray does not rebut the *Parsons* presumption.

Defendants next point to testimony from Dr. Jones. Specifically, Defendants point to the following exchange in their direct examination of Dr. Jones:

> I don't think that there is a[n] association between . . . his back pain, and that trauma he suffered. . . whatever back pain he had, for a short time after the injury, was probably related to the injury itself. Why he had long term, chronic back pain, I cannot answer. . . .

However, Defendants mischaracterize Dr. Jones's testimony. In that part of his deposition, Dr. Jones testified regarding lesions Plaintiff suffered on his spine, which were admittedly not related to Plaintiff's injury at work.

A full review of Dr. Jones's testimony shows Dr. Jones never gave testimony to a reasonable degree of medical certainty regarding causation for Plaintiff's long term, continuing back pain. In fact, in the same excerpt included in Defendants' brief, Dr. Jones further testified he did not "spend any time with [Plaintiff] in any of our visits talking about his back pain and the likely causation of that." Additionally, Dr. Jones testified:

> Q. And so, Doctor, fast-forwarding to today, if [Plaintiff] was still having back complaints as of today, would you have an opinion as to whether such current back complaints would, more likely than not, be related to the 2011 incident or to some other cause?
>
> A. It's so – and it's really hard for me to form any opinion regarding that because I never really spent time with him talking about that. So I don't know that I have a strong opinion one way or the other, as far as the etiology of his back pain, just because that was never my focus and I never thought these lesions were the cause of his back pain. So again, I put the work related injury and the back pain on the back burner and tried to find a diagnosis for him . . . . So literally, I don't know if I have a real strong opinion [ ] as to whether or not his current pain or residual pain or whatever pain he's had over the years is related to that trauma or not.

On cross-examination, the following exchange occurred:

> Q: Doctor, you just said that nothing you just read changed your opinions on causation. You had not given us any opinion on causation, is that correct, in this case?
>
> A. No.
>
> Q: That's not ---
>
> A: I have---
>
> Q: ---correct?
>
> A: No, I have not given any opinions regarding causation. I don't have an opinion regarding causation.
>
> Q: Okay. And to be clear, you have general medical opinions, but no specific medical opinions on [Plaintiff] and his facts involving his workers' compensation case?
>
> A: I have no opinion regarding causation for him. I don't know myself, I don't know -- even if I could try to read these notes and come up with an opinion, I don't know yet what I would think. I really have no opinion regarding causation. It wasn't my focus ever seeing him.

Defendants failed to present evidence showing the medical treatment was not directly related to the compensable injury. *See Perez*, 174 N.C. App. at 135, 620 S.E.2d at 292. Neither Dr. Murray nor Dr. Jones testified regarding causation between Plaintiff's back pain and the work injury. Accordingly, we hold the Commission did not err in concluding Defendants failed to rebut the *Parsons* presumption and this assignment of error is without merit.[9]

3. Entirety of Medical Evidence

[6] Next, we consider whether the Commission erred by failing to make sufficient findings of fact to resolve all of the material issues raised by the evidence. In particular, Defendants argue the Commission failed to make sufficient findings regarding testimony of Defendants' witnesses, Dr. Murray and Dr. Jones. We disagree.

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9. Because we hold the Defendants did not rebut the *Parsons* presumption, the burden to prove causation did not shift back to Plaintiff. *Miller*, 234 N.C. App. at 519, 760 S.E.2d at 35 ("If the defendant rebuts the *Parsons* presumption, the burden of proof shifts back to the plaintiff.") (citation omitted). As such, we need not address whether Plaintiff proved causation without the *Parsons* presumption, as argued in Defendants' brief.

"In a workers' compensation case, the Industrial Commission is the finder of fact." *Peagler*, 138 N.C. App. at 601, 532 S.E.2d at 212. It is exclusively within the Commission's province to determine the credibility of the witnesses and the evidence and the weight each is to receive. *Floyd v. First Citizens Bank*, 132 N.C. App. 527, 528, 512 S.E.2d 454, 455 (1999) (citation omitted). "In making these determinations, the Commission may not wholly disregard or ignore the competent evidence before it." *Peagler*, 138 N.C. App. at 601, 532 S.E.2d at 212 (citation omitted).

However, "[t]he Commission is not required . . . to find facts as to all credible evidence" and is "not required to make findings as to every detail of the credible evidence." *London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 476, 525 S.E.2d 203, 205 (2000) (citation omitted); *Woolard v. N. Carolina Dep't of Transp.*, 93 N.C. App. 214, 218, 377 S.E.2d 267, 269 (1989) (citation omitted). "Instead the Commission must find those facts which are necessary to support its conclusions of law." *London*, 136 N.C. App. at 476, 525 S.E.2d at 205.

Defendants argue the Commission failed to make proper findings regarding Dr. Murray's and Dr. Jones's testimony. Specifically, Defendants contend the Commission wholly failed to consider testimony from Dr. Murray, and that the Commission's findings regarding Dr. Jones's testimony are in error.

Here, the Commission made no findings directly regarding Dr. Murray's testimony. However, the Commission explicitly stated it received the deposition testimony of Dr. Murray into evidence. Additionally, Finding of Fact Number Eleven discusses Plaintiff's visits with Dr. Murray. As such, the Commission did not "wholly disregard or ignore the competent evidence before it." *Peagler*, 138 N.C. App. at 601, 532 S.E.2d at 212.

Regarding Dr. Jones's testimony, Defendants incorrectly assert Dr. Jones opined as to the causation issue. However, as explained *supra*, Dr. Jones did not testify regarding causation. As such, the Commission's findings regarding Dr. Jones's testimony were not in error.

Because the Commission did not fail to properly consider the evidence before it, this assignment of error is without merit.

V. Conclusion

For the foregoing reasons, we reverse and remand in part, and affirm in part the Commission's Opinion and Award.

REVERSED AND REMANDED IN PART; AFFIRMED IN PART.

Judges STROUD and DAVIS concur.

STATE v. CURLEE

[251 N.C. App. 249 (2016)]

STATE OF NORTH CAROLINA, PLAINTIFF
v.
DOUGLAS EUGENE CURLEE, DEFENDANT

No. COA16-515

Filed 20 December 2016

Criminal Law—appointed counsel—waived, then requested

The trial court's denial of defendant's request for appointed counsel and its ruling that defendant had waived the right to appointed counsel were not supported by competent evidence. Defendant had waived appointment of counsel before one judge and obtained continuances while he sought to hire counsel, but he was unsuccessful and his request for appointed counsel before another judge was refused. The second judge relied on the prosecutor's erroneous statement that defendant had been told at the last continuance that he would be forced to proceed pro se if he could not hire the private attorney. The first judge did not warn defendant that he would be forced to proceed pro se if he could not hire private counsel and did not make any inquiry to ascertain that defendant understood the consequences of representing himself.

Appeal by defendant from judgment entered 29 February 2016 by Judge Kevin M. Bridges in Davie County Superior Court. Heard in the Court of Appeals 3 November 2016.

Attorney General Roy Cooper, by Associate Attorney General Rory Agan, for the State.

Willis Johnson & Nelson PLLC, by Drew Nelson, for defendant-appellant.

ZACHARY, Judge.

Douglas Eugene Curlee (defendant) appeals from judgment entered upon his convictions for felonious larceny from a merchant and having attained the status of an habitual felon. On appeal, defendant argues that the trial court erred by finding that, at a hearing conducted two months prior to the date of trial, defendant had refused the appointment of counsel and that defendant was warned at that hearing that if he were unable to hire an attorney, he would have to proceed to trial *pro se*. For the reasons that follow, we agree.

I. Factual and Procedural History

On 6 February 2013, defendant was arrested and charged with larceny from a merchant, in violation of N.C. Gen. Stat. § 14-72.11(2) (2015), which provides that a person "is guilty of a Class H felony if the person commits larceny against a merchant . . . [b]y removing, destroying, or deactivating a component of an antishoplifting or inventory control device[.]" On 7 February 2013, defendant completed an affidavit of indigency, requested the appointment of counsel, and trial counsel was appointed to represent him on the charge of larceny from a merchant. On 19 May 2014, defendant was indicted on the charge that he had attained the status of an habitual felon. On 30 May 2014, defendant signed a waiver of the right to assigned counsel, because he was attempting to hire attorney Michael J. Parker.[1] Between May 2014 and May 2015, defendant's trial was continued several times to enable defendant to obtain funds with which to retain Mr. Parker as trial counsel. On 11 May 2015, defendant appeared in court before Judge Kevin Bridges. Mr. Parker informed the court that defendant had not retained him and that, if the court would not agree to continue the case, Mr. Parker would then move to withdraw as defendant's counsel. After some discussion, which is described in detail below, the court agreed to continue the case for two months, to give defendant more time in which to pay Mr. Parker for his representation.

On 29 June 2015, Mr. Parker filed a motion to withdraw as defendant's counsel because defendant had failed to pay for Mr. Parker's representation.[2] On 6 July 2015, defendant appeared before the trial court

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1. On 23 June 2014, defendant signed another waiver of counsel on which he checked the box next to the statement "I waive my right to all assistance of counsel, which includes my right to assigned counsel and my right to the assistance of counsel. In all respects, I desire to appear in my own behalf, which I understand I have the right to do." However, there is no other indication in the record that defendant ever expressed a wish to proceed *pro se*, and no record of the inquiry by a trial judge that is required by N.C. Gen. Stat. § 15A-1242 (2015). "The execution of a written waiver is no substitute for compliance by the trial court with the statute[;] [a] written waiver is something in addition to the requirements of N.C. Gen. Stat. § 15A-1242, not . . . an alternative to it." *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002) (citations and quotation omitted). Moreover, contrary to the assertion by the State on appeal, the trial court *did not* find that defendant "had previously waived his right to an attorney in court" and did not make findings pertinent to the requirements for determining that a defendant who wishes to represent himself has been properly informed of, and understands, the consequences of his decision.

2. Mr. Parker's motion also alleged that defendant had "failed and refused to cooperate with and follow the advice of counsel." However, Mr. Parker did not pursue this contention in court, and there is no record evidence regarding defendant's alleged failure to cooperate with his counsel.

for a hearing on Mr. Parker's motion to withdraw. The court allowed Mr. Parker's motion to withdraw, and defendant asked for counsel to be appointed. Based upon certain representations by the prosecutor, which are discussed in detail below, the trial court found that on 11 May 2015 defendant had refused Judge Bridge's offer to appoint counsel and had been warned that he would have to proceed *pro se* if he did not hire counsel by 6 July 2015. The trial court found that defendant had waived the right to a court-appointed attorney.

Defendant represented himself at his trial, which began on 7 July 2015, the day after the hearing on Mr. Parker's motion. Following the presentation of evidence, the arguments by defendant and the prosecutor, and the trial court's instructions to the jury, the jury retired to deliberate. While the jury was deliberating, defendant left the courthouse and failed to return. The trial court found that defendant had voluntarily waived his right to be present at all stages of his trial, continued with trial proceedings in defendant's absence, and ordered that defendant's bond be revoked and an order issued for his arrest. The jury returned a verdict finding defendant guilty of larceny from a merchant. A separate proceeding was conducted on the charge that defendant had attained the status of an habitual felon. The jury found that defendant was an habitual felon. The trial court entered a prayer for judgment continued, and explained to the jury that it could not sentence defendant until he was brought before the court.

Defendant was arrested in January of 2016, and appeared before Judge Bridges for sentencing on 29 February 2016. Defendant was sentenced to 103 to 136 months' imprisonment. He gave notice of appeal in open court.

II. Standard of Review

On appeal, defendant does not raise any issues pertaining to the substantive merits of his conviction of larceny from a merchant or the sentence imposed upon his conviction. Instead, defendant challenges the trial court's denial of his request for appointed counsel, on the grounds that the trial court's findings were not based upon competent evidence.

> "It is well settled in this jurisdiction that 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. Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is

> evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

State v. Rollins, 231 N.C. App. 451, 453-54, 752 S.E.2d 230, 233 (2013) (quoting *Mecklenburg Cnty. v. Simply Fashion Stores, Ltd.*, 208 N.C. App. 664, 668, 704 S.E.2d 48, 52 (2010)).

III. Discussion

On appeal, defendant argues that the trial court erred by denying his request for the appointment of counsel, on the grounds that the court's findings were unsupported by competent evidence. In analyzing this issue, we first note that certain relevant facts are uncontradicted, including the following:

> 1. Defendant was arrested on 6 February 2013, and counsel was appointed to represent him the following day.
>
> 2. On 30 May 2014, defendant signed a waiver of the right to appointed counsel.
>
> 3. Between May 2014 and May 2015, defendant's case was continued three times to allow defendant time to obtain funds with which to retain attorney Michael J. Parker to represent him.
>
> 4. On 11 May 2015, Mr. Parker and defendant appeared before Judge Bridges. Mr. Parker told the court that defendant had not paid him and that if the case were not continued he would move to withdraw. Defendant told the court that he had lost his job but that he expected to be able to pay Mr. Parker in a month and a half. The court continued the case for two months.
>
> 5. On 6 July 2015, defendant appeared before the trial court. Mr. Parker moved to withdraw as defendant's counsel because defendant had not fully retained him. Defendant asked for the appointment of counsel. The prosecutor made certain representations to the trial court concerning the proceedings on 11 May 2015. The trial court ruled that defendant had waived the right to appointed counsel.

"An indigent defendant's right to appointed counsel in a criminal prosecution is guaranteed by both the North Carolina Constitution and the Sixth Amendment to the United States Constitution." *State v. Holloman*, 231 N.C. App. 426, 429, 751 S.E.2d 638, 641 (2013) (citation

omitted). However, there are several circumstances under which an indigent defendant may lose the right to appointed counsel. First, a defendant may waive his right to appointed counsel:

> A criminal defendant may "waive his [constitutional] right to be represented by counsel so long as he voluntarily and understandingly does so." Once given, however, "a waiver of counsel is good and sufficient until the proceedings are terminated or until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him." The burden of establishing a change of desire for the assistance of counsel rests upon the defendant.

State v. Sexton, 141 N.C. App. 344, 346-47, 539 S.E.2d 675, 676-77 (2000) (quoting *State v. Hyatt*, 132 N.C. App. 697, 700, 513 S.E.2d 90, 93 (1999)). A defendant may also waive the right to be represented by counsel, instead electing to proceed *pro se*. " 'Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court . . . must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel.' " *State v. Blakeney*, __ N.C. App. __, __, 782 S.E.2d 88, 93 (2016) (quoting *State v. Thomas*, 331 N.C. 671, 674, 417 S.E.2d 473, 476 (1992)). "A trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242." *Id.* In addition, a criminal defendant who engages in serious misconduct may forfeit the right to appointed counsel. *Blakeney*, __ N.C. App. at __, 782 S.E.2d at 93-94.

Another situation that arises with some frequency in criminal cases is that of the defendant who waives the appointment of counsel and whose case is continued in order to allow him time to obtain funds with which to retain counsel. By the time such a defendant realizes that he cannot afford to hire an attorney, his case may have been continued several times. At that point, judges and prosecutors are understandably reluctant to agree to further delay of the proceedings, or may suspect that the defendant knew that he would be unable to hire a lawyer and was simply trying to delay the trial. It is not improper in such a situation for the trial court to inform the defendant that, if he does not want to be represented by appointed counsel and is unable to hire an attorney by the scheduled trial date, he will be required to proceed to trial without the assistance of counsel, *provided that* the trial court informs the defendant of the consequences of proceeding *pro se* and conducts the inquiry required by N.C. Gen. Stat. § 15A-1242.

> [D]efendant neither voluntarily waived the right to be represented by counsel, nor engaged in such serious misconduct as to warrant forfeiture of the right to counsel without any warning by the trial court. As a result, the trial court was required to inform defendant that if he discharged his attorney but was unable to hire new counsel, he would then be required to represent himself. The trial court was further obligated to conduct the inquiry mandated by N.C. Gen. Stat. § 15A-1242, in order to ensure that defendant understood the consequences of self-representation.

Blakeney at __, 782 S.E.2d at 98.

In the present case, the parties have offered arguments regarding, *inter alia*, whether defendant showed "good cause" for withdrawing his waiver of appointed counsel or whether he engaged in behavior that might have supported the trial court's conclusion that he had forfeited the right to appointed counsel. We conclude, however, that on the facts of this case, we are not required to resolve these issues.

Our resolution of this appeal requires review of the hearings conducted in May and July of 2015. At the 11 May 2015 hearing before Judge Bridges, the State was represented by Assistant District Attorney Wendy Terry, and defendant was represented by Michael Parker. Ms. Terry explained the current status of the case to the court:

> MS. TERRY: Mr. Parker has, I think, made an appearance for the defendant previously for the purpose of having the case continued so that this gentleman could retain him in full. This is Mr. Curlee's third appearance on the trial list. We continued it so he would have the opportunity of getting his counsel retained the last two times, if it pleases the Court. I have spoken with Mr. Parker. Mr. Parker indicates to me that Mr. Curlee has not been able to make the appropriate arrangements[.] . . . I want to address the [issue of] counsel.

Mr. Parker explained that defendant had not paid him the amount required for representation and informed the court that "[i]f your Honor will not continue the case, it will be my motion to withdraw." Judge Bridges discussed the matter with defendant, who informed him that he had lost his job due to repeated absences occasioned by the prosecutor's directive that defendant remain in the courtroom "all week." The court asked defendant if was presently able to retain Mr. Parker, and defendant responded "No sir, not now, I don't." Ms. Terry conceded that

defendant had been asked to be available in case his case was reached on the calendar, but that the State was "not being ugly about it in any way." The court then engaged in the following dialogue with defendant:

> THE COURT: Mr. Curlee, how long will it take you to hire your lawyer if I were to give you that time? Are you currently employed?
>
> THE DEFENDANT: I just got another job last week then I have to be in court this week. I don't know what will happen today on that. I would say at least a month, month and a half.
>
> THE COURT: I assume he signed a waiver for the file at some point?
>
> MR. PARKER: He originally had court-appointed counsel, Judge.
>
> THE CLERK: There's a waiver signed.
>
> THE COURT: What was the date of the waiver?
>
> THE CLERK: 6-23-14.
>
> THE COURT: All right. Sir, in June of last year you signed a waiver, I presume, to hire your own counsel. I also presume back when you signed the waiver you were gainfully employed?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And so the difference would be in the interim you lost your job?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: So if I were to continue the case to give you time, I could continue the case, give you time to hire a lawyer. If I don't continue the case, I presume you still would want some kind of counsel based on the change of circumstances?
>
> THE DEFENDANT: (Defendant nodding.)
>
> THE COURT: Meaning he lost his job in the interim which would delay the case either way. I will grant the motion and keep Mr. Parker at least viable at this point. How long are you telling me it will take to hire your lawyer?

> MS. TERRY: There's a July 6th term of court.
>
> THE COURT: July 6th. Mr. Curlee, you need to be ready then, sir. Is he free to go at this time then? Is there anything else that I need to know about that may be pending?
>
> MS. TERRY: No, sir.
>
> THE COURT: You are free to go. Be back July 6th.

The transcript thus establishes that at the 11 May 2015 hearing the judge was informed (1) that after signing a waiver of appointed counsel, defendant lost his job and was not presently able to retain Mr. Parker, (2) that if the case were not continued, Mr. Parker would move to withdraw as counsel, and (3) that, if the court did not continue the case, defendant would "want some kind of counsel based on [his] change of circumstances." The trial court concluded that, regardless of whether the case was continued to give defendant more time to retain Mr. Parker or, alternatively, Mr. Parker was allowed to withdraw, defendant had "lost his job in the interim which would delay the case either way." In other words, there would either be a delay caused by a continuance, or a delay caused by the need to appoint counsel for defendant.

Faced with this situation, the court did *not* seek input from defendant as to whether he would prefer to have counsel appointed or instead to work towards being able to hire Mr. Parker, and the court did not offer to appoint counsel for defendant at that time. Instead, the court decided on its own to continue the case in order to "keep Mr. Parker at least viable at this point." Significantly, at the 11 May 2015 hearing, Judge Bridges did *not* address the possibility that defendant might be unable to retain Mr. Parker even with a continuance. The court told defendant generally to "be ready" for trial on 6 July 2015. However, the court did *not* warn defendant that if he were unable to hire Mr. Parker, defendant would be forced to proceed *pro se*. Nor did the court make any inquiry to ascertain that defendant understood the consequences of representing himself.

On 6 July 2015, defendant appeared before the trial court. Mr. Parker had moved to withdraw due to defendant's failure to retain him, but represented defendant at the start of the hearing, before his motion was granted. The State was again represented by Ms. Terry. At the outset of the hearing, Ms. Terry stated the following:

> MS. TERRY: . . . Mr. Curlee is number one on the trial list. He was on the trial list term before last in front of the Honorable Judge Bridges. He had not finished -- despite

> the age of the case -- this is a 2013 case -- had not finished hiring an attorney. Judge Bridges gave him a two-month continuance so he could do that. In the interim he has not finished paying Mr. Parker. Mr. Parker filed a motion to withdrawal, if it pleases the Court. Judge Bridges instructed him that he should be ready to go with or without an attorney. I tender the Court Mr. Parker on his motion.

Ms. Terry's statement to the trial court that Judge Bridges "instructed [defendant] that he should be ready to go with or without an attorney" is completely inaccurate. Judge Bridges did not give defendant such a warning and, in fact, said nothing whatsoever about the possibility of defendant's being forced to represent himself. In response to Ms. Terry's proffer of Mr. Parker to the court, Mr. Parker agreed that defendant's failure to pay him constituted the grounds for his motion to withdraw, and informed the court that he wished to withdraw and that defendant "will have a motion to continue or request a court-appointed counsel." Thereafter, the parties engaged in the following dialogue:

> THE COURT: Mr. Curlee, anything you want to say about Mr. Parker's motion to withdraw?
>
> THE DEFENDANT: I have to say then, I lost my job. I just couldn't work. I just started back.
>
> THE COURT: The Court would grant Mr. Parker's motion to withdraw.
>
> MR. PARKER: Thank you, your Honor.
>
> THE COURT: And, Mr. Curlee, did you have any motions at this time?
>
> THE DEFENDANT: I would like to see if the Court could appoint me an attorney.
>
> THE COURT: When did Mr. Curlee sign a waiver?
>
> MS. TERRY: He had appointed counsel. He had Miss Hamilton-Dewitt whom he released. If I can approach with the Court file, I will let your Honor make her own determination in this matter. I can tell you that Judge Bridges offered Mr. Curlee court-appointed counsel two terms ago. He declined his offer, Mr. Curlee declined and wanted to hire an attorney. Judge Bridges told him he needed to be ready one way or the other this term of court.

Again, Ms. Terry's representation to the trial court was inaccurate and wholly unsupported by anything in the 11 May 2015 transcript. After the trial court heard from Ms. Terry, the hearing continued:

> THE COURT: For the record, the Court finds that Miss Hamilton-Dewitt was appointed February 7th of 2013. The case was continued until February 14th of 2013. That the case was continued until such time that on June 23rd, 2013, Mr. Curlee signed a waiver and was given an opportunity to hire an attorney, that the matter has been continued a year. The Court finds on information and belief that on the last court date, which was two months ago, that Judge Bridges granted a two-month continuance to the defendant. At that time Judge Bridges indicated that the matter would be tried with or without an attorney. That Judge Bridges gave the defendant an opportunity at that time to request a court-appointed attorney. Mr. Curlee indicated he wanted to hire his own attorney. That as of today he still has not done so. That Mr. Curlee is asking for a continuance and asking for a court-appointed attorney today. However, the Court finds this case is an old case. That it is first on the trial list that was duly published. That this is a 2013 case. The Court finds that Mr. Curlee knowingly and voluntarily waived his right to a court-appointed attorney on a previous court date and that he was given the opportunity to hire an attorney for several court dates. That he was put on notice two months ago that the case would be heard this term. The Court would deny the motion for court-appointed attorney.

It is clear from a review of the transcript that the trial court's ruling was based, at least in part, on Ms. Terry's misrepresentation that, at the 11 May 2015 hearing, (1) defendant was asked if he wanted counsel appointed at that point, (2) defendant was warned that the case would be tried in July regardless of whether defendant were able to hire Mr. Parker, and (3) defendant was explicitly warned that if he had not retained counsel by 6 July 2015, he would be forced to proceed to trial *pro se*. None of these representations are accurate.

We wish to be clear that this Court has no basis upon which to believe that Ms. Terry intentionally misrepresented the facts of this case to the trial court, and note that she spoke to the court without the benefit of a transcript. On the other hand, we note that in its appellate brief, the State is less than forthcoming about the history of this matter. For

example, the State asserts that in response to the trial court's inquiry, Ms. Terry "informed the trial court of the previous hearing, and the declaration of Judge Bridges that the appellant needed to be ready on 6 July 2015." This is a misrepresentation of the facts, and fails to acknowledge that Ms. Terry did *not* simply state that Judge Bridges had told defendant to "be ready" but had instead made several affirmative representations that were inaccurate. Indeed, the State omits *any* mention of either Ms. Terry's statements or the trial court's findings regarding defendant having allegedly been "warned" that he would have to represent himself if he was unable to hire Mr. Parker. As the State *does* have a transcript available for reference, this crucial omission is puzzling.

We also wish to emphasize that we are expressing no opinion on the substantive issues related to the appointment of counsel beyond our holding that the trial court's ruling was not supported by competent evidence. We offer no opinion, for example, on whether Judge Bridges might properly have warned defendant that he would have to proceed *pro se* if he did not hire an attorney, or on whether the trial court might properly have found, if it had been provided with accurate information, that defendant had waived his right to counsel.

We conclude that the trial court's denial of defendant's request for appointed counsel and its ruling that defendant had waived the right to appointed counsel were not supported by competent evidence. "A trial court does not reach a reasoned decision, and thus abuses its discretion, when its findings of fact are not supported by competent evidence." *Point Intrepid, LLC v. Farley*, 215 N.C. App. 82, 86, 714 S.E.2d 797, 800 (2011) (citing *Leggett v. AAA Cooper Transp., Inc.*, 198 N.C. App. 96, 104, 678 S.E.2d 757, 763 (2009)). As a result, defendant's conviction must be

REVERSED.

Judges STROUD and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
JUSTON PAUL JOHNSON, DEFENDANT

No. COA16-465

Filed 20 December 2016

1. Appeal and Error—appealability—no findings or conclusions—relevant evidence not disputed

Appellate review of the denial of defendant's speedy trial motion to dismiss was not precluded despite the trial court's failure to articulate findings or conclusions. None of the evidence relevant to the motion was disputed.

2. Constitutional Law—right to speedy trial—length and reason for delay

The trial court did not err by denying defendant's speedy trial motion to dismiss charges of assault with a deadly weapon inflicting serious injury with a sentencing enhancement for possessing or wearing a bulletproof vest. The primary cause of the delay was a backlog at the State Bureau of Investigation's Crime Lab, but the 18 months used by the Crime Lab to process forensic testing of evidence was a neutral reason for the delay. Unlike the docket, which is controlled by the prosecutor, a backlog of evidence to be tested is within control of a separate agency.

3. Constitutional Law—speedy trial—last-minute assertion of right

The trial court did not err by denying defendant's speedy trial motion to dismiss charges of assault with a deadly weapon inflicting serious injury with a sentencing enhancement for possessing or wearing a bulletproof vest. The eleventh-hour nature of defendant's motion carried minimal weight in determining whether defendant was denied his right to speedy trial.

4. Constitutional Law—speedy trial—no prejudice from delay

The trial court did not err by denying defendant's speedy trial motion to dismiss charges of assault with a deadly weapon inflicting serious injury with a sentencing enhancement for possessing or wearing a bulletproof vest. Defendant was not prejudiced by the delay between his arrest and trial, although he raised the questions of witnesses' memories and the ability to confer with counsel since he was incarcerated.

5. Assault—with a deadly weapon inflicting serious injury—participation in attack

The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury where the victim was attacked by two men and it was undisputed that defendant did not shoot the victim. Defendant was acting in concert with the other man; it would have been reasonable for a finder of fact to infer from the evidence that defendant intended to help his girlfriend in taking her children against the will of her estranged husband, that defendant sought and obtained the assistance of the other man, and that they brought to the victim's address weapons and other equipment.

6. Assault—bulletproof vest enhancement—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge that he committed assault while wearing or having in his immediate possession a bulletproof vest. The evidence was sufficient to allow a reasonable inference that defendant either wore or had in his immediate possession a bulletproof vest during the assault.

Appeal by Defendant from judgment entered 10 December 2015 by Judge Beecher R. Gray in Onslow County Superior Court. Heard in the Court of Appeals 5 October 2016.

Attorney General Roy Cooper, by Assistant Attorney General James D. Concepcion, for the State.

Parish & Cooke, by James R. Parish, for Defendant-Appellant.

INMAN, Judge.

A criminal defendant whose trial is delayed because of a backlog of forensic laboratory testing and who does not properly assert his speedy trial right until a trial has been scheduled has not been deprived of his constitutional right to a speedy trial.

Juston Paul Johnson ("Defendant") appeals from a judgment finding him guilty of assault with a deadly weapon inflicting serious injury with an enhancement that at the time of the commission of the felony, Defendant was in possession or wore a bulletproof vest. Defendant argues he was denied a fair and speedy trial, and that the trial court erred in failing to dismiss the assault with a deadly weapon inflicting

serious injury charge and the enhancement for the bulletproof vest for insufficient evidence. After careful review, we conclude that Defendant received a trial free of constitutional or other error.

Factual & Procedural Background

Evidence presented at trial tended to show the following:

Shortly after 9:15 pm on Friday, 23 August 2013, Anthony Sutton ("Mr. Sutton") had just parked his vehicle and was walking in the parking lot outside his apartment at 400 Hammock Lane in Jacksonville when a man wearing a bulletproof vest and gloves drew a gun and pointed it at his face. Mr. Sutton struck the man in the face and ran into the backyard of his apartment building. Mr. Sutton then heard a pop and felt a stinging sensation in the back of his left leg. He continued running until he lost feeling in his left leg and fell to the ground. The man with the gun jumped on Mr. Sutton, asked him if he wanted to die, and fired another shot. Mr. Sutton felt a burning sensation in his head like the feeling in his leg and believed he had been shot in the head.

Mr. Sutton grabbed the gun and fought with his assailant for it. Mr. Sutton then noticed another person in the yard, whom he at first thought was a neighbor coming to help him. But the other person joined in the fight, grabbed Mr. Sutton's hand that was on the gun, and placed a handcuff on Mr. Sutton's wrist. The person tried to handcuff both of Mr. Sutton's wrists, but Mr. Sutton punched him in the chest. The person with the handcuffs then put his hand inside Mr. Sutton's shorts and reached for his keys, then fell or moved to the ground, and then ran away. Mr. Sutton and the man with the gun continued to struggle, and Mr. Sutton heard his children screaming. At that point, Mr. Sutton released his grasp on the gun and tried to run toward the building. He then heard a third shot, his right leg went numb, and he fell again. After a few seconds, Mr. Sutton got up and ran to the front of the building. He reached the front of the adjacent apartment building, 600 Hammock Lane, when other people tackled him, told him to sit down, and began giving him first aid.

Mr. Sutton did not recognize either of his assailants. Although he saw that the man with the gun was wearing a bulletproof vest, he did not notice whether the second man was wearing a vest. When he hit the second man in the chest, "it didn't feel like flesh. It felt like it was padded. But [he didn't] really know what [the man] on."

Jacksonville police officers responded to a 911 call reporting shots fired outside of Mr. Sutton's apartment building and stopped a vehicle they

encountered driving away from the call location. Inside the vehicle they found Latasha Sutton (' "Ms. Sutton"), Mr. Sutton's estranged wife, in the driver's seat; Defendant in the front passenger seat; and Dwayne Robinson ("Mr. Robinson") in a rear passenger seat. A child was sitting in Ms. Sutton's lap and another child was sitting in the backseat near Mr. Robinson. Officers found a handgun belonging to Defendant in the center console. Officers found another handgun, which had recently been fired, under the floorboard of the backseat where Mr. Robinson was sitting. Officers also found a set of walkie talkies turned on and set to the same channel, a map, handcuffs, rope, and three or four bulletproof vests in the vehicle. One bulletproof vest was on the front floorboard on the right passenger side where Defendant was sitting at the time police stopped the vehicle.

Defendant was ordered to exit the vehicle and was arrested and searched at the scene. Police found in his possession a pair of handcuffs and ten handcuff keys on a key chain. Police ultimately confiscated Defendant's pants. Forensic testing later determined that the pants were stained with Mr. Sutton's blood.

Police removed Ms. Sutton, Mr. Robinson, and the children from the vehicle. Ms. Sutton told one of the officers, "[n]one of this would have happened if you would have done your job yesterday." The officer recognized Ms. Sutton and Defendant from his response to a domestic disturbance call at the same location a day earlier, on 22 August 2013. Ms. Sutton told police on that date that she was entitled to take custody of her children, who were in Mr. Sutton's apartment. Police officers were unable to assist Ms. Sutton and instructed her and Defendant to leave.

Lawrence Herndon ("Mr. Herndon"), Mr. Sutton's next-door neighbor, was in his apartment on the evening of 23 August 2013 when he heard a loud popping noise. When he heard another pop, Mr. Herndon went to the back window of his apartment and saw three people struggling outside about 20 feet away. He saw one of the three people standing up above another person on the ground, pointing the gun down at the person's neck. He saw the third person going through the pockets of the person who was on the ground. Mr. Herndon told his wife to call 911 and heard another gunshot and saw someone, whom he later identified as Defendant, running toward the front of the area between his building and an adjacent apartment building. Mr. Herndon then heard a woman and children screaming, and when he opened his front door, he heard someone say "they took the kids." Mr. Herndon walked outside his front door and found Mr. Sutton lying on the sidewalk. Mr. Herndon then

realized that Mr. Sutton was one of the three people who had been struggling in the back of the building. Mr. Herndon noticed that Mr. Sutton was handcuffed and bleeding.

Jacksonville police officers arrived within a few minutes of the 911 call. Officers asked Mr. Herndon if he could identify one or more of three people standing in front of a patrol car. Mr. Herndon identified Mr. Robinson as the person who had been holding the gun to Mr. Sutton's neck and he identified Defendant as the person who was reaching into Mr. Sutton's pockets when Mr. Robinson was holding the gun on Mr. Sutton's neck. Mr. Herndon noticed that the man with the gun was wearing a bulletproof vest. He did not recall seeing Defendant wearing a bulletproof vest.

After being advised of his *Miranda* rights, Defendant provided a written statement to police providing the following information: Defendant had come with Ms. Sutton to Mr. Sutton's apartment complex in Jacksonville on 22 August 2013 to pick up Ms. Sutton's children. Mr. Sutton refused to let Ms. Sutton take the children. The next day, 23 August 2013, Ms. Sutton told Defendant that Mr. Sutton had violated a restraining order and that he was on probation. Defendant returned to Mr. Sutton's apartment complex that evening with the understanding that Ms. Sutton had legal authority to take custody of the children because Mr. Sutton had violated his probation. Defendant's friend, Mr. Robinson, also rode with them, and they agreed that Ms. Sutton would drive the vehicle back to Fayetteville after picking up the children. After the vehicle was parked at the apartments, Mr. Robinson stepped out. Defendant was sitting in the vehicle with Ms. Sutton when he heard gunshots. Defendant saw Ms. Sutton's children outside the apartment building. He put the children in the vehicle and waited with Ms. Sutton for Mr. Robinson. Mr. Robinson then returned to the vehicle and they were in the process of leaving when they were stopped by police.

Defendant was arrested on the night of the shooting and on the following day he was served with a warrant charging him with attempted first degree murder. Defendant initially waived his right to court-appointed counsel, but eventually counsel was appointed to represent him. On 13 October 2015, Defendant was charged in a superseding indictment with attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and wearing or having in his immediate possession a bulletproof vest during the commission of the other charged felonies. On 24 October 2013, DNA evidence was collected from Defendant. From the time of his arrest until the jury

returned verdicts of guilty on 10 December 2015, Defendant was held in custody under a bond set at more than $500,000.[1]

On 14 November 2013, evidence including the pants Defendant wore on the night of the shooting and the DNA sample collected from Defendant was submitted to the State Bureau of Investigation Crime Lab for analysis. Having received no results after more than a year, the State submitted a "rush request" with the Crime Lab in January 2015. The Crime Lab released test results in May 2015 – more than 18 months after Defendant's arrest. After the test results were released, the case was set for trial, but the initial trial date of 5 October 2015 was continued at the request of Defendant's counsel to 9 November 2015.

On 23 September 2015, Defendant's counsel filed a motion to withdraw from the representation on the basis that he had been discharged by Defendant. On 2 October 2015, the same counsel filed a motion to dismiss the charges based on the alleged violation of Defendant's right to a speedy trial.

On 28 October 2015, again at the request of Defendant's counsel, the trial court postponed the trial from 9 November 2015 to 7 December 2015.

On 7 December 2015, Defendant informed the trial court that he wanted his counsel to continue representing him. The trial court then conducted a hearing on Defendant's speedy trial motion, orally denied the motion, and proceeded to impanel a jury for trial. Defendant gave notice of appeal in open court.

Analysis

I. Speedy Trial Motion

[1] Defendant contends the trial court erred in denying his motion to dismiss the charges against him based on the State's violation of his constitutional right to a speedy trial. We affirm the trial court's ruling.

The denial of a motion to dismiss on speedy trial grounds presents a question of constitutional law subject to *de novo* review. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). We therefore consider the matter anew and substitute our judgment for that of the trial court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

1. In a motion filed 2 October 2015 Defendant's counsel asserted that the bond amount was $750,000. The record does not include a bond order entered by the trial court.

The United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972), established a four-part test to determine if a defendant had been denied his constitutional right to a speedy trial. *Id.* at 530, 33 L. Ed. 2d at 116-17. The four factors are (1) the length of delay between accusation (by indictment or arrest) and trial; (2) the reason(s) for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant resulting from the delay. *Id.* No single factor is dispositive; "[r]ather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id.* at 533, 33 L. Ed. 2d at 118. The North Carolina Supreme Court expressly adopted the *Barker* factors in *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000), and noted that the same analysis applies to speedy trial claims asserted under Article I, Section 18 of the North Carolina Constitution.

Defendant notes that the trial court failed to articulate any findings of fact or conclusions of law. But the absence of findings and conclusions does not preclude review by this Court because none of the evidence relevant to Defendant's speedy trial motion was disputed. *See State v. Chaplin*, 122 N.C. App. 659, 663-64, 471 S.E.2d 653, 656 (1996) ("The information before the trial court is not in dispute and thus the failure of the trial court to make findings of fact does not prevent review by this Court."). Reviewing the undisputed evidence of record we proceed to apply the *Barker* analysis.

A. *Length of Delay*

[2] The length of delay between accusation and trial does not *per se* determine whether a defendant has been denied his speedy trial rights. *Grooms*, 353 N.C. at 62, 540 S.E.2d at 721. The United States Supreme Court has noted that a delay approaching one year "marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry." *Doggett v. United States*, 505 U.S. 647, 652 n. 1, 120 L. Ed. 2d 520, 528 n. 1 (1992). In this case, Defendant was arrested and remained incarcerated for nearly 28 months before he was tried. This delay raises the question of reasonableness and requires us to consider the additional factors.

B. *Reason for the Delay*

"[D]efendant has the burden of showing that the delay [of his trial] was caused by the neglect or willfulness of the prosecution." *Grooms*, 353 N.C. at 62, 540 S.E.2d at 721. If Defendant makes a *prima facie* showing that the delay resulted from neglect or willfulness by the State,

the burden shifts to the State to provide a neutral explanation for the delay. *State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003).

It is undisputed that the last four months of the delay of Defendant's trial resulted from his trial counsel's scheduling conflicts. It also appears that Defendant initially waived his right to appointed counsel but failed to retain counsel, so that counsel was appointed and first appeared for Defendant more than a month after his arrest. Seven months after his arrest, Defendant complained that his counsel had not spoken with him in two months. Ultimately, Defendant filed a *pro se* motion for appointment of new counsel, and Defendant's counsel filed a motion to withdraw from the representation. Delay caused by Defendant's indecision about counsel, counsel's lapse in communicating with Defendant, and counsel's scheduling conflicts should not be weighed against the State.

The primary cause of Defendant's delayed trial was a backlog at the State Bureau of Investigation's Crime Lab. The prosecution submitted evidence (including DNA evidence collected from Defendant after counsel was appointed to represent him in October 2013) to the Crime Lab for testing on 14 November 2013. The Crime Lab did not issue test results for another 18 months, in May 2015. Although the prosecution submitted a "rush request" with the Crime Lab in January 2015, it was not until April 2015 that the evidence was first tested for the presence of blood and other bodily fluids. When asked why testing did not start for more than a year after the evidence was submitted, Martha Traugott, a forensic scientist with the Crime Lab, testified that "[i]tems are usually worked in the order that we receive them." Erin Ermish, another Crime Lab scientist, testified that she first received evidence gathered in this case on 7 May 2015 and proceeded to conduct a DNA analysis. That was a few weeks before the Crime Lab issued its report. Ms. Ermish acknowledged that the State had submitted a "rush request" in January 2015. Asked by counsel for Defendant if she could explain the long delay in testing, Ms. Ermish testified that "due to the number of cases that had previously been submitted that were waiting to be worked, this case would have been worked in order when it was – when we go to that number."

When considering the factor of the reason for a delayed trial, "different weights should be assigned to different reasons." *Barker*, 407 U.S. at 531, 33 L. Ed. 2d at 117. More specifically:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily

> but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Id.

Defendant has not argued that the State deliberately delayed his trial, much less that the State delayed the trial to hamper his defense. Defendant concedes in his brief that "it is unclear the State had the ability to speed up" the testing process.

The undisputed testimony by Crime Lab scientists regarding a backlog of evidence to be tested provides an explanation analogous to that offered in *State v. Hammonds*, 141 N.C. App. 152, 160, 541 S.E.2d 166, 173 (2000), in which the trial court found that a congested court docket in Robeson County delayed the defendant's murder trial for more than four years following his arrest. *Id.* at 160, 541 S.E.2d at 173. " 'Our courts have consistently recognized congestion of criminal court dockets as a valid justification for delay.' " *Id.* (quoting *State v. Hughes*, 54 N.C. App. 117, 119, 282 S.E.2d 504, 506 (1981)). Unlike the management of a criminal court docket, which is within the control of the prosecutor, the management of a backlog of evidence to be tested is within the control of a separate agency, in this case the State Bureau of Investigation. While we acknowledge the holding in *Barker* that governmental responsibility for delay should be weighed against the State, Defendant has failed to make a *prima facie* showing that either the prosecution or the Crime Lab negligently or purposefully underutilized resources available to prepare the State's case for trial. For these reasons, we conclude that the 18 months used by the Crime Lab to process forensic testing of evidence in this case was a neutral reason for Defendant's delayed trial. *See also State v. Goins*, 232 N.C. App. 451, 453, 754 S.E.2d 195, 198 (2014) (concluding that a backlog at the Crime Lab was among "neutral" reasons for delay of the defendant's trial). Accordingly, this factor of the *Barker* analysis does not weigh in favor of Defendant.

C. *Defendant's Assertion of His Right to a Speedy Trial*

[3] The third factor to consider is whether and when a criminal defendant has asserted his right to a speedy trial. "The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker*, 407 U.S. at 531-32, 33 L. Ed. 2d at 117-18. A defendant is

not required to assert his right to a speedy trial in order to make a speedy trial claim on appeal. *Grooms*, 353 N.C. at 63, 540 S.E.2d at 722. But a defendant's failure to assert his speedy trial right, or his failure to assert the right sooner in the process, "does weigh against his contention that he has been denied his constitutional right to a speedy trial." *Id.* Here, Defendant first asserted his speedy trial right more than a year after he was arrested, and he did not properly[2] assert his right until October 2015 – more than two years after his arrest, after the State had obtained forensic test results from the Crime Lab, after the trial court had set the case for trial, and after Defendant's trial counsel had requested the trial date be continued. The eleventh-hour nature of Defendant's speedy trial motion carries minimal weight in his favor.

D. *Prejudice to Defendant*

[4] The final factor to consider is prejudice to Defendant caused by the delay between his arrest and trial. "A defendant must show actual, substantial prejudice." *Spivey*, 357 N.C. at 122, 579 S.E.2d at 257. The constitutional right to a speedy trial addresses three concerns: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Grooms*, 353 N.C. at 63, 540 S.E.2d at 722 (citations and quotation marks omitted). Of these concerns, most important "is whether the prosecutor's delay hampered defendant's ability to present his defense[.]" *State v. Hughes*, 54 N.C. App. 117, 120, 282 S.E.2d 504, 506 (1981).

In *Hughes*, the defendant contended that because of delay, he could no longer contact three alibi witnesses, but he presented no evidence about when the witnesses became unavailable. 54 N.C. App. at 120, 282 S.E.2d at 506-07. This Court held that "[b]ecause [the] defendant has not demonstrated that his witnesses were available at any earlier time, we cannot conclude that the prosecutor's delay caused him prejudice." *Id.* at 120, 282 S.E.2d at 507.

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2. Defendant filed a *pro se* motion to dismiss claiming that his right to a speedy trial had been violated on 30 March 2015. "Having elected for representation by appointed defense counsel, defendant cannot also file motions on his own behalf or attempt to represent himself. Defendant has no right to appear both by himself and by counsel." *Grooms*, 353 N.C. at 61, 540 S.E.2d at 721; *see also Spivey*, 357 N.C. at 121, 579 S.E.2d at 256 (holding that where the defendant was represented by counsel throughout his pretrial incarceration, and counsel did not file a speedy trial motion for nearly three years after the defendant's arrest, the "defendant's *pro se* assertion of his right to a speedy trial is not determinative of whether he was denied the right[]").

Defendant here contends that several witnesses' memories were affected by the delay between his arrest and trial. For example, he notes that Mr. Herndon could not recall seeing Defendant wearing a bullet-proof vest. Defendant contends that the lack of recall could have exculpated Defendant had it been presented when the witness's memory was clearer. However, without evidence that the witness would have testified more positively for Defendant at an earlier time, this Court can only speculate whether the lack of recall hampered the defense or the prosecution. *See Barker*, 407 U.S. at 534, 33 L. Ed. 2d at 119 (holding that the defendant's right to speedy trial was not violated when the trial transcript revealed only "very minor" memory lapses, and noting that one lapse was by a prosecution witness). Defendant also contends that because he was incarcerated, he was unable to confer adequately with his counsel. However, given Defendant's inability to obtain release on bond, we cannot conclude that Defendant would have obtained non-custodial contact with his counsel had his trial proceeded sooner.

Considering all of the *Barker* factors, we conclude that Defendant has failed to show that his constitutional right to a speedy trial was violated. We therefore affirm the trial court's denial of Defendant's motion to dismiss on that ground.

II. Acting in Concert

[5] Defendant argues that the trial court erred in denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury, because the evidence was insufficient to support that charge against him. We disagree.

We review *de novo* a trial court's denial of a defendant's motion to dismiss. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). The test 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." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quotation marks and citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). We review the evidence in the light most favorable to the State, drawing every reasonable inference in the State's favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 213 (1994). On the other hand, evidence which raises no more than a surmise, suspicion, or conjecture of guilt is insufficient to withstand the motion to dismiss even though the suspicion so aroused by the evidence is strong. *State v. Evans*, 279 N.C. 447, 453, 183 S.E.2d 540, 544 (1971).

If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant is the perpetrator, the motion to dismiss should be denied. *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005). When considering circumstantial evidence,

> the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.

State v. Thomas, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citations omitted).

To withstand a motion to dismiss a charge of assault with a deadly weapon inflicting serious injury, the State must produce substantial evidence that the defendant (1) assaulted the victim, (2) with a deadly weapon, (3) inflicting serious injury. *State v. Allen*, 193 N.C. App. 375, 378, 667 S.E.2d 295, 297-98 (2008). The term "serious injury" is defined by statute as physical or bodily injury resulting from an assault with a deadly weapon. *State v. Wallace*, 197 N.C. App. 339, 347-48, 676 S.E.2d 922, 928 (2009); *see also* N.C. Gen. Stat. § 14-32 (2015).

Here, jurors were provided sufficient evidence from which they could reasonably infer all of the factual elements of the charge against Defendant. Evidence that Mr. Sutton was shot three times with a gun and required hospitalization and surgery for his wounds satisfies the elements of assault with a deadly weapon and infliction of serious injury. The closer question is whether the evidence was sufficient to allow a reasonable inference that Defendant was a perpetrator of the crime.

It is undisputed that Mr. Robinson, and not Defendant, shot Mr. Sutton. So Defendant could only be found guilty of assaulting Mr. Sutton with a deadly weapon inflicting serious injury based upon a theory of acting in concert. The theory of acting in concert extends criminal liability to a person who, although not the perpetrator of a crime, joins with the perpetrator in a common purpose which results in the crime.

> If two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.

State v. Mann, 355 N.C. 294, 306, 560 S.E.2d 776, 784 (2002) (citations omitted).

The evidence presented at trial established the following facts: Defendant and Ms. Sutton, who lived in Fayetteville, drove on a Thursday to Mr. Sutton's residence in Jacksonville, where the Suttons engaged in a dispute over custody of their children until police arrived and required Defendant and Ms. Sutton to leave without the children. The next evening, Defendant drove his vehicle, along with Mr. Robinson and Ms. Sutton, from Fayetteville back to Mr. Sutton's residence in Jacksonville, carrying in the vehicle firearms, bulletproof vests, and walkie talkie radios that were turned on and set to the same channel. The vehicle was waiting in Mr. Sutton's apartment parking lot when he arrived home that evening. Mr. Robinson, who did not know Mr. Sutton, shot Mr. Sutton and asked him if he wanted to die. Defendant assisted Mr. Robinson in restraining Mr. Sutton, placed a handcuff on one of Mr. Sutton's wrists, tried without success to cuff both of Mr. Sutton's wrists, searched Mr. Sutton's pockets, and escorted the Suttons' children from Mr. Sutton's apartment to the vehicle where Ms. Sutton was waiting. After neighbors found Mr. Sutton bleeding from gunshot wounds, Defendant sped away from the scene in the vehicle with Ms. Sutton, Mr. Robinson, and the children.

This evidence allows a reasonable inference that Defendant brought Mr. Robinson to Jacksonville, armed and equipped with bulletproof vests and walkie talkies, to take the children away from Mr. Sutton by force. Taking children by force and against the will of their custodial parent is a crime. Although it may have been possible for Defendant to take the children without confronting Mr. Sutton, without using a gun, a bulletproof vest, or a walkie talkie to communicate with a partner, a natural consequence of the purpose included a confrontation and use of weapons and other equipment available to Defendant and Mr. Robinson at the crime scene.

Defendant argues that absent evidence that he was "anywhere near" Mr. Robinson when the shots were fired "or in a position to assist or even waiting to assist" him during the shooting, the evidence was insufficient to show that he was present during the crime. We are unpersuaded. Mr. Sutton's blood was found on Defendant's pants. Defendant had traveled from another county for the second time in two days to visit the home of his girlfriend's estranged husband following a custody dispute. Defendant had in his possession several sets of handcuffs and a firearm. After Mr. Robinson first shot Mr. Sutton, and while Mr. Robinson and Mr.

Sutton were struggling over the gun, Defendant aided Mr. Robinson in the assault. The North Carolina Supreme Court has held:

> One who procures or commands another to commit a felony, accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense, is a principal in the second degree and equally liable with the actual perpetrator.

State v. Price, 280 N.C. 154, 158, 184 S.E.2d 866, 869 (1971).

It would have been reasonable for a finder of fact to infer from the evidence presented at trial that Defendant intended to assist his girlfriend in taking her children against the will of her estranged husband, that Defendant sought and obtained the assistance of Mr. Robinson, and that they brought to Mr. Sutton's address weapons and other equipment for the purpose of succeeding in the effort that had failed the previous day.

Based on the reasonable inferences arising from the evidence presented at trial, we conclude that the trial court did not err in denying Defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury.

III. Bulletproof Vest Enhancement

[6] Defendant argues that the trial court erred in denying his motion to dismiss the charge that he committed assault while wearing or having in his immediate possession a bulletproof vest. We disagree.

Mr. Sutton testified at trial that he could not see what Defendant was wearing during the assault, but that when he punched Defendant's chest, it felt padded. A police officer who interviewed Mr. Sutton at the hospital testified that Mr. Sutton told him both attackers wore bulletproof vests. Police who stopped Defendant's vehicle immediately following the shooting found a bulletproof vest lying on the floor of the front passenger side of the vehicle where Defendant was sitting. This evidence was sufficient to allow a reasonable inference that Defendant either wore or had in his immediate possession a bulletproof vest during the assault. For this reason, the trial court did not err in denying Defendant's motion to dismiss the enhancement charge.

Conclusion

For all of the reasons explained above, we conclude that the trial court did not violate Defendant's constitutional right to a speedy trial and that Defendant has failed to demonstrate any error in his trial.

NO ERROR.

Judges DAVIS and ENOCHS concur.

STATE OF NORTH CAROLINA
v.
KEVIN JOHN KIRKMAN, DEFENDANT

No. COA16-407

Filed 20 December 2016

1. Appeal and Error—improper notice of appeal—certiorari—Rule 2

Defendant's petition for certiorari was allowed and, to the extent defendant challenged a guilty plea not normally appealable, Rule 2 of the Rules of Appellate Procedure was invoked where defendant did not give a proper notice of appeal from his motion to suppress and sought to challenge the procedures in his plea hearing.

2. Search and Seizure—knock and talk—observations at front door

An objection to a "knock and talk" search actually concerned the issue of whether there was probable cause to issue a search warrant where defendant was not home, there was no "talk," and officers applied for a search warrant based on what they observed at the front door, as well as the claims of a confidential informant which had led to the "knock and talk."

3. Search and Seizure—warrant—confidential informant—truthful

An officer's statement in an affidavit attached to a search warrant regarding prior truthful statements by a confidential informant met the irreducible minimum circumstances to sustain a warrant. A valid search warrant was issued.

4. Appeal and Error—improper notice of appeal—resentencing

Defendant's argument that the trial court was divested of jurisdiction when he appealed from the first, erroneous judgment against him was not considered where defendant had conceded that his notice of appeal was defective. Certiorari was granted.

5. Sentencing—resentencing—greater sentence—opportunity to withdraw plea

The trial court erred by resentencing defendant to a sentence greater than that provided in his plea agreement without giving him the opportunity to withdraw his plea.

Appeal by defendant from order entered 4 September 2015 by Judge Eric C. Morgan and appeal by defendant upon writ of certiorari from judgment entered 10 November 2015 by Judge Richard L. Doughton in Superior Court, Guilford County. Heard in the Court of Appeals 6 October 2016.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Shawn R. Evans, for the State.

David Weiss, for defendant-appellant.

STROUD, Judge.

Defendant appeals order denying his motion to suppress and judgment for drug-related convictions. The trial court properly denied defendant's motion to suppress and had jurisdiction to correct defendant's sentence since defendant's defective notice of appeal did not divest the trial court of jurisdiction. But as the State concedes, the trial court erred by not giving defendant an opportunity to withdraw his plea upon resentencing him. As explained in more detail below, we therefore affirm the order denying the motion to suppress but reverse the judgment and remand.

I. Background

On or about 18 March 2013, defendant was indicted for maintaining a dwelling for keeping or selling marijuana and two counts of trafficking in marijuana. In March of 2014, defendant filed a motion to suppress "any and all evidence" seized from his home, alleging that the officers did not establish probable cause for the search warrant which authorized the search of his home. On 4 September 2015, the trial court denied

defendant's motion to suppress and made the following findings of fact which are not contested on appeal:

> 1. On or about January 1, 2013, Officer C.S. Bradshaw of the Greensboro Police Department received information from a confidential source, that defendant was growing and selling marijuana.
>
> 2. In the application for the search warrant received in evidence as State's Exhibit 1, Officer Bradshaw, noting that the confidential informant was reliable, set out further specific information provided by the confidential informant, including the following: (a) that defendant was growing and selling marijuana from his residence . . . (b) that there was a large grow operation in the home, and (c) that there were generators running the lights. Officer Bradshaw further stated that the confidential informant was familiar with the appearance of illegal narcotics and that all previous information from the confidential informant had proven to be truthful and accurate to the best of Officer Bradshaw's knowledge.
>
> . . . .
>
> 11. Officers Bradshaw, Trimnal and Armstrong then decided to perform a "knock and talk" procedure to make inquiry further at the residence.
>
> 12. Officer Bradshaw testified that he had substantial experience in investigating narcotics matters, had made numerous arrests specifically related to marijuana, and had received specific training as to narcotics and the indications of marijuana growing activity such as mold and condensation, resulting from humidity, on the windows of marijuana "grow houses."
>
> . . . .
>
> 14. As Officer Bradshaw approached the house on the walkway to the front door, Officer Bradshaw noticed, in plain view to the right of the doorway, windows on the front right of the home that had substantial mold and condensation, as seen in State's Exhibits 3 and 4. In Officer Bradshaw's training and experience, this

was consistent with the heat and humidity associated with marijuana growing operations.

15. When Officer Bradshaw reached the front porch, he also heard, from the front porch, a loud sound consistent with an electrical generator running inside the home, which was also consistent with the information provided by the confidential informant.

. . . .

19. When Officer Trimnal approached the left side door and knocked, he smelled the odor of marijuana, and Officer Bradshaw also came over to the left side door, and he also smelled the odor of marijuana plainly and from outside the left side door of the home.

. . . .

21. Officers Bradshaw and Armstrong then sought the Warrant[.]

On 3 November 2015, defendant filed a written notice of appeal from the order denying his motion to suppress. On 10 November 2015, defendant pled guilty pursuant to an *Alford* plea to all of the charges against him, and the trial court entered judgment sentencing defendant to 25 to 30 months imprisonment. After receiving notification from the North Carolina Department of Public Safety that defendant's minimum and maximum terms of imprisonment as set forth in the judgment were incorrect, on 12 February 2016, the trial court entered another judgment sentencing defendant instead to 25 to 39 months imprisonment. In May of 2016, based upon his recognition of a defect in his notice of appeal, defendant filed a petition for writ of certiorari before this Court.

II. Petition for Writ of Certiorari

[1] According to defendant's petition "he lost the right of appeal by failing to give proper notice of appeal, and on the further ground that in Issue III of his brief, he seeks to challenge the procedures employed in his plea hearing, for which there is no right of appeal." The trial court rendered its decision to deny defendant's motion to suppress, and thereafter defendant entered into a plea agreement. On the same day as defendant's sentencing hearing and *before* judgment was entered, defendant's attorney filed a notice of appeal from the order denying defendant's motion to suppress. Thereafter, defendant did not file a timely appeal from the order denying his motion to suppress, and in

fact, even his oral notice to appeal given immediately after judgment was rendered appears to give notice of appeal only of the denial of his motion to suppress and not the actual judgment sentencing him.

A few months later, the trial court resentenced defendant to correct a prior error; this correction resulted in defendant's maximum sentence increasing by nine months although his minimum sentence remained the same. Defendant did not appeal the resentencing judgment but has since filed this petition for certiorari. The State "concede[s] that it was error for the trial court, at the new sentencing hearing[,] . . . not to allow defendant an opportunity to withdraw his plea where the sentence was greater than what he agreed to in his plea agreement[,]" and thus it would be appropriate for this Court to consider defendant's appeal.

Pursuant to North Carolina Rule of Appellate Procedure 21, we allow defendant's petition for certiorari. *See State v. Biddix*, ___ N.C. App. ___, ___, 780 S.E.2d 863, 866 (2015) ("N.C. Gen. Stat. § 15A–1444(e) states a defendant who enters a guilty plea may seek appellate review by certiorari, Appellate Rule 21(a)(1) is entitled Certiorari, and provides the procedural basis to grant petitions for writ of certiorari under the following situations: (1) when the right to prosecute an appeal has been lost by failure to take timely action[.]" (citation and quotation marks omitted)). Furthermore, to the extent defendant's appeal invokes challenges to his guilty plea not normally appealable, we invoke Rule 2 of the Rules of Appellate Procedure in order "to prevent manifest injustice" as this is a rare situation where *both parties* concede the trial court erred in sentencing defendant. N.C.R. App. P. 2; *see Biddix*, ___ N.C. App. at ___, 780 S.E.2d at 868 ("Under Appellate Rule 2, this Court has discretion to suspend the appellate rules either upon application of a party or upon its own initiative. 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. This Court's discretionary exercise to invoke Appellate Rule 2 is intended to be limited to occasions in which a fundamental purpose of the appellate rules is at stake, which will necessarily be rare occasions." (citations and quotation marks omitted)). We thus turn to defendant's issues on appeal.

III. Motion to Suppress

Defendant first challenges the denial of his motion to suppress on two separate grounds: (1) the "knock and talk" was a mere "guise" which allowed officers to surround his home and far exceeded the scope of a proper "knock and talk" and (2) the search warrant was deficient because it was based on an unsubstantiated anonymous tip.

> The standard of review for a trial court's order denying a motion to suppress is whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law. If a defendant does not challenge a particular finding of fact, such findings are presumed to be supported by competent evidence and are binding on appeal. The trial court's conclusions of law, however, are fully reviewable on appeal.

State v. Medina, 205 N.C. App. 683, 685, 697 S.E.2d 401, 403 (2010) (citations and quotation marks omitted).

A. Knock and Talk

[2] Defendant does not challenge any of the findings of fact regarding the knock and talk but only the conclusions of law determining the knock and talk was lawful. We first note that we will refer to the officers' approach to defendant's home as a "knock and talk," since that is the term used by defendant and in cases, although we also note that there was no "talk" in this case since no one answered the door after the officers knocked. The only evidence from the knock and talk was from the officers' observations from the exterior of the home of the conditions of the windows and hearing the sound of the generator. This was really a knock, look, and listen.

Yet defendant raises an interesting legal question not directly addressed by either party, since most knock and talk cases deal with *warrantless* searches. *See*, *e.g.*, *State v. Smith*, 346 N.C. 794, 800, 488 S.E.2d 210, 214 (1997) ("Knock and talk is a procedure utilized by law enforcement officers to obtain a consent to search when they lack the probable cause necessary to obtain a search warrant. That officers approach a residence with the intent to obtain consent to conduct a warrantless search and seize contraband does not taint the consent or render the procedure per se violative of the Fourth Amendment." (citation and quotation marks omitted)); *State v. Marrero*, ___ N.C. App. ___, ___, 789 S.E.2d 560, 564 (2016) ("A knock and talk is a procedure by which police officers approach a residence and knock on the door to question the occupant, often in an attempt to gain consent to search when no probable cause exists to obtain a warrant." (quotation marks omitted)); *State v. Dulin*, ___ N.C. App. ___, ___, 786 S.E.2d 803, 810 (2016) ("In *Grice*, police officers who approached the door of the defendant's home for a knock and talk noticed some plants growing in containers

in an unfenced area about fifteen yards from the residence. The officers recognized the plants as marijuana, seized them, and later arrested the defendant. The defendant argued that evidence of the plants should have been suppressed because the officers' warrantless search and seizure of the plants violated the Fourth Amendment, as the plants were within the curtilage of his home and thus were protected." (citation and quotation marks omitted)). In this case, based upon all of the information the officers already had, including the informant's tip, the further investigation which supported the tip, and the conditions which the officers observed outside the home, the officers then obtained a search warrant before going inside the home and ultimately seizing any of the property which defendant attempts to suppress in his motion.

Defendant's brief makes much of the "coercive" nature of the officers' approach to the home, since three officers simultaneously approached his front and side door. But again, this was a knock, look, and listen; there was no talking. Since defendant was not home at the time and no one else was in the home, as far as the record shows, we do not know who could have been coerced. Defendant further contends that "[n]o North Carolina appellate decision has analyzed, let alone approved practice whereby officers simultaneously go to multiple doors and surround the front of a home[.]" In one case, this Court did discuss that it was problematic in that particular situation for officers to go to the defendant's back door but did not address any issue regarding officers approaching front and side doors for a knock and talk. *See generally State v. Pasour*, 223 N.C. App. 175, 741 S.E.2d 323 (2012) (stating as the general facts that officers approached the front and side doors and only addressing the unlawful approach to the back door). However, even assuming *arguendo* that any information gained from the approach of the side door was unlawfully obtained and therefore should be suppressed, the fact remains that Officer Bradshaw lawfully approached from the front of the home where he heard the generator and noticed condensation and mold, all factors which in his experience and training were consistent with conditions of a home set up to grow marijuana.

When the officers approached defendant's home, they were in the process of seeking additional information to substantiate the claims of the confidential informant. The investigation started with the tip from the informant; then Officer Bradshaw did further investigation which fully supported the informant's claims. Only then did the officers approach defendant's home to do the knock and talk, and even approaching from the front door of the home, Officer Bradshaw was

able to observe conditions at the home which further substantiated the informant's tip. It is well established that an officer may approach the front door of a home, *see, e.g.*, *State v. Smith*, ___ N.C. App. ___, ___, 783 S.E.2d 504, 509 (2016) ("[I]n North Carolina, law enforcement officers may approach a front door to conduct 'knock and talk' investigations that do not rise to the level of a Fourth Amendment search." *See State v. Tripp*, 52 N.C. App. 244, 249, 278 S.E.2d 592, 596 (1981) ('Law enforcement officers have the right to approach a person's residence to inquire as to whether the person is willing to answer questions.') (internal citations omitted); *see also State v. Church*, 110 N.C. App. 569, 573–74, 430 S.E.2d 462, 465 (1993) ('[W]hen officers enter private property for the purpose of a general inquiry or interview, their presence is proper and lawful. . . . [O]fficers are entitled to go to a door to inquire about a matter; they are not trespassers under these circumstances.' ")), and if he is able to observe conditions from that position which indicate illegal activity, it is completely proper for him to act upon that information.

Ultimately, the officers did get a search warrant for the search which led to the seizure of defendant's contraband. Thus, the real issue is not the knock and talk, but whether there was probable cause to issue the search warrant. Defendant's challenge to the knock and talk is actually a challenge of the search warrant since information from the knock and talk is part of the factual basis for the issuance of the warrant. But the officers' observations at the house were only a small part of the information upon which the warrant was issued. Thus, we turn to defendant's next challenge, the confidential informant.

B. Confidential Informant

[3] Defendant contends that the search warrant was improperly issued because the confidential informant was not sufficiently reliable to form the basis of probable cause.

> In determining whether probable cause exists for the issuance of a search warrant, our Supreme Court has provided that the totality of the circumstances test is to be applied. Under the totality of the circumstances test,
>
> > the task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be

> found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

State v. Benters, 231 N.C. App. 295, 300, 750 S.E.2d 584, 588 (2013) (citations, quotation marks, ellipses, and brackets omitted), *aff'd*, 367 N.C. 660, 766 S.E.2d 593 (2014). In *State v. McKoy*, this Court explained that

> [t]his court has already established the irreducible minimum circumstances that must be set forth in support of an informant's reliability to sustain a warrant. In *Altman*, the affiant's statement that the confidential informant has proven reliable and credible in the past was held to meet the minimum standards to sustain a warrant. In the present case, the affiant's statement that the confidential informant had given this agent good and reliable information in the past that had been checked by the affiant and found to be true also meets this minimum standard.

16 N.C. App. 349, 351–52, 191 S.E.2d 897, 899 (1972) (citation, quotation marks, and ellipses omitted).

Here, the trial court found that the search warrant stated the

> confidential informant was reliable, [and] set out further specific information provided by the confidential informant, including the following: (a) that defendant was growing and selling marijuana from his residence . . . (b) that there was a large grow operation in the home, and (c) that there were generators running the lights. Officer Bradshaw further stated that the confidential informant was familiar with the appearance of illegal narcotics and that all previous information from the confidential informant had proven to be truthful and accurate to the best of Officer Bradshaw's knowledge.

In context, describing the informant as "reliable" is a succinct way of saying that the officer was familiar with the informant and the informant had provided accurate information in the past. In addition, the warrant affidavit stated, "All previous information provided by [the confidential informant] has proven truthful and accurate to the best of [Officer Bradshaw's] knowledge." We conclude that Officer Bradshaw's statement in the affidavit attached to the warrant regarding prior truthful statements provided by the confidential informant meets "the irreducible

minimum circumstances that must be set forth in support of an informant's reliability to sustain a warrant." *Id.* at 351–52, 191 S.E.2d at 899.

While defendant argues the confidential informant here should be viewed as anonymous, the record does not support this claim. Indeed, as we just noted, the warrant application supports the exact opposite conclusion. Officer Bradshaw had to know who the informant was to be aware of the informant's prior reliability. This was not an anonymous tip from an unknown person. Defendant's brief dwells upon various types of additional information that might have been provided to show the reliability of the informant; we agree that additional information would not be harmful or inappropriate, but it is also unnecessary. *See generally id.* at 351–52, 191 S.E.2d at 899. The search warrant stated that Officer Bradshaw had previously used information from the confidential informant and found it to be reliable. Officer Bradshaw then did additional investigation, all of which supported the informant's claims and established probable cause for issuance of the search warrant. *See id.* As a valid search warrant was issued, defendant's motion to suppress was properly denied. This argument is overruled.

IV. Resentencing

[4] Defendant's next two challenges address the trial court's resentencing after notification of an error in the range of his sentence from the North Carolina Department of Public Safety. Defendant first contends that the trial court was divested of jurisdiction because he had already appealed from the judgment. But defendant cannot have it both ways. Defendant has already conceded that his notice of appeal was defective, and thus jurisdiction was not with this Court, but rather still with the trial court. *See generally State v. Miller*, 205 N.C. App. 724, 696 S.E.2d 542 (2010) (determining that jurisdiction does not switch to this Court when a notice of appeal is defective). As discussed above, we granted review by certiorari to defendant for this very reason.

[5] Lastly, defendant contends that it was error for the trial court to resentence him to a sentence greater than that provided for in his plea agreement without giving him the opportunity to withdraw his plea; the State agrees with defendant. North Carolina General Statute § 15A-1024 provides that

> [i]f at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the

> defendant is entitled to a continuance until the next session of court.

N.C. Gen. Stat. § 15A-1024 (2013) (emphasis added). Since the trial court should have given defendant the opportunity to withdraw his plea in accordance with North Carolina General Statute § 15A-1024, we reverse and remand. *See State v. Oakley*, 75 N.C. App. 99, 104, 330 S.E.2d 59, 63 (1985) ("On remand, the defendant may withdraw his guilty plea at the resentencing hearing, if the judge decides to impose a sentence other than the original plea arrangement, N.C. Gen. Stat. Sec. 15A-1024 (1983), or he may seek to negotiate new terms and conditions under his original plea to the lesser included offense. Reversed in part and remanded for reinstatement of guilty plea and resentencing.").

V. Conclusion

For the foregoing reasons, we affirm the trial court's denial of defendant's motion to suppress, reverse defendant's judgment, and remand so that the trial court may afford defendant the opportunity to withdraw his plea before any new longer sentence may be imposed.

Affirmed in part; reversed in part; and remanded.

Judges McCULLOUGH and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
LUIS MIGUEL MARTINEZ

No. COA16-650

Filed 20 December 2016

1. Search and Seizure—traffic stop—search of vehicle—reasonable belief—evidence within vehicle

The trial court did not err in a prosecution for possession of a firearm by a felon by denying defendant's motion to suppress the search of his vehicle which revealed a firearm partially under the back seat after defendant was arrested for impaired driving. Based upon the totality of the circumstances, including defendant's actions and the officers' training and experience with regard to driving while impaired, the trial court properly concluded that the officers reasonably believed the vehicle could contain evidence of the offense.

2. Criminal Law—prosecutor's argument—defendant's failure to produce exculpatory evidence

The trial court did not err by overruling defendant's objection to the prosecutor's closing argument concerning defendant not testifying in a prosecution for possession of a firearm by a felon. While a prosecutor may not comment on a defendant's failure to take the stand, the defendant's failure to produce exculpatory evidence or to contradict the evidence presented by the State may be brought to the jury's attention by the State. Moreover, in this case, any error was harmless beyond a reasonable doubt.

3. Criminal Law—prosecutor's argument—scenario of the crime

The trial court did not abuse its discretion in a prosecution for possession of a firearm by a felon by allowing the prosecutor to make statements in his closing argument that allegedly asserted facts not in evidence. Prosecutors may create a scenario of the crime as long as the record contains sufficient evidence from which the scenario is reasonably inferable.

4. Criminal Law—prosecutor's closing argument—demonstration—no gross impropriety

Defendant did not show gross impropriety and the trial court did not commit reversible error by not intervening *ex mero motu* in a prosecution for possession of a firearm by a felon where the prosecutor pointed a rifle at himself during a demonstration. Defendant failed to show gross impropriety.

Appeal by defendant from judgment entered 5 October 2015 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 1 December 2016.

Attorney General Roy Cooper, by Assistant Attorney General Michael E. Bulleri, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellant Defender Daniel L. Spiegel, for defendant-appellant.

TYSON, Judge.

Luis Miguel Martinez ("Defendant") appeals from judgment entered after a jury found him guilty of possession of a firearm by a felon. We find no error.

I. Background

The State's evidence tended to show on 27 September 2014, at approximately 12:30 a.m., Winston-Salem Police Officer M.H. Saintsing observed a Chevrolet pick-up truck speeding 48 mph in a 35 mph zone near the intersection of Thomasville Road and Louise Road. Officer Saintsing performed a U-turn and followed the truck into a gas station parking lot, where it had just pulled in.

Officer Saintsing observed Defendant exit from the driver's side of the truck. A male passenger also exited from the truck, and both began walking toward the convenience store when Officer Saintsing activated his blue lights. Officer Saintsing approached Defendant and instructed him to get back into the vehicle. Defendant refused the officer's command, and continued toward the convenience store. After at least one subsequent command, Defendant returned to the location of the vehicle and threw the keys underneath the vehicle. The passenger attempted to re-enter the vehicle pursuant to the officer's commands, but was unable to because the door was locked.

Defendant denied being the driver of the truck, and stated he did not know who owned the truck. Officer Saintsing asked Defendant why the truck was not parked within a marked parking space, and Defendant stated "he just kind of pulled in." Officer Saintsing detected a strong odor of alcohol on Defendant, and contacted other officers to request assistance. Officers Gardner and Willey arrived, conducted a driving while impaired investigation, and formed the opinion that Defendant was impaired.

Defendant was unable to produce a driver's license. Officer Saintsing conducted a mobile computer search and learned Defendant's license had been suspended for a prior conviction of driving while impaired.

Defendant was arrested for driving while impaired. He was handcuffed and placed in the rear seat of one of the patrol cars, at least thirty feet away from his vehicle. Officer Gardner instructed Officer Willey to search the interior of Defendant's vehicle, incident to the arrest. Officer Gardner testified he had conducted between twenty and thirty driving while impaired investigations. At least fifty percent of these cases involved the discovery of evidence associated with driving while impaired inside the vehicle, such as open containers of alcohol. Officer Gardner stated he had been trained to search the vehicle under these circumstances. Defendant did not admit to drinking alcohol inside the vehicle.

Officer Willey discovered six beer bottles in the rear seat area of the vehicle. Some of the bottles were opened and some were not. A loaded

.22 caliber rifle was discovered, in a cocked position, halfway underneath the rear seat. The barrel of the rifle was pointed towards the passenger seat.

During routine booking questions, Defendant told officers he had stolen the truck from his father, the registered owner of the vehicle. No usable forensic evidence, such as fingerprints or DNA, was obtained from the rifle.

Prior to trial, Defendant filed a motion to suppress the search. The trial court concluded the search of the vehicle after Defendant's arrest was lawful based upon the officers' reasonable belief the vehicle could contain evidence of the offense of driving while impaired. The matter proceeded to trial. Defendant stipulated he had been convicted of felonious assault with a deadly weapon with intent to kill on 24 August 2010. The jury convicted Defendant of possession of a firearm by a felon, and Defendant was sentenced to an active prison term of 17 to 30 months. Defendant appeals.

II. Jurisdiction

Jurisdiction of right by timely appeal lies in this Court from final judgment of the superior court following a jury's verdict pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2015). Defendant is entitled to appeal the denial of his motion to suppress pursuant to N.C. Gen. Stat. § 15A-979(b) (2015).

III. Issues

Defendant argues the trial court erred by: (1) denying Defendant's motion to suppress; and (2) failing to intervene during the prosecutor's closing argument.

IV. Denial of Defendant's Motion to Suppress

[1] Defendant argues his motion to suppress should have been granted, because the officers lacked particularized reasons to believe evidence of impaired driving would be found inside the vehicle. We disagree.

A. Standard of Review

The trial court's findings of fact on a defendant's motion to suppress are conclusive and binding upon appeal if supported by competent evidence. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). This Court determines whether the trial court's findings of fact support its conclusions of law. *Id.*

We review the trial court's conclusions of law on a motion to suppress *de novo*. *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646,

648, *disc. review denied*, 362 N.C. 89, 656 S.E.2d 281 (2007). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

Where, as here, a defendant fails to challenge the trial court's findings of fact, they are deemed to be supported by competent evidence and are binding on appeal. *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36, *disc. review denied*, 358 N.C. 240, 594 S.E.2d 199 (2004).

B. Search Incident to Arrest

It is a "basic constitutional rule" that "searches conducted outside the judicial process, without prior approval by [a] judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 29 L. Ed. 2d 564, 576 (1971). "Among the exceptions to the warrant requirement is a search incident to a lawful arrest," which "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Arizona v. Gant*, 556 U.S. 332, 338, 173 L. Ed. 2d 485, 493 (2009) (citations omitted).

In *Arizona v. Gant*, the Supreme Court of the United States addressed the Fourth Amendment implications of a vehicle search following the driver's arrest. *Id.* at 335, 173 S.E.2d at 491. The Court warned of the danger of "giving police officers unbridled discretion to rummage at will among a person's private effects." *Id.* at 345, 173 L. Ed. 2d at 497. "A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, *when there is no basis for believing evidence of the offense might be found in the vehicle*, creates a serious and recurring threat to the privacy of countless individuals." *Id.* (emphasis supplied).

The Court established a rule designed to balance the individual's Fourth Amendment privacy interests with both officer safety and the need to collect evidence of the crime at issue.

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search *or it is reasonable to believe the vehicle contains evidence of the offense of arrest.* When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless

> police obtain a warrant or show that another exception to the warrant requirement applies.

Id. at 351, 173 S.E.2d at 501 (emphasis supplied).

The Court in *Gant* cited to Justice Scalia's concurrence in *Thornton v. United States*, 541 U.S. 615, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring), to explain its rationale. *Id.* at 343-49, 173 L. Ed. 2d at 496-99. In *Thornton*, Justice Scalia noted, "the fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging." 541 U.S. at 630, 158 L. Ed. 2d at 919 (emphasis in original).

This Court in *State v. Foy*, 208 N.C. App. 562, 563, 703 S.E.2d 741, 741 (2010) applied the holding in *Gant*. In *Foy*, the defendant was stopped after his driving caused the officer to believe he was intoxicated. *Id.* The officer discovered a revolver inside the defendant's truck, arrested the defendant for carrying a concealed weapon, and then searched the truck. *Id.*

This Court determined the search was valid as incident to arrest because the discovery of one concealed weapon provided the officers reason to believe that further evidence of this crime, such as another concealed weapon, ammunition, a receipt, or a gun permit, could exist inside the truck. *Id.* at 565-66, 703 S.E.2d at 743. Further, such evidence would be necessary and relevant to show ownership or possession, could serve to rebut any defenses offered by defendant at trial, and would aid the State in prosecuting the crime to its full potential. *Id.* This Court held, "[p]ermitting a search incident to arrest to discover offense-related evidence for the crime of carrying a concealed weapon is consistent with the United States Supreme Court's holding in *Gant*." *Id.* at 566, 703 S.E.2d at 743.

The question for the court on Defendant's motion to suppress is not whether it was reasonable for the officers to believe contraband may be found in the vehicle, but whether "evidence of the crime was reasonably believed to be present based on the nature of the suspected offense." *Id.* at 566, 703 S.E.2d at 743 (citing *Gant*, 556 U.S. at 351, 173 L. Ed. 2d at 501). Here, Defendant denied ownership, possession, and operation of the vehicle both verbally and by throwing the keys under the vehicle. Based upon the totality of the circumstances, including the strong odor of alcohol on Defendant, Defendant's effort to hide the keys and refusal to unlock the vehicle, and the officers' training and experience with regard to driving while impaired investigations, the trial court properly concluded the officers reasonably believed the vehicle could contain evidence of the offense. *Id.* Defendant's argument is overruled.

V. State's Closing Argument

[2] Defendant argues the trial court abused its discretion by overruling Defendant's objections to the State's closing argument. He also asserts the trial court should have intervened *ex mero motu* at various points during the prosecutor's closing argument after Defendant failed to object or request curative instructions.

A. Standard of Review

"Arguments of counsel are largely in the control and discretion of the trial court. The appellate courts ordinarily will not review the exercise of that discretion unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury." *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E.2d 110, 122 (1984) (citation omitted), *cert denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). "[W]e will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury." *State v. Covington*, 290 N.C. 313, 328, 226 S.E.2d 629, 640 (1976) (citations omitted). The reviewing court examines the full context in which the statements were made. *See, e.g.*, *State v. Lloyd*, 354 N.C. 76, 113-14, 552 S.E.2d 596, 622-23 (2001).

Where a prosecutor improperly comments on a defendant's constitutional right not to testify, a new trial is required unless the State can prove the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2015); *State v. Reid*, 334 N.C. 557, 556, 434 S.E.2d 193, 198 (1993).

Where a defendant fails to object to statements made by the prosecutor during closing argument, the standard of review is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999). "[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979) (citation omitted).

B. Comment Upon Defendant's Right Not to Testify

The Constitution of the United States and North Carolina's Constitution preserve a criminal defendant's right not to testify. U.S. Const. amend. V; N.C. Const. art. I § 23. "[I]t is well-settled law that a defendant need not testify" and "that the burden of proof remains with

the State regardless of whether a defendant presents any evidence." *State v. Williams*, 341 N.C. 1, 13, 459 S.E.2d 208, 216 (1995) (citation and quotation marks omitted), *cert. denied*, 516 U.S. 1128, 133 L. Ed. 2d 870 (1996). The State "violates [this rule] if the language used [was] manifestly intended to be, or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *State v. Parker*, 185 N.C. App. 437, 444, 651 S.E.2d 377, 382 (citation and quotation marks omitted), *disc. review denied*, 362 N.C. 91, 657 S.E.2d 26 (2007).

During opening statements, defense counsel asserted Defendant distanced himself from the truck and "acted nervous" because "he didn't want to get popped for driving while impaired." The prosecutor asserted the following during the State's closing argument:

> [PROSECUTOR]: First thing, you have the driver of the vehicle trying to distance himself from the vehicle. Why would you do that? Probably because you don't want the police to associate you with that vehicle. Now, I know the defense is going . . . to say "Well he did not want to get popped for DWI," I think is what they described it as in their opening.
>
> Well, think about this, and this will apply to all of the defense argument, the only evidence you heard in this case has been presented by the State. The State's evidence is uncontradicted so to the extent the defense makes any arguments at all, if their [sic] not based off of the evidence that the State has presented, they're not in evidence at all. See what I'm saying? *If they're saying "Well, he didn't want to get popped for DWI," well, then they need to put on evidence that he didn't want to get popped for DWI*, otherwise it's just an unsupported allegation floating out there.
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> [THE COURT]: Overruled.
>
> [PROSECUTOR]: Do you see what I'm saying here? They have an opportunity, the defense has an opportunity to put on evidence to support their arguments. They didn't take that opportunity here, so you can't assume the arguments that they are making are correct because they are unsupported. You see what I'm saying? *So if you want to come in here in this courtroom and tell 12 people, tell this jury,*

> *that "my client left that vehicle because he didn't want to get a DWI, not because he didn't want them to find the firearm in there," then you need to put on some evidence to support that and they haven't done that.*
>
> *I make no comment on the defendant's option or election not to testify in his case. We all know that's his constitutional right.* We have the right to remain silent. That's a sacred right under the Constitution but that is one thing that is quite different from the defense's failure to put on any exculpatory evidence or evidence of his innocence. Those are two –
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE COURT]: Sustained.
>
> [PROSECUTOR]: I want to make sure that I'm on sound legal grounds here. I don't want to say anything impermissible. This is what the Supreme Court of North Carolina had to say: "In closing arguments a prosecutor may not comment on the failure of the defendant to testify at trial." – I am not doing that – "However, it is permissible for the prosecutor to bring to the jury's attention a defendant's failure to produce exculpatory evidence or to contradict the evidence presented by the State."
>
> [DEFENSE COUNSEL]: Objection, Your Honor. (emphases supplied).

At this point, the trial court excused the jury. Outside the presence of the jury, the trial court warned the prosecutor he had "said enough about the defendant's election not to put on evidence" and directed the prosecutor to "move on to another subject." The prosecutor resumed his argument. Before concluding, he stated: "Once again the only evidence presented has been presented by the State[.]" The prosecutor further stated: "The defendant did not testify but you have heard him make some statements. You heard him on video."

Defendant argues his testimony would be the only plausible way to introduce evidence of the reason he wished to distance himself from the truck, and the jury naturally and necessarily understood the prosecutor's argument as a comment on Defendant's decision not to testify. Defendant further argues the prosecutor's explicit discussion of Defendant's right not to testify, while simultaneously denying he was commenting on that right, was itself improper and drew further attention to the previous

improper comments. *See State v. Roberts*, 243 N.C. 619, 621, 91 S.E.2d 589, 591 (1956) (prosecutor's statement that he had "not said a word" about the defendant's failure to testify was improper and added emphasis to the previous objectionable language).

Defendant relies on our Supreme Court's holding in *Reid*, that "any direct reference to [D]efendant's failure to testify is error and requires curative measures be taken by the trial court." 334 N.C. at 554, 434 S.E.2d at 196, In *Reid*, the Supreme Court awarded the defendant a new trial based upon the following statement of the prosecutor during closing argument:

> The defendant hasn't taken the stand in this case. He has that right. You're not to hold that against him. But ladies and gentlemen, we have to look at the other evidence to look at intent in this case[.]

Id.

"While it is true that the prosecution may not comment on defendant's failure to take the stand, 'the defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State may properly be brought to the jury's attention by the State in its closing argument.' " *State v. Thompson*, 110 N.C. App. 217, 225, 429 S.E.2d 590, 594-95 (1993) (quoting *State v. Jordan*, 305 N.C. 274, 287 S.E.2d 827 (1982)). Moreover, "[w]hen defendant forecasts evidence in the opening statement, the State is permitted to comment upon the lack of evidence supporting such a forecast in closing argument." *State v. Anderson*, 200 N.C. App. 216, 224, 684 S.E.2d 450, 456 (2009).

During opening statement, defense counsel stated Defendant's reason for distancing himself from the truck was due to not wanting "to get popped" for driving while impaired. These comments and circumstances distinguish this case from the facts present in *Reid*. The prosecutor's statements, viewed as a whole and in context, summarize the evidence put before the jury and assert no evidence was presented to support defense counsel's assertions in his opening statement. *See id.*

Defense counsel presented a forecast of evidence explaining Defendant's actions and nervous behavior during the traffic stop were due to his fear of being arrested for driving while impaired. Viewed as a whole, the prosecutor's statements pertain to Defendant's failure to produce exculpatory evidence to contradict the State's theory of why Defendant attempted to distance himself from the truck. *Thompson*, 110 N.C. App. at 225, 429 S.E.2d at 594-95.

Presuming *arguendo* the prosecutor's statements constituted an impermissible comment on Defendant's right to remain silent and the trial court erred by failing to intervene or give a curative instruction *ex mero motu*, "[c]omment on an accused's failure to testify does not call for an automatic reversal but requires the court to determine if the error is harmless beyond a reasonable doubt." *Reid*, 334 N.C. at 557, 434 S.E.2d at 198.

Defendant was charged with and convicted of possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1. The two elements of this offense are "that the defendant has a prior felony conviction, and a firearm in his possession." *State v. Hussey*, 194 N.C. App. 516, 521, 669 S.E.2d 864, 867 (2008). Because Defendant stipulated to his prior conviction for felonious assault with a deadly weapon with intent to kill, the only question before the jury was whether he possessed a firearm.

Uncontroverted evidence showed Defendant was stopped while driving his father's truck, and exited the vehicle before the officer stopped. He attempted to further distance himself from the vehicle by denying operation of the truck and knowledge of ownership of the truck, and by throwing the keys under the truck. The officers observed signs that Defendant had consumed alcohol. Upon searching the vehicle, the officers recovered a loaded and cocked rifle located in the backseat area. The rifle was discovered along with and on top of containers of alcohol, and had been placed into the rear of the truck with the butt facing the driver's door and the barrel pointing to the passenger seat.

Furthermore, the trial court charged the jury on the presumption of innocence, the State's burden of proving defendant's guilt beyond a reasonable doubt, and Defendant's failure to testify created no presumption against him. The jury is presumed to have followed the instructions of the trial court. *State v. Thornton*, 158 N.C. App. 645, 652, 582 S.E.2d 308, 312 (2003) (citations omitted). Any asserted error was harmless beyond a reasonable doubt. Defendant's argument is overruled.

C. Assertion of Facts Not in Evidence

[3] Defendant also argues the prosecutor improperly misled the jury during the closing argument by asserting facts not in evidence. In discussing the difference between actual and constructive possession, the prosecutor explained:

> [PROSECUTOR]: "Possession of an article may be either actual or constructive. A person has actual possession of

> an article if the person has it on his person, is aware of its presence and either alone or together with others has both the power and intent to control its disposition or use." So that is actual possession. *Think about it his [sic] way, when Mr. Martinez is placing the rifle in the truck and it is in his hands, he has actual possession of it.*
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> [THE COURT]: Overruled.
>
> [PROSECUTOR]: *When he closes the door and walks away from it a few steps now, he has constructive possession of it*, and I'll explain . . . . (emphases supplied).

Defendant argues that under the guise of explaining the law, the prosecutor was allowed to present a story to the jury in which Defendant, with the rifle "in his hands," placed it in the truck, closed the door and walked a few steps away. Though the rifle was found inside the vehicle he was driving, Defendant asserts no evidence established who placed the rifle in the vehicle.

"Prosecutors may, in closing arguments, create a scenario of the crime committed as long as the record contains sufficient evidence from which the scenario is reasonably inferable." *State v. Frye*, 341 N.C. 470, 498, 461 S.E.2d 664, 678 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996). The facts presented to the jury showed in detail the location and placement of the rifle in the backseat of the vehicle with the barrel pointed towards the passenger seat. Defendant has failed to show "gross impropriety in the argument as would be likely to influence the verdict of the jury." *Covington*, 290 N.C. at 328, 226 S.E.2d at 640. Defendant has failed to show the trial court abused its discretion in allowing the statement. This argument is overruled.

D. Handling of the Rifle

[4] Defendant also argues the prosecutor improperly inflamed the jurors' emotions and "caused them to make a decision based on fear" by pointing the rifle at himself. To demonstrate that the "only [] logical way" the rifle could have been placed in the vehicle was from the driver's side, the prosecutor acted out what he believed it would have looked like had the rifle been placed in the vehicle from the passenger's side. In doing so, the prosecutor pointed the barrel of the rifle at himself. He then stated, "I can see some of you all just cringing when I was pointing that weapon towards myself even knowing it is unloaded and safe."

Defendant did not object to the prosecutor's handling of the rifle in front of the jury and related statements. He has failed to show such gross impropriety "that the trial court committed reversible error by failing to intervene *ex mero motu*." *Trull*, 349 N.C. at 451, 509 S.E.2d at 193. This argument is overruled.

Notwithstanding our conclusions that Defendant has failed to object or to show prejudice in the prosecutor's statements and demonstrations to warrant a new trial, we find the prosecutor's words and actions troublesome. Without hesitation, the prosecutor flew exceedingly close to the sun during his closing argument. Only because of the unique circumstances of this case has he returned with wings intact. *See* Bergen Evans, Dictionary of Mythology 62-63 (Centennial Press 1970). We emphasize, "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict." Rev. R. Prof. Conduct N.C. St. B. 3.8 (Special Responsibilities of a Prosecutor) cmt. [1] (2015).

VI. Conclusion

The trial court properly concluded it was "reasonable [for the officers] to believe the vehicle contain[ed] evidence of the offense of arrest," and properly denied Defendant's motion to suppress. *Gant*, 556 U.S. at 345, 173 L. Ed. 2d at 497. Defendant has failed to show the prosecutor's purported comments on Defendant's decision not to testify and other statements and actions made during closing argument warrant the trial court's interventions *ex mero motu* or show prejudice for us to award a new trial.

Defendant received a fair trial, free of prejudicial errors he preserved and argued. We find no error in the trial court's denial of Defendant's motion to suppress, the jury's verdict, or the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges McCULLOUGH and DILLON concur.

STATE v. MILLER

[251 N.C. App. 297 (2016)]

STATE OF NORTH CAROLINA
v.
JUAN ANTONIA MILLER, DEFENDANT

No. COA16-424

Filed 20 December 2016

Search and Seizure—cocaine—traffic stop—extended—coerced consent to search

There was plain error in a case involving possession of cocaine where the cocaine was found in defendant's pocket after a traffic stop and the trial court did not exclude the evidence of cocaine as the fruit of an unconstitutional seizure. The officer saw defendant's vehicle in a high-crime area, and body camera footage revealed that the officer was more concerned with discovering contraband than issuing traffic tickets and that he unlawfully extended the traffic stop. Moreover, the body camera footage showed that the officer had turned defendant around to face the rear of the vehicle with his arms and legs spread before he asked for consent to search, which is textbook coercion.

Appeal by defendant from judgment entered 15 December 2015 by Judge Eric C. Morgan in Guilford County Superior Court. Heard in the Court of Appeals 21 September 2016.

Attorney General Roy Cooper, by Assistant Attorney General John G. Batherson, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant.

ELMORE, Judge.

Police ordered Juan Antonia Miller (defendant) out of a vehicle during a traffic stop and searched him, finding a small bag of cocaine in his pocket. The cocaine, defendant argues, was the fruit of an unconstitutional seizure and the trial court committed plain error by failing to exclude it from evidence at trial. Upon plain error review, we hold that (1) the officer unlawfully extended the traffic stop; (2) assuming the seizure was lawful, defendant's consent was not valid; and (3) admitting the evidence at trial prejudiced defendant and seriously affects the integrity and public reputation of judicial proceedings. Defendant is entitled to a new trial.

I. Background

On the evening of 18 March 2014, Officer H.B. Harris was patrolling "problem areas" with the Vice and Tactical Narcotics Team of the Greensboro Police Department. He observed a vehicle turn left from Darden Road onto Holden Road and position itself in front of his unmarked patrol car. Officer Harris followed the car to Interstate 85 and decided to run its license plate through the DMV database. The search indicated that a "hold" had been placed on the tag because the owner had not paid the insurance premiums.

Officer Harris, who was wearing a body-mounted camera, pulled the vehicle over and approached the passenger-side window. The owner of the vehicle, Derick Sutton, was in the passenger's seat; defendant was in the driver's seat. Officer Harris asked defendant for his driver's license before informing the two occupants that he had stopped them for speeding and a potential tag violation. When he learned that Sutton was the registered owner of the vehicle, Officer Harris inquired about the status of his insurance. Sutton handed Officer Harris an insurance card to show that he had recently purchased car insurance. At Officer Harris's request, Sutton also produced his driver's license and told the officer that they were "coming from a friend's house on Randleman Road." Officer Harris testified that this "piqued his interest" because he "knew . . . they did not get on the interstate from Randleman Road, and Holden Road is a little distance away from Randleman Road." He then ordered Sutton to step out of the vehicle.

As Sutton complied, Officer Harris asked Sutton if he had any weapons or drugs on him. Sutton said he did not, and was then motioned to stand with another officer who had arrived on the scene. Officer Harris proceeded toward the driver's side and asked defendant to step out of the vehicle. As defendant complied, Officer Harris asked defendant if he had any weapons or drugs on him. Defendant also said he did not. According to Officer Harris's testimony, he then asked defendant, "Do you mind if I check?" to which defendant responded, "No," and placed his hands on the trunk of the vehicle. Officer Harris searched defendant and found a plastic corner-bag of cocaine in his left pocket.

The footage from the body camera was published to the jury at trial and, at the jury's request, once more during deliberations. Defendant was found guilty of possession of cocaine and sentenced to an active term of six to seventeen months of imprisonment. He gave notice of appeal in open court.

II. Discussion

Defendant argues on appeal that Officer Harris unlawfully extended the traffic stop and evidence of the cocaine should have been excluded as the fruit of an unconstitutional seizure. Defendant filed no motion to suppress and raised no objection to the evidence at trial but contends on appeal that the admission of the cocaine and Officer Harris's testimony thereof amounted to plain error. Alternatively, defendant argues that he received ineffective assistance of counsel based on his counsel's failure to file a motion to suppress.

The State argues in response that plain error review is not appropriate because the issue is constitutional, rather than evidentiary, and defendant waived any challenge to the lawfulness of the seizure. *See State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) ("[P]lain error review in North Carolina is normally limited to instructional and evidentiary error." (citations omitted)); *see also State v. Canty*, 224 N.C. App. 514, 516, 736 S.E.2d 532, 535 (2012) ("Constitutional arguments not made at trial are generally not preserved on appeal." (citing *State v. Cummings*, 353 N.C. 281, 292, 543 S.E.2d 849, 856 (2001))), *writ of supersedeas and disc. review denied*, 366 N.C. 578, 739 S.E.2d 850 (2013). Had defendant raised the issue below, the State suggests, then the trial court would have scrutinized the facts and circumstances surrounding the traffic stop in greater detail. But because defendant remained silent at trial, the record is not sufficiently developed to reach a conclusion on the lawfulness of the seizure.

While we recognize the merit to the State's position,[1] this Court has applied plain error review to similar evidentiary challenges involving unpreserved constitutional claims. *See, e.g.*, *State v. Jones*, 216 N.C. App. 225, 229–30, 715 S.E.2d 896, 900–01 (2011), *appeal dismissed and disc. review denied*, 365 N.C. 559, 723 S.E.2d 767 (2012); *State v. Mohamed*, 205 N.C. App. 470, 474–76, 696 S.E.2d 724, 729–30 (2010). In cases where we have declined to do so, our Supreme Court has remanded for plain error review. *See, e.g.*, *State v. Bean*, 227 N.C. App. 335, 336–37, 742 S.E.2d 600, 602, *disc. review denied*, 367 N.C. 211, 747 S.E.2d 542 (2013). Accordingly, we must examine the evidence that was before the trial court "to determine if it committed plain error by allowing the

1. We also note that footage from an officer's body camera may not reveal the totality of the circumstances giving rise to a traffic stop. In some cases, however, it may be the best evidence of the interaction between an officer and a defendant. Because the footage was included in the record on appeal, it helps to alleviate concerns of reviewing an undeveloped record.

admission of the challenged [evidence]." *Mohamed*, 205 N.C. App. at 476, 696 S.E.2d at 730.

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) (quoting United *States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018 (1982)).

> 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 (alterations, citations, and internal quotation marks omitted).

The Fourth Amendment protects "against unreasonable searches and seizures." U.S. Const. amend IV. "A traffic stop is a seizure 'even though the purpose of the stop is limited and the resulting detention quite brief.' " *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)). As such, "[t]he scope of the detention must be carefully tailored to its underlying justification." *Florida v. Royer*, 460 U.S. 491, 500 (1983); *see also Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) ("A relatively brief encounter, a routine traffic stop is more analogous to a so-called *Terry*-stop than to a formal arrest." (alterations, citations, and internal quotation marks omitted)).

The Supreme Court explained in *Rodriguez* that "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop and attend to related safety concerns." *Rodriguez*, 135 S. Ct. at 1614 (citations omitted). The stop may last no longer than is necessary to address the infraction. *Id.* "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id.* (citation omitted).

An officer's mission may include " 'ordinary inquiries incident to the traffic stop.' " *Id.* at 1615 (quoting *Illinois v. Caballes*, 543 U.S. 405, 408

(2005)). The Supreme Court has explicitly approved certain incidental inquiries, including "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* (citations omitted). It has also held that an officer may order occupants out of a vehicle during a lawful traffic stop to complete the mission safely. *See id.* ("[T]he government's 'legitimate and weighty' interest in officer safety outweighs the '*de minimis*' additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle." (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 110–111 (1977)) (citing *Maryland v. Wilson*, 519 U.S. 408, 413–15 (1997))). *But see State v. Reed*, ____ N.C. App. ____, ____, ____ S.E.2d ____, ____ (Sept. 20, 2016) (No. COA16-33) ("[A]n officer may offend the Fourth Amendment if he unlawfully extends a traffic stop by asking a driver to step out of a vehicle." (citation omitted)), *temporary stay allowed*, ____ N.C. ____, ____ S.E.2d ____ (Oct. 5, 2016) (No. 365A16-1). Measures designed to "detect evidence of ordinary criminal wrongdoing," on the other hand, "lack[ ] the same close connection to roadway safety as the ordinary inquiries" and are not part of the officer's mission. *Rodriguez*, 135 S. Ct. at 1615–16.

Before *Rodriguez* was decided, we held in *State v. Jackson*, 199 N.C. App. 236, 681 S.E.2d 492 (2009), that an officer's questions about the presence of weapons and drugs unlawfully extended a traffic stop which should have otherwise been completed. *Id.* at 242–44, 681 S.E.2d at 496–98. The officer had stopped the vehicle on suspicion that Roth, the registered owner, was driving without a license. *Id.* at 238, 681 S.E.2d at 494. Roth, who had recently moved back to North Carolina, produced a valid Kentucky driver's license. *Id.* The officer later acknowledged that the stop "was pretty much over" after she checked his license, but she began a separate investigation:

> [I asked Roth] if there was anything illegal in the vehicle. He advised no. I asked if there was, specific, like, weapons, marijuana, any kind of drugs. He said no. I asked him if I could search the vehicle. [He] replied—first he said "the vehicle?" as in a question. And then he replied, "You can search the vehicle if you want to."

Id. at 238–39, 681 S.E.2d at 494. The interrogation, we concluded, "was indeed an extension of the detention beyond the scope of the original traffic stop" because the officer's questions were "not necessary to confirm or dispel [her] suspicion that Roth was operating without a valid driver's license and it occurred after [the officer's] suspicion . . . had already been dispelled." *Id.* at 242, 681 S.E.2d at 496–97.

We recognize that, in contrast to *Jackson*, Officer Harris may not have completed the two-part mission of the stop. But an officer cannot justify an extended detention on his or her own artful inaction. As *Rodriguez* makes clear, it is not whether the challenged police conduct "occurs before or after the officer issues a ticket" but whether it "prolongs—*i.e.*, adds time to—the stop." *Rodriguez*, 135 S. Ct. at 1616 (citation and internal quotation marks omitted). The more appropriate question, therefore, is whether Officer Harris "diligently pursued a means of investigation" designed to address the reasons for the stop. *See United States v. Sharpe*, 470 U.S. 675, 686 (1985) (citations omitted).

After reviewing the footage of the traffic stop, it is wholly evident that Officer Harris was more concerned with discovering contraband than issuing traffic tickets. He readily accepted Sutton's insurance card as proof that Sutton had been paying the premiums, and he even testified at trial that he had no way to determine if the insurance card was invalid. Thereafter, Officer Harris took no action to issue a citation, to address the speeding violation, or to otherwise indicate a diligent investigation into the reasons for the traffic stop. Instead, he ordered Sutton and defendant out of the vehicle and began an investigation into the presence of weapons and drugs.

Such a detour, albeit brief, can hardly be seen as a safety precaution to facilitate the mission of the stop as much as "a measure aimed at detecting evidence of ordinary criminal wrongdoing." *See Rodriguez*, 135 S. Ct. at 1615 (citations and internal quotation marks omitted). And absent "the same close connection to roadway safety as ordinary inquiries," the exit order and extraneous questioning cannot be justified as a *de minimis* intrusion outweighed by the government's interest in officer safety. *Id.* at 1615–16; *see also State v. Bullock*, ____ N.C. App. ____, ____, 785 S.E.2d 746, 752 (May 10, 2016) (No. COA15-731) ("[U]nder *Rodriguez*, even a *de minimis* extension is too long if it prolongs the stop beyond the time necessary to complete the mission." (citation omitted)), *writ allowed*, ____ N.C. ____, 786 S.E.2d 927 (June 16, 2016) (No. 194A16). Rather, there must have been some alternative basis to prolong the stop. *Rodriguez*, 135 S. Ct. at 1615.

To extend a lawful traffic stop beyond its original purpose, "there must be grounds which provide the detaining officer with additional reasonable and articulable suspicion or the encounter must have become consensual." *Jackson*, 199 N.C. App. at 241–42, 681 S.E.2d at 496 (citing *State v. Myles*, 188 N.C. App. 42, 45, 654 S.E.2d 752, 755, *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008)); *see Rodriguez*, 135 S. Ct. at 1615 ("An officer . . . may conduct certain unrelated checks during

an otherwise lawful traffic stop. But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual."); *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 166 (2012) ("[T]o detain a driver beyond the scope of the traffic stop, the officer must have the driver's consent or reasonable articulable suspicion that illegal activity is afoot." (citations omitted)); *see also State v. Parker*, 183 N.C. App. 1, 9, 644 S.E.2d 235, 242 (2007) ("Without additional reasonable articulable suspicion of additional criminal activity, the officer's request for consent [to search] exceeds the scope of the traffic stop and the prolonged detention violates the Fourth Amendment." (citations omitted)).

The State does not allege—nor does the evidence show—that the encounter had become consensual. A consensual encounter is one in which "a reasonable person would feel free to disregard the police and go about his business." *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (citations omitted). Minimally, defendant could not reasonably have felt that he was free to leave while Officer Harris still had his driver's license. *See Jackson*, 199 N.C. App. at 243, 681 S.E.2d at 497 ("Generally, an initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee's driver's license and registration." (citations omitted)).

The State argues instead that Officer Harris had reasonable suspicion to extend the stop because he observed the vehicle while patrolling "problem areas," defendant gave "incongruent" answers to his coming and going questions, defendant "raised his hands in the air" as he stepped out of the vehicle, and defendant was driving the vehicle instead of Sutton, the registered owner. "An officer has reasonable suspicion if a 'reasonable, cautious officer, guided by his experience and training,' would believe that criminal activity is afoot 'based on specific and articulable facts, as well as the rational inferences from those facts.' " *Williams*, 366 N.C. at 116, 726 S.E.2d at 167 (citations omitted). In determining whether reasonable suspicion exists, "the totality of the circumstances—the whole picture—must be taken into account." *United States v. Cortez*, 449 U.S. 411, 417 (1981). "While something more than a mere hunch is required, the reasonable suspicion standard demands less than probable cause and considerably less than preponderance of the evidence." *Williams*, 366 N.C. at 117, 726 S.E.2d at 167 (citations omitted).

Officer Harris's observation of the vehicle in a high-crime area is not sufficient, either by itself or in conjunction with the other "factors" identified by the State, to establish reasonable suspicion of criminal activity. *See Brown v. Texas*, 443 U.S. 47, 52 (1979) (holding that presence

in a high-crime area, "standing alone, is not a basis for concluding that [a defendant] was engaged in criminal conduct"). There was nothing "incongruent" about defendant's travel plans. Officer Harris found it suspicious that Sutton said they were "coming from a friend's house on Randleman Road" not because they were traveling in the opposite direction, but because Harris saw them merge onto the interstate from Holden Road—"which is a *little distance away* from Randleman Road." (Emphasis added.) As Officer Harris then approached the driver's side of the vehicle, defendant kept his hands in plain view above the steering wheel—a far cry from a signal of surrender and a gesture we cannot construe as "an indicator of culpability." And while the State notes "it is not clear why the defendant was driving the vehicle when it was registered to the passenger," it fails to elaborate on how this is more indicative of criminal activity than innocent travel.

Even assuming that the traffic stop was lawful up to the point when defendant consented to the search, as told by Officer Harris, we cannot conclude that his consent was valid. Officer Harris testified that defendant verbally agreed to the search and placed his hands on the trunk of the vehicle, but the footage from the body camera reveals a different version of the interaction. Officer Harris had defendant turned around, facing the rear of the vehicle with his arms and legs spread *before he asked for defendant's consent*. This was textbook coercion. If defendant did respond to Officer Harris's request—and it is still not apparent that he did—it was certainly not a free and intelligent waiver of his constitutional rights. *See State v. Vestal*, 278 N.C. 561, 578–79, 180 S.E.2d 755, 767 (1971).

III. Conclusion

The egregiousness of the violations in this case, apparent from the body camera footage, demands the conclusion that a fundamental error occurred at trial which both prejudiced defendant and seriously affects the integrity and public reputation of judicial proceedings. Because defendant is entitled to a new trial, we need not address his claim for ineffective assistance of counsel.

NEW TRIAL.

Judges STEPHENS and ZACHARY concurs.

STATE v. MOORE

[251 N.C. App. 305 (2016)]

STATE OF NORTH CAROLINA
v.
PIERRE JE BRON MOORE, DEFENDANT

No. COA16-493

Filed 20 December 2016

Probation and Parole—revocation—notice—revocation eligible violation

The State fulfilled its obligation of giving a probationer notice of the purpose of a revocation hearing and a statement of the violations alleged where the notices stated that the pending charges constituted a violation of defendant's probation but did not state which condition had been violated. It was noted, however, that it is always the better practice for the State to expressly state the condition of probation alleged to have been violated.

Judge HUNTER, JR. dissenting.

Appeal by Defendant from judgment entered 15 January 2016 by Judge R. Allen Baddour in Orange County Superior Court. Heard in the Court of Appeals 19 October 2016.

Attorney General Roy A. Cooper, III., by Assistant Attorney General Jessica V. Sutton, for the State.

Allegra Collins Law, by Allegra Collins, for Defendant-Appellant.

DILLON, Judge.

Defendant Pierre Je Bron Moore was convicted of a number of charges and placed on supervised probation. While on probation, he was served with two probation violation notices. After a hearing on the matter, Judge Baddour entered a judgment revoking Defendant's probation and activating his suspended sentence. On appeal, Defendant contends that Judge Baddour lacked jurisdiction to revoke his probation, contending that the State failed to give him adequate notice that it was alleging a revocation-eligible violation. We disagree and thus affirm Judge Baddour's judgment.

I. Analysis

In North Carolina, a defendant's "probation may be reduced, terminated, continued, extended, modified, or revoked . . . ." N.C. Gen. Stat. § 15A-1344(a) (2016). However, with the passage of the Justice Reinvestment Act of 2011, it is "no longer true that [*any*] violation of a valid condition of probation is sufficient to revoke defendant's probation." *State v. Kornegay*, 228 N.C. App. 320, 323, 745 S.E.2d 880, 882 (2013) (emphasis added). Rather, the Act enumerates three ways a defendant's probation may be revoked: (1) the defendant commits a criminal offense; (2) the defendant absconds supervision; or (3) the defendant previously served two periods of confinement in response to a violation. N.C. Gen. Stat. § 15A-1344(a).

And where the State seeks to *revoke* someone's probation, it "must give the probationer notice of the [revocation] hearing and its purpose, including a statement of the violations alleged." N.C. Gen. Stat. § 15A-1345(e). That is, the violation report served on the probationer must put him "on notice that the State [is] alleging a revocation-eligible violation[.]" *State v. Lee*, 232 N.C. App. 256, 260, 753 S.E.2d 721, 723 (2014). Absent adequate notice that a revocation-eligible violation is being alleged, the trial court lacks jurisdiction to revoke a defendant's probation, unless the defendant waives the right to notice. *Kornegay*, 228 N.C. App. at 322, 745 S.E.2d at 883.

In the present case, Judge Baddour revoked Defendant's probation based on his determination that Defendant had committed new criminal offenses, a revocation-eligible violation. On appeal, Defendant argues that he did not receive adequate notice that the State "intend[ed] to prove [at the hearing] that [he] violated a condition of probation that could result in the revocation of probation[.]" *Kornegay*, 228 N.C. App. at 322, 745 S.E.2d at 882.

The notices to Defendant alleged that he violated his probation as follows:

> The Defendant has the following pending charges in Orange County . . . 15 CR 51309 flee/elude arrest W/MV 6/8/15, . . . 14 CR 052225 possess drug paraphernalia 6/16/15, 14 CR 052224 resisting public officer 6/16/15 . . . .

While the notices state that the pending charges constituted a violation of Defendant's probation, the notices fail to state expressly *which* condition of probation the State was contending had been violated. More specifically, the notices do not expressly indicate that the State was alleging

that Defendant had violated the condition that he not commit a new criminal offense.

Our Court has never explicitly held that certain "magic" words must be used in a notice to confer jurisdiction on a court to revoke probation. However, on a number of occasions, our Court has been called upon to determine whether certain wording in a violation report constituted adequate notice.

For instance, in *State v. Lee*, we held that the notice was adequate where the violation report alleged that the probationer had certain enumerated criminal charges pending *and that* by he had, therefore, violated the condition that he not commit a new criminal offense. *Lee*, 232 N.C. App. at 260, 753 S.E.2d at 723-24. Indeed, it was unambiguous that the State was alleging a revocation-eligible violation. In *Kornegay*, however, we held that the notice was not adequate where the State alleged that the probationer possessed illegal drugs *but further alleged* that said possession constituted a violation of a different condition, namely that he not possess illegal drugs. *Kornegay*, 228 N.C. App. at 322, 745 S.E.2d at 882. Violating the condition that the probationer not possess illegal drugs, though, is not a revocation-eligible violation. Therefore, it certainly would not have been clear to the probationer in *Kornegay* from the notice that the State was alleging that he had committed the revocation-eligible violation of committing a new criminal offense.

We conclude that Defendant had adequate notice that the State was alleging a revocation-eligible violation of the condition, namely that he not commit a new criminal offense. Specifically, we conclude that where the notice fails to allege specifically which condition was violated but where the allegations in the notice could only point to a revocation-eligible violation, the notice is adequate to confer jurisdiction to revoke probation. Here, the only condition of Defendant's probation to which his alleged pending charges could reasonably be referring to is the condition that he not commit a new criminal offense. There is no ambiguity.

Our result might be different had the report stated that Defendant had been charged with the crime of possessing illegal drugs, without referring to a specific condition of probation. In such case, Defendant would have had to guess whether the State was alleging that he committed a non-revocation-eligible violation of possessing illegal drugs *or* a revocation-eligible violation of committing a new criminal offense.

We note, though, that it is always the better practice for the State to *expressly* state which condition of probation it is alleging has been violated.

II. Conclusion

The General Assembly has stated that the State's notice must give the probationer notice of the purpose of the hearing and a statement of the violations alleged. N.C. Gen. Stat. § 15A-1345(e). We conclude that the State fulfilled its obligation in this case. Accordingly, we conclude that Judge Baddour properly exercised jurisdiction to revoke Defendant's probation, and we find no error.

NO ERROR.

Judge ELMORE concurs.

Judge HUNTER, JR., dissents by separate opinion.

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

I respectfully dissent from the majority affirming the trial court and revoking Defendant's probation. Instead, I would vacate the trial court's judgment *ex mero motu* for lack of jurisdiction.

In probation revocations, the requirement of notice is imperative. Absent adequate notice, the trial court lacks subject matter jurisdiction. *State v. Kornegay*, 228 N.C. App. 320, 322, 745 S.E.2d 880, 882 (2013) (citing *State v. Tindall*, 227 N.C. App. 183, 187, 742 S.E.2d 272, 275 (2013)). To provide adequate notice, the "probation officer [must] specifically allege[ ] in the violation report that defendant . . . violated the condition that he not commit any criminal offense[,]" and Defendant must be "aware that the State [is] alleging a revocation-eligible violation and he [is] aware of the *exact violation* upon which the State relied." *State v. Lee*, 232 N.C. App. 256, 260, 753 S.E.2d 721, 723-24 (2014) (emphasis added).

The majority states, "Our Court has never explicitly held that certain 'magic' words must be used in a notice to confer jurisdiction on a court to revoke probation." However, the Court's definition of adequate notice in *Lee*, *Hancock*, and *Davis* and its identification of inadequate notice in *Tindall*, *Kornegay*, and *Jordan*, demonstrate the use of specific wording guides our Court's decision.

In *Lee*, *Hancock*, and *Davis*, this Court held the State provided adequate notice when the State used specific "commit no criminal offense" language. For example, in *Lee*, this Court held the State gave adequate notice when the "violation report *specifically* alleged that defendant

violated the condition of probation that he commit no criminal offense in that he had several new pending charges which were specifically identified . . . ." *Lee*, 232 N.C. App. at 259, 753 S.E.2d at 723 (emphasis added). The Court focused on the fact "[t]he probation officer specifically alleged in the violation report that defendant had violated the condition that he not commit any criminal offense." *Id.* at 260, 753 S.E.2d at 723-24. Additionally, the Court noted Defendant in *Lee* was "aware that the State was alleging a revocation-eligible violation and he was aware of the *exact violation* upon which the State relied." *Id.* at 260, 753 S.E.2d at 724 (emphasis added).

Further, this Court held in Davis:

> Defendant was provided with sufficient notice that his probation could be revoked by means of a probation violation report clearly indicating that: (1) Defendant had willfully violated the condition of his probation that he commit no criminal offense . . . . Therefore, unlike *Tindall* and *Kornegay*, Defendant was provided with adequate notice of the State's contention that he had committed a new criminal offense that was grounds for revocation . . . .

State v. Davis, No. COA 14-843, 2015 WL 892282, at *3 (unpublished) (N.C. Ct. App. March 3, 2015). Lastly, in *Hancock*, this Court held where specific "commit no criminal offense" is used, the "defendant need not be convicted of a criminal offense in order for the trial court to find that a defendant violated N.C. Gen. Stat. § 15A-1343(b)(1) by committing a criminal offense." *State v. Hancock*, ___ N.C. App. ___, ___, 789 S.E.2d 522, 526 (2016).

Similarly, our Court has held where specific "commit no criminal offense" language is lacking, the State did not provide adequate notice. In *State v. Jordan*, the trial court revoked Defendant's probation based on the violation "Other Violation: Defendant failed to report to superior court for pending probation violation on 12/3/2013." No. COA 14-931, 2015 WL 1201392, at *3-*4 (unpublished) (N.C. Ct. App. March 17, 2015) (all caps in original). The State alleged this violation constituted a criminal offense and was sufficient to support revocation. *Id.* at *3. However, this Court concluded "the fact that failure to appear can constitute a crime does not, in itself, provide adequate notice absent *clear indication* that the State is pursuing that violation as a criminal offense pursuant to N.C. Gen. Stat. § 15A-1343(b)(1)." *Id.* at *4 (emphasis added). This Court held "[a]dequate notice requires that a defendant be notified concerning *which alleged violations* the State intends to pursue for the purposes of probation revocation." *Id.* at *5 (emphasis added).

In *Tindall*, Defendant's probation officer filed a violation report alleging Defendant willfully violated two conditions of probation: (1) "not use, possess or control any illegal drug" and (2) "[to] participate in further evaluation, counseling, treatment or education programs . . . ." *Tindall*, 227 N.C. App. at 186, 742 S.E.2d at 275. This Court concluded the State failed to provide adequate notice. *Id.* at 187, 742 S.E.2d at 275. This Court highlighted the fact the report did not specifically allege Defendant committed a new criminal act. *Id.* at 186-87, 742 S.E.2d at 275. Thus, this Court held the trial court lacked jurisdiction. *Id.* at 187, 742 S.E.2d at 275.

In *Kornegay*, the State filed two violation reports alleging Defendant violated three conditions of probation: (1) he "not be in possession of any drug paraphernalia" (2) he "[p]ossess no firearm . . . or other deadly weapon," and (3) he "[n]ot use, possess or control any illegal drug or controlled substance . . . ." *Kornegay*, 228 N.C. App. at 321, 745 S.E.2d at 881 (brackets in original). Again, the reports did not specifically allege these behaviors violated the "commit no criminal offense" probation condition. *Id.* at 323, 745 S.E.2d at 883. This Court held the notice was inadequate and trial court lacked jurisdiction to revoke probation. *Id.* at 323-24, 745 S.E.2d at 883.

In this case, Defendant was convicted of various charges and placed on supervised probation and suspended sentencing. On 3 June 2015, Defendant's Probation Officer, Willie Atwater, filed violation reports and stated Defendant "willfully violated" certain conditions of probation and committed "other violation[s]." On both violation reports under "Other Violation," Probation Officer Atwater wrote the following:

> The Defendant has the following pending charges in Orange County. 15CR 051315 No operator[']s license 6/8/15, 15CR 51309 Flee/elude arrest w/mv 6/8/15. 13CR 709525 No operator[']s license 6/15/15, 14CR 052225 Possess drug paraphernalia 6/16/15, 14CR 052224 Resisting public officer 6/16/15, 14CR706236 No motorcycle endorsement 6/29/15, 14CR 706235 Cover reg sticker/plate 6/29/15, and 14CR 706234 Reg card address change violation.

(all caps in original)

The violation reports filed 3 June 2015 fail to provide adequate notice under our current case law. Merely alleging Defendant committed a new charge is not grounds for revocation. *Lee*, 232 N.C. App. at 260, 753 S.E.2d at 723. Further, the State failed to give notice of the *particular* revocation-eligible violation alleged by the State. *Id.* at 260-61, 753 S.E.2d at

723 ("because of the changes effected by the Justice Reinvestment Act, we have required that defendants be given notice of the *particular* revocation-eligible violation alleged by the State.") (emphasis added) (citations omitted). The violation report did not specifically allege Defendant "committed a criminal offense" when it listed the new charges under the heading "Other Violation." Further, the violation reports did not allege these new charges were revocation-eligible.

Because the probation violation reports fail to give Defendant adequate notice of the revocation-eligible conduct at issue, the trial court did not have subject matter jurisdiction to revoke Defendant's probation. Accordingly, I would vacate the trial court's judgment *ex mero motu*.

STATE OF NORTH CAROLINA
v.
KAP MUNG, DEFENDANT

No. COA16-470

Filed 20 December 2016

Motor Vehicles—driving while impaired—chemical analysis—not in native language

The trial court did not err in a driving while impaired prosecution by denying defendant's motion to suppress the results of a chemical analysis test where the officer informed defendant of his rights in English rather than in his native language of Burmese. As long as the rights delineated under N.C.G.S. § 20-16.2(a) are disclosed to a defendant, the requirements of the statute are satisfied and it is immaterial whether the defendant comprehends them.

Appeal by defendant from judgment entered 15 December 2015 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 November 2016.

Attorney General Roy Cooper, by Associate Attorney General J. Rick Brown, for the State.

Winifred H. Dillon for defendant-appellant.

ENOCHS, Judge.

Kap Mung ("Defendant") appeals from judgment entered upon his *Alford* plea to driving while impaired ("DWI"). On appeal, he contends that the trial court erred in denying his motion to suppress. Specifically, he asserts that the arresting officer failed to comply with the requirements of N.C. Gen. Stat. § 20-16.2(a) by ineffectually informing Defendant of his rights concerning a chemical analysis test. After careful review, we find no error.

Factual Background

From 11:00 p.m. on 28 September 2015 through 3:30 a.m. on 29 September 2015, officers with the Charlotte-Mecklenburg Police Department operated a DWI checkpoint on Idlewide Road in Charlotte, North Carolina. At approximately 1:27 a.m., Defendant, who was driving a Lexus sedan, pulled up to the checkpoint and was approached by Officer Nathan Crum ("Officer Crum").

Officer Crum asked Defendant, in English, for his driver's license and registration. Defendant provided his license, but was unable to produce his registration.

While Defendant was giving Officer Crum his license, Officer Crum observed that Defendant had red, bloodshot eyes. Officer Crum asked Defendant if the address on Defendant's license was correct, and Defendant answered in slurred speech that yes, it was. At this point, Officer Crum noticed a strong odor of alcohol emanating from Defendant and Defendant's car. Upon looking inside the vehicle, Officer Crum saw "a 24-ounce open container of an alcoholic beverage at [Defendant's] foot[.]"

Officer Crum ordered Defendant to get out of his car and Defendant complied. He then had Defendant perform a series of field sobriety tests including a horizontal gaze nystagmus test, a walk-and-turn test, and a one leg stand test — all of which Defendant failed. Officer Crum instructed Defendant on how to perform each test in English before he attempted it. Defendant stated to Officer Crum that he understood his instructions and proceeded to try to follow them.

Officer Crum next had Defendant perform two Alco-Sensor tests, each of which yielded positive results for the presence of alcohol in Defendant's system. At this point, Officer Crum placed Defendant under arrest for DWI. Defendant proceeded to plead with Officer Crum — in English — stating that "he couldn't get in trouble more, that he had already been arrested once for DWI" and that "he was here on a work visa and that he can't get in trouble again." After he was placed in the

back of Officer Crum's patrol car, Defendant repeatedly stated — in English — that he was sorry.

Officer Crum transported Defendant to the "BATmobile" for the purpose of performing a chemical analysis test on Defendant. Upon entering the BATmobile, Officer Crum read Defendant his rights under N.C. Gen. Stat. § 20-16.2(a) and provided Defendant with a written copy of these rights. Written copies of the rights were also posted on the wall of the BATmobile in both English and Spanish.

Officer Crum then instructed Defendant — in English — how to perform the chemical analysis test and Defendant stated that he understood and proceeded to follow Officer Crum's directions. The results of the test indicated that Defendant had a blood alcohol concentration of 0.13. At no point from the time he was stopped at the checkpoint through his performance of the chemical analysis test did Defendant express to Officer Crum that he did not understand his instructions or request an interpreter.

Defendant was charged with DWI. Defendant filed a motion to dismiss on the basis that the checkpoint was illegal; a motion to suppress based on lack of probable cause; and a motion to suppress the results of the chemical analysis test, which were heard before the Honorable Matt Josman in Mecklenburg County District Court on 21 August 2014.[1] Judge Josman denied these motions and Defendant appealed to Superior Court for a trial *de novo*.

On 30 November 2015, Defendant filed a motion to dismiss on the ground that the checkpoint was unconstitutional as well as a motion to dismiss for lack of probable cause for his arrest. That same day, he filed a motion to suppress the results of the chemical analysis test asserting that Officer Crum had violated N.C. Gen. Stat. § 20-16.2(a) by ineffectually informing him of his rights concerning the test due to the fact that he is originally from Burma and was not able to understand his rights or what was occurring on the ground that he did not speak English and was not provided a Burmese interpreter. On 11 December 2015, Defendant also filed a motion to dismiss on the same grounds set forth in his motion to suppress.

A hearing on Defendant's motions was held before the Honorable Carla N. Archie in Mecklenburg County Superior Court on 14 and

1. These motions are not included in the record on appeal, but were ruled upon by the district court as evidenced by its 21 August 2014 order denying them.

15 December 2015. Judge Archie denied Defendant's motions. Defendant then entered an *Alford* plea, reserving his right to appeal the trial court's denial of his motions.

The trial court sentenced Defendant to 12 months imprisonment, suspended sentence, and placed Defendant on 18 months supervised probation. Defendant gave oral notice of appeal at the close of the hearing.

Analysis

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress. Specifically, he contends that the results of the chemical analysis test should have been excluded due to the fact that Officer Crum failed to effectually inform him of his rights concerning the test pursuant to N.C. Gen. Stat. § 20-16.2(a). We disagree.

> This Court's review of a trial court's denial of a motion to suppress in a criminal proceeding is strictly limited to a determination of whether the court's findings are supported by competent evidence, even if the evidence is conflicting, and in turn, whether those findings support the court's conclusions of law. If so, the trial court's conclusions of law are binding on appeal. If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal. However, the trial court's conclusions of law are reviewed *de novo* and must be legally correct.

State v. Scruggs, 209 N.C. App. 725, 727, 706 S.E.2d 836, 838 (2011) (internal citations, quotation marks, and brackets omitted).

N.C. Gen. Stat. § 20-16.2(a) (2015) provides as follows:

> (a) **Basis for Officer to Require Chemical Analysis; Notification of Rights.** — Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense. Any law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person.
>
> Before any type of chemical analysis is administered the person charged shall be taken before a chemical

analyst authorized to administer a test of a person's breath or a law enforcement officer who is authorized to administer chemical analysis of the breath, who shall inform the person orally and also give the person a notice in writing that:

> (1) You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your drivers license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.
>
> (2) Repealed by Session Laws 2006-253, s. 15, effective December 1, 2006, and applicable to offenses committed on or after that date.
>
> (3) The test results, or the fact of your refusal, will be admissible in evidence at trial.
>
> (4) Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of 21.
>
> (5) After you are released, you may seek your own test in addition to this test.
>
> (6) You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

Defendant is correct as a general proposition that "[w]here [a] defendant is not advised of [his] rights [under N.C. Gen. Stat. § 20-16.2(a)], the State's [chemical analysis] test is inadmissible in evidence." *State v. Gilbert*, 85 N.C. App. 594, 597, 355 S.E.2d 261, 263 (1987). Here, Defendant asserts that he was not adequately informed of his rights under N.C. Gen. Stat. § 20-16.2(a) due to the fact that English is not his first language and that, consequently, the failure of Officer Crum to

ensure that these rights were communicated to him in his native language of Burmese resulted in a violation of the statute.

Both Defendant and the State direct us to this Court's opinion in *State v. Martinez*, __ N.C. App. __, 781 S.E.2d 346 (2016), as the controlling authority concerning whether a non-English speaking defendant's rights under N.C. Gen. Stat. § 20-16.2(a) have been sufficiently disclosed to him so that the results of a chemical analysis test are properly admissible into evidence and not subject to suppression. In *Martinez*, the defendant's vehicle was pulled over by a police officer when he attempted to evade a DWI checkpoint. *Id.* at __, 781 S.E.2d at 347. The officer ordered the defendant out of his vehicle and began conducting field sobriety tests. During the performance of these tests, it became apparent to the officer that the defendant did not fully understand English, and that his first language was Spanish. *Id.* at __, 781 S.E.2d at 347.

The officer ultimately arrested the defendant for driving while impaired and transported him to the Wake County Jail in order to conduct a chemical analysis of his breath. *Id.* at __, 781 S.E.2d at 347. Prior to the test, the officer read the defendant his implied consent rights in English and gave him a Spanish language version of those same rights in written form. The officer called his dispatcher, who spoke Spanish, and placed him on speaker phone to answer any questions the defendant may have had regarding the test. Thereafter, the defendant signed the Spanish language version of the implied consent rights form and submitted to testing. *Id.* at __, 781 S.E.2d at 347. The defendant was ultimately found guilty of driving while impaired. *Id.* at __, 781 S.E.2d at 347.

On appeal to this Court, the defendant argued that N.C. Gen. Stat. § 20-16.2(a) "requires that a motorist be informed orally of his or her implied consent rights in a language he or she fully understands before being subjected to [chemical analysis] testing. According to Defendant, because he is not a native English speaker, and he was only orally informed of his implied consent rights in English before being subjected to breath alcohol testing, the results were inadmissible." *Id.* at __, 781 S.E.2d at 348.

We expressly disagreed with the defendant's position, holding as follows:

> Our Supreme Court has held that the purpose of this statute is to promote cooperation between law enforcement and the driving public in the collection of scientific evidence, thereby ensuring public safety while safeguarding

> against the risk of erroneous driving privilege deprivation. *Seders v. Powell*, 298 N.C. 453, 464-65, 259 S.E.2d 544, 552 (1979). The statute provides that a law enforcement officer or chemical analyst who administers a breath alcohol test based on a suspected commission of an implied consent offense "shall" inform the motorist suspected of the offense "orally and also . . . in writing" about his or her rights and the consequences of refusing to submit to testing. N.C. Gen. Stat. § 20-16.2(a). However, the statute also provides that a person who is unconscious or is otherwise unable to refuse testing may nevertheless be subject to testing and that the requirements related to informing the motorist of his or her rights and the consequences of refusal are inapplicable. *Id.* § 20-16.2(b). Thus, neither the plain language nor the statutory purpose of § 20-16.2 disclose a legislative intent by our General Assembly to condition *the admissibility* of chemical analysis test results on a defendant's subjective understanding of the information officers and chemical analysts are required to disclose before conducting the testing.

Id. at __, 781 S.E.2d at 348. This Court then went on to further unambiguously hold that "[i]n its enactment of the requirements of subsection (a) of N.C. Gen. Stat. § 20-16.2, we believe that the General Assembly intended to require the disclosure of the information set out in that subsection, but not to condition the admissibility of the results of chemical analysis on the defendant's understanding of the information thus disclosed. Therefore, we hold that the trial court did not err in allowing the test results to be admitted into evidence over Defendant's objection." *Id.* at __, 781 S.E.2d at 348. (internal citation omitted).

We believe that *Martinez'* holding is straightforward and expressly clear: The admissibility of the results of a chemical analysis test are not conditioned on a defendant's subjective understanding of the information disclosed to him pursuant to the requirements of N.C. Gen. Stat. § 20-16.2(a). Therefore, as long as the rights delineated under N.C. Gen. Stat. § 20-16.2(a) are disclosed to a defendant — which occurred in the present case — the requirements of the statute are satisfied and it is immaterial whether the defendant comprehends them.

Consequently, we reaffirm our holding in *Martinez* and find that in the present case Officer Crum fully complied with N.C. Gen. Stat. § 20-16.2(a) when he read Defendant his rights as to the chemical

analysis test in English and provided him written form copies of those rights. As a result, we hold that the trial court did not err in denying Defendant's motion to suppress.

Conclusion

For the reasons stated above, the trial court properly denied Defendant's motion to suppress.

NO ERROR.

Chief Judge McGEE and Judge BRYANT concur.

STATE OF NORTH CAROLINA
v.
JOSE JESUS RIOS, DEFENDANT

No. COA16-108

Filed 20 December 2016

1. Appeal and Error—preservation of issues—basis of objection apparent from context

An issue regarding the admission of evidence of defendant's prior incarceration was properly preserved for appellate review where defendant raised only general objections but the basis of the objection was apparent from the context.

2. Evidence—character—not in issue—prior incarceration testimony allowed—abuse of discretion

The trial court abused its discretion by allowing testimony concerning defendant's prior incarceration where defendant did not testify and it was apparent that the State elicited the testimony to show defendant's propensity to commit the crimes for which he was charged. The danger of unfair prejudice was grave and the failure to exclude the evidence amounted to an abuse of discretion.

Judge DILLON dissenting.

Appeal by defendant from judgments entered 18 June 2015 by Judge Stanley L. Allen in Guilford County Superior Court. Heard in the Court of Appeals 5 October 2016.

Attorney General Roy Cooper, by Assistant Attorney General Stuart M. (Jeb) Saunders, for the State.

Gilda C. Rodriguez for defendant-appellant.

ELMORE, Judge.

Jose Rios (defendant) was convicted of trafficking in marijuana, conspiracy to traffic in marijuana, intentionally maintaining a dwelling for keeping and selling controlled substances, and possession of cocaine. Defendant appeals, arguing that the trial court erred in admitting evidence of his prior incarceration which was elicited by the State during cross-examination of defendant's witness. Because the evidence was inadmissible character evidence that prejudiced his defense, defendant is entitled to a new trial.

I. Background

On 27 June 2013, police executed a search warrant at 3108 Four Seasons Boulevard in Greensboro, where defendant lived with Oscar Morales and Junior Molina, the owner of the house. Morales was the only person in the house when police executed the warrant. Approximately twenty seconds elapsed from the time police knocked and announced their presence and when they entered the home.

Police first searched defendant's bedroom. Underneath the bed they found high-grade marijuana in a clear plastic jar and nine grams of cocaine in a tissue box. On top of an entertainment center was a box containing digital scales and 2,674 grams of marijuana in various plastic bags. They also found a wallet containing handwritten notes with names and contact information.

In Morales's bedroom, police found digital scales; an open box of sandwich bags; three canisters with false bottoms which are typically used to hide narcotics in transport; marijuana paraphernalia; a ledger describing different highs from different strands of marijuana; and 124 grams of marijuana, including 70.5 grams of compressed marijuana covered in plastic wrap. Officer Murphy testified that the marijuana found in Morales's bedroom was packaged the same way as that found in defendant's room.

The search of Molina's bedroom was less fruitful. Police found 4.5 grams of marijuana and a FedEx box with two vacuum-seal bags that had been cut open. The bags did not contain any marijuana residue

but police suspected the box had been used to ship narcotics. Officer Murphy testified that when drug traffickers "package marijuana in order to ship it across states, they will vacuum seal the marijuana one time and will wash it, put it inside of another vacuum seal bag and sometimes put it into a third vacuum seal bag, so you've got three layers, so basically one or two layers don't contain marijuana residue and the last one does."

During the search, police noticed a door leading to the garage secured by a hatch and padlock. They forced their way into the garage where they discovered a blue tote containing two large rectangular blocks of compressed marijuana wrapped in clear plastic, each weighing approximately ten pounds, and three one-gallon Ziploc bags, each containing about one pound of compressed marijuana. Next to the tote was a red cooler containing another square block of compressed marijuana weighing approximately twenty-eight pounds, and four vacuum-seal bags, each cut open and containing marijuana residue.

All told, police seized 57.25 pounds of marijuana from the house: 7.25 pounds from defendant's room, .25 pounds from Morales's room, 4.5 grams from Molina's room, and 49.5 pounds from the garage.

Ten latent fingerprints were pulled from the vacuum-seal bags in Molina's bedroom, along with six more prints from the two compressed marijuana blocks in the garage. The latent impressions were photographed and submitted to a print examiner, Doreen Huntington. Huntington compared eighty-four images taken from the impressions with the fingerprints of four individuals—including defendant. She selected four of the eighty-four images for comparison and concluded that one of the fingerprints from the vacuum-seal bags in Molina's bedroom matched defendant's right thumb print. The remaining three images could not be matched to any individual.

Defendant called his girlfriend, Charla Hodges, to testify at trial. Hodges testified that she knew defendant in high school, from 2004 to 2008, and they reconnected in 2011. They began dating in 2012 when Hodges was in graduate school at the University of North Carolina at Chapel Hill. Defendant was attending Guilford Technical Community College while at the same time working for a furniture company. They would visit each other on the weekends and sometimes study together. Hodges explained that between work, school, and visits to Chapel Hill, defendant spent a substantial amount of time away from his house.

Hodges would visit defendant in Greensboro "usually twice a month on the weekends" and was familiar with his residence. She thought he kept his room tidy but his bedroom door did not lock and it had a hole

at the bottom where it had been kicked in. Hodges testified that when defendant visited her in Chapel Hill, other people would use defendant's bedroom: "The reason I know that is because when I would come and visit we would find other articles of clothing that didn't belong to us, or we would be told that someone else stayed in the room while he was away."

During that time, Hodges testified, she never saw defendant use or possess drugs, and had never seen "any of this marijuana before, this 50-odd pounds." She did recall occasions when defendant's roommates had friends over and they smoked marijuana, but she and defendant did not participate and kept to themselves in defendant's room. Hodges also testified that she never saw defendant go in or out of the garage, and could not recall ever seeing a box on top of the entertainment center in his room. She explained that defendant would not have been able to lift that box because he was recovering from a surgery earlier that year: "He couldn't lift anything—I apologize for being graphic, but he couldn't even pull up his pants."

The State then cross-examined Hodges, leading to the following exchange:

> Q: You say that you saw him in high school and then you reconnected in 2011, is that right?
>
> A: Uh-huh.
>
> Q: There was some period of time you did not see him?
>
> A: Yes, sir.
>
> Q: He was not in Asheboro at that time?
>
> A: I'm not sure.
>
> Q: Do you have any idea where he was for, say, three and a half, four years?
>
> MR. COALTER: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> A: From what he has told me—well, yes, he did tell me where he was at that time, and he was incarcerated.
>
> Q: Okay. After that, Ms. Hodges, you say you and he reconnected, is that right?
>
> A: Uh-huh.

. . . .

Q: This all comes as something of a surprise, then, to you, Ms. Hodges.

A: Uh-huh. Very much so.

Q: But you were, before you reconnected with him, aware of his past.

A: No, uh-huh.

Q: But, in your words, you were aware that he had been incarcerated.

A: Yes. After he told me.

MR. COALTER: Well, objection, Your Honor. Move to strike.

THE COURT: Overruled. Motion denied.

MR. COLE: Nothing further, Your Honor.

At the conclusion of trial, the jury found defendant guilty on two counts of trafficking in marijuana, conspiracy to traffic in marijuana, intentionally maintaining a dwelling for keeping and selling controlled substances, and possession of cocaine. Defendant gave notice of appeal in open court.

II. Discussion

[1] On appeal, defendant argues that evidence of his prior incarceration was inadmissible character evidence elicited for the sole purpose of showing defendant's propensity to commit the crimes for which he was charged. We note that defendant raised only general objections to the testimony at trial. Because the basis of his objection is apparent from the context, however, defendant properly preserved this issue for appellate review. *See* N.C. R. App. P. 10(a)(1) (2016) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

[2] Character evidence is generally not admissible to prove conduct in conformity therewith. N.C. Gen. Stat. § 8C-1, Rule 404(a) (2015). A criminal defendant may, however, offer evidence of his or her own pertinent character trait. N.C. Gen. Stat. § 8C-1, Rule 404(a)(1) (2015). If the defendant so elects to "open the door" to his or her character, "proof may be

made by testimony as to reputation or by testimony in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 405(a) (2015). The prosecution may then rebut with evidence of the defendant's bad character, including "relevant specific instances of conduct." N.C. Gen. Stat. § 8C-1, Rules 404(a)(1), 405(a).

Rule 404(b) more specifically prohibits "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2015). Such evidence may be admissible for some independently relevant purpose, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* But the "bare fact" of a defendant's prior conviction is not admissible under Rule 404(b). *State v. Wilkerson*, 148 N.C. App. 310, 327–28, 559 S.E.2d 5, 16 (Wynn, J., dissenting), *rev'd per curiam for the reasons stated in the dissenting opinion*, 356 N.C. 418, 571 S.E.2d 583 (2002). Rather, "it is the facts and circumstances underlying the conviction that Rule 404(b) allows." *Id.* at 321, 559 S.E.2d at 12.

In contrast to Rule 404(b), Rule 609 does allow evidence of a prior conviction but only to impeach the credibility of a witness. N.C. Gen. Stat. § 8C-1, Rule 609 (2015); *see Wilkerson*, 148 N.C. App. at 320, 559 S.E.2d at 12 (Wynn, J., dissenting) ("[*P*]*rior convictions* are admissible under Rule 609, while *evidence of other crimes* is admissible under Rule 404(b)."). Prior convictions may not " 'be considered as substantive evidence that [a defendant] committed the crimes' for which he is presently on trial by characterizing him as 'a bad man of a violent, criminal nature . . . clearly more likely to be guilty of the crime charged.' " *State v. Carter*, 326 N.C. 243, 250, 388 S.E.2d 111, 116 (1990) (quoting *State v. Tucker*, 317 N.C. 532, 543, 346 S.E.2d 417, 423 (1986)); *see also State v. McClain*, 240 N.C. 171, 173, 81 S.E.2d 364, 365 (1954) ("The general rule is that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense." (citations omitted)).

Although in this case the State elicited testimony of defendant's prior *incarceration* rather than evidence of his *conviction*, there is no practical difference between the two. Each demonstrates to the jury that defendant committed a separate criminal offense in the past, and evidence that he was incarcerated necessarily includes the fact that he was convicted. Evidence of incarceration may, in fact, be more prejudicial where, as here, the jury is left to speculate as to the seriousness of the offense and the length of the sentence. And because defendant did not testify at trial, the State could not purport to attack his credibility

with evidence of his incarceration. It is readily apparent instead that the State elicited the testimony to show defendant's propensity to commit the crimes for which he was on trial.

The State contends nonetheless that equating evidence of incarceration with evidence of a conviction runs afoul of our decision in *State v. Goins*, 232 N.C. App. 451, 754 S.E.2d 195, *disc. review denied*, ____ N.C. ____, 763 S.E.2d 388 (2014). In that case, we rejected the argument that evidence of a defendant's recent incarceration amounts to "evidence of other crimes, wrongs, or acts" in violation of Rule 404(b). *Id.* at 458–59, 754 S.E.2d at 201. To the extent that Rule 404(b) contemplates the facts and circumstances *underlying* a conviction, *Wilkerson*, 148 N.C. App. at 321, 559 S.E.2d at 12 (Wynn, J., dissenting), then, admittedly, it would not include the bare fact of prior incarceration. Even so, like evidence of a conviction, evidence of incarceration is still character evidence under Rule 404(a). As such, it "is not admissible for the purpose of proving that [a person] acted in conformity therewith on a particular occasion" unless it fits within an enumerated exception. *See* N.C. Gen. Stat. § 8C-1, Rule 404(a)(1)–(3) (2015); *see also State v. Streater*, 197 N.C. App. 632, 647–48, 678 S.E.2d 367, 377 (2009) (treating testimony of previous incarceration as evidence of the defendant's bad character).

The State argues that, pursuant to Rule 404(a)(1), defendant offered evidence of his good character via Hodges's testimony, thereby opening the door for the State to rebut with evidence of defendant's bad character, i.e., his prior incarceration. Hodges did not testify as to defendant's reputation for being law-abiding, however, and she did not offer her opinion of the same. Her testimony was instead offered to support defendant's theory that the marijuana found in his room was attributable to Morales and Molina. The fact that Hodges had not seen defendant use or possess marijuana when she visited him was relevant to the defense, as were the facts that she saw defendant's roommates using marijuana, defendant's bedroom door was broken, and other people stayed in defendant's room when he visited Hodges. The State could rebut Hodges's testimony, as it did, by showing that there were long periods of time when Hodges was not at defendant's residence. But because defendant did not put his character in issue, the State could not purport to rebut Hodges's testimony with bad character evidence.

We might assume, as the State suggests, that defendant's prior incarceration had *some* other relevance. The nature of defendant's relationship with Hodges could have been a fact "of consequence to the determination of the action," N.C. Gen. Stat. § 8C-1, Rule 401 (2015), in which case defendant's incarceration was probative insomuch as it

showed a period of time when the two were not in contact with each other. Because Hodges had already testified that she did not see defendant for three years after high school, however, the probative value of defendant's precise whereabouts was minimal. The danger of unfair prejudice, in contrast, was decidedly grave such that the trial court's failure to exclude the evidence under Rule 403 amounts to an abuse of discretion. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2015) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."); *Wilkerson*, 148 N.C. App. at 327–28, 559 S.E.2d at 16 (Wynn, J., dissenting) (opining that where no exception applies, admitting the bare fact of a prior conviction violates Rule 403 because the evidence "is inherently prejudicial such that any probative value of the conviction is substantially outweighed by the danger of unfair prejudice" (footnote omitted)).

Finally, we think there is a reasonable possibility that, had the error not been committed, the jury would have reached a different result. *See* N.C. Gen. Stat. § 15A-1443(a) (2015). The evidence against defendant was largely—if not entirely—circumstantial, and a jury could have reasonably concluded that the marijuana and cocaine were attributable to defendant's roommates. Hodges's testimony presented a different picture of defendant, but evidence of his prior incarceration completely undercut his defense and gave the jury an alternative basis to convict.

III. Conclusion

The evidence of defendant's prior incarceration was not admissible, and because there is a reasonable possibility that, absent the evidence, the jury would have reached a different result, defendant is entitled to a new trial.

NEW TRIAL.

Judge HUNTER, JR. concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

I find no prejudicial error in this case.

I agree with the majority that the prosecution's questioning of Defendant's girlfriend regarding Defendant's prior incarceration was error.

Nevertheless, to the extent that the prosecutor crossed the line, I do not believe that error was prejudicial. There was substantial evidence that Defendant was a resident of the three-bedroom house and was involved in the drug activity occurring there. For instance, in one of the bedrooms, officers found several pounds of marijuana on top of the dresser and under the bed, Defendant's personal documents, medication bearing Defendant's name, and Defendant's personal effects, along with other evidence establishing that Defendant stayed in that room and did not have a roommate. Also, officers discovered Defendant's thumbprint on drug packaging, which was found in another part of the house. Defendant's evidence was weak in comparison, comprising mainly of testimony from Defendant's girlfriend that Defendant was not involved, much of which was contradicted by the physical evidence.

There is a remote chance that the reference to Defendant's incarceration, which was for some undisclosed reason and undisclosed period in the prior decade, could have had some impact. However, based on the evidence of Defendant's guilt in this case (among other things, the drugs in his room and his thumbprint on the drug packaging material), I do not believe that there is a *reasonable* possibility that the trial would have ended differently had the jury not heard the reference to Defendant's prior incarceration.

STATE OF NORTH CAROLINA
v.
DWAYNE ROBINSON, DEFENDANT

No. COA16-490

Filed 20 December 2016

1. Criminal Law—defense of accident—wrongdoing by defendant

The trial court did not err in a prosecution for attempted first-degree murder and assault with a deadly weapon arising from a fight by not instructing the jury on the defense of accident. Even if the unrequested instruction had been given, it was not probable that the jury would have reached a different verdict.

2. Criminal Law—wearing or possessing bulletproof vest—alternative instruction

The trial court did not err by instructing the jury that, if it found defendant guilty of any the crimes charged (attempted first-degree

murder and assault with a deadly weapon), it was required to determine whether defendant wore or had in his immediate possession a bulletproof vest. Although defendant contended that the instruction was improper because it presented two alternative theories, only one of which was supported by the evidence, the evidence submitted was sufficient to allow jurors to find either of the alternative theories.

Appeal by Defendant from judgments entered 9 November 2015 by Judge Jack W. Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 5 October 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Hilda Burnett-Baker, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for Defendant-Appellant.

INMAN, Judge.

A person who, while carrying a loaded firearm, starts a physical fight and discharges the firearm injuring another person, is not entitled to a jury instruction on the defense of accident.

Dwayne Robinson ("Defendant") appeals from the judgments entered upon his convictions for attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and a sentencing enhancement for the assault charge based on the fact that Defendant was wearing or had in his immediate possession a bulletproof vest at the time of the assault. On appeal, Defendant first argues that the trial court committed plain error by failing to instruct the jury on the defense of accident. Additionally, Defendant argues that the trial court committed plain error in its instructions to the jury regarding the bulletproof vest. After careful review, we conclude that Defendant has failed to demonstrate plain error.

Factual and Procedural Background

Evidence presented at trial included the following:

On 23 August 2013, at approximately 10:30 p.m., Jacksonville Police Department officers were dispatched in response to a 911 call reporting shots fired near 600 Hammock Lane. Officers approaching the apartments in marked police cruisers from different directions observed a sports utility vehicle recklessly speeding away from the area. The

officers converged on the vehicle, drew their weapons, and ordered the vehicle's occupants to step out.

Latasha Sutton ("Ms. Sutton") was in the driver's seat. Justin Johnson ("Johnson"), Ms. Sutton's boyfriend, was in the front passenger seat. In the back seat, police found Defendant. Ms. Sutton's two young children were also in the vehicle. After removing all the occupants from the vehicle, officers detected the odor of gunpowder. Crime scene investigators then arrived and searched the vehicle. They found loaded handguns, handcuffs, ammunition, rope, gloves, a knife in its sheath, and bulletproof vests. Ms. Sutton told officers, "[n]one of this would have happened if you would have done your job yesterday." One of the officers had responded to a domestic disturbance at the same address a day earlier and had seen Johnson, Ms. Sutton, and Ms. Sutton's estranged husband, Anthony Sutton ("Mr. Sutton"). The Suttons were fighting over custody of their children.

After stopping the vehicle in which Defendant was riding, officers searched the area outside the call address and found Mr. Sutton lying on the sidewalk, handcuffed and bleeding from gunshot wounds. Officer Lonnie Horton observed that Mr. Sutton had been shot once in the back of his left leg, just behind his knee, and once in the front of his right thigh. Mr. Sutton was taken to the hospital and treated for his injuries.

Defendant testified at trial as follows: Defendant had never met Mr. Sutton or Ms. Sutton and had no knowledge of the Suttons' child custody dispute prior to the shooting that resulted in his arrest. Johnson lived in Fayetteville and Defendant lived right outside of Fayetteville. They had become friends years earlier when both were deployed in Iraq by the United States Army. Defendant telephoned Johnson on 23 August 2013 to invite him to a Fayetteville restaurant to celebrate Defendant's graduation from an Army leadership school. When Defendant arrived at Johnson's apartment at 6:00 p.m., Johnson asked Defendant to ride with him to pick up Johnson's girlfriend, Ms. Sutton, and to take her to pick up her children. Defendant assumed the children were in Fayetteville. After Johnson and Defendant picked up Ms. Sutton, Defendant fell asleep in the back of Johnson's vehicle. When he awoke, the vehicle was parked at an apartment complex in Jacksonville. Defendant exited the vehicle to stretch his legs and walked about 50 yards toward a nearby road.

Defendant testified that as he was walking back toward Johnson's vehicle, he was almost hit by an SUV that entered the parking lot. The SUV driver, Mr. Sutton, parked and started walking in Defendant's direction. Defendant confronted Mr. Sutton about nearly hitting him, but Mr.

Sutton said nothing and continued walking past him. Defendant then grabbed Mr. Sutton by the back of his shirt, pulled and shoved him down on the asphalt, and cursed at him. When Mr. Sutton stood up, Defendant hit him in the head. Defendant and Mr. Sutton then began wrestling and fighting in the parking lot. Defendant had a loaded .40 caliber gun in the waistband of his pants, for which he had a concealed carry permit. During the fight, Mr. Sutton pulled Defendant down to the ground. When Defendant stood up, his gun came loose, slid down his pants leg, and was caught in his shoe. As Defendant tried to retrieve the gun, Mr. Sutton grabbed for it as well, and the two continued to wrestle and fight for the gun. Mr. Sutton had one hand on the barrel of the gun and the other hand on Defendant's wrist. Defendant's finger was on the trigger of the gun. Defendant hit Mr. Sutton's hand off of the barrel, and the gun went off.

Defendant testified that after the gun discharged, the two men continued to wrestle in the rough grass behind Mr. Sutton's apartment building. The gun discharged again. Mr. Sutton then pulled away from the fight, and the gun discharged a third time. After the third shot, the gun was out of both Defendant's and Mr. Sutton's hands, and Defendant put Mr. Sutton into a chokehold to stop him from fighting. Johnson then called out to Defendant, and Defendant told Johnson they were in the yard behind the apartment. Johnson tackled Mr. Sutton and attempted to handcuff him, but Johnson was unable to handcuff both hands. Defendant and Johnson then ran away. Defendant denied pointing the gun at Mr. Sutton at any time that night. Defendant also denied wearing a bulletproof vest.

Mr. Sutton testified at trial as follows: He had just parked his car outside his apartment after 9:00 p.m. on 23 August 2013 and was standing in the parking lot and using his phone when he noticed a man wearing a bulletproof vest and gloves walking in his direction. Mr. Sutton thought it was odd that the man was wearing gloves because the weather was hot. He was not concerned about the vest because he was familiar with military service members exercising while wearing vests. When Mr. Sutton next looked up from his phone, the man was holding a gun to his face. Mr. Sutton struck the man in the face and ran, then heard a loud sound and his leg went numb, and he knew he had been shot. Mr. Sutton tried to continue running but fell. The man leaned over him and said, "do you want to die?" Mr. Sutton told the man that "he wasn't going to kill [any]body." Mr. Sutton heard the gun discharge a second time and believed he had been shot in the head. Mr. Sutton fought with the man for control of the gun, which resulted in the two men wrestling. While Mr. Sutton and the man were wrestling, another man approached

and tried to handcuff Mr. Sutton's hands together. Johnson also went through Mr. Sutton's pockets, grabbed Mr. Sutton's keys, and ran away. Mr. Sutton eventually let go of the gun, tried to run towards the building, and then heard a third gunshot.

Lawrence Herndon, a neighbor of Mr. Sutton's, testified that he was in his apartment that evening and looked out of his front window after he heard a "pop noise." He did not see anyone outside. Upon hearing a second "pop," Herndon looked out of his back window and saw Mr. Sutton on the ground and two people struggling with him. Of the two men fighting with Mr. Sutton, the taller man had a gun and was wearing a bulletproof vest. After seeing the taller man pointing a gun at Mr. Sutton's throat and hearing someone say the word "kill," Herndon told his wife to call 911. Herndon later identified Defendant and Johnson as the two men fighting with Mr. Sutton, and specifically identified Defendant as the man with the gun and bulletproof vest.

Defendant was indicted on charges of attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, first degree kidnapping, felony conspiracy, and wearing a bulletproof vest during the commission of those crimes. On 9 November 2015, Defendant's case was called for trial in Onslow County Superior Court. The State declined to proceed on the kidnapping and a related conspiracy charge.

On 17 November 2015, the jury found Defendant guilty of attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury, and found that Defendant wore or had in his immediate possession a bullet-proof vest at the time of the felony. The jury found Defendant not guilty of conspiracy to commit first degree murder, conspiracy to commit assault with a deadly weapon with intent to kill inflicting serious injury, and conspiracy to commit assault with a deadly weapon inflicting serious injury. Defendant was sentenced to a minimum term of 192 months to a maximum term of 243 months for the attempted first degree murder charge and a minimum term of 157 months to a maximum term of 201 months for the assault with a deadly weapon with intent to kill inflicting serious injury charge, applying the bulletproof vest enhancement. Defendant appeals his convictions.

Analysis

I. Jury Instruction Regarding Defense of Accident

[1] Defendant argues that the trial court erred by failing to instruct the jury on the defense of accident because Defendant testified that his gun

discharged accidentally during the fight with Mr. Sutton. We hold that the trial court did not err in omitting the instruction and that, even if the trial court had instructed the jury regarding the defense of accident, it is not probable that jurors would have reached a different verdict.

Defendant's counsel did not request an instruction regarding the theory of accident. We therefore review for plain error. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). To show plain error, Defendant must establish "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). To prevail on appeal from the trial court's failure to instruct jurors on a defense, a defendant "must show that the requested instruction was not given in substance, and that substantial evidence supported the omitted instruction." *State v. White*, 77 N.C. App. 45, 52, 334 S.E.2d 786, 792 (1985) (citations omitted). "The trial court need only give the jury instructions supported by a reasonable view of the evidence." *Id.* at 52, 334 S.E.2d at 792 (citation omitted).

Although this Court usually considers the evidence in a light most favorable to the State when reviewing a criminal defendant's assignment of error, the standard is the opposite with respect to the omission of an instruction regarding a defense. "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (citations omitted).

The State argues that Defendant was not entitled to an instruction on the defense of accident because Defendant admitted that he started the fight with Mr. Sutton prior to the shooting. "The law is clear that 'evidence does not raise the defense of accident where the defendant was not engaged in lawful conduct when [a shooting] occurred.' " *State v. Gattis*, 166 N.C. App. 1, 11, 601 S.E.2d 205, 211 (2004) (quoting *State v. Riddick*, 340 N.C. 338, 342, 457 S.E.2d 728, 731 (1995)).

The evidence, even considered in a light most favorable to Defendant, reveals that Defendant was engaged in wrongdoing when he shot Mr. Sutton. Defendant admitted that he physically assaulted Mr. Sutton and had his hand on the trigger of his gun when it discharged, injuring Mr. Sutton. Because by his own admission he was engaged in wrongful conduct when he shot Mr. Sutton. Defendant was not entitled to a jury instruction on the defense of accident.

Even assuming *arguendo* that Defendant was not precluded from asserting the defense of accident and that the trial court erred in not *sua sponte* instructing the jury on that defense, Defendant cannot establish plain error in light of other evidence presented. Two eyewitnesses—Lawrence Herndon and Mr. Sutton—testified that Defendant held a gun to Mr. Sutton's head. Mr. Sutton testified that he was first shot by Defendant in the back of his knee while running from him. Officer Lonnie Horton, one of the first officers responding to the shooting scene, testified that Mr. Sutton had an entry bullet wound in the back of his knee. We cannot conclude, in light of this evidence, that the jury probably would have reached a different result had it been instructed regarding the defense of accident.

II. Jury Instruction Regarding Bulletproof Vest

[2] Defendant next contends that the trial court erred in instructing the jury that, if it found Defendant guilty of any of the crimes charged, it was required to determine whether Defendant wore or had in his immediate possession a bulletproof vest at the time he committed such crime. We conclude that the trial court did not err in this instruction.

N.C. Gen. Stat. § 15A-1340.16C(a) provides:

> If a person is convicted of a felony and it is found as provided in this section that the person wore or had in his or her immediate possession a bullet-proof vest at the time of the felony, then the person is guilty of a felony that is one class higher than the underlying felony for which the person was convicted.

N.C. Gen. Stat. § 15A-1340.16C(a) (2015).

The trial court instructed the jury that if it found Defendant guilty of any offense, it must answer "yes" or "no" to the question, "Do you find that he wore, or had in his immediate possession, a bulletproof vest at the time he committed the offense?" The trial court instructed the jury that the burden of proof on this issue was on the State, and that the jury should answer "yes" to the question only if it found the fact beyond a reasonable doubt.

The North Carolina Constitution provides: "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court[.]" N.C. Const. art. I, §24. The unanimity requirement is not violated "if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*[.]"

State v. Bell, 359 N.C. 1, 30, 603 S.E.2d 93, 113 (2004) (emphasis in original) (quoting *State v. Lyons*, 330 N.C. 298, 302–03, 412 S.E.2d 308, 312 (1991)).

Defendant contends that the instruction regarding the bulletproof vest was improper because it presented two alternative theories, only one of which was supported by the evidence. "Where the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, . . . this Court will not assume that the jury based its verdict on the theory for which it received a proper instruction." *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987).

Defendant does not dispute that both Mr. Sutton and Lawrence Herndon testified that Defendant was wearing a bulletproof vest at the time of the shooting. However, Defendant argues that by relying on this testimony, the State has failed to contend that there was any evidence that could support an instruction that a bulletproof vest was in Defendant's immediate possession—as opposed to being worn by Defendant—at the time of the shooting.

In order to submit to a jury a criminal charge, including the enhancement based upon use of a bulletproof vest during the commission of a felony, the State must present substantial evidence, which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980) (citations omitted). To determine if evidence is sufficient, this Court views the evidence in the light most favorable to the State. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

Although Mr. Sutton and Lawrence Herndon testified that Defendant wore a bulletproof vest at the time of the shooting, Defendant denied wearing a vest. If jurors had believed Defendant's testimony raised a reasonable doubt regarding whether he had been wearing the vest, they could answer "yes" to the question on the verdict sheet only if they found beyond a reasonable doubt that a bulletproof vest was in Defendant's "immediate possession" at the time of the shooting.

The State introduced evidence sufficient to support a reasonable inference that a bulletproof vest was in Defendant's immediate possession at the time of the shooting. Police officers found a bulletproof vest in the back of the vehicle where Defendant had been sitting when fleeing the scene of the shooting. Forensic testing determined that the blood on the vest belonged to Mr. Sutton, whom Defendant shot.

Therefore, if jurors were not convinced beyond a reasonable doubt that Defendant was wearing the vest during the shooting, they could reasonably infer that the vest was in Defendant's immediate possession at the time he committed the offenses for which he was found guilty. Because the evidence submitted was sufficient to allow jurors to find either of the alternative theories submitted to them regarding Defendant's possession of a bulletproof vest at the time of the shooting—either by wearing it or having it in his immediate possession—Defendant's argument that the charge was improperly submitted to the jury is without merit and is overruled.

Conclusion

The evidence submitted at trial precluded a jury instruction on the defense of accident and supported a jury instruction on the charge that Defendant committed felony assault while wearing or having in his immediate possession a bulletproof vest. Accordingly, Defendant has failed to demonstrate plain error.

NO PLAIN ERROR.

Judges DAVIS and ENOCHS concur.

STATE OF NORTH CAROLINA
v.
LEONARD PAUL SCHALOW

No. COA16-330

Filed 20 December 2016

1. Indictment and Information—missing language—non-fatal defect—sufficient for lesser-included offense

An indictment for attempted first-degree murder was not fatally defective where it omitted the required "with malice aforethought" language. The indictment was sufficient to allege attempted voluntary manslaughter, for which defendant would have been sentenced had the trial under that indictment proceeded to a guilty verdict.

2. Constitutional Law—double jeopardy—non-fatal flaw in indictment—mistrial and re-prosecution

Defendant's double jeopardy rights were violated where the trial court erred by denying defendant's motion to dismiss after a

mistrial was erroneously declared in the initial prosecution after a jury was empaneled due to a defect in the indictment and defendant was subsequently tried and convicted under a new indictment. Attempted first-degree murder and the lesser-included offense of attempted voluntary manslaughter (for which defendant could have been tried under the first indictment) are considered one offense under double jeopardy.

3. Constitutional Law—double jeopardy—appellate stay dissolved—re-trial

A violation of defendant's double jeopardy rights at the trial court level was furthered at the appellate level where defendant was twice subjected to double jeopardy arising from a non-fatal defect in an indictment. The prosecution under the first indictment was erroneously dismissed after a jury was empaneled, the Court of Appeals granted and then dissolved a temporary stay, and defendant was convicted in a new trial under a new indictment.

Appeal by defendant from judgment entered 5 November 2015 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 3 October 2016.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

TYSON, Judge.

Leonard Paul Schalow ("Defendant") appeals from judgment entered after a jury convicted him of attempted first-degree murder in 15 CRS 50922. We vacate Defendant's indictment, conviction, and judgment entered thereon.

The original indictment in 14 CRS 50887 was not fatally defective and sufficiently alleged attempted voluntary manslaughter. No manifest necessity existed to declare a mistrial after the jury had been impaneled, and jeopardy attached under the indictment in 14 CRS 50887. Defendant's subsequent indictment, prosecution, and conviction in 15 CRS 50992 violated his constitutional right against double jeopardy. U.S. Const. amend. V; N.C. Const. art. I, § 19.

I. Background

A. Facts

Erin Henry Schalow and Defendant were married in 1997 and moved to North Carolina in 2010. Two years later, Mrs. Schalow was hired as a nurse at a long-term adult care facility located in Brevard. Defendant was not working at the time the incidents occurred.

Mrs. Schalow testified Defendant assaulted her almost daily from December 2013 to February 2014. Defendant kicked her with hard-toe boots; hit her with walking sticks and an aluminum crutch; and strangled her into unconsciousness at least three times. Defendant also attacked her with a knife at least two times. One of those attacks and injuries caused her to seek medical attention. Many times, their minor son was present in the next room during these attacks.

Mrs. Schalow also testified Defendant threatened to torture and kill her. Defendant told her to "make my peace with [their] son and make sure [she] could be there as much as possible for him in the short-term" because he was going to torture and kill her over an extended period of time.

Mrs. Schalow's supervisor and co-workers noticed and inquired about her injuries. Mrs. Schalow explained her injuries were from falling down stairs, slamming her hand in a car door, or running into a wall. Her co-workers did not believe these explanations, and eventually Mrs. Schalow confided to one co-worker that Defendant had hit her.

In late February 2014, Mrs. Schalow arrived at work bleeding from her temple and mouth, both of her eyes were blackened and swollen, her jaw was so swollen she could not talk, and she experienced difficulty walking. At this point, her supervisor called the police.

Henderson County Sheriff's Detective Dottie Parker interviewed Mrs. Schalow, who stated her husband had beaten her the night before. When Detective Parker observed Mrs. Schalow's injuries, she advised her to go the hospital immediately. Mrs. Schalow was admitted to the hospital with extensive injuries. She remained inpatient at the hospital for three weeks.

B. Procedural History

Defendant was charged and indicted for attempted murder of Mrs. Schalow in 14 CRS 50887. The caption of that indictment identified the offense charged as "Attempt First Degree Murder." The body of

the indictment alleged "the defendant named above unlawfully, willfully and feloniously did attempt to murder and kill Erin Henry Schalow."

The cause in 14 CRS 50887 was called for trial on 17 March 2015, the jury was impaneled, and the State presented evidence against Defendant. After the jury was excused following the first day of trial, Judge Powell alerted the parties to the fact the indictment failed to allege "with malice aforethought" as required to charge attempted first-degree murder under the short-form indictment statute, N.C. Gen. Stat. § 15-144. The court cited *State v. Bullock*, 154 N.C. App. 234, 243-45, 574 S.E.2d 17, 23-24 (2002), *appeal dismissed*, *disc. review denied*, 357 N.C. 64, 579 S.E.2d 396, *cert. denied*, 540 U.S. 928, 157 L. Ed. 2d 231 (2003), in which a similar error was made in an initial indictment for attempted first-degree murder. Judge Powell announced he would hear arguments on the validity of the indictment the following morning.

The next morning, the State requested that Judge Powell dismiss the indictment as defective, in order to allow the State to re-indict Defendant in a bill which properly charged attempted murder. Defendant offered up a memorandum of law; repeatedly asserted that jeopardy had attached; and, argued dismissal by the trial court would be improper. Defendant also argued the indictment properly charged the lesser-included offense of attempted voluntary manslaughter and was not fatally defective. Defendant cited *State v. Bullock* in support of his position asserting the indictment effectively charged attempted voluntary manslaughter. *Id.*

After hearing arguments from the parties, Judge Powell ruled the indictment was fatally defective and the court had not acquired jurisdiction to try the case. He dismissed the indictment and declared a mistrial. Defendant objected to this ruling.

Defendant was subsequently re-indicted in 15 CRS 50922 on 18 May 2015. As with 14 CRS 50887, the caption of 15 CRS 50922 identified the charged offense as "Attempt First Degree Murder." This indictment alleged "the defendant named above unlawfully, willfully and feloniously did *with malice aforethought* attempt to murder and kill Erin Henry Schalow by torture." (emphasis supplied). A box checked on the indictment in 15 CRS 50922 indicated it was a "superseding indictment."

On 22 May 2015, Defendant filed a motion to dismiss 15 CRS 50922, along with a supporting memorandum of law. In his motion and memorandum, Defendant argued his prosecution in 15 CRS 50922 was barred by the double jeopardy protections in the Fifth Amendment to the Constitution of the United States and Article I, Section 19 of the North Carolina Constitution.

Defendant's motion and memorandum addressed and asserted three related grounds. First, there was no fatal defect or variance in the indictment in 14 CRS 50887. Second, the trial court in 14 CRS 50887 abused its discretion in declaring a mistrial. Finally, Defendant argued once jeopardy attached on the dismissed indictment for attempted voluntary manslaughter in 14 CRS 50887, the Double Jeopardy Clause prohibited Defendant from being prosecuted again for the greater offense of attempted murder.

On 4 June 2015, Judge Thornburg conducted a hearing on Defendant's double jeopardy motion and denied Defendant's motion to dismiss. A written order was entered on 10 June 2015. Judge Thornburg found Judge Powell had correctly determined the indictment in 14 CRS 50887 was fatally defective and did not abuse his discretion in dismissing the indictment and declaring a mistrial at the previous trial. Judge Thornburg concluded "the law is settled that there is no double jeopardy bar to a second trial when a charge is dismissed because an indictment . . . is defective."

Prior to his second trial, Defendant filed a motion for temporary stay and petition for writ of supersedeas. He requested this Court to stay the proceedings until it resolved the issues in Defendant's contemporaneously filed petition for writ of certiorari. Defendant's writ of certiorari requested this Court to stay and reverse Judge Thornburg's orders denying Defendant's motion to dismiss and habeas relief. Defendant again asserted the double jeopardy provisions of the North Carolina Constitution and the Constitution of the United States prohibited further prosecution of him pursuant to the new indictment. This Court allowed and entered the temporary stay, but later denied Defendant's petitions and dissolved the stay "without prejudice to his right to seek relief on appeal from the final judgment."

At the second trial, Defendant again asserted his double jeopardy defense at the outset, and renewed his motion to dismiss on double jeopardy grounds after the close of the evidence. The trial court denied the renewed motion to dismiss.

The jury convicted Defendant of attempted first-degree murder with both premeditation and deliberation and by torture. Defendant was sentenced to a minimum term of 157 months and a maximum term of 201 months. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court as of right from a final judgment in a superior court. N.C. Gen. Stat. § 7A-27(b)(1) (2015).

III. Issues

Defendant first argues jeopardy attached when the trial court dismissed the original indictment in 14 CRS 50887 and declared a mistrial absent any manifest necessity, and over Defendant's objection.

Defendant also argues the trial court erred in the subsequent trial by: (1) denying his motion to dismiss at the close of the State's evidence, where the evidence failed to show he committed any overt act with the intent to kill Mrs. Schalow; (2) allowing Detective Parker's testimony that she had elevated the charges against Defendant from assault to attempted murder; and, (3) failing to intervene *ex mero motu* when the prosecutor argued "a lot of thought" went into the decision to charge Defendant with attempted first-degree murder.

IV. Standard of Review

This Court reviews indictments alleged to be facially invalid *de novo*. *State v. Haddock*, 191 N.C. App 474, 476, 664 S.E.2d 339, 342 (2008). Facially invalid indictments deprive the trial court of jurisdiction to enter judgment in criminal cases. *Id.* This Court also reviews double jeopardy issues *de novo*. *State v. Baldwin*, __ N.C. App. __, __, 770 S.E.2d 167, 170 (2015). A trial court's decision to declare a mistrial due to manifest necessity is reviewed for abuse of discretion. *State v. Sanders*, 347 N.C. 587, 595, 496 S.E.2d 568, 573 (1998).

V. Sufficiency of an Indictment

[1] The State asserts the original indictment in 14 CRS 50887 was fatally defective, because it failed to allege any charge against Defendant. As such, the State argues the indictment did not confer jurisdiction upon the trial court and Defendant's constitutional right to be protected from double jeopardy was not violated. We disagree.

The Constitution of North Carolina provides: "no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment." N.C. Const. art. 1, § 22. Our Supreme Court has held:

> [a]n indictment or criminal charge is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution

> for the same offense. The indictment must also enable the court to know what judgment to pronounce in the event of conviction.

State v. Coker, 312 N.C. 432, 434-35, 324 S.E.2d 343, 346 (1984); *see Haddock*, 191 N.C. App at 476-77, 664 S.E.2d at 342. Generally, courts do not favor quashing an indictment. *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953); *see* N.C. Gen. Stat. § 15-153 (2015) ("[The indictment] shall not be quashed . . . by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.").

A. Short-form Indictment for Attempted Voluntary Manslaughter

The North Carolina General Assembly statutorily authorized short-form indictments to provide "a method by which indictments can be certain to be sufficient to withstand constitutional challenges." *State v. McKoy*, 196 N.C. App. 650, 656, 675 S.E.2d 406, 411 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 586, 683 S.E.2d 215 (2009). N.C. Gen. Stat. § 15-144 sets out the requirements for short-form indictments for murder and manslaughter:

> it is sufficient in describing *murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder* (naming the person killed), and concluding as is now required by law; and it is sufficient in describing *manslaughter to allege that the accused feloniously and willfully did kill and slay* (naming the person killed), and concluding as aforesaid; and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter, as the case may be.

N.C. Gen. Stat. § 15-144 (2015) (emphasis supplied).

In *State v. Jones*, 359 N.C. 832, 837-38, 616 S.E.2d 496, 499 (2005), our Supreme Court considered whether N.C. Gen. Stat. § 15-144 also permitted the use of a short-form indictment as sufficient to allege attempted first-degree murder. The Supreme Court considered N.C. Gen. Stat. § 15-144 in conjunction with N.C. Gen. Stat. § 15-170. *Id.* N.C. Gen. Stat. § 15-170 provides a defendant "may be convicted of the crime charged therein or of a less degree of the same crime, *or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime.*" N.C. Gen. Stat. § 15-170 (2015) (emphasis supplied).

The *Jones* Court noted that N.C. Gen. Stat. § 15-170 was relevant because "it reflects the General Assembly's judgment that, for purposes of the indictment requirement, attempt is generally treated as a subset of the completed offense." *Jones*, 359 N.C. at 837, 616 S.E.2d at 499. The Court held N.C. Gen. Stat. § 15-144 implicitly authorizes the State to use a short-form indictment to charge attempted first-degree murder. Based upon the principles in *Jones*, the State could properly use a short-form indictment to charge attempted voluntary manslaughter as a stand-alone offense, or as a lesser included offense to murder. *See id.*

B. Sufficiency of this Indictment under *State v. Bullock*

Defendant argues, while the original indictment omitted the words "with malice aforethought" and failed to properly assert attempted first-degree murder, the language in the original indictment was sufficient to allege the charge of attempted voluntary manslaughter. We agree.

In *Bullock*, the defendant was tried and convicted on attempted first-degree murder. *Bullock*, 154 N.C. App. at 236, 574 S.E.2d at 18. His indictment for attempted first-degree murder stated: "[t]he jurors for the State upon their oath present that on or about the date of the offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did attempt to kill and murder Yvonne Bullock." *Id.* at 244, 574 S.E.2d at 23. On appeal, the defendant argued the short-form indictment for attempted murder failed to allege "malice aforethought" as expressly required by N.C. Gen. Stat. § 15-144. *Id.* at 244, 574 S.E.2d at 24.

This Court agreed the indictment failed to properly allege attempted first-degree murder, but found that "the indictment sufficiently allege[d] a lesser-included offense." *Id.* at 245, 574 S.E.2d at 24. This Court clarified the *Bullock* indictment sufficiently alleged attempted voluntary manslaughter, as voluntary manslaughter "consists of an unlawful killing without malice, premeditation or deliberation." *Id.* As such, this Court did not vacate the indictment in *Bullock*, but held the proper remedy was to remand the case for resentencing on the lesser-included offense of attempted voluntary manslaughter and entry of judgment thereupon. *Id.*

In *State v. Yang*, 174 N.C. App. 755, 763, 622 S.E.2d 632, 647 (2005), *disc. review denied*, 360 N.C. 296, 628 S.E.2d 12 (2006), this Court relied on *Bullock* to hold the defendant's indictment, which insufficiently alleged attempted first-degree murder, was sufficient to allege attempted voluntary manslaughter. The *Yang* court explained that *Bullock* held "the indictment [in *Bullock*] did sufficiently allege the lesser-included offense of attempted voluntary manslaughter, notwithstanding the lack of the phrase 'malice aforethought.' " *Id.*

More recently in *Wilson*, this Court relied on *Bullock* to remand the defendant's case for resentencing on attempted voluntary manslaughter, where the indictment failed to allege attempted first-degree murder, but stated "the defendant named above unlawfully, willfully and feloniously did attempt to murder Timothy Lynch." *State v. Wilson*, 236 N.C. App. 472, 474-75, 762 S.E.2d 894, 895-96 (2014).

Had this Court concluded, in either *Bullock* or *Wilson*, the underlying indictments did not sufficiently allege any offense and were fatally defective, the trial court would have lacked jurisdiction to hear or impose sentences in either case. The appropriate remedy would have been to vacate both defendants' convictions, and not to remand for resentencing consistent with the lesser-included offense of attempted voluntary manslaughter.

The original indictment in 14 CRS 50887 failed to sufficiently allege attempted first-degree murder. However, had the trial proceeded and the impaneled jury returned a guilty verdict on attempted first-degree murder, as in *Bullock* and *Wilson*, that indictment would have supported a conviction and judgment sentencing Defendant of attempted voluntary manslaughter. *See Bullock*, 154 N.C. App. at 245, 574 S.E.2d at 24; *Wilson*, 236 N.C. App. at 474-75, 762 S.E.2d at 895-96.

Additionally, the original indictment apprised Defendant of the charges against him with sufficient certainty to enable him to prepare his defense. *See Coker*, 312 N.C. at 434-35, 324 S.E.2d at 346. Defendant expressly objected to the mistrial and dismissal of the indictment in 14 CRS 50887. Defendant was prepared to proceed with the trial on the issue of attempted voluntary manslaughter and requested the trial court to proceed on that charge. Once the State's failure to allege "with malice aforethought" in the original indictment in 14 CRS 50887 was discovered and communicated by Judge Powell, the court should have required the State to dismiss the charge against Defendant or to proceed with the trial on attempted voluntary manslaughter. *See State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987).

The indictment also enabled "the court to know what judgment to pronounce in the event of conviction." *Coker*, 312 N.C. at 434-35, 324 S.E.2d at 346. Judge Powell was aware of this Court's holding in *Bullock* and cited it upon realizing the omission of "with malice aforethought" in the original indictment. *See Bullock*, 154 N.C. App. at 244, 574 S.E.2d at 24. Based upon *Bullock* and *Wilson*, had the trial proceeded on the original indictment in 14 CRS 50887, the jury's conviction thereon would have supported a judgment and sentence of attempted voluntary

manslaughter. *See id.* at 245, 574 S.E.2d at 24; *Wilson*, 236 N.C. App. at 474-75, 762 S.E.2d at 895-96.

Under *de novo* review, the original indictment in 14 CRS 50887 was constitutionally and statutorily sufficient to invoke jurisdiction, allege attempted voluntary manslaughter, and was not fatally defective. *See id.* Since the indictment sufficiently alleged an offense upon which trial could have properly proceeded to judgment, it was error for the trial court to have concluded otherwise in 14 CRS 50887. This error was compounded in 15 CRS 50992 when, after the hearing of Defendant's double jeopardy motion, Judge Thornburg denied Defendant's motion to dismiss the indictment and concluded Judge Powell had "validly ruled the indictment was defective."

VI. Double Jeopardy

[2] With our determination that the indictment in 14 CRS 50887 was not fatally defective, we turn to whether the trial court erred in dismissing the indictment and declaring a mistrial based on manifest necessity, and the double jeopardy implications of that action.

The Fifth Amendment of the Constitution of the United States provides,

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V (emphasis supplied).

"It is a fundamental principle of the common law, guaranteed by our Federal and State Constitutions, that no person may be twice put in jeopardy of life or limb for the same offense." *State v. Shuler*, 293 N.C. 34, 42, 235 S.E.2d 226, 231 (1977) (citing U.S. Const. amend. V; N.C. Const. art. I, § 19; *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971)).

In a criminal prosecution, jeopardy attaches when a jury is impaneled to try a defendant on a valid bill of indictment. *Id.*; *Cutshall*, 278

N.C. at 344, 180 S.E.2d at 751. Once jeopardy attaches, it protects "a defendant from additional punishment and successive prosecution for the same criminal offense." *State v. Sparks*, 362 N.C. 181, 186, 657 S.E.2d 655, 658-59 (2008) (citation and quotation marks omitted); *see Gilliam v. Foster*, 75 F.3d 881, 893 (4th Cir. 1996), *cert. denied*, 517 U.S. 1220, 134 L. Ed. 2d 950 (1996) ("Among the protections provided by [the Double Jeopardy Clause] is the assurance that a criminal defendant will not be subjected to repeated prosecutions for the same offense." (citation and quotation marks omitted)).

While "the primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment," a separate body of double jeopardy law also protects a defendant's interest "in avoiding multiple prosecutions even where no final determination of guilt or innocence has been made." *United States v. Scott*, 437 U.S. 82, 92, 57 L. Ed. 2d 65, 74-75, *reh'g denied*, 439 U.S. 883, 58 L. Ed. 2d 197 (1978). These protected interests arise in two situations: (1) when the trial court declares a mistrial, and (2) when the trial court terminates the proceedings in favor of the defendant on a basis that is not related to factual guilt or innocence. *Id.*; *see State v. Priddy*, 115 N.C. App. 547, 551, 445, S.E.2d 610, 613, *disc. review denied*, 337 N.C. 805, 449 S.E.2d 751 (1994).

This separate body of law under the Double Jeopardy Clause protects the defendant's "valued right" to have a particular tribunal to decide guilt or innocence, once jeopardy attaches. *Gilliam*, 75 F.3d at 893. As the Supreme Court of the United States has held:

> The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Arizona v. Washington, 434 U.S. 497, 503-05, 54 L. Ed. 2d 717, 727-28 (1978) (footnotes omitted).

In 14 CRS 50887, jeopardy attached once the jury was duly impaneled under a valid indictment to try the case. *See Shuler*, 293 N.C. at 42,

235 S.E.2d at 231. Neither the State nor Defendant contends otherwise. Since the trial court's order did not constitute a "final determination of guilt or innocence," we analyze Defendant's double jeopardy claims under the separate body of double jeopardy law discussed in *Scott*. *Scott*, 437 U.S. at 92, 57 L. Ed. 2d at 74-75.

A. Trial Court's Declaration of a Mistrial

The trial court's order in 14 CRS 50887 stated: "I find that because the indictment is defective that the Court has no jurisdiction to try this case. And I dismiss the indictment. . . . I would find there's a manifest necessity that because the indictment is dismissed that a mistrial be declared." The briefs and arguments of both the State and Defendant proceed from the premise that the trial court's order functioned as a mistrial.

In their briefs and oral arguments to this Court regarding double jeopardy, the State and Defendant only argued whether manifest necessity existed for the trial court to declare a mistrial. *See Lee v. United States*, 432 U.S. 23, 32, 53 L. Ed. 2d 80, 88 (1977). We begin with the premise that, although the trial court both dismissed the indictment as defective and declared a mistrial, the court's order ultimately functioned as a mistrial and the manifest necessity analysis applies.

1. *Lee v. United States* and *Illinois v. Somerville*

In *Lee v. United States*, the Supreme Court reviewed an appeal in which the district court granted the defendant's motion to dismiss for failure of the indictment to charge either knowledge or intent as required by statute. *Id.* at 25-26, 53 L. Ed. 2d at 84-85. The district court's dismissal did not include any finding regarding the defendant's guilt or innocence. *Id.* at 29, 53 L. Ed. 2d at 86. In determining whether this order functioned as a "dismissal" or a "declaration of a mistrial" for the purposes of its double jeopardy analysis, the Court held that a trial court's label of its action is not determinative. *Id.* at 29-30, 53 L. Ed. 2d at 86-87. Rather, "[t]he critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged. A mistrial ruling invariably rests on grounds consistent with reprosecution, while a dismissal may or may not do so." *Id.* at 30, 53 L. Ed. 2d at 87.

The Supreme Court noted the indictment's failure to sufficiently allege the offense as required by statute, "like any prosecutorial or judicial error that necessitates a mistrial, was one that could be avoided—absent any double jeopardy bar—by beginning anew the prosecution of the defendant." *Id.* The district court's dismissal of the indictment

plainly contemplated the State would re-indict the defendant at a later date. *Id.* at 30-31, 53 L. Ed. 2d at 87. Based on this reasoning, the Supreme Court held:

> the order entered by the District Court was functionally indistinguishable from a declaration of mistrial.
>
> We conclude that the distinction between dismissals and mistrials has no significance in the circumstances here presented and that established double jeopardy principles governing the permissibility of retrial after a declaration of mistrial are fully applicable.

Id. at 31, 53 L. Ed. 2d at 87-88. (footnote omitted).

In *Lee*, the Supreme Court referenced a similar Supreme Court case where it upheld a trial court's declaration of a mistrial over the defendant's objection due to a fatal defect in the indictment. *Lee*, 432 U.S. at 31 n.9, 53 L. Ed. 2d at 87; *see Illinois v. Somerville* 410 U.S. 458, 459, 35 L. Ed. 2d 425, 428 (1973) (holding there was manifest necessity to declare a mistrial). The Court in *Lee* noted "[t]here is no reason to believe that *Somerville* would have been analyzed differently if the trial judge, like the District Court here, had labeled his action a 'dismissal' rather than a mistrial." *Lee*, 432 U.S. at 31 n.9, 53 L. Ed. 2d at 87. Furthermore, a subsequent Supreme Court case recognized that "*Lee* demonstrated that, at least in some cases, the dismissal of an indictment may be treated on the same basis as the declaration of a mistrial." *Scott*, 437 U.S. at 94, 57 L. Ed. 2d at 76.

2. Trial Court's Order in 14 CRS 50887

In terminating the proceeding in 14 CRS 50887, the trial court labeled its actions as both a dismissal of a defective indictment for lack of jurisdiction, as in *Lee*, and a declaration of a mistrial, as in *Somerville*. Whatever the label, the trial court's decision to terminate the proceedings did not "contemplate[] an end to all prosecution," but was based upon the erroneous belief the indictment did not invoke jurisdiction and the State could constitutionally re-indict Defendant at a later date. *Lee*, 432 U.S. at 30, 53 L. Ed. 2d at 87. Based on *Lee*, its analysis of *Somerville*, and as subsequently recognized in *Scott*, a dismissal of a defective indictment may be treated as a mistrial. *Id.* at 31, 53 L. Ed. 2d at 86-87; *see Somerville*, 410 U.S. at 459, 35 L. Ed. 2d at 428; *Scott*, 437 U.S. at 94, 57 L. Ed. 2d at 76. Whether we ultimately review the trial court's order as a dismissal or a mistrial, the "double jeopardy principles governing

the permissibility of retrial after a declaration of mistrial are fully applicable" in this case. *See id.*

B. Mistrials and Manifest Necessity

The United States Court of Appeals for the Fourth Circuit has explained:

> if a criminal proceeding is terminated by mistrial without a final resolution of guilt or innocence, a defendant may be retried in certain circumstances. When a defendant seeks or consents to the grant of a mistrial, there is no bar to his later retrial. *But, when a defendant opposes the grant of a mistrial, he may not be retried unless there was a manifest necessity for the grant of the mistrial or the failure to grant the mistrial would have defeated the ends of justice.*

Gilliam, 75 F.3d at 893. (emphasis supplied) (citations and footnotes omitted).

North Carolina courts have also recognized an order of mistrial after jeopardy has attached may only be entered over the defendant's objection where "manifest necessity" exists. *State v. Odom*, 316 N.C. 306, 310, 341 S.E.2d 332, 334 (1986); *State v. Jones*, 67 N.C. App. 377, 381, 313 S.E.2d 808, 811-812, *disc. review denied*, 315 S.E.2d 699 (1984). If a mistrial results from manifest necessity, double jeopardy does not bar the State from retrying the defendant on the same offense. *Odom*, 316 N.C. at 310, 341 S.E.2d at 334. However, if manifest necessity does not exist and "the order of mistrial has been improperly entered over a defendant's objection, defendant's motion for dismissal at a subsequent trial on the same charges must be granted." *Id.* (citations omitted); *see Gilliam*, 75 F.3d at 895.

"Whether a grant of a mistrial is manifestly necessary is a question that turns on the facts presented to the trial court." *Gilliam*, 75 F.3d at 895. Since a declaration of a mistrial inevitably affects a constitutionally protected interest, the trial court " 'must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.' " *Washington*, 434 U.S. at 514, 54 L. Ed. 2d at 733 (quoting *United States v. Jorn*, 400 U.S. 470, 486, 27 L. Ed. 2d 543, 557 (1971)).

As such, the trial court's discretion in determining whether manifest necessity exists is limited. *Jones*, 67 N.C. App. at 381, 313 S.E.2d at 812; *see U.S. v. Sloan*, 36 F.3d 386, 394 (4th Cir. 1994) (holding "manifest necessity" means a "high degree" of necessity is required for mistrial to be appropriate). The Fourth Circuit explained:

> First enunciated 170 years ago, this bedrock principle has been consistently reiterated and followed. Its basis is the Fifth Amendment's Double Jeopardy Clause . . . . Because jeopardy attaches before the judgment becomes final, it has been held that the double jeopardy clause protects a defendant's valued right to have his trial completed by a particular tribunal, and so prohibits the declaration of a mistrial absent manifest necessity.

Sloan, 36 F.3d 386 at 393 (citations and quotation marks omitted).

Our courts have set forth two types of manifest necessity: physical necessity and the necessity of doing justice. *State v. Crocker*, 239 N.C. 446, 450, 80 S.E.2d 243, 246 (1954). For example, physical necessity occurs in situations where a juror suddenly takes ill in such a manner that wholly disqualifies him from proceeding with the trial. *Id.* Whereas the necessity of doing justice "arises from the duty of the court to guard the administration of justice from fraudulent practices" and includes "the occurrence of some incident of a nature that would render impossible a fair and impartial trial under the law." *Id.* (citation and quotation marks omitted).

Both the Supreme Court of the United States and North Carolina courts have recognized that manifest necessity exists to declare a mistrial when the indictment contains a fatal defect, which deprives the court of jurisdiction. *Somerville*, 410 U.S. at 468-69, 35 L. Ed. 2d at 433-34; *State v. Whitley*, 264 N.C. 742, 745, 142 S.E.2d 600, 603 (1965) (citing *State v. Jordan*, 247 N.C. 253, 256, 100 S.E.2d 497, 499 (1957)). Thus, "[a] defendant is not subjected to double jeopardy when an insufficient indictment is quashed, and he is subsequently put to trial on a second, sufficient indictment." *State v. Oakes*, 113 N.C. App. 332, 340, 438 S.E.2d 477, 481, *disc. review denied*, 336 N.C. 76, 445 S.E.2d 43 (1994).

As noted, this Court does not favor dismissing indictments where the indictment is constitutionally sufficient to enable the court to proceed to judgment. *See Greer*, 238 N.C. at 327, 77 S.E.2d at 919; N.C. Gen. Stat. § 15-153. Unlike in *Somerville* and *Oakes*, in this case, the original indictment in 14 CRS 50887 was not fatally defective, it sufficiently alleged attempted voluntary manslaughter. *See Bullock*, 154

N.C. App. at 243-45, 574 S.E.2d at 23-24; *but see Somerville*, 410 U.S. at 468-69, 35 L. Ed. 2d at 433-34; *Oakes*, 113 N.C. App. at 340, 438 S.E.2d at 481. The trial court was aware of this Court's opinion in *Bullock* and cited it when it first realized the indictment had failed to allege "with malice aforethought."

The Supreme Court of the United States has emphasized the importance of "preserving the defendant's primary control over the course to be followed in the event of such [a prejudicial] error," *Lee*, 432 U.S. at 32, 53 L. Ed. 2d at 88 (citation and quotation marks omitted), and a defendant's a "valued right" to have his case heard before the original jury impaneled. *Washington*, 434 U.S. at 503-05, 54 L. Ed. 2d at 727-28. As noted below, in 14 CRS 50887, Defendant argued that based on *Bullock* the trial could and should properly proceed on attempted voluntary manslaughter.

Since the trial court retained jurisdiction, it could have proceeded on attempted voluntary manslaughter, and Defendant requested that the trial court proceed on that charge, no lack of jurisdiction or manifest necessity existed for the trial court to declare a mistrial to allow the State to re-indict Defendant. Judge Powell erred by ruling the indictment in 14 CRS 50887 was otherwise jurisdictionally defective to charge any crime to justify dismissal and by using this incorrect determination as a basis to declare a mistrial.

C. Dismissals and Mistrial based on Defendant's Motion or Consent

This case is distinguishable from those in which a dismissal or mistrial was entered based on the defendant's motion or consent. The Supreme Court of the United States has distinguished cases where the mistrial is entered pursuant to the defendant's motion or complicity, from those where the mistrial is entered over the defendant's objection. *See Scott*, 437 U.S. at 92-93, 57 L. Ed. 2d at 74-75; *Sloan*, 36 F.3d at 393 (holding there was no manifest necessity for the trial court to declare a mistrial over the defendant's objections).

The Supreme Court explained when a defendant moves for a mistrial:

> Such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact. "The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." *United States v. Dinitz*, 424 U.S. 600, 609, 47 L. Ed. 2d 267 (1976). But "[t]he Double Jeopardy Clause

> does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions." *Id.* at 611.

Scott, 437 U.S. at 93-94, 57 L. Ed. 2d at 76.

Similarly, when a defendant moves for a dismissal on grounds not related to the basis of factual guilt or innocence the Supreme Court held:

> [T]he defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant. . . . we conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice.

Id. at 98-99, 57 L. Ed. 2d at 79. Thus, if a *defendant* successfully seeks to avoid his trial prior to its conclusion by actions or a motion of mistrial or dismissal, the Double Jeopardy Clause is generally not offended by a second prosecution. *Id.* at 93, 57 L. Ed. 2d at 75.

1. *State v. Priddy*

North Carolina courts have also addressed this issue. In a case similar to the one here, this Court considered whether double jeopardy bars the State from appealing a trial court's order granting defendant's motion to dismiss for lack of jurisdiction. *Priddy*, 115 N.C. App. at 551, 445 S.E.2d at 613. In *Priddy*, the defendant moved to dismiss the case for lack of jurisdiction. *Id.* at 548, 445 S.E.2d at 611. The defendant in *Priddy* asserted the superior court lacked jurisdiction because the impaired driving charge was not initially tried in the district court. *Id.* at 548, 445 S.E.2d at 612. The superior court granted the defendant's motion to dismiss and the State appealed. *Id.* at 548, 445 S.E.2d at 611.

This Court held the superior court had jurisdiction over the impaired driving charge and the superior court erred in dismissing the indictment for lack of jurisdiction. *Id.* at 550, 445 S.E.2d at 612. Addressing the double jeopardy issue, this Court emphasized the defendant, not the State, moved to dismiss and the dismissal was "based solely upon the trial court's ruling that it had no jurisdiction and was entirely unrelated to the sufficiency of evidence as to any element of the offense

or to defendant's guilt or innocence." *Id.* at 551, 445 S.E.2d at 613. Based on *Scott*, this Court concluded double jeopardy did not bar the State's appeal or a retrial of the charge against the defendant. *Id.*

2. *State v. Vestal*

Another panel of this Court later distinguished *Priddy* and *Scott* in *State v. Vestal*, 131 N.C. App. 756, 509 S.E.2d 249 (1998). In *Vestal*, this Court held that double jeopardy barred the State from appealing the trial court's *sua sponte* order dismissing the case with prejudice, because the police department had violated an order from the trial court. *Id.* at 759, 509 S.E.2d at 252. The Court recognized that *Scott* and *Priddy*:

> mandate the rule against double jeopardy will not bar an appeal by the government *where the defendant took an active role in the dismissal*, because defendant essentially chose to end the trial and cannot later complain that he was 'deprived of his 'valued right to have his trial completed by a particular tribunal.'

Id. (emphasis supplied) (quoting *Scott*, 437 U.S. at 99-100, 57 L. Ed. 2d at 80). Unlike in *Scott* and *Priddy*, the defendant in *Vestal* did not take an active role in the process, which led to dismissal of the charge against him, but was "*involuntarily* deprived of his constitutional right to have his trial completed by the jury which had been duly empaneled and sworn." *Id.* at 760, 509 S.E.2d at 252 (emphasis supplied).

In *Priddy* and *Scott*, the defendants successfully sought termination of the original proceedings on grounds not related to factual guilt or innocence. The present case is similar to *Vestal*, where the defendant did not take any active role in acquiring dismissal. Here, Defendant actively argued against the trial court's order dismissing the indictment and declaring a mistrial in 14 CRS 50887. Although Defendant recognized the error in the indictment, he requested the trial proceed on the sufficiently alleged offense of attempted voluntary manslaughter. No manifest necessity existed to allow the trial court to declare a mistrial in 14 CRS 50887 over Defendant's persistent objections.

D. Greater and Lesser-Included Offenses under the Double Jeopardy Clause

Since we hold no manifest necessity existed to declare a mistrial in 14 CRS 50887 over the defendant's objection, we now consider the effects of the erroneous declaration. As noted earlier, if an "order of mistrial has been improperly entered over a defendant's objection, defendant's

motion for dismissal at a subsequent trial on the same charges must be granted." *Odom*, 316 N.C. at 310, 341 S.E.2d at 334.

Under the Double Jeopardy Clause, when one offense is a lesser-included offense of another, the two offenses are considered the same criminal offense. *Etheridge*, 319 N.C. at 50, 352 S.E.2d at 683 (citing *Brown v. Ohio*, 432 U.S. 161, 53 L. Ed. 2d 187 (1977); *State v. Revelle*, 301 N.C. 153, 270 S.E.2d 476 (1980)). Once jeopardy has attached to the lesser-included offense, a defendant may not thereafter be prosecuted for either the greater or lesser-included offenses. *See id.*; *Brown*, 432 U.S. at 169, 53 L. Ed. 2d at 196 ("Whatever the sequence may be, the Fifth Amendment forbids successive prosecution . . . for a greater and lesser included offense."); *State v. Birckhead*, 256 N.C. 494, 499, 124 S.E.2d 838, 843 (1962) (holding that once the defendant had been placed in jeopardy on the lesser-included offense of assault with intent to commit rape, double jeopardy principles implicit in the law of the land clause of the state constitution prohibited his subsequent prosecution for the greater offense of rape).

Attempted voluntary manslaughter is a lesser-included offense of attempted first-degree murder and is considered as the same offense under the Double Jeopardy Clause. *See State v. Rainey*, 154 N.C. App. 282, 290, 574 S.E.2d 25, 30, *disc. review denied*, 356 N.C. 621, 575 S.E.2d 520 (2002); Etheridge, 319 N.C. at 50, 352 S.E.2d at 683. Once jeopardy attaches to one of these offenses, the defendant cannot be subsequently tried on the other. *See Brown*, 432 U.S. at 169, 53 L. Ed. 2d at 196.

Once Judge Powell declared a mistrial where no manifest necessity existed in 14 CRS 50887, the State was prohibited from retrying Defendant on either attempted first-degree murder or attempted voluntary manslaughter, since they are considered the same offense under the Double Jeopardy Clause. *See Etheridge*, 319 N.C. at 50, 352 S.E.2d at 683. As a result, pursuant to double jeopardy, Judge Thornburg also erred by denying Defendant's motion to dismiss prior to trial in 15 CRS 50992. *See Odom*, 316 N.C. at 310, 341 S.E.2d at 334.

VII. Defendant's Previous Writ of Certiorari to this Court

[3] After Judge Thornburg denied his motion to dismiss made at the start of the second trial, Defendant filed a motion for temporary stay and petition for writ of supersedeas. He also petitioned this Court for writ of certiorari. Defendant asserted the double jeopardy provisions of the North Carolina Constitution and the Constitution of the United States prohibited further prosecution of him on the new indictment in 15 CRS 50992.

Defendant had no statutory right to appeal Judge Thornburg's interlocutory order. *See State v. Shoff*, 118 N.C. App. 724, 456 S.E.2d 875 (1995) (dismissing the defendant's appeal from an order denying his motion to dismiss on double jeopardy grounds), *aff'd*, 342 N.C. 638, 466 S.E.2d 277 (1996). However, Appellate Rule 21 authorizes petition for review of a non-appealable interlocutory order by writ of certiorari. N.C. R. App. P. 21(a)(1) (2015).

We recognize this Court's order dissolving the temporary stay and denying Defendant's petitions for writs of supersedeas and certiorari "without prejudice," essentially furthered the violation of Defendant's constitutional rights. *See Abney v. United States*, 431 U.S. 651, 660-62, 52 L. Ed. 2d 651, 660-61 (1977) (holding the Double Jeopardy Clause protects a defendant not only from conviction after successive trial, but from even being subjected to a second trial); *State v. Watson*, 209 N.C. 229, 231, 183 S.E. 286, 287 (1936) (stating the rule against double jeopardy "not only prohibits a second punishment for the same offense, but it goes further and forbids a second trial for the same offense, whether the accused has suffered punishment or not, and whether in the former trial he has been acquitted or convicted" (citation omitted)).

By denying his writ of certiorari, Defendant was subjected to a subsequent trial and conviction prior to final determination of whether his constitutional right against double jeopardy would be violated by such prosecution.

VIII. Conclusion

The original indictment in 14 CRS 50887 was constitutionally and statutorily sufficient to provide jurisdiction, allege attempted voluntary manslaughter, and was not fatally defective. The trial court erred in finding otherwise.

Since the indictment was not fatally defective and the trial court retained jurisdiction, no manifest necessity existed to declare a mistrial over Defendant's objections. Once the State's failure to allege "with malice aforethought" in the original indictment was discovered and communicated by Judge Powell in 14 CRS 50887, he should have required the State to either dismiss the charge against Defendant or to proceed to trial on attempted voluntary manslaughter. *See Etheridge*, 319 N.C. at 50, 352 S.E.2d at 683.

North Carolina courts have clearly stated "where the order of mistrial has been improperly entered over a defendant's objection, defendant's motion for dismissal at a subsequent trial on the same charges

must be granted." *Odom*, 316 N.C. at 310, 341 S.E.2d at 334. With a valid indictment and no manifest necessity to declare a mistrial, the State was barred from re-indicting Defendant on attempted murder or manslaughter. Judge Thornburg erred by denying Defendant's motion to dismiss the subsequent indictment in 15 CRS 50992. By denying his writ of certiorari, Defendant was subjected to a subsequent trial and conviction prior to final determination of whether his constitutional right against double jeopardy would be violated by such prosecution.

We do not address the merits of Defendant's other arguments regarding the trial in 15 CRS 50992, as we hold Defendant's double jeopardy rights were violated by his subsequent indictment, prosecution, trial, and conviction in 15 CRS 50992. We conclude Defendant's conviction by the jury and judgment entered thereon for attempted first-degree murder in 15 CRS 50922 must be vacated. *It is so ordered.*

VACATED.

Chief Judge McGEE and Judge DIETZ concur.

HARRY A. WILEY AND GERALD D. GILMAN, PLAINTIFFS
v.
L3 COMMUNICATIONS VERTEX AEROSPACE, LLC, DEFENDANT

No. COA16-460

Filed 20 December 2016

1. Jurisdiction—standing—failure to disclose claims in pending bankruptcy

Plaintiff lacked standing to pursue claims of discrimination and violation of the Wage and Hour Act in the trial court where he did not disclose those claims in his pending Chapter 13 bankruptcy proceeding.

2. Arbitration and Mediation—default—arbitration agreement—application not jurisdictional

The trial court had jurisdiction to enter a default judgment even though plaintiff had signed an arbitration agreement which deprived the court of authority to litigate the issues. Application of an arbitration clause is not a jurisdictional issue and can be waived by failure to timely invoke it.

3. Damages and Remedies—default judgment—set aside as to damages

The trial court did not abuse its discretion in a case involving discrimination and wage claims by setting aside the damages portion of the trial court's initial default judgment. The size of the judgement, including punitive damages that had not been requested, was a relevant factor toward the existence of extraordinary circumstances, and defendant's conduct in the case and its innocent explanation for missing the deadline provided a reasonable basis for the trial court to set aside the damages portion of the judgment.

4. Judgments—default—verification pages added to complaint at trial—not amendments to complaint

The trial court did not abuse its discretion by entering a default and default judgment against defendant where defendant contended that plaintiff amended the complaint at the default judgment hearing by adding verification pages to the complaint. The trial court's comments indicated that it treated those verifications as affidavits attesting to the truth of the allegations in the complaint, not as amendments to the complaint, and those verifications had no impact on the allegations in the complaint.

5. Judgments—default—notice

Although defendant contended on appeal that plaintiff did not serve a motion for entry of default and notice of hearing as required by N.C.G.S. § 1A-1, Rule 6(d), the requirements of Rule 6(d) are not applicable to motions for entry of default because those motions are, by nature, heard *ex parte*.

6. Judgments—default—unsuccessful attempts to reach plaintiff's counsel—not an appearance

Defendant did not make an appearance before entry of a default judgment where defendant presented evidence of a series of unsuccessful attempts by its counsel to reach plaintiff's counsel in the hour before the default judgment hearing occurred. The Court of Appeals has never held that unsuccessful unilateral efforts to communicate with opposing counsel can constitute an appearance.

7. Appeal and Error—briefs—argument incorporated by reference—abandoned

The Court of Appeals rejected an attempt by defendant to incorporate an argument by reference due to the page limitations of the Court of Appeals, which defendant conceded it sought to avoid by referencing outside arguments rather than presenting them in the brief. The argument was treated as abandoned.

8. Appeal and Error—preservation of issues—evidentiary—no offer of proof—answers not apparent from record

Evidentiary issues were not preserved for appellate review where the answers to the challenged questions were not apparent from the record and there was no offer of proof.

9. Damages and Remedies—arbitration agreement not presented at trial—no effect on calculation

Any error from defendant being prevented from presenting the parties' arbitration agreement in a trial for damages was harmless where defendant did not show that the exclusion would have affected the calculation of compensatory damages by the jury.

10. Damages—punitive—not pled

The trial court erred by submitting punitive damages to the jury where plaintiff did not properly plead punitive damages.

Appeal by defendant from judgment entered 17 September 2014 by Judge Lucy N. Inman, order entered 23 January 2015 by Judge Kendra D. Hill, and judgment entered 9 October 2015 and order entered 13 November 2015 by Judge Claire V. Hill in Cumberland County Superior Court. Cross-appeal by plaintiffs from order entered 9 October 2015 by Judge Kendra D. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 3 October 2016.

Yarborough, Winters & Neville, P.A., by Garris Neil Yarborough and H. Addison Winters, and Phelps Dunbar LLP, by M. Nan Alessandra and Robert M. Kennedy, Jr., for defendant-appellant/cross-appellee.

Ryan McKaig, Lee Tart Malone, and Robert A. Buzzard for plaintiffs-appellees/cross-appellants.

DIETZ, Judge.

Plaintiffs Harry Wiley and Gerald Gilman secured a default judgment against Defendant L3 Communications Vertex Aerospace, LLC after the company mistakenly missed its deadline to respond to the complaint. The trial court later set aside the damages portion of its award and held a trial on damages. The jury awarded compensatory and punitive damages to both Wiley and Gilman, totaling more than $750,000 each.

As explained below, we affirm in part and vacate in part. We hold that Gilman lacked standing to pursue his claims because he failed to

disclose the claims in his pending bankruptcy proceeding. Consistent with other courts that have addressed this issue, we conclude that North Carolina's standing principles do not permit a Chapter 13 debtor to pursue a claim that the debtor concealed from the bankruptcy estate.

We affirm the award of compensatory damages to Wiley, but vacate the award of punitive damages. The complaint did not allege any aggravating factors supporting an award of punitive damages under Rule 9(k) of the Rules of Civil Procedure. Indeed, the complaint did not even contain the words "punitive damages" in the allegations or prayer for relief, much less an articulation of the grounds required by the rule. Accordingly, as explained more fully below, we vacate in part, affirm in part, and remand for entry of a new judgment consistent with this opinion.

Facts and Procedural History

On 14 July 2014, Plaintiffs Harry Wiley and Gerald Gilman filed a joint complaint against their former employer, Defendant L3 Communications Vertex Aerospace, LLC, with each asserting claims for discrimination based on age, physical ability, and race. Gilman also asserted a claim for violation of the North Carolina Wage and Hour Act. Plaintiffs served L3 with a summons and the complaint on 17 July 2014.

L3 failed to timely file an answer or other responsive pleading. On 21 August 2014, Wiley and Gilman moved for entry of default. That same day, the clerk entered a default against L3.

On 8 September 2014, Wiley and Gilman moved for default judgment. On 15 September 2014, their motion for default judgment came on for hearing. L3 did not appear at the hearing.

On 17 September 2014, the trial court granted the motion for default judgment. The trial court awarded Wiley $391,274.44 in compensatory damages and $1,173,823.32 in punitive damages. The court awarded Gilman $727,525.62 in compensatory damages and $2,182,576.86 in punitive damages.

On 16 October 2014, L3 moved to set aside the entry of default and default judgment. On 23 January 2015, the trial court denied L3's request to set aside the entire judgment, but granted the motion with respect to damages and scheduled a trial on damages.

On 21 September 2015, the jury awarded Wiley $273,353.48 in compensatory damages and $500,000.00 in punitive damages. It awarded Gilman $279,180.00 in compensatory damages and $500,000.00 in punitive damages. On 9 October 2015, the trial court entered written judgment on the jury's verdict.

L3 timely moved for judgment notwithstanding the verdict or, alternatively, a new trial. The trial court denied L3's post-trial motions.

L3 timely appealed. Wiley and Gilman timely cross-appealed.

Analysis

Both parties appeal from various trial court orders and judgments throughout this case. We first address several jurisdictional arguments asserted by L3, and then turn to the parties' challenges to the trial court's rulings throughout the default proceedings.

I. Gilman's Failure to Disclose His Claim to the Bankruptcy Court

[1] L3 argues that Gilman lacked standing to bring the claims asserted in the complaint because he had a pending bankruptcy and failed to inform the bankruptcy court of the existence of his legal claims. As explained below, we agree.

Standing is a jurisdictional issue. *Union Grove Mill. & Mfg. Co. v. Faw*, 109 N.C. App. 248, 251, 426 S.E.2d 476, 478, *aff'd*, 335 N.C. 165, 436 S.E.2d 131 (1993). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Estate of Apple ex rel. Apple v. Commercial Courier Exp., Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005). A defect in subject matter jurisdiction cannot be waived by a party's failure to appear. *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956); *Matter of Triscari Children*, 109 N.C. App. 285, 288, 426 S.E.2d 435, 437 (1993). Thus, if Gilman lacked standing, the trial court had no power to enter judgment in his favor, notwithstanding L3's default.

We thus turn to L3's argument that Gilman lacked standing because of his failure to notify the bankruptcy court of his claims. Gilman's causes of action arose when L3 terminated him on 11 April 2013. Gilman petitioned for Chapter 13 bankruptcy in the United States Bankruptcy Court for the Eastern District of North Carolina on 10 January 2014. Because Gilman's claims existed when he petitioned for bankruptcy, they are the property of the bankruptcy estate and Gilman was required by law to disclose the claims to the estate. *See* 11 U.S.C. §§ 541, 1007(h), 1306(a). Gilman did not properly disclose these claims to the bankruptcy court until after the jury entered its verdict.

In a Chapter 13 bankruptcy, both the debtor and the trustee of the bankruptcy estate have concurrent standing to bring non-bankruptcy causes of action belonging to the estate. *Wilson v. Dollar Gen. Corp.*,

717 F.3d 337, 343 (4th Cir. 2013). This concurrent standing results from the special character of a Chapter 13 bankruptcy, in which the debtor retains possession of the property comprising the bankruptcy estate and is permitted to use that property in various ways. 11 U.S.C. §§ 363, 1303, 1306(b), 1322.

But the fact that debtors have concurrent standing to bring claims in the Chapter 13 context does not mean that we can ignore Gilman's failure to disclose the claims in his bankruptcy proceeding. As the Fourth Circuit acknowledged in *Wilson*, although a Chapter 13 debtor has standing to bring such claims, the debtor does so "on behalf of the estate" and "for the benefit of the estate." *Wilson*, 717 F.3d at 343–44.

This special, vicarious nature of the debtor's standing leads us to conclude, as other courts have, that the debtor's standing is conditional on having properly disclosed his claims in the bankruptcy proceeding. *Cowling v. Rolls Royce Corp.*, No. 1:11-CV-01719-JMS, 2012 WL 4762143, at *4 (S.D. Ind. Oct. 5, 2012) (unpublished); *Calvin v. Potter*, No. 07 C 3056, 2009 WL 2588884, at *3 (N.D. Ill. Aug. 20, 2009) (unpublished); *Robson v. Tex. E. Corp.*, 833 N.E.2d 461, 473 (Ind. Ct. App. 2005). As these courts reasoned, disclosing the claim in the bankruptcy proceeding is a necessary prerequisite to pursuing a claim on behalf of the estate. Without disclosing the claim, the bankruptcy court cannot factor that potential claim (and possible recovery) into any repayment plan, and the bankruptcy trustee cannot exercise its authority to evaluate the debtor's actions and determine if it must intervene to ensure the litigation is resolved in the best interests of the estate. We agree with this reasoning and hold that, when a debtor has concealed the existence of a potential legal claim in a Chapter 13 bankruptcy proceeding, the debtor cannot be pursuing that claim "on behalf of or for the benefit of her bankruptcy estate" and thus lacks standing under North Carolina law. *See Calvin*, 2009 WL 2588884, at *3.

This outcome also is consistent with our State's strict rules concerning prerequisites to proper legal standing when suing on behalf of others. For example, a homeowner's association lacks standing, even in an actual controversy at the heart of the association's representative role, if it failed to first obtain authority to sue under its bylaws. *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, __ N.C. App. __, __, __ S.E.2d __, __ (2016). Similar rules apply to those suing on behalf of a corporation. *See Anderson v. SeaScape at Holden Plantation, LLC*, __ N.C. App. __, __, 773 S.E.2d 78, 88 (2015). We see no reason why we should depart from this standing precedent for debtors suing on behalf of the bankruptcy estate.

Accordingly, we hold that Gilman lacked standing to litigate these claims because he pursued it without properly disclosing it in his bankruptcy proceeding. As a result, the trial court lacked subject matter jurisdiction to adjudicate the claim. *See Estate of Apple*, 168 N.C. App. at 177, 607 S.E.2d at 16.

"Where there is no jurisdiction of the subject matter the whole proceeding is void ab initio and may be treated as a nullity anywhere, at any time, and for any purpose." *High v. Pearce*, 220 N.C. 266, 271, 17 S.E.2d 108, 112 (1941). Accordingly, we vacate the judgment and award in Gilman's favor.

II. Application of Mandatory Arbitration Agreement

[2] L3 next argues that the trial court lacked jurisdiction to enter the default judgment because Wiley signed an arbitration agreement that governed any claims concerning his employment. L3 contends that, under the arbitration agreement, the court lacked authority to litigate these disputes.

This argument is foreclosed by precedent from this Court holding that application of an arbitration clause is not a jurisdictional issue and can be waived by failure to timely invoke it. *Blankenship v. Town and Country Ford, Inc.*, 155 N.C. App. 161, 163, 574 S.E.2d 132, 133–34 (2002).

In *Blankenship*, the defendant argued "that the trial court erred in denying its motion to set aside the default judgment because the trial court lacked jurisdiction since the parties were subject to mandatory arbitration with respect to issues raised in plaintiffs' complaint." *Id.* at 166, 574 S.E.2d at 135. This Court rejected that argument, holding that the arbitration agreement was binding on the court only if the defendant appeared in court and invoked it:

> Arbitration pursuant to a valid agreement may be compelled by a court only upon application by a party to the agreement.
>
> Plaintiffs chose to file suit against defendant rather than seek arbitration pursuant to the agreement. It was incumbent upon defendant to assert its right to arbitrate. Because defendant failed to assert its right to arbitrate, this Court is not compelled to enforce the arbitration agreement. Moreover, we hold that the trial court did not err in denying the motion to set aside the default judgment based on the existence of an arbitration agreement.

Id. at 166–67, 574 S.E.2d at 135 (citations omitted).

This case is indistinguishable from *Blankenship*. Because L3 did not timely appear in court and invoke the arbitration agreement to compel arbitration, the trial court did not err in entering judgment notwithstanding the parties' agreement to arbitrate this dispute.

III. Decision to Set Aside Default Judgment on Damages

[3] Having addressed these jurisdictional arguments, we turn to the parties' challenges to the trial court's rulings throughout the default proceedings.

First, Wiley argues that the trial court erred by setting aside the damages portion of the court's initial default judgment under Rule 60(b). Wiley focuses his argument on Rule 60(b)(6), and we thus begin our analysis there, although the trial court's order did not specify the particular provision of Rule 60(b) on which it relied.

Wiley argues that Rule 60(b)(6) cannot support the trial court's ruling because L3 failed to satisfy either of the first two prongs of the three-part test applicable to motions under Rule 60(b)(6). As explained below, the trial court was well within its sound discretion in allowing relief under Rule 60(b)(6).

"A trial court's decision to grant or deny a motion to set aside an entry of default and default judgment is discretionary. Absent an abuse of that discretion, this Court will not reverse the trial court's ruling." *Basnight Const. Co. v. Peters & White Const. Co.*, 169 N.C. App. 619, 621, 610 S.E.2d 469, 470 (2005). "[W]e only find abuse of discretion where the trial court's judgment is manifestly unsupported by reason." *Bodie Island Beach Club Ass'n, Inc. v. Wray*, 215 N.C. App. 283, 290, 716 S.E.2d 67, 74 (2011).

To qualify for relief under Rule 60(b)(6), a movant must satisfy a three-part test: "(1) extraordinary circumstances exist, (2) justice demands the setting aside of the judgment, and (3) the defendant has a meritorious defense." *Gibby v. Lindsey*, 149 N.C. App. 470, 474, 560 S.E.2d 589, 592 (2002). Wiley does not argue that L3 lacks a meritorious defense. Thus, we limit our analysis to the first two prongs of the test.

This Court previously has recognized that the size of a default judgment award is a relevant factor to consider when determining whether extraordinary circumstances exist and whether justice would be best served by affording relief from judgment. *See Anderson Trucking Serv., Inc. v. Key Way Transp., Inc.*, 94 N.C. App. 36, 43, 379 S.E.2d 665, 669 (1989).

Here, the size of the judgment was quite large, totaling well over $4 million. Moreover, as explained in Part VI below, that judgment included a large award of punitive damages, which were not even requested in the complaint.

Finally, L3 provided an explanation for why it failed to timely respond to the complaint and, although the trial court ultimately chose to uphold the default judgment on liability, L3's conduct in the case and its innocent explanation for why it missed the deadline readily provide a reasonable basis for the court to set aside the default judgment on damages. Accordingly, we reject Wiley's argument and hold that, under the deferential standard of review, the trial court's decision was not an abuse of discretion. *See Wray*, 215 N.C. App. at 290, 716 S.E.2d at 74.

IV. L3's Motion to Set Aside Entry of Default and Default Judgment

[4] Next, L3 asserts several challenges to the trial court's initial entry of default and default judgment and the court's denial of its motion to set aside the default. As explained below, we must reject these arguments under the applicable, narrow standard of review.

A trial court's decision to enter a default judgment, as well as a clerk or lower court's entry of default, are both reviewable for abuse of discretion. *Lowery v. Campbell*, 185 N.C. App. 659, 665, 649 S.E.2d 453, 456 (2007), *aff'd per curiam*, 362 N.C. 231, 657 S.E.2d 354 (2008). The decision to grant or deny a motion to set aside a default judgment likewise is reviewed for abuse of discretion. *Basnight Const. Co.*, 169 N.C. App. at 621, 610 S.E.2d at 470. As noted above, "we only find abuse of discretion where the trial court's judgment is manifestly unsupported by reason." *Wray*, 215 N.C. App. at 290, 716 S.E.2d at 74. As a result, "[t]his Court seldom has found an abuse of discretion by the trial court in failing to set aside a default judgment." *Bailey v. Gooding*, 60 N.C. App. 459, 466, 299 S.E.2d 267, 271 (1983).

A. Attachment of Verifications at Default Judgment Hearing

L3 first argues that the trial court erred by entering the default judgment because Wiley amended the complaint at the default judgment hearing, thus reopening L3's time to file a responsive pleading. Specifically, at the default judgment hearing (where L3 was not present), the following exchange occurred between Wiley's counsel and the trial court:

> MR. BUZZARD: We have got copies of the affidavits that are in the binder that we handed up, which Ms. Malone has copies to file.

> MS. MALONE: And also the verifications for the complaint.
>
> THE COURT: Well that's what I was going to say—
>
> MS. MALONE: They were signed the date, or prior to the filing to [*sic*] the complaint.
>
> THE COURT: Okay.
>
> MS. MALONE: I had just held those in my file, but I think I should probably put them in the file.
>
> THE COURT: Yes. You can hand those up, and in light of the default all allegations in the complaint are deemed admitted and insofar as they are verified.
>
> MS. MALONE: That was a filed copy and also a copy of the files.
>
> THE COURT: And have been verified and can be treated as affidavits.

L3 argues that, by adding the verification pages to the complaint, Wiley amended the complaint under Rule 15 of the Rules of Civil Procedure, thereby reopening the time to file a responsive pleading. As explained below, we disagree.

Our determination turns on the context in which the verification pages were offered to the court. As other jurisdictions have observed, "adding a verification to a complaint is not, strictly speaking, an amendment to the pleading itself." *Chisholm v. Vocational Sch. for Girls*, 103 Mont. 503, 508, 64 P.2d 838, 842 (1936). Moreover, the purpose of providing additional time to file a responsive pleading following an amendment is to offer the party an opportunity to respond to the amended allegations. *Turner Halsey Co. v. Lawrence Knitting Mills, Inc.*, 38 N.C. App. 569, 573, 248 S.E.2d 342, 345 (1978). Of course, if the allegations were not amended, this underlying purpose is not implicated.

Here, although the court accepted the verification pages into the trial record, the court's comments indicate that it treated those verifications as affidavits attesting to the truth of the allegations in the complaint, not as amendments to the contents of the complaint. And, as Wiley points out, those verifications had no impact on the allegations in the complaint. Accordingly, we hold that, in the context of this default judgment hearing, the submission of verifications, attesting to the truth of the allegations in the complaint, did not amend the complaint and reopen the time to file a responsive pleading. We therefore reject L3's argument.

B. Failure to Serve Affidavit of Service

[5] L3 next argues that Wiley did not properly serve the motion for entry of default and a notice of hearing at least five days before the hearing on the motion, as required by Rule 6(d) of the North Carolina Rules of Civil Procedure. This argument is meritless. Rule 6(d) states that it applies to a written motion "other than one which may be heard *ex parte*." This Court has held that the requirements of Rule 6(d) are not applicable to motions for entry of default because, by their nature, these motions are heard *ex parte*. *G & M Sales of E. N.C., Inc. v. Brown*, 64 N.C. App. 592, 594, 307 S.E.2d 593, 594–95 (1983). This decision also is consistent with the text of Rule 55 which, as explained in more detail below, provides a different, three-day period in which to serve notice on a party who has appeared in the case in advance of the default judgment hearing. Accordingly, we reject L3's argument.

C. Appearance Before Entry of Default Judgment

[6] L3 next argues that it had made an appearance in this action before entry of default judgment and thus was entitled to notice of the default judgment hearing under Rule 55 of the Rules of Civil Procedure. We are not persuaded.

Rule 55(b)(2) provides that, where "the party against whom judgment by default is sought has appeared in the action, that party (or, if appearing by representative, the representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application." When a party entitled to notice under this provision does not receive it, the court must vacate the default judgment. *Stanaland v. Stanaland*, 89 N.C. App. 111, 115, 365 S.E.2d 170, 172 (1988).

"Generally, an appearance requires some presentation or submission to the court." *Cabe v. Worley*, 140 N.C. App. 250, 253, 536 S.E.2d 328, 330 (2000). Nevertheless, "a defendant does not have to respond directly to a complaint in order for his actions to constitute an appearance." *Roland v. W & L Motor Lines, Inc.*, 32 N.C. App. 288, 289, 231 S.E.2d 685, 687 (1977). Instead, "an appearance may arise by implication when a defendant takes, seeks, or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff." *Id.* For example, in *Coastal Federal Credit Union v. Falls*, this Court held that the defendants' negotiations with plaintiff's law firm over a payment plan could be sufficient to qualify as an "appearance" entitling the defendants to notice of a default judgment hearing. 217 N.C. App. 100, 103–07, 718 S.E.2d 192, 194–96 (2011).

Here, L3 has not identified any communications that could satisfy the appearance requirement. To be sure, L3 presented evidence of a series of unsuccessful attempts by its counsel to reach Wiley's counsel in the hour before the default judgment hearing occurred. But this Court has never held that unsuccessful, unilateral efforts to communicate with opposing counsel can constitute an "appearance" for purposes of Rule 55, and we are unwilling to do so here. We adhere to the rule established in *Roland*, which permits an appearance by implication only "when a defendant takes, seeks, or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff." *Roland*, 32 N.C. App. at 289, 231 S.E.2d at 687. Accordingly, we reject L3's argument.

D. Sufficiency of Facts Alleged to Support Claims Asserted

[7] Finally, L3 argues that the allegations in the complaint are insufficient to state a valid claim on which relief can be granted and, as a result, the court lacked authority to enter judgment on those claims. But L3 does not present any argument on this point, instead stating that "[t]he law and facts are detailed at R. pp. 194–205 and are incorporated by reference herein." In a footnote, L3 then states that the arguments in this case require "detailed exposition" and that "[d]ue to page limitations, the Court is respectfully referred herein to prior briefs in the Record on Appeal, which are incorporated by reference."

This Court and our Supreme Court repeatedly have rejected attempts by litigants to "incorporate by reference" arguments found elsewhere in the trial record. *See, e.g.*, *Fortner v. J.K. Holding Co.*, 319 N.C. 640, 641–42, 357 S.E.2d 167, 167–68 (1987); *Stark v. N.C. Dep't of Env't & Nat. Res., Div. of Land Res.*, 224 N.C. App. 491, 513, 736 S.E.2d 553, 567 (2012); *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 615–16, 659 S.E.2d 442, 453 (2008). This precedent is particularly important in this Court, which adheres to strict page or word limits for briefs—limits that L3 concedes it sought to avoid by referencing outside arguments rather than presenting them in the brief. Under Rule 28(b)(6), an issue "not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." We therefore treat this argument as abandoned.

V. Exclusion of Certain Evidence at the Trial on Damages

[8] We next turn to L3's arguments concerning the trial on damages. L3 first argues that the trial court erred by excluding certain evidence it sought to introduce at trial, including evidence related to the circumstances surrounding Wiley's discharge and the existence of the arbitration agreement. As explained below, we reject this argument.

As an initial matter, many of L3's evidentiary arguments are not preserved for appellate review. "A party must preserve the exclusion of evidence for appellate review by making a specific offer of proof unless the significance of the evidence is ascertainable from the record." *Griffis v. Lazarovich*, 161 N.C. App. 434, 438, 588 S.E.2d 918, 921 (2003).

Here, L3 challenges the trial court's refusal to permit L3 to ask various questions concerning the company's planned reduction in force, its employment practices, and the Plaintiffs' job performance. But the content and significance of the answers to these questions is not apparent from the record and there was no offer of proof. Accordingly, these issues are not preserved for appellate review. *See id.*

[9] L3 also argues that the trial court erroneously prevented it from presenting any evidence concerning the parties' arbitration agreement. The parties' arbitration agreement is in the record and thus this issue properly is preserved for appellate review. Nevertheless, we reject this argument because the exclusion of the arbitration agreement, even if error, was harmless.

> Appellate courts do not set aside verdicts and judgments for technical or harmless error. It must appear that the error complained of was material and prejudicial, amounting to a denial of some substantial right. The appellant thus bears the burden of showing not only that an error was committed below, but also that such error was prejudicial—meaning that there was a reasonable possibility that, but for the error, the outcome would have been different.

Faucette v. 6303 Carmel Rd., LLC, __ N.C. App. __, __, 775 S.E.2d 316, 323 (2015).

Here, even if we assume the contents of the arbitration agreement had some minimal relevance, L3 has not shown that the exclusion of that evidence would have affected the calculation of compensatory damages owed to Wiley.[1] "The sole purpose of the damages trial was to determine the harm to [Wiley] caused by" L3's discriminatory termination of his employment. *See Hien Nguyen v. Taylor*, 219 N.C. App. 1, 16, 723 S.E.2d 551, 562 (2012). The availability of the arbitration procedures would not have impacted the jury's calculation of these compensatory damages, and thus, exclusion of this evidence was harmless.

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1. As explained in Part VI below, we vacate the award of punitive damages because Wiley failed to properly plead a request for punitive damages under Rule 9(k) of the Rules of Civil Procedure.

VI. Denial of Request for Punitive Damages

[10] Finally, L3 argues that the trial court erred by denying its motion for a directed verdict with respect to punitive damages. L3 contends that Wiley did not include a request for punitive damages or allege with particularity any of the aggravating factors that support punitive damages. L3 thus contends that the trial court should not have submitted that issue to the jury. We agree.

In 1994, our Supreme Court held in *Holloway v. Wachovia Bank & Trust Company* that "a plaintiff need not specially plead punitive damages as a prerequisite to recovering them at trial." 339 N.C. 338, 347, 452 S.E.2d 233, 238 (1994). Instead, the Court held that, "where a pleading fairly apprises opposing parties of facts which will support an award of punitive damages, they may be recovered at trial without having been specially pleaded." *Id.*

In 1995, apparently in response to *Holloway*, the General Assembly adopted Rule 9(k) of the North Carolina Rules of Civil Procedure. 1995 N.C. Sess. Laws ch. 514, § 3. That rule provides as follows: "A demand for punitive damages shall be specifically stated, except for the amount, and the aggravating factor that supports the award of punitive damages shall be averred with particularity." N.C. R. Civ. P. 9(k).

Thus, to recover punitive damages, "[P]laintiff's complaint must allege facts or elements showing the aggravating circumstances which would justify the award of punitive damages." *Hart v. Brienza*, __ N.C. App. __, __, 784 S.E.2d 211, 218 (2016). Those aggravating factors are "(1) fraud; (2) malice; or (3) willful or wanton conduct." *Id.*

Here, the complaint does not contain a request for punitive damages. Indeed, the words "punitive damages" are not contained anywhere in the complaint's allegations or in the prayer for relief. Moreover, there are no allegations of any of the aggravating factors that can support an award of punitive damages. See N.C. R. Civ. P. 9(k). Thus, we hold that Wiley failed to properly plead a request for punitive damages under Rule 9(k). As a result, the trial court erred by rejecting L3's argument and submitting the punitive damages issue to the jury.[2]

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2. L3 also challenges the trial court's denial of its motion for a directed verdict with respect to the award of compensatory damages to Wiley but, as with other issues in its brief, presents no argument, instead incorporating by reference arguments made in the trial court and contained in the record on appeal. As explained in Part IV.D above, the Rules of Appellate Procedure do not permit parties to incorporate by reference arguments set out in other pleadings. Accordingly, these arguments are abandoned on appeal. *See Stark*, 224 N.C. App. at 513, 736 S.E.2d at 567.

Conclusion

For the reasons set out above, we affirm the trial court's judgment with respect to the compensatory damages awarded to Plaintiff Harry A. Wiley, we vacate the award of punitive damages to Wiley, and we vacate the judgment entered in favor of Plaintiff Gerald D. Gilman for lack of standing. This case is remanded for entry of a new judgment consistent with this opinion.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Chief Judge McGEE and Judge TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 DECEMBER 2016)

CITY OF GREENSBORO v. FEWELL No. 16-501	Guilford (10CVS4454)	Affirmed
CROWDER v. BALDOR ELEC. No. 16-403	N.C. Industrial Commission (Y06047)	Affirmed
GENTRY v. BROOKS No. 16-614	Madison (13SP52)	Affirmed
HARDIN v. COULSTON No. 16-694	Mecklenburg (15CVD18570)	Affirmed
HARMON v. HARMON No. 16-728	Rowan (16CVD473)	Reversed
HENDERSON v. HENDERSON No. 16-72	Mecklenburg (10CVD8288)	Affirmed
IN RE B.E. No. 16-494	Wake (15JA195-199)	Affirmed
IN RE C.A.G. No. 16-332	Sampson (12JA94)	Affirmed
IN RE D.J.W-P. No. 16-518	Wake (14JT90)	Affirmed
IN RE D.M. No. 16-503	Yancey (15JT25)	Affirmed
IN RE HENDRICK No. 16-256	Buncombe (15SPC1527)	Vacated and Remanded
IN RE K.A.E. No. 16-488	Hoke (13JT46)	Reversed
IN RE L.A.T. No. 16-602	Cabarrus (15JT85)	Affirmed
IN RE Q.W. No. 16-678	Mecklenburg (15SPC7408)	Affirmed
IN RE T.J.T. No. 16-576	Wake (15JT11)	Affirmed

INTEGON NAT'L INS. CO. v. KING No. 16-600	Forsyth (15CVS3315)	Affirmed
SADLER v. HALL No. 16-547	Jackson (15CVD590)	Affirmed
SHELLEY v. CTY. OF HENDERSON No. 16-475	Henderson (15CVS2084)	Affirmed
SNELSON v. SNELSON No. 16-257	Buncombe (12CV5629)	Dismissed.
SPARROW v. TYCO INTEGRATED SEC. No. 16-409	N.C. Industrial Commission (15-001839)	Affirmed
STATE v. BELL No. 16-326	Edgecombe (13CRS52923-25) (14CRS1138)	No prejudicial error
STATE v. BOWES No. 16-304	Alamance (12CRS52181-85)	No Error
STATE v. BROWN No. 16-730	Greene (14CRS50719) (15CRS128)	Affirmed
STATE v. COOPER No. 16-483	Columbus (13CRS50014) (13CRS50018)	No Error
STATE v. CROSBY No. 16-454	Mecklenburg (15CRS6239)	No prejudicial error
STATE v. FENNELL No. 16-441	Wayne (13CRS3633-34) (13CRS51936)	No Error
STATE v. FERRELL No. 16-622	Edgecombe (15CRS52017)	Affirmed
STATE v. LUCAS No. 16-73	Wake (11CRS213380)	Affirmed
STATE v. MITCHELL No. 16-448	Wake (13CRS224586)	No Error
STATE v. MOSS No. 16-584	Edgecombe (14CRS1837) (14CRS52688) (14CRS52720-21)	Remanded for Re-sentencing in part; affirmed in part

STATE v. PATTON No. 16-462	Mecklenburg (14CRS221522) (14CRS35556)	No Error
STATE v. RODRIGUEZ No. 16-76	Dare (11CRS51756) (11CRS51758)	Affirmed
STATE v. SHABAZZ No. 16-526	Iredell (13CRS51208-15)	Affirmed
STATE v. SHEPERD No. 16-270	Yancey (12CRS50713)	No Error
STATE v. SMALLWOOD No. 16-131	Beaufort (13CRS50055)	No error in part; No plain error in part
STATE v. WALKER No. 16-392	Brunswick (13CRS1660-61) (13CRS1663-64) (13CRS701341)	Remanded
STATE v. WHITAKER No. 16-521	Halifax (14CRS52238)	No Error
STATE v. WILLIAMS No. 16-514	Sampson (13CRS50173)	Dismissed
STATE v. WILSON No. 16-496	Lenoir (13CRS51601)	No Error
STATE v. YOUNTS No. 16-523	Randolph (13CRS53018) (13CRS53048)	Remanded for resentencing.
SYLVESTER v. SYLVESTER No. 16-637	Buncombe (16CVD71)	Vacated and Remanded

ADELMAN v. GANTT

[251 N.C. App. 372 (2016)]

JEFFREY A. ADELMAN, PLAINTIFF
v.
LEROY GANTT, DEFENDANT

No. COA16-339

Filed 30 December 2016

1. Easements—easement implied by prior use—easement by necessity

The trial court did not err by granting plaintiff an easement implied by prior use and by necessity. Plaintiff reasonably believed the entire concrete driveway would continue to serve in the same manner as it had been for the past forty years. Further, plaintiff established the two elements required to obtain an easement by necessity over the concrete driveway.

2. Easements—sufficiency of description—motion for new trial —motion for supplemental proceedings

The trial court did not err by denying plaintiff's motion for a new trial or for supplemental proceedings. The trial court's description of the easement in the March 2015 judgment met the criteria for finding an easement implied by prior use and by necessity. Further, the information provided by Exhibit 1 was not new or additional since it provided an almost identical survey to the one put into evidence during the trial.

Appeal by defendant from judgment entered 30 March 2015 and order entered 6 October 2015 by Judge Karen Eady-Williams in Mecklenburg County District Court. Heard in the Court of Appeals 1 November 2016.

Weaver, Bennett & Bland, P.A., by Michael David Bland, for plaintiff-appellee.

Pamela A. Hunter for defendant-appellant.

BRYANT, Judge.

Where there was competent evidence sufficient to establish each element of plaintiff's easement claims introduced at trial, we affirm. Where the trial court's description of the easement was not ambiguous, the trial court correctly denied defendant's motion for a new trial or supplemental proceedings, and we affirm.

Plaintiff Jeffrey A. Adelman owns real property located at 1904 Harrill Street in Charlotte, North Carolina known as Lot 18. Defendant Leroy Gantt owns an adjoining lot, Lot 1, at 1900 Harrill Street. Lots 1 and 18 were previously owned by a common owner, James and Kathleen Blair.

In August 1978, the Blairs conveyed Lot 1 to defendant and Lot 18 to defendant's mother. Lot 18 contains a concrete driveway that provides ingress and egress for automobiles to the rear of Lot 18 and has been so used since the time it was constructed. The property in dispute is a two-foot-wide strip of the concrete driveway, which is located on Lot 1, defendant's property, where the driveway meets the public right of way (North Harrill Street). For over forty years the property in dispute has functioned as a driveway for the occupant of Lot 18.

In 1989, defendant had his property surveyed. The survey depicted the two-foot portion of the current driveway as being part of defendant's property. The 1989 survey also illustrated a chain-link fence at the edge of the concrete driveway that separated Lots 1 and 18 on defendant's grass line.

On 30 June 2008, plaintiff acquired Lot 18. At that time, defendant's chain-link fence remained on his grass line, and the concrete driveway was free from any obstruction. When plaintiff purchased Lot 18, based on the prior use of the concrete driveway and placement of the fence, plaintiff believed the entire concrete driveway was his property and for his use and enjoyment.

On or about 1 April 2014, plaintiff hired a contractor to install fence posts and a privacy fence in his backyard. During construction, three fence posts were placed in close proximity to the parking area behind defendant's home. Defendant questioned plaintiff as to whether the posts were actually on defendant's property. Plaintiff showed defendant a survey and defendant acknowledged the fence posts were located on plaintiff's property.

On or about 2 May 2014, defendant hired a surveyor to plot his property lines. The survey revealed plaintiff's fence posts were on plaintiff's property, and also reaffirmed the findings of the 1989 survey, which illustrated that two feet of defendant's northern property fell within a portion of plaintiff's concrete driveway. On 27 May 2014, defendant hired workmen to move the chain-link fence that bordered the concrete driveway into the concrete driveway so that it aligned exactly with defendant's property line as shown on a survey thereof. The new location of the fence narrowed the driveway by two feet and made entering and exiting Lot 18 difficult for plaintiff and his guests.

As a result of defendant's relocation of the fence, plaintiff has damaged the mirrors of two of his cars and does not leave the house at night because the fence limits his ability to get out of his driveway. Plaintiff has also contemplated renting his home, but potential renters were dissuaded from renting his property upon seeing the difficulties posed by the fence and the driveway. When plaintiff had a shed built in his backyard, workers had to bring their material in through a neighbor's driveway (with the neighbor's consent), as the workers' truck could not fit in plaintiff's driveway. Although defendant contends he needs the portion of the concrete driveway behind his chain-link fence for parking, prior to this dispute he parked his car in the same spot in front of his home for thirty-nine years, and he also has a carport in the back of his lot that provides additional parking.

On 14 August 2014, plaintiff filed a complaint and summons in Mecklenburg County District Court seeking damages for nuisance, prescriptive easement, easement by prior use, and easement by necessity. Defendant filed his motion and answer on 26 September 2014.

On 5 December 2014, an Arbitration Award and Judgment was filed, which ordered defendant "to remove the portion of [the] fence from the front of his house to the street on the side that burdens the property with plaintiff." On 11 December 2014, defendant filed a request for trial *de novo*.

On 2 February 2015, a bench trial was held in the Mecklenburg County District Court, the Honorable Karen Eady-Williams, Judge presiding, regarding plaintiff's request for an easement implied by prior use and by necessity over the portion of the concrete driveway in issue. The trial court orally granted plaintiff's request for an easement on the date of the hearing. Before the written judgment was filed and entered, plaintiff submitted a proposed order to the court and attached a recent survey of the property at issue conducted in February 2015 and labeled Exhibit 1.

By written judgment entered 30 March 2015, the trial court found and concluded that plaintiff was entitled to an easement under the theories of implied easement by prior use and easement by necessity. The trial court also found defendant's placement of the fence "served no reasonable purpose for the [d]efendant," "constitute[d] a nuisance by the [d]efendant as to the [p]laintiff," and ordered defendant to remove any portion of the fence located within the concrete driveway serving plaintiff's lot.

On 1 April 2015, defendant filed a motion for a new trial based on the description of the property in the judgment as not being specific or detailed enough to satisfy the easement requirements. Defendant also contended that plaintiff's Exhibit 1, the February 2015 survey of the property in dispute, was improperly "admitted" and considered by the trial court after plaintiff closed his case-in-chief. Defendant's motions for new trial and supplemental proceeding were denied on 6 October 2015 by Judge Eady-Williams. Defendant appeals.

On appeal, defendant argues the trial court erred by (I) granting plaintiff an easement by preexisting use and by necessity over defendant's property; and (II) denying defendant's motion for a new trial.

I

[1] Defendant contends the trial court committed reversible error by granting plaintiff an easement implied by prior use and by necessity. Specifically, defendant contends there was no competent testimony or evidence that the common owner of the property intended that the use of the driveway continue (prior use), and that because plaintiff does not need the use of defendant's driveway to reach a public road, any legal theory that an easement by necessity exists is negated.[1] We disagree.

The standard of review on appeal from a judgment entered after a non-jury trial is "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions were proper in light of such facts." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (citation omitted). The trial court's findings of fact are "conclusive on appeal if there is evidence to support those findings." *Id.* (citation omitted). "A trial court's conclusions of law, however, are reviewable *de novo*." *Id.* (citation omitted).

"Unchallenged findings of fact are presumed correct and are binding on appeal." *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) (citations omitted). Where specific findings are challenged, "[i]f the court's factual findings are supported by competent evidence, they are conclusive on appeal, even though there is evidence to the contrary." *Boundary Dispute Between Lots 97 & 98 of C.M. Bost Estate v. R.L. Wallace Constr. Co.*, 199 N.C. App. 522, 527, 681 S.E.2d 553, 557 (2009)

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1. Defendant also challenges the trial court's Finding of Fact No. 5 which states as follows: "On February 2, 2015, at the conclusion of the hearing, the undersigned orally granted Plaintiff's request for an easement."

(quoting *Lagies v. Myers*, 142 N.C. App. 239, 246, 542 S.E.2d 336, 341 (2001)). "In evaluating the credibility of the witnesses, the trial judge determines the weight to be given to their testimony and the reasonable inferences to be drawn therefrom." *Id.* (quoting *Terry's Floor Fashions, Inc. v. Crown Gen. Contractors, Inc.*, 184 N.C. App. 1, 10, 645 S.E.2d 810, 816 (2007)).

In the instant case, the trial court made the following findings of fact and conclusions of law relevant to easement implied by prior use and by necessity:

> 16. To establish the existence of the easement, which is a two feet portion of the concrete driveway, Plaintiff testified that when he purchased his house in June 2008, he believed he had full use of the concrete driveway based on his understanding of the prior use of this driveway. He understandably believe[d] that the entire concrete driveway was his property and for his use and enjoyment.
>
> 17. Plaintiff also provided photographs of his neighbor, the Defendant, erecting a chain link fence on a small portion of the concrete driveway, which was on the actual property line, but limiting Plaintiff's full use of the driveway and causing him concern about trying to access his back yard to park his vehicles.
>
> . . .
>
> 24. Prior to in or about August 1978, both Plaintiff's and Defendant's lots had originally been owned by the same land owner, but they were later divided and Defendant's mother lived on one lot (Lot 18) while Defendant lived on the adjacent lot (Lot 1).
>
> 25. Per Plaintiff's evidence and Plaintiff's Exhibit 3 (Deed recorded August 2, 1978), the property was severed in August 1978.
>
> 26. Defendant testified that the driveway had always been between the two properties and had been used solely as a driveway when his mother resided there. It had no other use. He did not testify to any restrictions on the use of the driveway at any time when his mother lived next to him. It had been used as a driveway for over 40 years or since his mother owned the house.

27. Defendant further testified that he routinely parked on the street when his mother lived next to him. He did this for 39 years. And he has a carport at the back of his house, which is located on a corner lot.

28. During trial, Defendant never testified that he had any need to use his mother's driveway to park his vehicle or otherwise while she resided next door. This allegation came about after Plaintiff moved into his mother's former home.

. . .

31. Prior to the two plots of land being divided in 1978 and at the time that Plaintiff purchased the property in 2008, the expectation was that the driveway would be used in its entirety as a driveway for the house where Plaintiff resides (Lot 18).

. . .

CONCLUSIONS OF LAW

. . .

10. The order entered by this Court on March 30, 2015 met the criteria listed above for the finding of an easement implied by prior use and necessity to unencumber property adjacent to Defendant's property.

A. Easement Implied by Prior Use

"An easement is a right to make some use of land owned by another without taking a part thereof." *Builders Supplies Co. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972) (citation omitted). An easement is non-possessory and serves only the limited purpose that gives rise to its creation. *See id.* at 270, 192 S.E.2d at 455 (citation omitted).

> To establish an easement implied by prior use, plaintiff[] must prove that: (1) there was a common ownership of the dominant and servient parcels of land and a subsequent transfer separated that ownership, (2) before the transfer, the owner used part of the tract for the benefit of the other part, and that this use was "apparent, continuous and permanent," and (3) the claimed easement is "necessary" to the use and enjoyment of plaintiff['s] land.

Metts v. Turner, 149 N.C. App. 844, 849, 561 S.E.2d 345, 348 (2002) (quoting *Knott v. Wash. Hous. Auth.*, 70 N.C. App. 95, 98, 318 S.E.2d 861, 863 (1984)). "[A]n easement from prior use may be implied to protect the probable expectations of the grantor and grantee that an existing use of part of the land would continue after the transfer." *Id.* (alteration in original) (quoting *Knott*, 70 N.C. App. at 98, 318 S.E.2d at 863).

1. "Apparent, Permanent, and Continuous" Use[2]

"[W]here one conveys a part of his estate, he impliedly grants all of those apparent or visible [appurtenant] easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed, and which are reasonably necessary for the use of that part." *Wiggins v. Short*, 122 N.C. App. 322, 328–29, 469 S.E.2d 571, 576 (1996) (citations omitted) (quoting *Carmon v. Dick*, 170 N.C. 305, 306–07, 87 S.E. 224, 225 (1915)).

Here, there was ample evidence that the concrete driveway was for access to defendant's mother's home (later, plaintiff's home), it was permanent in nature, and had been used by defendant's mother for over forty years. At trial, plaintiff testified that when he purchased his home in 2008 (1) the concrete driveway had been solely used as a driveway by the grantor (defendant's mother); (2) defendant had parking located in the front and back of his home; and (3) the chain-link fence separating the two property lots originally ran along the grass line of defendant's property rather than on the actual property line, until May 2014, when defendant hired workmen to relocate the fence onto the driveway. In addition to plaintiff's testimony, defendant introduced a survey of the property at issue, and both parties introduced photographs for the court to consider. Thus, the evidence presented at trial demonstrated that plaintiff reasonably believed the entire concrete driveway would continue to serve in the same manner as it had been for the past forty years.

2. Necessity

As with implied easements by necessity, *see infra* Section 1.B, there is a degree of necessity required in order to imply an easement by prior use. *See Smith v. Moore*, 254 N.C. 186, 190, 118 S.E.2d 436, 438 (1961). Our Courts have been markedly generous in their definition of what is "necessary" for the beneficial use of land to satisfy the element of

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2. It is undisputed that a common owner originally owned Lots 1 and 18 and the property was later severed prior to plaintiff's purchase of Lot 18. Thus, the first element of both theories of easement—implied by prior use and necessity—is not at issue.

necessity. *See*, *e.g.*, *Metts*, 149 N.C. App. at 850, 561 S.E.2d at 348–49 (holding that where an alternate road existed, but was never used, the plaintiff was still entitled to an implied easement by prior use); *McGee v. McGee*, 32 N.C. App. 726, 729, 233 S.E.2d 675, 677 (1977) (holding that where a second route was "unsuitable," the easement was reasonably necessary).

Here, competent evidence was presented by plaintiff which established the concrete driveway including the two-foot easement is reasonably necessary to plaintiff's enjoyment and use of his land. Plaintiff provided photographs and testimony for the court to consider, and specifically testified that without the access to the two feet of the concrete driveway at issue (1) plaintiff and his guests had difficulty entering and exiting his lot, (2) the restriction caused damage to the mirrors on two of his cars; (3) plaintiff does not leave his home at night because the restriction obstructs his view; (4) potential renters of the home on plaintiff's lot were dissuaded from renting the house because of the difficulty posed by the restriction in the driveway; and (5) a serviceman hired could not access plaintiff's home via the restricted driveway and was compelled to use the driveway of a neighbor.

Accordingly, the testimony, exhibits, and photographs sufficiently provided competent evidence for the trial court to find that unobstructed access to the concrete driveway was reasonably necessary, and, in turn, to find and grant an easement implied by prior use.

B. Easement by Necessity

> [A]n easement by necessity will be implied upon proof of two elements: (1) the claimed dominant parcel and the claimed servient parcel were held in common ownership which was ended by a transfer of part of the land; and (2) as a result of the land transfer, it became "necessary" for the claimant to have the easement.

Wiggins, 122 N.C. at 331, 469 S.E.2d at 577–78 (1996) (citing *Harris v. Greco*, 69 N.C. App. 739, 745, 318 S.E.2d 335, 339 (1984)).

1. Reasonable Belief

"To establish a right of way as 'necessary,' it is not required that the party thus claiming show absolute necessity. It is sufficient to show physical conditions and use which would 'reasonably lead one to believe that the grantor intended the grantee should have the right of access.' "

Id. at 331, 469 S.E.2d at 578 (quoting *Oliver v. Ernul*, 277 N.C. 591, 599, 178 S.E.2d 393, 397 (1971)).

In *Jernigan v. McLamb*, this Court held that easements by necessity are a result of the application of the presumption that whenever a party conveys property, he or she conveys whatever is necessary for the beneficial use of that property. 192 N.C. App. 523, 526, 665 S.E.2d 589, 592 (2008) (citation omitted).

Here, defendant testified that plaintiff's predecessor in interest (defendant's mother) was the only person to use the concrete driveway. Furthermore, defendant never testified that he had any need to use his mother's driveway for any purpose while she resided there. Based on defendant's testimony, it was reasonable for plaintiff to believe that his predecessor in interest conveyed the property with the right to continue to use the concrete driveway (in its entirety) for ingress and egress. Plaintiff's reasonable belief is reaffirmed by the fact that he had full use of the driveway for six years, until defendant moved the fence in 2014.

2. Essential to Use and Enjoyment

To establish an easement by necessity, the movant must show that the easement is essential to the use and enjoyment of the property. *See Oliver*, 277 N.C. at 599, 178 S.E.2d at 397 (citation omitted). When a grantee does not have "full beneficial use of their property," granting an easement by necessity is appropriate. *See Jernigan*, 192 N.C. App. at 527, 665 S.E.2d at 592 (citation omitted). In *Jernigan*, this Court granted an easement by necessity where the lack of legally enforceable access to the property at issue could have an impact on the property's value. *Id.* at 528, 665 S.E.2d at 592–93.

Here, plaintiff testified that at a certain point when he contemplated renting the house on Lot 18, potential renters were dissuaded from renting upon seeing the difficulty of entering and exiting the property via the driveway posed by the chain-link fence which fenced off two feet of the concrete driveway. Such testimony demonstrated that plaintiff's property value was negatively impacted by the obstruction of the chain-link fence erected by defendant. Therefore, sufficient evidence was provided to show that full use of the concrete driveway is essential to the plaintiff's use and enjoyment of his property.

Thus, the record reflects that competent evidence was introduced at trial to support the trial court's conclusion that plaintiff established the two elements required to obtain an easement by necessity over the concrete driveway. Accordingly, defendant's arguments as to easement implied by prior use and easement by necessity are overruled.

II

[2] Defendant contends the trial court committed reversible error when it denied his motion for new trial or for supplemental proceedings. Specifically, defendant contends that plaintiff failed to introduce competent evidence at trial for the court to determine the specific boundaries of any easement over defendant's land, and that Exhibit 1 constitutes evidence improperly submitted by plaintiff after plaintiff rested his case at trial. We disagree.

"[A]n appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982) (citations omitted).

> [W]here the grant of an easement of way does not definitely locate it, it has been consistently held that a reasonable and convenient way for all parties is thereby implied, in view of all the circumstances[.] . . . It is a settled rule that where there is no express agreement with respect to the location of a way granted but not located, the practical location and user of a reasonable way by the grantee, acquiesced in by the grantor or owner of the servient estate, sufficiently locates the way, which will be that which was intended by the grant.

Edwards v. Hill, 208 N.C. App. 178, 191, 703 S.E.2d 452, 461 (2010) (alterations in original) (quoting *Allen v. Duvall*, 311 N.C. 245, 249, 316 S.E.2d 267, 270 (1984)). "No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement . . . are sufficient to effect that purpose . . . . The instrument should describe with reasonable certainty the easement created and the dominant and servient tenements." *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 543 (1953) (citation omitted).

With regard to Exhibit 1 and defendant's contention that the description of the easement was ambiguous, the trial court made the following relevant findings of fact and conclusions of law:

> 10. Defendant further contends in his Motion that Plaintiff's "Exhibit 1," which is a recent survey of the property at issue, was admitted after the hearing and considered by this Court after the Plaintiff closed his case in chief.

11. However, at the conclusion of the trial in February 2015, this Court orally granted the Plaintiff's request for an easement without consideration or regard to the more recent survey as it did not exist.

12. Contrary to Defendant's allegations, this Court did not consider the recent survey, which had been attached to the Proposed Order and titled Plaintiff's "Exhibit 1," in its original oral ruling. This Court had no need to consider additional evidence or the recent survey as the other evidence presented by the Plaintiff was deemed sufficient for orally the [sic] granting of Plaintiff's request at the conclusion of the February 2015 hearing.

13. Furthermore, a similar survey to what was provided by Plaintiff in the 2015 survey had already been received into evidence during the February 2015 trial. This was not new information to the Court. It was virtually identical to what had been admitted during trial.

. . .

18. During the trial, Defendant introduced as his "Exhibit 1" a survey of the property that had been conducted in 1989. The survey clearly depicted the two feet portion of the current driveway as being part of Defendant's property. And Defendant testified to the same.

. . .

22. This evidence of where the property at issue was located was clear and unambiguous during the trial. And neither party objected to the introduction or admissibility of the Defendant's survey.

23. Defendant never questioned the location or description of the property at issue. He introduced the survey which clearly identified the portion of the property at issue. And, in his testimony, he detailed the exact location of the property.

. . .

33. Exhibit 1, which is the recent survey attached to the Order entered in March 2015, was provided for illustrative purposes only. It is not additional evidence that has been or was considered by this Court.

34. The description of the property provided by the parties at trial and in the March 2015 Order at issue was/is sufficient. And the description of the easement is sufficiently certain to permit with [sic] identification of the location of the easement with reasonable certainty.

. . .

CONCLUSIONS OF LAW

. . .

6. In easements, as in deeds generally, the intention of the parties is determined by a fair interpretation of the grant. 17 Am.Jur., Easements, Sec. 25. The grant of the easement in the case at bar can be fairly interpreted without confusion or ambiguity.

. . .

11. The description of the property listed in Order dated March 30, 2015 was sufficient to meet the legal criteria for identification of the easement.

12. There is no uncertainty, ambiguity nor vagueness in the description of the easement at issue.

13. The description of the easement is sufficiently certain to permit with [sic] identification and location of the easement with reasonable certainty.

14. No additional evidence was received by the undersigned after the Plaintiff closed his case and no such evidence was considered in any of the undersigned's rulings in this matter.

Courts have described easements with terminology reflecting the expectations of the grantor and grantee, without formal descriptions such as metes and bounds. *See Metts*, 149 N.C. App. at 849, 561 S.E.2d at 348. In *Metts*, this Court found the trial court properly identified an easement by prior use despite the defendants' contention that there could not be an implied easement because there was no attempt to locate the easement (a roadway) on the ground of the defendants' property. *Id.* at 849, 561 S.E.2d at 349. Because the trial court "found that the roadway was plainly visible and appeared on the tax map," and "[t]he witnesses testified to the roadway's existence and use by affidavit[,]" this Court held this was legally sufficient to identify the easement at issue. *Id.* at 850, 561 S.E.2d at 349 (citation omitted).

Here, the trial court's description of the easement in the March 2015 judgment met the criteria for finding an easement implied by prior use and by necessity. The March 2015 order properly identified plaintiff's easement as "an easement over the portion of the concrete driveway located on Lot 1." This conclusion reflects the trial court's finding that it was the expectation and intention of the predecessor-in-interest of plaintiff and defendant that the concrete driveway located on Lot 18 provide means of ingress and egress for the owner or occupant of Lot 18. Furthermore, the identification of the easement located over the "concrete paved driveway that is physically located on the Defendant's property" described a right of way that was "plainly visible," *see id.*, and reflected plaintiff's reasonable expectation that he would be able to continue to use this right of way without encumbrances. Accordingly, the trial court correctly denied defendant's motion for new trial as the description of the easement is not ambiguous.

Defendant also contends the trial court erroneously relied on plaintiff's Exhibit 1 in finding plaintiff was entitled to an easement. However, this contention is without merit. At the conclusion of the February 2015 trial, the trial court orally granted plaintiff's request for an easement, without consideration of plaintiff's Exhibit 1, as it was not presented to the trial court at that time. Moreover, the information provided by Exhibit 1 was not new or additional; it provided an almost identical survey to the one put into evidence during the trial. Accordingly, defendant's argument is overruled. The judgment of the trial court is

AFFIRMED.

Judges CALABRIA and STEPHENS concur.

DAVID WICHNOSKI, O.D., P.A. v. PIEDMONT FIRE PROT. SYS., LLC

[251 N.C. App. 385 (2016)]

DAVID WICHNOSKI, O.D., P.A. D/B/A SPECTRUM EYE CARE AND WICHNOSKI RE, LLC, PLAINTIFFS

v.

PIEDMONT FIRE PROTECTION SYSTEMS, LLC, AND SHIPP'S FIRE EXTINGUISHER SALES AND SERVICES, INC., DEFENDANTS

AND

SHIPP'S FIRE EXTINGUISHER SALES AND SERVICES, INC., THIRD-PARTY PLAINTIFF

v.

ANDUJAR CONSTRUCTION, INC., COLONY INVESTORS, LLC, CUSTOM SECURITY, INC., AND ELECTRICAL CONTRACTING SERVICES, INC., THIRD-PARTY DEFENDANTS

No. COA16-759

Filed 30 December 2016

Civil Procedure—damage to property—partial recovery from insurance company—motion to intervene

The trial court erred by holding that Main Street America Assurance Company (Main Street), an insurance company, could not intervene by right in an action arising from water freezing and causing flooding in a commercial condominium. Although plaintiffs opposed intervention by the insurance company because they had not been reimbursed fully for their losses, the right to intervene under N.C.G.S. § 1A-1, Rule 24(a)(2) does not turn on partial or full subrogation, but on whether the insurer had a direct and immediate interest in plaintiffs' action against third-party defendants, as well whether the insurer's ability to protect its interest could be impaired or impeded by plaintiffs' action and whether its interest is adequately represented by plaintiffs.

Appeal by Proposed Intervenor from order entered 9 June 2016 by Judge Forrest D. Bridges in Superior Court, Mecklenburg County. Heard in the Court of Appeals 28 November 2016.

Smith Moore Leatherwood, LLP, by John W. Reis, for Proposed Intervenor-Appellant, Main Street America Assurance Company.

Goldstein Law PLLC, by Jay M. Goldstein; and Saltz Matkov P.C., by Albert S. Nalibotsky, for Plaintiffs-Appellees.

McGEE, Chief Judge.

I. Background

David Wichnoski, O.D., P.A., d/b/a Spectrum Eye Care ("Spectrum") (together with Wichnoski RE, LLC, "Plaintiffs"), is a professional corporation engaged in the practice of optometry in Unit 105 ("the unit" or "Plaintiffs' unit") of a commercial condominium building ("the condominium") located at 7615 Colony Road, in Charlotte. Wichnoski RE LLC owns the unit in which Spectrum conducts its optometry practice. Defendant Piedmont Fire Protection Systems, LLC, ("Piedmont") installed the fire sprinkler system in the condominium. Defendant Shipp's Fire Extinguisher Sales and Services, Inc., ("Shipp's") conducted professional inspection(s) on the condominium's fire sprinkler system.

On or prior to 8 January 2014, freezing water pooled in a dry-pipe section of the condominium's fire sprinkler system and caused a pipe fitting to crack. As a result of the fractured pipe fitting, water flooded several units in the building, including Plaintiffs' unit, and caused property damage.

At the time of the water loss incident ("the incident"), Plaintiffs maintained an insurance policy ("the policy") with Main Street America Assurance Company ("Main Street"). The policy contained different policy limits for individual categories of coverage. After the incident, Plaintiffs made a claim under the policy for structural damages, damages to contents, loss of income, and damages to computer equipment and data. In total, Main Street paid Plaintiffs approximately $980,440.48 under the policy.

Plaintiffs filed a lawsuit against Piedmont and Shipp's (collectively, "Defendants") on or about 11 September 2015, alleging Defendants' negligence was the direct and proximate cause of Plaintiffs' damages from the water loss incident. Plaintiffs' complaint did not mention Main Street or its payments to Plaintiffs under the policy.[1] Main Street filed a motion to intervene in the lawsuit on 29 April 2016 and attached a complaint for damages, naming all then-existing defendants. In its motion to intervene, Main Street contended that "by asserting direct claims against the third parties[,] this proposed Intervenor's Complaint would allow [Main Street] to pursue its subrogation rights against all defendants and third-party defendants in this case[.]" Main Street alleged it was entitled to both

1. Plaintiffs named Piedmont and Shipp's as the only defendants. Four additional third-party defendants were subsequently added to the action by Shipp's Amended Answer: Andujar Construction, Inc.; Colony Investors, LLC; Custom Security, Inc.; and Electrical Contracting Services, Inc.

mandatory and permissive intervention under North Carolina Rule of Civil Procedure 24 ("Rule 24"). *See* N.C. Gen. Stat. § 1A-1, Rule 24 (2015).

Plaintiffs filed a motion opposing Main Street's motion to intervene on 17 May 2016. Plaintiffs alleged that

> [s]ince Main Street only partially reimbursed its policyholders for their losses, Main Street is not entitled to assert a claim in its own name. Main Street is neither a real party in interest in this action nor a "necessary party" under North Carolina law. . . . The Court should [also] exercise its discretion [by] denying Main Street's motion, as its presence in the lawsuit will prejudice [Plaintiffs'] interests.

Plaintiffs provided only one example of "partial reimbursement" from Main Street. Plaintiffs noted that, although they claimed damages to business personal property of approximately $450,000.00, Main Street paid only $320,000.00 on that claim, which was the policy limit for that specific category of damages.

The motion to intervene was heard on 23 May 2016. Main Street first argued it had a right to intervene in the action under N.C.G.S. § 1A-1, Rule 24(a)(2), which entitles a party to intervene if

> 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.

Main Street argued its payment to Plaintiffs, totaling more than $980,000.00, created a "direct and appreciable interest" in the transaction at issue in the lawsuit. Plaintiffs acknowledged receiving total payments in the amount alleged by Main Street, but nevertheless maintained that they were only partially compensated for their claims because "at a minimum[,] there was an uninsured loss as to the personal property portion of [Plaintiffs'] lawsuit."

Main Street further argued that its participation in the lawsuit was necessary to protect its own interests because, "[a]bsent intervention, [a subrogated] insurer is to a large extent, at the mercy of its insured's efforts and success in recovering from the responsible third-party." According to Main Street, Plaintiffs could not adequately represent Main Street's interest in recouping its payments, because Plaintiffs claimed an *uninsured* loss of only $130,000.00. Main Street contended this could

serve as a "disincentive [for Plaintiffs] to use their resources to seek damages beyond what was necessary to make themselves whole." Main Street also argued it should be permitted to intervene as a matter of discretion under N.C. Gen. Stat. § 1A-1, Rule 24(b)(2), because its intervention in the action would not "unduly delay or prejudice the adjudication of the rights of the original parties."

Plaintiffs cited *Hardware Dealers Mutual Fire Ins. Co. v. Sheek*, 272 N.C. 484, 158 S.E.2d 635 (1968), in support of their argument that, under current North Carolina law, "[an] insurer has no . . . legal right to bring an action [against third-party tortfeasors] unless they have fully compensated their insured. . . . The insured has the sole right to bring the action and will hold in trust any monies recovered that are ultimately owed to the insurer." Despite Main Street's total payments to Plaintiffs, Plaintiffs noted that "certain [individual] components of [their] loss" were subject to policy coverage limits. In particular, Plaintiffs' policy covered damages to contents (*i.e.*, personal property) up to $320,000.00. Plaintiffs submitted a claim for personal property loss of $450,000.00. According to Plaintiffs, because Main Street paid the policy limit with respect to that particular line item, rather than the full amount of Plaintiffs' claim, Plaintiffs were only "partially reimbursed" for their total loss. Plaintiffs argued that, notwithstanding N.C.G.S. § 1A-1, Rule 24, an insurer "do[es] not have a legal right to intervene in a case where the insured has not been made whole[.]" When the trial court asked why Plaintiffs opposed intervention by Main Street, counsel for Plaintiffs submitted that "having the insurance company as a plaintiff, can have . . . a negative bearing on the fact-finder. . . . Well, if . . . the jury knows that the insured has already been paid, it's less likely that they'll – they'll even find in the insured's favor."

The trial court agreed with Plaintiffs, finding that Main Street had not paid "the full extent" of Plaintiffs' damages and that

> under established law in North Carolina, . . . the plaintiff/property owner and insured still retains the exclusive right to file the lawsuit for the recovery of the damages and to the extent that the insurance carrier has an interest in that . . . recovery by way of subrogation. . . . [T]he plaintiff/property owner, insure[d,] acts as a trustee for that recovery for the benefit of the insurance carrier to the extent of the interest of that party in any recovery and . . . in carrying out that role as trustee, . . . there is adequate protection for the interest of the insurance carrier.

The court concluded that "this is a situation that [does not] allow[] for . . . intervention as a matter of right[.]" It further found that permitting discretionary intervention by Main Street would "result in undue delay."

Main Street's motion to intervene was denied by order filed 9 June 2016. The trial court deemed *Hardware Dealers* wholly dispositive on the issue of intervention of right, finding that

> where a subrogating insurance carrier has only partially reimbursed its insured, the insured has the sole right to sue the wrongdoer. Here Main Street reimbursed [P]laintiffs, it's [sic] insured, for only a portion of their losses. Therefore, Plaintiffs have the sole right to sue to recover for the damages [allegedly] caused by the defendants.

The court further found that

> [a]llowing [discretionary] intervention at this time [would] refocus the primary direction of the litigation . . . and cause delay by requiring the amendment of pleadings. . . . The addition of the subrogating insurer as a party plaintiff may also prejudice [Plaintiffs'] rights by unnecessarily injecting insurance into [Plaintiffs'] claims against the defendants.

Main Street appeals.

II. Standard of Review

A trial court's decision regarding intervention of right is reviewable *de novo*. *Harvey Fertilizer & Gas Co. v. Pitt Cty.*, 153 N.C. App. 81, 86, 568 S.E.2d 923, 926 (2002); *see also Hill v. Hill*, 121 N.C. App. 510, 511, 466 S.E.2d 322, 323 (1996) ("Intervention of right is an absolute right and denial of that right is reversible error, regardless of the trial court's findings."). "Under a *de novo* review, [this] [C]ourt considers the matter anew and freely substitutes its own judgment for that of the trial court." *Anderson v. Seascape at Holden Plantation, LLC*, 232 N.C. App. 1, 8, 753 S.E.2d 691, 697 (2014) (citation and quotation marks omitted) (alterations in original). A trial court's decisions regarding permissive intervention are reviewed for abuse of discretion only. *Harvey Fertilizer*, 153 N.C. App. at 86, 568 S.E.2d at 926. "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." *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997) (citation and internal quotation marks omitted).

III. Intervention of Right

1. N.C. Gen. Stat. § 1A-1, Rule 24(a)(2)

N.C. Gen. Stat. § 1A-1, Rule 24(a)(2), provides that "anyone shall be permitted to intervene in an action:"

> 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.

Pursuant to this provision, the party seeking to intervene must 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). Main Street alleges it has a right to intervene in Plaintiffs' lawsuit under Rule 24(a)(2) because it meets all three of the above requirements.

2. *Hardware Dealers*

Plaintiffs rely exclusively on *Hardware Dealers* in support of their argument that, because Main Street only "partially reimbursed" Plaintiffs for their losses related to the 8 January 2014 incident, Main Street has no right to intervene in Plaintiffs' action(s) against third-party tortfeasors for damages arising from that incident. The trial court agreed with Plaintiffs, finding that under *Hardware Dealers*, "[i]t is well-established law in North Carolina . . . that where a subrogating insurance carrier has only partially reimbursed its insured, the insured has the sole right to sue the wrongdoer." This was the only basis for the trial court's conclusion of law that Main Street was not entitled to intervene under Rule 24(a)(2). Importantly, we note that *Hardware Dealers* did not involve interpretation or application of N.C.G.S. § 1A-1, Rule 24, which had not yet been enacted when that case was pending before the trial court.[2] As discussed below, we find Plaintiffs' reliance on *Hardware Dealers* misplaced.

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2. N.C.G.S. § 1A-1, Rule 24, was ratified by the North Carolina General Assembly on 27 June 1967. Although the Supreme Court's decision in *Hardware Dealers* was filed on 12 January 1968, the trial court had dismissed the plaintiff's action on or about 24 April 1967, approximately two months before N.C.G.S. § 1A-1, Rule 24, was ratified. The rule was not raised or discussed in our Supreme Court's opinion.

In *Hardware Dealers*, the plaintiff-insurer brought suit against an alleged tortfeasor to recover the amount the plaintiff had paid to its insured, a furniture and hardware store, for damages caused by a fire. 272 N.C. at 484, 158 S.E.2d at 636. The defendant subsequently filed an affidavit in which an officer of the insured stated that the business's total losses exceeded the full amount of its insurance coverage by approximately $2,000.00.[3] The defendant argued that "therefore, . . . any action against this defendant for the damages alleged in the complaint [could] be maintained only by the insured[.]" *Id.* at 485, 158 S.E.2d at 636. Our Supreme Court agreed with the defendant, holding that

> when an insurer of property pays the insured's loss, he is subrogated to the extent of the payment to [the] insured's claim against the wrongdoer who caused the damage. If the sum paid covers the entire loss, the insurer is subrogated to the entire cause of action and may sue the wrongdoer without making the insured a party. When the insurer pays only a part of the loss, the insured must bring the suit for the entire loss in his own name. He becomes a trustee for the insurer to the extent of the amount the insurer has paid. If the insured refuses to bring the suit, the insurer may sue in its own name, for the amount it has paid, and make the insured a party defendant.

Id. at 486, 158 S.E.2d at 637. The Court concluded that the plaintiff-insurer was not the real party in interest, and that "[because] defendants have the right to demand that they be sued by the real party in interest and by none other[,]" this provided a complete defense to the plaintiff's suit.[4] *Id.* at 487, 158 S.E.2d at 638.

Main Street contends *Hardware Dealers* was implicitly overruled by *Colon v. Bailey*, 316 N.C. 190, 340 S.E.2d 478 (1986) (*per curiam*).

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3. The plaintiff did not challenge the defendant's contention that the insured's loss exceeded the amount it had paid to the insured under the insurance policy. Indeed, in a written motion to amend its complaint by making the insured a party, "the plaintiff [affirmatively] allege[d] the insured's loss exceeded the amount of plaintiff's coverage. When the [trial c]ourt ascertained this fact in the pre-trial conference, the [c]ourt concluded the plaintiff could not maintain the action." 272 N.C. at 487, 158 S.E.2d at 638.

4. The Court also held the plaintiff-insurer "had the legal right to demand that the insured assert its claim against the wrongdoer and to hold in trust for it so much of the recovery as was required to reimburse it for the amount paid. In the event the insured refused to prosecute its claim, the insurer could sue both the insured and the wrongdoer." 272 N.C. at 487, 158 S.E.2d at 638.

In *Colon*, the plaintiffs owned a restaurant that was destroyed by fire. The plaintiffs had an insurance policy with Great American Insurance Company ("Insurance Company") insuring the building in the event of fire loss and a separate policy with a different insurer ("the other insurer") insuring the building's contents. Insurance Company paid the plaintiffs the entire amount of their policy, and the plaintiffs also received payments from the other insurer. The plaintiffs subsequently signed a mutual release agreement with the defendants, who were lessees of plaintiffs' restaurant, in which the plaintiffs and defendants agreed to divide the proceeds recovered from the other insurer and further "released and discharged each other 'from all claims, suits, causes of action and charges' arising out of [the] defendants' lease of [the] plaintiffs' property." *Colon v. Bailey*, 76 N.C. App. 491, 492, 333 S.E.2d 505, 505-06 (1985).[5]

Several months after signing this agreement, the plaintiffs sued the defendants for breach of their lease agreement and negligent maintenance of equipment. Insurance Company sought to intervene, asserting "subrogation to the rights of [the] plaintiffs to the extent it had paid on [the] plaintiffs' policy." *Id.* at 492, 333 S.E.2d at 506. The defendants raised as a defense the mutual release agreement, which they contended barred all claims by the plaintiffs. The trial court denied Insurance Company's motion to intervene and entered summary judgment for the defendants. *Id.*

On appeal, the plaintiffs and Insurance Company argued that there was a genuine issue of fact as to whether the mutual release agreement released all claims or merely those claims related to the proceeds received from the other insurer. *Id.* at 493, 333 S.E.2d at 506. Insurance Company also contended it was entitled to intervention of right under N.C.G.S. § 1A-1, Rule 24(a)(2). *Id.* at 494, 333 S.E.2d at 507. This Court held that the trial court correctly interpreted the parties' mutual release agreement as a bar to the plaintiffs' suit against the defendants. We further concluded that, because summary judgment was proper, there was no pending "action" in which Insurance Company could intervene. Thus, N.C.G.S. § 1A-1, Rule 24(a)(2), which permits a party to intervene "in an action," did not apply. *Id.*

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5. This citation is to the Court of Appeals opinion, which contained the operative facts and procedural background of the case. Our Supreme Court reversed in a one-sentence, *per curiam* decision.

The dissenting judge maintained that the trial court erred in denying Insurance Company's motion to intervene:

> When [Insurance Company] moved to intervene the action was still pending, . . . and since [Insurance Company's] motion shows that it has a substantial interest in the transaction which is the subject of the suit, is so situated that the disposition of the action will impair its ability to protect that interest and its interest is not being adequately represented by [the] plaintiffs, it ha[d] the absolute right to intervene under the terms of Rule 24(a)(2).

Id. at 494-95, 333 S.E.2d at 507. Our Supreme Court subsequently reversed the decision of the Court of Appeals, "[f]or the reasons stated in the dissenting opinion[.]" *Colon v. Bailey*, 316 N.C. 190, 340 S.E.2d 478 (1986) (*per curiam*). We now consider whether the enactment of N.C.G.S. § 1A-1, Rule 24(a)(2), and the Supreme Court's *per curiam* reversal in *Colon*, modified or overruled *Hardware Dealers* with respect to partial subrogation claims.

We find *Hardware Dealers* inapposite to a discussion of mandatory intervention under N.C.G.S. § 1A-1, Rule 24(a)(2). The question at issue in *Hardware Dealers* – whether, at common law, an insurer could initiate an action against a tortfeasor to recover amounts paid to its insured – is not presently before us. Instead, the question is whether Rule 24(a)(2) entitles Main Street to intervene in an action already instituted by its insured. Nothing in the plain language of N.C.G.S. § 1A-1, Rule 24(a)(2), which was not yet in effect when *Hardware Dealers* was pending before the trial court, and which was not discussed, interpreted, or applied in the Supreme Court's decision in that case, suggests that the rule's applicability turns upon a proposed intervenor's status as partially or fully subrogated to the rights of the claimant. In the present case, because the trial court erroneously deemed *Hardware Dealers* dispositive on the issue of intervention of right, it failed to consider whether Main Street met the actual requirements of N.C.G.S. § 1A-1, Rule 24(a)(2). We do so now.

3. Interest Relating to the Property or Transaction Which is the Subject of the Action

N.C.G.S. § 1A-1, Rule 24(a)(2), first requires that a party seeking to intervene of right must "claim[] an interest relating to the property or transaction which is the subject of the action[.]" Our Supreme Court has held that

> where no other statute confers an unconditional right to intervene, the interest of a third party seeking to intervene as a matter of right under N.C.G.S. § 1A-1, Rule 24(a) must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment. . . . One whose interest in the matter in litigation is not a direct or substantial interest, but is an *indirect*, inconsequential, *or* a *contingent* one cannot claim the right to defend.

Virmani v. Presbyterian Health Services Corp., 350 N.C. 449, 459, 515 S.E.2d 675, 682-83 (1999) (citation and internal quotation marks omitted) (emphases in original). Thus, the focus under N.C.G.S. § 1A-1, Rule 24(a)(2), is not whether a proposed intervenor's interest is "partial" or "total," as Plaintiffs assert, but whether it is "direct and immediate" as opposed to "indirect, inconsequential, or . . . contingent[.]" Our appellate courts have recognized, even under the common law rule articulated in *Hardware Dealers*, that a partially subrogated insurer has a "clear . . . interest in the subject matter of [a] suit" brought by its insured. *See S & N Freight Line, Inc. v. Bundy Truck Lines, Inc.*, 3 N.C. App. 1, 6, 164 S.E.2d 89, 92 (1968); *see also Burgess v. Trevathan*, 236 N.C. 157, 161, 72 S.E.2d 231, 234 (1952) ("Since an insurance company which pays the insured for *a part of the loss* is entitled to share to the extent of its payment in the proceeds of the judgment in the action brought by the insured against the tort-feasor [sic] to recover the total amount of the loss, *it has a direct and appreciable interest in the subject matter of the action*[.]" (emphases added)). In the present case, the trial court "agree[d] . . . that [Main Street's] claim is one in which the insurance carrier has an interest[.]"

In *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 362 S.E.2d 812 (1987), this Court characterized subrogation as "an equitable remedy in which one steps into the place of another and takes over *the right to claim monetary damages* to the extent that the other could have[.]" *Id.*, 88 N.C. App. at 11, 362 S.E.2d at 818 (emphasis added). Thus, regardless of whether an insurer is partially or fully subrogated, the fact of subrogation "vests an equitable right to reimbursement in the insurer[.]" *Id.* at 12, 362 S.E.2d at 819. We conclude this "right to reimbursement" is an "interest" for purposes of N.C.G.S. § 1A-1, Rule 24(a)(2). This is consistent with *Colon*, in which the proposed intervenor was found to have a "substantial interest" in the suit, under Rule 24(a)(2), where it had paid "the full amount of [its insured's] *policy*[;]" *i.e.*, not necessarily the full amount of the insured's *loss*. *Colon*, 76 N.C. App. at 492, 333 S.E.2d at 505 (emphasis added).

This is also consistent with the rule followed in the federal courts, as announced by the United States Supreme Court in *U.S. v. Aetna Cas. & S. Co.*, 338 U.S. 366, 94 L. Ed. 171 (1949). In that case, the Court held:

> In cases of partial subrogation the question arises whether suit may be brought by the insurer alone, whether suit must be brought in the name of the insured for his own use and for the use of the insurance company, or whether all parties in interest must join in the action. Under the common-law practice rights acquired by subrogation could be enforced in an action at law only in the name of the insured to the insurer's use. [Our Court has] characterized this rule as "a vestige of the common law's reluctance to admit that a chose in action may be assigned, [which] is today but a formality which has been widely abolished by legislation." . . . *No reason appears why such a practice should now be required in cases of partial subrogation, since both insured and insurer "own" portions of the substantive right and should appear in the litigation in their own names.*

Id., 338 U.S. at 381, 94 L. Ed. at 185 (internal citations and quotation marks omitted) (emphasis added); *see also Virginia Electric & Power Co. v. Carolina Peanut Co.*, 186 F.2d 816, 820 (4th Cir. 1951) (holding insurance company should have been allowed to intervene in action by its insured to recover for damages sustained in a fire, because "it is elementary that in such a case an insurance company which has paid *a part of the loss* is entitled to a *pro rata* portion of any amount that may be recovered, and is entitled to join in the suit for the recovery of damages." (emphases added)); *Aikens v. Ludlum*, 113 N.C. App. 823, 824, 440 S.E.2d 319, 320 (1994) (holding that where "North Carolina decisions addressing [a rule of state civil procedure are] insufficient to answer [a] question, we are guided by federal law [if] the North Carolina version of [the rule] is virtually identical to its United States counterpart.").[6]

We conclude that the right to intervene under N.C.G.S. § 1A-1, Rule 24(a)(2), does not turn upon whether a proposed intervenor-insurer has been partially or fully subrogated to the claim(s) of its insured. Plaintiffs' interpretation would render Rule 24(a)(2), which refers only to "an interest," a nullity as applied to partially subrogated insurers. *See Quick v. Insurance Co.*, 287 N.C. 47, 55, 213 S.E.2d 563, 568 (1975)

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6. Rule 24(a)(2) of the Federal Rules of Civil Procedure is "virtually identical" to N.C.R. Civ. P. 24(a)(2). *See* Fed. R. Civ. P. 24(a)(2).

("There is a doctrine that if legislation undertakes to provide for the regulation of human conduct in respect to a specific matter or thing already covered by the common law, and parts of which are omitted from the statute, such omissions must be taken generally as evidences [sic] of the legislative intent to repeal or abrogate the same." (citation and quotation marks omitted)); *Moore v. Nationwide Mut. Ins. Co.*, 191 N.C. App. 106, 109, 664 S.E.2d 326, 328 (2008) (" 'When the legislature acts, it is always presumed that it acts with full knowledge of prior and existing law[.]' " (citation omitted)). Whether an insurer has paid part or all of an insured's loss, it has acquired "an interest" – *i.e.*, recoupment of payment(s) made to the insured – in a lawsuit by the insured to recover damages arising out of the same event or transaction that triggered the insurance payment(s).

In its motion to intervene, Main Street alleged its insurance payments to Plaintiffs "for damages to the structure, contents, loss of income, and computer equipment and data . . . totaled an amount in excess of $900,000." Plaintiffs concede they received more than $980,000.00 from Main Street. *See Councill v. Town of Boone Bd. of Adjust.*, 146 N.C. App. 103, 108, 551 S.E.2d 907, 910 (2001) (holding that "undisputed allegations [were] sufficient to establish that appellants [were] interested parties" under N.C.G.S. § 1A-1, Rule 24(a)(2)). Main Street thus satisfied the first requirement set forth in N.C.G.S. § 1A-1, Rule 24(a)(2), by demonstrating a direct and immediate interest in Plaintiffs' action against the third-party defendants. Because Main Street "claims an interest relating to the property or transaction which is the subject of [Plaintiffs'] action," the task of the trial court was to determine whether Main Street had shown a possibility of "practical impairment of the protection of that interest" and "inadequate representation of that interest by existing parties." *See Hunt v. Hunt*, ___ N.C. App. ___, ___, 784 S.E.2d 219, 223 (2016) (citation and quotation marks omitted).

4. Impair or Impede

Both the "impair or impede" and the "adequately represented" provisions of N.C.G.S. § 1A-1, Rule 24(a)(2), involve factual determinations to be made on a case-by-case basis. *See, e.g.*, *Charles Schwab & Co. v. McEntee*, 225 N.C. App. 666, 674, 739 S.E.2d 863, 868 (2013) (finding no right to intervene where proposed intervenor "ha[d] not *alleged facts* which would indicate that its interest was not adequately represented[.]" (emphasis added)); *Bailey and Assocs., Inc.*, 202 N.C. App. at 185-86, 689 S.E.2d at 583-84 (finding intervenors were entitled to intervene under Rule 24(a)(2), where facts showed numerous ways in which "they and their property would be injured" if a particular party prevailed

in the lawsuit). In the present case, the trial court made no findings with respect to Rule 24(a)(2)'s "impair or impede" prong.

The Official Comment to Rule 24 explicitly emphasizes that, under subsection 24(a)(2), "the harm to the intervenor's interest is to be considered from a 'practical' standpoint, rather than technically." *See* Official Comment to N.C.G.S. § 1A-1, Rule 24. Importantly, N.C.G.S. § 1A-1, Rule 24(a)(2), does not require that disposition of an action may "destroy" or "eliminate" a proposed intervenor's ability to protect its interest, but only that it "*may* as a *practical matter* impair or impede [the movant's] ability to protect its interest." Thus, it is not necessary that denying intervention would foreclose any possibility of recovery by the insurer. For instance, "even under subrogation law, the 'claim-splitting' rule does not in every case necessarily bar a *second* suit by a partially subrogated insurer on the same facts giving rise to a prior suit by its insured."[7] *Slurry*, 88 N.C. App. at 15, 362 S.E.2d at 821 (emphasis in original). Additionally, "[a] tort-feasor [sic] may not defeat an insurance carrier's subrogation rights when he has knowledge of the subrogated claim and thereafter secures a consent judgment or release from the injured or damaged party." *State Farm Mutual Auto. Ins. Co. v. Blackwelder*, 103 N.C. App. 656, 658, 406 S.E.2d 301, 302 (1991) (citation omitted); *cf. Johnston County v. McCormick*, 65 N.C. App. 63, 67, 308 S.E.2d 872, 874 (1983) ("The general rule in insurance subrogation cases . . . is that payment by a tort-feasor [sic] of an injured party's claim *without notice of a subrogee's interest* is a complete defense to a subrogee's claim against the tort-feasor." (emphasis added)). Because all third-party defendants[8] in the present case know of Main Street's subrogation rights as a result of Main Street's efforts to intervene in the action, a settlement between Plaintiffs and some or all of the defendants would not necessarily preclude Main Street from asserting its subrogation rights against the defendants. However, requiring an insurer to enforce its subrogation rights through separate lawsuits may nevertheless be an

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7. "[T]he common law rule against claim-splitting is based on the principle that all damages incurred as the result of a single wrong must be recovered in one lawsuit." *Bockweg v. Anderson*, 333 N.C. 486, 492, 428 S.E.2d 157, 161 (1993) (citation omitted) (emphasis in original). "Under North Carolina law, a plaintiff is entitled to one compensation for all loss and damage . . . which were the certain and proximate results of the single wrong or breach of duty, and the demand cannot be split and several actions maintained for the separate items of damage." *Harris-Teeter Super Markets v. Watts*, 97 N.C. App. 101, 104, 387 S.E.2d 203, 205 (1990) (citation and internal quotation marks omitted).

8. *See supra* n.1.

impractical method of protecting the insurer's interest. *See, e.g.*, *New v. Service Co.*, 270 N.C. 137, 139, 153 S.E.2d 870, 873 (1967) ("The purpose of making the insurer a party [to the insured's suit against an alleged tortfeasor] is to determine *and to protect*, in one action, the rights of all who may have an interest in the litigation." (emphasis in original)); *Parrish v. Grain Dealers Mutual Ins. Co.*, 90 N.C. App. 646, 649, 369 S.E.2d 644, 646 (1988) (Greene, J., concurring) ("In many instances, pursuit of a subrogation claim against an underinsured tortfeasor is futile because of the financial status of the tortfeasor.").

We find that Main Street's ability to protect its interest may be impaired or impeded by the disposition of Plaintiffs' action. In its motion to intervene, Main Street contended that "[w]ithout the addition of [Main Street] in the case, . . . Plaintiffs and their counsel [could] file a voluntary dismissal or settle out with one or more of the defendants at any time[.]" Absent intervention, an insurer's ability to recover directly from its policyholder is constrained by the insured's level of success in recovering from the third parties. If Plaintiffs' ultimate recovery is insufficient to fully satisfy Main Street's subrogation rights, Main Street will have to seek recovery from numerous third parties, with uncertain prospects of success. *See State ex rel. Crews v. Parker*, 319 N.C. 354, 360, 354 S.E.2d 501, 505 (1987) (finding proposed intervenor's interest in reimbursement would "[c]learly . . . be impaired by any judgment . . . which failed to take her claim for reimbursement into account, regardless of whether she would be bound by that judgment. She would, as a practical matter, suffer the expense and inconvenience of bringing a separate suit against [the] defendant."); *see also Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991) (finding intervenors' ability to protect their interest would be impaired or impeded by disposition of action because "[i]f [plaintiff] prevail[ed] . . . , [the intervenors] would have to satisfy their judgment from other assets of the insureds and the existence and amount of such assets [were] questionable."); *Alford v. Davis*, 131 N.C. App. 214, 218, 505 S.E.2d 917, 920 (1998) (citing *Teague* as providing "the current approach to interpreting [N.C.]G.S. § 1A-1, Rule 24[.]").

5. Adequate Representation

We also find Main Street has satisfied Rule 24(a)(2)'s third requirement by showing its interest is not adequately represented by Plaintiffs.

While the trial court did find that "there [was] adequate protection for the interest of the insurance carrier," it did so based on the common law rationale followed in *Hardware Dealers*, that "the plaintiff/property owner . . . acts as a trustee . . . for the benefit of the [partially

subrogated] insurance carrier to the extent of the interest of that party in any recovery[.]" The mere fact that "the law imposes the duty upon [a] policyholder to act as the trustee for the insurer to the extent of the amounts paid by the insurer" does not necessarily ensure the policyholder will (or can) "adequately represent" a subrogated insurer's interest as contemplated by N.C.G.S. § 1A-1, Rule 24(a)(2). In the present case, the trial court recognized the inherent disadvantage to Main Street, finding Plaintiffs would hold "*any funds they recover* from the defendants in trust for themselves and Main Street, the subrogating insurer." Plaintiffs allege an uninsured loss of $130,000.00. Main Street, by contrast, has a vested interest of nearly one million dollars. This discrepancy alone suggests Plaintiffs cannot adequately represent Main Street's interest. Our Supreme Court has held that an insured must account to its insurer only "[w]hen the insured obtains *full satisfaction* from the wrongdoer[.]" *Insurance Co. v. R.R.*, 165 N.C. 143, 147, 80 S.E. 1069, 1072 (1914) (emphasis added). Main Street can recover directly from Plaintiffs only to the extent that Plaintiffs' ultimate recovery exceeds the amount of Plaintiffs' uncompensated losses. *See Powell v. Water Co.*, 171 N.C. 345, 352, 88 S.E. 426, 430 (1916) (noting that, where insured brings suit against tortfeasor for entire damages, insured "holds recovery *first to make good his own loss*, and then in trust for the insurer[.]" (emphasis added)).

As Main Street observed at the hearing on its motion to intervene, Plaintiffs may have little incentive "to use their resources to seek damages beyond what [is] necessary to make themselves whole." This proposition does not require an assumption that Plaintiffs would act in bad faith in their efforts to recover on Main Street's behalf; it merely acknowledges that they may encounter practical limitations that Main Street's participation could alleviate. Main Street alleged it has "all the resources to pay for a fire protection engineering expert and to assist in . . . bearing [Plaintiffs'] costs." Finally, Plaintiffs' opposition to Main Street's effort to intervene indicates that, at minimum, Plaintiffs' and Main Street's interests are not entirely aligned.

In addition to the above considerations, we note that "[o]ur courts favor the swift and efficient resolution of disputes." *Crews*, 319 N.C. at 360, 354 S.E.2d at 505. In *Crews*, the State and the intervenor had concurrent interests in obtaining reimbursement of child support payments from the defendant. When the State and the defendant submitted a proposed settlement to the trial court, the other interested party moved to intervene. The trial court denied the motion and this Court affirmed. Our

Supreme Court reversed. In addition to finding that the intervenor met the requirements of N.C.G.S. § 1A-1, Rule 24(a)(2), the Court held that

> [a]llowing the [S]tate to settle [the] defendant's obligation to pay public assistance arrearages without providing [the intervenor] an opportunity to litigate in this action her own claim for arrearages inevitably prolongs and complicates the litigation process. This is precisely the type of situation contemplated by the rule for intervention of right.

Id. at 360-61, 354 S.E.2d at 505; *see also Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co.*, 141 N.C. App. 569, 578, 541 S.E.2d 157, 163 (2000) ("The interests of judicial economy and efficiency weigh in favor of suits that will settle all of the issues in the underlying controversy."). We find this reasoning instructive in the present case.

IV. Conclusion

For the foregoing reasons, we reverse the trial court's order and hold that Main Street is entitled to intervene in Plaintiffs' lawsuit pursuant to N.C.G.S. § 1A-1, Rule 24(a)(2). Because we hold that the trial court's order must be reversed, we do not reach Main Street's additional argument regarding discretionary intervention under N.C.G.S. § 1A-1, Rule 24(b)(2). The case is remanded to the trial court with instructions to enter an order allowing intervention by Main Street.

REVERSED AND REMANDED.

Judges BRYANT and ENOCHS concur.

FINKS v. MIDDLETON

[251 N.C. App. 401 (2016)]

MARSHELLE MIDDLETON FINKS, PLAINTIFF
v.
COLIN HUMPHREY MIDDLETON (INDIVIDUALLY); AND COLIN HUMPHREY MIDDLETON, EXECUTOR OF THE ESTATE OF SYLVIA HUMPRHEY MIDDLETON; COLIN HUMPRHEY MIDDLETON, TRUSTEE OF THE SYLVIA MIDDLETON REVOCABLE TRUST; AND COLIN HUMPRHEY MIDDLETON, ATTORNEY-IN-FACT FOR SYLVIA HUMPHREY MIDDLETON, DEFENDANTS

No. COA16-630

Filed 30 December 2016

1. Appeal and Error—interlocutory orders and appeals—substantial right—inconsistent verdicts—multiple trials

Although defendants appealed from the trial court's interlocutory order denying multiple motions to dismiss, they were entitled to an immediate appeal because it affected a substantial right to avoid inconsistent verdicts in multiple trials.

2. Wills—inheritance dispute—standing—civil action

The trial court properly denied defendant brother's motions to dismiss under Rules 12(b)(1), (b)(6), and 9 in an inheritance dispute. Plaintiff sister had standing to assert a civil action and retained standing even after the mother's 2012 will was probated. The case was remanded with instructions to hold any pending caveat in abeyance until resolution of plaintiff's civil action.

Appeal by defendants from order entered 15 March 2016 by Judge Michael D. Duncan in Rockingham County Superior Court. Heard in the Court of Appeals 16 November 2016.

Scott Law Group, PLLC, by Harvey W. Barbee, Jr. and Robert G. Scott; and Willis W. Apple, PA, by Willis W. Apple, for plaintiff-appellee.

Boydoh & Hale, PLLC, by J. Scott Hale, for defendant-appellants.

ELMORE, Judge.

This appeal arises from a bitter sibling dispute between Marshelle Middleton Finks and her brother, Colin Humphrey Middleton, over Marshelle's expected inheritance of their elderly mother Sylvia Middleton's ("Sylvia") estate, which purportedly diminished in value from a net worth of over $800,000.00 in real and personal property to $0.00 in the four years preceding her death. In 2009, Sylvia allegedly

executed a will (the "2009 Will") naming Colin and Marshelle as co-executors and contemplating a virtually equal estate distribution among her three children: Colin, Marshelle, and Lexa Middleton Herzog. In early 2012, however, Sylvia created an *inter vivos* revocable trust (the "Sylvia Middleton Revocable Trust"), naming herself initial trustee and Colin successor trustee; executed a new continuing power-of-attorney, naming Colin attorney-in-fact; and executed a new will (the "2012 Will"), naming Colin executor and transferring her entire residuary estate into the Sylvia Middleton Revocable Trust. Over the next few months, Sylvia engaged in a series of transactions conveying multiple parcels of realty by deed to herself as initial trustee of the trust, to a business entity owned and operated by Colin, and to Colin, individually. In 2013, Sylvia was admitted into a nursing home due to advanced dementia. Sylvia died in 2015 with an estate value of $0.00.

Shortly after Sylvia's death, after discovering the changes to her estate plan, Marshelle sued Colin individually, as executor of Sylvia's estate, as trustee of the Sylvia Middleton Revocable Trust, and as Sylvia's attorney-in-fact, for fraud, constructive fraud, conversion, unjust enrichment, and punitive damages. Marshelle alleged that since January 2012, Colin had exploited Sylvia's diminished cognitive ability due to her progressive dementia and had unduly influenced Sylvia to revise her estate plan to benefit Colin to the exclusion of Marshelle and Lexa and to convey multiple parcels of realty to Colin or to entities within Colin's control. Colin moved to dismiss Marshelle's claims for lack of standing, failure to state a claim, and failure to plead with sufficient particularity. Hours before his motions to dismiss were heard, he filed an application to probate the 2012 Will, which was approved that day. Subsequently, Colin submitted the probated 2012 Will for consideration during the hearing on his motions to dismiss. The trial court denied Colin's motions to dismiss on all grounds. Colin appeals.

I. Background

Marshelle's complaint generally alleged the following facts. When the parties' father died in 2009, he left Sylvia an estate of approximately $800,000.00 consisting of both real and personal property. Sylvia, an only child, also inherited her parents' considerable estate, consisting of multiple parcels of real property, homes, barns, and cash.

On 2 February 2009, Sylvia executed the 2009 Will. According to its terms, Sylvia "desired that her three children[, Colin, Marshelle, and Lexa,] use the assets and property that they receive from her, in part, for the education and maintenance of their children"; that her "three children

. . . receive equal shares of certificates of deposit, IRA accounts and stocks, mutual funds, cash, etc."; that her "residuary estate . . . be given to the three children . . . equally"; and that Marshelle and Colin would serve as co-executors. Additionally, the 2009 Will devised certain homes and parcels of real property among the three siblings. After executing the 2009 Will, Sylvia began exhibiting noticeable signs of dementia.

Shortly before January 2012, Colin urged Sylvia to revise her estate plan and brought her to a law firm for that purpose. On 9 January 2012, Sylvia created the Sylvia Middleton Revocable Trust, naming herself initial trustee and Colin successor trustee. Additionally, Sylvia executed a new continuing power-of-attorney, naming Colin attorney-in-fact and Colin's wife, Davina, successor attorney-in-fact; a healthcare power-of-attorney; and the 2012 Will, appointing Colin executor and Davina successor executor.

According to its terms, the 2012 Will revoked all prior wills; bequeathed all tangible personal property to Sylvia's residuary estate; and transferred all real and personal property of her residuary estate to the Sylvia Middleton Revocable Trust. Additionally, the 2012 Will directed that Sylvia's "residuary estate . . . be added to and administered as a part of the [Sylvia Middleton Revocable] Trust created . . . for the benefit of my children, [Colin], [Marshelle], and [Lexa] . . . ."

Over the next few months, several relevant events occurred. On 1 February 2012, Colin formed "Humphrey's Ridge Resort, LLC," a business entity naming Colin as manager and member, and naming Davina, Sylvia, and the Sylvia Middleton Revocable Trust as members. On 14 March 2012, Colin brought Sylvia back to a law firm, where Sylvia executed four quitclaim deeds conveying six parcels of realty: three parcels—134.48, 39.90, and 31.60 acres—were conveyed to Humphrey's Ridge Resort, LLC; two parcels—77.53 and 0.703 acres—were conveyed to Sylvia as initial trustee of the Sylvia Middleton Revocable Trust; and one parcel—21.67 acres—was conveyed to Colin individually. On 5 June 2012, Colin brought Sylvia to a different law firm, where she executed two non-warranty deeds conveying two parcels of realty: one for a parcel of 0.572 acres, conveying an interest of one-half to Marshelle and one-half to Sylvia, as trustee of the Sylvia Middleton Revocable Trust; the other clarifying a clerical error in recording one of the previous quitclaim deeds. On 10 December 2012, Colin brought Sylvia back to the first law firm, where she as trustee of the Sylvia Middleton Revocable Trust executed a quitclaim deed conveying the 77.53-acre parcel to Humphreys Ridge Resort, LLC. In addition to these conveyances, Marshelle alleged that since January 2012, Colin "acquired numerous items of personal

property that . . . were beyond his apparent means, including . . . several cars and a new boat."

In April 2013, Colin placed Sylvia into Countryside Manor Nursing Home ("Countryside"). Sylvia's treating doctor at Countryside informed Colin that Sylvia had memory problems and needed to remain admitted due to her progressive dementia. Although Colin never informed Marshelle, Marshelle learned about Sylvia's dementia and admission into Countryside from her cousin. On 18 September 2013, when Marshelle first visited Sylvia at Countryside, Sylvia stated that she could not remember virtually anything that had occurred over the last three years, "and did not know how she got to Countryside, who brought her there and why." On approximately 31 December 2013, Marshelle met with a Countryside doctor who informed her that Sylvia had been taking "memory medication." Sylvia subsequently went "through a violent stage as a result of her advancing dementia" and then was "removed to the memory unit at Spring Arbor in Greensboro in approximately May of 2014." During the summer of 2015, Colin moved his family "from his meager mobile home located on Belews Creek Lake into the larger, more extravagant Belews Creek lakefront residence owned by [Sylvia]." On 2 August 2015, Sylvia died. After Sylvia's death, Colin refused to discuss Sylvia's estate with Marshelle or the creation or terms of the Sylvia Middleton Revocable Trust to which Colin became successor trustee.

On 27 October 2015, Marshelle sued Colin, alleging causes of action for fraud, constructive fraud, conversion, unjust enrichment, and punitive damages. Marshelle alleged that Colin breached the fiduciary duty he owed to Sylvia through a series of transactions unlawfully transferring Sylvia's assets from her estate to Colin or to entities within his control, which left nothing in her estate to be distributed upon her death to her other children, contrary to Sylvia's wishes according to the 2009 Will. Marshelle asserted that the estate planning documents Sylvia executed on 9 January 2012 were invalid, including the 2012 Will, as was the creation of the Sylvia Middleton Revocable Trust, based on Sylvia's progressive cognitive decline due to dementia and based on Colin's undue influence. Specifically, Marshelle alleged that by 9 January 2012, "the dementia suffered by [Sylvia] had progressed to the point . . . that she was not . . . legally competent to execute documents of significant import to the management and control of her assets for the remainder of her life, and/or to the ultimate disposition of her assets upon her death." Marshelle also challenged the validity of Sylvia's subsequent *inter vivos* conveyances of realty.

On 4 January 2016, Colin filed an answer, denying the existence of the 2009 Will, admitting he was named a successor trustee of the Sylvia Middleton Revocable Trust and a successor trustee of the "Sylvia Middleton Revocable Trust Agreement Amended and Restated," and filed motions to dismiss Marshelle's action pursuant to Rules 9, 12(b)(1), and 12(b)(6) of the North Carolina Rules of Civil Procedure. On 16 February 2016, Colin filed a notice of hearing and renewed motions to dismiss. Colin's motions to dismiss were scheduled to be heard at the 22 February 2016 civil session of the Rockingham County Superior Court.

Shortly before Colin's motions to dismiss were heard, Colin initiated an estate proceeding, No. 16 E 110, and filed, *inter alia*, an application for probate of the 2012 Will, which showed an estate value of $0.00. That same day, an assistant clerk of court issued a certificate of probate for the 2012 Will. Subsequently, during the hearing on his motions to dismiss, Colin submitted the certification of probate to the trial court for consideration. By written order entered on 15 March 2016, the trial court denied Colin's motions to dismiss under Rules 9, 12(b)(1), and 12(b)(6). Colin appealed.

After the appellate record was filed, Colin filed a motion to amend the record, asserting that Marshelle had filed a caveat on 31 May 2016 seeking to invalidate the 2012 Will on grounds of lack of testamentary incapacity and undue influence[1] and seeking to include in the record Marshelle's "Estate Proceeding Summons and Petition for Caveat" because they "are relevant and directly related to the issue of [Marshelle's] standing, which is at issue on appeal." Simultaneously, Colin filed his principal brief, which makes reference to the caveat proceeding and relies upon it in making his substantial right and standing arguments. On 8 August 2016, this Court denied Colin's motion to amend the record on appeal to include Marshelle's estate proceedings summons and petition for caveat.

II. Jurisdiction

[1] It is undisputed that Colin appeals from an interlocutory order. However, Colin claims a right to appeal because, absent immediate

1. Although we have denied Colin's motion to amend the record on appeal to include Marshelle's caveat petition based upon his argument that the caveat proceedings "are relevant and directly related to the issue of [Marshelle's] standing, which is at issue on appeal," we take judicial notice of Marshelle's caveat petition for the limited purpose of explaining context and determining the appealability of this interlocutory order. *See Whitmire v. Cooper*, 153 N.C. App. 730, 735 n.4, 570 S.E.2d 908, 911 n.4 (2002) (taking judicial notice of a related action between the parties and relying on that judicially noticed action's pendency in holding that the trial court properly dismissed the action on appeal), *disc. review denied*, *appeal dismissed*, 356 N.C. 696, 579 S.E.2d 104 (2003).

review, he would be deprived of his substantial right to avoid inconsistent verdicts in multiple trials, since delay would permit Marshelle's civil action and her separate caveat to proceed simultaneously. Marshelle argues that Colin's appeal should be dismissed as interlocutory because his "argument regarding inconsistent verdicts and multiple trials turns . . . on matters which are not part of the record before the Court" and "references to extraneous material and arguments based upon materials that are not part of the record on appeal must be disregarded by this Court." Marshelle advances no argument to dispute Colin's claimed substantial right.

"Generally, the denial of a party's motion to dismiss is interlocutory, and thus is not immediately appealable." *Strates Shows, Inc. v. Amusements of Am., Inc.*, 184 N.C. App. 455, 459, 646 S.E.2d 418, 422 (2007) (citation omitted). "However, interlocutory orders are immediately appealable if delaying the appeal will irreparably impair a substantial right of the party." *Newcomb v. Cnty. of Carteret*, 183 N.C. App. 142, 145, 643 S.E.2d 669, 671 (2007) (citations and internal quotation marks omitted). "A party's right to avoid separate trials of the same factual issues may constitute a substantial right." *Nello L. Teer Co. v. Jones Bros., Inc.*, 182 N.C. App. 300, 303–04, 641 S.E.2d 832, 836 (2007) (citing *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982)).

"Where a party is appealing an interlocutory order to avoid two trials, the party must show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *Clements v. Clements*, 219 N.C. App. 581, 585, 725 S.E.2d 373, 376 (2012) (citation and internal quotation marks omitted). "Issues are the 'same' if the facts relevant to their resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 79, 711 S.E.2d 185, 190 (2011) (citation omitted). "The extent to which an interlocutory order affects a substantial right must be determined on a case-by-case basis." *Id.* at 78, 711 S.E.2d at 189.

Colin contends that because Marshelle in her caveat "seeks to set aside the [2012] Will upon the same grounds alleged . . . in [her civil] action," inconsistent verdicts are possible since "the same factual issues are being litigated in two separate proceedings between [Marshelle] and [Colin]."

Here, Marshelle's caveat seeks to invalidate the 2012 Will because Sylvia lacked testamentary capacity and was unduly influenced by Colin to execute it. These allegations raise issues as to whether Sylvia had

the requisite mental capacity to execute a will on 9 January 2012 and whether the execution of that will was procured by Colin's undue influence. Marshelle also requests that Colin produce Sylvia's 2009 Will for probate. In Marshelle's civil action, she alleges that, *inter alia*, as a result of Colin's allegedly fraudulent behavior and undue influence over Sylvia's diminished mental capacity, Sylvia revised her estate plan by executing certain estate planning documents on 9 January 2012, including the 2012 Will, and that due to the extent of Sylvia's progressive dementia on that date, she was not legally competent to execute estate planning documents. Marshelle's civil action does not seek to set aside the 2012 Will because at that time the 2012 Will had not been probated. Rather, her civil action was focused on whether Colin unlawfully caused Sylvia to substantially alter her estate plan; improperly obtained possession of Sylvia's assets during her lifetime; converted over $25,000.00 of Sylvia's real and personal property to his own use; engaged in fraud by effectuating various transactions involving Sylvia for his own benefit; and took advantage of Sylvia's declining mental faculties to obtain property to which he was not entitled.

However, whether Sylvia lawfully executed the 2012 Will on 9 January 2012 implicates overlapping factual issues in Marshelle's civil action because on that date Sylvia executed other estate planning documents—including the continuing power-of-attorney and creating the Sylvia Middleton Revocable Trust—the validity of which are also challenged in Marshelle's civil action against Colin. Additionally, since Marshelle has alleged that Sylvia's diminished mental faculties were the result of progressive dementia, the progress of the disease on 9 January 2012 is relevant when considering the validity of subsequent transactions transferring Sylvia's real and personal property to herself as trustee of the Sylvia Middleton Revocable Trust and to Colin individually. Accordingly, we conclude that we have jurisdiction to entertain Colin's appeal.

III. Analysis

[2] Colin contends the trial court erred by denying his motion to dismiss under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure for lack of subject matter jurisdiction because Marshelle "lacks standing to challenge the will outside a caveat proceeding." At issue is whether the superior court lost jurisdiction and Marshelle lost standing in the pending civil action because Colin probated the 2012 Will.

"Standing concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss."

Fuller v. Easley, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) (citations omitted). "We review 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).

To have standing to bring an action, one must be a "real party in interest[.]" N.C. Gen. Stat. § 1-57 (2015). "A real party in interest is . . . benefited or injured by the judgment in the case . . . . [and] who by substantive law has the legal right to enforce the claim in question." *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 18–19, 234 S.E.2d 206, 209 (1977) (citations omitted). Typically, the real party in interest in cases of fraud and undue influence seeking to set aside conveyances of realty is the person against whom the actions were taken. *See Holt v. Holt*, 232 N.C. 497, 501, 61 S.E.2d 448, 452 (1950). However, if the person against whom the actions were taken dies but the cause of action still exists, "the right [to sue] passes to the heirs in case of intestacy and to the devisees in case the grantor leaves a will." *Id.* at 502, 61 S.E.2d at 452 (internal citations omitted).

"If a party does not have standing to *bring* a claim, a court has no subject matter jurisdiction to hear the claim." *In re Will of McFayden*, 179 N.C. App. 595, 600, 635 S.E.2d 65, 69 (2006) (emphasis added) (citation and internal quotation marks omitted). However, "[s]tanding is determined at the time of the filing of a complaint." *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 625, 684 S.E.2d 709, 714 (2009); *Simeon v. Hardin*, 339 N.C. 358, 369, 451 S.E.2d 858, 866 (1994) ("When standing is questioned, the proper inquiry is whether an actual controversy existed 'at the time the pleading requesting . . . relief is filed." (citation omitted)). Additionally, "it is the general rule that once jurisdiction attaches, 'it will not be ousted by subsequent events.' " *Id.* (quoting *In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978)).

> "Jurisdiction is not a light bulb which can be turned off or on during the course of the trial. Once a court acquires jurisdiction over an action it retains jurisdiction over that action throughout the proceeding. . . . If the converse of this were true, it would be within the power of the defendant to preserve or destroy jurisdiction of the court at his own whim."

Quesinberry v. Quesinberry, 196 N.C. App. 118, 123, 674 S.E.2d 775, 778–79 (2009) (quoting *Peoples*, 296 N.C. at 146, 250 S.E.2d at 911).

Here, when Marshelle initiated her civil action against Colin, no script had been admitted to probate as Sylvia's will. Therefore, when Marshelle filed her complaint, she had standing, either as an heir or devisee under the 2009 Will, to challenge the conveyances of realty on Sylvia's behalf; the subsequent probate of the 2012 Will did not retroactively extinguish that standing. Indeed, if we were to hold otherwise, Colin would be wielding the "power . . . to preserve or destroy jurisdiction of the court at his own whim." *Peoples*, 296 N.C. at 146, 250 S.E.2d at 911. Furthermore, even after the 2012 Will was probated, Marshelle had standing as a named beneficiary under its terms. *See Holt*, 232 N.C. at 502, 61 S.E.2d at 452 (citations omitted). Therefore, we overrule Colin's challenge as to this issue.

Colin also argues that Marshelle lacks standing because "all issues raised in [her civil action] are governed by [her] caveat petition" and cites to *Mileski v. McConville*, 199 N.C. App. 267, 273, 681 S.E.2d 515, 520 (2009) ("Plaintiff's essential claim—that defendants' undue influence procured the will submitted to the Clerk of Court and procured the transfer of assets—can be properly determined through a caveat proceeding."), to support his position. *Mileski* is readily distinguishable. In *Mileski*, the plaintiff filed his civil action *after* the contested will was probated, unlike Marshelle who filed hers before. 199 N.C. App. at 268–69, 681 S.E.2d at 517. Neither party has pointed to an instance in our case law where a plaintiff filed a civil action implicating the validity of a will before that will was probated and our research has disclosed none. Additionally, the *Mileski* Court's holding implies that it determined the caveat proceeding provided the plaintiff in that case with a complete and adequate remedy. *Id.* at 273, 681 S.E.2d at 520.

However, our case law recognizes that "the purpose of a caveat proceeding is limited and . . . where adequate remedy cannot be obtained in a caveat proceeding, the plaintiff is entitled to proceed with a tort claim." *Wilder v. Hill*, 175 N.C. App. 769, 772, 625 S.E.2d 572, 575 (2006) (citing *Murrow v. Henson*, 172 N.C. App. 792, 800, 616 S.E.2d 664, 669 (2005) ("[T]he inadequacy of relief in a caveat proceeding entitles a plaintiff to proceed with his or her tort claim.")). "[T]he question is whether a caveat proceeding was available and, if so, whether such a proceeding would provide an adequate remedy to plaintiffs." *Murrow*, 172 N.C. App. at 800, 616 S.E.2d at 669.

Here, no caveat proceeding was available when Marshelle filed her civil action. Additionally, such a caveat proceeding would provide inadequate relief, since a judgment setting aside the 2012 Will or probating

the 2009 Will would neither set aside the Sylvia Middleton Revocable Trust nor Sylvia's *inter vivos* conveyances of realty to which Marshelle claims entitlement. Therefore, we conclude, "the inadequacy of relief in [the] caveat proceeding entitles [Marshelle] to proceed with . . . her tort claim." *Id.* Accordingly, we affirm the trial court's denial of Colin's motion to dismiss under Rule 12(b)(1).

In light of our determination that Marshelle had standing to assert the claims in her civil action, Colin's remaining Rule 9 and 12(b)(6) arguments, which hinge upon the invalid premise that Marshelle lacked standing, are meritless. We have considered each of Marshelle's civil action claims through the lens that Marshelle has standing and conclude that the trial court properly denied Colin's motions to dismiss under Rules (9) for failure to plead with sufficient particularity and 12(b)(6) for failure to state a claim.

However, given the facts of this case, because allegations in Marshelle's civil action raise issues as to the validity of certain estate planning documents allegedly executed on 9 January 2012, we believe the proper course would be for the superior court to hold caveat proceedings in abeyance until Marshelle's civil action claims are resolved. *See Baldelli v. Baldelli*, __ N.C. App. __, __, 791 S.E.2d 687 (2016) (reversing a superior court's dismissal of the plaintiff's claims under the prior pending action doctrine on the basis that a related equitable distribution action was pending in district court and remanding the case to the superior court with instructions to hold the plaintiff's claims in abeyance until resolution of the district court action).

In *Baldelli*, the plaintiff and defendant, who incorporated multiple business entities during their marriage, were involved in an equitable distribution action in district court when the plaintiff filed a subsequent civil action in superior court alleging, *inter alia*, breach of fiduciary duty. __ N.C. App. at __, 791 S.E.2d at 687. The superior court dismissed plaintiff's claim for lack of subject matter jurisdiction on the basis that the prior pending action doctrine established jurisdiction in the district court and divested the superior court of jurisdiction. *Id.* at __, 791 S.E.2d at 690.

On appeal, we reversed the superior court's dismissal of the plaintiff's claims under the prior pending action doctrine because the plaintiff, in her district court action, would be unable to recover the relief she requested in her superior court action. *Id.* However, we observed that the plaintiff's district court and superior court actions raised issues so interrelated it would not be in the interest of judicial economy or clarity

for both actions to proceed simultaneously. *Id.* Therefore, we remanded the case to the superior court with instructions to hold the plaintiff's civil action claims in abeyance until the equitable distribution action in district court was resolved. *Id.* at __, 791 S.E.2d at 691. We explained:

> However, because the parties and subject matter of Plaintiffs' breach of fiduciary duty claim are closely related—when not identical—to the parties and the subject matter to be decided in a portion of the district court action, and because there is a clear interrelationship between the issues in both actions, we do not believe it is in the interest of judicial economy or clarity for both of these actions to proceed simultaneously. To allow both actions to proceed concurrently would be to invite conflict between the resolution of interrelated issues in the two actions.

Id. at __, 791 S.E.2d at 690. We believe this same reasoning should apply here.

Here, Marshelle alleges, *inter alia*, fraud and constructive fraud against Colin for which she claims damages in excess of $25,000.00. If Marshelle prevails on her civil action claim, she will set aside certain *inter vivos* conveyances of realty that may be returned to Sylvia's estate for distribution. Accordingly, under *Baldelli*, we believe Marshelle's civil action should be resolved prior to the determination of the caveat proceeding. As in *Baldelli*, the parties and the subject matter to be decided in the caveat proceeding may be closely related, if not identical, to the parties and the subject matter to be decided in a portion of Marshelle's civil action. "[B]ecause there is a clear interrelationship between the issues in both actions, we do not believe it is in the interest of judicial economy or clarity for both of these actions to proceed simultaneously." *Id.*

Thus, we believe it is appropriate for the superior court to hold any caveat to the 2012 Will in abeyance until resolution of Marshelle's civil action. Accordingly, we affirm the superior court's denial of Colin's Rule 12(b)(1), (b)(6), and (9) motions to dismiss but remand with instructions to hold any caveat proceeding in abeyance until resolution of the civil action.

IV. Conclusion

Although interlocutory, the trial court's order denying Colin's multiple motions to dismiss affected his substantial right to avoid inconsistent verdicts in multiple trials. We hold that the trial court properly denied

Colin's motions to dismiss under Rules 12(b)(1), (b)(6), and 9 because Marshelle had standing to assert the claims in her civil action and retained standing even after Sylvia's 2012 Will was probated. Although the 2012 Will was probated after Marshelle's civil action was initiated, since a caveat proceeding would not provide her with an adequate remedy, she is entitled to proceed in her civil action. Since issues raised in Marshelle's civil action may be inextricably entwined with issues raised in a separate caveat proceeding, we remand with instructions to hold any pending caveat in abeyance until resolution of Marshelle's civil action.

AFFIRMED AND REMANDED.

Judge STEPHENS concurs.

Judge DIETZ concurs by separate opinion.

DIETZ, Judge, concurring.

I concur in the judgment in this case but would have dismissed the appeal for lack of jurisdiction because the appellant failed to establish that the denial of the motion to dismiss affected a substantial right. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

GAUSE v. NEW HANOVER REG'L MED. CTR.

[251 N.C. App. 413 (2016)]

JOYCE VERA LIVINGSTON GAUSE, INDIVIDUALLY,[1] NATALIE GAUSE, AS GAL ON BEHALF OF JOYCE VERA LIVINGSTON AND VERTIS GAUSE, INDIVIDUALLY, PLAINTIFFS
v.
NEW HANOVER REGIONAL MEDICAL CENTER, DEFENDANT

No. COA16-595

Filed 30 December 2016

1. Medical Malpractice—failure to comply with pleading requirements—professional services—clinical judgment

The trial court did not err by dismissing plaintiffs' ordinary negligence claim based on their failure to comply with a pleading requirement applicable to a medical malpractice claim. Plaintiffs' discovery responses revealed allegations that defendant was negligent in furnishing or failing to furnish professional services. Further, undisputed evidence produced in discovery showed that the patient's injury stemmed from the x-ray technician's activities which required her to use clinical judgment.

2. Pleadings—Rule 9(j)—Rule 56—new theory of negligence

The trial court did not err by allegedly considering matters outside the pleadings. Plaintiffs misconstrued the interaction between Rule 9(j) and Rule 56 of the North Carolina Rules of Civil Procedure. Plaintiffs were bound by their pleadings and could not raise a new theory of negligence for the first time on appeal.

3. Appeal and Error—appealability—notice of appeal—motion to amend

Although plaintiffs contend the trial court abused its discretion by denying their motion to amend the complaint, the Court of Appeals did not have jurisdiction to review the trial court's order. Plaintiff's' notice of appeal did not refer to or encompass this issue, nor could the issue be fairly inferred from the language in the notice of appeal.

Appeal by Plaintiffs from order entered 5 April 2016 by Judge Charles Henry in New Hanover County Superior Court. Heard in the Court of Appeals 2 November 2016.

1. Per the custom of this Court, we style the caption of our opinion as it appears in the order from which the appeal is taken. In this matter, following the deaths of Mr. and Mrs. Gause, this Court allowed Plaintiffs' Motion to Substitute Parties, ordering that "Natalie Joyce Gause shall be substituted for Joyce Vera Livingston Gause, and Josie May Gause Brown shall be substituted for Vertis Ceamore Gause."

The Law Offices of Adam Neijna, PLLC, by Adam M. Neijna, for Plaintiffs-Appellants.

Harris, Creech, Ward & Blackerby, P.A., by Heather M. Beam, R. Brittain Blackerby, and Jay C. Salsman, for Defendant-Appellee.

Linwood L. Jones for North Carolina Hospital Association, amicus curiae.

INMAN, Judge.

When a hospital patient injured in a fall during an x-ray examination brings a claim for ordinary negligence, but pre-trial discovery reveals that the fall occurred when the x-ray technician was rending services requiring specialized skill and clinical judgment, the claim sounds in medical malpractice and is subject to dismissal based on the patient's failure to comply with Rule 9(j) of the Rules of Civil Procedure.

Plaintiffs Natalie Gause ("Natalie") and Josie May Gause Brown (collectively "Plaintiffs"), in their respective capacities for decedents Joyce Vera Livingston Gause ("Mrs. Gause" or "Plaintiff Gause"), and her husband, Vertis Ceamore Gause, appeal from an order dismissing Plaintiffs' negligence cause of action and denying Plaintiffs' Motion to Amend the Complaint.[2] Because Plaintiffs' complaint sounded in medical malpractice, not ordinary negligence, we affirm the trial court.

I. Factual and Procedural Background

On 16 March 2015, Natalie drove her mother, Mrs. Gause, to the Emergency Department of New Hanover Regional Medical Center ("Defendant" or "New Hanover") because Mrs. Gause was experiencing chest pains related to a fall several days prior. Mrs. Gause was 73-years-old and had a history of falling due to unsteadiness, often requiring assistance to walk distances.

At a triage station in the Emergency Department, a nurse assessed Mrs. Gause's chief complaint, determined her priority status, and ordered the hospital protocol for evaluating a complaint of chest pain. The nurse entered an order requesting, *inter alia*, an "x-ray chest PA or AP."

2. The trial court's order also dismissed Plaintiffs' claim of injury based on the theory of *res ipsa loquitur*. Plaintiffs do not appeal that portion of the order.

A posterior-anterior ("PA") chest x-ray requires the patient to be in a standing position with an x-ray board, called a wall bucky, in front of the patient and the x-ray tube behind the patient. An anterior-posterior ("AP") chest x-ray may be taken with the patient standing, sitting, or lying down. A "PA" x-ray is optimal because it provides a superior image with the most information about the patient, allowing a more accurate diagnosis.

After waiting several minutes, Mrs. Gause was taken into a restricted area within the emergency department and assessed by another nurse. Following the second nurse's assessment, the x-ray technician, Kayne Darrell ("Darrell"), met Mrs. Gause and Natalie in the triage hallway and transported Mrs. Gause in a wheelchair to a radiology room. Natalie remained in the hallway.

Darrell and Mrs. Gause were the only two people in the radiology room when Darrell explained the chest x-ray process to Mrs. Gause, stating that she would ask Mrs. Gause to stand at the wall bucky. Darrell asked Mrs. Gause if she thought that she would be able to stand for the x-ray. Mrs. Gause answered, "I think so."

According to Darrell, as soon as Mrs. Gause said, "I think so," to Darrell's surprise she "immediately, and rapidly, stood up, unassisted" from the wheelchair. According to a doctor with whom Darrell spoke later that day, Darrell said that "she stood the patient up" from the wheelchair.

Darrell watched as Mrs. Gause took a few steps toward the wall bucky, watched Mrs. Gause for three or four seconds, and assessed that Mrs. Gause seemed "very stable." Darrell then turned around and walked several steps away from the patient to move a tube into position to take the x-ray. After three or four seconds, Darrell turned back toward Mrs. Gause and saw her falling backward. Darrell immediately ran to try to break the fall but could not reach Mrs. Gause before her head struck the floor. Mrs. Gause suffered a severe traumatic brain injury as a result of the fall.

Mrs. Gause's brain injury left her unable to communicate and unable to independently perform basic activities of daily living. She became a resident at a long-term nursing care facility where she received twenty-four-hour, around-the-clock care. She died in the nursing care facility on 10 June 2016, approximately 15 months after the fall.

On 15 July 2015, while Mrs. Gause was still living, Plaintiffs filed a complaint in New Hanover County Superior Court alleging Defendant was liable for ordinary negligence and negligence on a theory of

res ipsa loquitur. In the ordinary negligence claim, Plaintiffs alleged that "Defendant negligently/or carelessly:"

> a. transported Plaintiff to and/or from the x-ray room;
>
> b. asked Plaintiff to stand without properly supporting her;
>
> c. allowed Plaintiff to sit up and/or stand without properly securing her;
>
> d. placed Plaintiff in an unsteady position;
>
> e. failed to take adequate measures to support Plaintiff;
>
> f. failed to properly secure Plaintiff while transporting her;
>
> g. allowed Plaintiff to be at risk of falling;
>
> h. failed to take adequate precautions and/or safety measures to prevent Plaintiff from falling while transporting her to and/or from x-ray[.]
>
> . . . .

The Complaint did not label any claim as one for medical malpractice and did not contain a certification of compliance with Rule 9(j), which requires expert review prior to the filing of a medical malpractice action.

On 1 October 2015, Defendant filed an Answer asserting, *inter alia*, that the Complaint "should be dismissed for failure of the Plaintiff[s] to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure." The parties then proceeded with discovery.

In response to an interrogatory, Plaintiff Gause listed 20 specific ways that Defendant was negligent, including, *inter alia*, contentions that Defendant "[f]ailed to inquire as to Plaintiff's condition, history of falls, limited mobility, problems with standing, and risk of falling;" "[f]ailed to conduct a fall risk assessment to determine whether to take the x-ray PA or AP;" and "[f]ailed to properly administer the x-ray."

Plaintiffs' counsel took the deposition of Darrell, who testified that she assessed Mrs. Gause upon first meeting her and continuing until Mrs. Gause had taken a few steps away from the wheelchair without assistance. Darrell testified that her assessment was based on her clinical judgment and observations of the patient, including the patient's mental status, and on more than 22 years of experience as an x-ray technician.

Following written discovery and depositions, Defendant filed a Motion for Summary Judgment. Two days later, Plaintiffs filed a Motion

to Amend the Complaint to add a claim of medical negligence against Defendant. The proposed Amended Complaint alleged that, pursuant to Rule 9(j), the medical care and relevant records "have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care." The proposed Amended Complaint did not allege when the expert review had occurred.

Defendant's Motion for Summary Judgment and Plaintiffs' Motion to Amend came on for hearing on 4 February 2016 in New Hanover Superior Court, Judge Charles Henry presiding. On 5 April 2016, the trial court entered an order dismissing Plaintiffs' *res ipsa loquitur* claim, dismissing Plaintiffs' negligence claim without prejudice, and denying Plaintiffs' Motion to Amend.

Plaintiffs filed a Notice of Appeal.

II. Standard of Review

> 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. A trial court's grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to the non-moving party.

Sturgill v. Ashe Mem'l Hosp., Inc., 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007) (citations and internal quotation marks omitted).

III. Analysis

A. Medical Malpractice or Ordinary Negligence Theory

[1] Plaintiffs argue that the trial court erred in dismissing their ordinary negligence claim based on their failure to comply with a pleading requirement applicable only to a medical malpractice claim. We disagree for two reasons. First, Plaintiffs' discovery responses reveal allegations that Defendant was negligent in furnishing or failing to furnish professional services. Second, undisputed evidence produced in discovery shows that Mrs. Gause's injury stemmed from the x-ray technician's activities which required her to use clinical judgment. We conclude that Plaintiffs' claim necessarily sounds in medical malpractice and not in ordinary negligence.

In North Carolina, the distinction between a claim of medical malpractice and ordinary negligence is significant for several reasons, including that medical malpractice actions cannot be brought without prior review of the medical care and relevant medical records by a person reasonably expected to qualify as an expert and to testify that the defendant provided substandard care. N.C. Gen. Stat. § 1A-1, Rule 9(j) (2015). Failure to allege compliance with Rule 9(j) in a complaint for medical malpractice requires dismissal. *Id.*

"Whether an action is treated as a medical malpractice action or as a common law negligence action is determined by our statutes[.]" *Smith v. Serro*, 185 N.C. App. 524, 529, 648 S.E.2d 566, 569 (2007). A medical malpractice action is defined in relevant part as "[a] civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.[3] N.C. Gen. Stat. § 90-21.11(2)(a) (2015). "The statutory definition of medical malpractice is a broad one." *Duke Univ. v. St. Paul Fire and Marine Ins. Co.*, 96 N.C. App. 635, 640, 386 S.E.2d 762, 766 (1990) (citation omitted).

The term "professional services" is not defined by our statutes but has been defined by this Court as "an act or service arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual." *Sturgill*, 186 N.C. App. at 628, 652 S.E.2d at 305 (citations and internal quotation marks omitted). Our courts have classified as medical malpractice those claims alleging injury resulting from activity that required clinical judgment and intellectual skill. *See Sturgill*, 186 N.C. App. at 630, 652 S.E.2d at 306; *Alston v. Granville Health Sys.*, 221 N.C. App. 416, 421, 727 S.E.2d 877, 881 (2012). Our courts have classified as ordinary negligence those claims alleging injury caused by acts and omissions in a medical setting that were primarily manual or physical and which did not involve a medical assessment or clinical judgment. *See, e.g.*, *Horsley v. Halifax Reg'l Med. Ctr., Inc.*, 220 N.C. App. 411, 725 S.E.2d 420 (2012), and cases cited therein.

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3. A "health care provider" is "[a] person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: . . . radiology[.]" N.C. Gen. Stat. § 90-21.11(1)(a). The parties do not dispute that an x-ray technician is a health care provider.

This Court in *Sturgill*, 186 N.C. App. at 631, 652 S.E.2d at 307, affirmed the trial court's order allowing a motion for summary judgment and dismissing the plaintiff's complaint for failure to comply with Rule 9(j). *Sturgill* involved a claim by the estate of a 76-year-old man who suffered a severe head injury after falling in his hospital room. *Id.* at 625, 652 S.E.2d at 304. The estate filed a complaint pleading ordinary negligence. *Id.* at 626, 652 S.E.2d at 304. The defendant argued that the claim was actually for medical malpractice and subject to dismissal because it did not allege compliance with Rule 9(j). *Id.* at 626-27, 652 S.E.2d at 304. The trial court, and ultimately this Court, agreed. *Id.* at 631, 652 S.E.2d at 307. Although the plaintiff contended that the hospital, through its nurses, was negligent in failing to follow a fall prevention plan and supervise the decedent, this Court noted that the complaint alleged that the decedent fell because nurses failed to restrain him in his hospital bed. *Id.* at 628-29, 652 S.E.2d at 305. This Court also cited an affidavit submitted by the plaintiff, filed in opposition to the motion for summary judgment, stating that the decedent was injured because he was not "properly restrained." *Id.* at 629-30, 652 S.E.2d at 306. This Court held that "[b]ecause the decision to apply restraints is a medical decision requiring clinical judgment and intellectual skill, . . . it is a professional service." *Id.* at 630, 652 S.E.2d at 306.

Also on facts similar to those now before us, in *Alston*, 221 N.C. App. at 421, 727 S.E.2d at 881, this Court held that a claim arising from a patient's fall in the hospital sounded in medical malpractice. The decedent in *Alston* was lying unconscious on a hospital operating table when she fell to the floor and was injured. *Id.* at 419, 727 S.E.2d at 880. The decedent's estate sued the hospital and surgeon on a theory of *res ipsa loquitur*, alleging that it was unknown how the decedent fell and that the injury would not have occurred in the absence of negligence. *Id.* at 419, 727 S.E.2d at 879. Discovery, however, revealed that the decedent fell because medical personnel had failed to secure her in restraints. *Id.* at 420-21, 727 S.E.2d at 880. Following the defendants' motions for summary judgment, the trial court dismissed the action for failure to comply with Rule 9(j). *Id.* at 417, 421, 727 S.E.2d at 878, 881. Affirming the trial court, this Court held that the plaintiff could not state a claim for *res ipsa loquitur* because the cause of the decedent's fall was no longer unknown. *Id.* at 420-21, 727 S.E.2d at 880. This Court also held that the plaintiff's claim sounded in medical malpractice because "[t]he evidence presented by [the d]efendants in support of their summary judgment motions . . . shows that the decision to restrain a patient under anesthesia is one that requires use of specialized skill and knowledge and,

therefore, is considered a professional service." *Id.* at 421, 727 S.E.2d at 881 (citations omitted).

Here, Plaintiffs' Complaint alleged that "Defendant negligently and/or carelessly," *inter alia*, "failed to take adequate precautions and/or safety measures to prevent Plaintiff [Gause] from falling while transporting her to and/or from x-ray;" and/or "failed to perform such acts and/or take those measures necessary to protect Plaintiff [Gause] from falling." These allegations, general as they are, sound in medical malpractice, because deciding what precautions and measures were "adequate" and "necessary" required medical personnel to use clinical judgment and intellectual skill. But our holding turns on more than the Complaint.

Plaintiffs' interrogatory responses specify numerous contentions that Defendant, through its agents and employees, was negligent in furnishing or failing to furnish the following services: assessing the patient, inquiring about and reviewing the patient's medical history, and administering the x-ray. Each of these services—assessment, inquiry, review, and administering a diagnostic imaging procedure—involves specialized knowledge and skills which are predominantly mental or intellectual, rather than physical or manual. *See Lewis v. Setty*, 130 N.C. App. 606, 608, 503 S.E.2d 673, 674 (1998).

Darrell testified in deposition that she assessed Mrs. Gause from the moment they met until the moment Darrell determined that she could walk away from Mrs. Gause to position the x-ray tube. Darrell testified that her assessment was based upon her clinical experience, judgment, and observations of the patient. Plaintiffs argue it could be reasonably inferred from the evidence that despite her testimony, Darrell used no judgment or skill and performed no assessment of Mrs. Gause, but simply stood her up and walked away, allowing her to fall. Such an inference, however, would not remove this case from the statutory definition of medical malpractice which includes a claim for injury "arising out of the furnishing *or failure to furnish* professional services." N.C. Gen. Stat. § 90-21.11(2)(a) (emphasis added).

It is undisputed that Darrell took Mrs. Gause into her care following a nurse's order for "x-ray chest PA or AP." The nature of the order—providing for alternative methods of imaging—necessarily required Darrell to make a clinical judgment regarding how to administer the x-ray. Darrell testified that when making such decisions, "what you're trying to do is – is give the radiologist an optimal image without compromising the patient's safety and comfort." Whether Darrell failed to assess Mrs. Gause or inadequately assessed her in choosing to take a standing

x-ray, Mrs. Gause's injury arose from medical malpractice as defined by statute.

Plaintiffs contend that this case is controlled by a line of decisions classifying claims in medical settings as ordinary negligence. Those cases are all factually and legally inapposite.

In *Norris v. Rowan Mem'l Hosp., Inc.*, 21 N.C. App. 623, 623, 205 S.E.2d 345, 346 (1974), a 75-year-old patient fell from a hospital bed and fractured her hip after nurses failed to raise her bedrails in clear violation of a hospital rule. This Court held that "the alleged breach of duty did not involve the rendering or failure to render professional nursing or medical services requiring special skills[,]" because the nurses were not allowed any discretion about raising the bedrails. *Id.* at 626, 205 S.E.2d at 348. Unlike the nurses in *Norris*, Darrell was required by the x-ray order to decide whether to take the x-ray with Mrs. Gause standing, sitting, or lying down.

In *Lewis v. Setty*, 130 N.C. App. at 607, 503 S.E.2d at 673, the plaintiff, a quadriplegic, fell and was injured while being transferred from an examination table to his wheelchair by the defendant doctor and the plaintiff's aide. In holding that the plaintiff's action sounded in ordinary negligence, this Court reasoned that "the removal of the plaintiff from the examination table to the wheelchair did not involve an occupation involving specialized knowledge or skill, as it was predominately a physical or manual activity." *Id.* at 608, 503 S.E.2d at 674. Unlike the defendants in *Lewis*, Darrell was not engaged in a predominately physical or manual activity when Mrs. Gause fell.

In *Horsley v. Halifax Reg'l Med. Ctr., Inc.*, 220 N.C. App. at 412, 725 S.E.2d at 421, the plaintiff brought an action for gross negligence after falling from a standing position while admitted as a patient at the defendant hospital. Hospital nurses knew that the plaintiff required assistance to stand or walk without falling. *Id.* at 412, 725 S.E.2d at 420. Later that evening, the plaintiff was standing against the wall near the nurses' station and said aloud that she was going to fall; however, none of the nurses offered her a wheelchair, cane, or walker. *Id.* at 412, 725 S.E.2d at 421. The plaintiff fell and was injured. *Id.* The trial court dismissed the plaintiff's claim for failure to include a 9(j) certification. *Id.* at 412, 725 S.E.2d at 421. This Court reversed the trial court, reasoning that "nothing in the record indicates that the decision to offer a cane to a patient requires a written order or a medical assessment" or "require[s] specialized skill[,]" and therefore "expert testimony . . . is not necessary to develop a case of negligence for the jury." *Id.* at 414, 725 S.E.2d at

421-22. By contrast, Plaintiffs here asserted in their discovery responses that Defendant failed to properly assess Mrs. Gause. And Darrell confirmed in her deposition that deciding whether to take a standing x-ray required assessment and clinical judgment.

Plaintiffs also argue that Defendant is estopped from asserting that this action is one for medical malpractice because Defendant objected to discovery on the basis that Plaintiffs had not alleged a medical malpractice cause of action. Judicial estoppel bars inconsistent assertions of fact, but generally "the doctrine should not be applied to prevent the assertion of inconsistent legal theories . . . such a limitation is necessary to avoid interference with our liberal pleading rules, which permit a litigant to assert inconsistent, even contradictory, legal positions within a lawsuit." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 32, 591 S.E.2d 870, 890 (2004). Plaintiffs' argument is without merit.

In sum, Plaintiffs' claim sounds in medical malpractice and not in ordinary negligence, and it was subject to dismissal for failing to comply with Rule 9(j). Further, because Plaintiffs' Complaint contained no 9(j) certification, it did not allege a viable claim for medical malpractice.

B. Considering Matters Outside the Pleadings

[2] The trial court, consistent with our precedent, determined that Plaintiffs' Complaint was subject to dismissal for failure to comply with Rule 9(j) based in part on written discovery responses and deposition testimony. *See Alston*, 221 N.C. App. at 420-21, 727S.E.2d at 880-81 (affirming summary judgment against the plaintiff because evidence produced in discovery revealed that the plaintiff's claim was for medical malpractice and not negligence *res ipsa loquitur*); *Sturgill*, 186 N.C. App. at 629-30, 652 S.E.2d at 306 (affirming summary judgment against the plaintiff based in part on affidavit submitted in evidence). In arguing that the trial court was prohibited from considering matters outside the pleadings,[4] Plaintiffs misconstrue our precedent regarding the interaction between Rule 9(j) and Rule 56 of the North Carolina Rules of Civil Procedure, which provides for dismissal of an action on summary judgment. N.C. Gen. Stat. § 1A-1, Rule 56 (2015).

4. Defendant argues that this Court lacks jurisdiction to determine whether the trial court erred by considering matters outside the pleadings because Plaintiffs' Notice of Appeal and Proposed Issues on Appeal contained in the settled record did not designate it as an issue. Defendant's argument is without merit. Rule 3(d) of the North Carolina Rules of Appellate Procedure requires a notice of appeal to identify the party who is appealing, the judgment or order from which the party appeals, the court to which the party addresses the appeal, and the signature of the appealing party's counsel of record.

Plaintiffs misstate the holding by the North Carolina Supreme Court in *Anderson v. Assimos*, 356 N.C. 415, 417, 572 S.E.2d 101, 102 (2002). In that decision, vacating a decision by this Court regarding the constitutionality of Rule 9(j), the Supreme Court held that the issue was not preserved for appeal because the plaintiff's complaint asserted *res ipsa loquitur* "as the sole basis for the negligence claim." *Id.* The Court explained that "pleadings have a binding effect as to the underlying theory of plaintiff's negligence claim[,]" and treated the plaintiff's complaint as a binding judicial admission that his claim, if viable at all, was supported only by the theory of *res ipsa loquitur*. *Id. Anderson* has been construed by this Court to prohibit a plaintiff from changing the theory of negligence without first amending the complaint. It does not mean that the trial court must look exclusively to the complaint in deciding on summary judgment that a plaintiff's claim must be dismissed for failure to comply with Rule 9(j). *Anderson*'s reasoning was applied by this Court in *Sturgill* when the plaintiff argued a theory of negligence different from the theory alleged in her complaint, which this Court held constituted a claim for medical malpractice. *Sturgill*, 186 N.C. App. at 630, 652 S.E.2d at 306. This Court held that "plaintiff is bound by her pleadings, and may not raise this new theory of negligence for the first time on appeal." *Id.* at 630, 652 S.E.2d at 306-07. Plaintiffs' argument is without merit.

C. Motion to Amend

[3] Plaintiffs contend that the trial court abused its discretion in denying Plaintiffs' Motion to Amend the Complaint. We do not have jurisdiction to review the trial court's order as to this issue because Plaintiffs' Notice of Appeal did not refer to or encompass this issue, nor can the issue be fairly inferred from the language in the Notice of Appeal.

Rule 3(d) of the North Carolina Rules of Appellate Procedure provides that a notice of appeal "shall designate the judgment or order from

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N.C. R. App. P. 3(d). Plaintiffs' Notice of Appeal identified all of the required information and specified that it was appealing from the trial court's order "which dismissed Plaintiffs' action without prejudice." The appeal of the dismissal inherently includes an appeal from the trial court's analysis and conclusions leading to the dismissal, including its reference to matters outside the pleadings. *See Smith v. Indep. Life Ins. Co.*, 43 N.C. App. 269, 273, 258 S.E.2d 864, 867 (1979). Rule 10(b) of the North Carolina Rules of Appellate Procedure requires the appellant to include at the conclusion of the record a numbered list of proposed issues presented on appeal, but the rule also provides that "[p]roposed issues on appeal are to facilitate the preparation of the record on appeal *and shall not limit the scope of the issues presented on appeal in an appellant's brief*." N.C. R. App. P. 10(b) (emphasis added).

which appeal is taken . . . ." N.C. R. App. P. 3(d). "Rule 3 is jurisdictional, and if the requirements of the rule are not complied with, the appeal must be dismissed." *Foreman v. Sholl*, 113 N.C. App. 282, 291, 439 S.E.2d 169, 175 (1994) (citation omitted). "[T]he appellant must appeal from each part of the judgment or order appealed from which appellant desires the appellate court to consider . . . ." *Smith*, 43 N.C. App. at 272, 258 S.E.2d at 866. *Smith* recognized that some specific issues may "merge" into broader issues. *Id.* at 272-73, 258 S.E.2d at 866. There, the plaintiff's notice of appeal referred to the trial court's order allowing "Defendants' Motions for Summary Judgment." *Id.* at 272, 258 S.E.2d at 866. This Court held that the notice was sufficient to include in its scope the plaintiff's appeal from the trial court's conclusion that the complaint failed to state a claim for which relief could be granted, noting that "[t]he fact that the trial court labeled the defense in the order as one for failure to state a claim does not prevent us from regarding it as one for summary judgment." *Id.* at 273, 258 S.E.2d at 866-67 (citation omitted). This Court further held that "a notice of appeal should be deemed sufficient to confer jurisdiction on the appellate court on any issue if, from the content of the notice, it is likely to put an opposing party on guard the issue will be raised[.]" *Id.* at 274, 258 S.E.2d at 867.

In this case, Plaintiffs' Notice of Appeal specified that Plaintiffs were appealing the trial court's order "which dismissed Plaintiffs' action without prejudice." Unlike in *Smith*, the trial court's denial of Plaintiffs' Motion to Amend was entirely independent of the trial court's ruling dismissing the action without prejudice. *See Foreman*, 113 N.C. App. at 292, 439 S.E.2d at 176 (holding notice was insufficient to preserve third issue for appeal because the plaintiffs stated only two issues for appeal in their notice, and the third issue was not sufficient to dismiss the plaintiffs' entire claim). The trial court could have denied Defendant's Motion for Summary Judgment and still rejected Plaintiffs' Motion to Amend. Theoretically, at least, the trial court could have dismissed Plaintiffs' ordinary negligence claim and allowed Plaintiffs' Motion to Amend to state a medical malpractice claim, although our precedent disfavors such an outcome. *See Alston v. Hueske*, __ N.C. App. __, __, 781 S.E.2d 305, 310 (2016) ("Because the legislature has required strict compliance with [Rule 9(j)], our courts have ruled that if a pleader fails to properly plead his case in his complaint, it is subject to dismissal without the opportunity for the plaintiff to amend his complaint under Rule 15(a)."); *see also Keith v. N. Hosp. Dist. of Surry Cty.*, 129 N.C. App. 402, 405, 499 S.E.2d 200, 202 (1998) ("To read Rule 15 in this manner would defeat the objective of Rule 9(j), which . . . seeks to avoid the *filing* of frivolous medical malpractice claims.").

Finally, because the Notice of Appeal identified the order as dismissing the action *without prejudice*, it is not fairly inferred from the Notice that an appeal from the ruling on the Motion to Amend was intended or even necessary. Rule 3(d) can be treacherous for an appellant whose notice identifies one but not all provisions in the order or judgment from which the appellant seeks relief.

IV. Conclusion

For the reasons we have explained, we affirm the trial court's conclusion that this is an action for medical malpractice requiring a certification as provided in Rule 9(j), and we dismiss the remainder of Plaintiffs' appeal for lack of jurisdiction.

AFFIRMED IN PART; DISMISSED IN PART.

Judges DAVIS and ENOCHS concur.

DIANE MAUREEN HOGUE, Plaintiff
v.
TERRY LEE HOGUE, Defendant

No. COA16-710

Filed 30 December 2016

1. Appeal and Error—appealability—equitable distribution action terminated—other matters discussed

An equitable distribution action was effectively terminated by a trial court order declaring a prior equitable distribution order void, and the Court of Appeals had jurisdiction, even though other pending matters may have been discussed.

2. Appeal and Error—equitable distribution—motion for contempt—motion to dismiss—not the proper mechanism for relief

The trial court lacked the authority to void an equitable distribution order where the order was entered by a trial court judge, the parties reconciled and subsequently separated again, plaintiff demanded compliance with the terms of the order and defendant refused, plaintiff filed a motion for contempt, and the trial court dismissed that motion. A motion to dismiss a contempt motion is not the proper mechanism to seek relief from a final order or judgment.

HOGUE v. HOGUE

[251 N.C. App. 425 (2016)]

Appeal by plaintiff from order entered 18 April 2016 by Judge Jeannette R. Reeves in Lincoln County District Court. Heard in the Court of Appeals 30 November 2016.

The Jonas Law Firm, P.L.L.C., by Johnathan L. Rhyne, Jr. and Rebecca J. Yoder, for plaintiff-appellant.

Wesley E. Starnes for defendant-appellee.

ELMORE, Judge.

After the parties' separation, the trial court entered an order of equitable distribution. The parties reconciled shortly thereafter and continued their marital relationship for three years before separating again. Upon their second separation, plaintiff filed a motion for contempt against defendant for failing to comply with the terms of the equitable distribution order. Defendant moved to dismiss plaintiff's motion. The trial court granted defendant's motion to dismiss, concluding that the equitable distribution order was void upon the parties' reconciliation. We hold that, in ruling on defendant's motion to dismiss plaintiff's motion for contempt, the trial court lacked subject matter jurisdiction to void the equitable distribution order previously entered in the same action. We vacate the trial court's order declaring the prior equitable distribution order void.

I. Background

Diane Hogue (plaintiff) and Terry Hogue (defendant) were married on 24 November 1986 and separated on 11 October 2008. Plaintiff filed a complaint on 19 May 2009 for an equitable distribution of the parties' marital and divisible property. She later amended her complaint to include claims for child custody, child support, and alimony.

On 14 March 2011, the trial court entered an order of equitable distribution. The court concluded that an unequal division in favor of plaintiff was equitable and ordered defendant to pay a distributive award in the amount of $665,471.10. Defendant filed a Rule 59 motion for a new trial ten days later, along with a Rule 60 motion for relief based upon "mistake and surprise committed during the hearing and in the rendering of the judgment," and "misrepresentation and misconduct of the plaintiff." Sometime in March or April after the equitable distribution order was entered, the parties reconciled and began living together again as husband and wife. They closed on a new home that summer and liquidated most of the extraneous personal property subject to distribution.

Defendant's Rule 59 and 60 motions were never heard and neither party complied with the terms of the equitable distribution order.

The parties continued their marital relationship for about three years. In December 2014, plaintiff moved out of the marital home and sent defendant a letter demanding that he comply with the terms of the equitable distribution order. When defendant refused, plaintiff filed a motion for contempt and order to show cause. Defendant in turn moved to dismiss plaintiff's motion, arguing that the resumption of the parties' marital relations voided the executory portions of the equitable distribution order, and the order was not revived upon their subsequent reconciliation. Because the executory portions of the order were void and unenforceable, defendant averred, plaintiff's motion for contempt should be dismissed.

On 18 April 2016, the trial court entered an order granting defendant's motion to dismiss. The court concluded that, pursuant to *Schultz v. Schultz*, 107 N.C. App. 366, 374, 420 S.E.2d 186, 191 (1992), the equitable distribution order was "void and unenforceable" because the parties reconciled while every provision of the order remained executory. The court also concluded that "equity dictates voiding the order." Defendant's pending Rule 59 and 60 motions were dismissed as moot and the case continued until the next court term for the purpose of "status review."

Plaintiff timely appeals from the order granting defendant's motion to dismiss and adjudging the equitable distribution order void and unenforceable.

II. Discussion

[1] The trial court's order declaring the prior equitable distribution order void and unenforceable in effect determined the equitable distribution action. While other pending matters may have been discussed at the status review, the equitable distribution action had been terminated. Because the order would otherwise be final within the meaning of Rule 54(b) but for the other pending claims or motions in the action, this court has jurisdiction over the appeal pursuant to N.C. Gen. Stat. § 50-19.1 (2015).

[2] The parties disagree as to the effect of their reconciliation on the trial court's order of equitable distribution, or more specifically, whether the trial court erred in concluding that resumption of the marital relationship voids the executory portions of an equitable distribution order. A separate but related issue—and the only one we decide today—is whether the trial court, in ruling on defendant's motion to dismiss

plaintiff's contempt motion, had authority to adjudge the equitable distribution order void.

A district court judge may not ordinarily modify, overrule, or change the judgment of another district court judge previously made in the same action. *In re Royster*, 361 N.C. 560, 563, 648 S.E.2d 837, 840 (2007); *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972); *Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117 (1981). Pursuant to Rule 60(b), however, a trial judge may relieve a party from a final order or judgment for reasons including mistake, newly discovered evidence, fraud, the judgment is void, or it is no longer equitable that the judgment have prospective application. N.C. Gen. Stat. § 1A-1, Rule 60(b) (2015). An order entered "pursuant to Rule 60(b) 'does not overrule a prior judgment or order but, consistent with statutory authority, relieves parties from the effect of the judgment or order.' " *Duplin Cnty. Dep't of Soc. Servs. ex rel. Pulley v. Frazier*, 230 N.C. App. 480, 482, 751 S.E.2d 621, 623 (2013) (quoting *Charns v. Brown*, 129 N.C. App. 635, 639, 502 S.E.2d 7, 10 (1998)); *see also Hoglen v. James*, 38 N.C. App. 728, 731, 248 S.E.2d 901, 904 (1978) ("A [trial court] judge has the authority to grant relief under a Rule 60(b) motion without offending the rule that precludes one [trial court] judge from reviewing the decision of another." (citing *Charleston Capital Corp. v. Love Valley Enters., Inc.*, 10 N.C. App. 519, 179 S.E.2d 190 (1971))).

The trial court adjudged the equitable distribution order void and unenforceable upon defendant's motion to dismiss plaintiff's motion for contempt rather than a Rule 60(b) motion. A motion to dismiss a contempt motion is not the proper mechanism to seek relief from a final order or judgment. And while a trial court may, under appropriate circumstances, act sua sponte to grant relief under Rule 60(b), *Pope v. Pope*, ____ N.C. App. ____, ____, 786 S.E.2d 373, 378 (May 17, 2016) (No. COA15-1062) (citing *Carter v. Clowers*, 102 N.C. App. 247, 253, 401 S.E.2d 662, 665 (1991)), the record does not suggest that the trial court was acting under Rule 60(b) when it entered its order in this case. The order must be vacated. *See Hieb v. Lowery*, 121 N.C. App. 33, 38–39, 464 S.E.2d 308, 311–12 (1995) (holding that superior court judge lacked authority to modify judgment of another previously entered where "plaintiff made no Rule 60(b) motion" and judge did not "purport to act pursuant to Rule 60(b)"), *aff'd*, 344 N.C. 403, 407–08, 474 S.E.2d 323, 325–26 (1996); *see also Crook v. KRC Mgmt. Corp.*, 206 N.C. App. 179, 184, 697 S.E.2d 449, 453 (2010) ("If one trial judge enters an order that unlawfully overrules an order entered by another trial judge, such an order must be vacated . . . ." (citation omitted)).

III. Conclusion

Because the trial court lacked authority to declare the equitable distribution order void upon defendant's motion to dismiss plaintiff's motion for contempt, we vacate the order. We want to make clear, however, that our decision does not preclude defendant from seeking relief from the equitable distribution order pursuant to Rule 60(b), or the trial court from acting *sua sponte* to grant such relief pursuant to Rule 60(b).

VACATED.

Judges HUNTER, JR. and ENOCHS concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF
v.
LILLIAN DIANNE HULL AND ANNITTA B. CROOK, DEFENDANTS

No. COA16-522

Filed 30 December 2016

Statutes of Limitation and Repose—claim by insurance company—subrogation

The trial court did not err in an action arising from a multi-car vehicle accident by dismissing plaintiff-insurance company's complaint for failing to bring a lawsuit based upon its subrogation rights within the applicable three-year statute of limitations. It was clear from the complaint that the alleged breach of the subject insurance policy occurred when defendants affirmatively declared that settlement funds would not be returned.

Judge TYSON concurring in part and dissenting in part.

Appeal by plaintiff from order entered 23 February 2016 by Judge Mark E. Klass in Davidson County Superior Court. Heard in the Court of Appeals 17 October 2016.

Caudle & Spears, P.A., by Harold C. Spears and Christopher P. Raab, for plaintiff-appellant.

Doran, Shelby, Pethel and Hudson, P.A., by Michael Doran, for defendants-appellees.

ENOCHS, Judge.

The North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau") appeals from the trial court's order dismissing its complaint pursuant to Lillian Dianne Hull's and Annitta B. Crook's ("Defendants") Rule 12(b)(6) motion to dismiss. After careful review, we affirm.

Factual Background

Farm Bureau is an insurer authorized and licensed to issue insurance policies in North Carolina. Hull was insured under a business automobile policy issued by Farm Bureau ("Farm Bureau Policy"). The Farm Bureau Policy, provided a single limit of $100,000.00 in uninsured motorist ("UM") and underinsured motorist ("UIM") coverage, through the North Carolina Uninsured Motorist Coverage Endorsement ("Endorsement"). Crook was listed as a driver under the policy.

In May 2011, Hull was a passenger inside a vehicle, owned and operated by Crook, when another vehicle, owned and operated by Deborah Branham ("Branham"), crossed the center line and collided with Crook's vehicle. Shortly after this initial collision, a third vehicle, operated by Brandon Robinson ("Robinson"), also struck Defendants' vehicle.

Both Hull and Crook were injured during the collision and underwent medical treatment. Hull asserted medical expenses in excess of $58,000.00, and Crook asserted medical expenses in excess of $104,000.00. Five other individuals were injured in the accident, but none of them are parties to this action.

At the time of the accident, Branham was insured under an automobile liability insurance policy issued by Integon/GMAC ("GMAC") with policy limits of $30,000.00 per person and $60,000.00 per accident. Robinson was insured under automobile liability insurance policies by Allstate Insurance Company ("Allstate") with policy limits of $100,000.00 per person and $300,000.00 per accident, and by Mercury Insurance Company ("Mercury") with a policy limit of at least $250,000.00 per person.

As a result of the multiple claims asserted against Branham, GMAC tendered the limits of its liability coverage for Branham to Defendants and the five other individuals injured in the accident. Of those funds, Hull received $10,420.00 and Crook received $16,127.52, for a combined total of $26,547.52. Farm Bureau was given notice of GMAC's tender of Branham's policy limits.

Defendants claimed Branham qualified as an underinsured motorist under the Farm Bureau Policy and asserted a UIM claim. Farm Bureau did not advance, but offered to pay the Defendants' UIM claims for $73,452.48, the $100,000.00 UIM policy limit minus the liability settlements Defendants received from GMAC, Branham's carrier. The letter proposing this particular settlement to Defendants offered to waive Farm Bureau's "subrogation rights to the above referenced claim." The "referenced claim" in this letter addressed only GMAC's tender of Branham's policy limits to Defendants and none others. This offer by Farm Bureau to tender the balance of its UIM limits was also subject to the express condition that Defendants execute and return a Release and Trust Agreement for Underinsured Motorist Coverage ("Settlement Agreement") before the funds accompanying the agreement were disbursed.

Consistent with the Farm Bureau Policy and Endorsement, this Settlement Agreement included a paragraph that expressly preserved Farm Bureau's subrogation rights against any other party from which Defendants might recover damages. This paragraph required Defendants to hold any such money in trust for payment to Farm Bureau pursuant to its subrogation rights. However, both Defendants struck through and initialed this paragraph, signed the altered Settlement Agreements, and returned them to Farm Bureau without the tendered proceeds on 14 March 2012.

Defendants subsequently asserted claims against Robinson, the driver of the third vehicle, for their damages suffered due to his negligence in the accident. When Farm Bureau learned of this additional potential recovery, it claimed subrogation rights against any recovery from Robinson or his insurance companies.

Farm Bureau subsequently filed the present Complaint for Declaratory Judgment to determine and establish those rights on 1 May 2015. On 9 July 2015, Defendants notified Farm Bureau their claims against Robinson and his insurance companies had settled. Crook settled her claim against Robinson for a payment of $140,000.00. Hull settled her claim for $75,000.00.

On 4 February 2016, the trial court heard Defendants' Rule 12(b)(6) motion to dismiss. Prior to the hearing Farm Bureau amended its complaint to add a second claim for relief seeking monetary damages. Farm Bureau filed this amendment with both Defendants' and the court's consent. At the hearing, Defendants informed the court that their pending Rule 12(b)(6) motion was also being asserted against the amendment to the complaint filed that day.

On 23 February 2016, the trial court entered an order granting Defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim. It is from this order that Farm Bureau appeals.

Analysis

On appeal, Farm Bureau contends that the trial court erred in granting Defendants' motion to dismiss. 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 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)).

In the present case, Farm Bureau argues that its subrogation claims are not barred by the applicable statute of limitations. It contends that the breach of its insurance policies with Defendants occurred when Defendants reached a settlement with Robinson's insurance carrier and Defendants refused to pay Farm Bureau under the subrogation clause of Hull's policy.

Defendants, conversely, contend that the breach of Hull's policy occurred when they marked out the subrogation clause of the policy, initialed it, and remitted it to Farm Bureau along with a letter stating that they no longer intended to honor Farm Bureau's subrogation rights. If Farm Bureau is correct as to the time of breach, its claim is timely. However, if Defendants are correct, Farm Bureau's claim is time-barred.

" 'The statute of limitations for a breach of contract action is three years. The claim accrues at the time of notice of the breach.' " *Ludlum*

v. State, 227 N.C. App. 92, 94, 742 S.E.2d 580, 582 (2013) (quoting *Henlajon, Inc. v. Branch Highways, Inc.*, 149 N.C. App. 329, 335, 560 S.E.2d 598, 603 (2002)).

In the present case, Farm Bureau's complaint reveals on its face that it alleged Defendants breached their contract on 14 March 2012 when Defendants expressly manifested their intent not to honor Farm Bureau's subrogation rights. The complaint plainly states the following:

> 11. By letter date March 9, 2012, Farm Bureau offered to settle Hull and Crook's UIM claims for the total sum of $73,452.48 (representing the difference between the UIM policy limits of $100,000.00 and the liability settlements in the sum of $26,547.52 that Hull and Crook received from Integon/GMAC) on the condition that Hull and Crook execute and return a Release and Trust Agreement for Underinsured Motorist Coverage. True, genuine and authentic copies of Farm Bureau's March 9, 2012, letter and the Release and Trust Agreement are attached hereto as Exhibit B and incorporated herein by reference.
>
> 12. Contrary to the express condition of settlement, Hull and Crook materially altered the Release and Trust Agreement by marking through its second paragraph, signed the altered Release and Trust Agreements, returned it to Farm Bureau by letter date March 14, 2012, and negotiated Farm Bureau's check. Copies of the March 14, 2012, letter and the altered Release and Trust Agreements are attached hereto as Exhibit C and incorporated herein by reference.
>
> 13. Hull and Crook had no authority or right to negotiate the settlement checks on any terms other than those offered by Farm Bureau.
>
> 14. Farm Bureau demanded that Hull and Crook return the settlement funds, but Hull and Crook refused to do so.

It is readily apparent from Farm Bureau's own complaint that it alleged breach of the subject insurance policy occurred on 14 March 2012 when Defendants (1) expressly stated to Farm Bureau that they were not honoring their subrogation rights; (2) marked out and initialed the paragraph on the Release and Trust Agreements for Underinsured Motorist Coverage concerning subrogation; and (3) refused to return the settlement funds despite Farm Bureau's express demand that they do so.

In the present case, there existed more than the mere apprehension or the mere threat of an action – indeed, Farm Bureau alleged two claims in its amended complaint and did not "relinquish" the first claim of Defendants' obligation to return the $73,452.48 until it did so in its briefs and at oral argument. The claim for that money accrued when Defendants affirmatively declared the funds would not be returned – a clear disagreement and, necessarily, more than a threat or apprehension of a lawsuit.

Even assuming *arguendo* that Defendants' actions were not a direct breach of contract, Defendants actions would alternatively, at the very least, constitute an anticipatory breach of contract which would begin to toll the three-year statute of limitations.

> The doctrine of anticipatory breach is well known: when a party to a contract gives notice that he will not honor the contract, the other party to the contract is no longer required to make a tender or otherwise perform under the contract because of the anticipatory breach of the first party. Because by their words and conduct, defendants indicated that they would no longer honor the contract, plaintiff was excused from its obligation to tender the purchase price and *had an action for breach of contract*.

Phoenix Ltd. P'ship of Raleigh v. Simpson, 201 N.C. App. 493, 505, 688 S.E.2d 717, 725 (2009) (internal citation and quotation marks omitted and emphasis added). Our Supreme Court has long held that "[i]t is established by the decisions in this jurisdiction . . . [t]hat the cause of action [for breach of contract] accrues at the time of default, which may arise from abandonment *or anticipatory breach*[.]" *Lipe v. Citizens Bank & Trust Co.*, 207 N.C. 794, 795-96, 178 S.E. 665, 666 (1935) (emphasis added).

"Breach may also occur by repudiation. Repudiation is a positive statement by one party to the other party indicating that he will not or cannot substantially perform his contractual duties. When a party repudiates his obligations under the contract *before* the time for performance under the terms of the contract, the issue of anticipatory breach or breach by anticipatory repudiation arises." *Millis Const. Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 510, 358 S.E.2d 566, 569 (1987) (internal citations omitted). "[F]or a breach of contract action, the claim accrues upon breach." *Miller v. Randolph*, 124 N.C. App. 779, 781, 478 S.E.2d 668, 670 (1996).

In the present case, the tortfeasors were known to the parties at the time of Defendants' clear and unambiguous repudiation of Farm Bureau's subrogation rights. Despite this fact, Farm Bureau did not initiate its cause of action based upon these subrogation rights until 1 May 2015 — over three years after Defendants' express anticipatory breach of them on 14 March 2012.

Consequently, the trial court did not err in dismissing Farm Bureau's complaint for failing to bring its lawsuit based upon its subrogation rights within the applicable three year statute of limitations. "Having resolved this case on that issue, we need not consider the remaining issues presented by the parties to this Court, and any discussion of them would be obiter dictum." *Stark ex rel. Jacobsen v. Ford Motor Co.*, 365 N.C. 468, 481, 723 S.E.2d 753, 761-62 (2012).

Conclusion

For the reasons stated above, the trial court's order granting Defendants' motion to dismiss is affirmed.

AFFIRMED.

Chief Judge McGEE concurs.

Judge TYSON concurring in part, dissenting in part in a separate opinion.

TYSON, Judge, concurring in part, dissenting in part.

The majority's opinion concludes Farm Bureau's claim was barred by the applicable statute of limitations, and as such does not address the merits of this case. I concur with the majority that Farm Bureau's breach of contract claim is time-barred, but only to the extent Farm Bureau's claim asserted Defendants were obligated to return the sum of $73,452.48 paid to them pursuant to their UIM claims. Farm Bureau waived this claim in its briefs and again at oral argument.

Rather, Farm Bureau has requested (1) a declaration that it is subrogated to the proceeds of the Robinson recovery to the extent of its prior payment of UIM benefits to Defendants; and, (2) a recovery from Defendants out of the proceeds from the Robinson recovery offsetting the amount Farm Bureau previously paid Defendants under Defendant Hull's policy. The majority does not attempt to distinguish Farm Bureau's breach of contract claim from its declaratory judgment action, and

argues all claims are time-barred. Farm Bureau's declaratory judgment action and request for recovery from the Robinson proceeds are timely filed and are not time-barred under the statute. I respectfully dissent.

I. Statute of Limitations

Defendants argue the complaint demonstrates Farm Bureau's claim is barred by the applicable three year statute of limitations. They assert Farm Bureau's subrogation claim arose when Farm Bureau made payments to Defendants. They point out the record demonstrates Farm Bureau forwarded funds on 9 March 2012, which Defendants received on 12 March 2012, and Farm Bureau was made aware that Defendants altered the Settlement Agreement by 15 March 2012. Farm Bureau's complaint was filed 1 May 2015.

Farm Bureau responds its subrogation claim could not and did not accrue until settlement proceeds from Robinson were tendered to Defendants, as Farm Bureau had not suffered any subrogation damages prior to that point.

The majority holds Farm Bureau's complaint was time-barred because a breach of contract occurred when the Defendants struck through the subrogation language in the Settlement Agreements, and Farm Bureau brought its action more than three years after that point. Farm Bureau's initial complaint, which asserted "Defendants are obligated to return the sum of $73,452.48" received pursuant to their initial UIM claim, would be barred by the statute of limitations. Farm Bureau tendered those funds over three years prior to bringing its claims.

However, Farm Bureau explicitly relinquished this contract claim in its briefs and at oral argument, stating, "Farm Bureau waives any claim for the return of the specific funds paid to the Defendants under the UM/UIM provisions of the Farm Bureau Policy, to the extent that such a claim was asserted in its Complaint." Rather, Farm Bureau is timely seeking (1) a declaration that it is subrogated to the proceeds of the Robinson recovery to the extent of its prior payment of UIM benefits to Defendants; and, (2) a recovery from Defendants out of those proceeds from Robinson offsetting UIM benefits Farm Bureau had previously paid. These claims were timely filed and are not barred by the statute of limitations.

A. Standard of Review

" 'Dismissal of a complaint is proper under the provisions of Rule 12(b)(6) of the North Carolina Rules of Civil Procedure . . . when some fact disclosed in the complaint necessarily defeats the plaintiff's

claim.' " *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (quoting *Hooper v. Liberty Mut. Ins. Co.*, 84 N.C. App. 549, 551, 353 S.E.2d 248, 250 (1987)). Therefore, "[an affirmative] statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996).

B. Analysis

Neither party disputes and we agree the applicable statute of limitations in this case is three years. *See* N.C. Gen. Stat. § 1-52(1) (2015) (three-year statute of limitations for breach of contract claims); N.C. Gen. Stat. § 1-52(2) (2015) (establishing three-year statute of limitations for statutorily-based claims for which no other statute of limitation is provided); *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 277 N.C. 216, 222, 176 S.E.2d 751, 756 (1970) (applying the three-year statute of limitations from N.C. Gen. Stat. § 1-52(1) to a claim for equitable subrogation). Rather, this issue concerns when Farm Bureau's right of action to file a claim accrued, and commenced the running of the statute of limitations.

"In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises[.]" *Thurston Motor Lines, Inc. v. General Motors Corp.*, 258 N.C. 323, 325, 128 S.E.2d 413, 415 (1962) (citations and quotation marks omitted). The statute of limitations "cannot begin to run against an aggrieved party who under no circumstances could have maintained an action at the time the wrongful act was committed *until* that aggrieved party becomes entitled to maintain an action." *Williams v. General Motors Corp.*, 393 F.Supp. 387, 392 (M.D.N.C. 1975), *aff'd*, 538 F.2d 327 (4th Cir. 1976) (emphasis in original); *see Penley v. Penley*, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985) ("In no event can a statute of limitation begin to run until plaintiff is entitled to institute action."). For example, in breach of contract actions, [t]he claim accrues at the time of notice of the breach." *Henlajon, Inc. v. Branch Highways, Inc.*, 149 N.C. App. 329, 335, 560 S.E.2d 598, 603 (2002).

In contrast, courts only exercise jurisdiction in declaratory judgment actions where an "actual controversy" exists between the parties. *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984). Our Supreme Court has acknowledged, while the "actual controversy" rule is difficult to apply in some cases, "[a] mere difference of opinion between parties does not constitute a controversy within the

meaning of the Declaratory Judgment Act." *Id.* (citation and quotation marks omitted).

"Mere apprehension or the mere threat of an action or a suit is not enough." *Id.* Litigation must appear unavoidable for an actual controversy to exist. *Id.* "Thus the Declaratory Judgment Act does not 'require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise.' " *Id.* (quoting *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942)).

Here, Farm Bureau did not waive its subrogation rights. As noted, the waiver contained in Farm Bureau's initial settlement offerto Defendants only waived subrogation rights to the "above referenced claim," specifically GMAC's tender of Branham's policy limits to Defendants, and did not waive its future subrogation rights against other recoveries.

The majority holds the statute of limitations began to run when Defendants altered the Settlement Agreements and retained the proceeds tendered therewith, as this constituted an anticipatory breach and repudiation of the contract. The majority, quoting *Millis Const. Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 510, 358 S.E.2d 566, 569 (1987), states:

> Repudiation is a positive statement by one party to the other party indicating that he will not or cannot substantially perform his contractual duties. When a party repudiates his obligation under the contract before the time for performance under the terms of the contract, the issues of anticipatory breach or breach by anticipatory repudiation arises. (emphasis and citations omitted).

However, this Court has further explained:

> For repudiation to result in a breach of contract, "the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute[.]" *Edwards v. Proctor*, 173 N.C. 41, 44, 91 S.E. 584, 585 (1917) (citation and quotation marks omitted). *Furthermore, even a "distinct, unequivocal, and absolute" "refusal to perform" is not a breach "unless it is treated as such by the adverse party."* *Id.* (citation and quotation marks omitted). Upon repudiation, the non-repudiating party "may at once treat it as a breach of the entire contract and bring his action

> accordingly." *Id.* (citation and quotation marks omitted). Thus, breach by repudiation depends not only upon the statements and actions of the allegedly repudiating party but also upon the response of the non-repudiating party. *See id.*

D.G. II, LLC. v. Nix, 211 N.C. App. 332, 338-339, 712 S.E.2d 335, 340-41 (2011) (emphases supplied) (quoting *Profile Invs. No. 25, LLC v. Ammons East Corp.*, 207 N.C. App. 232, 237, 700 S.E.2d. 232, 235-36 (2010)).

Here, Farm Bureau did not treat Defendants' action of altering the Settlement Agreements as a "breach of the entire contract." *See id.* Rather, Farm Bureau allowed Defendants to retain the tender of the UIM benefits, which Farm Bureau acknowledges Defendants were rightfully owed under the policy. As stated in Defendants' answer, Farm Bureau "agreed to allow Defendants to have full use and control of said UIM funds, with the parties agreeing to disagree as to each other's position regarding subrogation rights as against future recoveries." As such, an anticipatory breach did not occur.

At the time of Farm Bureau's tender of the UIM policy limits, no other recovery existed from which Farm Bureau could seek to be subrogated. As addressed below, the purpose of UIM coverage is "to place a policy holder *in the same position that the policy holder would have been in* if the tortfeasor had had liability coverage equal to the amount of the UM/UIM coverage." *Nationwide Mut. Ins. Co. v. Haight*, 152 N.C. App. 137, 142, 566 S.E.2d 835, 838 (2002) (emphasis supplied) (citations and quotation marks omitted), *disc. rev. denied*, 356 N.C. 675, 577 S.E.2d 627 (2003). If Defendants had never received any additional recovery from Robinson, who was fully insured, Farm Bureau could not have asserted any subrogation rights.

Similarly, had Defendants recovered an amount from Robinson less than the $73,452.48 UIM benefits paid by Farm Bureau, Farm Bureau would have only been entitled to subrogation rights against the additional recovery in the amount actually received by Defendants, and not the full amount it had previously paid to Defendants. Here, Defendants received an amount in excess of the $73,452.48 Farm Bureau had previously paid, which allowed Farm Bureau to assert subrogation rights against the additional recovery for the entire amount previously paid under the UIM policy.

Under the Farm Bureau Policy and Endorsement, Farm Bureau's subrogation rights are *directly dependent* upon an additional recovery by Defendants. Until Defendants received the additional recovery

from the fully insured Robinson and then denied Farm Bureau subrogation, Farm Bureau had no actionable claim for subrogation. As such, no actionable claim for a declaration of its subrogation rights could or did arise until Defendants' recovery and denial. *See Gaston Bd. of Realtors*, 311 N.C. at 234, 316 S.E.2d at 61.

If Farm Bureau had brought a declaratory judgment action for subrogation at any time between its tender of the UIM limits and notice of Robinson's settlement, no actual controversy would have supported its claim. *See id.* The declaratory judgment action in this case did not accrue until after Farm Bureau was notified of Defendants' settlement proceedings with Robinson, Defendants denied Farm Bureau's subrogation rights to those accessible funds, and "litigation appear[ed] unavoidable." *Id.* Farm Bureau timely filed its action for declaratory judgment within three years after receiving notice of Defendants' negotiations with Robinson, ultimate payment by Robinson, and Defendants' refusal to subrogate. *See* N.C. Gen. Stat. § 1-52.

Farm Bureau's declaratory judgment action and claim for recovery from the proceeds received by Defendants from fully insured tortfeasor Robinson is properly filed and is not barred by the statute of limitations applicable to the Defendants' original breach of contract. Because I would hold these remaining claims are not time-barred, I address the other issues raised by Farm Bureau in this case.

II. Preservation of Farm Bureau's Arguments for Subrogation Rights Under the Endorsement and N.C. Gen. Stat. § 20-279.21(b)(3)-(4)

Farm Bureau asserts it properly preserved its claims for appeal based upon the Endorsement and N.C. Gen. Stat. § 20-279.21(b)(3)-(4). I agree.

A. Standard of Review

This Court has repeatedly held "the law does not permit parties to swap horses between courts in order to get a better mount, meaning, of course, that a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court." *Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (citations and quotation marks omitted).

B. Analysis

Farm Bureau's complaint requests the trial court to "enter a Declaratory Judgment . . . *construing the BAP policy.*" (emphasis supplied). Defendants contend this language limits Farm Bureau's

arguments to the main policy and does not include the Endorsement. I disagree.

The Farm Bureau Policy provides additional coverage to Defendants through the North Carolina Uninsured Motorist Coverage Endorsement (the "Endorsement"). This additional coverage includes both UM and UIM coverage for bodily injury, as the term "underinsured motor vehicle" is included within the definition of "uninsured motor vehicle" in the Endorsement. The Endorsement is an essential part and extension of Farm Bureau's Policy. As such, Farm Bureau properly preserved its arguments regarding the Endorsement's UM and UIM coverage.

Farm Bureau also properly preserved its arguments under N.C. Gen. Stat. § 20-279.21(b)(3)-(4). North Carolina law clearly states the provisions of N.C. Gen. Stat. § 20-279.21 are read into the Farm Bureau Policy to the same extent as if they were actually incorporated therein: "Where a statute is applicable to a policy of insurance, the provisions of the statute enter into and form a part of the policy to the same extent as if they were actually written into it." *Lichtenberger v. American Motorists Ins. Co.*, 7 N.C. App. 269, 272, 172 S.E.2d 284, 286-87 (1970) (emphasis, citations, and quotation marks omitted). When Farm Bureau sought a declaration of its subrogation rights by "construing the BAP policy," the Endorsement and applicable statutory provisions were also properly incorporated therein and were before the trial court to consider.

III. Farm Bureau's Subrogation Rights Under the Endorsement and N.C. Gen. Stat. § 20-279.21(b)(3)-(4)

Neither party disputes Branham, the initial tortfeasor, was an underinsured motorist or that upon GMAC's tender of Branham's policy limits, Defendant Hull was able to access her UIM coverage under the Farm Bureau Policy and Endorsement. Rather, Farm Bureau argues the Farm Bureau Policy, Endorsement, and N.C. Gen. Stat. § 20-279.21(b)(3)-(4), expressly provide subrogation rights to Farm Bureau with respect to Defendants' recovery from Robinson. Farm Bureau also asserts that neither the statute nor the Farm Bureau Policy and Endorsement require that Farm Bureau advance its policy limits in regards to the GMAC tender to preserve its subrogation rights against any future recovery by Defendants.

A. Standard of Review

When considering a motion to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure, "[t]he question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are

sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. NCNB Nat. Bank of N.C.*, 85 N.C. App. 669, 670-71, 355 S.E.2d 838, 840 (1987).

> In order to overcome such a motion, a plaintiff is not required to "conclusively establish" any factual issue in the case. Rather, the only question properly before a court reviewing a Rule 12(b)(6) motion is whether "the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true."

Feltman v. City of Wilson, 238 N.C. App. 246, 256, 767 S.E.2d 615, 622 (2014) (emphasis, citation, and quotation marks omitted). The allegations in the complaint, taken as true, must be reviewed in the light most favorable to the nonmoving party. *Donovan v. Fiumara*, 114 N.C. App. 524, 526, 442 S.E.2d 572, 574 (1994).

B. Analysis

The Motor Vehicle Safety and Financial Responsibility Act of 1953 (the "Act") "is a remedial statute and the underlying purpose is the protection of innocent victims who have been injured by financially irresponsible motorists." *Haight v. Travelers/Aetna Property Casualty Corp.*, 132 N.C. App. 673, 678, 514 S.E.2d 102, 106, *disc. review denied*, 350 N.C. 831, 537 S.E.2d 824 (1999); N.C. Gen. Stat. § 20-271.1-.39 (2015). "The terms of the Act are written into every North Carolina automobile liability policy, and where the terms of a policy conflict with those of the Act, the Act will prevail." *Farm Bureau Ins. Co. of N.C., Inc. v. Blong*, 159 N.C. App. 365, 369, 583 S.E.2d 307, 310, *disc. review denied*, 357 N.C. 578, 589 S.E.2d 125 (2003).

The Act includes provisions outlining the requirements for both UM and UIM coverage. N.C. Gen. Stat. § 20-279.21(b)(3)-(4) (2015). UM coverage "fill[s] the gap" in situations where a tortfeasor has no liability insurance. James E. Snyder, Jr., *North Carolina Automobile Insurance Law* § 30-1 (3d ed.1999).

Whereas, UIM coverage is a secondary source of recovery, which "allows the insured to recover when the tortfeasor has insurance, but his coverage is in an amount insufficient to compensate fully the injured party." *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 494, 467 S.E.2d 34, 41 (1996) (citation and quotation marks omitted); *see* Snyder, *North Carolina Automobile Insurance Law* § 30-1. "UIM coverage is intended

to place a policy holder *in the same position that the policy holder would have been in* if the tortfeasor had had liability coverage equal to the amount of the UM/UIM coverage." *Nationwide Mut. Ins. Co. v. Haight*, 152 N.C. App. at 142, 566 S.E.2d at 838 (emphasis supplied). An injured party is not entitled to and may not obtain UIM proceeds, if the tortfeasor's insurance is sufficient to compensate his damages or if it is greater than his UIM coverage. N.C. Gen. Stat. § 20-279.21(b)(4).

In support of this interpretation of the statute, both the UM and UIM provisions of the Act provide an insurer with subrogation rights against additional recovery received by the injured party. For subrogation rights under UM coverage, N.C. Gen. Stat. § 20-279-21(b)(3) provides:

> In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of coverage, the insurer making payment shall, to the extent thereof, be entitled to the proceeds of any settlement for judgment resulting from the exercise of any limits of recovery of that person against *any person or organization legally responsible for the bodily injury for which the payment is made*, including the proceeds recoverable from the assets of the insolvent insurer.

N.C. Gen. Stat. § 20-279.21(b)(3) (emphasis supplied).

The subrogation rights of insurers under the UIM provision are more limited:

> An underinsured motorist insurer may at its option, upon a claim pursuant to underinsured motorist coverage, pay moneys without there having first been an exhaustion of the liability insurance policy covering the ownership, use, and maintenance of the underinsured highway vehicle. In the event of payment, the underinsured motorist insurer shall be either: (a) entitled to receive by assignment from the claimant any right or (b) subrogated to the claimant's right regarding any claim the claimant has or had against the owner, operator, or maintainer of the underinsured highway vehicle, provided that the amount of the insurer's right by subrogation or assignment shall not exceed payments made to the claimant by the insurer. *No insurer shall exercise any right of subrogation or any right to approve settlement with the original owner, operator, or maintainer of the underinsured highway vehicle under a policy providing coverage against an underinsured*

> *motorist where the insurer has been provided with written notice before a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of that notice.*

N.C. Gen. Stat. § 20-279.21(b)(4) (emphasis supplied).

1. Subrogation Rights Against Recovery from Joint Tortfeasors

This Court has previously considered whether the plain language of N.C. Gen. Stat. § 20-279.21(b)(3)-(4) extend and protect an insurer's subrogation rights against a joint tortfeasor, who is not underinsured. *Blong*, 159 N.C. App. at 371, 583 S.E.2d at 310-11. In *Blong*, a drunk driver ran a red light and struck another vehicle containing five teenagers. *Id.* at 366, 583 S.E.2d at 308. The drunk driver's insurance carrier tendered the limits of its policy to the victims and their families almost immediately after the accident, but the amount was inadequate to compensate their damages. *Id.*

The victims and their families filed two "dram shop" lawsuits, contending the businesses were negligent in serving alcohol to a person who was already intoxicated. *Id.* at 366-67, 583 S.E.2d at 308. At the same time, the victims and their families sought further compensation under their own UIM coverage. *Id.* at 367, 583 S.E.2d at 308. One of the victims was covered under a policy through Farm Bureau, which tendered the full amount it owed under the policy: $250,000. *Id.* The policy had a limit of $300,000 per accident, but the victims already received $50,000 from the drunk driver's insurance company and, like in the present case, Farm Bureau waived its subrogation rights against that initial $50,000 recovery from the underinsured tortfeasor. *Id.* at 366-67, 583 S.E.2d at 308-09.

Prior to tendering the limits of the policy, Farm Bureau informed the policy holder it would seek an offset of its UIM payments from the amount recovered in the dram shop actions. *Id.* at 367, 583 S.E.2d at 309. The parties "agreed to disagree" about future subrogation rights. *Id.* Farm Bureau's tender of payment was thus made without prejudice to Farm Bureau's right to seek a determination of its subrogation rights, which was the ultimate question before this Court in *Blong*. *Id.*

Although *Blong* was a UIM case, this Court considered both the provisions of N.C. Gen. Stat. § 20-279.21(b)(3) and (4) regarding UM and UIM coverage in making this determination. *Id.* at 371, 583 S.E.2d at 310-11. This Court first held the broad language stated in the UM provision

allowing subrogation "against any person or organization legally responsible" also applied to UIM coverage. *Blong*, 159 N.C. App. at 371, 583 S.E.2d at 310-11. This Court then interpreted that subrogation language to encompass the liability and coverage of the bars involved in the dram shop lawsuits. *Id.* at 373, 583 S.E.2d at 312.

This Court in *Blong* noted the issue of how to interpret the language of N.C. Gen. Stat. § 20-279.21(b)(3) had arisen, but was not addressed in a prior case because the insurer had waived any rights to subrogation under its policy. *Id.* at 371, 583 S.E.2d at 311 (citing *Silvers v. Horace Mann Ins. Co.*, 90 N.C. App. 1, 11-12, 367 S.E.2d 372, 378 (1988), *modified and remanded*, 324 N.C. 289, 378 S.E.2d 21 (1989)). The policy in *Blong* did not present such an impediment. *Id.* As such, this Court held Farm Bureau was entitled to subrogation for the recovery received as a result of the dram shop lawsuits, and stated "[p]laintiff insurer, by the Act and present policy, is subrogated to defendants' right to recover from *any legally responsible party*." *Id.* at 372, 583 S.E.2d at 311 (emphasis supplied).

Here, the facts and issues alleged by Farm Bureau in its amended complaint parallel those before this Court in *Blong*. *See id.* at 366-67, 583 S.E.2d at 308-09. As in *Blong*, Defendants received an initial settlement from the underinsured driver's insurer, GMAC. Farm Bureau waived subrogation to that amount and paid out the balance of its UIM policy limits to Defendants. This tender of payment was conditioned upon Defendants signing and returning the Settlement Agreement as tendered, which included a provision providing Farm Bureau with subrogation rights against any recovery received from "any other person or persons, organizations, associations or corporations[.]" Also, as in *Blong*, controversy arose over the subrogation rights of Farm Bureau against any future recovery Defendants received from joint tortfeasors. In both cases, this controversy resulted in Farm Bureau seeking a declaration of its rights once recovery was realized. *See id.*

When Defendants recovered from Robinson in this case, Farm Bureau properly asserted subrogation rights against Defendants' recovery from Robinson as a "legally responsible party," provided that Farm Bureau had not waived its subrogation rights under the Farm Bureau Policy, Endorsement, and Act. *See id.* at 371, 583 S.E.2d at 311. Defendants' answer specifically confirms Farm Bureau had not and did not waive its subrogation rights to future recoveries against other tortfeasors. To do so, as the majority allows here, allows Defendants a double recovery as a result of and arising from their original wrongful conduct.

2. Waiver of Subrogation Rights by Failure to Advance

Relying upon the Farm Bureau Policy and Endorsement, N.C. Gen. Stat. § 20-279.21(b)(4), and North Carolina Supreme Court precedent, Defendants argue when Farm Bureau failed to advance the amount of tentative liability settlement offered by GMAC within thirty days of being notified, this failure resulted in a waiver of Farm Bureau's subrogation rights to any future claims or recoveries from joint tortfeasors. Farm Bureau's complaint admits it was notified of the GMAC settlement offer and that it did not advance. However, Farm Bureau argues its failure to advance only waived its subrogation rights against future recovery from Branham and GMAC; and not advancing did not result in a waiver of its rights against all future claims from any other joint tortfeasors.

Defendants rely on *Lunsford v. Mills*, to argue Farm Bureau was required to advance the tentative liability settlement as a pre-condition to preserve and assert subrogation rights under N.C. Gen. Stat. § 20-279.21(b)(4). *Lunsford v. Mills*, 367 N.C 618, 766 S.E.2d 297 (2014). Farm Bureau argues *Lunsford* does not hold that UIM insurers cannot waive subrogation recovery from the underinsured tortfeasor, or that UIM insurers must advance their UIM policy limits to preserve their subrogation rights against some future unknown or unidentified recovery from other tortfeasors.

In *Lunsford*, Lunsford sued all the joint tortfeasors in one action claiming they were jointly and severally liable for his injuries. *Id.* at 620, 766 S.E.2d at 299. While one of the tortfeasors in that action was underinsured, the combined insurance of the tortfeasors was over the limits of Lunsford's UIM coverage with Farm Bureau. *Id.* Pursuant to that action, the underinsured driver's insurance company tendered the limits of its policy to Lunsford. *Id.* Lunsford's attorney notified Farm Bureau of the underinsured driver's tender and demanded Farm Bureau tender payment of Lunsford's UIM claims. *Id.*

Lunsford eventually settled its claims with the other tortfeasors for an amount that exceeded his UIM coverage with Farm Bureau. *Id.* Unlike here, Farm Bureau never tendered the UIM coverage to Lunsford, but filed a motion for summary judgment on Lunsford's UIM claims. *Id.* at 620-21, 766 S.E.2d at 299. Lunsford also moved for summary judgment, maintaining that his UIM policy "stacked" and he was entitled to receive $350,000—the amount of his aggregated UIM coverage minus the $50,000 recovered from the underinsured driver. *Id.* at 621, 766 S.E.2d at 299-300. The trial court granted Lunsford's motion for summary judgment and ordered that Farm Bureau pay Lunsford $350,000. *Id.* at 621, 766 S.E.2d at 300.

Our Supreme Court upheld the trial court's order and held an insured is only required to exhaust the liability insurance of a single at-fault driver in order to trigger payment of UIM benefits. *Id.* at 627, 766 S.E.2d at 303. In support of its conclusion, the Court briefly addressed subrogation and noted, "[i]f . . . insureds were required to exhaust the liability policies of all at-fault motorists as a prerequisite to recovering UIM coverage, there would be no need to provide UIM carriers subrogation or reimbursement rights, and consequently, these provisions would be rendered meaningless." *Id.* at 628, 766 S.E.2d at 304.

The Court reiterated that the purpose of the UIM statute is "to place a policy holder in the same position that the policy holder would have been in if the tortfeasor had had liability coverage equal to the amount of the . . . UIM coverage." *Id.* at 628 n.1, 766 S.E.2d at 304 (quoting *Nationwide Mut. Ins. Co. v. Haight*, 152 N.C. App. at 142, 566 S.E.2d at 838). In doing so, the Court noted the statute allows an insurer to "seek recovery of any overpayment through the exercise of its rights to subrogation or reimbursement. Through these mechanisms, insurers are able to recoup any overpayment and insureds are divested of any so-called 'windfall' " *Id.* The effect of the majority's conclusion here specifically allows Defendants a double recovery and the prohibited "windfall."

In *Lunsford*, the insurer, "could have preserved its subrogation rights by advancing its UIM policy limits." *Id.* at 628, 766 S.E.2d at 304. Contrary to the facts here and before us, the insurer in *Lunsford* had not paid the insured any amounts under the insured's UIM policy or attempted to preserve its rights to subrogation in any other way. *Id.*

While Farm Bureau admits it did not advance in this case, it expressly reserved its subrogation rights through other means. First, unlike in *Lunsford*, this case did not originate as a single action against multiple tortfeasors. Defendants, here, first pursued a claim against the underinsured driver and his carrier, GMAC. Upon notice of this settlement, Farm Bureau, in this case, tendered the policy limits owed to Defendants under the UIM coverage in the Endorsement. Farm Bureau's offer to settle Defendants' UIM claims for $73,452.48 represented the precise difference between the UIM policy limits of $100,000 and the initial liability settlements from GMAC in the sum of $26,547.52. Farm Bureau did not need to preserve its subrogation rights against GMAC, because Farm Bureau's tender of the policy limits already accounted for and credited GMAC's tender of proceeds against the UIM policy limits.

Second, Farm Bureau expressly conditioned the tender upon Defendants' signature and return of the Settlement Agreements

accompanying the proffered check. This Settlement Agreement expressly asserted Farm Bureau's policy and statutory subrogation rights against any future tortfeasor recovery received by Defendants. Unilaterally and without authority, Defendants crossed through that provision providing Farm Bureau subrogation rights to future recovery and failed to return the proceeds check tendered with the Settlement Agreements. Defendants' action was an express rejection of the Settlement Agreement and proceeds as tendered. This action constituted a counter-offer to Farm Bureau, as a rejection of terms as tendered becomes counteroffer. *See Normile v. Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985) ("[I]f the seller purports to accept but changes or modifies the terms of the offer, he makes what is generally referred to as a qualified or conditional acceptance. . . . Such a reply from the seller is actually a counteroffer[.]" (citations and quotation marks omitted)). Farm Bureau never agreed to release its subrogation rights against recovery by Defendants from other joint tortfeasors.

Finally, Farm Bureau did not waive its rights to subrogation under the Farm Bureau Policy and Endorsement. This Court has specifically looked at the coverage provided under the UIM policy in determining whether an insurer has waived its subrogation rights. *See Blong*, 159 N.C. App at 371, 583 S.E.2d at 311 (citing *Silvers*, 90 N.C. App. at 11-12, 367 S.E.2d at 378). As noted in *Blong*, the broad subrogation language of N.C. Gen. Stat. § 20-279.21(b)(3) is "subject to the terms and conditions of such coverage." *Id.*

The Farm Bureau Policy initially addresses Farm Bureau's subrogation rights under "Transfer of Rights of Recovery Against Others to Us," which states:

> If any person or organization to or for whom we make payment under this Coverage Form has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after "accident" or "loss" to impair them.

Like the language in N.C. Gen. Stat. § 20-279.21(b)(3), this language provides Farm Bureau with broad subrogation rights against "any person or organization" from whom the insured has the right to recover damages.

Under the Endorsement, UIM coverage is only triggered and payable if the insured is damaged by an *underinsured vehicle*. The Endorsement's "Transfer of Rights of Recovery Against Others to Us"

amends, but does not replace, Farm Bureau's subrogation rights concerning its UIM coverage:

> a. If we make any payment on the Named Insured's behalf, we are entitled to recover what we paid from other parties. The Named Insured must transfer rights of recovery against others to us. The Named Insured must do everything necessary to secure these rights and do nothing to jeopardize them.
>
> However, our rights under this paragraph do not apply with respect to vehicles described in Paragraphs F.4.a., c. and d. of the definition of "uninsured motor vehicle". For these vehicles, if we make any payment and the Named Insured recovers from another party, that Named Insured must hold the proceeds in trust for us and pay us back the amounts we have paid.
>
> b. Our rights do not apply under this provision with respect to damages caused by an "accident" with [an underinsured] vehicle described in Paragraph b. of the definition of "uninsured motor vehicle" if we:
>
> (1) Have been given prompt written notice of a tentative settlement between an "insured" and the insurer of [an underinsured] vehicle described in Paragraph b. of the definition of "uninsured motor vehicle"; and
>
> (2) Fail to advance payment to the "insured" in an amount equal to the tentative settlement within 30 days after receipt of notification.

Under the Endorsement, the language waiving subrogation rights by failing to advance only and expressly applies to a recovery *from the underinsured vehicle*, and not broadly to anyone from whom the insured has a right to recover. For subrogation rights against damages recovered from any other vehicle, the main provision in the Farm Bureau Policy applies and gives Farm Bureau subrogation rights against anyone from whom the insured has the right to recover damages.

Farm Bureau did not need to preserve its subrogation rights against recovery from GMAC under the Endorsement, because Farm Bureau took that recovery into account as a credit when it tendered the balance of its UIM policy limits to Defendants.

On the other hand, Robinson was not operating an *underinsured vehicle*. As such, the damages caused by Robinson do not meet the definitional trigger required in order for the limitation in the Endorsement to apply. Rather the broad language of the Farm Bureau Policy is applicable, which preserves Farm Bureau's subrogation rights against the recovery from the fully insured Robinson.

UIM coverage "allows the insured to recover when the tortfeasor has insurance, but his coverage is in an amount insufficient to compensate fully the injured party." *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. at 494, 467 S.E.2d at 41. Its purpose is not for injured parties to receive a "windfall" and net recovery in excess of their actual damages. *See Lunsford*, 367 N.C. at 628 n.1, 766 S.E.2d at 304; *Walker v. Penn Nat. Sec. Ins. Co.*, 168 N.C. App. 555, 558-59, 608 N.C. App. 107, 110 (2005) (holding the trial court erred in failing to credit defendant with the $30,000.00 paid by the liability carrier); *N.C. Farm Bureau Mut. Ins. Co. v. Gurley*, 139 N.C. App. 178, 183, 532 S.E.2d 846, 849 (2000) ("While we realize that the insureds will never be fully compensated for their loss, we see no evidence that the legislature intended to award the insureds more than they would have received if the tortfeasor had been insured or uninsured." (citations and quotation marks omitted)).

Farm Bureau's complaint, when viewed in light most favorable to Farm Bureau, alleges a claim upon which relief can be granted. *See Feltman*, 238 N.C. App. at 256, 767 S.E.2d at 622. While Farm Bureau admits it did not advance, this case is distinguishable from *Lunsford*, as Farm Bureau tendered the limits of the amount owed to Defendants under the Farm Bureau Policy and Endorsement. Furthermore, as in *Blong*, Farm Bureau tendered this amount on the express condition that its subrogation rights against future recoveries were preserved. *See Blong*, 159 N.C. App. at 367, 583 S.E.2d at 309. The trial court erred by granting Defendants' Rule 12(b)(6) motion to dismiss.

3. Applicability to Defendant Crook

Defendants argue the subrogation provisions in the Farm Bureau Policy and Endorsement do not apply to Defendant Crook, as she was not a named insured. I disagree.

The Endorsement's "Transfer of Rights of Recovery Against Others To Us," states, "[i]f we make any payment on the Named Insured's behalf, we are entitled to recover what we paid from other parties. *The Named Insured must transfer rights of recovery against others to us*. The Named Insured must do everything necessary to secure

these rights[.]" (emphasis supplied). While this provision only requires the "Named Insured" to transfer the rights of recovery against others to Farm Bureau, this provision only changes, but does not replace, the Farm Bureau Policy "Transfer of Rights" provision. The Farm Bureau Policy "Transfer of Rights" provision is much broader, and requires "any person or organization to or for whom we make payment" to transfer their rights of recovery against others to Farm Bureau. This includes any recovery received by Defendant Crook. Defendants' argument is without merit.

VIII. Conclusion

While I concur that Farm Bureau's breach of contract claim seeking a return of the UIM benefits paid to Defendants is time-barred, as Farm Bureau stipulates, the remaining Farm Bureau declaratory judgment claims are not time-barred.

Farm Bureau declaratory judgment action and claim for recovery of proceeds received by Defendants from Robinson could not and did not accrue until Farm Bureau received notice of Defendants' negotiations with and payment by Robinson, and Defendants' denied of Farm Bureau's subrogation rights to that recovery. Farm Bureau brought its declaratory judgment action within three years of Defendants' denial of Farm Bureau's subrogation rights to the Robinson recovery, Farm Bureau's claim is not barred by the statute of limitations.

Since the Endorsement and the Act are essential parts and an extension of the Farm Bureau Policy, Farm Bureau properly preserved its arguments under the Farm Bureau Policy, the Endorsement, and the Act. Finally, Farm Bureau's complaint, when viewed in light most favorable to Farm Bureau, alleges a claim upon which relief can be granted.

As such, the trial court erred in granting Defendant's motion to dismiss Farm Bureau's declaratory judgment action. I do not address Farm Bureau's equitable subrogation argument, as the trial court erred in granting Defendants' motion to dismiss. I concur in part and respectfully dissent in part.

RIDLEY v. WENDEL

[251 N.C. App. 452 (2016)]

BENJAMIN RIDLEY, PLAINTIFF
v.
BRET WENDEL; HENDRICK LUXURY COLLISION CENTER, LLC; CITY CHEVROLET AUTOMOTIVE COMPANY; NATIONWIDE MUTUAL FIRE INSURANCE COMPANY; AND EACH OF THEM, DEFENDANTS

No. COA16-363

Filed 30 December 2016

1. Evidence—expert testimony—auto repair—damage not noticed

The trial court did not err in a case arising from a failed auto repair following a collision by allowing plaintiff's expert to testify that defendant did not "just accidentally miss all this damage." The witness was tendered as an expert in automotive repair without objection and was so admitted, the testimony followed his expert opinion, which was not objected to, about the obviousness of the damage to the vehicle, and the testimony was provided in response to a general question and assisted the jury in understanding the evidence.

2. Evidence—expert testimony—auto repair—motivation not to repair

The trial court did not err in a case arising from a failed auto repair following a collision by allowing an expert witness to testify that the there was "motivation for not fixing the damaged areas." The testimony did not address defendant's motivations but instead gave a general overview based upon the witness's area of expertise of why a body shop may not repair certain damage to a vehicle.

3. Unfair Trade Practices—auto repairs—repairs not done

The trial court did not err by denying defendant's motion for judgment notwithstanding the verdict on plaintiff's claim for unfair and deceptive trade practices arising from failed auto repairs after a collision. There was more than a scintilla of evidence that plaintiff suffered damages from defendant's representations that the vehicle was repaired when it was not, that defendant knew or should have known that it was not repaired, and that defendant had conducted unauthorized repairs.

4. Damages and Remedies—failed auto repairs—remittitur

The trial court properly denied defendant a new trial where defendant argued that the jury ignored the instructions on damages,

but the trial court properly calculated the remittitur of damages to put plaintiff in the same position he would have been in had he not been the victim of fraud.

5. Attorney Fees—failed auto repair—authority for award

The trial court's award of attorney fees was reversed in a case that rose from a failed auto repair after a collision. The award was under N.C.G.S. § 20-354.9 for violation of the North Carolina Motor Vehicle Repair Act, but the case was not tried under the Act and the jury was neither given instructions on nor asked to render a verdict on any cause of action related to the Act.

Appeal by defendant City Chevrolet Automotive Company from judgment entered 4 January 2016 by Judge Daniel A. Kuehnert in Catawba County Superior Court. Heard in the Court of Appeals 28 November 2016.

Jones, Hewson & Woolard, by Lawrence J. Goldman, for defendant-appellant.

Law Offices of Jason E. Taylor, PC, by Lawrence B. Serbin and Jason E. Taylor, for plaintiff-appellee.

ENOCHS, Judge.

City Chevrolet Automotive Company ("Defendant")[1] appeals from judgment entered on 4 January 2016 following a jury verdict finding Defendant liable to Benjamin Ridley ("Plaintiff") for fraud and negligence and awarding damages in the amount of $200,000.00. The judgment of the trial court remitted the jury's verdict to $110,270.66, found Defendant had violated the Unfair and Deceptive Trade Practices Act, trebled the damages to $330,811.98, and awarded attorneys' fees and costs to Plaintiff. On appeal, Defendant contends that the trial court erred in allowing Plaintiff's expert witness to testify regarding the motivations and intent of Defendant; in denying Defendant's motion notwithstanding the verdict on the claim for unfair and deceptive trade practices; in denying Defendant's motion for a new trial; and in awarding Plaintiff attorneys' fees. After careful review, we affirm the judgment, but reverse the grant of attorneys' fees.

1. City Chevrolet Automotive Company is the only defendant which is a party to the present appeal.

Factual Background

On 12 June 2013, Plaintiff was involved in a motor vehicle accident in his 2008 Land Rover LR3. Plaintiff's vehicle struck Bret Wendel's vehicle when Wendel turned in front of Plaintiff at an intersection as the traffic light turned yellow. Plaintiff was travelling at 40 miles per hour at the time of the collision and both vehicles were damaged.

After the accident, Plaintiff contacted Land Rover Corporation of America to find out who they recommended to repair his vehicle. Plaintiff ultimately selected Hendrick Luxury Collision Center ("Hendrick") to do the repairs. He specifically relayed his concerns to Hendrick that because of the force of the collision there was likely to be unseen damage to the vehicle's frame.

Approximately one month later, Hendrick notified Plaintiff that his vehicle had been repaired and was ready to be picked up. Hendrick, however, had not performed any repairs on the vehicle. Unbeknownst to Plaintiff, the repairs had, in actuality, all been performed by the collision repair shop of Defendant.

Plaintiff picked up his vehicle from Hendrick and drove it home. On his way home, he noticed that the vehicle was pulling to the right significantly and whenever he hit a bump in the road, "there was a very loud clanking like metal slapping metal[.]" When Plaintiff arrived home, he inspected the vehicle and noticed that the front left tire had an eighteen inch gash in it and was the same tire that had been on the vehicle at the time of the collision. Plaintiff contacted Hendrick with his concerns about the repairs to his vehicle and, on 8 August 2013, Hendrick took Plaintiff's Land Rover back to their shop for further inspection and repairs.

Hendrick had possession of the vehicle "approximately from June until . . . the first part of September." When Hendrick returned the vehicle to Plaintiff, it still pulled to the right, but the clanking sound was no longer heard. Plaintiff attempted to contact Hendrick several times over the next several weeks, but Hendrick never returned any of his phone calls.

Wendel was insured by Nationwide Mutual Fire Insurance Company ("Nationwide"). After Hendrick returned his vehicle to him for the second time, Plaintiff contacted Nationwide and requested that they reimburse him for the diminished value of his Land Rover. Nationwide made Plaintiff an offer of reimbursement, but Plaintiff did not believe that it was fair, and so he declined the offer.

To determine the exact diminished value of his vehicle, Plaintiff took his vehicle to Michael Bradshaw at K&M Auto in Hickory, North Carolina. After inspecting Plaintiff's vehicle, Bradshaw determined that the Land Rover was not safe and "shouldn't be on the road." The vehicle had several issues that had either not been repaired or had been repaired improperly. Plaintiff left the vehicle at K&M Auto and contacted Nationwide to discuss these issues.

It was at this time that Nationwide "made the decision to total loss the vehicle" and notified Plaintiff that he "would get paid the value of the vehicle in a couple of days." Nationwide produced a supplemental estimate of repair that included replacing the frame of the vehicle. This estimate, or the separate estimate prepared by Bradshaw, required that the vehicle be declared a total loss. However, Nationwide then represented to Plaintiff that they would need to have the vehicle inspected by a third-party to confirm that the frame of the vehicle did, in fact, need to be replaced. This inspection was never performed because Plaintiff backed out of the agreed-upon inspection.

On 15 July 2014, Plaintiff filed suit against Defendant, Wendel, Hendrick, and Nationwide for damage done to his vehicle in the original collision, as well as damages related to the repair of his vehicle. Plaintiff asserted claims for negligence, fraud, negligent misrepresentation, civil conspiracy, tortious breach of contract, bad faith refusal to settle, and unfair and deceptive trade practices. Nationwide was dismissed as a defendant, and the claims against Wendel were ordered to be tried separately. Beginning on 9 November 2015, a jury trial was held on Plaintiff's claims against Defendant and Hendrick in Catawba County Superior Court before the Honorable Daniel A. Kuehnert.

The jury returned a verdict against Defendant and Hendrick on 18 November 2015. The jury found Defendant guilty of fraud and negligence and awarded Plaintiff $200,000.00 in damages. Because civil conspiracy was not found by the jury, Hendrick was dismissed from the suit pursuant to the trial court's granting of its post-judgment motion to dismiss. On 20 November 2015, Defendant moved for judgment notwithstanding the verdict and a new trial. On 1 December 2015, Plaintiff filed a motion for costs and attorneys' fees.

The trial court remitted the jury's verdict to $110,270.66 when it entered judgment on 28 December 2015. The trial court also found unfair and deceptive trade practices, and trebled the damages to $330,811.98. The trial court also awarded Plaintiff attorneys' fees pursuant to the North Carolina Motor Vehicle Repair Act in the amount of $100,725.00,

as well as costs totaling $6,726.68. It is from this judgment that Defendant appeals.

Analysis

I. Expert Witness Testimony

[1] Defendant first argues on appeal that the trial court erred in allowing Plaintiff's expert to testify that Defendant did not "just accidentally miss all this damage" and that there was "motivation for not fixing the damaged areas" of the vehicle. Specifically, Defendant argues that this testimony should have been excluded as it "suggests whether legal conclusions should be drawn or whether legal standards are satisfied." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 587, 403 S.E.2d 483, 489 (1991). We disagree, and affirm the trial court on this issue.

It is well established that "the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). "Given such latitude, it follows that a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *State v. McGrady*, 232 N.C. App. 95, 98, 753 S.E.2d 361, 365 (2014) (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004)), *aff'd*, 368 N.C. 880, 787 S.E.2d 1 (2016). " '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.' " *Id.* (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1998)).

Rule 702(a) of the North Carolina Rules of Evidence provides that

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> > (1) The testimony is based upon sufficient facts or data.
> >
> > (2) The testimony is the product of reliable principles and methods.

> (3) The witness has applied the principles and methods reliably to the facts of the case.

Furthermore, pursuant to Rule 704 of the North Carolina Rules of Evidence, "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Expert testimony is admissible if " 'the opinion expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.' " *State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223 (citing *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978)), *cert. denied*, __ U.S. __, 181 L. Ed. 2d 529 (2011).

In the present case, Plaintiff's expert, Michael Bradshaw, had worked in the automobile collision repair industry for twenty-five years. As an automotive steel structural technician and as an estimator, Bradshaw had achieved the "platinum level" of the Inter-Industry Conference on Auto Collision Repair. He was recognized by Automotive Service Excellence as a certified collision repair technician and collision estimator. Also, he was certified by 17 different automobile manufacturers to provide collision repair for their vehicles. Mr. Bradshaw was tendered as an expert in automotive repair without objection, and was so admitted.

Plaintiff's expert was asked, and answered in the negative, whether "any professional body tech [could] just accidentally miss all this damage." This testimony followed his expert opinion, which was not objected to, as to the obviousness of the damage to the vehicle. We find that this testimony was provided in response to a general question and assisted the jury in understanding the evidence before it. It did not address the intent or motivation of Defendant.

[2] Defendant also argues that the expert should not have been allowed to testify that there was "motivation for not fixing the damaged areas." However, this testimony did not address Defendant's motivations, but instead gave a general overview — based upon the witness' area of expertise — of why a body shop may not repair certain damage to a vehicle. Bradshaw explained different methods by which an automotive repair shop can bill for services and opined that the method used by Defendant could embolden a shop not to repair all of the damage to a vehicle.

None of the testimony Defendant argues was improperly admitted invaded the province of the jury. Rather, it comprehensively assisted the jury in understanding the evidence and determining a fact in issue. "The

[expert] witness may offer testimony in the form of an opinion or inference even though it may embrace the ultimate issue to be decided by the jury." *State v. Huang*, 99 N.C. App. 658, 663, 394 S.E.2d 279, 283 (1990) (citation, quotation marks, and ellipses omitted).

To prevail on this issue, Defendant must not only show that the challenged testimony was improperly admitted, but must also show that it was prejudicial. "In civil cases, the burden is on the appellant not only to show error but to enable the court to see that he was prejudiced or the verdict of the jury probably influenced thereby." *HAJJM*, 328 N.C. at 589, 403 S.E.2d at 490 (citation, quotation marks, and brackets omitted). As shown above, the challenged expert testimony was properly admitted and, therefore, whether this expert's testimony was prejudicial need not be addressed. The trial court did not err, and this assignment of error is overruled.

II. Unfair and Deceptive Trade Practices

[3] Defendant argues in its second assignment of error that the trial court erred in denying its motion for judgment notwithstanding the verdict on Plaintiff's claim for unfair and deceptive trade practices. Defendant asks this Court to grant it a new trial because of the inconsistency between the basis for fraud pled in Plaintiff's complaint and the jury's rejection of this basis in their verdict. It contends that for this reason, Plaintiff's fraud claim cannot support the finding of unfair and deceptive trade practices. We disagree, and affirm the trial court's denial of Defendant's motion.

A motion for a judgment notwithstanding the verdict is, fundamentally, the renewal of an earlier motion for a directed verdict. *Henderson v. Traditional Log Homes, Inc.*, 70 N.C. App. 303, 306, 319 S.E.2d 290, 292 (1984). When a motion for judgment notwithstanding the verdict is brought, the issue is "whether the evidence is sufficient to take the case to the jury and to support a verdict for [the non-moving party]." *Id.* The evidence is to be considered in the light most favorable to the non-moving party, and the non-moving party is entitled to all reasonable inferences that can be drawn from that evidence. *Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986). "This is a high standard for the moving party, requiring a denial of the motion if there is more than a scintilla of evidence to support the non-movant's *prima facie* case." *Ellis v. Whitaker*, 156 N.C. App. 192, 195, 576 S.E.2d 138, 140 (2003).

N.C. Gen. Stat. § 75-1.1(a) (2015) states, in pertinent part, that "unfair or deceptive acts or practices in or affecting commerce [ ] are declared unlawful." Our Supreme Court has maintained that " '[i]n order

to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff.' " *Bumpers v. Cmty. Bank of N. Virginia*, 367 N.C. 81, 88, 747 S.E.2d 220, 226 (2013) (quoting *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001)).

"While our Supreme Court has held that to succeed under G.S. 75-1.1, it is not necessary for the plaintiff to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception, plaintiff must, nevertheless, show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception." *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 452-53, 279 S.E.2d 1, 7 (1981). Moreover, while "[a] mere breach of contract, even if intentional, is not an unfair or deceptive act under Chapter 75[,]" *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 42, 626 S.E.2d 315, 323 (2006), "substantial aggravating circumstances attending the breach [may allow the plaintiff] to recover under the Act[.]" *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992) (citation omitted).

In the present case, evidence was presented, which when viewed in the light most favorable to Plaintiff, tended to show that Plaintiff had suffered damages due to Defendant's representations to him that his vehicle was repaired, when Defendant knew or should have known that it was not fully or properly repaired. Furthermore, the evidence tended to show that Defendant had also conducted unauthorized repairs to Plaintiff's vehicle. These actions by Defendant had the tendency or capacity to mislead or create the likelihood of deception. Additionally, these facts were ultimately found by the jury. Consequently, because more than a scintilla of evidence was presented establishing these facts, the trial court correctly denied Defendant's motion for judgment notwithstanding the verdict. Therefore, Defendant's arguments on this issue are overruled.

III. Remittitur and New Trial

[4] Defendant next argues that it should also be granted a new trial because the jury's verdict indicates that they ignored the trial court's instructions on damages. It further argues that even the trial court's remittitur of damages was insufficient to uphold the verdict because it is unclear whether the jury's verdict included punitive damages and because the trial court's remittitur included items which were not recoverable as damages. Again, we disagree.

Defendant asserts that the trial court should have granted its motion for a new trial pursuant to Rules 59(a)(5)-(7) of the North Carolina Rules of Civil Procedure which provide as follows:

> 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:
>
> . . . .
>
> (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[.]

"Denial of a motion for a new trial pursuant to N.C.R. Civ. P. 59(a)(5) and (6) is reviewed for an abuse of discretion, while the sufficiency of the evidence to justify the verdict is reviewed under a de novo standard." *Everhart v. O'Charley's Inc.*, 200 N.C. App. 142, 160, 683 S.E.2d 728, 742 (2009).

"A jury is presumed to follow the court's instructions[,]" and we must therefore presume that the jury based its verdict on these instructions. *Nunn v. Allen*, 154 N.C. App. 523, 541, 574 S.E.2d 35, 46 (2002). Defendant has presented no evidence, aside from the amount of the jury award, to show that the jury did not follow the instructions of the trial court. While "[t]he party seeking damages bears the burden of proving them in a manner that allows the fact-finder to calculate the amount of damages to a reasonable certainty . . . proof to an absolute mathematical certainty is not required." *State Properties, LLC v. Ray*, 155 N.C. App. 65, 76, 574 S.E.2d 180, 188 (2002).

Here, Plaintiff presented evidence regarding the cost incurred for the storage of his damaged vehicle, his loss of the use of his vehicle, and the cost of renting a vehicle while his was unsafe to drive. Certainly Plaintiff should not recover a windfall of excess recovery, but, if fraud is proved — as the verdict here indicates — he must be allowed "a complete remedy." *Tradewinds Airlines, Inc. v. C-S Aviation Servs.*, 222 N.C. App. 834, 841, 733 S.E.2d 162, 169 (2012) (citation omitted). " '[I]t is elementary that a plaintiff in a fraud suit has a right to recover an amount in damages which will put him in the same position as if the fraud had not been practiced on him.' " *Id.* (quoting *Godfrey v. Res-Care*,

Inc., 165 N.C. App. 68, 79, 598 S.E.2d 396, 404 (2004)). " 'Damages are compensation in money, in an amount so far is possible, to restore a respective plaintiff to his or her original condition or position[.]' " *Id.* (quoting *Godfrey*, 165 N.C. App. at 78-79, 598 S.E.2d at 404). We are satisfied here that the trial court properly calculated the remittitur of damages to put Plaintiff in the same position he would have been in had he not been the victim of fraud, and, as a result, we affirm the trial court's denial of Defendant's motion for a new trial on this ground.

IV. Attorneys' Fees

[5] In its final argument on appeal, Defendant asserts that the trial court erred in awarding attorneys' fees to Plaintiff pursuant to N.C. Gen. Stat. § 20-354.9 (2015) for violation of the North Carolina Motor Vehicle Repair Act. This case was not tried under this Act and the jury was neither given instructions on nor asked to render a verdict on any cause of action related to this Act. Therefore, we reverse the trial court's award of attorneys' fees.

"Because statutes awarding an attorney's fee to the prevailing party are in derogation of the common law, [these statutes] must be strictly construed." *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 257, 400 S.E.2d 435, 437 (1991). Here, the statute under which the trial court awarded attorneys' fees states, in pertinent part: "Any customer injured by a violation of this Article may bring an action in the appropriate court for relief. The prevailing party in *that action* may be entitled to damages plus court costs and reasonable attorneys' fees." N.C. Gen. Stat. § 20-354.9 (emphasis added).

Rule 54(c) of the North Carolina Rules of Civil Procedure states, in pertinent part, that "[e]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

> [I]t is well-settled that adherence to the particular legal theories that are suggested by the pleadings is subordinate to the court's duty to grant the relief to which the prevailing party is entitled. It is equally well-settled, however, that the relief granted must be consistent with the claims pleaded and embraced within the issues determined at trial, which presumably the opposing party had the opportunity to challenge. Simply put, the scope of a lawsuit is measured by the allegations of the pleadings and the evidence before the court and not by what is demanded. Hence, relief under Rule 54(c) is always proper when it

> does not operate to the substantial prejudice of the opposing party. Such relief should, therefore, be denied when the relief demanded was not suggested or illuminated by the pleadings nor justified by the evidence adduced at trial.

N.C. Nat. Bank v. Carter, 71 N.C. App. 118, 121-22, 322 S.E.2d 180, 183 (1984) (internal citations omitted).

Here, Plaintiff brought his case without reference to, or reliance upon, the North Carolina Motor Vehicle Repair Act. Neither his pleadings nor his evidence at trial gave any indication that he was relying on this Act to remedy his loss. It is thus axiomatic that he may not recover any remedy provided for by this Act. Therefore, the trial court's grant of attorneys' fees based upon the Motor Vehicle Repair Act must be reversed.

Conclusion

In conclusion, the trial court properly allowed Plaintiff's expert witness to testify at trial. Furthermore, the trial court did not err in finding unfair and deceptive trade practices or in denying Defendant's motion for a new trial. These rulings of the trial court are consequently affirmed. The granting of attorneys' fees based upon the North Carolina Motor Vehicle Repair Act, however, is reversed.

AFFIRMED IN PART; REVERSED IN PART.

Chief Judge McGEE and Judge BRYANT concur.

STATE v. LAIL

[251 N.C. App. 463 (2016)]

STATE OF NORTH CAROLINA
v.
AVERY JOE LAIL, JR.

No. COA16-608

Filed 30 December 2016

1. Homicide—second-degree murder—depraved heart malice

Amended N.C.G.S. § 14-17 does not require the jury to specify in every instance whether depraved heart malice supports its verdict finding an accused guilty of second-degree murder. However, there is no language indicating an intent to limit depraved heart malice as statutorily defined to only instances involving the reckless driving of an impaired driver.

2. Sentencing—second-degree murder—special verdict—malice theory—depraved heart

The trial court did not err in a second-degree murder case by sentencing defendant as a B1 felon based on the jury's general verdict. Although trial courts for sentencing purposes should require the jury by special verdict to designate under which available malice theory it found defendant guilty of second-degree murder, there was no evidence presented in this case that would support a finding of B2 depraved-heart malice.

Appeal by defendant from judgment entered 28 September 2015 by Judge J. Thomas Davis in Gaston County Superior Court. Heard in the Court of Appeals 30 November 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General David J. Adinolfi, II, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

ELMORE, Judge.

Avery Joe Lail, Jr. (defendant) appeals from a judgment entered after a jury returned a general verdict finding him guilty of second-degree murder. Defendant argues the trial judge improperly sentenced him as a Class B1 felon based on a verdict failing to specify whether the jury found him guilty of Class B1 or B2 second-degree murder, which depends, in part, on which malice theory supported the conviction. We conclude defendant received a fair trial and a proper sentence.

During defendant's murder trial, the State proceeded under a deadly weapon implied malice theory arising from defendant's alleged use of a butcher knife to slash the victim's throat. After the presentation of evidence, the judge instructed the jury on the definitions of express malice and deadly weapon implied malice (B1 second-degree murder) but not on depraved-heart malice (B2 second-degree murder). The judge charged the jury on first-degree murder, second-degree murder, and voluntary manslaughter. The jury returned a general verdict of guilty of second-degree murder.

At sentencing, an issue arose about whether defendant should be sentenced as a B1 or B2 felon based on the jury's general verdict. Under our State's previous murder statute, all second-degree murders were B2 felonies. Under an applicable amendment to that statute, second-degree murder was reclassified as a B1 or a B2 felony based, in part, on whether depraved-heart malice supported the conviction. Over defendant's objection, the trial judge ruled that, based on the evidence presented and the jury instruction, the verdict supported sentencing defendant as a B1 felon.

On appeal, defendant argues that since depraved-heart malice may have supported his conviction, the jury's general verdict did not support B1 punishment and requires he be resentenced as a B2 felon. We hold that since the jury was not presented with evidence supporting a finding of depraved-heart malice, its general verdict was unambiguous and his B1 sentence proper. Where, however, the jury is presented with both B2 depraved-heart malice and a B1 malice theory, a general verdict would be ambiguous and a B2 sentence would be proper. In this situation, trial judges for sentencing purposes should frame a special verdict requiring the jury to specify which malice theory supported its second-degree murder verdict.

I. Background

Just before 10:00 p.m. on 23 March 2014, Brian Dale Jones was found dead on a driveway located on Old Dowd Road in Mecklenburg County. His head and face had been beaten and bruised, his neck cut and stabbed repeatedly by a knife, and his right internal jugular vein severed. The autopsy on Brian's body revealed that he was extremely intoxicated at the time of his death, his blood alcohol level registering at .43 on the breathalyzer scale, but that he died of blood loss from his knife wounds.

On 11 April 2014, Mark Huntley, defendant, and Joyce Delia Rick were arrested in connection with Brian's death. The three had been living together in Joyce's home for a few weeks before Brian arrived

uninvited at Joyce's door on the night he died. During interviews with police, the three gave statements concerning the events surrounding Brian's homicide. On 21 April 2014, defendant was indicted on one count of first-degree murder. From 14 to 25 September 2015, defendant was tried in Gaston County Superior Court. The State's evidence generally established the following facts relevant to which malice theory supported the jury's verdict.

Mark testified that he witnessed defendant murder Brian with a butcher knife. According to Mark's testimony, on 23 March 2014, he, defendant, and Joyce were in Joyce's living room watching a NASCAR race on television. Around 1:00 p.m., defendant and Mark began drinking. A few hours later that evening, Brian arrived at Joyce's home driving a green car belonging to Brian's girlfriend, Susan Braddy. Mark had previously dated Susan. Mark had met Brian a few times before and the two had gotten into an altercation about Susan once before at a convenience store. Brian brought with him a Duke's Mayonnaise jar full of moonshine, which he shared with defendant and Mark. Over the next hour or so, the four of them hung out and talked. Joyce did not drink. Mark took a few swigs of the moonshine, but defendant and Brian drank most of it. Defendant and Brian also smoked crack together.

Once the moonshine was finished, Brian, heavily intoxicated, slurring his words and barely able to stand, started to leave Joyce's home in an attempt to drive home. Defendant tried to persuade Brian to sleep on the couch and sober up before driving but Brian refused. Defendant then helped Brian stumble outside to Susan's car and crawl into the vehicle. Mark followed. From outside the car, defendant continued to encourage Brian not to drive. Mark remained outside for a few minutes but then went back inside Joyce's home.

When Mark returned outside a few minutes later, he noticed that Brian had backed Susan's car into the driveway and defendant was standing at the driver's side window continuing to argue with Brian. The argument turned into a fight, and defendant began punching Brian through the car window. Defendant then opened the driver's side door, pulled Brian out of the vehicle, and began punching, kicking, and stomping him. Mark grabbed defendant from behind and tried to stop defendant from beating Brian, but defendant hit Mark in the head and then continued to beat a defenseless Brian. Defendant, standing on Brian's chest, stopped hitting Brian and then declared that he would be right back. Defendant went inside Joyce's home and returned outside wielding a butcher knife with an eight-inch stainless steel blade. Defendant got back on top of Brian's chest. Mark asked defendant what he was doing.

Defendant replied: "I'm gonna kill him" and then cut Brian's throat two or three times with the butcher knife.

Defendant threatened to kill Mark if he did not help dispose of Brian's body. At this point, Brian was still alive but bleeding profusely, and the only sound Mark heard from Brian was "the gurgling of the blood in his throat and lungs." After an unsuccessful attempt to load Brian's body into Susan's vehicle, defendant and Mark loaded him into the back of Joyce's minivan. Defendant drove the minivan, and Mark followed in Susan's vehicle. At one point, Mark noticed Brian's arm dangling out of the back window and got defendant's attention. The two pulled over, loaded Brian's arm back into the minivan, and then continued driving. Brian was eventually dropped on Old Dowd Road in Mecklenburg County.

Defendant and Mark then returned to Joyce's home, changed clothes, and started for South Carolina in Susan's car, leaving the minivan and without cleaning any of the blood. Over the next few days, defendant and Mark drove to South Carolina, and then to West Virginia, before returning to Charlotte and ditching Susan's car on a road near the U.S. Whitewater Center. Defendant called Joyce to come pick them up and then the three proceeded home, where they returned to sitting around watching television as if nothing ever happened until Mark was arrested a few days later.

Joyce testified that she did not witness Brian's murder. According to Joyce's testimony, on 23 March 2014, she, defendant, and Mark were hanging around watching television in her home when she heard an unexpected knock on her door around 8:00 or 9:00 p.m. When she opened the door, she saw Brian standing there. Joyce had known Brian for about four or five years and had introduced Brian and Susan, Joyce's friend of nearly forty years, to each other about a year earlier. Brian and Susan were currently living together and dating.

Joyce invited Brian into her home. Brian returned briefly to Susan's car and retrieved a jar of moonshine before coming inside and sitting down. He shared the moonshine with defendant and Mark, and the three passed it back and forth among them as they talked. Joyce did not sip any of the moonshine but took her nightly sleeping medicine that diminishes her mental faculties. Joyce was watching television when she heard an argument develop. She was unaware who was arguing or what they were arguing about but the men started to get loud. Joyce glanced over and saw Brian slam his fist into her glass coffee table. She told Brian to leave. Brian stood up and defendant said, "Let's go outside." All three men went outside.

A few minutes later, defendant came back inside, looking angry and drunk, and told Joyce that "Brian slapped him and he kicked [Brian's] ass." Joyce thought defendant was bluffing and went down the hall to the bathroom. When she came out, defendant was no longer in her home. Joyce never saw Mark come back inside, and she never saw Brian again. Approximately twenty minutes later, defendant came back inside and told her that he was going to put gas into her minivan. About an hour after that, Mark and defendant returned to Joyce's home, their clothes appearing wet, and the two went down the hall to change. Joyce started the washing machine and Mark and defendant put in their clothes. About thirty to forty-five minutes later, Mark and defendant left again, and Joyce did not see them for several days.

Defendant's evidence generally corroborated most of the State's evidence except for one major difference—that it was Mark who had cut Brian's neck.

Defendant testified that he witnessed Mark murder Brian with a steak knife. According to defendant's testimony, during the evening of 23 March 2014, he returned from a trip to the bathroom to find Mark and Joyce arguing with someone at the door. Joyce introduced this person as Brian, Susan's boyfriend. Brian looked angry. Defendant had never met Brian before and did not know Susan. Right after they met, Brian asked defendant if he drank moonshine. Defendant replied that he did, and Brian got the moonshine from Susan's car. Defendant returned to the couch and continued watching television as Brian and Mark started bickering. The more moonshine Brian drank, the more Brian and Mark argued about Susan. Eventually, Brian slammed his fist into the coffee table. The slam woke up Joyce, who told Brian to leave.

Mark escorted Brian outside and defendant followed. When they got to Susan's car, Mark and Brian started bickering again about Susan. Defendant stepped in between them to break up the fight. Brian backhanded defendant in the mouth, breaking defendant's artificial teeth. Defendant lost his temper and "beat the shit out of [Brian]," knocking him out and then kicking him in the face for good measure. Defendant then left Mark and Brian outside and went back inside Joyce's home. He saw Joyce and told her that he beat up Brian. About five minutes later, defendant returned outside and saw Mark kneeling beside Brian, giving the appearance that Mark was robbing Brian. When defendant grabbed Mark by the arm and pulled him back, he saw that Brian was covered in blood and that Mark had a knife. Defendant asked Mark why he had murdered Brian, and Mark responded that he had to do it for Susan.

Mark then asked defendant to help him dispose of Brian's body, which he did.

After the presentation of evidence, the trial court charged the jury on first-degree murder, second-degree murder, and manslaughter, and instructed on express malice and deadly weapon implied malice but not depraved-heart malice. On 25 September 2015, the jury returned a verdict finding defendant guilty of second-degree murder, not guilty of first-degree murder, and not guilty of manslaughter.

At sentencing, an issue arose as to whether defendant should be sentenced as a Class B1 or B2 felon under recently amended N.C. Gen. Stat. § 14-17(b), which reclassified second-degree murder as either a Class B1 or B2 felony, based, in part, on whether depraved-heart malice supported the conviction. Both parties argued about which Class defendant should be sentenced under based on the jury's general verdict. Over defendant's objection, the trial judge ruled that the jury's verdict, properly interpreted, found defendant guilty of Class B1 second-degree murder. The trial judge reasoned:

> [R]eading the statute . . . there would have to be some evidence that would allow some reckless and wanton manner theory to have been addressed by the jury in this case. The jury was given malice in the form of . . . the use of a deadly weapon, which is certainly not a reckless and wanton manner-type argument. So . . . the Court is going to find . . . based on the evidence in this particular case that there was not any evidence to suggest that this act, while it may be based on an inherently dangerous act, was done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberate mental mischief. So . . . the Court is going to conclude that based on the evidence in this case, the jury instructions that were given and the findings of the jury. . . , that this is a B-1 second-degree murder.

Accordingly, the trial court sentenced defendant as a Class B1 felon to 483–592 months of imprisonment. Defendant gave timely oral notice of appeal.

II. Analysis

A. 2012 Amendment

[1] Defendant contends that amended N.C. Gen. Stat. § 14-17 requires the jury to specify in every instance whether depraved-heart malice

supported its verdict finding an accused guilty of second-degree murder. We disagree. Additionally, defendant contends that contrary to the parties and the trial judge's interpretation, depraved-heart malice as contemplated by section (b)(1) of the statute is not limited to driving while intoxicated homicide cases. We agree.

Issues of statutory construction are questions of law reviewed *de novo*. *In re Ernst & Young, L.L.P.*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (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.' " *Id.* (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990)). "When construing statutes, this Court first determines whether the statutory language is clear and unambiguous." *Wiggs v. Edgecombe Cnty.*, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) (citation omitted). If it is, "we will apply the plain meaning of the words, with no need to resort to judicial construction." *Id.* (citation omitted). Additionally, the " '[l]egislature is presumed to know the existing law and to legislate with reference to it.' " *State v. Davis*, 198 N.C. App. 443, 451–52, 680 S.E.2d 239, 246 (2009) (quoting *State v. Southern R. Co.*, 145 N.C. 495, 542, 59 S.E. 570, 587 (1907)).

Malice is an essential element of second-degree murder. *See, e.g.*, *State v. Thomas*, 325 N.C. 583, 604, 386 S.E.2d 555, 567 (1989). North Carolina recognizes at least three malice theories:

> (1) "express hatred, ill-will or spite"; (2) commission of inherently dangerous acts in such a reckless and wanton manner as to "manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief"; or (3) a "condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification."

State v. Coble, 351 N.C. 448, 450–51, 527 S.E.2d 45, 47 (2000) (quoting *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982)). "The second type of malice [is] commonly referred to as 'depraved-heart' malice[.]" *State v. Fuller*, 138 N.C. App. 481, 484, 531 S.E.2d 861, 864 (2000) (citing *State v. Rich*, 351 N.C. 386, 527 S.E.2d 299 (2000)). This type of malice is frequently used to support second-degree murder convictions based on drunk driving. *See, e.g.*, *Rich*, 351 N.C. at 395, 527 S.E.2d at 304 (upholding second-degree murder conviction under depraved-heart malice theory where an intoxicated driver "inten[ed] to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind"). However,

it is not limited only to situations involving drunk driving. *See, e.g.*, *State v. Bethea*, 167 N.C. App. 215, 219–20, 605 S.E.2d 173, 177 (2004) (upholding second-degree murder conviction under depraved-heart malice theory based on a sober driver's "reckless and wanton attempt to elude law enforcement"); *State v. Qualls*, 130 N.C. App. 1, 10–11, 502 S.E.2d 31, 37 (1998) (upholding second-degree murder conviction under depraved-heart malice theory based on a defendant's severe shaking of an infant-victim, causing his death), *aff'd*, 350 N.C. 56, 510 S.E.2d 376 (1999); *see also State v. Lilliston*, 141 N.C. 650, 651, 54 S.E. 427, 427 (1906) (upholding murder conviction under depraved-heart malice theory where the defendant in the crowded reception room of a railroad station engaged in a shootout, causing the death of an innocent bystander).

N.C. Gen. Stat. § 14-17 previously classified all second-degree murders, regardless of malice theory, as Class B2 felonies. *See* N.C. Gen. Stat. § 14-17(b) (2011) ("[A]ny person who commits [second-degree] murder shall be punished as a Class B2 felon."). In 2012, our General Assembly amended this statute, reclassifying second-degree murder as a Class B1 felony, except under two situations where it would remain a Class B2 felony. N.C. Gen. Stat. § 14-17(b) (2015) now provides in pertinent part:

> (b) . . . . Any person who commits second degree murder shall be punished as a Class B1 felon, except that a person who commits second degree murder shall be punished as a Class B2 felon in either of the following circumstances:
>
> > (1) The malice necessary to prove second degree murder is based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.
> >
> > (2) The murder is one that was proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance described in G.S. 90-90(1)d., or methamphetamine, and the ingestion of such substance caused the death of the user.

The plain language of this amendment, that persons convicted of second-degree murder "shall be punished as a Class B1 felon, *except*," indicates clearly that the legislature intended to increase the sentence for second-degree murder to Class B1 and to retain Class B2 punishment only where either statutorily defined situation exists. Since only the second malice form recognized by judicial law, depraved-heart malice, was

codified as mandating B2 punishment, it is clear the legislature intended a conviction based on the first or third malice forms to be treated as B1 second-degree murder. Logically, then, in a situation where no evidence is presented that would support a finding that an accused acted with depraved-heart malice, specification of malice theory would not provide clarity for sentencing purposes; it would be inferred from a general verdict that the jury found the accused guilty of B1 second-degree murder. Therefore, we conclude that amended N.C. Gen. Stat. § 14-17(b) does not always require a jury to specify whether depraved-heart malice theory supported its conviction.

Additionally, section (b)(1) was drafted in a way virtually identical to the language developed by our case law and the pattern jury instruction used to describe depraved-heart malice. *See Rich*, 351 N.C. at 396, 527 S.E.2d at 304 (approving jury instruction describing depraved-heart malice as acts "inherently dangerous to human life . . . done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief"). There is no language indicating an intent to limit depraved-heart malice as statutorily defined to only instances involving the reckless driving of an impaired driver. Thus, we interpret section (b)(1) as contemplating all forms of depraved-heart malice.

B. Malice Theory Supporting the Jury's Verdict

[2] Defendant contends the trial court improperly sentenced him as a B1 felon based on the jury's general verdict, since the evidence presented may have supported a finding that he acted with depraved-heart malice. Therefore, defendant argues, the jury's verdict failing to specify whether depraved-heart malice theory supported its conviction did not authorize the trial judge to sentence him as a B1 felon but requires that he be resentenced as a B2 felon. We disagree.

"When a judge inflicts punishment that the jury's verdict alone does not allow . . . the judge exceeds his proper authority." *Blakely v. Washington*, 542 U.S. 296, 304 (2004) (internal citation omitted); *State v. Norris*, 360 N.C. 507, 516, 630 S.E.2d 915, 921 ("[T]rial courts are limited to whatever punishment the jury's verdict authorizes."), *cert. denied*, 549 U.S. 1064 (2006). We review *de novo* whether the sentence imposed was authorized by the jury's verdict. *See, e.g.*, *State v. Silhan*, 302 N.C. 223, 261–62, 275 S.E.2d 450, 477–78 (1981) (reviewing *de novo* whether the defendant's sentence for an underlying felony was supported by a general verdict failing to specify which theory presented, (1) premeditation and deliberation or (2) felony murder, supported the jury's finding

that the defendant was guilty of first-degree murder), *abrogated on other grounds by State v. Sanderson*, 346 N.C. 669, 488 S.E.2d 133 (1997).

Additionally, "[w]here the jury is presented with more than one theory upon which to convict a defendant and does not specify which one it relied upon to reach its verdict, '[s]uch a verdict is ambiguous and should be construed in favor of [the] defendant.' " *State v. Daniels*, 189 N.C. App. 705, 709, 659 S.E.2d 22, 25 (2008) (quoting *State v. Whittington*, 318 N.C. 114, 123, 347 S.E.2d 403, 408 (1986) (citation omitted)). " 'This Court is not free to speculate as to the basis of a jury's verdict.' " *Id.* (quoting *Whittington*, 318 N.C. at 123, 347 S.E.2d at 408). However, "[a] verdict may be given . . . a proper interpretation by reference to the indictment, the evidence, and the instructions of the court." *State v. Abraham*, 338 N.C. 315, 359, 451 S.E.2d 131, 155 (1994) (quoting *State v. Hampton*, 294 N.C. 242, 247–48, 239 S.E.2d 835, 839 (1977)).

Defendant argues that the evidence presented may have supported a finding by the jury that he acted with B2 depraved-heart malice. Defendant cites to *State v. Lilliston* support his position that depraved-heart malice has been established where the reckless use of a deadly weapon caused another's death and points to the evidence presented at trial that (1) defendant and Brian had neither a prior relationship nor previous animosity between each other; and (2) defendant and Brian were extremely intoxicated. Defendant argues:

> Taking all of this evidence together, a reasonable juror could conclude that Brian['s] death from the knife wounds to his neck . . . were . . . the product of reckless and wanton acts by a man whose mind and judgment was so impaired by alcohol that he engaged in extremely dangerous acts with [a] knife in complete disregard for human life, acts which manifested a depraved mind deliberately bent on mischief.

We disagree.

In *Lilliston*, our Supreme Court held that the reckless use of a deadly weapon constituted a depraved-heart malice theory supporting a murder conviction. 141 N.C. at 651, 54 S.E. at 427. In that case, the defendant and another man "were at a house of ill fame engaged in gambling and drinking" when "a difficulty sprung up . . . between th[em] over charges of cheating." *Id.* The next day at the railroad station "in the crowded reception room they engaged in shooting at each other; the next room, separated only by a glass partition, being occupied by ladies and children." *Id.*

> [The other man] fired two shots, and then ran out of the east door, [the defendant] fired five shots; and these two men, who showed this contemptuous defiance of law, and of the lives of so many peaceable people who were entitled to the protection of the law in their lives and persons, escaped unharmed, while one bystander was killed, another seriously wounded, and others narrowly escaped.

Id. Based on those facts, the *Lilliston* Court concluded that the men acted with depraved-heart implied malice sufficient to support murder by willingly engaging in a shootout in a crowded place when it was highly probable someone would be injured:

> The homicide occurred in a crowded waiting room. The doctrine is well settled that malice is implied when an act dangerous to others is done so recklessly or wantonly as to evince depravity of mind and disregard of human life, and, if the death of any person is caused by such an act, it is murder. The most frequent instance of this species of murder is where death is caused by the reckless discharge of firearms under such circumstances that some one would probably be injured, and even where the discharge was accidental, resulting from handling the weapon in a threatening manner it was held murder.

Id. (citations and internal quotation marks omitted).

Here, there is simply no evidence which would have supported a finding of depraved-heart malice or an instruction on that theory. Unlike in *Lilliston*, where the defendant was convicted of second-degree murder of an innocent bystander, no evidence was presented that defendant intended to kill someone other than Brian but slashed his neck by accident. The evidence neither suggested that defendant slashed around a knife so recklessly or wantonly that he inadvertently killed someone nor that defendant used an imprecise weapon or aimed so indiscriminately as to manifest a mind utterly without regard for human life and social duty. The evidence here showed that the repeated knife cuts were deliberately aimed at Brian's neck.

In this case, defendant was indicted for first-degree murder. The State proceeded under a deadly weapon implied malice theory, which falls into the third malice category: That " 'condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.' " *Coble*, 351 N.C. at 451, 527 S.E.2d at 47 (quoting *Reynolds*, 307 N.C. at 191, 297 S.E.2d at 536).

"[T]he third type of malice is established by 'intentional infliction of a wound with a deadly weapon which results in death.' " *Id.* (quoting *Reynolds*, 307 N.C. at 191, 297 S.E.2d at 536). "[M]alice is presumed where the defendant intentionally assaults another with a deadly weapon, thereby causing the other's death." *State v. McNeill*, 346 N.C. 233, 238, 485 S.E.2d 284, 287 (1997) (citation omitted), *cert. denied*, 522 U.S. 1053 (1998). A butcher knife is a deadly weapon. *See*, *e.g.*, *State v. Uvalle*, 151 N.C. App. 446, 455, 565 S.E.2d 727, 733 (2002) (citations omitted). However, deadly weapon implied malice is "not a conclusive, irrebuttable presumption." *State v. Debiase*, 211 N.C. App. 497, 509–10, 711 S.E.2d 436, 444–45 (2011) (citations omitted) (holding that the mandatory presumption of deadly weapon malice was converted to a permissible inference when the defendant presented "evidence concerning the reason for which, manner in which, and circumstances under which he used" the deadly weapon).

At trial, the State introduced evidence of deadly weapon implied malice by showing that defendant repeatedly slashed Brian's neck with a butcher knife, one large cut severing Brian's right internal jugular vein, proximately causing his death. Defendant wholly denied cutting Brian's neck with a knife and blamed Mark. Defendant never specifically rebutted deadly weapon implied malice nor advanced a depraved-heart malice theory argument. Nor did defendant request that the judge instruct the jury on depraved-heart malice. Accordingly, the trial judge submitted the charge under an express malice and deadly weapon implied malice theory and elected not to instruct on a depraved-heart malice theory. The judge instructed:

> For you to find the defendant guilty of first-degree murder the State must prove . . . that the defendant intentionally and with malice killed the victim with a deadly weapon. Malice means not only hatred, ill will, or spite, as it is ordinarily understood to be sure that is malice, but it also means that condition of mind which prompts a person to take the life of another intentionally, or to intentionally inflict serious bodily harm which proximately results in another's death without just cause, excuse, or justification.
>
> If the State proves beyond a reasonable doubt that the defendant intentionally killed the victim with a deadly weapon, or intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused the victim's death you may infer first that the killing was unlawful, and second, that it was done with malice, but you are not

> compelled to do so. You may consider this, along with all other facts and circumstances, in determining whether the killing was unlawful and whether it was done with malice.
>
> A deadly weapon is a weapon which is likely to cause death or serious injury. In determining whether the instrument involved was a deadly weapon you should consider its nature, the manner in which it was used, and the size and strength of the defendant as compared to the victim. A knife is a deadly weapon.
>
> . . . .
>
> If you find from the evidence beyond a reasonable doubt that . . . the defendant, acting either by himself or acting together with other persons, intentionally and with malice wounded the victim with a deadly weapon thereby proximately causing the victim's death it would be your duty to return a verdict of guilty of second-degree murder.

When considering the evidence presented and the instruction given, we conclude that there was no ambiguity in the jury's general verdict. No evidence presented would have supported a finding that defendant acted with B2 depraved-heart malice. The evidence presented supported only B1 theories of malice and the jury was instructed only on those theories. Therefore, although the jury was not instructed to answer under what malice theory it convicted defendant of second-degree murder, it is readily apparent from the evidence presented and instructions given that the jury, by their verdict, found defendant guilty of B1 second-degree murder. *See*, *e.g.*, *State v. Wiggins*, 161 N.C. App. 583, 593, 589 S.E.2d 402, 409 (2003) ("[T]he verdict sheets did not lack the required degree of specificity needed for a unanimous verdict if they could be properly understood by the jury based on the evidence presented at trial." (citation omitted)). Therefore, we hold that the trial judge properly sentenced defendant as a B1 felon.

However, we note that a general verdict would be ambiguous for sentencing purposes where the jury is charged on second-degree murder and presented with evidence that may allow them to find that either B2 depraved-heart malice or another B1 malice theory existed. In such a situation, courts cannot speculate as to which malice theory the jury used to support its conviction of second-degree murder. *See State v. Goodman*, 298 N.C. 1, 16, 257 S.E.2d 569, 580 (1979) ("If the jury's verdict were general, not specifying the theory upon which guilt was found, the court would have no way of knowing what theory the jury used

and would not have proper basis for passing judgment."). As a practical matter, where a general verdict would be ambiguous for sentencing purposes, trial courts should frame a special verdict requiring the jury to specify under which available malice theory it found the defendant guilty of second-degree murder. *See State v. Blackwell*, 361 N.C. 41, 46–49, 638 S.E.2d 452, 456–58 (2006) (encouraging the use of special verdicts in criminal cases where appropriate and recognizing that "special verdicts are a widely accepted method of preventing *Blakely* error"); *State v. Sargeant*, 206 N.C. App. 1, 10, 696 S.E.2d 786, 793 (2010) ("[A] jury's specification of its theory . . . is for purposes of sentencing proceedings."), *writ allowed*, 364 N.C. 331, 700 S.E.2d 743 (2010), and *aff'd as modified*, 365 N.C. 58, 707 S.E.2d 192 (2011).

III. Conclusion

N.C. Gen. Stat. § 14-17(b) reclassified second-degree murder into a Class B2 or a Class B1 felony based, in part, on whether depraved-heart malice supported the conviction. Where a jury is charged on second-degree murder and presented with evidence that may support a finding that an accused acted with B2 depraved-heart malice, trial courts for sentencing purposes should require the jury by special verdict to designate under which available malice theory it found the defendant guilty of second-degree murder. However, where, as here, no evidence presented would support a finding of B2 depraved-heart malice, a trial court may properly deduce from a general verdict that the jury found the defendant guilty of B1 second-degree murder. Accordingly, we find no error below and hold that the trial court properly sentenced defendant as a B1 felon.

NO ERROR.

Judges HUNTER, JR. and ENOCHS concur.

STATE v. ZUBIENA

[251 N.C. App. 477 (2016)]

STATE OF NORTH CAROLINA
v.
ASHLEY MEREDITH ZUBIENA

No. COA16-316

Filed 30 December 2016

1. Appeal and Error—appealability—guilty plea

The Court of Appeals (COA) had jurisdiction to hear defendant's appeal of her guilty plea. The COA was bound by the Supreme Court's decision in *Dickens*, and thus, defendant had a direct right of appeal pursuant to N.C.G.S. § 15A-1444(e).

2. Pleadings—motion to withdraw guilty plea—failure to meet burden

The trial court did not err by denying defendant's motion to withdraw her guilty plea. Defendant failed to meet her burden of showing that the trial court violated N.C.G.S. § 15A-1024 or that it was manifestly unjust.

3. Penalties, Fines, and Forfeitures—fine—modest amount compared to seriousness of offense

The trial court did not abuse its discretion by imposing a $1,000 fine. The fine was a relatively modest amount compared with the seriousness of the offense of strangulation of defendant's two-year-old daughter.

Judge ENOCHS dissenting.

Appeal by defendant from judgment entered 2 November 2015 by Judge William H. Coward in Buncombe County Superior Court. Heard in the Court of Appeals 5 October 2016.

Roy Cooper, Attorney General, by Alesia Balshakova, Assistant Attorney General, for the State.

Linda B. Weisel for defendant-appellant.

DAVIS, Judge.

Ashley Meredith Zubiena ("Defendant") appeals from her conviction for assault by strangulation. On appeal, she contends that the trial

court erred in (1) denying her post-sentencing motion to withdraw her guilty plea; and (2) ordering her to pay a $1,000 fine as part of her sentence. After careful review, we affirm.

Factual and Procedural Background

On 30 October 2015, a bill of information was filed charging Defendant with assault by strangulation of her two-year-old daughter.[1] Defendant subsequently entered into a plea agreement with the State, which was set forth in a transcript of plea. The "Plea Arrangement" section of that document provided as follows:

> Defendant shall plead guilty to one count of assault by strangulation. Pursuant to plea, the State shall dismiss the remaining charges delineated hereafter in this transcript.
>
> Parties stipulate Defendant is a level III for felony sentencing with 6 points.

On 2 November 2015, a plea hearing was held before the Honorable William H. Coward in Buncombe County Superior Court. At the hearing, the trial court conducted a plea colloquy pursuant to N.C. Gen. Stat. § 15A-1022, which included the following:

> THE COURT: All right. Miss Zubiena, have the charges been explained to you by your lawyer, and do you understand the nature of the charges, and do you understand every element of each charge?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Have you and your lawyer discussed the possible defenses, if any, to the charges?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Are you satisfied with your lawyer's legal services?
>
> THE DEFENDANT: Yes, your Honor.
>
> . . . .
>
> THE COURT: Do you understand that you're pleading guilty to the charge of assault by strangulation which

1. Although not all of the pertinent charging documents are included in the record, it appears from the transcript of plea that Defendant was also charged with misdemeanor child abuse and driving with a revoked drivers' license.

occurred on May 22, 2014 which is a Class H felony for which the maximum punishment is 39 months?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you now personally plead guilty to the charge that I just described?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are you, in fact, guilty?

THE DEFENDANT: Yes, your Honor.

. . . .

THE COURT: You understand that the Courts have approved the practice of plea arrangements, and you can discuss your plea arrangement with me without fearing my disapproval?

THE DEFENDANT: Yes, your Honor.

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

THE DEFENDANT: Yes, your Honor.

THE COURT: The Prosecutor and your lawyer have informed the Court these are all the terms and conditions of your plea. *Defendant shall plead guilty to one count of assault by strangulation. Pursuant to plea, the State shall dismiss the remaining charges delineated hereafter in this transcript. Parties stipulate that Defendant is a Level Three for felony sentencing with six points. Charges to be dismissed are misdemeanor child abuse and driving while license revoked not impaired revocation*. So is the plea arrangement as set forth within this transcript and as I've just described it to you correct as being your full plea arrangement?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you now personally accept this arrangement?

THE DEFENDANT: Yes, your Honor.

THE COURT: Other than the plea arrangement has anyone promised you anything or has anyone threatened

> you in any way to cause you to enter this plea against your wishes?
>
> THE DEFENDANT: No, your Honor.
>
> THE COURT: Do you enter this plea of your own free will, fully understanding what you're doing?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: Do you agree that there are facts to support your plea and do you consent to the Court hearing a summary of the evidence?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: All right. Miss Zubiena, do you have any questions about what I've just said to you or about anything else connected to your case?
>
> THE DEFENDANT: No, your Honor.

(Emphasis added.)

After conducting a sentencing hearing, the trial court sentenced Defendant to 10-21 months imprisonment, suspended the sentence, placed her on 36 months supervised probation, imposed as special probation a five-month active term of imprisonment, and imposed a $1,000 fine. Defendant was also ordered to pay court costs and miscellaneous fees.

After the trial court announced its sentence in open court, the following exchange took place:

> [DEFENSE COUNSEL]: Your Honor, the client would motion to strike her plea.
>
> THE COURT: Denied. You have any grounds? You don't like the sentence?
>
> [DEFENSE COUNSEL]: We like [sic] to take it to trial.
>
> THE COURT: I don't think that's a grounds [sic] for striking a plea.
>
> [DEFENSE COUNSEL]: Yes, sir.

Defendant gave timely notice of appeal.

Analysis

Defendant makes two arguments on appeal. First, she argues that the trial court erred in denying her motion to withdraw her guilty plea given that the plea agreement and plea colloquy contained no indication that a fine could be imposed as part of her punishment. Second, she contends that the fine violated the excessive fines clauses of the federal and state constitutions or, in the alternative, that the trial court abused its discretion in imposing the fine.

I. Appellate Jurisdiction

[1] We must first determine whether this Court has jurisdiction to hear Defendant's appeal. N.C. Gen. Stat. § 15A-1444(e) provides, in pertinent part, the following:

> Except 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*.

N.C. Gen. Stat. § 15A-1444(e) (2015) (emphasis added). Our Supreme Court has explained that this portion of N.C. Gen. Stat. § 15A-1444(e) means "that when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is 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." *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980).

In *Dickens*, the defendant pled guilty to various charges and was sentenced to a term of imprisonment. On the following day, he moved to withdraw his guilty pleas on the ground that his attorney had told him that he would receive a punishment consisting solely of restitution rather than a prison sentence. The trial court denied the motion, and the defendant appealed. *Id.* at 77, 261 S.E.2d at 184.

The Supreme Court held that the defendant was "entitled to appeal as a matter of right since his motion to withdraw his pleas of guilty, made during the term and on the day following pronouncement of judgment, was denied." *Id.* at 79, 261 S.E.2d at 185. *Dickens* has not been overturned by the Supreme Court and is thus binding on our Court. *See Mahoney v. Ronnie's Rd. Serv.*, 122 N.C. App. 150, 153, 468 S.E.2d 279,

281 (1996) ("[I]t is elementary that we are bound by the rulings of our Supreme Court."), *aff'd per curiam*, 345 N.C. 631, 481 S.E.2d 85 (1997). Moreover, the General Assembly has not subsequently revised the relevant portion of N.C. Gen. Stat. § 15A-1444 upon which *Dickens* relied.

The present case is analytically indistinguishable from *Dickens*. Here too Defendant pled guilty, was sentenced, unsuccessfully moved to withdraw her guilty plea, and argued on appeal that the sentence imposed was different from that contained in her plea agreement. Therefore, as in *Dickens*, Defendant has an appeal as of right to this Court pursuant to N.C. Gen. Stat. § 15A-1444(e) to challenge the denial of her motion to withdraw her guilty plea. *See Dickens*, 299 N.C. at 79, 261 S.E.2d at 185.

Our dissenting colleague reaches a different conclusion, relying principally on this Court's decision in *State v. Carriker*, 180 N.C. App. 470, 637 S.E.2d 557 (2006), for the proposition that Defendant was required to file a petition for *certiorari* in order to appeal the denial of her motion to withdraw her guilty plea.[2] In *Carriker*, the defendant entered into a plea agreement that stated she would receive a suspended sentence and pay a fine and court costs. She pled guilty, was given a suspended sentence, and was also ordered to surrender her nursing license. She then moved to withdraw her guilty plea on the ground that her plea agreement had not mentioned the surrender of her nursing license. The trial court denied the motion, and she appealed. *Id.* at 470, 637 S.E.2d at 558.

On appeal, this Court stated the following with regard to its jurisdiction to hear the appeal:

> We begin by noting that "a challenge to the procedures followed in accepting a guilty plea does not fall within the scope of N.C. Gen. Stat. § 15A–1444 (2003), specifying the grounds giving rise to an appeal as of right." *State v. Rhodes*, 163 N.C. App. 191, 193, 592 S.E.2d 731, 732 (2004). Defendants seeking appellate review of this issue must obtain grant of a writ of *certiorari*.

Id. at 471, 637 S.E.2d at 558. We then proceeded to address the merits of the appeal after noting that the defendant had, in fact, filed a petition for *certiorari*. *Id.*

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2. We note that the State has not asserted that Defendant lacks an appeal as of right or that this Court otherwise lacks jurisdiction.

Carriker failed to acknowledge *Dickens* and instead relied upon our prior decision in *Rhodes*. However, *Rhodes* did not involve a defendant who had moved to withdraw his guilty plea in the trial court. In *Rhodes*, the defendant entered into a plea agreement providing that he would be sentenced in the intermediate range. *Rhodes*, 163 N.C. App. at 192, 592 S.E.2d at 732. The trial court accepted his plea and imposed a suspended sentence. After a recess, the trial court reopened the case *sua sponte* based on new information and proceeded to resentence the defendant to an active term of imprisonment. The defendant did not move to withdraw his guilty plea in the trial court but nevertheless filed an appeal based, in part, on his contention that the court had imposed a sentence that was inconsistent with his plea agreement when it resentenced him. *Id.* at 192-94, 592 S.E.2d at 732-33.

The State argued on appeal that the defendant was not entitled to an appeal as of right and was instead required to petition for a writ of *certiorari*. We agreed with the State's argument but elected to treat Defendant's appeal as a *certiorari* petition. *Id.* at 193, 592 S.E.2d at 732.

In analyzing the jurisdictional issue in *Rhodes*, we cited *State v. Bolinger*, 320 N.C. 596, 359 S.E.2d 459 (1987). In *Bolinger*, after pleading guilty and being sentenced by the trial court, the defendant did not move to withdraw his guilty plea. On appeal, however, one of his arguments was that the trial court erred in accepting his guilty plea because it did not make a proper determination that he had knowingly pled guilty. The Supreme Court held that the defendant was not entitled to an appeal as of right on this issue because none of the grounds set out in N.C. Gen. Stat. § 15A-1444 providing for an appeal as of right were applicable. In so holding, the Supreme Court expressly noted that the "*defendant has made no motion to withdraw the plea.*" *Id.* at 601, 359 S.E.2d at 462 (emphasis added).

Similarly, the defendant in *State v. Blount*, 209 N.C. App. 340, 703 S.E.2d 921 (2011) — a case that is relied upon by the dissent — never moved to withdraw his guilty plea in the trial court. The defendant in *Blount* argued on appeal that the trial court erred in imposing a sentence that differed from the sentence specified in his plea agreement. We explained that because no provision of N.C. Gen. Stat. § 15A-1444 provided him with an appeal as of right on that issue, he was required to — and did — petition for a writ of *certiorari*. *Id.* at 345, 703 S.E.2d at 925.

Thus, unlike the present case and *Dickens*, the defendants in *Bolinger*, *Rhodes*, and *Blount* never made a motion in the trial court to withdraw their guilty pleas. For this reason, those defendants were

required to file a petition for a writ of *certiorari* because they lacked an appeal as of right under N.C. Gen. Stat. § 15A-1444(e). Conversely, where a defendant *does* move to withdraw her guilty plea in the trial court, she has an appeal as of right pursuant to N.C. Gen. Stat. § 15A-1444(e). *See Dickens*, 299 N.C. at 79, 261 S.E.2d at 185.

Notably, the dissent fails to differentiate between those cases where the defendant actually moved to withdraw a guilty plea in the trial court and those in which the defendant did not. Yet that question is crucial for jurisdictional purposes, as N.C. Gen. Stat. § 15A-1444(e) — by its express terms — provides an appeal as of right "when a motion to withdraw a plea of guilty or no contest *has been denied* . . . ." N.C. Gen. Stat. § 15A-1444(e) (emphasis added). *Carriker* appears to be the only reported case in which a North Carolina court has stated that a petition for *certiorari* was necessary for appellate review even where the defendant made a timely motion to withdraw his guilty plea in the trial court. In asserting this proposition, however, *Carriker* is in direct conflict with *Dickens*.

State v. Shropshire, 210 N.C. App. 478, 708 S.E.2d 181, *disc. review denied*, 365 N.C. 204, 710 S.E.2d 28 (2011), serves as an example of our Court properly following *Dickens*. In *Shropshire*, the defendant pled guilty pursuant to a plea agreement and was sentenced to a term of imprisonment. After his sentence was announced, the defendant immediately moved to withdraw his guilty plea. The trial court denied the motion, and the defendant gave notice of appeal. *Id.* at 479-80, 708 S.E.2d at 182. On appeal, we explained that

> [a]lthough Shropshire pled guilty in the trial court, Shropshire may properly appeal to this Court pursuant to N.C. Gen. Stat. § 15A–1444(e) (2009) ("[E]xcept 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.") and *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980) ("[W]hen a motion to withdraw a plea of guilty or no contest has been denied, the defendant is 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.").

Id. at 480 n.2, 708 S.E.2d at 182 n.2.

The dissent attempts to distinguish *Dickens* from the present case by asserting that *Dickens* "present[ed] a *substantive* legal issue concerning whether a proper factual basis existed to support a defendant's guilty plea" whereas the present appeal deals with "a *procedural* challenge involving the acceptance of a guilty plea." In actuality, however, although the Supreme Court in *Dickens* briefly addressed whether a factual basis for the defendant's pleas existed, the Court explicitly stated that the "defendant's motion to withdraw his pleas of guilty is based on his assertion that he was told by his attorney . . . that he would be allowed to make restitution in lieu of a prison sentence[,]" yet the trial court nevertheless imposed a prison sentence. *Dickens*, 299 N.C. at 83, 261 S.E.2d at 187.

Thus, the principal issue in *Dickens* was not whether a factual basis existed to support the plea but rather whether the defendant received the sentence he thought had been agreed to as part of his guilty plea, which is the same issue Defendant raises here. Therefore, we cannot agree with the dissent's attempt to distinguish *Dickens* from the present case based on a "procedural" versus "substantive" distinction. Neither *Dickens* nor the statute recognize such a distinction for purposes of determining whether a defendant has an appeal as of right under N.C. Gen. Stat. § 15A-1444(e) from the denial of a motion to withdraw a plea after sentencing.

Accordingly, because we are bound by the Supreme Court's decision in *Dickens*, we conclude that Defendant has a direct right of appeal pursuant to N.C. Gen. Stat. § 15A-1444(e). Under the circumstances presented here, the language from *Carriker* relied upon by the dissent is in conflict with *Dickens* and therefore does not control. *See Employment Staffing Grp., Inc. v. Little*, __ N.C. App. __, __ n.3, 777 S.E.2d 309, 313 n.3 (2015) ("[W]here there is a conflict between an opinion from this Court and one from our Supreme Court, we are bound to follow the Supreme Court's opinion.").

II. Denial of Motion to Withdraw Guilty Plea

[2] We now turn to the merits of Defendant's appeal. Her primary argument is that the trial court's denial of her motion to withdraw her guilty plea constituted error because she was given a sentence that was inconsistent with her plea agreement. This argument is based on the fact that although the plea agreement and plea colloquy were silent as to the possibility of a fine, the trial court nevertheless imposed a $1,000 fine as a part of her sentence.

Pursuant to N.C. Gen. Stat. § 15A-1024,

> [i]f at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

N.C. Gen. Stat. § 15A-1024 (2015).

Thus, if the sentence imposed by a court is "other than provided for in" the defendant's plea agreement, "[u]nder the express provisions of [N.C. Gen. Stat. § 15A-1024] a defendant is entitled to withdraw his plea and as a matter of right have his case continued until the next term." *State v. Williams*, 291 N.C. 442, 446-47, 230 S.E.2d 515, 518 (1976) (emphasis omitted); *see also State v. Wall*, 167 N.C. App. 312, 314, 605 S.E.2d 205, 207 (2004) ("Our General Assembly has created a clear right for a defendant to withdraw a plea at the time sentence is imposed if that sentence differs from that contained in the plea agreement[.]"). If, conversely, "the sentence imposed is *consistent* with the plea agreement, the defendant is entitled to withdraw his plea upon a showing of manifest injustice." *State v. Russell*, 153 N.C. App. 508, 509, 570 S.E.2d 245, 247 (2002) (citation omitted and emphasis added).

Accordingly, we must first determine whether the sentence imposed in this case was inconsistent with Defendant's plea agreement. The applicable section of the transcript of plea states as follows:

> Defendant shall plead guilty to one count of assault by strangulation. Pursuant to plea, the State shall dismiss the remaining charges delineated hereafter in this transcript.
>
> Parties stipulate Defendant is a level III for felony sentencing with 6 points.

Thus, the plea agreement specified only three things: (1) the crime to which Defendant would plead guilty; (2) the charges that would be dismissed; and (3) Defendant's prior record level and number of prior record points for sentencing purposes. During the plea colloquy, Defendant confirmed in open court that these provisions constituted her "full plea agreement." While the transcript of plea and the plea colloquy reflected the fact that the statutory maximum term of imprisonment for assault by strangulation is 39 months, it is clear that her plea agreement did not contain specific terms regarding her sentence.

As such, this case is distinguishable from *Carriker*. There, the plea agreement stipulated that the defendant "would receive a suspended sentence and pay a fine and costs." *Carriker*, 180 N.C. App. at 470, 637 S.E.2d at 558. Given that the plea agreement in *Carriker* specified the punishments that the defendant would receive, the fact that the trial court's actual sentence included an additional punishment — surrender of her nursing license — rendered it inconsistent with the plea agreement and, therefore, subject to N.C. Gen. Stat. § 15A-1024. *Id.* at 471, 637 S.E.2d at 558.

Similarly, in other cases in which our appellate courts have granted relief to defendants pursuant to N.C. Gen Stat. § 15A-1024, the sentence imposed was different than that agreed to in the defendant's plea agreement. *See, e.g.*, *State v. Puckett*, 299 N.C. 727, 730, 264 S.E.2d 96, 98 (1980) (while plea agreement stipulated that defendant's convictions would be consolidated for sentencing purposes, trial court declined to consolidate convictions and instead imposed consecutive sentences); *Wall*, 167 N.C. App. at 317, 605 S.E.2d at 209 (trial court imposed sentence different than that set forth in plea agreement); *Rhodes*, 163 N.C. App. at 195, 592 S.E.2d at 733 (trial court imposed longer prison sentence than that provided for in plea agreement).

In the present case, however, we cannot conclude that the trial court "impose[d] a sentence other than provided for in [the] plea arrangement," N.C. Gen Stat. § 15A-1024, given that Defendant's plea agreement did not specify a sentence at all. Accordingly, Defendant is not entitled to relief under N.C. Gen Stat. § 15A-1024.

Having determined that Defendant's sentence was not inconsistent with her plea agreement, we must next consider whether it was manifestly unjust for the trial court to deny her motion to withdraw her guilty plea. *See Russell*, 153 N.C. App. at 509, 570 S.E.2d at 247 ("If the sentence imposed is consistent with the plea agreement, the defendant is entitled to withdraw his plea upon a showing of manifest injustice." (citation omitted)). "Factors to be considered in determining the existence of manifest injustice include whether: defendant was represented by competent counsel; defendant is asserting innocence; and defendant's plea was made knowingly and voluntarily or was the result of misunderstanding, haste, coercion, or confusion." *Shropshire*, 210 N.C. App. at 481, 708 S.E.2d at 183 (citation, quotation marks, and brackets omitted).

Initially, we observe that Defendant provided no specific reason to the trial court in support of her motion to withdraw her plea. Upon the trial court's inquiry as to the grounds for her motion, Defendant's

counsel simply stated: "We like [sic] to take it to trial." When the trial court then indicated that it did not think this was a sufficient reason to withdraw a guilty plea, Defendant's counsel once again failed to articulate a specific ground.

With regard to the above-quoted factors from *Shropshire*, Defendant does not argue that she (1) received ineffective assistance of counsel; (2) was innocent; or (3) pled guilty involuntarily or due to haste, coercion, or confusion. Defendant has failed to persuade us that the trial court's refusal to allow her to withdraw her plea was manifestly unjust simply because she was not made aware at the time she entered her plea that she could be subject to a fine. Indeed, we have previously observed that N.C. Gen. Stat. § 15A-1022(a) — the statute setting forth the steps a trial court must take to ensure that a defendant's decision to plead guilty is the result of an informed choice — "contains no provision requiring a defendant to be informed of any potential fines prior to acceptance of a guilty plea." *State v. Bozeman*, 115 N.C. App. 658, 663, 446 S.E.2d 140, 144 (1994).

It is likewise clear that mere dissatisfaction with one's sentence does not give rise to manifest injustice in this context. *See Shropshire*, 210 N.C. App. at 481, 708 S.E.2d at 183 (holding there was no manifest injustice where it was apparent that the "only reason for moving to withdraw [the defendant's] plea was his dissatisfaction with his sentence").

Accordingly, we conclude that Defendant has failed to meet her burden of showing that the trial court violated N.C. Gen. Stat. § 15A-1024 or that it was manifestly unjust for the trial court to deny her motion to withdraw her guilty plea. Therefore, we affirm the trial court's denial of her motion.

III. Legality of Fine

[3] Plaintiff's final argument is that the imposition of a $1,000 fine in this case constituted an abuse of discretion or, alternatively, a violation of the federal and state constitutions. We disagree.

N.C. Gen. Stat. § 15A-1361 provides that "[a] person who has been convicted of a criminal offense may be ordered to pay a fine as provided by law." N.C. Gen. Stat. § 15A-1361 (2015). "Any judgment that includes a sentence of imprisonment may also include a fine. . . . Unless otherwise provided, the amount of the fine is in the discretion of the court." N.C. Gen. Stat. § 15A-1340.17 (2015). There is no statutory provision that specifically addresses the amount of a fine that may be imposed upon a conviction for assault by strangulation. Accordingly, the amount of the fine is left to the trial court's discretion. *See id.*

In exercising its discretion to impose a fine, a "trial court must take into account the nature of the crime, the level of the offense, and the aggravating and mitigating factors, just as it would in setting the length of imprisonment for a defendant." *State v. Sanford Video & News, Inc.*, 146 N.C. App. 554, 557, 553 S.E.2d 217, 218 (2001), *disc. review denied*, 355 N.C. 221, 560 S.E.2d 359 (2002). It is well established that "trial judges have broad discretion in determining the proper punishment for crime, and . . . their judgment will not be disturbed unless there is a showing of abuse of discretion, procedural conduct prejudicial to the defendant, or circumstances which manifest inherent unfairness." *Id.* (citation, quotation marks, and brackets omitted). Here, we are unable to identify any basis for determining that the trial court's imposition of the $1,000 fine against Defendant constituted an abuse of discretion or was otherwise unlawful.

We are also unpersuaded by Defendant's argument that the trial court erred by failing to consider her resources when it imposed the fine. The statute Defendant cites for this proposition, N.C. Gen. Stat. § 15A-1362, states that "[i]n determining the *method of payment* of a fine, the court should consider the burden that payment will impose in view of the financial resources of the defendant." N.C. Gen. Stat. § 15A-1362(a) (2015) (emphasis added). As its plain language indicates, this statute relates to the method of payment of the fine rather than its amount.

Finally, we reject Defendant's argument that her fine violated the prohibition on excessive fines under the Eighth Amendment to the United States Constitution or Article 1, Section 27 of the North Carolina Constitution. "As the wording of the clause [prohibiting excessive fines] under our North Carolina Constitution is identical to that of the United States Constitution, our analysis is the same under both provisions." *Sanford Video & News, Inc.*, 146 N.C. App. at 557, 553 S.E.2d at 219. A fine "violates the Excessive Fines Clause if it is *grossly disproportional* to the gravity of a defendant's offense." *Id.* at 558, 553 S.E.2d at 219 (citation and quotation marks omitted). We have previously held that a $50,000 fine was not grossly disproportionate to the offense of distributing obscene materials. *See id.* at 559, 553 S.E.2d at 219.

Here, given the relatively modest amount of the fine as compared with the seriousness of the offense — strangulation of Defendant's two-year-old daughter — we have no difficulty concluding that the fine was not "grossly disproportional to the gravity of [D]efendant's offense . . . ." *Id.* at 558, 553 S.E.2d at 219 (emphasis omitted). Accordingly, Defendant has failed to show that the fine imposed in this case was unconstitutional.

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Judge INMAN concurs.

Judge ENOCHS dissents by separate opinion.

ENOCHS, Judge, dissenting.

Because I would find that Defendant failed to establish appellate jurisdiction, I respectfully dissent from the majority opinion reaching the merits of Defendant's appeal.

Defendant argues on appeal that the trial court erred by denying her post-sentencing motion to withdraw her guilty plea. Defendant is correct as a general proposition that

> [i]f at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

N.C. Gen. Stat. § 15A-1024 (2015).

This Court has plainly and unambiguously held that "a defendant seeking review of the trial court's compliance with N.C. Gen. Stat. § 15A-1024 *must* obtain grant of a writ of certiorari." *State v. Blount*, 209 N.C. App. 340, 345, 703 S.E.2d 921, 925 (2011) (citation omitted and emphasis added). This is so because "a challenge to the procedures followed in accepting a guilty plea *does not fall within the scope of N.C. Gen. Stat. § 15A-1444 (2003)*, specifying the grounds giving rise to an appeal as of right. Defendants seeking appellate review of this issue *must* obtain grant of a writ of certiorari." *State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006) (internal citation omitted and emphasis added).

Defendant's appeal identifies no substantive challenge to the guilty plea she sought to withdraw. Nor did Defendant's counsel present any substantive argument before the trial court. Because her appeal raises only a procedural issue, in the absence of a writ of *certiorari*, this Court is without jurisdiction.

"It is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008). Furthermore, it is fundamental that " '[i]n North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute' " *State v. Tinney*, 229 N.C. App. 616, 619, 748 S.E.2d 730, 733 (2013) (quoting *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002)). Here, Defendant has not filed a petition for writ of *certiorari*. As a result, Defendant is not entitled to appellate review of the denial of her motion to withdraw her post-sentencing guilty plea and, as such, her appeal must be dismissed.

In *Carriker*, a defendant charged with felony possession of cocaine entered into a plea agreement in which she acquiesced to plead guilty to possession of drug paraphernalia and, in turn, receive a suspended sentence and pay a fine and court costs. *Carriker*, 180 N.C. App. at 470, 637 S.E.2d at 558. After pleading guilty, however, the trial court sentenced her to forty-five days imprisonment, suspended that sentence, and ordered her to surrender her nursing license. The defendant moved to withdraw her guilty plea, and the trial court denied her motion. *Id.*

On appeal, the defendant argued that the trial court erred in ordering her to surrender her nursing license because that portion of her sentence was not contemplated under the terms of her plea agreement, and further asserted that the trial court compounded its error by denying her post-sentencing motion to withdraw her guilty plea. *Id.* at 470-71, 637 S.E.2d at 558. The defendant, recognizing that our caselaw unambiguously requires that a petition for writ of *certiorari* must be filed when challenging the procedures followed in accepting a guilty plea under N.C. Gen. Stat. § 15A-1024, correctly filed a petition for writ of *certiorari* contemporaneously with her appeal. *Id.* at 471, 637 S.E.2d at 558.

This Court went on to expressly hold that

> a challenge to the procedures followed in accepting a guilty plea *does not fall within the scope of N.C. Gen. Stat. § 15A–1444 (2003)*, specifying the grounds giving rise to an appeal as of right. Defendants seeking appellate review of this issue *must* obtain grant of a writ of certiorari. Defendant here filed a petition with this Court for a writ of certiorari, and we hereby allow the petition. Thus, we will review the merits of her contentions.

Id. (internal citation and quotation marks omitted and emphasis added). *Carriker* has been cited in subsequent cases by this Court including

Blount, wherein we reaffirmed our holding in *Carriker* by once more unambiguously providing that "a challenge to the procedures followed in accepting a guilty plea does not come within the scope of N.C. Gen. Stat. § 15A-1444 (2009), which specifies the grounds for appeals as of right. *State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006); *State v. Rhodes*, 163 N.C. App. 191, 193, 592 S.E.2d 731, 732 (2004). Consequently, a defendant seeking review of the trial court's compliance with N.C. Gen. Stat. § 15A-1024 " 'must obtain grant of a writ of certiorari.' *Carriker*, 180 N.C. App. at 471, 637 S.E.2d at 558." *Blount*, 209 N.C. App. at 345, 703 S.E.2d at 925.

Carriker's holding is thus distinguishable from *State v. Dickens*, 299 N.C. 76, 261 S.E.2d 183 (1980), cited to by Defendant and the majority. In that case, the defendant's appeal was predicated N.C. Gen. Stat. § 15A-1022 — which presents a *substantive* legal issue concerning whether a proper factual basis existed to support a defendant's guilty plea. *Id.* at 82-83, 261 S.E.2d at 187. This is a wholly separate and distinct ground for an appeal of a post-sentencing motion to withdraw a guilty plea than one brought pursuant to on N.C. Gen. Stat. § 15A-1024 which, as in the present case, deals with a *procedural* challenge involving the acceptance of a guilty plea. Indeed, § 15A-1024 is not addressed, discussed, or even mentioned in passing in *Dickens* given that the defendant's arguments in that case were wholly based upon his comprehension of his plea and whether a factual basis existed to support it rather than the procedures involved with accepting it. *See also State v. Salvetti*, 202 N.C. App. 18, 25, 687 S.E.2d 698, 703 (2010) (finding appeal as of right under 15A-1444(e) for appeal concerning post-sentencing motion to withdraw guilty plea premised upon N.C. Gen. Stat. § 15A-1022, but not discussing or addressing N.C. Gen. Stat. § 15A-1024 as that statute was never in issue).

Therefore, it is clear that *Carriker*, *Blount*, and *Dickens* are all in accord in that *Carriker* and *Blount* mandate that a petition for writ of *certiorari* is required when a *procedural* challenge is brought under § 15A-1444(e) — as "the *procedures* followed in accepting a guilty plea *do[ ] not fall within the scope of N.C. Gen. Stat. § 15A–1444*[,]" *Carriker*, 180 N.C. App. at 471, 637 S.E.2d at 558 (internal citation and quotation marks omitted and emphasis added) —, whereas a *substantive* legal challenge brought under § 15A-1444(e) creates an appeal as of right, such as was the case in *Dickens* where the defendant's appeal was predicated on N.C. Gen. Stat. § 15A-1022. Defendant cannot establish appellate jurisdiction by attempting to camouflage her appeal as a substantive legal challenge by citing to inapplicable caselaw

concerning separate and distinct statutory provisions where it is clear that her appeal is plainly procedural in nature — indeed, Defendant does not argue otherwise — and predicated upon a separate and distinct statute concerning challenges to the procedures utilized by trial courts in denying post-sentencing motions to withdraw guilty pleas. It is axiomatic that simply because a defendant claims appellate jurisdiction exists by citing to certain statutes and caselaw, this does not make it so. *See State v. Sale*, 232 N.C. App. 662, 664, 754 S.E.2d 474, 477 (2014) ("Defendant purports to have a right to appeal the trial court's imposition of a special condition of probation pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a2) (2013). However, neither statute confers a right to appeal here."). To hold otherwise would needlessly and unnecessarily create a conflict in our caselaw that simply does not exist when *Blount*, *Carriker*, and *Dickens* are read carefully and *in pari materia*.

Consequently, because Defendant's attempted appeal is a procedural challenge concerning the trial court's acceptance of her post-sentencing motion to withdraw her guilty plea under § 1024, and "a challenge to the procedures followed in accepting a guilty plea *does not fall within the scope of N.C. Gen. Stat. § 15A–1444 (2003)*, specifying the grounds giving rise to an appeal as of right[,]" *Carriker*, 180 N.C. App. at 471, 637 S.E.2d at 558 (internal citation and quotation marks omitted and emphasis added), I would hold that her appeal must be dismissed in accord with the clear and immutable precedents established by this Court.

VAUGHAN v. MASHBURN

[251 N.C. App. 494 (2016)]

MARIA VAUGHAN, PLAINTIFF
v.
LINDSAY MASHBURN, M.D., AND LAKESHORE WOMEN'S SPECIALISTS, PC, DEFENDANTS

No. COA15-1230

Filed 30 December 2016

Medical Malpractice—Rule 9(j) certification—amendment to correct wording—statute of limitations

The trial court did not abuse its discretion in a medical malpractice case by concluding that an amendment to the complaint to correct the Rule 9(j) certification would be futile. Where a medical malpractice plaintiff does not file a complaint with a proper certification pursuant to N.C.G.S. § 1A-1, Rule 9(j) before the running of the statute of limitations, the action cannot be deemed to have commenced within the statute of limitations.

Appeal by Plaintiff from order entered 27 August 2015 by Judge Stanley L. Allen in Iredell County Superior Court. Heard in the Court of Appeals 29 March 2016 and opinion filed by this Court on 21 June 2016. By order entered 1 July 2016, this Court allowed Plaintiff's Motion to Withdraw Opinion and Stay Mandate.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Patricia P. Shields and Joshua D. Neighbors; Shapiro, Appleton & Duffan, P.C., by Kevin M. Duffan; and Collum & Perry, PLLC, by Travis E. Collum, for Plaintiff.

Parker Poe Adams & Bernstein, LLP, by Chip Holmes and John D. Branson, for Defendants.

STEPHENS, Judge.

This appeal presents the issue of whether a trial court abused its discretion in denying Plaintiff's motion to amend a timely-filed complaint alleging medical malpractice in order to clarify a defective Rule 9(j) certification where (1) the motion to amend is made after the statute of limitations has expired, but (2) the evidence is undisputed that the actual Rule 9(j) review took place before the complaint was filed. Because Plaintiff's amended complaint would not relate back to the filing date of the original complaint, making the amendment futile, we are constrained to affirm the trial court's denial of Plaintiff's motion to amend.

Factual and Procedural Background

On 3 May 2012, Plaintiff Maria Vaughan underwent a hysterectomy performed by Defendant Lindsay Mashburn, M.D., a physician practicing obstetrics and gynecology as an employee of Defendant Lakeshore Women's Specialists, PC. Vaughan alleges that, during the procedure, Mashburn inappropriately inflicted a surgical wound to Vaughan's right uterer. In preparation for filing a medical malpractice claim against Defendants, in mid-October 2014, Vaughan's trial counsel contacted Nathan Hirsch, M.D., a specialist in obstetrics and gynecology who had performed more than one hundred hysterectomies. Counsel sent Hirsch all medical records related to Defendants' alleged negligence for Hirsch's review as required by Rule 9(j) of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2015) (requiring that a medical malpractice "pleading specifically assert[] that the *medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry* have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care") (emphasis added). On 31 October 2014, Hirsch informed Vaughan's counsel that he had formed the opinion that the care and treatment provided to Vaughan by Defendants was a violation of the applicable standard of care and that he would testify to that opinion. Thus, the pre-suit review in Vaughan's case complied in all respects with the requirements of Rule 9(j).

However, the medical malpractice complaint Vaughan filed on 20 April 2015 stated "the Plaintiff avers that *the medical care* received by Maria Vaugh[a]n complained of herein *has been reviewed* . . . ." (Emphasis added). This certification language comes from a prior version of Rule 9(j):[1]

> The *medical care* in this action has been reviewed by persons reasonably expected to qualify as expert witnesses pursuant to Rule 702 of the North Carolina Rules of Evidence and are willing to testify that the medical care

1. In 2011, our General Assembly amended Rule 9(j) to, *inter alia*, substitute "medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed" for "medical care has been reviewed" in subsections (j)(1) and (j)(2). *See* Session Law 2011-400, s. 3. This amendment thus created an additional requirement that plaintiffs certify the review of their medical *records*, as well as their medical *care*, by "persons reasonably expected to qualify as expert witnesses . . . ." *See* N.C. Gen. Stat. § 1A-1, Rule 9(j)(1).

> in this case did not comply with the applicable standard of care.

N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2009) (emphasis added). As Vaughan concedes, her certification omitted the required assertion that "all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry" were reviewed by the medical expert.

On 10 June 2015, Mashburn filed a motion to dismiss pursuant to Rule of Civil Procedure 12(b)(6), asserting that the complaint failed to state a claim upon which relief can be granted. On 12 June 2015, Defendants filed an answer, incorporating Mashburn's motion to dismiss by reference. On 30 June 2015, Vaughan filed a motion for leave to file an amended complaint, seeking to amend the wording of the Rule 9(j) certification to clarify that "all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry" were reviewed by the medical expert. Attached to the motion to amend were an affidavit of Vaughan's trial counsel, an affidavit of Hirsch, and Vaughan's responses to Defendants' Rule 9(j) interrogatories, each of which indicated that Hirsch, who reasonably expected to qualify as an expert witness pursuant to Rule 702, had reviewed Vaughan's medical records before the complaint was filed.

Following a hearing on 10 August 2015, on 27 August 2015, the trial court entered an order granting Defendants' motion to dismiss and denying Vaughan's motion to amend, stating two bases for its ruling:

> 1. Plaintiff's Original Complaint, filed April 20, 2015, did not comply with Rule 9(j) of the North Carolina Rules of Civil Procedure, as amended effective October 1, 2011, in that the pleading did not specifically assert that the Plaintiff's medical expert reviewed all medical records pertaining to the alleged negligence that are available to the Plaintiff after reasonably inquiry [and]
>
> 2. Plaintiff's Motion for Leave to File an Amended Complaint, filed on June 30, 2015, is . . . futile because the proposed amendment to Plaintiff's Original Complaint does not relate back to the filing date of Plaintiff's Original Complaint, and the statute of limitations ran on May 3, 2015.[][2]

2. Medical malpractice claims must be brought within three years of the last allegedly negligent act of the physician or medical care provider. *See* N.C. Gen. Stat. § 1-15(c) (2015).

(Emphasis in original). From that order, Vaughan gave written notice of appeal on 5 September 2015.

Discussion

Vaughan argues that the trial court erred in concluding that her proposed amendment was futile, and that, as a result, the court abused its discretion in denying her motion to amend and erred in dismissing the action. Specifically, Vaughan contends that the trial court was acting under a misapprehension of law, to wit, that Vaughan's proposed amended complaint did not relate back to the date of the filing of the original complaint even though "uncontroverted evidence showed that an appropriate expert review occurred before the filing of the original complaint." We are constrained by recent precedent to reject this argument.

> Motions to amend are governed by N.C. Gen. Stat. § 1A-1, Rule 15. Rule 15(a) provides that:
>
> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.
>
> Generally, Rule 15 is construed liberally to allow amendments where the opposing party will not be materially prejudiced. Our standard of review for motions to amend pleadings requires a showing that the trial court abused its discretion.

Fintchre v. Duke Univ., __ N.C. App. __, __, 773 S.E.2d 318, 322-23 (2015) (citations and brackets omitted). Futility of amendment is one reason that may justify a denial of a motion to amend. *Id.* at __, 773 S.E.2d at 323. However, "[w]hen discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion." *Rutherford Elec. Mbrshp. Corp. v. 130 of Chatham, LLC*, __ N.C. App. __, __, 763 S.E.2d 296, 299 (2014) (citations and internal quotation marks omitted), *appeal dismissed and disc. review denied*, __ N.C. __, 769 S.E.2d 192 (2015).

Here, the trial court concluded that allowing Vaughan's motion to amend would be futile because the amended complaint would not relate back to the filing date of her original complaint, a matter controlled by subsection (c) of Rule 15:

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C. Gen. Stat. § 1A-1, Rule 15(c) (2015). In the two decades since Rule 9(j) was enacted, our State's appellate courts have frequently considered the interplay between its certification requirements and the amendment and "relate back" provisions of Rule 15(a) and (c).

"Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review *before* filing of the action. Rule 9(j) thus operates as a preliminary qualifier to control pleadings rather than to act as a general mechanism to exclude expert testimony." *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012) (citation and internal quotation marks omitted; emphasis in original). Soon after Rule 9(j) was enacted, this Court held that "a medical malpractice complaint that fails to include [*any*] Rule 9(j) certification [cannot] be subsequently amended pursuant to Rule 15 to include the Rule 9(j) certification." *Keith v. N. Hosp. Dist.*, 129 N.C. App. 402, 404, 499 S.E.2d 200, 202, *disc. review denied*, 348 N.C. 693, 511 S.E.2d 646 (1998). More recently, our Supreme Court held that "permitting amendment of a complaint to add the expert certification where the expert review occurred *after* the suit was filed would conflict directly with the clear intent of the legislature." *Thigpen v. Ngo*, 355 N.C. 198, 204, 558 S.E.2d 162, 166 (2002) (emphasis added). Vaughan cites *Thigpen* as controlling the outcome of her appeal and "establish[ing] that a medical malpractice plaintiff may amend [her] Rule 9(j) certification and receive benefit of relation back under Rule 15 so long as there is evidence 'the review occurred before the filing of the original complaint' in the form of an affidavit or otherwise," such as the evidence presented to the trial court by Vaughan.

We believe that *Thigpen* differs factually and procedurally from Vaughan's case in several respects, including that Thigpen actually filed an amended medical malpractice complaint to cure her failure to include *any* Rule 9(j) certification in her original complaint. *Id.* at 200,

558 S.E.2d at 164. "[S]ix days after the statute of limitations expired, [the] plaintiff filed an amended complaint including a certification that the 'medical care has been reviewed' by someone who would qualify as an expert." *Id.* The plaintiff's case was dismissed by the trial court for failure to comply with the requirements of Rule 9(j). *Id.* Thus, among other issues, the Supreme Court considered whether

> an amended complaint which fails to allege that review of the medical care in a medical malpractice action took place before the filing of the original complaint satisfies the requirements of Rule 9(j). We hold it does not. . . . In light of the plain language of the rule, the title of the act, and the legislative intent previously discussed, it appears review must occur *before* filing to withstand dismissal. Here, in her amended complaint, [the] plaintiff simply alleged that [the] plaintiff's medical care *has been reviewed* by a person who is reasonably expected to qualify as an expert witness. There is no evidence in the record that plaintiff alleged the review occurred *before* the filing of the original complaint. Specifically, there was no affirmative affidavit or date showing that the review took place before the statute of limitations expired. Allowing a plaintiff to file a medical malpractice complaint and to then wait until after the filing to have the allegations reviewed by an expert would pervert the purpose of Rule 9(j).

Id. at 204, 558 S.E.2d at 166-67 (citation, internal quotation marks, and some brackets omitted; some emphasis added). In other words, the Court held that, where an amended complaint is allowed to correct a flawed Rule 9(j) certification, the amendment must specify that the required review occurred before the *original complaint was filed* in order to satisfy the requirements of Rule 9(j). However, contrary to Vaughan's assertion on appeal, the above-quoted language does not stand for the proposition that the inclusion of an "affirmative affidavit or date showing that the review took place before the statute of limitations expired" will entitle a plaintiff to (1) amend her Rule 9(j) certification or (2) receive benefit of relation back under Rule 15. In *Thigpen*, our Supreme Court simply did not address those questions, as it noted in holding that discretionary review had been improvidently allowed as to the issue "of whether a plaintiff who files a complaint without expert certification pursuant to Rule 9(j) can cure that defect after the applicable statute of limitations expires by amending the complaint as a matter of right and having that amendment relate back to the date of the

original complaint." *Id.* at 204-05, 558 S.E.2d at 167. Thus, *Thigpen* is inapposite to Vaughan's appeal.

Instead, we conclude that this Court's recent decisions in *Alston v. Hueske*, __ N.C. App. __, 781 S.E.2d 305 (2016) and *Fintchre*, *supra*, are dispositive and require that we affirm the decision of the trial court in Vaughan's case.

In *Alston*, as here, we reviewed a trial court's denial of a plaintiff's motion to amend her medical malpractice complaint to comply with the Rule 9(j) certification requirement and the court's resulting dismissal of the plaintiff's entire action. *Id.* at __, 781 S.E.2d at 307. The *Alston* plaintiff's original complaint alleged compliance with Rule 9(j) as follows:

> 29. Prior to commencing this action, *the medical records were reviewed and evaluated by a duly Board Certified* [sic] who opined that the care rendered to Decedent was below the applicable standard of care.
>
> 30. . . . The medical care referred to in this complaint has been reviewed by person(s) who are reasonably expected to qualify as expert witnesses, or whom the plaintiff will seek to have qualified as expert witnesses under Rule 702 of the Rules of Evidence, and who is willing to testify that the medical care rendered [to the] plaintiff by the defendant(s) did not comply with the applicable standard of care.

Id. (emphasis added). This Rule 9(j) certification, like that in Vaughan's original complaint, did not track the statutory language. Like Vaughan, alerted to this defect by the defendant's answer and motion to dismiss *after* the expiration of the statute of limitations, the plaintiff "requested leave to amend the pleadings in order to clearly comply with Rule 9(j) . . . ." *Id.* "[T]he trial court denied the [plaintiff's] request under Rule 15(a). . . . reason[ing that] the legislature intended 9(j) be satisfied from the beginning, at the time the complaint was filed." *Id.*

On appeal, the plaintiff first argued that the trial court erred in dismissing the complaint under "a hyper-technical reading of the rule [that] conflicts with the purpose of Rule 9(j), to prevent frivolous malpractice claims [because a] reading of the whole record show[ed] that [the plaintiff's] claim is not frivolous." *Id.* at __, 781 S.E.2d at 310. We rejected this contention, noting that

> Rule 9(j) requires "the medical care and all medical records" be reviewed by a person reasonably expected to

> qualify as an expert witness and who is willing to testify the applicable standard of care was not met. According to the complaint, the medical care was reviewed by someone reasonably expected to qualify as an expert witness who is willing to testify that [the] defendants did not comply with the applicable standard of care. However, the complaint alleges medical records were reviewed by a "Board Certified" that said the care was below the applicable standard of care. Thus, the complaint does not properly allege the medical records were reviewed by a person reasonably expected to qualify as an expert witness.

Id. In so holding, this Court noted that, due to the imprecise language of the certification in the original complaint, the Court did "not have enough information to evaluate whether this witness could reasonably be expected to qualify as an expert in this case." *Id.*

The *Alston* Court then considered the trial court's denial of the plaintiff's motion to amend her original complaint so as to clarify her compliance with the requirements of Rule 9(j). Citing *Keith*, the Court observed that, "[b]ecause the legislature has required strict compliance with this rule, our courts have ruled that if a pleader fails to properly plead his case in his complaint, it is subject to dismissal without the opportunity for the plaintiff to amend his complaint under Rule 15(a)[,]" and that, further, "[b]ecause th[e] plaintiff did not file the complaint with the proper Rule 9(j) certification before the running of the statute of limitation, the complaint cannot have been deemed to have commenced within the statute." *Id.* at __, 781 S.E.2d at 310, 311.

Vaughan attempts to distinguish *Alston* from her own case by noting that, unlike in *Alston* where the Court did "not have enough information to evaluate whether th[e] witness could reasonably be expected to qualify as an expert[,]" *id.* at __, 781 S.E.2d at 310, here the evidence is undisputed that Vaughan fully complied with the review requirements of Rule 9(j) *before* the complaint was filed. However, in affirming the trial court's denial of the plaintiff's motion to amend, the *Alston* Court did not discuss or even mention the lack of clarity regarding whether the review required by Rule 9(j) had actually been completed before the original complaint was filed. *See id.* at __, 781 S.E.2d at 310-11. Likewise, the Court did not qualify its holding that, where a "plaintiff did not file the complaint with the proper Rule 9(j) certification before the running of the statute of limitation, the complaint cannot have been deemed to have commenced within the statute." *Id.* at __, 781 S.E.2d at 311.

In *Fintchre*, this Court also considered the interplay of Rule 9(j) and Rule 15. In that matter, as in Vaughan's case,

> the trial court concluded that [the] plaintiff had failed to file a complaint containing the required Rule 9(j) certification within three years of the acts that caused her alleged injuries based on [the] plaintiff's failure to allege that all medical records pertaining to the alleged negligence were reviewed by a person who [the] plaintiff reasonably expected to qualify as an expert witness. The trial court further concluded that [the] plaintiff's motion to amend the 9(j) certification in her second complaint . . . was futile because the statute of limitations elapsed.

__ N.C. App. at __, 773 S.E.2d at 323 (internal quotation marks omitted). The plaintiff conceded that the language of the Rule 9(j) certification was deficient, but argued that,

> because she complied with the substantive requirements of Rule 9(j) before she filed her first action, filed her first action within the statute of limitations, and filed her second action within one year of taking a voluntary dismissal of her first action, the trial court should have granted her motion to amend the Rule 9(j) certification in her second complaint.

Id. The *Fintchre* Court affirmed the trial court's dismissal of that plaintiff's action based on the futility of her motion to amend:

> Both complaints failed to allege that a person reasonably expected to qualify as an expert had reviewed all available medical records pertaining to the alleged negligence. Because the second complaint was filed following the expiration of the statute of limitations, [the] plaintiff must rely on the first complaint in order to have timely filed her medical malpractice action. We hold that *where* [*the*] *plaintiff failed to file a complaint including a valid Rule 9(j) certification within the statute of limitations*, *granting [the] plaintiff's motion to amend her second complaint would have been futile*, as the trial court found.

Fintchre, __ N.C. App. at __, 773 S.E.2d at 325 (emphasis added). As with *Alston*, Vaughan draws our attention to distinctions between her case and *Fintchre*, namely: (1) that *Fintchre* concerned the amendment of a complaint after a voluntary dismissal pursuant to Rule 41(a); and (2)

that Vaughan, unlike the plaintiff in *Fintchre*, did not file *two* complaints with non-conforming Rule 9(j) certifications, the second of which was filed after notice of the first certification's deficiency. As with the distinctions Vaughan notes from *Alston*, we are not persuaded that these distinctions with *Fintchre* played a meaningful role in the Court's reasoning or holding. Indeed, as noted in the concurring opinion in *Fintchre*, in that matter, as here, it was clear that the plaintiff had actually complied with the substance of Rule 9(j) and that her certification failure did not violate the intent of the rule:

> [I]t is undisputed that [the] plaintiff complied with the requirement that her medical care and records be reviewed by a medical expert before her first complaint was filed and that [the] defendants had notice of that fact. Thus, the *intent* of Rule 9(j), to wit, requiring expert review of medical malpractice claims to prevent frivolous lawsuits, was plainly met before [the] plaintiff filed her first complaint. The obvious failure of [the] plaintiff's trial counsel to word the Rule 9(j) certification of compliance as specified in the statute is a highly technical failure which here results in the dismissal of a medical malpractice case which is *not* frivolous for the reasons Rule 9(j) is designed to prevent. I am thus sympathetic with the position of [the] plaintiff, who is thereby denied any opportunity to prove her claims before a finder of fact. I question whether such a harsh and pointless outcome was intended by our General Assembly in enacting Rule 9(j).

Fintchre, __ N.C. App. at __, 773 S.E.2d at 327 (Stephens, J., concurring) (emphasis in original).

Nonetheless, in this appeal, Vaughan argues that the recent decision of this Court in *Boyd v. Rekuc*, __ N.C. App. __, 782 S.E.2d 916, *disc. review denied*, __ N.C. __, __ S.E.2d __ (2016), controls the outcome of her case and mandates that we reverse the trial court's dismissal. Because the opinion in *Boyd* addressed a different issue than that presented in Vaughan's appeal, we disagree.

In *Boyd*, this Court addressed the interplay between Rule 9(j) and Rule of Civil Procedure 41(a), which

> allows a plaintiff to dismiss any action voluntarily prior to resting his case. . . . [and], where the dismissed action was filed within the applicable statute of limitations, . . . [to] commence a new action (based on the same claim)

> outside of the applicable statute of limitations so long as the new action is commenced within one year after the original action was dismissed.

Id. at __, 782 S.E.2d at 917 (citation and emphasis omitted). After "the trial court granted [the d]efendants' motion to dismiss [the p]laintiff's [second] complaint, concluding that [it] was not filed within the applicable statute of limitations[,]" the plaintiff timely appealed. *Id.* This Court reversed the trial court's dismissal, holding that

> where a plaintiff voluntarily dismisses a medical malpractice complaint which was timely filed in good faith but which lacked a required Rule 9(j) certification, said plaintiff may re-file the action after the expiration of the applicable statute of limitations provided that (1) he files his second action within the time allowed under Rule 41 and (2) the new complaint asserts that the Rule 9(j) expert review of the medical history and medical care occurred prior to the filing of the original timely-filed complaint.

Id. (emphasis omitted). The Court reached this result after concluding that the "case involve[d] the interplay between Rule 9(j) and Rule 41(a)(1) of our Rules of Civil Procedure" and was "essentially 'on all fours' with our Supreme Court's 2000 opinion in *Brisson v. Santoriello*, 351 N.C. 589, 528 S.E.2d 568 (2000)." *Id.*

In her motion, Plaintiff specifically cites the following language in *Boyd*, purporting to summarize the holding of *Brisson*:

> A medical malpractice complaint which fails to include the required Rule 9(j) certification is subject to dismissal with prejudice pursuant to Rule 9(j). Prior to any such dismissal, however, said plaintiff may amend or refile (pursuant to Rules 15 or 41, respectively) the complaint with the proper Rule 9(j) certification. Further, if such subsequent complaint is filed after the applicable statute of limitations has expired but which otherwise complies with Rule 15 or 41, the subsequent complaint is not time-barred if it asserts that the Rule 9(j) expert review occurred before the original complaint was filed.

Id. at __, 782 S.E.2d at 918. This language in *Boyd* is both dictum and erroneous in regard to the holding in *Brisson*. First, as noted *supra*, no issue regarding a Rule 15(a) amendment was before this Court in *Boyd*. Second, the Supreme Court did not consider the interplay of Rules 9(j)

and 15(a) in *Brisson*. The plaintiff in *Brisson* filed a complaint lacking a proper Rule 9(j) certification, and the defendant moved to dismiss on that basis. 351 N.C. at 591, 528 S.E.2d at 569. The plaintiff then filed a motion to amend the complaint per Rule 15(a), or in the alternative, to take a voluntary dismissal per Rule 41(a). *Id.* at 592, 528 S.E.2d at 570. The trial court denied the motion to amend, and the plaintiff subsequently took a voluntary dismissal and later filed a second complaint with the proper Rule 9(j) certification. *Id.* After the trial court dismissed the second complaint as barred by the statute of limitations, the plaintiff appealed. *Id.* In its opinion, the Supreme Court stated:

> We note at the outset that the Court of Appeals, in its opinion, addressed at length the effects of [the] plaintiffs' proposed amended complaint. We find that [the] *plaintiffs' motion to amend, which was denied, is neither dispositive nor relevant to the outcome of this case.* Whether the proposed amended complaint related back to and superceded the original complaint has no bearing on this case once [the] plaintiffs took their voluntary dismissal on 6 October 1997. . . .
>
> *The only issue for us to review on appeal is whether [the] plaintiffs' voluntary dismissal pursuant to N.C.R. Civ. P. 41(a)(1) effectively extended the statute of limitations by allowing [the] plaintiffs to refile their complaint against defendants within one year, even though the original complaint lacked a Rule 9(j) certification. We hold that it does.*

Id. at 593, 528 S.E.2d at 570 (emphasis added).[3]

Therefore, we must reject Vaughan's assertion in her motion that

> *Boyd* unequivocally holds that a plaintiff may amend a medical malpractice complaint outside of the applicable statute of limitations in order to truthfully allege compliance with Rule 9(j) where the requisite review occurred prior to the filing of the first complaint. Further, *Boyd* establishes that it is error for the trial court to deny such an amendment based on futility.

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3. The *Fintchre* Court also noted this critical difference in distinguishing *Brisson*, upon which the plaintiff in that case heavily relied with regard to her Rule 15(a) argument. *See Fintchre*, __ N.C. App. at __, 773 S.E.2d at 323-24.

The issue of amending complaints was simply not before this Court in *Boyd*, and thus the opinion in that matter neither held nor established the points urged by Vaughan.

For the reasons discussed above, we are again compelled by precedent to reach "a harsh and pointless outcome" as a result of "a highly technical failure" by Vaughan's trial counsel—the dismissal of a nonfrivolous medical malpractice claim and the "den[ial of] any opportunity to prove her claims before a finder of fact." *Fintchre*, __ N.C. App. at __, 773 S.E.2d at 327 (Stephens, J., concurring).

Conclusion

In sum, our case law establishes that, where a medical malpractice "plaintiff did not file the complaint with the *proper* Rule 9(j) certification *before the running of the statute of limitation*, the complaint cannot have been deemed to have commenced within the statute." *Alston*, __ N.C. App. at __, 781 S.E.2d at 311 (emphasis added). Thus, "where [a] plaintiff failed to file a complaint including a *valid* Rule 9(j) certification *within the statute of limitations*, granting [the] plaintiff's motion to amend her second complaint would have been futile . . . ." *Fintchre*, __ N.C. App. at __, 773 S.E.2d at 325 (emphasis added). The trial court's conclusion that Vaughan's amendment would be futile was therefore correct under our established precedent and not a misapprehension of law. As a result, we cannot conclude that the trial court's denial of Vaughan's motion to amend was an abuse of discretion. Accordingly, the trial court's order denying that motion and dismissing Vaughan's medical malpractice complaint must be affirmed. While we are sympathetic to the arguments of Vaughan's able appellate counsel and appreciate the highly technical nature of our decision here, we are bound by our existing precedent. This Court simply does not have the authority to rule otherwise.

AFFIRMED.

Judges BRYANT and McCULLOUGH concur.

WATTS-ROBINSON v. SHELTON

[251 N.C. App. 507 (2016)]

LENA WATTS-ROBINSON, PLAINTIFF
v.
BRANDON SHELTON, DEFENDANT

No. COA16-599

Filed 30 December 2016

1. Attorneys—legal malpractice—disciplinary hearing—defamation—privileged testimony

The trial court did not err by granting defendant attorney's motion to dismiss under Rule 12(b)(6) a defamation action for failure to state a claim. Defendant's testimony, during a disciplinary hearing investigating allegations that plaintiff attorney mismanaged entrusted client funds and engaged in professional misconduct, was absolutely privileged.

2. Evidence—attorney disbarment order—probative value outweighed unfair prejudice

The trial court did not err in a defamation case by admitting over plaintiff attorney's objection her disbarment order. The disbarment order's probative value was not substantially outweighed by unfair prejudice and was relevant to whether defendant attorney's testimony during the disciplinary hearing was absolutely privileged.

Appeal by plaintiff from order entered 11 January 2016 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 November 2016.

Lena Watts-Robinson, plaintiff-appellant, pro se.

Robinson Bradshaw & Hinson P.A., by R. Steven DeGeorge, for defendant-appellee.

ELMORE, Judge.

Lena Watts-Robinson appeals from an order dismissing her defamation action against Brandon Shelton, opposing counsel in an employment discrimination case (the "*Billips* action"). In her complaint, Watts-Robinson alleged that Shelton defamed her while testifying before the Disciplinary Hearing Commission of the North Carolina State Bar ("DHC") during a hearing investigating allegations that Watts-Robinson, *inter alia*, mismanaged entrusted client funds and engaged

in professional misconduct while representing the plaintiff-employee in the *Billips* action. Shelton moved to dismiss Watts-Robinson's defamation action for failure to state a claim on the basis that his testimony during the disciplinary hearing was absolutely privileged, since it was made in the course of a judicial proceeding and was sufficiently relevant to that proceeding. After a dismissal hearing, the superior court granted Shelton's motion and dismissed Watts-Robinson's defamation action.

Two issues are presented in this appeal: whether Shelton's allegedly defamatory statements made during the disciplinary hearing before the DHC were absolutely privileged from civil action, and whether the trial court erred by refusing to exclude the resulting discipline order disbarring Watts-Robinson from practicing law ("disbarment order") on the basis that its prejudice outweighed its probative value. We hold Shelton's challenged statement was absolutely privileged and the superior court properly refused to exclude the disbarment order. Accordingly, we affirm.

I. Background

Watts-Robinson was disbarred from the practice of law on 2 December 2014. According to the disbarment order, Watts-Robinson deposited entrusted client funds into a bank account that accrued interest and paid herself the earned interest, rather than disbursing it to her clients or to the North Carolina Interest on Lawyers Trust Account Program ("IOLTA") as required by law. Additionally, Watts-Robinson engaged in other egregious acts of professional misconduct while representing at least two of her clients, Billips and N. Burton, including, *inter alia*, mismanaging entrusted funds by merging client funds with her own, failing to promptly notify Billips when she received his settlement proceeds, failing to respond to Billips' request for his settlement proceeds, and using entrusted client funds for her own personal benefit by reimbursing herself from Billips' settlement proceeds for court sanctions imposed against her personally.

During Watts-Robinson's disciplinary hearing, Shelton was called to testify about his dealings with her as to the settlement proceeds from the *Billips* action. Specifically, Shelton was questioned about Watts-Robinson's objection to a $96,011.92 settlement check made payable directly to Billips. Shelton explained that Watts-Robinson notified him that Shelton's client needed to reissue the check because Billips owed Watts-Robinson expenses and she was concerned that he would not reimburse her. When counsel for the State Bar asked Shelton to expand on his stated concern about Watts-Robinson's request that the check

made payable to Billips be reissued made payable in a manner she could deposit into her own bank account, Shelton responded: "My concern was that Ms. Watts-Robinson was potentially trying to run some kind of scam on Mr. Billips and I did not want my client to be in the middle of a dispute with Mr. Billips and Ms. Watts-Robinson." After the disciplinary hearing, on 4 December 2014 the DHC entered an order of discipline, the disbarment order, disbarring Watts-Robinson from practicing law.

On 10 November 2015, Watts-Robinson filed an action against Shelton, alleging, *inter alia*, that his "scam" claim defamed her and caused her emotional distress. Shelton moved to dismiss the action for failure to state a claim under Rule 12(b)(6), attaching the disbarment order to his motion, and arguing that his statement was absolutely privileged because it was made during the course of a judicial proceeding and was sufficiently relevant to its subject matter.

On 7 January 2016, the trial court heard Shelton's motion to dismiss. During the dismissal hearing, Watts-Robinson objected to the trial court considering the disbarment order because it was more prejudicial than probative. The trial court never ruled on her motion, but did consider the disbarment order in reaching its decision effectively refusing to exclude it. On 11 January 2016, the trial court entered an order dismissing Watts-Robinson's defamation action. Watts-Robinson appeals.

II. Analysis

A. Rule 12(b)(6) Dismissal was Proper

[1] Watts-Robinson contends the trial court erred by granting Shelton's Rule 12(b)(6) dismissal because it applied the improper "palpably irrelevant" standard, not the proper "sufficiently relevant" standard, when determining whether Shelton's statements were absolutely privileged under North Carolina's defamation law. Watts-Robinson further contends that Shelton's statement was not "sufficiently relevant" to the proceeding and, therefore, should not be absolutely privileged. Shelton retorts that Watts-Robinson's assertion there exist two relevance standards is merely two sides of the same coin, and, no matter the flip, his statement made during the disciplinary hearing lands on the side of absolute privilege against a civil action. We agree with Shelton.

We review *de novo* a trial court's ruling on a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Jackson v. Charlotte Mecklenburg Hosp. Auth.*, 238 N.C. App. 351, 352, 768 S.E.2d 23, 24 (2014) (citation omitted). A Rule 12(b)(6) dismissal is proper when

> (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.

Izydore v. Tokuta, __ N.C. App. __, __, 775 S.E.2d 341, 345 (citation omitted), *disc. review denied*, 368 N.C. 430, 778 S.E.2d 92 (2015).

"[A] defamatory statement made in due course of a judicial proceeding is absolutely privileged and will not support a civil action for defamation, even though it be made with express malice," *Jarman v. Offutt*, 239 N.C. 468, 472, 80 S.E.2d 248, 251 (1954) (citations omitted), unless the statement is "so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety," *Harman v. Belk*, 165 N.C. App. 819, 825, 600 S.E.2d 43, 48 (2004) (citation and quotation marks omitted). "In deciding whether a statement is absolutely privileged, a court must determine (1) whether the statement was made in the course of a judicial proceeding; and (2) whether it was sufficiently relevant to that proceeding." *Id.* at 824, 600 S.E.2d at 47 (citing *Harris v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 669, 672, 355 S.E.2d 838, 841 (1987)). Because Watts-Robinson concedes Shelton's challenged statement was made during the course of a judicial proceeding, our review is limited to its relevancy.

During the disciplinary hearing, counsel for the State Bar and Shelton engaged in the following exchange:

> Q Would you tell the [DHC] panel basically about the substance of [Watts-Robinson's] communications with you after receiving the settlement checks [in the *Billips* action]?
>
> A Yes, ma'am. Ms. Watts-Robinson was upset or she disputed the manner in which the payments were made. The check to her was fine, but the check that was made payable to Mr. Billips she said was not satisfactory. She was -- first of all she was upset that we did not deposit them. I explained why we didn't deposit them, why we sent them, and she indicated that the check to Mr. Billips was incorrect. It should have been made payable to her or Mr. Billips or deposited directly into her account.
>
> . . . .

Q And once you sent her the check again, did she deposit it into her account?

A She deposited the check that was made payable to her. She did not deposit the check that was made payable to Mr. Billips.

Q Did she send it back to you a second time?

A She did.

Q And how did you respond at that point?

A I believe we had a phone conversation to discuss what the underlying problem was in terms of the way the payments were issued.

Q What's your understanding or what did Ms. Watts-Robinson state about the reason why there was an issue with the check made payable to Mr. Billips?

A She state [sic] that Mr. Billips owed her expenses out of the payments that were made to him and her concern was . . . that he would cash his check and not reimburse her the expenses that are owed to her.

Q At that point, did you then have the checks reissued as she was requesting?

A Not immediately, no.

Q What did you do after learning what Ms. Watts-Robinson described as the issue with the check?

A There were concerns on my part in terms of making -- changing the check in the way that Ms. Watts-Robinson wanted, so we ultimately ended up drafting an addendum to the original settlement agreement to clearly kind of delineate and outline the reasons for and how the checks to Mr. Billips were ultimately going to be paid.

Q *What were your concerns?*

A *My concern was that Ms. Watts-Robinson was potentially trying to run some kind of scam on Mr. Billips* and I did not want my client to be in the middle of a dispute with Mr. Billips and Ms. Watts-Robinson.

> Q I note that in her letter, Plaintiff's Exhibit 26, she gives two options for payment "Law Office of Lena Watts-Robinson or Louis Billips"; and then in the alternative reissuing the check "Law Office of Lena Watts-Robinson on behalf of Louis Billips." Did you choose to reissue the check in accord with either of these suggested options?
>
> A I believe after the addendum was signed off on by both parties, including Mr. Billips, that we ended up issuing the check to Ms. Watts-Robinson on behalf of Mr. Billips.

(Emphasis added.)

Watts-Robinson argues that since the disciplinary hearing was not focused on any alleged scam she ran, Shelton's "scam" claim was not "sufficiently relevant to the proceeding" but was "palpably irrelevant to [its] subject matter."

To the contrary, central to the subject matter of Watts-Robinson's disciplinary hearing was her alleged mismanagement of entrusted client funds, including the settlement proceeds from the *Billips* action. Considering the entire exchange in context, Shelton's response to questioning that he was concerned "Watts-Robinson was potentially trying to run some kind of scam on Mr. Billips" after she requested the settlement check be reissued in a manner that would permit her to deposit the check into her own bank account, because she was concerned Billips would not reimburse her for some expense, was sufficiently relevant such that it was not palpably irrelevant to the subject matter of the disciplinary proceeding.

Accordingly, Shelton's testimony during the disciplinary hearing was absolutely privileged, and the trial court properly granted his motion to dismiss under Rule 12(b)(6) for failure to state a claim.

B. No Error Under Rule 403's "Unfair Prejudice" Balance

[2] Watts-Robinson next contends the trial court erred by admitting over objection the disbarment order in violation of Rule 403 of the North Carolina Rules of Evidence. We disagree.

During the dismissal hearing, Watts-Robinson moved to exclude the disbarment order on the basis that it was more prejudicial than probative. Although the trial court never explicitly ruled on her motion, *see* N.C. R. App. P. 10(a)(1) (2016) ("It is . . . necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."), it refused to exclude the disbarment order and considered it in reaching its decision to grant Shelton's motion to dismiss.

We apply an abuse-of-discretion standard when reviewing a trial court's Rule 403 decision. *Wolgin v. Wolgin*, 217 N.C. App. 278, 283, 719 S.E.2d 196, 200 (2011). "An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Ward*, 364 N.C. 133, 139–40, 694 S.E.2d 738, 742 (2010) (citations, quotation marks, and brackets omitted).

Under Rule 403, a trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (2015). " 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *Id.* § 8C-1, Rule 403 official cmt.

However, excluding evidence under Rule 403's weighing of probative value against prejudice has no logical application to bench trials, such as this dismissal hearing, since we presume trial judges can consider relevant evidence, weigh its probative value, and reject improper inferences in reaching a decision. *See, e.g.*, *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005) ("[T]he trial court in a bench trial 'is presumed to have disregarded any incompetent evidence.' " (citation omitted)); *see also In re Oghenekevebe*, 123 N.C. App. 434, 438, 473 S.E.2d 393, 397 (1996) ("In a nonjury trial, if incompetent evidence is admitted and there is no showing that the judge acted on it, the trial court is presumed to have disregarded it." (citation omitted)). Indeed, here the trial court explained: "The Court is not using the order to determine whether or not you had wrong doings. The Court is simply trying to determine the relevance of the testimony of the person that appeared before the State Bar."

Nonetheless, the disbarment order's probative value was not substantially outweighed by unfair prejudice. The disbarment order was relevant to whether Shelton's testimony during the disciplinary hearing was absolutely privileged. It showed that Watts-Robinson was disciplined, in large part, for misconduct arising from her representation of Billips (57 of the DHC's 105 factual findings) and, specifically, for mismanaging Billips's settlement proceeds. Although the disbarment order was prejudicial, Watts-Robinson has not demonstrated that the trial court was improperly biased by it in reaching its decision. Contrarily, the trial transcript positively demonstrates otherwise. Accordingly, we hold that the trial court did not violate Rule 403 by refusing to exclude the disbarment order. *See N. Carolina State Bar v. Adams*, __ N.C. App. __, __, 769 S.E.2d 406, 411 (2015) (holding that the DHC did not violate Rule

403 in admitting evidence when the defendant had not demonstrated an improper basis on which DHC may have considered it).

III. Conclusion

Shelton's response to the request by counsel for the State Bar to expand on his concern about reissuing the settlement check was absolutely privileged. Thus, the trial court properly dismissed Watts-Robinson's defamation action under Rule 12(b)(6). The trial court also did not violate Rule 403 by refusing to exclude the disbarment order during this nonjury dismissal hearing. Accordingly, we affirm.

AFFIRMED.

Judges STEPHENS and DIETZ concur.

EDWARD F. WILKIE AND DEBRA T. WILKIE, PLAINTIFFS
v.
CITY OF BOILING SPRING LAKES, DEFENDANT

No. COA16-652

Filed 30 December 2016

1. Appeal and Error—interlocutory order—inverse condemnation—substantial right

An order in an inverse condemnation case was interlocutory but was properly before the Court of Appeals because it affected a substantial right.

2. Eminent Domain—inverse condemnation—private use

A trial court's order in an inverse condemnation case was reversed where the drainage pipes at a city-owned lake were changed, the water level of the lake changed, and plaintiffs alleged that their lake-side property was taken by inverse condemnation. The trial court concluded that the property was taken for a private use, and there was no remedy through inverse condemnation.

3. Constitutional Law—inverse condemnation—claims remaining—no adequate remedy

A holding that a trial court order erroneously found for plaintiffs on an inverse condemnation claim did not dispose of the case where plaintiffs had also brought constitutional claims that were not addressed.

WILKIE v. CITY OF BOILING SPRING LAKES

[251 N.C. App. 514 (2016)]

Appeal by Defendant from order entered 5 November 2015 by Judge Ebern T. Watson, III, in Brunswick County Superior Court. Heard in the Court of Appeals 16 November 2016.

Kurt B. Fryar for Plaintiffs.

Cauley Pridgen, P.A., by James P. Cauley, III, David M. Rief, and Geneva L. Yourse, and North State Strategies, by Jack Cozort, for Defendant.

STEPHENS, Judge.

Defendant City of Boiling Spring Lakes ("the City") appeals from an order issued pursuant to N.C. Gen. Stat. § 40A-47[1] determining all issues other than compensation. The City argues that the trial court erred by concluding that an inverse condemnation occurred, because (1) the City's actions were not for a public use or benefit, (2) the flooding of the Wilkies' property was temporary and not subject to recurrence, (3) the City was not able to foresee encroachment onto or damage to the Wilkies' property, (4) the trial court misapplied the balancing test enumerated by the United States Supreme Court, (5) the trial court failed to address the City's defense of estoppel, and (6) the trial court failed to determine the boundary line and area of the property taken. We agree that the trial court erred in finding that there was a taking of the Wilkies' property by inverse condemnation when the City's actions were not for the public use or benefit.

Factual and Procedural Background

The Wilkies own two lots that border Spring Lake in the city of Boiling Spring Lakes. The City owns Spring Lake. The lake is fed by natural, underground springs in the lake and surface runoff. Excess water drains from the lake through two pipes at the west end of the lake. The City replaced those two pipes in 2006.

On 25 June 2013, the Board of Commissioners of Boiling Spring Lakes held a workshop meeting. At that meeting, the Board was presented with a petition signed by twenty-one residents of the City who owned property bordering the north side of Spring Lake. The petition asserted that the lake level was lowered by the 2006 pipe replacement,

1. Section 40A-47 provides that a trial judge in a condemnation proceeding, upon motion of either party and ten days' notice, shall determine "all issues raised by the pleadings other than the issue of compensation." N.C. Gen. Stat. § 40A-47 (2015).

and asked that the Board take action to raise the lake level to restore it to its level before 2006. No action was taken on the petition at this meeting, but it was decided to discuss the issue again at the Board's July meeting.

The names of both Mr. and Mrs. Wilkie appeared on the petition to raise the lake level. Mrs. Wilkie signed both names to the petition. She testified that she "thought [the petition] was a joke."

On 2 July 2013, at the Board's regular meeting, the petition and the issue of the Spring Lake water level were again discussed. All five commissioners, the mayor, and property owner Jane Falor took part in the discussion. Several commissioners had been to the lake to examine the water level and the drainage pipes. In addition, three commissioners had spoken with Larry Modlin, Director of Public Works for the City at that time, and one commissioner spoke with the city manager to discuss the lake level and possible ways to raise it. Commissioner Caster stated that Modlin advised him that one simple way to restore the lake level would be to install an "elbow" on each drainage pipe for approximately two hundred dollars, which could be easily removed if it did not work or to prevent flooding in the event of a storm. In addition, it was noted that one of the existing pipes was clogged, which needed to be fixed. Following the discussion, the Board voted 5-0 to "return Spring Lake to its original shore line as quickly as can be done."

On 11 July 2013, the City installed the elbows on the drainage pipes in Spring Lake. The elbows increased the height of the drainage pipes by six inches. The intent of this action was to maintain the lake level where it was on 2 July 2013.

On 6 August 2013, the Board held another regular meeting. Several property owners whose lots abut Spring Lake attended the meeting, including Mr. Wilkie. One property owner presented the Board with a second petition signed by twenty property owners, five of whom had signed the initial petition to raise the lake level. This second petition complained that the lake level was too high, and requested that it be restored to the level it had been prior to the installation of the elbows. Mr. Wilkie signed this petition. In addition, several of the property owners spoke at the meeting. Mr. Wilkie and two other property owners spoke to complain about the flooding on their property that they attributed to the installation of the elbows. One property owner attributed the flooding to increased rainfall and slow drainage of excess water from the lake, and asked the Board to give the lake time to "stabilize to more normal conditions."

Commissioner Glidden read a statement acknowledging the flooding problem, but differentiating the flooding due to problems with drainage speed from problems with the lake level, which the elbows were installed to maintain. She explained that the elbows "did accomplish what we thought we were going to accomplish," but that once they were installed, "Mother Nature played her trick on us and started raining." The Board voted to hold a workshop and special meeting on 17 August 2013 to address the Spring Lake water level, and to lower the lake level by three inches for the eleven days prior to the special meeting to alleviate flooding.

The City sent out a notice of the special meeting to the property owners whose lots bordered on Spring Lake, and invited them to address the Board regarding the lake level. On 17 August 2013, the Board held the special meeting. Ten property owners spoke and addressed their concerns to the Board regarding the lake level. Some, including Mr. Wilkie, complained that their property was flooded as a result of the Board's action to raise the lake level. Mr. Wilkie stated that he had "lost about 20' to 30' of property which is under water now." Other property owners urged that the flooding was not due to the elbows, but rather due to substantial rainfall, and the inability of the lake to drain as quickly as the runoff accumulated. Still other owners asked that the lake level be raised further. One property owner, David Crawford, pointed out that only five people who had signed the petition to raise the lake level had now changed their minds.

The city manager stated that he had met with a representative from the North Carolina Department of Environment and Natural Resources, Water Management Division, who had come down to inspect the situation, but was unable to determine the proper water level for the lake. Multiple commissioners expressed concern that the high levels of rainfall were complicating the issue, and urged waiting until the water level stabilized before taking further action. A motion to reduce the lake level by two inches to alleviate the flooding that did exist was defeated. The Board ultimately adjourned, taking no action, but advising property owners to continue to monitor the lake level.

The level of Spring Lake was discussed again at the September and October Board meetings, with residents speaking both for and against lowering the lake level. At the 1 October 2013 meeting, Mr. Wilkie indicated that the Eldridge Law Firm had sent a letter to the Board, that he had given information to the Board on inverse condemnation, and that the City would "be sued over the elbow on the Lake." Motions to remove the elbows were defeated at both meetings.

Only one property owner spoke at the 12 November 2013 meeting, and she urged the Board to continue to evaluate the facts regarding the lake level. The Board did not discuss the issue. At the 7 January 2014 meeting, two property owners, including Mr. Wilkie, spoke about the flooding still being caused by the high water level of Spring Lake. A motion to remove the elbows was again defeated.

On 13 January 2014, the Board held another special meeting to discuss Spring Lake. Two property owners spoke, and requested that the water level be raised back to the level of 2 July 2013. After discussion of the lake level and the related issue of whether Spring Lake had enough drainage pipes to allow it to drain excess water fast enough, the Board voted to have an engineering study done to determine the proper lake level.

On 4 February 2014, Mr. Wilkie spoke briefly at the Board's regular meeting, again requesting that the elbows be removed. The Board voted to have SunGate Design Group ("SunGate"), an engineering firm, address the Board to explain the work they proposed to do involving the Spring Lake water level. The Board held a workshop on 26 March 2014 to hear SunGate's proposal. At the workshop, Henry Wells, vice president of SunGate, spoke regarding the methodology his firm would use to determine the appropriate lake level for Spring Lake. Wells indicated that the preliminary study would take about a month to complete, and that following the study, adjustments could be made so that the lake could drain at the correct speed. Several property owners also spoke, including Mr. Wilkie, who asserted that the elbows caused the flooding.

On 1 April 2014, Mr. Wilkie again spoke at the Board's regular meeting. He urged the City to "address the problem with the residents that have low lake levels and those of us who have flooding issues." Also at this meeting, the Board unanimously approved entering into a contract with SunGate to determine the correct lake level for Spring Lake.

On 10 June 2014, the Board held a workshop and special meeting for SunGate to discuss the results of the preliminary engineering report on the Spring Lake water level. Henry Wells again spoke on behalf of SunGate. He explained that SunGate's recommendation was to reduce the lake level to where it was before the elbows were installed, and to add a pipe to help the excess water drain more efficiently. Several property owners then spoke, both in favor of and against taking action in accordance with SunGate's recommendation.

SunGate subsequently submitted an engineering report to the Board dated 10 July 2014. The report included in its summary and conclusions

that SunGate had looked at the deeds transferring Spring Lake to the City, and could not find authority for the City to increase the level beyond the lake as it was shown on a 1960 plat.

On 16 June 2014, the Board reconvened its special meeting from 10 June 2014. At the meeting, the Board voted 3-2 to reduce the level of Spring Lake by three inches and to monitor the effect on the lake which Spring Lake drained into. On 1 July 2014, at its regular meeting, the Board voted to reduce the lake level an additional two and a half inches to meet the recommendation of SunGate. On 30 July 2014, the elbows were removed.

Mr. and Mrs. Wilkie filed this action alleging inverse condemnation by the City on 23 May 2014, prior to the removal of the elbows. On 20 April 2015, the City moved to dismiss the complaint, or in the alternative for the trial court to determine all issues other than damages pursuant to N.C. Gen. Stat. § 40A-47. The City simultaneously filed a request for the trial court to consider matters outside the pleadings and to treat the motion to dismiss as a motion for summary judgment. On 4 May 2015, the City answered the complaint. The trial court denied the City's motion for summary judgment by order entered 1 July 2015. On 5 November 2015, the trial court entered an order purportedly determining all of the issues other than damages. The trial court concluded in its order that:

> 1. The actions taken by the City as set forth in the findings of fact amount to a taking of the Wilkies' property without just compensation . . . under the provisions of Chapter 40A of the North Carolina General Statutes and the 5th and 14th Amendments to the Constitution of the United States of America.
>
> . . . .
>
> 4. The City's intention in maintaining Spring Lake at elevated levels was for the benefit of private land owners abutting the Lake. Thus, the City's taking of the Wilkies' property was for a private use.
>
> . . . .
>
> 9. The City has taken the Wilkies' property by inverse condemnation.
>
> 10. The Wilkies have proven their [N.C. Gen. Stat] §[]40A-51 cause of action.

> 11. The City, by inverse condemnation, took a temporary easement interest in 1,120 square feet of the Wilkies' property for a period of 1 year and 20 days and has also taken a portion of the topsoil and centipede grass that was located on the same 1,120 square feet without adequate notice or compensation.

The trial court then ordered a trial to be conducted to determine the damages to which the Wilkies were entitled for the City's taking of the easement in the Wilkies' property. The City filed a notice of appeal from the trial court's order, which was received by the Brunswick County Clerk's office prior to 7 December 2015, and entered on 8 December 2015.

Discussion

On appeal, the City argues that the trial court erred in concluding that the City took the Wilkies' property by inverse condemnation. We agree.

1. Interlocutory nature of the appeal

[1] Initially, we note that this appeal is interlocutory. "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). "If a party attempts to appeal from an interlocutory order without showing that the order in question is immediately appealable, we are required to dismiss that party's appeal on jurisdictional grounds." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 189 (2011). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (citations omitted), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950).

"[I]mmediate appeal is available from an interlocutory order or judgment which affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citation and internal quotation marks omitted). Orders issued pursuant to N.C. Gen. Stat. § 40A-47 concerning title and the area of property taken affect a substantial right and are immediately appealable. *Mecklenburg County v. Simply Fashion Stores, Ltd.*, 208 N.C. App. 664, 667, 704 S.E.2d 48, 51 (2010) (citations omitted); *see also Town of Apex v. Whitehurst*, 213 N.C. App. 579, 582-83, 712 S.E.2d 898, 901 (2011) ("[O]rders from a condemnation hearing concerning title and area taken are vital preliminary issues that must

be immediately appealed pursuant to N.C. [Gen. Stat.] § 1-277, which permits interlocutory appeals of determinations affecting substantial rights." (citation omitted)).

The trial court's 5 November 2015 order is interlocutory, because it does not dispose of all of the issues in the case. The trial court specifically did not determine the issue of damages. However, because the order was issued pursuant to N.C. Gen. Stat. § 40A-47 and addressed the area taken by the City, the order affects a substantial right and is properly before this Court.

2. Standard of review

[2] At a hearing conducted pursuant to N.C. Gen. Stat. § 40A-47, the trial court determines all issues other than compensation. § 40A-47. A review of North Carolina case law reveals two standards which this Court has used in review of orders issued pursuant to section 40A-47.

In *Town of Matthews v. Wright*, this Court stated:

> Our Supreme Court has held *de novo* review is appropriate when reviewing decisions of the trial court on all issues other than damages in eminent domain cases. *See Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001). We review eminent domain issues *de novo* because of the well-settled principle that *de novo* review is required where constitutional rights are implicated. *See id.*

__N.C. App. __, __, 771 S.E.2d 328, 333 (2015).

In contrast, in *L&S Water Power, Inc. v. Piedmont Triad Reg'l Water Auth.*, the Court stated:

> This Court is bound by factual findings of the trial court, as long as the findings are supported by competent evidence. *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 111, 338 S.E.2d 794, 799 (1986). We review the trial court's conclusions of law *de novo* on appeal. *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

211 N.C. App. 148, 151, 712 S.E.2d 146, 149 (2011), *disc. review improvidently allowed*, 366 N.C. 324, 736 S.E.2d 484 (2012).

The issue on appeal is whether the trial court's legal conclusion that the City took the Wilkies' property by inverse condemnation was error.

Thus, regardless of the standard used, we review this legal conclusion *de novo*.

3. Inverse condemnation

The City argues that the trial court erred in concluding that the City took the Wilkies' property by inverse condemnation for several reasons. The City's first argument is that the trial court erred, because there can be no inverse condemnation when property is not taken for a public use. We agree.

"Inverse condemnation is a device which forces a governmental body to exercise its power of condemnation, even though it may have no desire to do so." *City of Greensboro v. Pearce*, 121 N.C. App. 582, 587, 468 S.E.2d 416, 420 (1996) (citation and internal quotation marks omitted). The North Carolina General Statutes provide the remedy of an inverse condemnation action "[i]f property has been taken by an act or omission of a condemnor listed in [N.C. Gen. Stat §] 40A-3(b) or (c) and no complaint containing a declaration of taking has been filed." N.C. Gen. Stat § 40A-51 (2015). Section 40A-3(b) states:

> (b) Local Public Condemnors — Standard Provision. — For the public use or benefit, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property, either inside or outside its boundaries, for the following purposes.
>
> (1) Opening, widening, extending, or improving roads, streets, alleys, and sidewalks. The authority contained in this subsection is in addition to the authority to acquire rights-of-way for streets, sidewalks and highways under Article 9 of Chapter 136. The provisions of this subdivision (1) shall not apply to counties.
>
> (2) Establishing, extending, enlarging, or improving any of the public enterprises listed in G.S. 160A-311 for cities, or G.S. 153A-274 for counties.
>
> (3) Establishing, enlarging, or improving parks, playgrounds, and other recreational facilities.
>
> (4) Establishing, extending, enlarging, or improving storm sewer and drainage systems and works, or sewer and septic tank lines and systems.

> (5) Establishing, enlarging, or improving hospital facilities, cemeteries, or library facilities.
>
> (6) Constructing, enlarging, or improving city halls, fire stations, office buildings, courthouse jails and other buildings for use by any department, board, commission or agency.
>
> (7) Establishing drainage programs and programs to prevent obstructions to the natural flow of streams, creeks and natural water channels or improving drainage facilities. The authority contained in this subdivision is in addition to any authority contained in Chapter 156.
>
> (8) Acquiring designated historic properties, designated as such before October 1, 1989, or acquiring a designated landmark designated as such on or after October 1, 1989, for which an application has been made for a certificate of appropriateness for demolition, in pursuance of the purposes of G.S. 160A-399.3, Chapter 160A, Article 19, Part 3B, effective until October 1, 1989, or G.S. 160A-400.14, whichever is appropriate.
>
> (9) Opening, widening, extending, or improving public wharves.
>
> The board of education of any municipality or county or a combined board may exercise the power of eminent domain under this Chapter for purposes authorized by Chapter 115C of the General Statutes.
>
> The power of eminent domain shall be exercised by local public condemnors under the procedures of Article 3 of this Chapter.

N.C. Gen. Stat. § 40A-3(b) (2015). Section 40A-3 sets out "the exclusive uses for which the authority to exercise the power of eminent domain is granted to . . . local public condemnors." N.C. Gen. Stat. § 40A-1(a) (2015). An exercise of the power of eminent domain occurs when "the government takes property *for public use* because such action is advantageous or beneficial to the public." *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 854, 786 S.E.2d 919, 924 (2016) (citation omitted; emphasis omitted and added). "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (citation omitted).

The plain language of section 40A-51 defines when the remedy of an inverse condemnation action is available against a public condemnor. The statute limits the availability of this remedy to instances in which property is taken by a condemnor pursuant to one of the enumerated acts or omissions in section 40A-3(b). § 40A-51. Section 40A-3(b) begins by stating that the governing body of a municipality possesses the power of eminent domain to perform each of its enumerated acts "[f]or the public use or benefit." § 40A-3(b); *see also Stout v. City of Durham*, 121 N.C. App. 716, 718, 468 S.E.2d 254, 256-67, *disc. review granted*, 344 N.C. 637, 477 S.E.2d 54 (1996), *motion for disc. review withdrawn*, 345 N.C. 353, 484 S.E.2d 93 (1997). Thus, the plain language of section 40A-51 limits its application to action taken by a municipality "for the public use or benefit." As a result, there is no remedy of inverse condemnation under the statute when property is not taken "for the public use or benefit."

The trial court concluded that "the City's taking of the Wilkies' property was for a private use," because it was intended to benefit the property owners whose lots bordered Spring Lake.[2] Applying the plain language of section 40A-51, there is no remedy through an inverse condemnation action for the Wilkies, because their property was not taken "for the public use or benefit." Therefore, we reverse the trial court's order concluding that the City took the Wilkies' property by inverse condemnation. Because we reverse the trial court's order based on the City's first argument, it is unnecessary for us to reach the City's remaining arguments that the trial court erred.

[3] However, this holding does not dispose of the case. North Carolina case law is clear that an aggrieved person has a direct claim under the North Carolina Constitution for violation of his or her constitutional rights when no adequate state law remedy exists. *See Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 ("[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution."), *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992); *Midgett v. N.C. State Highway Comm'n*, 260

2. The Wilkies argue that the City took their property for a public use despite urging this Court to affirm the trial court's order. To the extent that this argument was intended as a challenge to the trial court's legal conclusion that the City took the Wilkies' property for a private use, all of the evidence from the Board's meeting minutes supports finding of fact 8 and the legal conclusion that the Board took action to increase the lake level in response to the petition from the group of private landowners. There is no evidence that the Board considered any benefit to the public in its discussions about the lake level.

N.C. 241, 132 S.E.2d 599 (1963) (holding that the plaintiff could directly pursue a claim for just compensation under the Law of the Land clause of the North Carolina Constitution where the statutory inverse condemnation remedy, which was ordinarily exclusive, was not adequate under the facts of the case), *overruled in part on other grounds*, *Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 304 S.E.2d 164 (1983); *see also Bigelow v. Town of Chapel Hill*, 227 N.C. App. 1, 14-15, 745 S.E.2d 316, 326-27 (applying the holding in Corum and reversing the trial court's dismissal of the plaintiffs' claims under the North Carolina Constitution against the Town of Chapel Hill), *disc. review denied*, 367 N.C. 223, 747 S.E.2d 543 (2013); *Patterson v. City of Gastonia*, 220 N.C. App. 233, 239, 725 S.E.2d 82, 88 (applying the holding in Corum and reversing the trial court's dismissal of the plaintiffs' claims under the North Carolina Constitution against the City of Gastonia), *disc. review denied*, 366 N.C. 406, 759 S.E.2d 82 (2012).

Mr. and Mrs. Wilkie alleged in their complaint that "the City . . . caused the [Wilkies] damages, [took] property belonging to the [Wilkies] and affected the [Wilkies]' property rights in violation of their Constitutional rights contained within the 5th and 14th Amendments to the Constitution of the United States of America as well as Article 1, Sec. 19, of the Constitution of the State of North Carolina." The trial court's order did not address the Wilkies' claim under the North Carolina Constitution. Accordingly, we remand this matter to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges ELMORE and DIETZ concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 30 DECEMBER 2016)

BUFFA v. CYGNATURE CONSTR. & DEV., INC. No. 16-237	Watauga (14CVS134)	Affirmed in part; reversed and remanded in part
CHERRY CMTY. ORG. v. STONEHUNT, LLC No. 16-615	Mecklenburg (15CVS16825)	Affirmed in part; Reversed in part
GRENNAN v. GRENNAN No. 16-531	New Hanover (14CVD235)	Vacated and Remanded
HARRELL v. MIDLAND BD. OF ADJUST. No. 16-646	Cabarrus (14CVS2649)	Affirmed
HERNDON v. HERNDON No. 15-28-2	Durham (14CVD3144)	Affirmed
JOHNSON v. JOHNSONOW No. 16-528	Orange (13CVS1222)	Affirmed
LARSEN v. ARLINGTON CONDO. OWNERS ASS'N, INC. No. 16-618	Mecklenburg (14CVS17863)	No Error
MYLES v. LMS, INC. No. 16-548	N.C. Industrial Commission (289378)	Affirmed
NECKLES v. HARRIS TEETER No. 16-569	N.C. Industrial Commission (W55950)	Reversed and Remanded
PASS v. BROWN No. 16-300	Davidson (14CVS1540)	Affirmed in part; dismissed in part
PITTSBORO MATTERS, INC. v. TOWN OF PITTSBORO No. 16-323	Chatham (15CVS767)	Affirmed in part; dismissed in part
QUALITY BUILT HOMES INC. v. TOWN OF CARTHAGE No. 15-115-2	Moore (13CVS1264)	Reversed and Remanded
REECE v. SODEXO, INC. No. 16-508	N.C. Industrial Commission (13-750965)	Affirmed and Remanded

STATE v. MARTINEZ No. 16-374	Mecklenburg (14CRS217434-36) (14CRS217439) (14CRS217441) (14CRS217447) (14CRS217448) (14CRS217453) (14CRS217456) (14CRS217458-59)	Vacated and Remanded in Part, No Prejudicial Error in Part.
STATE v. REEGER No. 16-342	Gaston (13CRS57314)	No prejudicial error
STATE v. RICHARDSON No. 16-534	Durham (13CRS58222)	No Error
STATE v. RIGGSBEE No. 16-498	Forsyth (13CRS62622)	Affirmed
STATE v. SULLIVAN No. 16-609	Mecklenburg (13CRS47595-602) (13CRS47605-06)	No error in part; dismissed in part
STATE v. VO No. 16-553	Catawba (14CRS51818)	Affirmed
WILLIS v. HAMILTON No. 16-148	Onslow (15CVD1226)	Dismissed

BANKS v. HUNTER

[251 N.C. App. 528 (2017)]

TONY R. BANKS, PLAINTIFF
v.
KIMBERLY HUNTER, DEFENDANT

No. COA16-666

Filed 17 January 2017

Jurisdiction—subject matter jurisdiction—foreclosure—default judgment—order of divestiture—real property secured under deed of trust

The district court lacked subject matter jurisdiction to enter default judgment and order of divestiture as they pertained to ordering conveyance of title of defendant's real property secured under the deed of trust. The portion of the default judgment requiring defendant to convey her real property secured under the deed of trust to plaintiff was vacated. The order of divestiture, which terminated defendant's right, title, and interest in the real property and purported to vest it with plaintiff, was also vacated.

Appeal by defendant to review order entered 2 March 2016 by Judge Meader W. Harriss, III in Pasquotank County District Court denying defendant's motion for relief from judgment. Heard in the Court of Appeals 17 November 2016.

The Twiford Law Firm, by John S. Morrison, for plaintiff-appellee.

Gunther Law Group, by Timothy P. Koller; and The Law Office of Jason E. Gillis, by Jason E. Gillis, for defendant-appellant.

TYSON, Judge.

Kimberly Hunter ("Defendant") appeals from order denying her Rule 60(b) motion for relief from judgment. Defendant argues the trial court lacked subject matter jurisdiction and, alternatively, that it was error for the trial court to deny her motion for relief from judgment. We conclude the trial court lacked subject matter jurisdiction and partially vacate one of the underlying judgments and vacate another.

I. Background

On or about 7 February 2014, Tony R. Banks ("Plaintiff") loaned Defendant $3,606.46, evidenced by a promissory note dated 7 February 2014 executed by Defendant ("the Note"). The Note required Defendant

to repay the $3,606.46 within ninety days. In the event of default, Plaintiff would become the sole owner of Defendant's real property located at 1100 Possum Quarter Road in Elizabeth City, North Carolina ("Real Property").

The relevant language from the Note purporting to grant Plaintiff ownership of Defendant's property states: "[f]or Collateral, the property (house & land) at the address listed below which serves the purpose for this loan will be titled to me upon receipt of funds. If the borrower fails to make the payment when due, the loan will be considered in default and the lender will become the sole owner of the said listed property."

Four days later, on 11 February 2014, Defendant executed a deed of trust on the Real Property as security for the Note. The deed of trust was properly recorded in the Pasquotank County Register of Deeds that day. The deed of trust was signed by both parties and lists Plaintiff as both the trustee and the beneficiary. The deed of trust also includes a power of sale clause, stating, in relevant part:

> If, however, there shall be any default (a) in the payment of any sums due under the Note, this Deed of Trust or any other instrument securing the Note, and such default is not cured within ten (10) days from the due date, or (b) if there shall be default in any of the other covenants, terms or conditions of the Note and such default is not hereby, or any failure or neglect to comply with the covenants, terms or conditions contained in this Deed of Trust or any other instrument securing the Note and such default is not cured within fifteen (15) days after written notice, then and in any of such events, without further notice, it shall be lawful for and the duty of the Trustee, upon request of the Beneficiary, to sell the land herein conveyed at public auction for cash, after having first giving such notice of hearing and advertising the time and place of such sale in such manner as may then be provided by law, and upon such and any resales and upon compliance with the law then relating to foreclosure proceedings under power of sale to convey title to the purchaser in as full and ample manner as the Trustee is empowered.

After Defendant failed to repay the loan, on 16 October 2014 Plaintiff instituted an action in district court solely on the Note for specific performance and sought for the court to convey Defendant's Real Property to him.

Defendant was personally served. When she failed to file an answer, an entry of default was entered by the Pasquotank County Clerk of Court on 27 January 2015. Defendant was later served with a Motion for Default Judgment. After the hearing on the Motion for Default Judgment, the district court entered an order on 13 March 2015 for Defendant to pay Plaintiff's attorney's fees and court costs, and to execute a deed for all her right, title, and interest in the Real Property within ten days. In its order, the district court expressly retained jurisdiction to enter further orders, if necessary.

Defendant was served with the Default Judgment Order, but failed to comply. Plaintiff filed a Motion for Contempt on 17 June 2015 and sought an order to convey the Real Property to him. After a hearing on Plaintiff's motion on 24 June 2015, the district court entered an Order of Divestiture and Vesting, which purported to divest Defendant of her Real Property and vest it with Plaintiff, pursuant to Rule 70 of the N.C. Rules of Civil Procedure.

The time for timely appeal having expired, Defendant filed a Motion for Relief from Judgment and Order on 8 September 2015, pursuant to Rules 60(b)(3) and 60(b)(6) of the N.C. Rules of Civil Procedure. After hearing arguments from counsel and testimony of Defendant, the district court rendered an order denying Defendant's motion on 12 February 2016, and signed the order on 2 March 2016. On 23 March, Defendant filed timely notice of appeal from the district court's order denying her Rule 60(b) Motion for Relief from Judgment.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat § 7A-27(b)(2) (2015), which provides for appeal of right from any final judgment of a district court in a civil action.

III. Issues

Defendant argues for the first time on appeal that the district court lacked subject matter jurisdiction over Plaintiff's claim for specific performance to convey Defendant's Real Property securing the Note. Defendant also argues that the trial court abused its discretion in denying her Rule 60(b) motion.

We need not reach the issue of whether the district court abused its discretion in denying Defendant's Rule 60(b) motion. The district court lacked subject matter jurisdiction over Plaintiff's claim to transfer ownership of Defendant's encumbered Real Property to him by specifically enforcing the Note.

IV. Standard of Review

Subject matter jurisdiction 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). (citation omitted) (alteration in original). Subject matter jurisdiction "involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (citation omitted), *disc. review denied*, 354 N.C. 217, 554 S.E.2d 338 (2001). A court's lack of subject matter jurisdiction is not waivable and can be raised at any time, including on appeal. *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted).

V. Analysis

A. Subject Matter Jurisdiction

Defendant raises the district court's lack of subject matter jurisdiction before this Court. "Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *In re T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790 (citations omitted).

"A court's subject matter jurisdiction over a particular case is invoked by the pleading." *Boseman v. Jarrell*, 364 N.C. 537, 546, 704 S.E.2d 494, 501 (2010) (citations omitted). "When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened." *Hopkins v. Hopkins*, 8 N.C. App. 162, 169, 174 S.E.2d 103, 108 (1970) (citations omitted). "A void judgment is in legal effect no judgment. No rights are acquired or divested by it. It neither binds nor bars any one, and all proceedings founded upon it are worthless." *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956) (citation omitted).

B. Remedies for Mortgage Default

The remedies for default of debt and realizing upon real property secured as collateral are well settled. "A mortgage is a conveyance by a debtor to his creditor, or to some one in trust for him, as a security for the debt." *Walston v. Twiford*, 248 N.C. 691, 693, 105 S.E.2d 62, 64 (1958)

(citations omitted). "[A]n equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has in a court of equity a right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage." *Bunn v. Braswell*, 139 N.C. 135, 142 51 S.E. 927, 930 (1905) (quoting *Peugh v. Davis*, 96 U.S. 332, 337, 24 L. Ed. 775, 776 (1877)). Furthermore,

> While in a mortgage or deed of trust to secure a debt the legal title to the mortgaged premises passes to the mortgagee or trustee, as the case may be, the mortgagor or trustor is looked upon as the equitable owner of the land-with the right to redeem at any time prior to foreclosure. This right, after the maturity of the debt, is designated his equity of redemption.

Riddick v. Davis, 220 N.C. 120, 125, 16 S.E.2d 662, 666 (1941) (citations and internal quotation marks omitted).

North Carolina's public policy does not look favorably upon efforts to deprive a debtor and mortgagor of real property of his equity of redemption. *See Wilson v. Fisher*, 148 N.C. 535, 62 S.E. 622, 624 (1908) (holding, *inter alia*, that agreement between debtor and creditor to waive debtor's equity of redemption is void).

A long settled exception exists in North Carolina which makes it possible for a lender to cut off a mortgagor's equity of redemption:

> [I]f a lender, A, insists upon and takes a deed in absolute form from borrower B, to secure the obligation owed to A, upon an oral promise or representation that A will reconvey the land to B upon payment of the indebtedness at the appropriate time, parol evidence will not be admissible to show that the absolute deed and the oral agreement to reconvey upon payment of the indebtedness were intended to constitute a mortgage for security purposes only. In the absence of fraud, mistake, ignorance, or undue influence, parol evidence is inadmissible to show that such a deed in absolute form was intended as a mere mortgage.

James A. Webster, Jr., Webster's Real Estate Law in North Carolina § 13.05[2] (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 6th ed. 2011) (footnotes omitted); *See, e.g.*, *Sowell v. Barrett*, 45 N.C. 50, 50 (1852) (dealing with this type of agreement and stating, "[i]n a bill filed to redeem property, conveyed to the [creditor] by a deed absolute on

its face, a Court of Equity will not relieve the plaintiff, upon mere proof of the parties' declarations. There must be proof of fraud, ignorance or mistake, or of facts inconsistent with the idea of an absolute purchase.")

Similarly, an equity of redemption may not exist when an absolute deed is conveyed by a grantor to a grantee, which is accompanied by a *written* agreement to reconvey to the grantor upon the payment of an agreed amount of money by an agreed upon time. *Obriant v. Lee*, 214 N.C. 723, 725, 200 S.E. 865, 867 (1939) (citation omitted). Unlike an oral agreement to reconvey, parol evidence can be introduced, even in the absence of fraud, mistake, ignorance, or undue influence, to prove the true character of the parties' agreement. *See Rice v. Wood*, 82 N.C. App. 318, 326, 346 S.E.2d 205, 210 (citation omitted), *disc. review denied* 318 N.C. 417, 349 S.E.2d 599 (1986).

If a preponderance of the evidence shows the parties intended for the agreement to be an option to purchase, and not a mortgage, then the grantor cannot assert an equity of redemption. *See Obriant*, 214 N.C. at 725, 200 S.E. at 867 (citation omitted). Also, if a preponderance of the evidence tends to show the parties intended for the agreement to be a mortgage, then the grantor (mortgagor) would retain an equity of redemption. *See id.* at 727, 200 S.E. at 868 (citation omitted).

Here, Defendant-debtor did not convey an absolute deed to the Plaintiff-lender that was accompanied by either a written or oral agreement for the Plaintiff-lender to reconvey the land upon payment of a specific sum of money. Defendant-debtor's obligation is evidenced by a promissory note, which was secured by a recorded deed of trust on Defendant-debtor's Real Property.

"A creditor can seek to enforce payment of a promissory note by pursuing foreclosure by power of sale, judicial foreclosure, or by filing for a money judgment, or all three options, until the debt has been satisfied." *Lifestore Bank v. Mingo Tribal Pres. Trust*, 235 N.C. App. 573, 574, 763 S.E.2d 6, 7 (2014), *disc. review denied*, 368 N.C. 255, 771 S.E.2d 306 (2015).

C. Foreclosure

In North Carolina, the term "foreclosure" is not defined by statute or case law. Other jurisdictions define "foreclosure" as "[a] legal proceeding to terminate a mortgagor's interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property." *Eastern Savings Bank, FSB v. Esteban*, 129 Haw. 154, 155, 296 P.3d 1062, 1063 (2013) (citing *Black's Law Dictionary* 719 (9th ed. 2009)); *see also Ruiz*

v. 1st Fid. Loan Servicing, LLC, 829 N.W.2d 53, 57 (Minn. 2013) (citation omitted); *Wirth v. Commonwealth of Pennsylvania*, 626 Pa. 124, 160, 95 A.3d 822, 843 (2014) (citation omitted), *cert. denied sub nom. Houssels v. Pennsylvania*, __ U.S. __, 135 S. Ct. 1405, 191 L. Ed. 2d 362 (2015). North Carolina statutes provide for two means by which a foreclosure proceeding may be brought against real property: (1) foreclosure by judicial sale pursuant to N.C. Gen. Stat. § 1-339.1 *et seq.*, or, (2) if expressly provided within the deed of trust or mortgage, by power of sale under N.C. Gen. Stat. § 45-21.1 *et seq. Wolfe v. Wolfe*, 64 N.C. App. 249, 255, 307 S.E.2d 400, 404 (1983) (citations omitted), *disc. review denied*, 310 N.C. 156, 311 S.E.2d 297 (1984). These statutes provide the exclusive means for foreclosure in North Carolina. *Id.*

North Carolina previously recognized the common law "strict foreclosure," under which, if a mortgagor failed to satisfy his debt by a fixed date, a court would convey the mortgagor's interest in the collateral to the mortgagee without the need for a sale. *Bunn v. Braswell*, 139 N.C. at 142, 51 S.E. at 930. To avoid the harsh result that a mortgagor would lose "any and all interest in [his] land[,]" courts began to recognize the mortgagor's equity of redemption, the ability to redeem a mortgage debt within a reasonable time after default and before foreclosure. *Id.*

"[A] foreclosure by power of sale is a type of special proceeding, limited in scope and jurisdiction, in which the clerk of court determines whether a foreclosure pursuant to a power of sale should be granted." *Mingo*, 235 N.C. App. at 579, 763 S.E.2d at 10. A foreclosure by judicial sale "requires formal judicial proceedings initiated by summons and complaint in the county where the property is located and culminating in a judicial sale of the foreclosed property if the mortgagee prevails." *Phil Mech. Const. Co. v. Haywood*, 72 N.C. App. 318, 321, 325 S.E.2d 1, 3 (1985) (citation omitted).

Here, as indicated by the language in the Note stating "[f]or Collateral, the property (house & land) at the address listed below which serves the purpose for this loan will be titled to me upon receipt of funds," and the subsequently executed deed of trust containing a power of sale clause, Defendant's legal title to real property was conveyed to Plaintiff to hold as a trustee under the deed of trust, and not as an absolute deed. *Walston*, 248 N.C. at 693, 105 S.E.2d at 64.

Plaintiff did not file to only seek a money judgment to enforce payment of the promissory note, but instead also sought specific performance to have Defendant's Real Property judicially conveyed to him. Plaintiff's pursuit of specific performance in the district court to terminate Defendant's (the mortgagor's) interest in her property in order to

gain unencumbered title to satisfy Defendant's unpaid debt on the Note and extinguish Defendant's interest therein, by definition, constitutes a "foreclosure." *See Wirth*, 626 Pa. at 160, 95 A.3d at 843; *see also Black's Law Dictionary* 719 (9th ed. 2009). Because Plaintiff petitioned the district court to transfer Defendant's interest in the Real Property to him, without a sale, after default of repayment and the debt was not repaid by the time specified in the Note, Plaintiff sought a "strict foreclosure." *See Bunn*, 139 N.C. at 142, 51 S.E. at 930. This form of foreclosure is no longer recognized in North Carolina. *Id.*

Based on his complaint, Plaintiff did not seek a foreclosure pursuant to either N.C. Gen. Stat. § 1-339.1 *et seq.*, or N.C. Gen. Stat. § 45-21.1 *et seq.* The terms of the deed of trust grant Plaintiff the power to bring a power of sale foreclosure, which he did not utilize. He did not ask the court to order a sale of Defendant's Real Property. Both of the exclusive and statutory means of foreclosure require a sale of mortgaged property. *See*, *e.g.*, N.C. Gen. Stat. § 1-339.1 ("A judicial sale is a *sale* of property made pursuant to an order of a judge or clerk in an action or proceeding in the superior or district court, including a *sale* pursuant to an order made in an action in court to foreclose a mortgage or deed of trust[.]" (emphasis supplied); N.C. Gen. Stat. § 45-21.1(a)(2) (" 'Sale' means a sale of real property or a sale of any leasehold interest created by a lease of real property pursuant to (i) an express power of sale contained in a mortgage, deed of trust, leasehold mortgage, or leasehold deed of trust or (ii) a 'power of sale', under this Article, authorized by other statutory provisions."). By not pursuing a foreclosure sale, Plaintiff was not seeking a foreclosure procedure allowed under either of our foreclosure statutes.

Additionally, in a foreclosure sale, the mortgagor-debtor is entitled to any excess proceeds, the amount obtained from the sale in surplus of the amount owed on the debt, less the costs of sale. *Smith v. Clerk of Superior Court*, 5 N.C. App. 67, 73-74, 168 S.E.2d 1, 5-6 (1969). Plaintiff's seeking of a judicial conveyance rather than a sale of the Real Property has the effect of depriving Defendant of any potential excess proceeds she is entitled to.

In analyzing the jurisdiction of the district court to grant relief that is not one of the exclusive means of relief provided by statute, our Supreme Court's analysis in *Boseman v. Jarrell* is instructive. In *Boseman*, the plaintiff had petitioned for and obtained from the adoption court a type of adoption that was not one of the three exclusive means of adoption provided by Chapter 48 of our General Statutes. *Boseman*, 364 N.C. at 546, 704 S.E.2d at 501. The Court held, *inter alia*, that because the plaintiff had petitioned for a type of adoption, not recognized in our exclusively

statutory adoption laws, the plaintiff's petition did not invoke the adoption court's subject matter jurisdiction. *Id.* at 547, 704 S.E.2d at 501.

The Court determined that because plaintiff failed to seek a type of adoption expressly allowed by the adoption statute, plaintiff's petition for adoption did not invoke the adoption court's subject matter jurisdiction and all actions in the proceeding before the adoption court, including the entry of the decree, were taken and entered without subject matter jurisdiction. *Id.* The Court held that because the General Assembly did not vest our courts with subject matter jurisdiction to create the type of adoption attempted, the adoption decree was void *ab initio*. *Id.* at 539, 704 S.E.2d at 496.

Here, as in *Boseman*, Plaintiff petitioned for a strict foreclosure of encumbered property under a deed of trust, a type of relief not afforded under our General Statutes. Plaintiff's petition for specific performance to transfer Defendant's Real Property to him, amounted to a strict foreclosure, which is unrecognized by our statutes providing for the exclusive means of foreclosure. *Wolfe*, 64 N.C. App. at 255, 307 S.E.2d at 404. Because a court's subject matter jurisdiction is invoked by the pleadings, Plaintiff failed to invoke the trial court's subject matter jurisdiction over the relief sought by seeking a type of foreclosure which is not allowed for by our foreclosure statutes. *See Boseman* at 546, 704 S.E.2d at 501. The actions taken before the district court, including the Default Judgment Order against Defendant, as it affects the conveyance of tile of Real Property secured by the deed of trust, were done without subject matter jurisdiction. The Default Judgment Order, to the extent it orders the conveyance of Defendant's Real Property, and the subsequent Order of Divestiture to enforce the Default Judgment, are void for lack of jurisdiction and are vacated.

VI. Conclusion

The district court is without subject matter jurisdiction to enter the Default Judgment Order and Order of Divestiture as they pertain to ordering conveyance of title of Defendant's Real Property secured under the deed of trust. The Default Judgment Order, to the extent it requires Defendant to convey her Real Property secured under the deed of trust to Plaintiff, is vacated. The Order of Divestiture, which terminates Defendant's right, title, and interest in the Real Property and purports to vest it with Plaintiff, is also vacated. *It is so ordered.*

VACATED.

Judges McCULLOUGH and DILLON concur.

BROOKLINE RESIDENTIAL, LLC v. CITY OF CHARLOTTE

[251 N.C. App. 537 (2017)]

BROOKLINE RESIDENTIAL, LLC AND RESIDENCES AT BROOKLINE LLC, PLAINTIFFS
v.
CITY OF CHARLOTTE; AND INTERNATIONAL FIDELITY INSURANCE COMPANY, DEFENDANTS

No. COA16-202

Filed 17 January 2017

Cities and Towns—performance bond—successor developer—enforcement

The trial court did not err by granting summary judgment in favor of defendants and denying plaintiff Brookline's cross-motion. Plaintiff, a successor developer, was not entitled to any of the relief sought in its pleadings because it lacked a legal basis to compel defendant City to enforce the performance bond that had originally been obtained by the prior developer to guarantee the construction of certain infrastructure improvements.

Appeal by plaintiffs from order entered 24 August 2015 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 August 2016.

Morningstar Law Group, by William J. Brian, Jr., Shannon R. Joseph, and Jeffrey L. Roether, for plaintiffs-appellants.

Senior Assistant City Attorney, Lina E. James, for defendant-appellee City of Charlotte.

Johnston, Allison & Hord, P.A., by Martin L. White and Munashe Magarira, for defendant-appellee International Fidelity Insurance Company.

DAVIS, Judge.

This case presents the issue of whether a successor developer may compel the City of Charlotte to enforce a performance bond that had originally been obtained by the prior developer to guarantee the construction of certain infrastructure improvements. Brookline Residential, LLC and Residences at Brookline, LLC (collectively "Brookline") appeal from an order granting summary judgment in favor of the City of Charlotte (the "City") and International Fidelity Insurance Company

("IFIC") (collectively "Defendants") and denying Brookline's cross-motion. After careful review, we affirm the trial court's order for the reasons set forth below.

Factual and Procedural Background

In 2007, Clarion-Reames, LLC ("Clarion-Reames"), a developer, sought to construct a residential housing development called Brookline Phase 1 on a parcel of land (the "Property") in Charlotte, North Carolina. In early 2008, Clarion-Reames received final approval from the City to record plats for a section of the development known as "Phase 1, Map 1." In order to receive this approval, Clarion-Reames agreed to complete certain road improvements (the "Original Road Improvements") to nearby Lakeview Road and Reames Road estimated to cost $683,500, and on 26 February 2008 Clarion-Reames obtained a surety bond (the "Bond") from IFIC to guarantee construction of the improvements.

The Bond listed Clarion-Reames as the principal, IFIC as the obligor, and the City as the obligee. The Bond stated that if Clarion-Reames was "in default under its obligation to install improvements" pursuant to the Subdivision Final Plat Approval Form it had submitted in connection with final approval of Phase I, Map I, IFIC "will (a) within fifteen (15) days of determination of such default, take over and assume completion of said improvements, or (b) pay the City of Charlotte in cash the reasonable cost of completion."

Although Clarion-Reames obtained the Bond as a precondition to final plat approval of Phase I, Map I — which was to consist of 10 single-family homes — the bonded improvements covered all of the required public road improvements for the entire Brookline Phase 1 development, which was to consist of 184 single-family homes.

By 2010, Clarion-Reames had constructed only nine of the planned 184 homes in the Brookline development and had completed some, but not all, of the bonded road improvements. In early 2010, Clarion-Reames ceased work on the development because it was unable to raise sufficient capital for the project.

In July 2011, Clarion-Reames's lender foreclosed on the Property, which was purchased by Brookline in May 2012. Before making the purchase, Brookline had made inquiries to the City about the status of the Bond. In an email to Neil Kapadia, one of Brookline's two principals, the Customer Service and Permitting Manager for the City, Nan Peterson, stated that "the City does have a bond for the . . . improvements on Lakeview and Reames Road."

In February 2013, Brookline recorded several new plats in order to combine a number of lots on the Property that had been depicted as individual lots in the original Brookline Phase I plan. Brookline then filed a rezoning petition with the City in early 2013 in order to receive approval for its plans to build multi-family housing on the Property. On 30 April 2013, while that rezoning petition was pending, Brookline made another inquiry to the City regarding the status of the Bond. Tom Ferguson, the Engineering Program Manager for the City, provided the following response in an email to Kapadia:

> 1) **What does the bond cover?** The bond covers the required improvements to Lakeview and Reames Roads as specified on the subdivision plans approved by the City on September 6, 2007.
>
> 2) **When will the City call the bond and complete the remaining improvements?** The prior developer/owner has completed sufficient improvements to safely serve the limited development which has occurred to date (only 9 homes built so far). The unfinished improvements include widening for turn lanes, curb & gutter, and sidewalk along Reames Road and a segment of sidewalk on Lakeview Road east of Cushing Street. Until there is additional development activity within the site to warrant construction of the turn lanes on Reames Road, we do not plan to call the bond and complete the remaining improvements.
>
> You previously contacted our office in February 2012 regarding the status of the referenced bond. At that time, we confirmed that the bond was still in place and that the original developer (or the surety) remained responsible for completing the improvements to Reames Road and Lakeview Road. Since that time, you have filed a rezoning petition for the site. The site plan associated with your rezoning petition (2013-047) proposes to relocate the street connections to Reames Road approximately 200 feet north of the connection point shown on the currently approved subdivision plans. Please be advised that the currently held performance bond guarantees construction of improvements as specified on the subdivision plans approved in September 6, 2007. *If you make changes to the approved plans upon which the current performance bond was based, you will likely become fully*

> *responsible for all roadway improvements specified on the revised plans.*

(Emphasis added.)

After receiving this email, Brookline went forward with its rezoning plans, and in July 2013 the City approved Brookline's rezoning petition to allow for multi-family apartment units on the Property. In November 2014, the City approved Brookline's subdivision plan, which provided for certain road improvements (the "Altered Road Improvements") that included several new improvements along with most of the Original Road Improvements. As part of the approval process, Brookline committed to making the Altered Road Improvements.

In the spring and summer of 2014, Brookline tried unsuccessfully to convince the City to call the Bond and force IFIC to pay for the portions of the Original Road Improvements that had not yet been completed and were included within the Altered Road Improvements. After failing to persuade the City to enforce the Bond, Brookline filed the present action against Defendants in Mecklenburg County Superior Court on 17 November 2014. Defendants each filed motions to dismiss, which the trial court denied on 28 May 2015.

Brookline filed an amended complaint on 3 June 2015 in which it requested various forms of declaratory relief relating to the Bond, including a declaration that "the City [was] obligated either to call the Bond and provide those funds to Plaintiffs to use to construct the portion of the Original Road Improvements that remain part of the Altered Road Improvements, or tender as damages to Plaintiffs the cost to construct the portions of the Original Road Improvements that remain of [sic] part of the Altered Road Improvements." Brookline sought accompanying injunctive relief requesting that the trial court direct (1) the City to call the Bond and fund the construction of the Original Road Improvements; (2) IFIC to pay the City the funds necessary to complete the portions of the Original Road Improvements that remained part of the Altered Road Improvements; and (3) the City to advance to Plaintiffs all funds received from IFIC pursuant to the Bond for Brookline's use in completing the Altered Road Improvements. Brookline also asserted a claim, in the alternative, for the recovery of damages for the expenses it would incur if it was required to construct the portions of the Original Road Improvements contained within the Altered Road Improvements.

The parties filed cross-motions for summary judgment, and a hearing was held on 3 August 2015 before the Honorable Hugh B. Lewis. On 24 August 2015, the trial court entered an order granting Defendants'

motions for summary judgment and denying Brookline's cross-motion. Brookline filed a timely notice of appeal.

Analysis

"On an appeal from an order granting summary judgment, this Court reviews the trial court's decision *de novo*. 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." *Premier, Inc. v. Peterson*, 232 N.C. App. 601, 605, 755 S.E.2d 56, 59 (2014) (internal citations and quotation marks omitted). "The moving party has the burden of demonstrating the lack of any triable issue of fact and entitlement to judgment as a matter of law. The evidence produced by the parties is viewed in the light most favorable to the non-moving party." *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (internal citations omitted). We have held that "[a]n 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." *In re Alessandrini*, __ N.C. App. __, __, 769 S.E.2d 214, 216 (2015) (citation omitted).

Brookline's argument that the trial court erred in granting summary judgment in favor of Defendants essentially rests on two main contentions: (1) that the City had an obligation to seek enforcement of the Bond upon Clarion-Reames's default and Brookline is entitled to compel the City's performance of that duty;[1] and (2) that the City's obligation remains ongoing because the Bond was neither invalidated nor extinguished despite the changes in zoning and road improvement plans that occurred after Brookline purchased the property. Because our analysis of the first issue is dispositive of this appeal, we need not address the second issue.

Brookline argues that "a municipality's statutory authority to obtain a performance bond to secure improvements required in connection with the approval and recordation of a subdivision plat, carries an implicit obligation on the municipality to enforce that bond when the primary obligor defaults and loses the development to foreclosure." In order to determine the validity of this contention on the present facts, we must analyze the relevant statutes enacted by the General Assembly

1. Brookline does not argue that it possesses the authority itself to call the Bond. Rather, it contends that the City has a legal duty to call the Bond and that Brookline has the right to compel the City to exercise this power through the present action.

and the applicable ordinance passed by the City pertaining to the use of performance bonds in regulating subdivision development.

The General Assembly has provided that "[a] city may by ordinance regulate the subdivision of land within its territorial jurisdiction." N.C. Gen. Stat. § 160A-371 (2015). Such municipal ordinances

> may provide for the more orderly development of subdivisions by requiring the construction of community service facilities in accordance with municipal plans, policies, and standards. To assure compliance with these and other ordinance requirements, the ordinance may provide for performance guarantees to assure successful completion of required improvements. If a performance guarantee is required, the city shall provide a range of options of types of performance guarantees, including, but not limited to, surety bonds or letters of credit, from which the developer may choose. . . .

N.C. Gen. Stat. § 160A-372(c) (2013).[2]

The City's subdivision ordinance during the time period relevant to this action stated, in pertinent part, as follows:

> Unless specifically noted, before any final plat of a subdivision is eligible for final approval, and before any street is accepted for maintenance by the city or the state department of transportation, minimum improvements, including drainage and soil erosion, must have been completed by the developer and approved by the city or county engineer in accordance with the standards and specifications of the Charlotte Land Development Standards manual or bonded in accordance with section 20-58(c).

Charlotte, N.C., Code § 20-51. Section 20-58(c) of the ordinance, in turn, provided in relevant part the following:

> Where the improvements required by this chapter have not been completed prior to the submission of the final subdivision plat for approval, the approval of the plat will be subject to the owner filing a surety bond or an

2. There were a number of changes made to N.C. Gen. Stat. § 160A-372 in 2015 that became effective after 1 October 2015. *See* 2015 Sess. Laws 486, 486-90, ch. 187, §§ 1-3. We apply the prior version of the statute that was in effect during the time period relevant to this action.

> irrevocable letter of credit with the engineering department . . . with sureties satisfactory to the city guaranteeing the installation of the required improvements . . . . Upon completion of the improvements and the submission of as-built drawings, as required by this chapter, written notice thereof must be given by the subdivider to the appropriate engineering department. The engineering department will arrange for an inspection of the improvements and, if found satisfactory, will, within 30 days of the date of the notice, authorize in writing the release of the security given, subject to the warranty requirement.

Charlotte, N.C., Code § 20-58(c).

We must interpret the above-quoted statutes and ordinance according to well-established principles of statutory construction. *See Woodlief v. Mecklenburg Cty.*, 176 N.C. App. 205, 209, 625 S.E.2d 904, 907 ("The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances." (citation and quotation marks omitted)), *disc. review denied*, 360 N.C. 492, 632 S.E.2d 775 (2006).

> The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature. If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms. Thus, in effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used.

Lunsford v. Mills, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (internal citations and quotation marks omitted).

Based upon our careful reading of the above-quoted provisions, we are unable to conclude that Brookline is entitled to an order compelling the City to call the Bond. Neither the statutes nor the ordinance contain language either specifying the circumstances under which the City must enforce a performance guarantee or authorizing a developer to compel the City to take such action. This Court is not at liberty to read into the statutes and ordinance words that simply do not exist therein. *See id.* (holding that in construing statutes courts must not "insert words not used"); *In re Duckett*, 271 N.C. 430, 436, 156 S.E.2d 838, 844 (1967) ("It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.").

In an attempt to show that the City had a duty to call the Bond, Brookline points to the language in N.C. Gen. Stat. § 160A-372(c) providing that "[t]o assure compliance with . . . ordinance requirements, the ordinance may provide for performance guarantees to assure successful completion of required improvements." N.C. Gen. Stat. § 160A-372(c). Brookline then asserts that the City's ordinance implementing this statute provides for only one set of circumstances under which a bond may be released — that is, when the City, upon inspection, certifies that the bonded improvements have been completed. *See* Charlotte, N.C., Code § 20-58(c) ("Upon completion of the improvements and the submission of as-built drawings, as required by this chapter, written notice thereof must be given by the subdivider to the appropriate engineering department. The engineering department will arrange for an inspection of the improvements and, if found satisfactory, will, within 30 days of the date of the notice, authorize in writing the release of the security given . . . .").

However, while this language explains how a bond may be satisfied and released after agreed-upon improvements have been made, it does not speak to when — and under what circumstances — the City *must* seek enforcement of a bond. Thus, no duty on the City's part to enforce such bonds is expressly contained in the statutes or the ordinance. And Brookline has failed to persuade us that such a duty is implied therein.

Moreover, even assuming *arguendo* that there are, in fact, some conceivable circumstances under which the City could be compelled to enforce a performance bond by an appropriate party, Brookline is not such a party. Here, Brookline was not a party to the Bond, was not assigned rights under the Bond, and was not a third-party beneficiary of the Bond.[3] Furthermore, Brookline (1) was expressly warned by the City before rezoning the Property and altering the road improvement plans that "[i]f you make changes to the approved plans upon which the current performance bond was based, you will likely become fully responsible for all roadway improvements specified on the revised plans"; and (2) made a commitment to the City — in connection with the City's approval of Brookline's development plans — to construct the required road improvements itself.

While our ruling in this case is based entirely on North Carolina law, we note that our decision is consistent with two recent decisions from

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3. A "public performance bond is a contract, governed by the law of contracts." *Town of Pineville v. Atkinson/Dyer/Watson Architects, P.A.*, 114 N.C. App. 497, 499, 442 S.E.2d 73, 74 (1994).

other jurisdictions that have addressed similar issues.[4] In *Ponderosa Fire District v. Coconino County*, 235 Ariz. 597, 334 P.3d 1256 (Ct. App. 2014), the original developer obtained several bonds to guarantee infrastructure improvements tied to plat approval by Coconino County of a portion — referred to as Unit 3 — of a larger housing development. Units 1 and 2 had already been finished and their improvements installed. The original developer went bankrupt before it could build any homes on — or complete the infrastructure improvements for — Unit 3. *Id.* at 599, 334 P.3d at 1258.

After several trustee sales, a successor developer, Bellemont 276, L.L.C. ("Bellemont"), purchased Unit 3 in order to build homes on it and then sell them to the public. Bellemont attempted to persuade Coconino County to call the bonds that had been obtained by the original developer and covered the required improvements to Unit 3. After failing to convince the county to enforce these bonds, Bellemont brought suit against the county. In its complaint, Bellemont "alleg[ed] that it had acquired Unit 3 with the expectation the bonds would be called to pay for the remaining improvements and infrastructure" and "requested declaratory relief, a writ of mandamus compelling the County to call the bonds, and monetary damages." *Id.* at 600, 334 P.3d at 1259.

On appeal, the Arizona Court of Appeals examined the relevant Arizona statute, which stated in pertinent part that subdivision regulations adopted by a county "shall require the posting of performance bonds, assurances or such other security as may be appropriate and necessary to ensure the installation of required street, sewer, electric and water utilities, drainage, flood control and improvements meeting established minimum standards of design and construction." *Id.* at 602, 334 P.3d at 1261.

The court held that the statute "plainly require[s] the County to 'ensure' that the amount of the bond posted by a developer is sufficient to cover the cost of necessary subdivision improvements. The statute

4. Although decisions from other jurisdictions are not binding on this Court on an issue arising under North Carolina law, we may consider such decisions as persuasive authority. *See Carolina Power & Light Co. v. Employment Sec. Comm'n of N.C.*, 363 N.C. 562, 569, 681 S.E.2d 776, 780 (2009) (noting that while not binding, a decision from another jurisdiction was nonetheless "instructive"); *State v. Williams*, 232 N.C. App. 152, 157, 754 S.E.2d 418, 422 ("While we recognize that decisions from other jurisdictions are, of course, not binding on the courts of this State, we are free to review such decisions for guidance." (citation and quotation marks omitted)), *appeal dismissed and disc. review denied*, 367 N.C. 784, 766 S.E.2d 846 (2014); *Skinner v. Preferred Credit*, 172 N.C. App. 407, 413, 616 S.E.2d 676, 680 (2005) ("Because this case presents an issue of first impression in our courts, we look to other jurisdictions to review persuasive authority that coincides with North Carolina's law."), *aff'd*, 361 N.C. 114, 638 S.E.2d 203 (2006).

does not, however, specify when a county is required to call a bond." *Id.* at 603, 334 P.3d at 1262. The court then stated as follows:

> We conclude the County's decision not to call the bonds at this time was a proper exercise of its necessary and implied power under [the statute]. The legislative purpose of the statute is to require developers such as Bellemont to pay for the cost of subdivision improvements. Here, the County determined that calling the bonds did not serve this interest; rather, the County decided, in its discretion, to forego calling the bonds and require Bellemont to pay for the cost of the Unit 3 improvements.
>
> In support of this conclusion, we note that Bellemont's construction of [the statute] would lead to absurd results. Under Bellemont's interpretation of the statute, whenever a developer abandons a subdivision, a county has a mandatory duty to call the bond, regardless of the circumstances. This leaves counties with an open-ended obligation to finish all abandoned subdivision improvements, with no discretion to consider *any* factors that may arise after the final plat is approved. For example, counties would be required to call a bond and finish improvements for a subdivision that may lay vacant for many years. . . .
>
> We therefore conclude the County exercised its discretion under the statute by seeking to have Bellemont install the required subdivision improvements rather than calling the bonds.

Id. at 603-04, 334 P.3d at 1262-63 (internal citations omitted).

The court then examined the relevant Coconino County ordinance, which provided as follows:

> The Final Plat will be submitted to the Board for approval if the construction and improvements have been accepted or if a cash deposit or other financial arrangement acceptable to the County have been made between the subdivider and the Board. In the event the subdivider fails to perform within the time allotted by the Board, then after reasonable notice to the subdivider of the default, the County may do or have done all work and charge subdivider's deposit with all costs and expenses incurred.

Id. at 604, 334 P.3d at 1263 (emphasis omitted).

The court concluded that the language of this ordinance — like the language of the statute — did not limit the county's discretion as to when to call the bonds. Accordingly, the court determined that Bellemont was not entitled to an order compelling the county to enforce the bonds covering Unit 3. *Id.* at 605, 334 P.3d at 1264.

Similarly, in *LDS Development, LLC v. City of Eugene*, 280 Or. App. 611, 382 P.3d 576 (2016), the original developer represented to the City of Eugene, Oregon that it would install certain infrastructure improvements in connection with the city's approval of a development project and obtained a bond guaranteeing its performance. That developer then withdrew from the project before completing the bonded improvements. A successor developer purchased the property and subsequently sued the city, alleging that the city was required to either finish the improvements itself or call the performance bond. *Id.* at 616, 382 P.3d at 579.

On appeal, the Oregon Court of Appeals held that the applicable

> statutes and city code provisions do not require that the city actually exercise its right to call in a bond or complete the improvements itself in the event that a developer fails to do so. Certainly the city may exercise its discretion to complete planned improvements or to enforce a bond provided by a subdivider who failed to fulfill its obligations, but, under the operative statutes, the city is not required to do so.

Id. at 620, 382 P.3d at 582. Thus, the reasoning in *Ponderosa* and *LDS* is fully consistent with our ruling on this issue.

In light of our holding that Brookline lacks authority to compel the City to call the Bond and has no legal rights with respect to the Bond, we likewise reject the notion that it is entitled to any of the other forms of declaratory or injunctive relief requested in its amended complaint. *See Beachcomber Props., L.L.C. v. Station One, Inc.*, 169 N.C. App. 820, 824, 611 S.E.2d 191, 194 (2005) ("Absent an enforceable contract right, an action for declaratory relief to construe or apply a contract will not lie."); *DeMent v. Nationwide Mut. Ins. Co.*, 142 N.C. App. 598, 600, 544 S.E.2d 797, 799 (2001) (concluding that "because plaintiff was a stranger to [the] insurance contract . . . , plaintiff lacked standing to seek a declaratory judgment construing the policy provisions"). Nor do we discern any legal basis upon which Brookline would be entitled to recover monetary damages stemming from the City's exercise of its discretion in not enforcing the Bond.

For these reasons, we hold that the trial court properly granted Defendants' motions for summary judgment and denied Brookline's cross-motion. However, we note that while the precise basis for the trial court's ruling is not entirely clear from its 24 August 2015 order, it appears that the trial court's decision was based primarily on the notions that (1) Brookline's rezoning of the property from single-family homes to multi-family apartments "drastically changed" the 2008 preliminary subdivision plans approved by the City; and (2) the road improvements constructed by Clarion-Reames before the foreclosure were adequate to support the nine existing single-family homes in the development. We need not address either of these issues given our holding that Brookline is not entitled to any of the relief sought in its pleadings because it lacks a legal basis to compel the City to call the Bond or any other legal rights relating to the Bond.

Accordingly, we affirm the ultimate result reached by the trial court albeit for different reasons. *See State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987) ("A correct decision of a lower court will not be disturbed on review simply because an insufficient or superfluous reason is assigned. The question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable." (citation omitted)), *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987); *Cape Fear Pub. Util. Auth. v. Costa*, 205 N.C. App. 589, 598, 697 S.E.2d 338, 343 (2010) (affirming trial court's order granting summary judgment for reasons different from those articulated by trial court).

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Judges ELMORE and DIETZ concur.

EDWARDS v. EDWARDS

[251 N.C. App. 549 (2017)]

ALLEN G. EDWARDS, PLAINTIFF
v.
CHRISTINE L. EDWARDS, DEFENDANT
v.
BRANDON EDWARDS, THIRD-PARTY DEFENDANT

No. COA16-346

Filed 17 January 2017

1. Divorce—equitable distribution—property valuation—tax report

Where the trial court in an equitable distribution proceeding valued a parcel of real property at $193,195 based on county tax records submitted by the wife, there was no error. The husband did not object to the wife's introduction of the ad valorem tax value of the property, and that tax report supported the trial court's finding regarding the fair market value of the property.

2. Divorce—equitable distribution—rental property valuation—proper calculation

On appeal from the trial court's equitable distribution order, the Court of Appeals reversed and remanded the trial court's valuation of certain rental properties. On one rental property, trial court should have subtracted the husband's expenses for upkeep from the rent received, and on the other rental property, where the husband and wife's adult son had been living, the trial court should have determined how much rent the husband actually received and then subtracted his expenses for upkeep.

Appeal by Plaintiff from order entered 10 December 2015 by Judge Melinda H. Crouch in New Hanover County District Court. Heard in the Court of Appeals 5 October 2016.

The Lea/Schultz Law Firm, P.C., by James W. Lea, III, for the Plaintiff-Appellant.

J. Albert Clyburn for the Defendant-Appellee.

DILLON, Judge.

Allen Edwards ("Husband") appeals from an equitable distribution order. For the following reasons, we affirm in part and reverse and remand in part.

I. Background

Husband and Christine Edwards ("Wife") were married in 1989, separated in 2012, and were divorced in 2013. Mr. and Ms. Edwards had one child during their marriage, Brandon Edwards.[1]

This appeal concerns the equitable distribution of (1) two parcels of real property (one located on St. Mary Church Road and the other on Pointer Lane) and (2) the rental value of both properties during the period of separation.

In its equitable distribution order and judgment, the trial court assigned a net fair market value of $193,195 to the property on St. Mary Church Road and a net fair market value of $109,439 to the property on Pointer Lane. Further, the trial court found that Husband exclusively possessed these properties during the period of separation (approximately 36 months) and that the total fair market rental value of the properties during this period was $72,000 for the entire period ($2,000/month). The trial court distributed this fair market rental value to Husband as divisible property.

Following entry of the trial court's equitable distribution order, Husband timely appealed.

II. Standard of Review

In an equitable distribution proceeding, "the trial court is to determine the net fair market value of [a] property based on the evidence offered by the parties." *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 419, 588 S.E.2d 517, 521 (2003). "A trial court's findings of fact in an equitable distribution case are conclusive if supported by any competent evidence." *Id.* "The mere existence of conflicting evidence or discrepancies in evidence will not justify reversal." *Mrozek v. Mrozek*, 129 N.C. App. 43, 48, 496 S.E.2d 836, 840 (1998).

III. Analysis

A. Fair Market Value of St. Mary Church Road Property

[1] Husband first argues that the trial court's use of the tax value in calculating the fair market value of the St. Mary Church Road property constituted an abuse of discretion. We disagree. Based on well-established

1. Brandon Edwards was added to this action as a third-party Defendant because he held title to certain property that could have been classified as marital property. He is not a party to this appeal and has not submitted any documents to this Court.

Supreme Court precedent, although a real property's tax value is generally not competent to establish the value of the real property, it may be considered by the fact-finder if its introduction is not properly objected to.

Marital property is valued as of the date of separation, *Davis v. Davis*, 360 N.C. 518, 526-27, 631 S.E.2d 114, 120 (2006), which, in this case, was in 2012.

At trial, Husband presented the expert opinion of a real estate appraiser that the value of the St. Mary Church Road property was $61,000 *as of the time of trial* in 2015. Wife presented Wilson County tax records showing that the tax value of the property was determined to be $193,195 *as of January 1, 2008*. After considering this evidence, the trial court found that the fair market value of the St. Mary Church Road property on the date of separation was $193,195, the same amount as the tax value assigned to the property.

Our Supreme Court has held that ad valorem tax records are not competent to establish the market value of real property. *Star Mfg. Co. v. Atlantic Coast Line R.R.*, 222 N.C. 330, 332-33, 23 S.E.2d 32, 36 (1942); *Bunn v. Harris*, 216 N.C. 366, 373, 5 S.E.2d 149, 153 (1939); *Hamilton v. Seaboard*, 150 N.C. 193, 194, 63 S.E. 730, 730 (1909); *Cardwell v. Mebane*, 68 N.C. 485, 487 (1873) ("The 'tax lists' [are] not competent evidence to show the value of the land[.]");[2] *see also Craven County v. Hall*, 87 N.C. App. 256, 258, 360 S.E.2d 479, 480 (1987). This is so because "in the valuation of [] land, for taxation, the owner is not consulted. . . . It is well understood that it is the custom of the assessors to fix a uniform, rather than an actual, valuation." *Bunn*, 216 N.C. at 373, 5 S.E.2d at 153. Further, "the assessors were not witnesses in the case, sworn and subject to cross-examination in the presence of the [fact-finder]." *Cardwell*, 68 N.C. at 487. *See also Suffolk & C. R. Co. v. West End Land & Imp. Co.*, 137 N.C. 330, 332-33, 49 S.E. 350, 351 (1904).[3]

However, Husband did not object at trial to Wife's introduction of the ad valorem tax value of the St. Mary Church Road property. And our Supreme Court has long held that "it is a well established rule

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2. Authored by Richmond Mumford Pearson, who served as North Carolina's Chief Justice from 1858-1878. Justice Pearson was our first popularly elected Chief Justice, first elected in 1868.

3. We note that our Court has previously stated that "the *ad valorem* tax value assessed by a county is [] allowed as evidence of the value of real property." *Clay v. Monroe*, 189 N.C. App. 482, 487, 658 S.E.2d 532, 536 (2008) (emphasis added); *see also Brock v. Stone*, 203 N.C. App. 135, 136, 691 S.E.2d 37, 39 (2010). However, we are compelled to follow precedent from our Supreme Court on this issue.

that evidence admitted without objection, though it should have been excluded had proper objection been made, is entitled to be considered for whatever probative value it may have." *Quick v. United Ben. Life Ins. Co.*, 287 N.C. 47, 59, 213 S.E.2d 563, 570 (1975). In a fuller explanation of this rule, our Supreme Court has stated:

> It is generally recognized in this jurisdiction that evidence admitted without objection is properly considered by the court in determining the sufficiency of the evidence and by the jury in determining the issue, even though the evidence is incompetent and should have been excluded had objection been made. . . . The objection to the admission of this evidence must be made at the time of its introduction, and where testimony sufficient to establish a fact at issue has been received in evidence without objection, a nonsuit cannot be sustained even if the only evidence tending to establish the disputed fact is incompetent.

Reeves v. Hill, 272 N.C. 352, 362, 158 S.E.2d 529, 537 (1968) (internal marks and citations omitted); *see also Jackson v. N.C. Dept. of Commerce*, ___ N.C. App. ___, ___, 775 S.E.2d 687, 689 (2015).

Here, the trial court's finding regarding the fair market value of the St. Mary Church Road property was supported by the property tax report submitted by Wife with no objection from Husband. Therefore, we affirm the trial court's valuation of the property. *See Mrozek*, 129 N.C. App. at 48, 496 S.E.2d at 840.

B. Fair Market Rental Value

[2] Husband's second argument relates to the trial court's calculation of the fair market rental value of the properties during the 36-month period of separation. Wife concedes that Husband is correct in his argument.

For the St. Mary Church Road property, the trial court imputed and distributed a fair market rental value of $43,200 to Husband based on a fair rental value of $1,200 per month *times* 36 months. Husband argues that the trial court's findings concerning the fair market value is not supported by competent evidence, and Wife makes no argument to the contrary. Rather, the parties agree that the proper calculation should be the actual amount of rent received by Husband during this period *minus* the expenses paid by Husband for the upkeep of the property during this period. The parties concede that competent evidence in the record shows that Husband received gross rental income of $15,200 during the period of separation and that the matter should be remanded in

order to allow the trial court to determine what reduction in this value, if any, Husband is entitled to for the $6,833 he claims he expended for the upkeep of the property during the period of separation. Accordingly, we reverse and remand the trial court's valuation of this divisible property as set forth in the Conclusion. *See* N.C. R. App. P., Rule 28.

For the Pointer Lane property, the trial court imputed and distributed a fair market rental value of $28,800 ($800/month) to Husband. Husband testified that in his opinion, a fair market rental value for the Pointer Lane property would be approximately $800 per month. Husband further testified that the parties' son was occupying Pointer Lane and was not paying rent. Wife testified that their son was paying approximately $300 per month. On appeal, Husband argues that the trial court abused its discretion in valuing this divisible property at $28,800. Wife makes no argument to support the trial court's valuation, but rather concedes that their adult son lived at Pointer Lane during the relevant time period and that the imputed rental value should only be the amount Husband actually received. We note that the trial court made no findings to show its reasoning in using a fair rental value number when the parties' son was living in the property. We further note that there is conflicting evidence in the record as to how much rent, if any, Husband actually received. Accordingly, we reverse and remand this valuation, as set forth in the Conclusion. *See* N.C. R. App. P., Rule 28.

IV. Conclusion

The trial court's valuation of the St. Mary Church Road property based on the tax value evidence is affirmed. Though tax value evidence is generally not competent to prove value, the evidence offered by Wife was not objected to and could therefore be considered by the trial court in its valuation of the St. Mary Church Road property.

The trial court's valuation of certain divisible property – namely, the rental value of the St. Mary Church Road and Pointer Lane properties during the period of separation – is reversed and remanded. On remand, the trial court shall determine the rental value of the St. Mary Church Road property at the rent actually received by Husband (which the parties concede to be $15,200.00) *minus* Husband's expenses as allowed by the trial court. The trial court shall determine the rental value of the Pointer Lane property based on the rent actually received by Husband minus any expenses paid by Husband as allowed by the trial court. In doing so, the trial court shall make findings concerning Husband's expenses for both properties and may, in its discretion, receive additional evidence if necessary. Finally, after the trial court has re-valued

this divisible property, the trial court may redistribute any marital and divisible property to achieve an equitable distribution.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges ELMORE and HUNTER, JR., concur.

BAKER A MITCHELL, JR, AND THE ROGER BACON ACADEMY, INC, PLAINTIFFS
v.
EDWARD H PRUDEN, IN HIS INDIVIDUAL CAPACITY, DEFENDANT

No. COA16-428

Filed 17 January 2017

1. Appeal and Error—interlocutory orders and appeals—substantial right—governmental immunity—public official immunity—judicial/quasi-judicial immunity

Although defendant's appeal from a denial of a motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) was from an interlocutory order, the affirmative defenses of governmental immunity, public official immunity, and judicial/quasi-judicial immunity entitled defendant to immediate appellate review.

2. Immunity—public official immunity—superintendent—approval of new charter school

The trial court erred by denying defendant's motion to dismiss plaintiffs' second amended complaint alleging claims of libel *per se*, libel *per quod*, unfair and deceptive trade practices, and punitive damages. Defendant was entitled to public official immunity. Defendant's actions were consistent with the duties and authority of a superintendent and constituted permissible opinions regarding his concerns for the approval of a new charter school.

Appeal by defendant from order entered 20 January 2016 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 20 October 2016.

Nexsen Pruet, PLLC, by G. Eugene Boyce, R. Daniel Boyce, and Alex R. Williams, for plaintiff-appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Edwin Love West, III, Julia C. Ambrose, and Eric M. David, for defendant-appellant.

McCULLOUGH, Judge.

Edward H. Pruden ("defendant") appeals from an order denying his motion to dismiss Baker A. Mitchell, Jr. ("Mitchell") and The Roger Bacon Academy, Inc.'s ("RBA") (collectively "plaintiffs") second amended complaint. For the reasons stated herein, we reverse the order of the trial court.

I. Background

On 6 January 2015, plaintiffs filed a complaint against defendant. On 13 January 2015, plaintiffs filed an amended complaint.

On 15 July 2015, plaintiffs filed a second amended complaint alleging claims of libel *per se*, libel *per quod*, unfair and deceptive trade practices ("UDTP"), and punitive damages. The second amended complaint alleged as follows: Mitchell is the owner and manager of RBA, founded in 1999. RBA is a corporation, engaged in the organization, support, and operation of four public charter schools in southeast North Carolina: Charter Day School ("CDS"), Columbus Charter Schools, Douglass Academy, and South Brunswick Charter School. Defendant was Superintendent of Brunswick County Schools ("BCS") from 1 July 2010 until 30 November 2014. Defendant, acting outside of the scope of his employment as Superintendent, falsely stated to third parties that the public charter schools were "dismantling" North Carolina's public education system and that they have "morphed into an entrepreneurial opportunity." On 4 December 2013, a video entitled "Dr. Pruden Superintendent of the Year Video" was published on YouTube. In that video, defendant falsely stated that BCS was superior to the "competition" because BCS "does not operate schools for a profit." Plaintiffs alleged that defendant's reference to "competition" was "clearly a reference" to the public charter schools for children of Brunswick County.

The second amended complaint further alleged as follows: In 2013, RBA submitted an application to the Office of Charter Schools for a new public charter school named "South Brunswick Charter School" ("SBCS"). Defendant began an "obsessive public campaign to derail approval" of the new school, "viciously defaming the character and reputation" of Mitchell. First, defendant submitted a "Local Education Agency Impact Statement" to the Office of Charter Schools on 9 April 2013

and a revised impact statement ("impact statement") on 14 May 2013. At some time after 20 May 2013, defendant's impact statement was posted to a website maintained by the North Carolina Department of Public Instruction. Plaintiffs alleged that the impact statement contained statements that "maligns" plaintiffs and "casts aspersions on Mitchell's honesty, character and moral standing in the community[.]" Defendant also privately petitioned at least one member of the Charter School Advisory Council ("CSAC") to manipulate the approval process such that approval of the charter would be denied. The vice-chair of the CSAC, Tim Markley ("Markley"), "issued repeated challenges" to the SBCS. On 16 July 2013, a motion was made to approve the SBCS conditioned upon a change in the CDS Board. Markley met with defendant in the hall after the meeting and Markley was overheard expressing his regrets and apologizing for not being able to prevent approval of the SBCS charter.

Plaintiffs alleged that defendant, acting in his individual capacity, began submission of "a parade of documents" to the North Carolina State Board of Education ("SBE"), including copies of defamatory letters written to Mr. Bill Cobey, chairman of the SBE, expressing false allegations and his concerns about what defendant claimed were conflicts of interest between Mitchell, RBA, and public charter schools. In a letter dated 7 August 2013 to Mr. Cobey and the SBE, defendant urged that the SBE consider information regarding conflicts of interest before taking action on the application for SBCS. Plaintiffs alleged that this letter contained statements which were "false, libelous and intended to impugn the ethical reputation and character of Mitchell" by stating as follows:

> As evidenced by the nature of the CSAC's final vote, which required two attempts to obtain a majority, there are many "red flags" surrounding [SBCS's] application and the apparent and multiple conflicts of interest surrounding the Roger Bacon Academy and Charter Day School's board of directors.

Plaintiffs further alleged that in a letter dated 3 September 2013 to Mr. Cobey and the SBE, defendant, outside of the scope of his duties, formally requested a "delay granting preliminary approval to [SBCS] due to violations of North Carolina's Public Records Law and heightened conflict of interest concerns[.]" In a letter dated 4 November 2013 to Mr. Cobey and the SBE, defendant sought a response from the SBE regarding its investigation into the conflict of interest allegations raised by defendant. On 20 December 2013, Mr. Cobey responded to these letters informing defendant that "after careful review for actual and potential conflicts of interest, the [State Ethics] Commission has determined that

Mr. Mitchell is eligible to serve on the CSAB [Charter School Advisory Board] and has not identified any actual conflicts of interest[.]" Plaintiffs alleged that in a 7 January 2014 letter, defendant "accosted" the SBE, encouraging the SBE to continue investigation of Mitchell, RBA, and CDS. Regarding all the letters, plaintiffs alleged that defendant had no information to support the false and defamatory statements, that his actions were outside the scope of his duties as Superintendent, and that they were only meant to further his personal campaign to maliciously defame plaintiffs.

Plaintiffs alleged that although defendant knew the falsity of his statements, on 7 January 2014, defendant published the 7 August 2013, 3 September 2013, 4 November 2014, and 7 January 2014 letters to media outlets across southeast North Carolina. After the publication of defendant's false and defamatory statements, CDS and Douglass Academy saw a profound reduction in enrollment and RBA received a reduction in management fees. Plaintiffs alleged that defendant acted with actual malice, in his individual capacity, and outside the scope of his duties as Superintendent. Thus, they alleged that sovereign immunity did not apply or alternatively, that it was waived.

On 6 November 2015, defendant filed a motion to dismiss plaintiffs' second amended complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Defendant argued that his statements were made in his official capacity, on behalf of the Brunswick County Board of Education. Defendant claimed plaintiffs failed to plead wavier of sovereign/governmental immunity with the required specificity. Furthermore, defendant argued that plaintiffs' claims were barred by the doctrine of sovereign/governmental immunity, public official immunity, and judicial or quasi-judicial immunity. As to the claims of libel *per se* and libel *per quod*, defendant argued that the claims failed because the statements at issue were not "of and concerning" plaintiffs, not defamatory as a matter of law, and not false. Defendant also argued that plaintiffs' claims were barred by the applicable statute of limitations, N.C. Gen. Stat. § 1-54, as all but one of the statements at issue was published more than a year before the complaint was filed. Defendant contended that the UDTP claim failed because the underlying claims for libel failed to state a claim for relief and that Chapter 75 of the North Carolina General Statutes does not create a cause of action against an agency or subdivision of the State. Defendant argued that he was entitled to reasonable attorneys' fees because plaintiffs knew, or should have known, this action was frivolous and malicious. Lastly, defendant contended that plaintiffs' claims were barred by the protections of the

First Amendment to the United States Constitution and Article I, Section 14 of the North Carolina Constitution.

Following a hearing held on 17 November 2015, the trial court entered an order on 20 January 2016, denying defendant's Rule 12(b)(6) motion and defendant's oral Rule 12(b)(1) motion to dismiss. Defendant appeals from this order.

II. Discussion

The sole issue on appeal is whether the trial court erred by denying defendant's motion to dismiss plaintiffs' second amended complaint. Defendant argues that he is entitled to quasi-judicial immunity, public official immunity, and governmental immunity.

[1] Defendant's appeal from a denial of a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) is interlocutory. *See Bolton Corp. v. T.A. Loving Co.*, 317 N.C. 623, 629, 347 S.E.2d 369, 373 (1986). However, "this Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Hines v. Yates*, 171 N.C. App. 150, 156, 614 S.E.2d 385, 389 (2005). Also, rulings "denying dispositive motions based on [a] public official's immunity affect a substantial right and are immediately appealable." *Summey v. Barker*, 142 N.C. App. 688, 689, 544 S.E.2d 262, 264 (2001). Because defendant's motion to dismiss and arguments assert the affirmative defenses of governmental immunity, public official immunity, and judicial/quasi-judicial immunity, we hold that this appeal is properly before our Court.

> 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.

Green v. Kearney, 203 N.C. App. 260, 266-67, 690 S.E.2d 755, 761 (2010) (citation omitted). "Although well-pleaded factual allegations of the complaint are treated as true for purposes of a 12(b)(6) motion, conclusions of law or unwarranted deductions of facts are not admitted." *Dalenko v. Wake County Dep't of Human Servs.*, 157 N.C. App. 49, 56, 578 S.E.2d 599, 604 (2003) (internal quotation marks and citation omitted).

> A complaint is not sufficient to withstand a motion to dismiss if an insurmountable bar to recovery appears on the face of the complaint. Such an insurmountable bar may consist of an absence of law to support a claim, an absence of facts sufficient to make a good claim, or the disclosure of some fact that necessarily defeats the claim.

Al-Hourani v. Ashley, 126 N.C. App. 519, 521, 485 S.E.2d 887, 889 (1997) (internal citations omitted).

[2] First, we consider whether the trial court erred by denying defendant's motion to dismiss under the doctrine of public official immunity.

"A public official is one who exercises some portion of sovereign power and discretion, whereas public employees perform ministerial duties." *Dalenko*, 157 N.C. App. at 55, 578 S.E.2d at 603 (citation omitted). "Clearly, the superintendent of a school system must perform discretionary acts requiring personal deliberation, decision and judgment." *Gunter v. Anders*, 114 N.C. App. 61, 67, 441 S.E.2d 167, 171 (1994). Therefore, defendant, as the superintendent of BCS from 1 July 2010 until 30 November 2014, was a public officer for purposes of immunity.

> The defense of public official immunity is a "derivative form" of governmental immunity. 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[.]"

Fullwood v. Barnes, __ N.C. App. __, __, 792 S.E.2d 545, __ (2016) (internal citations omitted). "Thus, a public official is immune from suit unless the challenged action was (1) outside the scope of official authority, (2) done with malice, or (3) corrupt." *Wilcox v. City of Asheville*, 222 N.C. App. 285, 288, 730 S.E.2d 226, 230 (2012). "Actions that are malicious, corrupt, or outside of the scope of official duties will pierce the cloak of official immunity[.]" *Fullwood*, __ N.C. App. at __, 792 S.E.2d at __.

"A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984).

> It is well settled that absent evidence to the contrary, it will always be presumed that public officials will discharge

> their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. This presumption places a heavy burden on the party challenging the validity of public officials' actions to overcome this presumption by competent and substantial evidence.

Strickland v. Hedrick, 194 N.C. App. 1, 10, 669 S.E.2d 61, 68 (2008) (citation omitted). "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." *Fullwood*, __ N.C. App. at __, 792 S.E.2d at __ (citation and internal quotation marks omitted).

In the present case, plaintiffs' second amended complaint included allegations that defendant was "acting beyond the scope of his employment as Superintendent[]" and that defendant's actions were "outside the scope of his duties as Superintendent and only meant to further his personal campaign to maliciously defame Mitchell and RBA."

We note that although the second amended complaint alleges that defendant's actions were beyond the scope of his duties, "we are not required to treat this allegation of a legal conclusion as true." *Dalenko*, 157 N.C. App. at 56, 578 S.E.2d at 604.

The factual allegations in the second amended complaint, considered as true, tend to show, in pertinent part, that: on 4 December 2013, a video entitled "Dr. Pruden Superintendent of the Year Video" was published on the YouTube website where defendant references the "competition," that BCS does not operate schools for a profit, and tells the competition "game on"; defendant submitted the impact statement, approved by the Brunswick County Board of Education, to the Office of Charter Schools in compliance with N.C. Gen. Stat. § 115C-238.29D(d)(3) (2012)[1]; the impact statement noted that "Brunswick County opposes the approval of the South Brunswick Charter School application[]"; the impact statement was then posted on a website maintained by the North Carolina Department of Public Instruction, Office of Charter Schools; in a letter dated 7 August 2013, addressed to Mr. Cobey and all members of the SBE, and signed by defendant as Superintendent of BCS, defendant expressed concerns regarding possible conflicts of interest surrounding

1. The statute in place at that time stated that the "board of education of the local school administrative unit in which the charter school is located" would have "an opportunity to be heard by the State Board of Education on any adverse impact the proposed growth would have on the unit's ability to provide a sound basic education to its students[.]" N.C. Gen. Stat. § 115C-238.29D(d)(3) (2012).

the RBA and CDS's board of directors and stated that the letter was endorsed unanimously by four members of the Brunswick County Board of Education; in a letter dated 3 September 2013, addressed to Mr. Cobey and all members of the SBE, and signed by defendant as Superintendent of BCS, defendant requested that the SBE delay voting on whether or not to grant preliminary approval for the fourth charter school to be managed by the RBA and to seek additional information from the Office of Charter Schools regarding conflicts of interest; in a letter dated 4 November 2013, addressed to Mr. Cobey and all members of the SBE, and signed by defendant as Superintendent of BCS, defendant sought an update and response from the SBE regarding its investigation into the potential conflicts of interest; on 20 December 2013, defendant received a letter from Mr. Cobey that informed him that the State Ethics Commission had determined that Mitchell was eligible to serve on the Charter School Advisory Board; in a letter dated 7 January 2014, addressed to Mr. Cobey and all members of the SBE, and signed by defendant as Superintendent of BCS, defendant acknowledges receiving the 20 December 2013 letter but addresses "additional concerns to which [the 20 December 2013] letter did not respond[]" and asks the SBE to pursue a "real, substantive investigation of these issues before committing over one million dollars ($1,000,000) of additional taxpayer dollars next year[]"; and on 7 January 2014, defendant instructed the Executive Director of Quality Assurance and Community Engagement with BCS to republish the 7 August 2013, 3 September 2013, 4 November 2013, and 7 January 2014 letters to media outlets across southeast North Carolina.

After considering the foregoing, we hold that the second amended complaint does not allege facts which would support a legal conclusion that any of defendant's alleged conduct was outside the scope of his duties as Superintendent of BCS. Defendant's actions were consistent with the duties and authority of a superintendent and constituted permissible opinions regarding his concerns for the approval of a new charter school.

As to the allegations of malice, the second amended complaint merely stated that defendant's actions were "only meant to further his personal campaign to maliciously defame Mitchell and RBA[.]" It is well established that "a conclusory allegation that a public official acted willfully and wantonly should not be sufficient, by itself, to withstand a Rule 12(b)(6) motion to dismiss. The facts alleged in the complaint must support such a conclusion." *Meyer v. Walls*, 347 N.C. 97, 114, 489 S.E.2d 880, 890 (1997). Here, plaintiffs state bare, conclusory allegations that

defendant acted with malice. Because we presume that defendant discharged his duties in good faith and exercised his power in accordance with the spirit and purpose of the law and plaintiffs have not shown any evidence to the contrary, we hold that the second amended complaint failed to allege facts which would support a legal conclusion that defendant acted with malice.

In conclusion, we hold that the allegations of plaintiff's second amended complaint are legally insufficient to overcome defendant's public official immunity. Accordingly, we hold that the trial court erred by denying defendant's motion to dismiss plaintiffs' second amended complaint under the doctrine of public official immunity, and reverse the order of the trial court. Because we hold that defendant is entitled to public official immunity, we do not reach defendant's remaining arguments.

III. Conclusion

The 20 January 2016 order of the trial court is reversed.

REVERSED.

Judges STROUD and ZACHARY concur.

RME MANAGEMENT, LLC, PLAINTIFF
v.
CHAPEL H.O.M. ASSOCIATES, LLC AND CHAPEL HILL MOTEL ENTERPRISES, INC., DEFENDANTS

No. COA16-596

Filed 17 January 2017

Landlord and Tenant—lease—timeliness of tax payment—implicit grace period

The trial court did not err by denying plaintiff lessor's motion for summary judgment and granting summary judgment in favor of defendant lessees. The pertinent taxes were paid during the implicit grace period which the lease afforded, given the ordinary meaning of the terms used, and in light of the course of dealing.

Appeal by plaintiff from order entered 7 March 2016 by Judge Lunsford Long in Orange County District Court. Heard in the Court of Appeals 3 November 2016.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Patricia P. Shields and James R. Baker, for plaintiff-appellant.

Troutman Sanders LLP, by Ashley H. Story and D. Kyle Deak, for defendants-appellees.

ZACHARY, Judge.

Plaintiff RME Management, LLC (RME) appeals an order granting summary judgment in favor of Defendants Chapel H.O.M. Associates, LLC (HOM) and Chapel Hill Motel Enterprises, Inc. (CHME). For the reasons that follow, we affirm.

I. Background

RME and HOM are the assignees of the lessor and the lessee, respectively, of real property located at 1301 Fordham Boulevard in Chapel Hill, North Carolina (the property). The lease was executed on 17 March 1966, and shortly thereafter, the original lessee built a hotel on the property, which is still in operation today. In January 1967, CHME entered into a sublease to operate the hotel. The lease and sublease were assigned to HOM in August 1988. RME became the owner and current lessor of the property in October 2012.

The lease's initial term commenced on 1 January 1966 and was scheduled to terminate on 31 December 2015. However, the lease contained a renewal option that allowed HOM to extend the lease for an additional forty-nine years. HOM exercised the renewal option in September 2014, and the additional forty-nine-year lease term was set to commence on 1 January 2016.

Central to this case, the lease contained two provisions that required HOM, as lessee, to pay taxes assessed against the property. Paragraph 17 of the lease provides, in pertinent part:

> As a further rental hereunder, the Lessee shall pay all ad valorem and personal property taxes which may be assessed against the demised premises and the improvements thereon and personal property located therein, or any part thereof, for each year of the term of this lease. . . .

Paragraph 19 further provides that:

> The Lessee expressly agrees to pay all installments of taxes and assessments required to be paid by it hereunder *when due*, subject to the right of said Lessee to contest

> such tax or assessment, in good faith, provided the title of the Lessors shall not be placed in jeopardy by forfeiture, foreclosure, sale under tax warrant, or otherwise.

(Emphasis added). Although HOM's obligation to pay property taxes is clear, the lease does not define the term "when due" as it relates to the date by which the taxes must be paid. The lease also contains a default provision:

> If any default of the Lessee hereunder shall continue uncorrected for thirty (30) days after notice thereof from the Lessors, the Lessors may, by giving written notice to the Lessee, at any time thereafter during the continuance of such default either (a) terminate the lease, or (b) re-enter the demised premises by summary process or otherwise, and expel the Lessee and remove all personal property therefrom and re-let the premises at the best rent obtainable. . . .

Property tax notifications and bills were mailed to CHME (which was obligated to pay property taxes, in full, under the sublease), and HOM appears to have relied on CHME to make all necessary payments. While the subject of considerable dispute on appeal, it appears that RME, HOM, and their predecessors never gave much, if any, attention to when the property taxes were being paid before 2013.

On 23 October 2013, however, RME's attorney, Jonathan Ganz, sent a letter to defendants alleging that they had breached the lease by failing to pay property taxes on or before September 1st in each of the preceding four years. The letter stated that RME had just recently become aware of these circumstances, and further asserted that "[i]n Orange County, real property tax bills for a calendar year are due on September 1 of that year." HOM responded, through its attorney, by sending a letter to RME, asserting that the lease did not require the tenant to pay taxes by September 1st of any fiscal year. Despite the parties' contrary positions on the issue of exactly when property tax payments were to be made, RME took no further action at that time, as Mr. Ganz's letter failed to comply with the technical requirements of the lease's notice and default provisions.

There was no dispute in 2014 as to when the property taxes had to be paid, as CHME appealed the property's valuation, thereby tolling the date on which the taxes were "due" under the lease. However, the 2015 tax bill for the property was issued in July 2015 and defendants did not pay the taxes by 1 September 2015. As a result, on 21 September 2015,

RME sent HOM a notice of default "for failure to pay all taxes as required pursuant to the lease." HOM responded as follows in a letter dated 16 October 2016:

> This letter is sent in response to your letter dated September 21, 2015 which wrongfully alleges a default under the Lease. We specifically deny that a default exists for failure to pay all taxes as required under the Lease.
>
> Pursuant to N.C.G.S. § 105-360, 2015 real property taxes are payable without interest through January 5, 2016. Real property taxes are not delinquent, and interest does not begin to accrue until January 6, 2016. As such, there exists no delinquency in the payment of real property taxes and no default under the terms of the Lease.

For whatever reason, defendants chose not to pay the property tax bill immediately, an action that would have cured the alleged default. Consequently, RME sent HOM a written notice that the lease had been terminated and instructed HOM and CHME to vacate the premises.

The notice of termination was dated 27 October 2015, the same day that RME filed a summary ejectment action against defendants in the Small Claims Division of Orange County District Court. RME paid the taxes on the morning of 3 November 2015. Later that same day, Federal Express delivered a tax payment from CHME to the Orange County Tax Administrator's Revenue Division. Thereafter, HOM tried to tender the amount of the 2015 tax payment to RME on two occasions, but RME refused to accept reimbursement.

The complaint seeking summary ejectment was dismissed by an Orange County Magistrate on 10 November 2015. RME noted an appeal to Orange County District Court on 18 November 2015, and also filed a motion for summary judgment. After conducting a hearing on the matter, the trial court denied RME's motion for summary judgment and granted summary judgment in favor of defendants. The trial court's order held:

> Here, the course of dealing clearly shows that the parties historically did not construe the lease to require that the taxes be paid by midnight on September 1 each year; they understood the terms "pay" and "pay when due" to have been used in their ordinary sense, rather than within the technical, literal definitional requirements of N.C. Gen. Stat. § 105-360.

> The ordinary meaning of "pay" and "pay when due" customarily includes an implicit grace period during which payment can be made without being overdue; few obligations, and certainly not property taxes, are expected to be paid on the very first day they become due.
>
> The taxes were paid during the implicit grace period which the lease afforded, given the ordinary meaning of the terms used, and in light of the course of dealing.
>
> Accordingly, there is no genuine issue as to any material fact, Defendants are entitled to judgment as a matter of law, Plaintiff's motion for summary should be denied, and summary judgment should be entered for Defendants[.]

RME appeals.

II. Analysis

RME's principal arguments on appeal are that the trial court erred in denying its summary judgment motion and in granting summary judgment in favor of defendants. We disagree.

A. Standard of Review

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). "In ruling on a motion for summary judgment the evidence is viewed in the light most favorable to the non-moving party." *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986) (citation omitted). "A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense." *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003) (citation and internal quotation marks omitted). "A trial court may enter summary judgment in a contract dispute if the provision at issue is not ambiguous and there are no issues of material fact." *Malone v. Barnette*, __ N.C. App. __, __, 772 S.E.2d 256, 259 (2015) (citing *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 633, 684 S.E.2d 709, 719 (2009) ("[W]hen the language of a contract is not ambiguous, no factual issue appears and only a question of law which

is appropriate for summary judgment is presented to the court."), and other citation omitted). Furthermore, if a grant of "summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

B. "When Due"

RME argues that the trial court improperly denied its motion for summary judgment on the summary ejectment claim and that that the court erred in granting summary judgment in favor of defendants. More specifically, RME contends that Paragraph 19 of the lease, which states that taxes must be paid "when due," required defendants to pay the taxes immediately on 1 September 2015. RME's argument, as we understand it, is that because tax payments became "due" under N.C. Gen. Stat. § 105-360 on September 1st, any payment made after that date was late, or "past due," such that RME was entitled to send a notice of default and terminate the lease. In contrast, defendants argue that because the taxes first became due on September 1st and were not delinquent until January 6th, the taxes were "due," i.e., payable, at any time from September 1st to January 5th (of the following year). We agree with defendants.

"A lease is a contract which contains both property rights and contractual rights." *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 570, 500 S.E.2d 752, 756 (citation omitted), *disc. review denied*, 349 N.C. 240, 514 S.E.2d 274 (1998). The provisions of a lease are, therefore, interpreted according to general principles of contract law. *Martin v. Ray Lackey Enters., Inc.*, 100 N.C. App. 349, 354, 396 S.E.2d 327, 330 (1990).

"Interpreting a contract requires the court to examine the language of the contract itself for indications of the parties' intent at the moment of execution." *State v. Philip Morris USA, Inc.*, 359 N.C. 763, 773, 618 S.E.2d 219, 225 (2005) (citing *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973)). "If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) (citation omitted). "When the language of a contract is plain and unambiguous then construction of the agreement is a matter of law for the court." *Whirlpool Corp. v. Dailey Constr., Inc.*, 110 N.C. App. 468, 471, 429 S.E.2d 748, 751 (1993). In such a case, " 'the court may not ignore or delete any of [the contract's] provisions, nor insert words into it, but must construe the contract as written, in the light of the undisputed evidence as to the custom, usage, and meaning of its terms.' " *Hemric v. Groce*, 169 N.C. App. 69, 76, 609 S.E.2d 276, 282 (quoting *Martin v. Martin*, 26 N.C. App. 506, 508, 216 S.E.2d 456, 457-58 (1975)), *cert. denied*, 359 N.C. 631, 616 S.E.2d 234 (2005).

If the contract's terms are ambiguous, however, "then resort to extrinsic evidence is necessary and the question is one for the jury." *Whirlpool Corp.*, 110 N.C. App. at 471, 429 S.E.2d at 751 (citation omitted). Even so, "ambiguity . . . is not established by the mere fact that [one party] makes a claim based upon a construction of its language which the [other party] asserts is not its meaning." *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). Instead, "[a]n ambiguity exists where the language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties." *Holshouser v. Shaner Hotel Grp. Props. One Ltd. P'ship*, 134 N.C. App. 391, 397, 518 S.E.2d 17, 23 (1999), *aff'd per curiam*, 351 N.C. 330, 524 S.E.2d 568 (2000) (citations and internal quotation marks omitted).

An additional principle of contract construction is that "parties are generally presumed to take into account all existing laws when entering into a contract." *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 406, 584 S.E.2d 731, 739 (2003) (citation omitted). "When the language of a statute is clear and without ambiguity, 'there is no room for judicial construction,' and the statute must be given effect in accordance with its plain and definite meaning." *AVCO Fin. Servs. v. Isbell*, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984) (citation omitted). Mindful that our central task is to interpret the parties' intent "at the moment of [the lease's] execution," *Philip Morris USA, Inc.*, 359 N.C. at 773, 618 S.E.2d at 225, we first note that the relevant statute—in terms of intent—is the one that was in effect in 1966, N.C. Gen. Stat. § 105-345 (1965).[1] However, there is no material difference between the 1965-version of section 105-345 and its successor, N.C. Gen. Stat. § 105-360(a) (2015), which provides:

> Taxes levied under this Subchapter by a taxing unit are *due and payable* on September 1 of the fiscal year for which the taxes are levied. Taxes are payable at par or face amount if paid before January 6 following the due date. Taxes paid on or after January 6 following the due date are subject to interest charges. Interest accrues on taxes paid on or after January 6 as follows. . . .

1. Section 105-345 provided that all property taxes were "due and payable on the first Monday of October in which they [were] . . . assessed or levied." It also provided that if tax payments were made in cash "[a]fter the first day of November and on or before the first day of February next after due and payable, the tax shall be paid at par or face value." N.C. Gen. Stat. § 105-345(2) (1965).

(emphasis added). Therefore, we base our analysis, as have the parties, on the language contained in section 105-360. Here, we must interpret the phrase "when due" in relation to defendants' obligation to pay property taxes under Paragraph 19 of the lease and section 105-360. More precisely, the issue presented is whether a lessee fails to perform its obligation when property taxes are not paid at the moment they become due when a lease requires the lessee to pay taxes "when due." No appellate decisions in North Carolina have addressed this exact question, but the Court of Appeals of Michigan has confronted the issue.

In *Roseborough v. Empire of America*, the plaintiffs claimed that the defendant bank had failed to pay the real estate taxes in a timely manner, as required by the parties' mortgage agreement. 168 Mich. App. 92, 93, 423 N.W.2d 578, 579 (1987) (per curiam). The plaintiffs contended that the bank's agreement to pay the taxes "when due" required payment of the 1984 taxes on 1 December 1984, the date on which property tax collection commenced and the amounts assessed became a lien on the property. *Id.* at 95, 423 N.W.2d at 579. As a result, the *Roseborough* Court had to interpret the mortgage contract language "when due" in relation to the obligation to pay property taxes under the law. *Id.* The Court held that "when due" meant when payable, which under Michigan law was a period commencing December 1st and ending at the point that the tax bill became delinquent on the following February 15th. *Id.* at 95-96, 423 N.W.2d at 579. Accordingly, the taxes were "due," in the sense of being payable, at any time between December 1st and February 15th, not just on December 1st.

Although clearly not controlling, we find the reasoning in *Roseborough* compelling, and we apply it to the circumstances of this case. The effect of the interpretation that RME urges us to adopt is as follows: the lease required defendant to pay the taxes at the moment they first became "due." Under this interpretation, defendants could only meet their obligation by paying the property taxes on, and only on, September 1st. In other words, any payment before September 1st would be "early," any payment on September 1st would be "when due," and any payment after September 1st would be late, or past the point "when" the payments were "due." This is a nonsensical, hyper-technical construction of the lease and North Carolina property tax law.

Indeed, after noting that the first sentence of section 105-360 provides that property taxes are "due and payable on September 1," and that the second sentence provides that property taxes are "payable" without interest "if paid before January 6 following the due date," RME

argues that "[d]efendants' statement that taxes are 'due and payable through January 5' inserts the phrase 'and payable' into the second sentence of the statute." But there is no meaningful distinction between the terms due and payable. As recognized by one of America's leading legal lexicographers, "[b]ecause a debt cannot be *due* without also being *payable*, the doublet *due* and *payable* is unnecessary in place of *due*." Bryan A. Gardner, *A Dictionary of Modern Legal Usage* 299 (2d ed. 1995). Just because taxes first become due on September 1st does not mean that they become past due on the following day. Instead, property taxes in North Carolina are "due" (i.e., payable) over a period of time (September 1st through the following January 5th) and not on any single date. The use of the phrase "when due," without qualifying language, must be given its plain meaning, and its plain meaning is, when applied to section 105-360, the period of time between the first and last dates for timely payment of those taxes (September 1st and January 5th, respectively). As noted in *Roseborough*, "Plaintiffs' argument would have more force if the . . . agreement contained qualifying language such as 'when first become due' or 'at the moment taxes become due.' " 168 Mich. App. at 95-96, 423 N.W.2d at 579. Such qualifying language is absent from the lease in the instant case. Accordingly, we reject RME's interpretation of the phrase "when due" as it relates to HOM's obligation to pay property taxes under the lease.

Application of section 105-360 to the lease's terms reveals that taxes on the property first become due on September 1st, but they do not become past due or delinquent until the following January 6th. Because the plain meaning of "when due" refers to the period running from September 1st to January 5th, we conclude that Paragraph 19 of the lease is not ambiguous. When RME sent notice of termination in October 2015 and paid the property taxes in November 2015, RME deprived HOM of the opportunity to meet its obligation to pay (or direct CHME to pay) the taxes on or before 5 January 2016. The trial court, therefore, properly concluded that no genuine issue of material fact remained, that RME's motion for summary judgment should be denied, and that summary judgment should be entered in favor of defendants. As our decision results solely from our interpretation of Paragraph 19's plain language, we need not address whether the trial court properly considered evidence of the parties' prior course of dealing. *See Shore*, 324 N.C. at 428, 378 S.E.2d at 779 ("If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered.").

III. Conclusion

For the reasons stated above, we affirm the trial court's order denying RME's motion for summary judgment and granting summary judgment in favor of defendants.

AFFIRMED.

Judges STROUD and McCULLOUGH concur.

SOUTHERN SHORES REALTY SERVICES, INC., PLAINTIFF
v.
WILLIAM G. MILLER, THE MILLER FAMILY LIMITED PARTNERSHIP II, THE MILLER FAMILY LIMITED PARTNERSHIP III, OLD GLORY II, LLC, OLD GLORY III, LLC, OLD GLORY IV, LLC, OLD GLORY V, LLC, OLD GLORY VI, LLC, OLD GLORY VII, LLC, OLD GLORY IX, LLC, OLD GLORY XI, LLC, OLD GLORY XII, LLC, AND OLD GLORY XIII, LLC, DEFENDANTS

No. COA16-557

Filed 17 January 2017

Corporations—breach of contract—piercing the corporate veil—directed verdict—judgment notwithstanding verdict

The trial court did not err by denying defendants' motions for directed verdict or judgment notwithstanding the verdict on plaintiff's claims for breach of contract against all defendants, and on plaintiff's claim for piercing the corporate veil brought against William G. Miller. Plaintiff presented more than a scintilla of evidence to support each element of these claims.

Appeal by defendants from orders entered on 1 October 2015 and 15 December 2015, and judgment entered 18 November 2015 by Judge Cy A. Grant, Sr. in Dare County Superior Court. Heard in the Court of Appeals 3 November 2016.

Vandeventer Black LLP, by David P. Ferrell and Kevin A. Rust, for plaintiff-appellee.

Gregory E. Wills, P.C., by Gregory E. Wills, for defendants-appellants.

ZACHARY, Judge.

William G. Miller; The Miller Family Limited Partnership II; The Miller Family Limited Partnership III; Old Glory II, LLC; Old Glory III, LLC; Old Glory IV, LLC; Old Glory V, LLC; Old Glory VI, LLC; Old Glory VII, LLC; Old Glory IX, LLC; Old Glory XI, LLC; Old Glory XII, LLC; and Old Glory XIII, LLC (collectively, defendants), appeal from judgment entered against them following a trial on claims asserted by Southern Shores Realty Services, Inc. (plaintiff), and from the trial court's denial of defendants' motions for a directed verdict and for entry of Judgment Notwithstanding the Verdict ("JNOV") or in the alternative for a new trial. On appeal, defendants argue that they were entitled to entry of a directed verdict or JNOV on plaintiff's claims for breach of contract against all defendants, and on plaintiff's claim for piercing the corporate veil brought against William G. Miller ("Mr. Miller"). We have carefully reviewed defendants' arguments in light of the record on appeal and the applicable law, and conclude that the trial court did not err and that defendants are not entitled to relief.

I. Background

This appeal arises out of a dispute concerning thirteen contracts for management of properties available for short-term vacation rental of houses on the North Carolina coast. Plaintiff is a North Carolina real estate company that provides rental management services to the owners of vacation rental properties on the Outer Banks. Plaintiff generally contracts with the owners of properties that are available for short-term rental of less than thirty days. Plaintiff advertises and rents the properties, and provides housekeeping, maintenance, and record-keeping services for the properties' owners. In return, plaintiff earns a commission of 13% of the total rental price for a vacation rental. In order to reserve a house for a short-term vacation rental, prospective tenants are required to deposit half of the total rental amount with plaintiff in advance. When plaintiff receives the deposit, it disburses the deposit to the owner of the property. When the tenant departs the rental property, plaintiff transfers the remainder of the rental payment to the property's owner.

Defendant William Miller is "the patriarch and speaker for the family business" at issue in the present case, which consists of the construction, rental, and sale of coastal properties. The other defendants are limited liability companies (LLCs) established in North Carolina pursuant to the North Carolina Limited Liability Company Act, N.C. Gen. Stat. § 57D-1-01 *et. seq.* Each LLC was established to manage the construction, rental, and sale of a single coastal property. Mr. Miller is a managing member of each LLC, as are Mr. Miller's wife and their sons.

In 2009, plaintiff signed thirteen contracts with the LLC defendants in the instant case, under the terms of which plaintiff agreed to provide rental management services for the 2010 vacation rental season. The contracts and the correspondence between plaintiff and defendants refer to defendants as "Owner" and to plaintiff as "SSRS" or "Agent." Each of these contracts provided, in relevant part that:

> SSRS will remit rental proceeds collected, less any deductions authorized hereunder . . . to Owner on the following basis: SSRS will disburse up to 50% of the rental rate when the advance payment is made and the balance is disbursed after the tenant's departure provided: (1) this shall not constitute a guarantee by Agent for rental payments that Agent is unable to collect in the exercise of reasonable diligence; (2) payments hereunder are subject to limitations imposed by the VRA regarding advance disbursement of rent; and (3) if, pursuant to this Agreement or required by the VRA, Agent either has refunded or will refund in whole or in part any rental payments made by a tenant and previously remitted to Owner, Owner agrees to return same to Agent promptly upon Agent's demand. Two exceptions to this policy are:
>
> . . .
>
> 2. "Foreclosure" - Owner will report foreclosure on the rental property to Agent and rental proceeds already disbursed to Owner will be returned to SSRS. Any remaining proceeds paid by Tenant will be held by SSRS to ensure the availability of funds for Tenant's rental or refund. If Agent receives information regarding Owner's financial difficulties of any kind, Agent will hold remaining rental income for the protection of Tenant's rental or refund. Foreclosure is a material fact; therefore, Agent is required to disclose knowledge of foreclosure to Tenant.

Plaintiff subscribed to a listing service that included a list of properties that were in foreclosure. In January of 2010, one of defendants' properties that plaintiff had rented to vacation tenants for the summer of 2010 appeared on the foreclosure list. Defendants had not informed plaintiff of this occurrence. David Watson, plaintiff's sales manager and general manager, arranged a meeting with Mr. Miller, at which Mr. Miller agreed to return the rental deposit that plaintiff had disbursed to defendant LLCs for rental of the property. Sharon Bell, who had been plaintiff's

accounting supervisor for approximately twenty years, attended the meeting and heard Mr. Miller agree to return the rental deposits that had been disbursed to his businesses for properties that were in foreclosure. However, those funds were never returned to plaintiff, and on 28 January 2010, plaintiff received a letter from an attorney associated with the law firm representing defendants, admitting that five of the properties subject to contracts between plaintiff and defendants were then in foreclosure. The letter stated in relevant part, the following:

> As Mr. Miller has informed you, Stubbs & Perdue is representing Mr. Miller and Old Glory in his negotiations with various creditors that hold liens on his properties and that you are the rental agency for. I am writing to assure you that we are diligently working on this project and are hopeful that some sort of resolution will be reached.
>
> What we are unsure of is whether this will be inside or outside of bankruptcy. If we are only left with the alternative of filing for bankruptcy, our plan is to file under chapter 11 of the Bankruptcy Code. This will allow Mr. Miller to remain in control of the properties and continu[e] to operate as normal while a plan of reorganization is formulated. Mr. Miller has stressed his intentions to continue utilizing Southern Shores as his rental agency.
>
> Right now the there are two primary factors that would push Mr. Miller into filing for bankruptcy. First would be the inability to reach a compromise with the creditors where a sale of a property would occur. A close second is this notice letter from your agency that might deter renters from selecting Old Glory properties for their vacation.
>
> Mr. Miller and I understand your concern regarding protecting your renters, so let me assure you that we will keep you in the loop as far as our negotiations with creditors. We would appreciate prior notice of your sending out these notice letters. As I have been informed, if we are unsuccessful in dismissing a foreclosure hearing, your intent is to send out the letters two weeks prior to the scheduled sale. Right now, the first scheduled hearing is February 5 and the sale is February 26. We will be attending the hearing and attempt to have the foreclosure dismissed. I will let you know how this goes.

> Further, we have advised Mr. Miller to retain the deposits as these are needed to maintain and ready the properties for being rented. . . . Accordingly, it is imperative that Mr. Miller continue to receive deposits from Southern Shores as is specified in the agreement between you and Mr. Miller.
>
> Just in case you are not aware, here is a current list of hearing and sale dates:
>
> [Chart of foreclosure sale dates scheduled for dates between 28 February 2010 and 18 March 2010].

On 3 February 2010, plaintiff received a letter from Mr. Miller individually, in which Mr. Miller stated that:

> From: William G. Miller
>
> Subject: Rental Management Agreement - Foreclosures.
>
> I am very disappointed with [plaintiff]. [Plaintiff] is in violation of the 2009 and 2010 Rental Management Agreement, Pars. 7.
>
> As stated - Foreclosure is a material fact.
>
> Property on the disclosure list is not "Foreclosure." The hearing is only to determine if the property is indeed a possible "foreclosure." Even after the hearing, the property is not in "Foreclosure." The hearing determines the appropriate players involved and the real negotiations can start. As a last resort, a Chapter 11 would be filed the day before any announced sale. At that point the players could be forced to accept changes requested.
>
> Holding Rental Income - [Plaintiff] has not received any information of the owners' financial difficulties. . . . [T]his is a "STRATEGIC DEFAULT" [which is] defined throughout the United States as "NOT A FINANCIAL DIFFICULTY" but as a process to force an action.
>
> . . . [Plaintiff] has withheld money from ten other properties. Each property is a Limited Liability Company (LLC). . . . This appears to be a willful action to harm my business.
>
> . . .

> These are my initial thoughts. I have not run it through my lawyers. Consider this and talk to me within the next two days, so I can plan accordingly.

(Use of capital letters and underlining in original).

One of defendants' properties was sold in foreclosure on 18 March 2010. At that point, defendants had not returned the funds that plaintiff had disbursed to them. On 26 March 2010, plaintiff terminated its contractual relationship with defendants. Plaintiff informed the tenants who had reserved rentals for the summer of 2010 about the foreclosure proceedings and used plaintiff's own funds to recompense the tenants for the rental deposits they had made and that plaintiff had disbursed to defendants. Ultimately, eleven of the thirteen properties that were the subject of contracts between plaintiff and defendants were sold in foreclosure.

On 19 January 2011, plaintiff filed a complaint against defendants, seeking to recover the sum of $74,221.79 that plaintiff had spent from its own funds to recompense the tenants for the tenants' deposits made prior to the initiation of foreclosure proceedings on defendants' properties. Plaintiff asserted claims for breach of contract and unfair or deceptive trade practices against all defendants, and a claim against Mr. Miller individually, seeking to hold him personally liable for plaintiff's damages by application of the equitable remedy known as "piercing the corporate veil." On 1 April 2011, defendants filed an answer denying the material allegations of plaintiff's complaint, raising various defenses, and asserting counterclaims against plaintiff for breach of contract, breach of fiduciary duty, tortious interference with contract, and unfair or deceptive trade practices. In its reply, plaintiff denied defendants' allegations and moved for dismissal of defendants' counterclaims. On 20 March 2013, Judge Walter H. Godwin, Jr. entered an order granting plaintiff's motion for summary judgment on defendants' counterclaims for breach of fiduciary duty, tortious interference with contract, and unfair or deceptive trade practices, denying plaintiff's motion for summary judgment on defendants' claim for breach of contract, and denying defendants' motion for summary judgment on plaintiff's claims for breach of contract and unfair or deceptive trade practices.

The parties' claims were tried before the trial court and a jury at the 28 September 2015 civil session of Dare County Superior Court. During trial, Mr. Miller testified that he had been employed full-time as a real estate owner and manager since 1987, and that plaintiff and defendants had signed contracts for plaintiff to manage thirteen rental properties

for the 2010 summer vacation season. Mr. Miller admitted that in the fall of 2009 defendants stopped making mortgage payments on the properties that were the subject of their contracts with plaintiff. At that point, Mr. Miller prepared proposed modification agreements for submission to one or more lending institutions and investigated the possibility of declaring bankruptcy. Mr. Miller testified that the plan for each property was to "stop the payments on it and then if we get a foreclosure sale and before the upset period is up, you know, we will file Chapter 11 and we will retain control of that entity through a Chapter 11."

Mr. Miller conceded that the contracts between plaintiff and defendants required defendants to notify plaintiff if a property was in foreclosure and to return rental deposits that had been disbursed to defendants, and that after some of defendants' properties went into foreclosure, defendants did not return the rental deposits that plaintiff had disbursed to defendants. He also admitted that the eleven properties on which he stopped making mortgage payments were sold "on the courthouse steps[.]" In addition, Mr. Miller acknowledged that the contracts further provided that if plaintiff "receives information regarding owner's financial difficulties of any kind" that plaintiff would then "hold remaining rental income for protection of tenants, rental or refund" and that the contracts specified that foreclosure was a material fact that would be disclosed to tenants.

At the close of plaintiff's evidence and again at the close of all the evidence, defendants moved for a directed verdict in their favor. At the close of all the evidence, the trial court granted defendants' motion for directed verdict against plaintiff as to plaintiff's claims for unfair or deceptive trade practices, but allowed plaintiff's claims for breach of contract and piercing the corporate veil to be submitted to the jury. At the close of all the evidence, plaintiff moved for directed verdict on defendants' claim for breach of contract; the trial court denied plaintiff's motion and defendants' claim for breach of contract was also submitted to the jury.

On 2 October 2015, the jury returned verdicts finding that defendants had breached their contracts with plaintiff; that plaintiff was entitled to recover the sum of $74,221.79 (the amount of rental deposits disbursed to defendants) from defendants; and that Mr. Miller had controlled defendants with respect to the acts or omissions that damaged plaintiff. The jury did not find that plaintiff had breached the contracts with defendants. On 18 November 2015, the trial court entered judgment in accordance with the jury's verdicts. On 24 November 2015, defendants filed a motion asking the trial court to set aside the verdicts of the jury

pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(b)(1), and to enter judgment in Mr. Miller's favor with respect to plaintiff's claim to pierce the corporate veil, or in the alternative, to award defendants a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. Following a hearing on defendants' motions, the trial court entered an order on 15 December 2015, denying defendants' motions. Defendants noted a timely appeal to this Court from the denial of defendants' motion for directed verdict, JNOV, or a new trial, and the judgment entered in this case.

II. Standard of Review

On appeal, defendants argue that the trial court erred by denying their motions for directed verdict and JNOV. "When considering the denial of a directed verdict or JNOV, the standard of review is the same. 'The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury.' " *Green v. Freeman*, 367 N.C. 136, 140, 749 S.E.2d 262, 267 (2013) (quoting *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991)). "A motion for JNOV 'should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim.' 'A scintilla of evidence is defined as very slight evidence.' " *Hayes v. Waltz*, __ N.C. App. __, __, 784 S.E.2d 607, 613 (2016) (quoting *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (2009), and *Pope v. Bridge Broom, Inc.*, __ N.C. App. __, __ 770 S.E.2d 702, *disc. review denied*, 368 N.C. 284, 775 S.E.2d 861 (2015)). "The party moving for judgment notwithstanding the verdict, like the party seeking a directed verdict, bears a heavy burden under North Carolina law." *Taylor v. Walker*, 320 N.C. 729, 733, 360 S.E.2d 796, 799 (1987).

Defendants also argue that the trial court erred in its instructions to the jury. "When a challenge to the trial court's instructions to the jury raises a legal question, it is subject to review *de novo*. However, . . . '[t]he form and phraseology of issues is in the court's discretion, and there is no abuse of discretion if the issues are sufficiently comprehensive to resolve all factual controversies.' " *Geoscience Grp., Inc. v. Waters Constr. Co., Inc.*, 234 N.C. App. 680, 686, 759 S.E.2d 696, 700 (2014) (citing *Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc.*, 159 N.C. App. 43, 53, 582 S.E.2d 701, 706-07 (2003), and quoting *Barbecue Inn, Inc. v. CP & L*, 88 N.C. App. 355, 361, 363 S.E.2d 362, 366 (1988)).

III. Breach of Contract

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor*

v. Hill, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citation omitted). In this case, the parties stipulated to the existence of valid contracts between defendants and plaintiff. As discussed above, each of the parties' contracts stated, in relevant part, that:

> . . . SSRS will disburse up to 50% of the rental rate when the advance payment is made and the balance is disbursed after the tenant's departure provided . . . if, pursuant to this Agreement or required by the VRA, Agent either has refunded or will refund in whole or in part any rental payments made by a tenant and previously remitted to Owner, Owner agrees to return same to Agent promptly upon Agent's demand. . . .
>
> . . . Owner will report foreclosure on the rental property to Agent and rental proceeds already disbursed to Owner will be returned to SSRS. Any remaining proceeds paid by Tenant will be held by SSRS to ensure the availability of funds for Tenant's rental or refund. If Agent receives information regarding Owner's financial difficulties of any kind, Agent will hold remaining rental income for the protection of Tenant's rental or refund. Foreclosure is a material fact; therefore, Agent is required to disclose knowledge of foreclosure to Tenant.

We hold that the terms of each of the contracts plainly required that if a rental property was subject to foreclosure, defendants would (1) notify plaintiff of the foreclosure proceeding, and (2) return to plaintiff any rental income that plaintiff had previously disbursed to defendants for the property that was in foreclosure. Plaintiff presented ample evidence establishing that defendants failed to perform either of these contractual obligations, and defendants do not dispute that they did not return the rental deposits that plaintiff had disbursed prior to learning that some of defendants' properties were in foreclosure. We conclude that plaintiff presented evidence to support each element of its claims for breach of contract and that the trial court did not err by denying defendants' motions for directed verdict and JNOV with respect to these claims.

In reaching this conclusion, we have carefully evaluated defendants' arguments urging us to reach a different result. Defendants' primary argument is that the result in this case should be dictated, not by the express terms of the parties' contracts, but by the statutory provisions of the North Carolina Vacation Rental Act ("VRA"), N.C. Gen. Stat. § 42A-1 *et. seq.* Defendants direct our attention to references in the

contracts in which the parties acknowledge their obligation to adhere to all applicable law, including the VRA. For example, each of the contracts states that:

> . . . Owner hereby contracts with Agent, and Agent hereby contracts with Owner, to lease and manage the propert . . . in accordance with all applicable laws and regulations, including but not limited to the North Carolina Vacation Rental Act (NCGS 42A-1 *et. seq.*) . . . upon the terms and conditions contained herein.

Defendants argue that their appeal raises a "matter of first impression" regarding the proper interpretation of N.C. Gen. Stat. § 42A-19(a) (2015), which states in relevant part that:

> The grantee of residential property voluntarily transferred by a landlord who has entered into a vacation rental agreement for the use of the property shall take title to the property subject to the vacation rental agreement if the vacation rental is to end not later than 180 days after the grantee's interest in the property is recorded in the office of the register of deeds.

N.C. Gen. Stat. § 42A-19(a) requires the buyer of property acquired in a *voluntary* transfer from the owner to honor previously executed vacation rental agreements that are scheduled within six months of the voluntary transfer. efendants contend that this provision also applies to property that is *involuntarily* transferred in a foreclosure proceeding. Defendants apparently assume that a tenant who has contracted for a short-term vacation rental of one or two weeks might choose to litigate the tenant's right to insist on the rental of a property that had been sold in foreclosure. As a practical matter, this seems unlikely; however, we conclude that on the facts of this case we are not required to resolve any issues pertaining to the VRA or to determine the correct interpretation of its provisions.

Assuming, *arguendo*, that defendants have correctly interpreted the scope of N.C. Gen. Stat. § 42A-19, this does not change the outcome of this case. The plain language of the parties' contracts required defendants to notify plaintiff if a rental property was in foreclosure, and to refund any previously disbursed rental payments associated with the property. "When competent parties contract at arm's length upon a lawful subject, as to them the contract is the law of their case." *Suits v. Insurance Co.*, 249 N.C. 383, 386, 106 S.E.2d 579, 582 (1959). "[T]o

ascertain the intent of the parties at the moment of execution . . . the court looks to the language used[.] . . . Presumably the words which the parties select were deliberately chosen and are to be given their ordinary significance." *Briggs v. Mills, Inc.*, 251 N.C. 642, 644, 111 S.E.2d 841, 844 (1960) (citations omitted).

Defendants suggest that because their contracts recite that the parties will follow the applicable provisions of the VRA - which would be required whether or not the contracts included the reference to the VRA - the terms of the contracts are thereby *replaced* by the VRA, which defendants contend "control[s] the relationship between all the parties[.]" Defendants have not cited any authority for the proposition that a contract's reference to relevant statutory provisions nullifies the contract's express terms, and we know of no authority for this position. We conclude that defendants have failed to show that the VRA conflicts with or replaces the terms of the parties' contracts, and that the interpretation of the VRA is not germane to the issue of defendants' entitlement to a directed verdict on plaintiff's claims for breach of contract.

Defendants also argue that, although the parties' contracts state that defendants "will report foreclosure on the rental property to Agent" and that "rental proceeds already disbursed to Owner will be returned to SSRS," these obligations do not arise until the entire foreclosure proceeding is completed and the deed to the property is transferred to a new owner. Defendants contend that the fact that "the VRA defines 'Transfer' as 'recording at the registrar of deeds' " requires the conclusion that "the term 'Foreclosure,' in this context, must mean the point at which a deed vesting title in the lender is recorded at the registrar of deeds[.]" However, "foreclosure" is defined as "[a] legal proceeding to terminate a mortgagor's interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property." Black's Law Dictionary 719 (9th ed. 2009). It is long established that "[i]n construing contracts ordinary words are given their ordinary meaning unless it is apparent that the words were used in a special sense. 'The terms of an unambiguous contract are to be taken and understood in their plain, ordinary and popular sense.' " *Harris v. Latta*, 298 N.C. 555, 558, 259 S.E.2d 239, 241 (1979) (internal quotation omitted). We conclude that the term "foreclosure" in the parties' contracts should be interpreted in its ordinary meaning as being a legal proceeding by a mortgagee brought against a mortgagor who has defaulted on payments due under the terms of a mortgage contract. Therefore, defendants' contractual obligation to notify plaintiff of foreclosure proceedings arose when these proceedings were initiated.

Defendants also argue that the trial court erred in its instructions to the jury on the effect of a sale in foreclosure upon a vacation rental tenant's legal right to enforce a short-term lease entered into prior to the foreclosure. Neither the trial court's instructions to the jury nor the verdict sheets submitted to the jury asked the jury to render a verdict on the effect of a foreclosure upon a tenant's legal right to force the purchaser of a property to honor a short-term vacation rental lease. At one point during its deliberations, the jury asked for instructions on the definition of the term "foreclosure" and on whether a bank that purchased a property in foreclosure would be required to honor a vacation rental agreement. The trial court instructed the jury on the definition of foreclosure taken from Black's Law Dictionary, 9th ed., as quoted above, and we conclude that the trial court did not err in giving this definition. The trial court further instructed the jury that our appellate jurisprudence had not established whether a bank would be obligated to honor a vacation rental lease after buying a property in foreclosure but that, as a general rule, "the sale under a mortgage or deed of trust cuts out and extinguishes all liens, encumbrances and junior mortgages executed subsequent to the mortgage containing the power."

Defendants contend that the trial court's instruction failed to account for an exception to the general rule established by the provisions of the VRA. However, as discussed above, the parties' contracts imposed certain duties upon defendants in the event of a foreclosure on a property that was subject to a short-term rental. These contractual obligations were not dependent upon or associated with the issue of the rights of a short-term vacation rental tenant upon foreclosure of a property subject to a short-term vacation lease, and the jury was not required to resolve any factual issues regarding the effect of foreclosure upon a tenant's rights in its determination of the merits of the parties' respective claims. Defendants have failed to articulate any way in which the trial court's instructions on this issue, even if erroneous, would have confused the jury as to any of the substantive issues it was required to resolve or would have affected the jury's verdict on plaintiff's claims for breach of contract. We conclude that this argument is without merit.

For the reasons discussed above, we conclude that plaintiff presented more than a scintilla of evidence to support each element of its claims for breach of contract. Therefore, the trial court did not err by denying defendants' motions for directed verdict, for entry of a JNOV, or for a new trial on these claims.

IV. Piercing Corporate Veil

Mr. Miller argues that the trial court erred by denying his motion for directed verdict, entry of JNOV, or award of a new trial on plaintiff's claim seeking to hold him personally liable for plaintiff's damages by applying the equitable doctrine of piercing the corporate veil. For the reasons that follow, we disagree.

A. Introduction: Legal Principles

The determination of whether an individual may be held personally liable for the debts of a business entity with which the individual is associated depends in part upon the nature of the entity. "The general rule is that in the ordinary course of business, a corporation is treated as distinct from its shareholders." *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 438, 666 S.E.2d 107, 112 (2008) (citation omitted). However:

> [E]xceptions to the general rule of corporate insularity may be made when applying the corporate fiction would accomplish some fraudulent purpose, operate as a constructive fraud, or defeat some strong equitable claim. Those who are responsible for the existence of the corporation are, in those situations, prevented from using its separate existence to accomplish an unconscionable result.

Ridgeway, 362 N.C. at 439, 666 S.E.2d at 112-113 (internal quotation omitted). Thus, "courts will disregard the corporate form or 'pierce the corporate veil,' and extend liability for corporate obligations beyond the confines of a corporation's separate entity, whenever necessary to prevent fraud or to achieve equity." *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985) (citation omitted). A court's decision to pierce the corporate veil, thereby "proceeding beyond the corporate form[,] is a strong step: Like lightning, it is rare [and] severe [.]" *Ridgeway* at 439, 666 S.E.2d at 112 (internal quotation omitted).

The limitation upon circumstances in which a corporate officer or shareholder may be personally liable for debts incurred by the corporation is an important distinction between the law governing corporations and that of partnerships. "Shareholders in a corporation are insulated from personal liability for acts of the corporation, . . . but partners in a partnership are not insulated from liability[.] . . . Stated differently, no corporate veil exists between a general partnership and its partners." *Ron Medlin Constr. v. Harris*, 364 N.C. 577, 583, 704 S.E.2d 486, 490 (2010).

In the present case, the defendants, with the exception of Mr. Miller, are limited liability companies, or LLCs. "An LLC is a statutory form of business organization . . . that combines characteristics of business corporations and partnerships." *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 636, 652 S.E.2d 231, 235 (2007) (internal quotation omitted). "[T]he North Carolina Limited Liability Company Act provides for the formation of a business entity combining the limited liability of a corporation and the more simplified taxation model of a partnership. . . allowing for great flexibility in its organization." *Id.* "[A]s its name implies, limited liability of the entity's owners, often referred to as 'members,' is a crucial characteristic of the LLC form, giving members the same limited liability as corporate shareholders. . . . As a corporation acts through its officers and directors, so an LLC acts through its member-managers[.]" *Id.* In addition, N.C. Gen. Stat. § 57D-3-30 (2015) provides that a "person who is an interest owner, manager, or other company official is not liable for the obligations of the LLC solely by reason of being an interest owner, manager, or other company official."

However, our appellate courts have generally upheld the imposition of personal liability upon an individual manager of an LLC under the same circumstances that support piercing the corporate veil. "[A] judgment in this area requires a peculiarly individualized and delicate balancing of competing equities. Nevertheless, for the purpose of achieving uniformity and predictability in this critical area of jurisprudence, this Court has previously adopted the 'instrumentality rule.' " *Ridgeway* at 440, 666 S.E.2d at 113 (quoting *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985)). In *Glenn*, our Supreme Court "enumerated three elements which support an attack on [a] separate corporate entity under the instrumentality rule[.]" *Glenn*, 313 N.C. at 454, 329 S.E.2d at 330. The Court described these elements as follows:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and

> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. at 455, 329 S.E.2d at 330 (internal quotation omitted). The Court also set out circumstances that have proven useful in determining whether it is appropriate to pierce the corporate veil in a specific case:

> Factors which heretofore have been expressly or impliedly considered in piercing the corporate veil include:
>
> 1. Inadequate capitalization[.] . . .
>
> 2. Non-compliance with corporate formalities. . . .
>
> 3. Complete domination and control of the corporation so that it has no independent identity. . . .
>
> 4. Excessive fragmentation of a single enterprise into separate corporations. . . .

Glenn at 455, 329 S.E.2d at 330-31 (citations omitted). These factors may be weighed differently in a case in which the business entity in question is an LLC rather than a corporation. For example, N.C. Gen. Stat. § 57D-3-20 (2015) provides in relevant part that "(a) The management of an LLC and its business is vested in the managers[,]" and that "(d) All members by virtue of their status as members are managers of the LLC[.]" Given that all members of an LLC are statutorily deemed to be managers, the fact that an individual has a management role in an LLC cannot, standing alone, justify imposing personal liability upon the manager on the grounds that he or she exercised "control" over the LLC.

B. Discussion

Preliminarily, we address the scope of defendants' appellate arguments. Plaintiff argues that our review should be limited to the arguments that defendants made on the issue of piercing the corporate veil at the trial level, in their motions for entry of a directed verdict. However, defendants have also appealed from the denial of their motion for entry of JNOV or the award of a new trial. We will therefore address arguments that defendants raised at either hearing.

As discussed above, to hold Mr. Miller personally liable for the judgment entered against defendants:

> [Plaintiff] must present evidence of three elements:
>
> "(1) Control . . . complete domination, not only of finances, but of policy and business practice in respect to the

> transaction attacked[;] . . . and (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a . . . positive legal duty . . . in contravention of [a] plaintiff's legal rights; and (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of."

Green v. Freeman, 233 N.C. App. 109, 111, 756 S.E.2d 368, 371-72 (2014) (quoting *Green*, 367 N.C. at 146, 749 S.E.2d at 270 (internal citations and quotations omitted)).

We next determine whether plaintiff offered "more than a scintilla" of evidence as to these elements. In making this determination, we will also consider the evidence of the factors discussed above, including inadequate capitalization, excessive fragmentation of a single enterprise into separate LLCs, and whether Mr. Miller exercised complete domination and control over the LLCs. We conclude that the non-compliance with corporate formalities, which is another factor identified in *Glenn*, is of less relevance in the context of an LLC, which is subject to far fewer formal statutory requirements than is a corporation. We also recognize that the mere fact that Mr. Miller had a management role in the LLCs cannot be the basis for imposing personal liability upon him.

It is undisputed that eleven of the thirteen properties that were the subject of the contracts between the parties were sold in foreclosure, and that during the course of the foreclosure proceedings Mr. Miller informed plaintiff that defendants might be forced to declare bankruptcy. The LLCs did not have sufficient capital to pay creditors and conduct business. We conclude that this is evidence tending to show that the LLCs were inadequately capitalized. In addition, the fact that a separate LLC was formed for the management of each individual rental property constitutes evidence from which a reasonable fact-finder might find that defendants' business enterprise was excessively fragmented. We note that at trial, Mr. Miller testified that the reason that defendants formed 30 or 40 LLCs for the business was to limit the liability of the LLCs.

We also conclude that plaintiff offered sufficient evidence to support a finding that Mr. Miller personally controlled the finances, policies, and business practices of the LLCs. In this respect, we note that at trial Mr. Miller acknowledged that he was in charge of managing the family business:

> MR. MILLER: Well we're all managing members and we all have the capability of signing papers and that sort of

> thing. It's been agreed at this point in time that we have an agreement within ourselves that, you know, I'm the present managing member but that James there is going to take over and he will have control.

Two of plaintiff's witnesses at trial, Mr. Watson and Ms. Bell, testified that their business dealings were always with Mr. Miller, whom they understood to be the "decision maker" for the LLCs. In fact, *defendants'* counsel asked Mr. Watson to acknowledge on cross-examination that "Mr. Miller [had] told [him] . . . that if there was any kind of bankruptcy done *he* would remain in charge[.]" (emphasis added). In addition, the attorney who wrote to plaintiff stated that the law firm with which he was associated represented "Mr. Miller and [the LLCs]" but did not indicate that the firm represented any other members of the LLCs individually. The content of the letter unmistakably characterized Mr. Miller as the "alter ego" of the family business. For example, the letter stated that a plan was being formulated that "will *allow Mr. Miller to remain in control* of the properties[,]" proclaimed that "Mr. Miller has stressed his intentions to continue utilizing [plaintiff] Southern Shores as *his* rental agency[,]" noted the existence of "two primary factors that would *push Mr. Miller into filing for bankruptcy*[,]" and warned plaintiff that "it is imperative that Mr. Miller continue to receive deposits from [plaintiff] Southern Shores as is specified in the *agreement between you and Mr. Miller*." Moreover, Mr. Miller wrote to plaintiff individually to express his opinions on matters in contention between the parties. Finally, we note that in their appellate brief, *defendants* describe Mr. Miller as "the patriarch and speaker for the family business."

As discussed above, in order to survive a motion for directed verdict or JNOV, the non-movant need only present "more than a scintilla of evidence" on each element of its claim. *Stark v. Ford Motor Co.*, 365 N.C. 468, 480, 723 S.E.2d 753, 761 (2012) (citation omitted). It is well established that in ruling on a motion for directed verdict or JNOV, "the trial court is to consider all evidence in the light most favorable to the party opposing the motion; the nonmovant is to be given the benefit of every reasonable inference that legitimately may be drawn from the evidence; and contradictions must be resolved in the nonmovant's favor." *Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986). In this case, we conclude that plaintiff presented more than a scintilla of evidence from which the jury could find that Mr. Miller exercised complete control over the LLCs. We also conclude that plaintiff offered sufficient evidence that Mr. Miller used his control over the LLCs to disregard the contractual obligation to return the rental deposits to plaintiff and that Mr. Miller's

actions were the proximate cause of the damages suffered by plaintiff. As a result, we conclude that the trial court did not err by denying defendants' motions for directed verdict or JNOV.

In their appellate brief, defendants direct our attention to the facts that the LLCs were properly formed under North Carolina law and that Mr. Miller did not own a majority share of the businesses. We have held, however, that plaintiff offered evidence of Mr. Miller's complete domination of the LLCs sufficient to allow the jury to determine whether he should be held personally liable for the judgment against defendants. Defendants also concede that an individual may be "held personally liable" when an individual's exercise of control is used to violate a duty owed to a plaintiff. In this case, there was evidence indicating that (1) defendants owed a duty to return to plaintiff the rental deposits previously disbursed when the properties went into foreclosure; (2) Mr. Miller made the substantive decisions for the LLCs and was known as the "decision maker"; (3) Mr. Miller refused to comply with this contractual obligation, even writing a letter to plaintiff as an individual (the letter in no way suggested that he was writing on behalf of other LLC members) expressing his personal "disappointment" with plaintiff; and (4) the damages suffered by plaintiff were directly and proximately caused by Mr. Miller's refusal to return the rental deposits. We conclude that defendants' argument regarding the insufficiency of plaintiff's evidence is without merit.

Defendants also argue, in a somewhat dramatic fashion, that unless the trial court is reversed "the concept of limited liability [will be] eliminated entirely from the law of contracts in North Carolina," with the result that any member of an LLC with "whom the opposing party actually deals with on a day-to-day basis, would be subject to personal liability for breach of the LLC's contract." Defendants contend that if we uphold the jury's verdict "then there is no point in having a 'limited liability' company in this State." We disagree with defendants' implication that the instant case is in some way extending or changing the established law concerning the imposition of personal liability on an individual based upon his or her actions in relation to a business entity. For example, it seems clear that on the facts of this case there would be no basis upon which to hold any of the other member-managers of the LLCs personally liable. Nor is Mr. Miller's liability premised simply upon his exercise of ordinary daily management of the LLCs. Instead, it appears that he made the decision to intentionally breach the parties' contracts without input from the other LLC members, and attempted to use the LLCs to achieve an unjust result. We also note that, to the extent

that defendants are urging that as a matter of public policy the law governing individual liability in the context of an LLC should be changed, "[t]he General Assembly is the policy-making agency because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004). We conclude that "plaintiff has carried his minimal burden of presenting more than a scintilla of evidence supporting his . . . claim." *Morris v. Scenera Research, LLC*, 368 N.C. 857, 862, 788 S.E.2d 154, 158 (2016).

For the reasons discussed above, we conclude that the trial court did not err by denying defendants' motions for directed verdict or JNOV and that its orders should be

AFFIRMED.

Judges ELMORE and STROUD concur.

WALTER CALVERT SMITH, PLAINTIFF
v.
STEWART POLSKY, M.D., CAROLINA UROLOGY PARTNERS, PLLC, AND LAKE NORMAN UROLOGY, PLLC, DEFENDANTS

No. COA16-605

Filed 17 January 2017

Appeal and Error—interlocutory orders and appeals—denial of pretrial motion in limine—no substantial right

Defendants' appeal of the trial court's denial of certain portions of their pretrial motion in limine was from an interlocutory order Defendants failed to establish that their appeal affected a substantial right that would be lost or inadequately addressed absent immediate review.

Appeal by defendants from order entered 8 March 2016 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 15 November 2016.

Homesley, Gaines, Dudley & Clodfelter, LLP, by Edmund L. Gaines and Christina Clodfelter, for plaintiff-appellee.

Parker Poe Adams & Bernstein LLP, by Chip Holmes and Bradley K. Overcash, for defendants-appellants.

ZACHARY, Judge.

Stewart Polsky, M.D., Carolina Urology Partners, PLLC, and Lake Norman Urology, PLLC (defendants) appeal an order denying certain portions of their pretrial motion *in limine*. For the reasons that follow, we dismiss defendants' appeal as interlocutory.

I. Background

Plaintiff Walter Smith (Smith) became a paraplegic in 1975 when he suffered a spinal cord injury in a motor vehicle accident. In 1995, Smith underwent the implantation of an inflatable penile prosthesis, which malfunctioned and ceased operating in 2008. Dr. Polsky became Smith's urologist in 2005. On 25 August 2009, Dr. Polsky performed penile prosthesis revision surgery on Smith, a procedure that involved removing the original inflatable penile prosthetic device and replacing it with a new one.

Following the procedure, Smith experienced pain and swelling at the surgical site, and he was eventually hospitalized on 19 September 2009. Dr. Polsky examined Smith at the hospital, diagnosed him with a "possible scrotal infection," and prescribed three antibiotics. The antibiotics Gentamicin, Vancomycin, and Ceftriaxone were administered intravenously. After being discharged from the hospital on 23 September 2009, Smith was instructed to continue taking the three antibiotics intravenously, and Advanced Home Care, Inc. (Advanced Home Care) provided and administered the medications. Smith received his last dose of Gentamicin—which is known to cause bilateral vestibulopathy, a condition caused by damage to one's inner ears that results in imbalance and impaired vision—on 9 October 2009. Shortly thereafter, Smith was diagnosed with bilateral vestibulopathy. Smith had the infected, replacement penile prosthesis surgically removed approximately three years later.

In February 2011, Smith filed for Chapter 7 Bankruptcy. On 21 August 2012, the trustee of Smith's bankruptcy estate filed a complaint in Iredell County Superior Court against Dr. Polsky, his medical practice, and Advanced Home Care. The complaint alleged numerous theories of medical negligence arising out of the surgical care as well as the prescription and monitoring of the post-surgery antibiotic therapy that Smith received from August through October of 2009. Pertinent to this appeal, the complaint alleged that once Smith was diagnosed with

a scrotal (or superficial wound) infection on 19 September 2009, Dr. Polsky was negligent in choosing to prescribe antibiotic therapy instead of surgically removing the infected penile prosthesis. All claims against Advanced Home Care were eventually settled and dismissed, and a portion of the settlement proceeds were used to satisfy the claims of Smith's bankruptcy estate. As a result, Smith was substituted as plaintiff against Dr. Polsky and his practice, the remaining defendants in the medical negligence action.

In May 2014, defendants filed a Motion for Summary Judgment, or in the alternative, Motion for Partial Summary Judgment. However, before the trial court ruled on defendants' motion, the parties entered into a Voluntary Dismissal with Prejudice and Stipulation (the Dismissal). Pursuant to the Dismissal, Smith dismissed with prejudice the claims contained in Paragraph 41, subparagraphs (d) through (k) of his complaint, which alleged the following theories of negligence:

> (d) Having decided to initiate antibiotic therapy on September 19, 2009, Defendant Dr. Polsky breached the standard of care by choosing the antibiotic gentamicin as opposed to choosing other more efficacious and less risky agents.
>
> (e) Having decided to administer gentamicin, Dr. Polsky failed to communicate to the hospital pharmacists the severity of the infection, and whether he was employing gentamicin as a primary or synergistic agent.
>
> (f) Having decided to administer gentamicin, Dr. Polsky failed to adequately inform himself of what parameters would be applied by the hospital pharmacists in calculating "gentamicin daily dosing per pharmacy."
>
> (g) Having decided to administer gentamicin, Dr. Polsky failed to select a proper dose of gentamicin for the target infection assuming that it required treatment for more than 3-5 days.
>
> (h) Having decided to administer gentamicin, Dr. Polsky failed to prudently balance the probability of success with antibiotic treatment against the extremely high likelihood that bilateral vestibulopathy would result from the prolonged administration of 7 mg/kg/day of gentamicin.
>
> (i) Having decided to administer gentamicin, Dr. Polsky failed to order renal function testing with sufficient

> frequency to detect rapidly deteriorating renal function. This violation continued throughout the period of gentamicin administration as changes in renal function were noted. Defendant Dr. Polsky breached the standard of care when he failed to discontinue gentamicin immediately on October 1, 2009, when excessive gentamicin and vancomycin trough levels were obtained in conjunction with an increased serum creatinine.
>
> (j) Defendant Dr. Polsky breached the standard of care when he failed to discontinue gentamicin immediately on October 6, 2009, when excessive gentamicin and vancomycin trough levels were obtained in conjunction with an increased serum creatinine.
>
> (k) His care was also deficient in other respects as may be discovered in the prosecution of this action.

The Dismissal also required Smith to file an amended complaint, and he did so on 3 September 2014. Smith further stipulated that the "only remaining theories of negligence alleged against [d]efendants . . . [were] enumerated in Paragraph 32, subparagraphs (a) through (c)" of his amended complaint, which read:

> (a) Defendant Dr. Polsky breached the standard of care by failing to utilize a multiple wound irrigation technique at the time of the AMS 700 reimplantation on August 25, 2009.
>
> (b) On or about September 19, 2009, Defendant Dr. Polsky breached the standard of care by failing to remove the previously placed reservoir and attached tubing, along with the AMS 700 device which was implanted on August 25, 2009.
>
> (c) Defendant Dr. Polsky breached the standard of care by initiating antibiotic treatment for the infected prosthetic device on September 19, 2009. The risk of Dr. Polsky's prescribed long term therapy greatly outweighed the extremely unlikely potential reward of salvaging the device.

In exchange for Smith's promises to dismiss the above-mentioned theories of negligence and file an amended complaint, defendants agreed and stipulated that material issues of fact remained concerning Smith's surviving negligence claims.

Smith and defendants both filed pretrial motions between November and December of 2015. Defendants' motion *in limine* No. 1 requested that the trial court exclude

> [a]ny evidence and/or argument related to any theories of liability that Dr. Polsky was negligent in any manner for the selection and/or use of the antibiotic Gentamicin, including but not limited to: (1) the decision not to choose any alternative antibiotic; (2) testimony or evidence relating to the individual toxicity characteristics of Gentamicin; (3) that the "prolonged" use of Gentamicin was negligent; and (4) evidence related to the "synergistic" effect of the antibiotics as those claims have been Dismissed, with Prejudice, by the Plaintiff.

The trial court held a hearing on the parties' pretrial motions on 21 December 2015. At the hearing, defendants argued that while Smith could present evidence that "any antibiotic treatment would not have helped [him] because the only [prudent] decision [was] the surgical removal," he could not contend that Dr. Polsky was negligent in choosing, administering, dosing, or monitoring the antibiotic Gentamicin.

In contrast, Smith argued that not allowing him to explain the risks of the Gentamicin treatment "would be to hamstring . . . , prevent us from being able to give the jury the rest of the story." Smith's position was that the term "initiating antibiotic therapy" in Paragraph 32, subparagraph (c) of his amended complaint included and preserved claims that Dr. Polsky was negligent in prescribing the long-term use of Gentamicin.

Defendants responded by asserting that all negligence claims concerning the specific, prolonged use of Gentamicin to treat Smith's infection had been dismissed with prejudice. According to defendants, the Dismissal acted as a prior adjudication on the merits as to those claims, and all subparts of defendants' motion *in limine* should have been granted pursuant to the doctrine of res judicata.

In an order entered 8 March 2016, the trial court denied defendant's motion *in limine* No. 1, subparts (1) through (3), and granted defendants' motion as to subpart (4). Defendants appeal.

II. Standard of Review

It is well established that

> [a] motion *in limine* seeks pretrial determination of the admissibility of evidence proposed to be introduced at

> trial, and is recognized in both civil and criminal trials. The trial court has wide discretion in making this advance ruling . . . . Moreover, 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.

Heatherly v. Indus. Health Council, 130 N.C. App. 616, 619, 504 S.E.2d 102, 105 (1998) (internal citations and quotation marks omitted). When this Court reviews a decision to grant or deny a motion *in limine*, the determination will not be reversed absent a showing that the trial court abused its discretion. *Id.*

In the instant case, because the trial court's order denying portions of defendants' motion *in limine* No. 1 is interlocutory, we must first determine whether this appeal is properly before us. Both Smith and defendants contend that the trial court's ruling is subject to immediate review, but "acquiescence of the parties does not confer subject matter jurisdiction on a court." *McCutchen v. McCutchen*, 360 N.C. 280, 282, 624 S.E.2d 620, 623 (2006).

"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. 354, 362, 57 S.E.2d 377, 381 (1950). In most cases, a party has "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). This general rule prevents "fragmentary and premature appeals that unnecessarily delay the administration of justice[.]" *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980).

There are "at least two instances[,]" however, in which a party may immediately appeal from an interlocutory order or judgment. *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 579 (1999). The first occasion arises when the trial court certifies its order for immediate review under Rule 54(b) of the North Carolina Rules of Civil Procedure. *McConnell v. McConnell*, 151 N.C. App. 622, 624, 566 S.E.2d 801, 803 (2002). In the second instance, immediate review is available where the order affects a substantial right. *Blackwelder v. Dept. of Human Res.*, 60 N.C. App. 331, 333, 299 S.E.2d 777, 779 (1983).

Our Supreme Court has defined a "substantial right" as "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person]

is entitled to have preserved and protected by law: a material right." *Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579 (quotation marks and citation omitted) (alteration in original). "The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order." *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001). Put differently, an appellant must demonstrate that the challenged "order deprives the appellant of 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*, 60 N.C. App. at 335, 299 S.E.2d at 780). In making this determination, our appellate courts take a "restricted view of the 'substantial right' exception to the general rule prohibiting immediate appeals from interlocutory orders." *Blackwelder*, 60 N.C. App. at 334, 299 S.E.2d at 780.

III. Analysis

According to defendants, "[a]llowing [Smith] to resurrect his Gentamicin-specific claims that were previously dismissed undermines the doctrine of *res judicata* and violates [d]efendants' substantial right to avoid inconsistent verdicts on the same claims." Defendants further argue that if the trial court's preliminary ruling on their motion *in limine* is not addressed, they will be forced "to re-litigate the previously-adjudicated Gentamicin claims." Defendants' res judicata defense rests on their contention that the Dismissal operated as a final judgment on the merits releasing them from any further exposure to Gentamicin claims at trial. In sum, while acknowledging the interlocutory nature of their appeal, defendants insist that the denial of their motion *in limine* No. 1, subparts (1) through (3), affects a substantial right. We disagree.

The longstanding rule in North Carolina is that a voluntary dismissal with prejudice is, by operation of law, a final judgment on the merits implicating the doctrine of res judicata. *Riviere v. Riviere*, 134 N.C. App. 302, 306, 517 S.E.2d 673, 676 (1999); *Kabatnik v. Westminster Co.*, 63 N.C. App. 708, 712, 306 S.E.2d 513, 515 (1983); *Barnes v. McGee*, 21 N.C. App. 287, 290, 204 S.E.2d 203, 205 (1974). "Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citations omitted). By its very operation, the doctrine precludes the relitigation of "all matters . . . that were or should have been adjudicated in the prior action." *Id.* (citation omitted).

This Court has previously held that "when a trial court enters an order rejecting the affirmative defense[] of res judicata . . ., the order *can* affect a substantial right and *may* be immediately appealed." *Strates Shows, Inc. v. Amusements of Am., Inc.*, 184 N.C. App. 455, 459, 646 S.E.2d 418, 422 (2007) (emphasis added; citation and internal quotation marks omitted). Even so, it is clear that invocation of res judicata "does not . . . automatically entitle a party to an interlocutory appeal of an order rejecting" that defense. *Foster v. Crandell*, 181 N.C. App. 152, 162, 638 S.E.2d 526, 534, *disc. review denied*, 361 N.C. 567, 650 S.E.2d 602 (2007). For example, the "denial of a motion for summary judgment based upon the defense of *res judicata* may involve a substantial right so as to permit immediate appeal only where a possibility of inconsistent verdicts exists if the case proceeds to trial." *Country Club of Johnston County, Inc. v. U.S. Fidelity and Guar. Co.*, 135 N.C. App. 159, 167, 519 S.E.2d 540, 546 (1999) (citation and quotation marks omitted), *disc. review denied*, 351 N.C. 352, 542 S.E.2d 207 (2000). Thus, motions based upon res judicata serve to "prevent[] the possibility that a successful defendant, or one in privity with that defendant, will twice have to defend against the same claim by the same plaintiff, or one in privity with that plaintiff." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993).

According to defendants, "[p]roceeding with the present case under the trial court's ruling will force [them] to re-litigate the previously-adjudicated Gentamicin claims" and to "confront the likelihood of inconsistent verdicts[.]" In making this argument, defendants equate the Dismissal with a prior decision on the merits in a court of law.

Previous decisions, however, have specifically restricted interlocutory appeals based on the doctrine of res judicata.

> Interlocutory appeals [are limited] to the situation when the rejection of . . . defenses [based upon res judicata or collateral estoppel] g[i]ve rise to a risk of two actual trials resulting in two different verdicts. *See, e.g., Country Club of Johnston County, Inc.* . . . , 135 N.C. App. . . . [at] 167, 519 S.E.2d . . . [at] 546 . . . (holding that an order denying a motion based on the defense of res judicata gives rise to a "substantial right" only when allowing the case to go forward without an appeal would present the possibility of inconsistent jury verdicts) . . . ; *Northwestern Fin. Group, Inc. v. County of Gaston*, 110 N.C. App. 531, 536, 430 S.E.2d 689, 692 (holding that the defense of res judicata gives rise to a "substantial right" only when there is a risk of two actual trials resulting in two different verdicts),

> *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993). One panel, however, has held that a "substantial right" was affected when defendants raised defenses of res judicata and collateral estoppel based on a prior federal summary judgment decision rendered on the merits. *See Williams v. City of Jacksonsville Police Dep't*, 165 N.C. App. 587, 589-90, 599 S.E.2d 422, 426 (2004).

Foster, 181 N.C. App. at 162-63, 638 S.E.2d at 534.

The *Foster* Court dismissed the defendants' appeal and had no need to reconcile *Country Club*, *Northwestern*, and *Williams*, because in *Foster*, as here, there was no possibility of a result inconsistent with a prior jury verdict or a prior decision on the merits by a judge. *Id.* at 163, 638 S.E.2d at 534. Indeed, defendants' res judicata defense in the instant case rests solely on the Dismissal with the accompanying stipulations. A review of the pertinent case law reveals that, in the context of interlocutory appeals involving the defense of res judicata, this Court has drawn a distinction between claims of a substantial right based on prior voluntary dismissals with prejudice and claims based on prior adjudications by a judge or jury. *Id.*; *Robinson v. Gardner*, 167 N.C. App. 763, 769, 606 S.E.2d 449, 453, *disc. review denied*, 359 N.C. 322, 611 S.E.2d 417 (2005); *Allen v. Stone*, 161 N.C. App. 519, 522, 588 S.E.2d 495, 497 (2003); *see also Anderson v. Atl. Cas. Ins. Co.*, 134 N.C. App. 724, 727, 518 S.E.2d 786, 789 (1999) (holding that the defendant was not entitled to immediate appeal based on argument that action was barred by a release because "[a]voidance of trial is not a substantial right").

In *Allen*, the plaintiff had dismissed her claims pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure on two previous occasions. 161 N.C. App. at 519-20, 588 S.E.2d at 496. After the plaintiff filed a third action, the defendant filed a motion to dismiss based on the ground that Rule 41(a)(1)'s two-dismissal rule[1] barred the action. The trial court denied the motion to dismiss, and the defendant appealed, arguing that the denial of his motion based on the prior dismissals affected a substantial right. *Id.* at 521, 588 S.E.2d at 496. However, this Court rejected the defendant's argument and explained "that avoidance of a trial, no matter how *tedious or unnecessary*, is not a substantial right entitling an appellant to immediate review." *Id.* at 522, 588 S.E.2d at 497 (emphasis added).

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1. Rule 41(a)(1) of the North Carolina Rules of Civil Procedure provides "that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed . . . an action based on or including the same claim."

The procedural facts in *Robinson* were virtually identical to those in *Allen*. However, the defendants in *Robinson* claimed that their appeal affected a substantial right because the plaintiff's prior dismissal with prejudice gave rise to the defense of res judicata. 167 N.C. App. at 768, 606 S.E.2d at 452-53. After holding that it was bound by *Allen*, the *Robinson* Court explained that the defendants' assertion of a res judicata defense had no talismanic effect on the substantial right inquiry:

> The present appeal does not involve possible inconsistent jury verdicts or even an inconsistent decision on the merits since, as in *Allen*, there was only a voluntary dismissal that would—if not set aside—result in an adjudication on the merits only by operation of law. There has been no decision by any court or jury that could prove to be inconsistent with a future decision. Defendants do not seek to avoid inconsistent decisions; they seek to avoid any litigation at all.

Id. at 769, 606 S.E.2d at 453.

In *Foster*, the defendants appealed the denial of their motion for judgment on the pleadings. The defendants' claim of a substantial right was based on their contention that a prior settlement and voluntary dismissal with prejudice afforded them the defenses of collateral estoppel and res judicata. 181 N.C. App. at 162, 638 S.E.2d at 533. This Court disagreed, held that it was bound by the decisions in *Allen* and *Robinson*, and dismissed the defendants' appeal as interlocutory. *Id.* at 163, 638 S.E.2d at 534. The *Foster* Court reasoned as follows: "Like the defendants in *Robinson* and *Allen*, defendants in this case base their claim of res judicata on a prior voluntary dismissal with prejudice that does not reflect a ruling on the merits by any jury or judge." *Id.* at 163-64, 638 S.E.2d at 534.

As in *Foster*, defendants in the present case base their claim of a substantial right exclusively on Smith's dismissal with prejudice and the parties' accompanying stipulations. In making this claim, defendants ignore the fact that no judge or jury has ruled on the merits of the claims affected by the Dismissal. Instead, the Dismissal represents "an adjudication on the merits only by operation of law." *Robinson*, 167 N.C. App. at 769, 606 S.E.2d at 453. This appeal does not involve possible inconsistent jury verdicts, much less an inconsistent decision on the merits. *See Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982) (while the possibility of two trials on the same issue can give rise to a substantial right justifying an interlocutory appeal, the appellant must

show that a judgment or order creates "the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue"); *Country Club of Johnston County, Inc.*, 135 N.C. App. at 167, 519 S.E.2d at 546 (dismissing appeal based on res judicata because prior decisions involved summary judgment orders and not verdicts, and, therefore, the case "present[ed] no possibility of inconsistent verdicts").

In addition, despite defendants' assertion that res judicata "controls" our substantial right analysis, it is not insignificant that this appeal arises from the partial denial of a motion *in limine*. A preliminary ruling "on a motion *in limine* is subject to change during the course of trial, depending upon the actual evidence offered at trial." *Xiong v. Marks*, 193 N.C. App. 644, 647, 668 S.E.2d 594, 597 (2008) (citation and quotation marks omitted). Consequently, the trial court may, in its discretion, modify its ruling on the Gentamicin claims before or during trial of this matter.

For the reasons stated above, defendants have failed to establish that their appeal affects a substantial right that will be lost or inadequately addressed absent immediate review. As such, the trial court's order on the motion *in limine* is not subject to immediate appeal.

IV. Conclusion

Because defendants have not demonstrated the existence of a substantial right, their appeal from the trial court's denial of a portion of their motion *in limine* is not eligible for immediate review. Accordingly, defendants' appeal is dismissed as interlocutory.

DISMISSED.

Judges CALABRIA and INMAN concur.

STATE OF NORTH CAROLINA
v.
KENDRICK TARRELL BURTON

No. COA16-343

Filed 17 January 2017

1. Appeal and Error—preservation of issues—failure to object at trial

Although defendant contended that the trial court erred by allowing the State to introduce into evidence the cocaine found in the vehicle and admitting his statement to an officer that the cocaine in the vehicle belonged to him, defendant did not object to this evidence at trial and thus failed to preserve it for review.

2. Constitutional Law—effective assistance of counsel—failure to object—failure to show prejudice

Defendant did not receive ineffective assistance of counsel based on his counsel's failure to object at trial to the admission of either the cocaine obtained from defendant's car or his incriminating statement admitting that the cocaine belonged to him rather than another person. Defendant failed to show any prejudice arising from his trial counsel's actions.

Appeal by defendant from judgment entered 10 November 2015 by Judge Marvin P. Pope Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 7 September 2016.

Roy Cooper, Attorney General, by Katy Dickinson-Schultz, Assistant Attorney General, for the State.

Meghan Adelle Jones for defendant-appellant.

DAVIS, Judge.

This case presents the issues of whether (1) the State must affirmatively prove that a vehicle was "readily mobile" in order for the "automobile exception" to permit a warrantless search under the Fourth Amendment; and (2) *Miranda* warnings are required before a law enforcement officer may read aloud the charges against two arrestees in each other's presence. Kendrick Tarrell Burton ("Defendant") appeals from his conviction of felony possession of cocaine. On appeal, he

contends that the trial court erred in admitting both the cocaine discovered as the result of a search of his vehicle and the incriminating statement he made while in custody. Alternatively, he contends that he was denied his right to effective assistance of counsel. After careful review, we conclude that Defendant received a fair trial free from error.

Factual and Procedural Background

The State presented evidence at trial tending to establish the following facts: On 18 February 2014, Officer Joshua Kingry of the Asheville Police Department was patrolling an area in downtown Asheville, North Carolina. At approximately 9:10 p.m., Officer Kingry was driving on Water Street when he smelled a strong odor of marijuana. He got out of his car to investigate the source of the odor. He determined that the odor was coming from a silver Honda Civic — which was later determined to be registered to Defendant — parked on the side of the street. As Officer Kingry walked up to the vehicle, he noticed a man — later determined to be Cortez Duff — sitting in the passenger seat with a "tray in his lap . . . [with] marijuana . . . on the tray[.]"

Officer Kingry told Duff to exit the vehicle, searched him, and found a set of digital scales in Duff's pocket. While Officer Kingry was talking to Duff, Defendant came out of the house adjacent to the area where the vehicle was parked. Defendant asked why Officer Kingry was searching Duff, and Officer Kingry responded that he had smelled marijuana and found Duff in possession of marijuana in the car. Defendant told Officer Kingry that he "couldn't search based on the odor of marijuana" and that Defendant needed to get his wallet out of the vehicle.

Officer Kingry directed both Defendant and Duff to sit on the hood of the car while he searched the vehicle. During his search, he found Defendant's wallet as well as a Mason jar containing marijuana. In addition, Officer Kingry located a black sock with two plastic bags inside of it, each containing a substance he recognized to be crack cocaine.

Officer Kingry placed Defendant and Duff under arrest and took them to the Buncombe County Detention Center. After arrest warrants had been issued, Officer Kingry read both warrants aloud to Defendant and Duff in each other's presence. As Officer Kingry finished reading the charges, Defendant told Officer Kingry that Duff "shouldn't be charged with the cocaine because it was [Defendant's]." Defendant was subsequently indicted for possession with intent to sell or deliver cocaine.

A jury trial was scheduled to begin in Buncombe County Superior Court on 10 November 2015. That same day, Defendant's counsel filed a

motion to suppress the evidence that had been obtained from his car.[1] The motion stated, in pertinent part, as follows:

> According to the State's Discovery, my client was detained on 2/14/2014 on or about 26 Water Street, Asheville, N.C. He was detained because Asheville Police Officer Kingry said that he stopped and when he smelled the odor of marijuana coming from a parked car, owned by my client and occupied by Corteze [sic] Lamont Duff. Officer Kingry reported seeing Marijuana in the lap of Mr. Duff who he detained. He also detained my client when he came out to his car to try and retrieve his wallet. The defendant objects to being detained, arrested, searched, and having his car searched. He denies voluntarily consenting to any searches.

A hearing on Defendant's motion was held before the Honorable Marvin P. Pope, Jr. Defendant's attorney stated the following to the trial court regarding the motion: "Your Honor, frankly I'm not sure my client has standing to object to the beginning of the detention, but I think he might. He wanted me to object to it, but I don't think it's a strong argument."

The trial court denied Defendant's motion to suppress, and Defendant's trial began. The jury ultimately found Defendant guilty of felony possession of cocaine. Defendant was sentenced to 5 to 15 months imprisonment. His sentence was suspended, and he was placed on supervised probation for 18 months. Defendant gave oral notice of appeal in open court.

Analysis

I. Preservation of Issues for Appeal

[1] Defendant argues that the trial court erred in allowing the State to introduce into evidence the cocaine found in the vehicle because, he contends, the search of his car violated his rights under the Fourth Amendment. He also challenges the admission of his statement to Officer Kingry that the cocaine in the vehicle belonged to him on the theory that the introduction of this evidence violated his rights under the Fifth Amendment. However, Defendant concedes in his brief that his trial counsel did not object to any of this evidence at trial.

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1. We note that the record does not indicate that Defendant ever made a motion to suppress the statement he made at the detention center to Officer Kingry.

Our Supreme Court has held that

> [t]o preserve an issue for appeal, the defendant must make an objection at the point during the trial when the State attempts to introduce the evidence. A defendant cannot rely on his pretrial motion to suppress to preserve an issue for appeal. His objection must be renewed at trial. [Defendant's] failure to object at trial waived his right to have this issue reviewed on appeal. This assignment of error is overruled.

State v. Golphin, 352 N.C. 364, 463, 533 S.E.2d 168, 232 (2000) (citations omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

Thus, Defendant has failed to preserve these issues for appellate review. *See id.* at 465, 533 S.E.2d at 234 ("As [defendant] did not object, he has failed to preserve these assignments of error for appellate review.").

Nor is Defendant entitled to review of these issues for plain error. It is well established that this Court will conduct plain error review only where the defendant specifically makes a plain error argument in his appellate brief. *See State v. Dennison*, 359 N.C. 312, 312-13, 608 S.E.2d 756, 757 (2005) (where "defendant did not 'specifically and distinctly' allege plain error as required by North Carolina Rule of Appellate Procedure 10(c)(4), defendant [was] not entitled to plain error review" (citation omitted)). Here, Defendant has failed to "specifically and distinctly" argue plain error in his brief, and — for this reason — he is not entitled to plain error review. *See Golphin*, 352 N.C. at 465, 533 S.E.2d at 234 (because defendant "did not 'specifically and distinctly' argue plain error . . . these assignments of error are overruled" (internal citation omitted)).

II. Ineffective Assistance of Counsel

[2] Defendant contends, alternatively, that he was denied effective assistance of counsel. 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." *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (citation and quotation marks omitted), *cert. denied*, __ U.S. __, 182 L. Ed. 2d 176 (2012).

> Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result

> of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

> In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal. It is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendants to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Turner, 237 N.C. App. 388, 395, 765 S.E.2d 77, 83 (2014) (internal citations, quotation marks, and brackets omitted), *disc. review denied*, 368 N.C. 245, 768 S.E.2d 563 (2015). However, "[i]n considering ineffective assistance of counsel claims, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Id.* at 396, 765 S.E.2d at 84 (citation and brackets omitted).

Defendant argues that his trial counsel's representation was ineffective because he failed to object at trial to the admission of either (1) the cocaine obtained from Defendant's car; or (2) his incriminating statement admitting that the cocaine belonged to him rather than to Duff. We address each of these issues in turn.

A. Discovery of Cocaine Inside Defendant's Vehicle

Defendant contends that his trial counsel should have objected on Fourth Amendment grounds to the admission of the cocaine obtained during Officer Kingry's warrantless search of his vehicle. Defendant asserts that because the State did not prove that Defendant's car was

"readily mobile," a warrantless search of the vehicle was not permitted under the Fourth Amendment. We disagree.

It is well established that "[p]ursuant to the so-called 'automobile exception' to the warrant requirement, a search warrant is not a prerequisite to the carrying out of a search of a motor vehicle as long as the officer has probable cause to search." *State v. Corpening*, 109 N.C. App. 586, 589, 427 S.E.2d 892, 894 (1993). The United States Supreme Court has explained that the automobile exception to the Fourth Amendment's protection against warrantless searches and seizures "has historically turned on the ready mobility of the vehicle, and on the presence of the vehicle in a setting that objectively indicates that the vehicle is being used for transportation." *California v. Carney*, 471 U.S. 386, 394, 85 L. Ed. 2d 406, 415 (1985).

While appearing to concede that the automobile exception would normally apply to the facts of this case, Defendant argues that the exception is inapplicable here because the State failed to prove that Defendant's vehicle was "readily mobile." In making this argument, Defendant cites our Supreme Court's decision in *State v. Isleib*, 319 N.C. 634, 356 S.E.2d 573 (1987).

In *Isleib*, an officer observed the defendant driving a vehicle, and based on an informant's tip, the officer conducted a warrantless search of the vehicle without the defendant's consent. *Id.* at 638, 356 S.E.2d at 576-77. The officer did not see any contraband in plain view, but upon searching a pocketbook in the vehicle, he found a bag of marijuana. The defendant filed a motion to suppress the evidence, arguing that her Fourth Amendment rights were violated as a result of the warrantless search. The trial court granted her motion, and we affirmed. *Id.* at 636, 356 S.E.2d at 575.

The Supreme Court reversed our decision, holding that the search of the vehicle fell within the automobile exception to the warrant requirement. *Id.* at 637, 356 S.E.2d at 575. The court held that

> [t]he so-called "automobile exception" to the warrant requirement . . . is founded upon two separate but related reasons: the inherent mobility of motor vehicles which makes it impracticable, if not impossible, for a law enforcement officer to obtain a warrant for the search of an automobile while the automobile remains within the officer's jurisdiction and the decreased expectation of privacy

> which citizens have in motor vehicles, which results from the physical characteristics of automobiles and their use.

Id. at 637, 356 S.E.2d at 575-76 (internal citations omitted).

Defendant attempts to characterize *Isleib* as standing for the proposition that where an officer does not actually see a vehicle being driven, the vehicle cannot be deemed "readily mobile" for purposes of the automobile exception. However, no such proposition was stated by our Supreme Court in *Isleib*. Nor has Defendant cited to any other case expressly holding that the State must prove a vehicle was actually capable of movement at the time an officer conducted a warrantless search of it where the vehicle's appearance gave no indication it was incapable of being driven.[2]

In the present case, the record establishes that Officer Kingry observed Defendant's car parked on the street next to his residence. No evidence was presented at trial suggesting that the vehicle was actually incapable of movement at the time it was searched by Officer Kingry.[3]

Therefore, Defendant has failed to offer any persuasive argument that an objection by his trial counsel on this ground would have been successful. Accordingly, he has failed to show prejudice for purposes of his ineffective assistance of counsel claim. *See State v. Roache*, 358 N.C. 243, 326, 595 S.E.2d 381, 433 (2004) (rejecting ineffective assistance of counsel claim where defendant failed to show prejudice).

B. Incriminating Statement

Defendant next argues that his trial counsel provided ineffective assistance by failing to object to the admission of his statement to Officer Kingry that the cocaine belonged to him rather than Duff. He contends that this statement was obtained in violation of his Fifth Amendment rights because Officer Kingry failed to advise him of his *Miranda*[4] rights before reading the two warrants to him and Duff in each other's presence.

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2. Defendant cites a number of decisions applying the automobile exception in which the court mentions as part of the factual summary of the case that the vehicle was observed by an officer while it was being driven. However, we reject Defendant's attempt to extrapolate from these cases a rule that an officer *must* actually see the vehicle being driven before the automobile exception can apply.

3. While there was testimony that Defendant's car was towed following his arrest, there was no explanation given for the towing, and we lack any basis for concluding that the vehicle was towed because it was inoperable.

4. *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966).

The warnings required by *Miranda* "appl[y] only in the situation where a defendant is subject to custodial interrogation." *State v. Barden*, 356 N.C. 316, 337, 572 S.E.2d 108, 123 (2002) (citation omitted), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). Here, the State does not dispute that Defendant was in custody at the time the warrants were read to him and Duff. Thus, the remaining question is whether Defendant's statement was made during interrogation.

> Both the United States Supreme Court and this Court have held that during a custodial interrogation, if the accused invokes his right to counsel, the interrogation must cease and cannot be resumed without an attorney being present . . . . The term 'interrogation' is not limited to express questioning by law enforcement officers, but also includes any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Golphin, 352 N.C. at 406, 533 S.E.2d at 199 (internal citations and quotation marks omitted).

This Court has held that "[f]actors that are relevant to the determination of whether police should have known their conduct was likely to elicit an incriminating response include: (1) the intent of the police; (2) whether the practice is designed to elicit an incriminating response from the accused; and (3) any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion[.]" *State v. Fisher*, 158 N.C. App. 133, 142-43, 580 S.E.2d 405, 413 (2003) (citation and quotation marks omitted), *aff'd per curiam*, 358 N.C. 215, 593 S.E.2d 583 (2004).

The State contends that Defendant's statement was spontaneous rather than the result of interrogation. It is well established that "[s]pontaneous statements made by an individual while in custody are admissible despite the absence of *Miranda* warnings." *State v. Lipford*, 81 N.C. App. 464, 468, 344 S.E.2d 307, 310 (1986). North Carolina courts have applied this principle on a number of occasions.

For example, in *State v. Mack*, 81 N.C. App. 578, 345 S.E.2d 223 (1986), the defendant was found asleep in a car that had driven off the road and come to a stop on top of a fence. When a police officer approached the car, he smelled a strong odor of alcohol and saw a bottle of whisky on the front passenger side floorboard. After the officer transported the defendant to the police station, the officer asked him

"questions with reference to a social security number." *Id.* at 579, 345 S.E.2d at 224 (quotation marks omitted). The defendant responded, "All I did was . . . I fell asleep and ran over there to the fence." *Id.*

The defendant moved to suppress this statement, and the trial court denied the motion. *Id.* at 579-80, 345 S.E.2d at 224. On appeal, this Court determined that because the officer could not "have reasonably anticipated a self-incriminatory answer" in response to questions regarding the defendant's social security information, "we construe defendant's inopportune response to the officer's routine booking questions as a 'spontaneous utterance.' " *Id.* at 582, 345 S.E.2d at 225.

Similarly, in *State v. Frazier*, 142 N.C. App. 361, 542 S.E.2d 682 (2001), a police officer found drugs in the defendant's hotel room. At trial, the officer was asked by the prosecutor whether the defendant made any statements while in the hotel room. The officer testified that the defendant had stated that "there were no other drugs in the room." *Id.* at 364, 542 S.E.2d at 685. The defendant's counsel moved to suppress the officer's testimony regarding the defendant's statement, arguing that it was obtained in violation of his *Miranda* rights. The trial court denied the motion. *Id.* at 364, 542 S.E.2d at 685.

This Court affirmed the trial court's denial of the motion to suppress the defendant's statement. We held that "[s]pontaneous statements made by an individual while in custody are admissible despite the absence of Miranda warnings." *Id.* at 369, 542 S.E.2d at 688 (citation and quotation marks omitted). Because there was "no evidence from the record Defendant's statement was made in response to any question posed by the officers[,]" we concluded that the utterance was a "spontaneous statement, not made in response to the officers' prompting, and thus . . . admissible despite the absence of *Miranda* warnings." *Id.* at 370, 542 S.E.2d at 689; *see also State v. Sellers*, 58 N.C. App. 43, 48, 293 S.E.2d 226, 229 (where defendant told officer "I'm drunk. I would maybe blow a thirty [on a breathalyzer test,]" the statement was spontaneous such that no *Miranda* warning was required), *disc. review denied*, 306 N.C. 749, 295 S.E.2d 485 (1982).

We are likewise satisfied in the present case that Defendant's admission to Officer Kingry is properly classified as a spontaneous statement. N.C. Gen. Stat. § 15A-501 provides, in pertinent part, that "[u]pon the arrest of a person, with or without a warrant . . . a law-enforcement officer: (1) Must inform the person arrested of the charge against him or the cause for his arrest." N.C. Gen. Stat. § 15A-501 (2015); *see also* N.C. Gen. Stat. § 15A-401(c)(2) (2015).

Here, the State argues that Officer Kingry's act of reading Defendant's and Duff's charges to both of them at the same time was consistent with his statutory obligation to inform them of the charges against them. While Defendant argues that it is not a common practice for an officer to inform multiple arrestees of the charges against them in the presence of one another, he has failed to cite any legal authority condemning this practice as unlawful. Moreover, Defendant has also failed to show (1) any awareness by Officer Kingry of a personal relationship between Defendant and Duff so as to have led him to believe that upon hearing the charges against Duff, Defendant was likely to make an inculpatory statement; or (2) that his reading of the charges in this manner was a practice designed to improperly elicit incriminating statements from defendants. Therefore, no *Miranda* warning was required under these circumstances.

Accordingly, Defendant has once again failed to show any prejudice arising from his trial counsel's actions. Therefore, we are unable to conclude that Defendant received ineffective assistance of counsel. *See State v. Givens*, __ N.C. App. __, __, 783 S.E.2d 42, 49 (2016) ("Accordingly, defendant's argument that he received ineffective assistance of counsel and is entitled to a new trial is overruled.").

Conclusion

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

NO ERROR.

Judges CALABRIA and TYSON concur.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
GEORGE REYNOLD EVANS, DEFENDANT

No. COA16-629

Filed 17 January 2017

1. Constitutional Law—right to speedy trial—Barker factors—failure to challenge sufficiency of evidence

The trial court did not err by denying defendant's motions to dismiss the drugs and weapons charges against him based on an alleged violation of his constitutional right to a speedy trial. The trial court properly considered the factors articulated in *Barker*. Further, defendant did not challenge the evidentiary support for any of the trial court's findings, or argue that the court's findings did not support its conclusion of law.

2. Search and Seizure—traffic stop—motion to suppress evidence—reasonable suspicion

The trial court did not err in a drugs and weapons case by denying defendant's motion to suppress the evidence seized at the time of his arrest. The officer had the requisite reasonable suspicion to justify a traffic stop of defendant's car, and the trial court's findings of fact also supported this conclusion. Further, defendant failed to offer any appellate argument challenging the evidentiary basis for a conclusion that reasonable suspicion existed.

Appeal by defendant from judgment entered 8 January 2016 by Judge Jay D. Hockenbury in Onslow County Superior Court. Heard in the Court of Appeals 29 November 2016.

Attorney General Roy Cooper, by Associate Attorney General Cara Byrne, for the State.

Sharon L. Smith for defendant-appellant.

ZACHARY, Judge.

George Evans (defendant) appeals from the judgment entered upon his convictions for possession of drug paraphernalia and carrying a concealed weapon. On appeal, defendant argues that the trial court erred by denying his motions to dismiss the charges against him for violation

of his constitutional right to a speedy trial, and to suppress evidence seized at the time of defendant's arrest. After careful consideration of defendant's arguments, in light of the record and the applicable law, we conclude that the trial court did not err and that defendant is not entitled to relief on the basis of these arguments.

I. Factual and Procedural Background

At approximately 4:00 a.m. on 9 March 2013, Jacksonville Police Officer Jason Griess was patrolling the area of U.S. 17 and Moosehart Avenue, an area that Officer Griess characterized as a "known drug corridor." As Officer Griess drove north on U.S. 17, he observed that a vehicle traveling south had come to a complete stop in the right-hand lane of travel. The vehicle "was stopped in the middle of the southbound travel lane in the outside travel lane," and was not at a stop sign or intersection. Defendant was later determined to be the driver of the car. Officer Griess then saw an unidentified pedestrian approach the passenger side of the car and lean in the window. Based on Officer Griess's observations that the vehicle had stopped in the roadway at 4:00 a.m., that a man then approached and leaned into the car and that these events occurred in an area known for drug activity, Officer Griess decided to conduct an investigatory traffic stop. When Officer Griess turned his patrol vehicle around and approached the car from behind, the vehicle started moving south again, and pulled into a parking lot. Officer Griess followed the car into the parking lot and alerted other officers as to his location.

In the parking lot, Officer Griess got out of his patrol vehicle and approached defendant's car. As Officer Griess approached the car, he saw defendant open the door, duck his head down, and then straighten up. Defendant came around the side of the car, raised his arms, and told Officer Griess that he had gotten out of the car in order to pick up his cell phone from the floor of the car. Officer Griess ordered defendant to get back in the car. Several other law enforcement officers soon arrived, including Sergeant Chris Funke, who noticed that a glass pipe was lying directly behind the driver's side front tire. Officer Griess testified at trial that:

> It was a clear glass cylindrical pipe . . . [with] dark residue on it and what I -- I believe to be crack cocaine inside of it that was dark as well like it had been used recently. I also noted at the time it was unbroken. The location of it was directly behind the front driver's side.

Based upon his training and experience, Officer Griess believed the pipe to be of the type used to smoke crack cocaine. The pipe was three

or four inches directly behind the front tire and in a location where, if the pipe had been present in the parking lot before defendant entered, it would have been crushed when defendant's car drove over it. Sergeant Funke took possession of the pipe, and Officer Griess placed defendant under arrest for possession of drug paraphernalia and possession of cocaine. When Officer Griess searched defendant's car incident to this arrest, he discovered a pellet gun.

On 9 March 2013, defendant was arrested and charged with possession of cocaine, possession of drug paraphernalia, and carrying a concealed weapon. Defendant was released on an unsecured bond the same day. In April, 2014, defendant was arrested and charged with felony assault. Defendant was unable to make bond and remained in jail awaiting trial on the charges associated with this serious assault and was still incarcerated on those charges when defendant was tried for the offenses at issue in this case. On 16 April 2014, the unsecured bond that had been set for the present charges was changed to a $2,500 secured bond. On 6 March 2015, defendant filed a motion for a speedy trial, and on 15 May 2015, the trial court modified the bond in this case to unsecured; however, defendant remained in jail on the assault charges. Defendant was indicted for the charges in the instant case on 15 April 2015.

The charges against defendant came on for trial at the 5 January 2016 criminal session of Onslow County Superior Court. Prior to trial, the trial court conducted a hearing on defendant's motions to dismiss the charges against him for violation of his constitutional right to a speedy trial and to suppress items seized at the time of his arrest. The court denied both of these motions. On 8 January 2016, the jury returned verdicts finding defendant guilty of possession of drug paraphernalia and carrying a concealed weapon, but finding him not guilty of possession of cocaine. The trial court sentenced defendant to consecutive terms of imprisonment of 45 days each for the two offenses of which he was convicted. Because defendant was given credit for the 341 days that he was in jail prior to trial, he did not serve any additional time as a result of these convictions. Defendant gave notice of appeal in open court.

II. Standard of Review

Defendant has appealed from the trial court's orders on two pretrial motions that were heard by the court without a jury. "On appeal, 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.' " *Barker v. Barker*, 228 N.C. App. 362, 364, 745 S.E.2d 910, 912 (2013)

(quoting *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). "The well-established rule is that findings of fact made by the court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support them, although the evidence might have supported findings to the contrary." *Henderson County v. Osteen*, 297 N.C. 113, 120, 254 S.E.2d 160, 165 (1979) (citation omitted). "A trial court's unchallenged findings of fact are 'presumed to be supported by competent evidence and [are] binding on appeal.' " *Hoover v. Hoover*, __ N.C. App. __, __, 788 S.E.2d 615, 616 (2016) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

In this case, defendant argues that the trial court erred by denying his motions to dismiss the charges against him for deprivation of his constitutional right to a speedy trial and to suppress the evidence seized at the time of his arrest on the grounds that the evidence was seized in violation of his rights under the Fourth Amendment to the United States Constitution. Thus, both of defendant's appellate arguments are based upon an assertion that his constitutional rights were violated. "An appellate court reviews conclusions of law pertaining to a constitutional matter *de novo*." *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (citation omitted). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

III. Speedy Trial Motion

A. Introduction

[1] The Sixth Amendment to the United States Constitution states, in relevant part, that "in all criminal prosecutions the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI. "This provision is made applicable to the states by the Fourteenth Amendment." *State v. Washington*, 192 N.C. App. 277, 282, 665 S.E.2d 799, 803 (2008) (citing *Klopfer v. North Carolina*, 386 U.S. 213, 222, 18 L. Ed. 2d 1, 8 (1967)). The leading case on a criminal defendant's constitutional right to a speedy trial is *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972), in which the United States Supreme Court set out a framework for analyzing a defendant's assertion of a violation of the right to a speedy trial:

> A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should

> assess in determining whether a particular defendant has been deprived of his right. . . . [W]e identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

Barker, 407 U.S. at 530, 33 L. Ed. 2d at 116-117. "North Carolina courts have adopted these standards in analyzing alleged speedy trial violations." *Washington*, 192 N.C. App. at 282, 665 S.E.2d at 803 (citing *State v. Bare*, 77 N.C. App. 516, 519, 335 S.E.2d 748, 750 (1985)). *Barker* also held that no single factor is determinative:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

Barker at 533, 33 L. Ed. 2d at 118. We next consider the factors identified in *Barker* in the context of the facts of this case.

B. *Barker* Factors

1. Length of Delay

In analyzing a defendant's claim of deprivation of the right to a speedy trial, "[w]e must first determine the relevant period of delay. 'A defendant's right to a speedy trial attaches upon being formally accused of criminal activity, by arrest or indictment.' The period relevant to speedy trial analysis ends upon trial." *State v. Friend*, 219 N.C. App. 338, 343, 724 S.E.2d 85, 90 (2012) (quoting *State v. Hammonds*, 141 N.C. App. 152, 159, 541 S.E.2d 166, 172 (2000)). In this case, defendant was arrested on 9 March 2013 and tried beginning on 5 January 2016, a period of delay of two years and ten months.

"[S]ome delay is inherent and must be tolerated in any criminal trial[;] for example, the state is entitled to an adequate period in which to prepare its case for trial[.]" *State v. Pippin*, 72 N.C. App. 387, 391-92, 324 S.E.2d 900, 904 (1985) (citations omitted). "Consequently, 'the length of a delay is not determinative of whether a violation has occurred.' " *Hammonds*, 141 N.C. App. at 159, 541 S.E.2d at 172 (quoting *Bare*, 77 N.C. App. at 519, 335 S.E.2d at 750). Thus:

> "[T]he length of the delay is to some extent a triggering mechanism. Until there is some delay which is

> presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." . . . Because the length of delay is viewed as a triggering mechanism for the speedy trial issue, "its significance in the balance is not great."

Id. (quoting *Barker* at 530-31, 33 L. Ed. 2d at 117, and *State v. Hill*, 287 N.C. 207, 211, 214 S.E.2d 67, 71 (1975)).

In this case, defendant asserts that the delay of almost three years between his arrest and the trial on the present charges was long enough to trigger our examination of the other three factors set out in *Barker*. The State argues that the delay was not unreasonable but concedes that the length of the delay may be "a triggering mechanism[.]" We conclude that the length of delay in this case was extensive enough to trigger our consideration of the other *Barker* factors.

2. Reason for Delay

Preliminarily, we address the proper burden of proof regarding the production of evidence as to the reason for the delay of a defendant's trial. In *State v. Spivey*, 357 N.C. 114, 579 S.E.2d 251 (2003), the defendant argued that the four and a half year delay between his arrest and trial violated his right to a speedy trial. Our Supreme Court agreed that "the length of delay was approximately four and one-half years, which is clearly enough to trigger examination of the other factors." *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255. The Court then addressed the defendant's duty to produce evidence as to the cause of the delay:

> [The] defendant has the burden of showing that the delay was caused by the neglect or willfulness of the prosecution. Only after the defendant has carried his burden of proof by offering *prima facie* evidence showing that the delay was caused by the *neglect or willfulness* of the prosecution must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence. This Court has stated:
>
> > "The constitutional guarantee does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case. . . . Neither a defendant nor the State can be protected from prejudice which is an incident of ordinary or reasonably necessary delay. The proscription is against

> purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort."

Spivey at 119, 579 S.E.2d at 255 (emphasis in original) (quoting *State v. Johnso*n, 275 N.C. 264, 273, 167 S.E.2d 274, 280 (1969) (other citations omitted)). We conclude that upon a defendant's production of evidence that his trial was delayed for a length of time sufficient to trigger review of the other *Barker* factors, the defendant then has the burden of producing evidence establishing a *prima facie* case that the delay resulted from the neglect or willfulness of the State. At that point, the burden shifts to the State to rebut the defendant's evidence.

On appeal, defendant proposes a different burden of proof, and argues that the trial court "erred in applying the *Barker* analysis, because it failed to hold the prosecution to its burden of justifying the delay once [the defendant] made a *prima facie* showing of unreasonable delay." Defendant contends that when a defendant shows that the length of delay is sufficient to trigger review of the other *Barker* factors, the burden of proof then shifts to the State to explain the cause of the delay, *without* requiring the defendant to make an initial proffer of evidence indicating that the delay was caused by the willful acts or negligence of the State. We disagree.

Defendant's position is supported solely by his reference to an excerpt from a sentence in *Pippin*, in which this Court stated that on the facts of that case, the Court "agree[d] with the implicit finding of the trial court that a delay of fourteen months in bringing defendant to trial was *prima facie* unreasonable and required the district attorney to fully justify the delay." *Pippin*, 72 N.C. App. at 392, 324 S.E.2d at 904. Defendant appears to contend that the use of the phrase "*prima facie* unreasonable" in this excerpt has the effect of placing the burden upon the State to "fully justify" any pretrial delay that is lengthy enough to warrant review of the factors discussed in *Barker*. However, review of the entire *Pippin* opinion makes it clear that defendant's interpretation of that case is not correct. In *Pippin*, this Court stated that:

> Defendant has the initial burden of showing, *prima facie*, that the delay was caused by the willful acts or neglect of the prosecuting authority, and, if this burden is met, the State must "offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* showing or risk dismissal."

Pippin, 72 N.C. App. at 391, 324 S.E.2d at 904 (emphasis added) (quoting *State v. McKoy*, 294 N.C. 134, 143, 240 S.E. 2d 383, 390 (1978)). Upon

review of the facts of the case and the factors identified in *Barker*, we held that:

> In balancing the four *Barker* factors, we find that defendant had presented a *prima facie* case that the district attorney's delay in bringing him to trial for approximately fourteen months was caused, in significant part, by the negligence of the district attorney in securing an indictment under which defendant could be properly tried. . . . Once the defendant presented a *prima facie* case that substantial delay was the result of the district attorney's negligence, the burden of proof shifted to the state to fully explain and justify the reasons for the delay.

Pippin at 398, 324 S.E.2d at 907-908 (emphasis added). We conclude that *Pippin* does not support defendant's position on the burden of proof in a case raising a speedy trial claim.

In the present case, defendant does not argue that he presented evidence that the delay of his trial was the result of the willful actions or negligence of the State. Defendant instead relies upon his contention, which we have rejected, that the State had the initial burden of producing evidence to justify the delay. We also observe that the uncontradicted record evidence established that (1) between the time of defendant's arrest and his trial, he was represented by five different attorneys, each of whom needed time to become familiar with the case, and that (2) although the prosecutor submitted the glass pipe to the State Crime Lab within a few days of defendant's arrest, the lab did not return the pipe and test results to the State until 22 July 2015. We conclude that defendant has failed to make a persuasive argument regarding the reason for the delay.

3. Defendant's Assertion of Right

In *Barker*, the United States Supreme Court held that although a defendant's failure to assert his right to a speedy trial would not constitute a waiver, "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker* at 532, 33 L. Ed. 2d at 118. In this case, defendant asserted his right to a speedy trial in a timely *pro se* motion, which was later adopted by his counsel.

4. Prejudice

Regarding the prejudice arising from a violation of a defendant's right to a speedy trial, *Barker* held that:

> Prejudice . . . should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker, 407 U.S. at 532, 33 L. Ed. 2d at 118.

At the hearing on defendant's speedy trial motion, the trial court asked defendant's counsel to articulate the prejudice that defendant had suffered as a result of the delay in his trial. After consulting with defendant, his counsel stated that defendant was prejudiced by being jailed for almost a year on relatively minor charges and that the delay "allowed the State through its witnesses to formulate a concerted plan on how to respond to these allegations. . . . In other words, they were -- it gave them time to get their stories all together so they would be consistent." In addition, defendant testified at the hearing that he was prejudiced by the delay in his trial because, in his opinion, the delay allowed the State's witnesses to coordinate and to fabricate their testimony. The following excerpt is representative of defendant's testimony on this issue:

> DEFENDANT: [i]f we had went to trial when we was supposed to have went to trial, none of this would have come about with them giving them adequate time to make changes and lie about the story concerning the crack pipe and the other charge because I was stopped twice within one week. And that gave them ample time to coordinate, because it was the same officer who stopped me the first time. Seven days later, they stopped me again. And every time that they stopped me, it was always a lie that they used as an excuse to obtain searching my vehicle.

Neither defendant's testimony nor the statement of his counsel was supported by other evidence. On appeal, defendant concedes that the trial court did not find his testimony credible, but argues that the trial court failed to give adequate consideration to the prejudice that is inherent in pretrial incarceration. Defendant fails to acknowledge that, during the time that he was incarcerated on the present charges, he was also incarcerated on unrelated felony charges. "Although a convict in the penitentiary is entitled to the constitutional protection of a speedy trial,

in determining the effect of the length of delay in trial, it must be noted that such a person is not deprived of the freedom an acquittal would bring to a person being held in jail only for the purpose of awaiting trial." *State v. Wright*, 28 N.C. App. 426, 430, 221 S.E.2d 751, 754, *aff'd*, 290 N.C. 45, 224 S.E.2d 624 (1976). In this case, defendant remained in jail on unrelated charges even after his bond was reduced to unsecured, and he does not allege that he suffered anxiety or prejudice specifically related to these charges. We conclude that the only prejudice that defendant has identified is the prejudice that is an essential attribute of any period of incarceration.

C. Discussion

As discussed above, the "four interrelated factors [identified in *Barker*] must be considered and balanced in deciding whether a defendant's Sixth Amendment right to a speedy trial has been violated." *State v. Pickens*, 346 N.C. 628, 649, 488 S.E.2d 162, 174 (1997). In the present case, the trial court made the following findings of fact in its order denying defendant's motion to dismiss the charges against him for violation of his right to a speedy trial:

> 1. The Defendant was arrested on March 9, 2013 by the Jacksonville Police Department and charged with the offenses listed in the indictment in the above file number.
>
> 2. It has been approximately 2 years and 9 months from the date of the Defendant's arrest until the current term of Court in which the Defendant's case was called for trial.
>
> 3. The controlled substances seized from the Defendant at the time of his arrest were submitted to the State Crime Laboratory for analysis on or about March 15, 2013.
>
> 4. The reports and conclusions of the Crime Lab and their analysis were not completed until about July 22, 2015.
>
> 5. The Defendant has had five lawyers appointed to represent him during the pendency of this action; some lawyers withdrew because of conflicts, others at the request of the defendant.
>
> 6. The Defendant asserted his right to speedy trial by filing a motion to that effect on or about March 9, 2015. . . .
>
> 7. It has been approximately 10 months from the time the defendant asserted his right to a speedy trial until the case was called for trial[.] . . .

> 8. On March 29, 2014, the defendant was arrested and charged with an unrelated felony assault and attempted murder in Onslow County file numbers 14 CRS 52041; 52042; 52052; 52011; 1110 and has remained in pretrial incarceration for those offenses pending resolution of those offenses.
>
> 9. The Defendant has pending offenses in Columbus County for offenses related to the assault and attempted murder.
>
> 10. According to the court file and records maintained by the Clerk of Court, the Defendant has approximately 341 days pretrial credit to be applied to this case number.
>
> 11. The Defendant's original bond was set at $2,500 which was not an unreasonable bond for these offenses.
>
> 12. There has been no evidence presented to the Court of any purposeful impermissible or intentional delay which the prosecution could have avoided by reasonable effort. The defendant has failed to present any evidence that the delay was caused by the State's negligence or willfulness, and there is no indication that the Court's resources were either negligently or purposefully underutilized.
>
> 13. There is no credible evidence other than the defendant's personal opinion that the delay allowed officers of the Jacksonville Police Department to collude with each other as to the events of the night in question pertaining to the defendant's arrest for these offenses.
>
> 14. There is no credible evidence presented to the Court that the delay prejudiced the defendant or that the defendant's defense was impaired in any way by the delay.

On the basis of its findings, the trial court concluded that:

> Based upon the above findings of fact, the Court concludes as a matter of law that none of the defendant's rights to a speedy trial under the North Carolina General Statutes, North Carolina Constitution or the United States Constitution have been violated.

We conclude that the trial court's order reflects an appropriate consideration of the factors articulated in *Barker*. On appeal, defendant

does not challenge the evidentiary support for any of the trial court's findings, or argue that the court's findings do not support its conclusion of law. "It is not the role of the appellate courts . . . to create an appeal for an appellant," as doing so would leave "an appellee . . . without notice of the basis upon which an appellate court might rule." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (*per curiam*) (citation omitted). We conclude that defendant has failed to demonstrate that the trial court erred by denying his motion to dismiss the charges against him for violation of his right to a speedy trial, and that accordingly the trial court's order should be affirmed.

IV. Suppression Motion

[2] Defendant argues next that the trial court erred by denying his motion to suppress the evidence seized at the time of his arrest, on the grounds that "the trial court applied the incorrect probable cause standard, rather than reasonable suspicion, to analyze the evidence," and that the trial court's findings of fact were insufficient to show that the decision to stop defendant was based upon reasonable suspicion. We conclude that this argument lacks merit.

"Both the United States and North Carolina Constitutions protect against unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. I, § 20. Although potentially brief and limited in scope, a traffic stop is considered a 'seizure' within the meaning of these provisions." *State v. Otto*, 366 N.C. 134, 136-37, 726 S.E.2d 824, 827 (2012) (citation omitted). "Traffic stops have been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, . . . 20 L. Ed. 2d 889 (1968)." *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (internal quotation omitted). "Under *Terry* and subsequent cases, a traffic stop is permitted if the officer has a 'reasonable, articulable suspicion that criminal activity is afoot.' " *Id.* (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000)).

"An investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.' " *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). When determining whether an investigatory stop was based upon reasonable suspicion of criminal activity:

> A court must consider "the totality of the circumstances --the whole picture" in determining whether a reasonable suspicion to make an investigatory stop exists. The stop

> must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. The only requirement is a minimal level of objective justification, something more than an "unparticularized suspicion or hunch."

Watkins, 337 N.C. at 441-42, 446 S.E.2d at 70 (quoting *U.S. v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981), and *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989) (other citation omitted)).

An appellate court's review of an order ruling on a defendant's 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) (citations omitted). "However, when, as here, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed *de novo* and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted).

In the present case, the uncontradicted evidence showed that Officer Griess was patrolling an area that he described as a "known drug corridor" at 4:00 a.m., when he observed defendant's car stop in the lane of traffic, whereupon an unidentified pedestrian approached defendant's car and leaned in the window. Officer Griess testified that "all [of] these actions are indicative to me of a drug transaction" and that, based upon this set of circumstances he decided to "pull up behind the vehicle and conduct a traffic stop." Officer Griess testified that his "primary concern was the drug activity because of the possible hand-to-hand transaction [he had] observed." We conclude that Officer Griess's observations, coupled with reasonable inferences from those observations, gave Officer Griess the requisite reasonable suspicion of criminal activity required for him to conduct a brief investigatory traffic stop, based on the facts that (1) defendant stopped his vehicle in a lane of traffic on the roadway; (2) after he stopped his car, an unknown pedestrian approached the car and leaned in the window; and (3) this incident occurred at 4:00 a.m. in an area known to Officer Griess to be a location where drug sales frequently took place.

In its order denying defendant's suppression motion, the trial court's findings of fact included the following;

. . .

> 2: The Court is in a position to adjudge the credibility of the witnesses.
>
> 3: On March the 9th, 2013, at approximately 4:12 a.m., Jacksonville Police Officer Jason Griess on routine patrol was traveling north on US Highway 17 [and observed] . . . a vehicle coming toward the officer who was going 45 miles per hour, and this was in the vicinity of Moosehart Avenue and Route 17 in Jacksonville, which is a large business corridor and, also, a noted drug corridor in the city. The officer noticed that the vehicle, who was traveling in the opposite direction, came to a stop on the outside lane, which is the lane closest to the businesses of Route 17 at this location. This is a five-lane highway, two lanes in each direction with a turn lane in the middle. There were other vehicles going south in the same direction of the noted vehicle and traffic was light. . . .
>
> 4: The officer noticed that the vehicle came to a complete stop on the outside lane and an individual, a male, approached the vehicle on the passenger's side and was leaning into the vehicle. The officer, who was alone in his patrol car, performed a U-turn and turned on his blue light[.] . . .
>
> 5: The officer did the U-turn and was making the stop because of a violation done in his presence of either a state or city statute. The state statute is [N.C. Gen. Stat. §] 20-141(h) which states no person shall operate a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic. . . .
>
> 6: The officer observed the traffic violations before he turned his blue light on. The officer also observed suspicious activity in the drug corridor by the car stopping on the road and a male approaching and leaning into the car.
>
> 7: After the blue light was on, the vehicle quickly made two right turns [into a] . . . parking lot[.] . . . The officer pulled up behind the vehicle at a 90-degree angle[.] . . .

8: The officer called in his location, and got out of the car. As he was approaching the vehicle, the officer noticed the top front door began to open[.] . . . A male head popped out and an individual identified as the defendant walked to the officer, who told the defendant to get back in the car. The defendant made a statement, "I was just getting out to pick up my cell phone from the floor." At that time, the officer called for additional backup[,] . . . [and] stayed next to the car . . . watching the defendant until the backup arrived.

9: In approximately one minute the backup arrived; Officer Colvell, Officer Ehrler and Officer Funke. . . .

10: Officer Griess brought the other officers up to date on what happened before their arrival, and Officer Funke found a glass pipe that is typically used for smoking cocaine three to four inches behind the front driver's tire in a position [where it] was highly unlikely that the pipe would not have been crushed if it was in that position before the Defendant parked his car.

11: The pipe on the ground was picked up and put into an evidence bag. Officer Griess searched the vehicle and he found a pellet gun wrapped in a ski mask in a pocket on the back of [the] driver's passenger seat readily accessible to the defendant.

12: The glass smoking pipe on the ground is similar to pipes used to smoke cocaine. The Defendant was placed under arrest for possession [of] drug paraphernalia, possession of cocaine, and carrying a concealed weapon. The pipe, ski mask and pellet gun were seized and taken to the evidence room of the Jacksonville Police Department. . . . The defendant was not given a citation for violating the North Carolina State Statute 20-141(h) or the Jacksonville City Statute 0125-1113, because the emphasis of the police investigation was on the drug charges.

. . .

Based upon its findings of fact, the trial court concluded that:

1: If an officer has probable cause to believe that an individual has committed even a very minor criminal offense

in his presence, he may without violating the Fourth Amendment arrest the offender.

2: An officer has probable cause for arrest when the facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person or one of reasonable caution in believing in the circumstances shown that the suspect has committed an offense.

3: Observing a traffic violation provides sufficient justification for a police officer to detain the offender vehicle for as long as it takes to perform the judicial incidence of a routine traffic stop.

4: Officer Griess had probable cause to believe that a traffic violation occurred in his presence and was justified in stopping the Defendant's vehicle.

5: The officers were justified in searching in the area of the vehicle, and after finding the crack pipe, had lawful grounds to search the vehicle even without the defendant's consent.

6: The traffic stop, arrest of the defendant, and search of the [defendant's] vehicle satisfied the constitutional requirements set forth in the U.S. Constitution, the North Carolina Constitution and the North Carolina General Statutes.

In the heading to defendant's appellate argument regarding the denial of his suppression motion, defendant asserts that "there was no reasonable suspicion sufficient to justify stopping [defendant]." However, defendant does not set forth any legal argument or citation to authority to support this contention, which is therefore deemed abandoned. *See* N.C. R. App. P. Rule 28(a) (2015) ("Issues not presented and discussed in a party's brief are deemed abandoned."). Defendant's appellate brief instead focuses upon the fact that the trial court applied a probable cause standard, rather than reasonable suspicion, to the question of whether the brief investigative seizure of defendant violated his rights under the Fourth Amendment. Defendant correctly asserts that the proper standard for determining the constitutionality of a traffic stop is reasonable suspicion. However, defendant fails to acknowledge that probable cause is a more stringent standard than reasonable suspicion and that, as a result, the trial court's error tended to benefit defendant.

Moreover, "there is sound authority to the effect that where the court below has reached the correct result, the judgment may be affirmed even though the theory on which the result is bottomed is erroneous." *Dobias v. White*, 240 N.C. 680, 688, 83 S.E.2d 785, 790 (1954). "If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (citations omitted).

We conclude that the undisputed facts and circumstances known to Officer Griess support the conclusion that the law enforcement officer had the requisite reasonable suspicion to justify a traffic stop of defendant's car, and that the trial court's findings of fact support this conclusion as well. As discussed above, defendant has not offered any appellate argument challenging the evidentiary basis for a conclusion that reasonable suspicion existed. Defendant asserts that the court's findings of fact are insufficient to establish reasonable suspicion, and cites *State v. Murray*, 192 N.C. App. 684, 666 S.E.2d 205 (2008). In *Murray*, however, the law enforcement officer who stopped the defendant admitted that he had not observed the defendant violate any traffic laws, and that the officer had "no reason to believe" that the defendant was engaged in any illegal activity. *Murray*, 192 N.C. App. at 688, 666 S.E.2d at 208. In the present case, Officer Griess observed defendant stop his vehicle in a lane of travel of a busy highway, which is both a violation of traffic regulations and a safety hazard. The officer also saw a pedestrian approach defendant's car and lean in the window and, as previously discussed, these events occurred at 4:00 a.m. in an area known for illegal drug sales. We conclude that *Murray* is factually distinguishable from the present case and does not require reversal of the trial court's denial of defendant's suppression motion.

For the reasons discussed above, we conclude that the trial court did not err by denying defendant's motion to dismiss the charges against him for violation of his right to a speedy trial, or by denying his motion to suppress the evidence seized at the time of his arrest. Given that defendant has raised no other challenges to his convictions, we conclude that defendant had a fair trial, free of reversible error.

NO ERROR.

Judges CALABRIA and INMAN concur.

STATE v. GREENE

[251 N.C. App. 627 (2017)]

STATE OF NORTH CAROLINA
v.
KRYSTEN S. GREENE, DEFENDANT

No. COA15-1060

Filed 17 January 2017

1. Larceny—from the person—sleeping victims—not touching purses

Where defendant stole several items from the victims' purses while they slept in a hospital waiting room, the trial court erred by failing to dismiss the charge against defendant for larceny from the person. The victims' purses—although close to the victims—were not actually touching the victims, so there was insufficient evidence that the property was taken from the victims' person or within the victims' protection and presence.

2. Conspiracy—to possess stolen property—sufficiency of evidence

Where defendant stole several items from the victims' purses while they slept in a hospital waiting room, the trial court did not err by declining to dismiss the charges of conspiracy to possess stolen goods. The evidence showed that defendant made a phone call from jail to a Mr. Spencer, and thereafter Mr. Spencer showed up at the residence where the stolen pistol was located and admitted to "working with" defendant.

3. Evidence—hearsay—same evidence admitted without objection

The Court of Appeals declined to consider defendant's argument that the trial court erroneously admitted hearsay from a police detective in defendant's trial for theft-related charges, because the same evidence was admitted on several other occasions without objection, including by another detective.

4. Evidence—plain error review—no probable impact on jury's verdict

Where defendant argued that the trial court committed plain error in allowing a police detective to testify that a Mr. Spencer was linked to several other crimes with defendant and that he had admitted to working with defendant, even assuming error, considering the other evidence regarding a conspiracy with Mr. Spencer there was no probable impact on the jury's verdict.

5. Constitutional Law—effective assistance of counsel—alleged error on cross-examination of police officer

Where defendant was convicted for several theft-related offenses, defendant did not receive ineffective assistance of counsel. Even assuming defendant's attorney committed an error in his cross-examination of a police detective, defendant failed to show that but for counsel's unprofessional errors the result of the proceeding would have been different.

6. Appeal and Error—argument not considered—conviction at issue already vacated

The Court of Appeals did not address whether the trial court committed plain error in reinstructing the jury on larceny from the person, because earlier in the same opinion the Court of Appeals vacated and remanded defendant's conviction for larceny of the person.

7. Larceny—two separate victims—not one continuous transaction

Where defendant stole property from two separate victims, the Court of Appeals rejected defendant's argument that the takings were part of one continuous transaction and that judgment should be arrested on one of the larceny convictions.

Appeal by defendant from judgments entered on 4, 6 and 13 May 2015 by Judge John E. Nobles, Jr. in Superior Court, Onslow County. Heard in the Court of Appeals 22 February 2016.

Attorney General Josh Stein, by Special Deputy Attorney General I. Faison Hicks, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

STROUD, Judge.

Defendant appeals from several convictions for theft-related offenses. We vacate defendant's convictions for larceny from the person because the evidence does not establish the necessary elements to sustain a conviction of larceny from the person and remand for judgment to be entered on the lesser-included offense of misdemeanor larceny and any resentencing if necessary due to two of defendant's multiple convictions being vacated. We find no error as to defendant's remaining convictions.

I. Background

The State's evidence tended to show in November 2012, Ms. Ramona Tongdee was at the hospital with her grandmother because her grandfather was hospitalized for a stroke. Ms. Tongdee and her grandmother were in a waiting room furnished with couches, recliners, and chairs. Ms. Tongdee fell asleep on a couch and when she awoke her "purse was on the floor. Rather than kind of tucked away, it was on the floor with things spilled out of it[.]" Ms. Tongdee's grandmother's purse "was on the couch, in the same manner." Ms. Tongdee was missing her pink .40 caliber semiautomatic pistol and her grandmother was missing $75.00.

The hospital had security video cameras in this area and the security footage showed a man "going through Ms. Tongdee's purse, as well as other family members' property, while they were asleep in the room. Altogether, the time frame spanned about 11 minutes, while the male was going through the their [(sic)] property while they slept." Later, in a field near a residence, officers discovered a pink pistol. Mr. Julian Spencer later arrived at the residence and told the officers he was there to get a dog from inside the residence, but he did not have a key. Mr. Spencer then admitted that he was working with defendant.

In April of 2013, Ms. Marcia Humphrey returned to her home and discovered that thousands of dollars of cash and old coins, including an 1857 quarter, were missing from her home. Defendant's fingerprint was found in Ms. Humphrey's home, although Ms. Humphrey did not know him or give him permission to be in her home. Thereafter, defendant's girlfriend pawned Ms. Humphrey's 1857 quarter.

In April of 2014, defendant was indicted for several crimes. Ultimately, the jury convicted him of felonious breaking and/or entering, felonious larceny after breaking and/or entering, felonious possession of stolen goods/property, larceny of a firearm, possession of a stolen firearm, two counts of larceny from the person, felonious possession of stolen goods/property, feloniously conspiring to possess stolen goods/property, and possession of a firearm by felon. In February of 2015, defendant "admitted habitual felon status." (Original in all caps.) The trial court entered judgments, and defendant appeals.

II. Motion to Dismiss

Defendant contends that two of his motions to dismiss should have been allowed.

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence.

State v. Johnson, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted).

A. Larceny from the Person

[1] Defendant first contends that the trial court erred in failing to dismiss the charge of larceny from the person from Ms. Tongdee and her grandmother due to insufficiency of the evidence.

> The essential elements of larceny are: (1) taking the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with intent to permanently deprive the owner of the property. It is larceny from the person if the property is taken *from the victim's person or within the victim's protection and presence at the time of the taking.*

State v. Hull, 236 N.C. App. 415, 418, 762 S.E.2d 915, 918 (2014) (emphasis added) (citations and quotation marks omitted). Our Supreme Court has explained that the definition of a taking "from the person" was established by the common law:

> This Court recently addressed the crime of larceny from the person in *State v. Buckom*, 328 N.C. 313, 401 S.E.2d 362 (1991). We noted that because the North Carolina General Statutes do not define the phrase "from the person" as it relates to larceny, the common law definition controls. We quoted with approval from the common law description of "from the person":
>
> > Property is stolen "from the person," if it was under the protection of the person at the time. Property attached to the person is under the protection of the person even while he is asleep. And

> the word "attached" is not to be given a narrow construction in this regard. It will include property which is being held in the hand, or an earring affixed to the ear, or a chain around the neck, or anything in the pockets of clothing actually on the person's body at the moment. Moreover, property may be under the protection of the person although not actually "attached" to him. Thus if a man carrying a heavy suitcase sets it down for a moment to rest, and remains right there to guard it, the suitcase remains under the protection of his person. And if a jeweler removes several diamonds and places them on the counter for the inspection of a customer, under the jeweler's eye, the diamonds are under the protection of the person. On the other hand, one who is asleep is not actually protecting property merely because it is in his presence. Taking property belonging to a sleeping person, and in his presence at the time, is not larceny from the person unless the thing was attached to him, in the pocket of clothing being worn by him, or controlled by him at the time in some equivalent manner.
>
> The crime of larceny from the person is regularly understood to include the taking of property "from one's presence and control." Thus, for larceny to be "from the person," the property stolen must be in the immediate presence of and under the protection or control of the victim at the time the property is taken.

State v. Barnes, 345 N.C. 146, 148–49, 478 S.E.2d 188, 190 (1996) (citations omitted).

State v. Buckom clarifies,

> At common law, Larciny [sic] from the person is either by privately stealing; or by open and violent assault, which is usually called robbery. Open and violent larciny [sic] from the person, or robbery is the felonious and forcible taking from the person of another, of goods or money to any value by violence or putting him in fear. The difference between the two forms of larceny referred to by Blackstone is that robbery, even in its least aggravated

> form, is an open and violent larciny [sic] from the person, or the felonious taking, from the person [of,] or in the presence of[,] another, of goods or money against his will by violence or by putting him in fear, whereas stealing from the person is a concealed, clandestine activity. At common law, larceny from the person differs from robbery in that larceny from the person lacks the requirement that the victim be put in fear. Larceny from the person forms a middle ground in the common law between the private stealing most commonly associated with larceny, and the taking by force and violence commonly associated with robbery.

328 N.C. 313, 317, 401 S.E.2d 362, 364–65 (1991) (citations, quotation marks, and ellipses omitted).

Defendant argues that our Supreme Court clarified in *State v. Barnes* that "[t]aking property belonging to a sleeping person, and in his presence at the time, is not larceny from the person unless the thing was attached to him, in the pocket of clothing being worn by him, or controlled by him at the time in some equivalent manner." 345 N.C. 146, 149, 478 S.E.2d 188, 190 (1996). Defendant argues that because Ms. Tongdee's purse and her grandmother's purse were not attached to them as they slept, there was insufficient evidence of larceny from the person.

The State's argument essentially concedes that the purses were not attached to or touching the victims and takes a creative technological approach to defendant's contentions. The State argues that even if the purses were not attached to their owners, the purses were still under their protection thanks to their vicarious "eye" of the video cameras in the hospital[1]:

> Property is under the protection of a person, such that it can be the subject of a larceny from the person, so long as, among other things, it is under the person's eye. *E.g.*, *State of North Carolina v. Buckom*, 328 N.C. 313, 401 S.E.2d 362 (1991) ("If a jeweler removes several diamonds and places them on the counter for the inspection of a customer, under the jeweler's eye, the diamonds are under the protection of the person.")

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1. The videotape of the incident is not in our record, so our statement of the facts and analysis is based upon the testimony at trial, some of which describes what is happening in the video.

> Here, the evidence showed that Ms. Tongdee and [her grandmother] placed their purses essentially right next to their bodies as they lay down to sleep. And the evidence also showed that they went to sleep in a room that was equipped with a video surveillance camera that created a motion picture photo-recording of every human action that occurred during every second while Ms. Tongdee and [her grandmother] slept in the ICU waiting room. This video surveillance camera acted as the functional equivalent to the jeweler's eye in *Buckom*.

(Quotation marks and brackets omitted). The State's argument takes the meaning of "under the jeweler's eye," far out of context and beyond its meaning as used in case law. *Buckom*, 328 N.C. at 318, 401 S.E.2d at 365; *see State v. Boston*, 165 N.C. App. 890, 893, 600 S.E.2d 863, 865 (2004).

In *State v. Boston*, this Court noted that cases addressing the situations where property was taken from the person emphasize the importance of "the awareness of the victim of the theft at the time of the taking[.]" 165 N.C. App. at 893, 600 S.E.2d at 865. In *Boston*, the defendant testified that he was having a conversation with the victim in the victim's home and "noticed a wallet on a little table near where defendant was standing. Defendant then took the wallet and walked out the door." *Id.* at 891, 600 S.E.2d at 864. The victim had turned away and did not see the defendant take the wallet. *Id.* at 893, 600 S.E.2d at 865. This Court determined that the trial court erred by failing to instruct the jury on misdemeanor larceny because the "defendant presented evidence that the wallet was not under the eye of, or the protection or control of, Mr. Skinner at the time the wallet was taken." *Id.* The court in *Boston* noted that its

> holding is consistent with the North Carolina Supreme Court's decision in *State v. Buckom*, 328 N.C. 313, 401 S.E.2d 362 (1991). In *Buckom*, the Court held that the "from the person" element of larceny from the person was supported by evidence that the defendant took money from the open drawer of a cash register at the same time the cashier was reaching in the drawer to make change. What distinguishes *Buckom* from Lee[2] and *Barnes* is not

2. In *State v. Lee*, this Court determined that the taking of a handbag from a grocery cart when the owner was "four or five steps away" looking at the grocery shelves was not larceny from the person. 88 N.C. App. 478, 478–79, 363 S.E.2d 656, 656 (1988) (quotation marks omitted).

> only the distance involved, which is relevant to immediate presence, but also the awareness of the victim of the theft at the time of the taking, which is relevant to protection and control. This distinction is further supported by dicta in *Buckom* and *Barnes*. Both cases cited the example of diamonds placed on the counter and "under the jeweler's eye" as remaining under the protection of the jeweler. *Buckom*, 328 N.C. at 318, 401 S.E.2d at 365; *Barnes*, 345 N.C. at 148, 478 S.E.2d at 190.

Id.

Video surveillance systems may make a photographic record of a taking, but they are no substitute for "the awareness of the victim of the theft at the time of the taking[.]" *Id.* Many stores, office buildings, and even city streets now have video camera surveillance. Furthermore, it is increasingly common for individuals to have video security systems in their yards and homes, and some systems will allow individuals to view the video from their home system on their phone or computer when away from the residence. The State's theory of video surveillance as the "functional equivalent" of the human eye would convert any larceny committed in areas monitored by video to larceny of the person. Sometimes technological changes may lead quite reasonably to changes in the law, but the essence of larceny from the person is still that it is *from the person*, which requires the person's awareness at the time of the taking unless the item was attached to the person. *See id.*

Nor does the evidence here show that the purses were attached, in the owners' pocket, or controlled in a like manner. *See Barnes*, 345 N.C. at 149, 478 S.E.2d at 190. Ms. Tongdee testified that her purse was between her and her daughter "touching the couch" and that her grandmother's "purse was between her [grandmother] and the recliner and the couch[.]" Even though the purses were close to their owners, the evidence does not show that the purses were actually even touching them. Because Ms. Tongdee and her grandmother were sleeping at the time of the larceny, without their purses "attached to [them], in the pocket of clothing being worn by [them], or controlled by [them] at the time in some equivalent manner[,]" *id.*, we conclude that there was insufficient evidence that "the property [was] taken from the victim[s'] person or within the victim[s'] protection and presence at the time of the taking." *Hull*, 236 N.C. App. at 418, 762 S.E.2d at 918. Therefore, we vacate and remand for entry of judgment on misdemeanor larceny. *See generally Lee*, 88 N.C. App. at 479–80, 363 S.E.2d at 657 ("In vacating the larceny from the person conviction, however, we note that the evidence and

verdict support a conviction of the lesser included offense of misdemeanor larceny, and remand the matter to the trial court so defendant can be sentenced for that offense in compliance with G.S. 14-3(a)." (citation omitted)).

B. Conspiracy to Possess Stolen Property

[2] Defendant next contends that the trial court erred in failing to dismiss the charges of conspiracy to possess stolen goods, *i.e.*, the gun. Defendant concedes he was in possession of stolen property but argues the evidence was insufficient as to any conspiracy. "A criminal conspiracy is an agreement between two or more persons to do an unlawful act. A conspiracy may be shown by express agreement or an implied understanding. A conspiracy may be shown by circumstantial evidence[.]" *State v. Choppy*, 141 N.C. App. 32, 39, 539 S.E.2d 44, 49 (2000) (citations, quotation marks, and brackets omitted).

The evidence showed that defendant made a phone call from jail to Mr. Spencer. Thereafter, Mr. Spencer showed up at the residence where the pistol was and admitted to "working with" defendant. The jury could reasonably infer from the evidence that Mr. Spencer conspired with defendant to possess the pistol. *See id.* We conclude that there was sufficient evidence of a conspiracy to possess stolen property, *see id.*, and thus the trial court properly denied defendant's motion to dismiss. This argument is overruled.

III. Hearsay Testimony

Defendant next raises several hearsay issues.

A. Hearsay with Same Evidence Admitted

[3] Defendant contends that the trial court erred in overruling his objection to hearsay as to Detective Lincoln's testimony regarding what a witness told him about a vehicle description, the owner of that vehicle, and the relationship between defendant and the vehicle owner, defendant's girlfriend. We need not review these arguments because even if Detective Lincoln's testimony was inadmissible hearsay, the same evidence was admitted on several other occasions without objection, including by another detective. *See State v. Perry*, 159 N.C. App. 30, 37, 582 S.E.2d 708, 713 (2003) ("By failing to object to the later admission of the same evidence, defendant has waived any benefit of the original objection and failed to preserve the issue for appeal."). These arguments are overruled.

B. Plain Error

[4] Defendant also contends that although he failed to object, the trial court committed plain error in allowing Detective Lincoln to testify that Mr. Spencer was linked to several other crimes with defendant, and he had admitted to working with defendant.

> [T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error. For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, quotation marks, and brackets omitted). Considering the other evidence regarding a conspiracy with Mr. Spencer, including that defendant called him from jail, and thereafter Mr. Spencer showed up at the location where the stolen pistol was hidden, even if there was hearsay testimony as to the relationship between the two, we do not believe this "error had a probable impact on the jury's finding that the defendant was guilty." *Id.*

IV. Ineffective Assistance of Counsel

[5] Defendant next argues that he received ineffective assistance of counsel because his attorney elicited the hearsay testimony regarding the relationship between himself and Mr. Spencer.

> To obtain relief for ineffective assistance of counsel, the defendant must demonstrate initially that his counsel's conduct fell below an objective standard of reasonableness. The defendant's burden of proof requires the following:
>
> > 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.
>
> The 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. Quick, 152 N.C. App. 220, 222, 566 S.E.2d 735, 737 (2002) (citations and quotation marks omitted). Even generously presuming arguendo that defendant's attorney committed an error in his cross-examination of Detective Lincoln, defendant has not shown that, "but for counsel's unprofessional errors, the result of the proceeding would have been different" given the telephone call between the two from jail coupled with Mr. Spencer thereafter showing up where the gun was hidden. *Id.* We conclude that defendant did not receive ineffective assistance of counsel. This argument is overruled.

V. Jury Instructions

[6] Defendant next contends that the trial court committed plain error in reinstructing the jury on larceny from the person as the instructions "amounted to a directed verdict of guilty since the court did not explain that the person would not physically possess the property or not be within the person's protection if the person was asleep at the time of the taking." (Original in all caps.) As we have already vacated and remanded for defendant's conviction of larceny of the person and as defendant does not challenge the instruction regarding the elements of misdemeanor larceny, we need not address this issue.

VI. Arrest Judgment

[7] Lastly, defendant contends that the trial "court should arrest judgment on one of the two larceny of the persons in 13 CRS 53006 since the thefts occurred during a continuous transaction and is thus one larceny for the purposes of conviction and sentencing." (Original in all caps.) Defendant contends that his theft of the gun from Ms. Tongdee and the cash from her grandmother were part of one continuous transaction. Defendant cites to *State v. Froneberger*, where the defendant was convicted after pawning items of silver from the same larceny victim on

four separate occasions, and this Court set aside three of the convictions because there was no evidence that the larceny was not actually one transaction, but then defendant pawned the items over time. *See Froneberger*, 81 N.C. App. 398, 344 S.E.2d 344 (1986). The Court noted the general rule, "A single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place." *Id.* at 401, 344 S.E.2d at 347. Thus, because in *Froneberger*, all of the items stolen belonged to the same owner and were taken from the same place without any evidence that the items were taken at different times, this Court set aside three of the convictions. *Id.* at 401-02, 344 S.E.2d at 347. Evidence indicating property was taken from the same person led to only one conviction of larceny for the defendant. *See id.*

But here, the takings were from two separate victims. In an analogous situation, regarding robbery, this Court has determined that when the "defendants threatened the use of force on separate victims and took property from each of them. . . . [E]ach separate victim was deprived of property. The armed robbery of each person is a separate and distinct offense, for which defendants may be prosecuted and punished." *State v. Johnson*, 23 N.C. App. 52, 56, 208 S.E.2d 206, 209 (1974). Here, defendant took property from both Ms. Tongdee and her grandmother. In fact, the jury saw the video surveillance recording which showed that defendant walked up to the couch where Ms. Tongdee was sleeping, took a purse, went through it, took the gun, began to walk away, and then turned around, walked back to the waiting area, and grabbed a purse from a chair where Ms. Tongdee's grandmother was asleep. Defendant walked away after taking Ms. Tongdee's gun and appeared to be leaving, but then he returned to take her grandmother's purse.

The elements of larceny are: "(1) taking the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with intent to permanently deprive the owner of the property." *Hull*, 236 N.C. App. at 418, 762 S.E.2d at 918. Here defendant took and carried away property belonging to two separate victims, without either owner's consent, and with the intent to permanently deprive each of them of their personal property, and thus the jury was properly allowed to consider both charges and the trial court properly sentenced defendant upon them. *See generally Johnson*, 23 N.C. App. at 56, 208 S.E.2d at 209. This argument is overruled.

VII. Conclusion

For the foregoing reasons, we vacate defendant's convictions for larceny from the person and remand for entry of judgments for misdemeanor larceny and any necessary resentencing on defendant's multiple convictions. As to all other issues raised on appeal, we find no error.

VACATED and REMANDED in part; NO ERROR in part.

Judges CALABRIA and TYSON concur.

STATE OF NORTH CAROLINA
v.
BOBBY JOHNSON

No. COA16-491

Filed 17 January 2017

1. Confessions and Incriminating Statements—coercive police interview—failure to Mirandize

The trial court erred by denying defendant's motion to suppress inculpatory statements he made during a police interview in which he was shown a DNA analysis indicating that his DNA was recovered from under a murder victim's fingernails—at which time he should have been *Mirandized*—and then was questioned for hours in a coercive manner. In light of the overwhelming evidence of defendant's guilt, however, the error was harmless beyond a reasonable doubt.

2. Homicide—evidence excluded—overwhelming evidence of guilt

The trial court did not err in defendant's murder trial by excluding evidence of bullet fragments recovered from a parking lot adjoining the crime scene that might have indicated the presence of a second gun. Even assuming for the sake of argument that there was a second gun involved in the crime, the State did not need to prove that defendant was the person who shot the victim in order to convict him of first-degree murder, and the presence of an additional gun would not have weakened the evidence of defendant's involvement.

STATE v. JOHNSON

[251 N.C. App. 639 (2017)]

Appeal by Defendant from judgment entered 6 October 2015 by Judge Eric L. Levinson in Superior Court, Mecklenburg County. Heard in the Court of Appeals 19 September 2016.

Attorney General Josh Stein, by Assistant Attorney General Alvin W. Keller, Jr., for the State.

Marilyn G. Ozer for Defendant.

McGEE, Chief Judge.

Anita Rychlik ("Anita") and her husband, David Rychlik ("David"), were employees of the Thrift Motel in Charlotte ("the motel") when Anita was shot and killed in the early morning hours of 2 May 2007. David was outside in the parking lot in front of the motel talking to Brandy Davis ("Brandy"), when three men ("the men"), all dressed in black, approached from the left side of the motel as one faced the front of the building. At that time, Anita managed the motel and David acted as the security guard. Anita was asleep inside the motel. One of the men was holding a gun, and the man forcibly searched David and Brandy, taking some personal items from both of them, and a set of keys to the motel from David.

Brandy testified the men were African-American, that two of them were approximately five feet, six inches tall or five feet, seven inches tall and weighed about 150 pounds, while the third man was approximately six feet or six feet, one inch tall and weighed between 180 and 200 pounds. According to Brandy, the larger man was holding a small black gun. The men asked David where the safe was and they demanded keys. All three of the men were talking and demanding things. David was hit in the head with the gun during the altercation. Brandy described the man holding the gun as "the older gentleman," and "the tall one," and testified that he told one of the "younger guys" to stay with her and David, and to "shoot" them if they moved. Brandy could see the younger men's faces, and estimated them to be eighteen or nineteen years old. Brandy also testified that the man holding the gun had a "mask all the way down his face" which made it difficult to tell how old he was. One of the smaller, younger men remained with David and Brandy, while the other two men entered the motel. Brandy did not know if the younger man who remained with them had a gun. The two men then entered Anita's bedroom in the motel and there was a struggle. Brandy heard Anita give "a very panic-attack scream," and Anita was shot once in the back of her neck and killed. The men then fled from the scene.

James Rhymes ("Rhymes"), who lived at the motel, testified that on the night in question he left his room upon hearing a strange noise. As Rhymes turned to head toward Anita's office, which was a very short distance from Rhymes' room, he was confronted by a man wearing a mask and holding a gun. Rhymes pushed the gun away from him and turned and ran away up a nearby hill. As he was running away, he heard two gunshots, but was not hit.

The three men escaped, and no one was charged with Anita's murder until 24 October 2011. However, during the course of the investigation Bobby Johnson ("Defendant") was identified as a suspect and, in 2007, he was placed in custody, read his *Miranda* rights, which he waived, and he voluntarily gave investigators an interview and a buccal swab for the purposes of collecting his DNA. DNA was also recovered from under Anita's fingernails, and these DNA samples were sent for testing and comparison. Results from the DNA analysis were returned to investigators in 2009. Although the DNA analysis indicated that only one in 16,600,000 African-Americans could have been the contributor of the DNA recovered from under Anita's fingernails, and that Defendant was one of those African-Americans who could have contributed that DNA, the Charlotte-Mecklenburg Police Department did not attempt to locate Defendant until late 2011.

A police detective "called [Defendant] and spoke to him a number of times and made arrangements for him to come down to the station." Detective William Earl Ward, Jr. ("Detective Ward") testified that they "wanted to talk to him about the DNA evidence." Defendant voluntarily went to the police station on the morning of 24 October 2011, arriving at approximately 9:40 a.m. Defendant was escorted to an interview room on the second floor, just outside the homicide office. The interview room was behind doors that remain locked. Detective Ward and Detective Brian Whitworth ("Detective Whitworth"), together ("the detectives") began to interview Defendant. Approximately four hours after entering the interview room, Defendant was placed under arrest for murder, and approximately ten minutes later, after additional conversation, he was read his *Miranda* rights and signed a waiver of those rights. Approximately twenty-five minutes after that, Defendant began to discuss his involvement in the crime. Defendant named brothers Antonio Chaney ("Tony") and Joshua Chaney ("Josh") as the two other men involved, and stated that it was Tony who shot and killed Anita.

Because the voluntariness of Defendant's confession is an issue on appeal, we examine in great detail Defendant's interrogation on 24 October 2011 – from the initiation of the questioning until Defendant

admitted participating in Anita's murder. According to the video recording of Defendant's interview, the questioning began in a police interrogation room at approximately 9:50 a.m. Defendant told the detectives that he had been "saved" recently, and Defendant was reminded that Detective Ward had interviewed him back in 2007. At approximately 10:11 a.m., the detectives showed Defendant a forensic report stating DNA had been recovered from under Anita's fingernails,[1] and that there was only a one in 16,600,000 chance that the DNA would match any particular African-American, but that the DNA recovered from under Anita's fingernails matched Defendant's DNA.

Detective Ward told Defendant that the 2007 interview had locked Defendant into a statement and that, with the DNA report, they now had the "meat and potatoes," and that Defendant's 2007 statement was coming back and "kicking you in the ass." Defendant was told that the crime was committed by three people, and that one of those three people was Defendant. Defendant was told: "The fact is your DNA is under [Anita's] fingernails in her living quarters which you denied even being there." Defendant was told that he needed "to do the right thing by God," and was told the DNA analysis "puts you there[,]" that "[y]ou were there that night, you know what happened." Defendant was told he had not been at home like he had been telling the detectives. Defendant was told, "you were there [at the motel], you were involved in this crime, it's as simple as that, I can't put it more plainly, you can't make this stuff up. It's a scientific fact." "You were there. This puts you there. You understand what this holds? This could be a capital murder case. This is a death penalty case." "If you want to wear it on your own, that's your decision. If you want to do the right thing and bring other people that were involved, that's your decision." The detectives continued:

> Your body parts, your cells, your DNA, are on her body. How can that happen if you never touched her? There's no way. There's no way your DNA can be spit in the wind and land somewhere. It has to be her grabbing your hair or grabbing your neck. That's how it happens. It's forever, Bobby.[2] Bobby, so you understand, where we're coming

1. The DNA recovered was identified as having come from three separate individuals, one of whom was Anita. Defendant was identified as the likely (one in over sixteen million chance) contributor of the second profile. The third profile was never matched to anyone.

2. Throughout the interview, the detectives referred to Defendant as "Bobby." At times, Defendant referred to himself as "Bobby."

> from is not "hey, we wanted to talk to you about this murder case . . . ." Where we stand now as a law enforcement agency . . . is that there's no question anymore. That's the meat and potatoes right there for the case [pointing at the DNA analysis]. That's enough to charge you with murder right now. Right now. My suggestion to you is this. Stop with the "I wasn't there," because this proves you were there.

The detectives told Defendant that if the shooting was an accident, if Anita backed into the gun and "pow, holy sh*t, you didn't mean for that to happen, now's the time to talk about it. If you stay silent about it, Bobby, you're going to wear it." The detectives told Defendant that they knew what happened to Anita in her room, but that Defendant was going to have to explain it. Defendant was then told again that that the odds were one in 16,600,000 that any African-American person other than Defendant could have contributed the DNA recovered from under Anita's fingernails.

Referring to an earlier comment Defendant had made, Detective Ward stated: "When you said [Anita] was shot in the back of the neck, only you, me, the victim, and the coroner knew that. That was not publicized." Detective Ward told Defendant: "I have locked you in so hard to this story here, you can't get out with a blow torch." As Defendant continued to deny being involved, the detectives stopped him from talking and told him they knew he was lying. The detectives told Defendant:

> You're in a box right now. This is the . . . lock to the door [Detective Ward was holding the DNA report in his hand]. If you want to wear capital murder on your own and let them other two dipsticks go run free, that's on you man. I can't help you with that. But if you want to be a hero, be a real man, be a God saved man, then do the right thing.

The detectives told Defendant they could not promise him anything and people had to pay for their crimes, but that Defendant was facing a capital murder charge and he needed to do what was best for himself. They told Defendant the district attorney would look at the people involved and work with those that they and the detectives believed were being "honest and true." Defendant was told he should cooperate and get the truth "off his chest." Defendant was told that "[p]eople need . . . something to grab ahold of in a case when they're . . . boxed in, and you're boxed in. You're boxed in by the best evidence that is out there for any case today – DNA." Defendant was told that because of the DNA

evidence, "I know you're either my shooter, or you're someone who was with my shooter. We want the shooter."

Defendant was asked, in light of the DNA evidence, what he thought the jury was going to think. Defendant answered that they would think he took part in the crime. Defendant was told that DNA analysts do not make mistakes, and he needed to "do the right thing." Defendant was told that the DNA evidence was "pretty damning, that puts you there." Defendant responded "That put me there, man. That right there just took my life. That right there just took my life." Detective Ward responded:

> Yes, so, and I want you to understand that. That's what I'm trying to explain to you, that it's over. This game is over. This is the meat and potatoes of the case [touching the DNA analysis], that's what we need to lock folks up. We thought well, we can go get a warrant, let's not do that. . . . But this isn't going away, this is a done deal. It's a done deal.

Defendant responded: "I mean, I'm going to jail, so . . . ." Detective Ward interjected: "Well, we're not there yet, but it's pretty close, ok? And if that will make you understand. If that will make you a believer that's, that's a possibility. We'll do what we need to do." Defendant replied, "I want to be on your team. I don't want to be in prison the rest of my damn life." Detective Ward said: "I tell you that the DA works with people . . . ." Defendant interjected that the issue was "not going away," and told the detectives he would try and help them out in the hope that the case against him would be resolved in the best way possible. The detectives told Defendant: "We're going to need everybody that was involved, and what part they played, to help you. That's the only thing that's gonna help you. Saying what you're saying right now, that's not gonna help Bobby a damn bit."

Shortly after making this statement, at approximately 10:36 a.m., the detectives asked Defendant if they could pat him down for weapons. Defendant complied, and was frisked and asked to take off his hat. After the pat-down, Defendant sat back in his chair and the interrogation continued. Defendant was asked to talk about his experience of being "saved," and was told that it was more important to help others than to help himself. The detectives told Defendant that there were three people involved, and that he was one of them. They told Defendant he should help himself, that if he wanted to "wear this" by himself, then "God bless you," but that that would be crazy since there were two others involved. Detective Ward said: "Sh*t, I wouldn't go down by myself."

Defendant was then asked again if he had shot Anita, or been with the person who had, and Defendant again replied, "no." Defendant was told that the detectives did not believe him, and Defendant replied: "I know you don't." Defendant was told: "So what you're telling us, and what you're telling the DA, is that you're not willing to help out." Defendant was again reminded that it was a capital murder case with DNA evidence implicating him. Detective Ward told Defendant they locked him into a story in 2007, a story that was a lie, then they took the buccal swab to test his DNA, and that if "Bobby doesn't choose to help himself, then Bobby can wear it himself. All I can do is say that the smartest thing, based on my experience, is to cooperate. . . . You and two other folks, two other people, have gotten away with murder since 2007. That sucks."

Detective Ward told Defendant they had shown the "meat and potatoes" to him, but he was still not willing to help himself. Defendant was told: "We rely on facts. We don't rely on B.S. This right here [touching DNA report] is fact." Defendant was then told: "Bobby doesn't know what we've done. He doesn't know that we haven't already talked to the *other defendants*. You don't know what other evidence we have, or what other folks have said about what you did." (Emphasis added).

Defendant was told: "We've done our homework. The ball's in your court. The time to get on the bus and get the best seat is now. I didn't have this [the DNA evidence]" in 2007. The detectives told Defendant that he was allowed to tell his lies in 2007, but now they were showing him the truth. "It's black and white." The detectives offered to go and get an assistant district attorney to see what offer Defendant might get for cooperating, but Defendant declined. Defendant was told that it was up to him to "save your own tail," and that if he needed to throw others "under the bus" he should do that. The detectives talked some more about Defendant needing to get the best seat on the bus, and Defendant told them that he was trying to. Defendant then started crying.

The detectives said that "accidents happen," and that Defendant should act in a godly way. Defendant said that he felt "set up." When Defendant again denied having been at the murder scene, the detectives told him he could not keep denying involvement. Defendant said: "I don't have a life." The detectives responded: "You don't," and told Defendant he was lying, they knew the truth, that Defendant could not deny what was in his heart, and that the only way to "take care of those tears" was to get it all out in the open and "clean his heart, clean Bobby's soul."

The detectives then told Defendant his tears didn't "mean sh*t," that Defendant was just crying because he was "trapped," and that Defendant did what he did and made his own choices. The detectives told Defendant they were giving him the option to cut his losses, and that was all they could do. A few minutes later, Defendant stated: "I want to help you bad" and started to cry again. Defendant then hit himself in the head and began sobbing for over a minute. As Defendant whimpered with his head on the table, he was told to wipe his face, and asked if he had any regrets. Defendant was asked if the tears were for Anita or himself.

At approximately 11:09 a.m., Defendant told the detectives he was sick to his stomach, and he was provided with a trash can and told that the only way to feel better would be to start talking to them. Defendant was told that the best thing for him, and what the jury would like to see, would be to show remorse. Defendant began sobbing again and denied having killed Anita. Defendant continued sobbing for a couple of minutes and, at one point, his head fell to the table. Talking through sobs, Defendant said he was "a free man right now," then spit into a cup and said, "I'm about to lose my life."

The detectives kept telling Defendant he was making it hard on himself, and to think about God. Defendant told the detectives he was trying to help, and that he came voluntarily to talk. Defendant was then told that most people do not run, they talk, and that "we didn't call you and say hey Bobby I need to talk to you about this murder case, you're a suspect. Would you have come down? Probably not." Defendant was told the only way to "make it right" with God and with Defendant's children was to tell the detectives "how it went down." Defendant was then asked: "What you blubbering for?" "Bad news for you, Bobby, cause it's your DNA hooked to hers. Boom!" Defendant responded, crying, "I'm tore apart. I'm destroyed right now."

Defendant was told: "There's only one thing to do in this room," and Defendant responded: "I know there's only one thing to do in this room." The detectives told Defendant that either he "goes down" or he "gives up the other two folks." Defendant continued crying with his head on the table and was told: "For us, this is the best interview in the world. We got you. You know we got you." The detectives then told Defendant how making a plea agreement worked, that not all cases went to trial, and that if Defendant wanted, they would go and get an assistant district attorney at that moment. After a couple of minutes, Defendant stated that if he admitted to committing the crime, he would go to prison for

life or get the death penalty. After some more back and forth, Defendant was told, "you're trying to find another lie to tell me. You're stuttering."

Several minutes later, Defendant was told: "You know it's over," and he responded: "I know it's over." The detectives then asked, "who else was with you that night?" After another long pause, Defendant again denied involvement, cried some more, and said, "that's all I got." After several minutes, the detectives told Defendant: "You are almost there." "We know what happened." "We're trying to be there for you." Detective Whitworth told Defendant: "I could have just come and locked you up but I don't do that to people because I'm an honorable man." Defendant said he could not keep repeating the same thing, and was told, "then don't, repeat the right thing." Defendant began crying again and indicated he felt suicidal.

A couple of minutes later, Defendant was told it was not unusual for people to come in "and lie like you." Defendant cried some more and the detectives told him that his continued lying made the "best case for DA – you lie to us once on tape, lied again on tape – got your DNA." Defendant then said: "I know I'm dead," and the detectives told him he had the choice to cooperate or not, and asked him, "are you willing to wear this yourself?"

Detective Ward asked Defendant if he thought he was going to be able to go home "today." When Defendant answered that he did not, he was told: "Then you're under arrest for murder." Detective Whitworth told him: "If you don't believe you can get up and walk out of here, then I have no choice. You just told me you believe you're going to jail." Detective Ward then asked Defendant: "Did you just say that, yes or no?" Defendant responded: "Yes, sir." Detective Ward responded: "Then I'm going to have to place you under arrest and then I've got some stuff to do before I continue." "Because to be voluntary you've got to believe you can walk out of here." Defendant said he believed he could go home but that he wanted to help because he believed he was the "star player." Detective Ward told Defendant that if he felt like he could leave, "we're good," but if he did not, "then we'll have to do something different." Defendant was then asked if he thought he could get up and walk out at any time, and Defendant responded, "not at any time, only after you free me to go." A visibly exasperated Detective Whitworth responded: "That's different, Bobby." He then asked Defendant again if he thought he could walk out at that moment, and Defendant responded in the affirmative. Defendant was then told: "Because if not, then we're going to have to go to the next level." Defendant later said he had "faith" that he

could walk out, but also knew he could not provide what the detectives wanted and that he was confused.

Defendant said, speaking about himself: "Right now it looks like Bobby did this because Bobby has DNA under the victim['s] . . . nails." Several minutes later, the detectives told Defendant: "You did what you did." "You're full of sh*t." And: "You're done." The detectives again told Defendant they were certain they were talking to the right person, that Defendant was "choosing not to help" himself, and that he was lying. The detectives told Defendant: "All you can do is make it a little easier on you." They asked him: "Do you think it will go easier on you if you don't talk?" Defendant replied: "No[,]" and the detectives thanked him and said: "So you're listening to us." The detectives reiterated they were certain they were "talking to the right person" and that Defendant was not going to change their minds. The detectives told Defendant to "cut your losses. Help yourself."

At approximately 12:20 p.m., the detectives told Defendant there would be no other interviews with him after that one, that someone would have to pay for the crime, and the nature of the punishment would depend on the individual. Defendant was told: "You told us things in these interviews that only the killer knows. It's that simple." "So is Bobby willing to help Bobby?" Defendant was again told to "cut his losses" and "get the best seat on the bus." Several minutes later, Defendant was told he had gotten away with murder for four years, was asked if he wanted to share the blame, and was told that the "DA wants to know who didn't cooperate; who did cooperate."

The detectives told Defendant they did not "think" he was lying to them, they "knew" it. Defendant was told the "ball" was in his court and, after a long pause, Defendant was again asked if he wanted an assistant district attorney to come and tell him what was in his best interest. Defendant was told that coming clean would give him peace and closure, and that showing remorse would help "cleanse" his soul, and put him at "a higher level." At approximately 12:45 p.m., Defendant was told the district attorney would look at who had cooperated; if only one of the three involved had cooperated, the district attorney would go after the other two; if two of the three had cooperated, the district attorney would go after the uncooperative one. Several minutes later, the detectives asked: "Do you trust them that much?"

Defendant then put his head on the table and went silent for a very long pause. One of the detectives touched Defendant, and Defendant

said: "God," which was followed by minutes more of silence. At approximately 1:05 p.m. Defendant stated: "I'm dead." The detectives told him he would have to pay, but the question was how much; that it would be a question of cooperation versus non-cooperation. Defendant was again told it would be better for him if he cooperated. He was asked if he wanted the detectives to get an assistant district attorney, and was told by Detective Ward that, if he gave a truthful statement, "I'll work for you."

The detectives told Defendant his record was not that bad, other than his prior murder conviction, and that the district attorney would consider that. Defendant was again told the detectives knew they were talking to the right person, and that Defendant knew he was the right person, too.

The detectives left Defendant alone in the interrogation room at 1:15 p.m. and Defendant began to pray out loud. A few minutes later Defendant got up and asked if he could use the restroom, which he did, then returned to an empty interrogation room where he sat alone until 1:57 p.m., when Detective Ward returned alone and resumed talking to Defendant. Detective Ward showed Defendant two post-mortem photographs of Anita at approximately 2:01 p.m.

At approximately 2:03 p.m., Detective Ward told Defendant he was placing him under arrest for Anita's murder, and Detective Ward had Defendant shackle himself to chains set in the interrogation room floor. Although Detective Ward had not yet given Defendant his *Miranda* warnings, he continued to talk to Defendant and listen to him for approximately eleven more minutes. Defendant told Detective Ward he could give him some answers if Detective Ward would allow him to call someone. Detective Ward told Defendant that he was not going to listen to lies. Defendant was told that he was not going to get to go home because murder suspects are generally held without bail.

At approximately 2:14 p.m., Detective Ward began to read Defendant his *Miranda* rights, and Defendant signed a waiver of those rights at approximately 2:17 p.m. Detective Ward continued to question Defendant and told him he was trying to work with Defendant, and that cooperating would be the smartest thing. At approximately 2:22 p.m., Detective Ward told Defendant: "I felt like I had to make you a believer, you weren't believing us." "I felt in my heart like the only thing that's going to make you understand that this isn't going to go away is to charge you with murder. So I charged you with murder."

Several minutes later, Detective Ward assured Defendant he did not "have a problem taking the stand on the behalf of a defendant." Detective Ward told Defendant that he could face either second-degree, first-degree, or capital murder and "that's why I'm . . . beating my head against the wall trying to explain to you, help yourself. Put it into a better category for you." Detective Ward told Defendant he could not promise anything, but the district attorney would go easier on Defendant if Defendant was truthful. Defendant was told to "cut his losses," that if he was honest about what he had done, it would help him. Defendant was told not to "wear" the charge all by himself.

At approximately 2:38 p.m., Defendant began crying again and told Detective Ward, "you have to get me a witness protection plan, though," then began sobbing. Defendant asked: "I'm already dead, should I just kill myself all the way?" At approximately 2:40 p.m., Defendant told Detective Ward, while sobbing, "I wasn't the gunman." Defendant then told Detective Ward that Tony and Josh were the other two men involved, asked Detective Ward for a hug, and sobbed on Detective Ward's shoulder. As indicated above, Defendant told the detectives that he had not killed Anita, and that he assumed Tony had been the one who shot her.

Acting on information obtained from Defendant, the detectives located Tony and Josh and questioned them at the police station. Tony and Josh gave different accounts from each other when questioned by the police, and then gave different accounts when testifying at trial. When initially questioned, Josh told police he had handled a gun that night, and that the gun belonged to him. Josh testified that he first told the detectives that he shot Anita, but that this statement was not recorded. Josh then told police Tony had killed Anita; that Tony had told him "he [Tony] shot her[, but Tony] didn't know if he killed her or not." However, at trial, Josh testified he never touched a gun, that Defendant brought the gun, and that he did not know who shot Anita. Tony testified at trial that Defendant and Josh planned the robbery. Tony also testified that Josh never had a gun, but admitted he had previously told police that Josh "probably did have a gun[.]"

When Josh testified at trial, he said that he, Tony, and Defendant walked to the motel and when they were beside the motel, Defendant pulled out a gun and said they should rob a man and a woman who were standing in the parking lot. Josh and Tony wore stocking caps, and Defendant wore a ski mask that covered his face. They all approached the man and woman in the parking lot and Defendant threatened them with his gun and told them to get on the ground; then Josh went through

their pockets. Josh put the items he recovered into his own pockets, except a set of keys, which he gave to Defendant. Defendant told Josh to remain with the victims, and he and Tony went to the motel. Josh heard both a man and a woman screaming, and some gunfire. Defendant and Tony returned a few minutes later and the three men left together. Josh testified that Defendant attempted to rob another man who was approaching the motel, but the man ran away and Defendant fired his gun at the man, but missed. Defendant hid the gun under a brick beside an abandoned building. Josh testified he never had a gun that night, and that he never saw Tony with a gun.

Tony's testimony was that he, Josh, and Defendant left a friend's house and headed toward the motel with the intention of committing a robbery. According to Tony's testimony, Defendant and Josh had come up with the plan. However, Tony then testified they all came up with the plan once they were at the motel. Tony testified Defendant hit the man in the head with his gun, then saw Josh doing something to the man and woman who were on the ground. Tony took the keys and attempted to unlock to door to the motel, and finally managed to find the correct key. He and Defendant went inside, and encountered a woman sleeping. Defendant went to the woman, and when she woke up "she was trying to get him off[,] and "she was screaming." Tony said he left the room to rejoin Josh, then they heard a gunshot and saw Defendant "coming out of the room running." The three men then ran away from the motel, but when they saw a man coming towards them, Defendant shot at the man twice. They went behind a building where Defendant hid the gun under a brick.

Defendant filed a motion to suppress on 11 December 2014, arguing his statements to police should be suppressed because they were not voluntarily made. Defendant's motion specifically argued that Defendant was subjected to custodial interrogation before he was given his *Miranda* rights, and that Defendant's inculpatory statements were made pursuant to improper use of both threat and promise.

Defendant's motion was heard 28 September 2015, and was denied by order entered 3 November 2015, *nunc pro tunc*, 29 September 2015. The trial court ruled that Defendant "was not in custody until the time that he was advised that he was under arrest and Mirandized at 2:14 p.m." The trial court further ruled that Defendant's inculpatory statements were made voluntarily, and not "obtained as a result of hope or fear instilled by the detectives." Defendant was tried and found guilty of first-degree murder on 6 October 2015. Defendant appeals.

[1] In Defendant's first argument, he contends the trial court erred in denying his motion to suppress. We agree, but hold the error was harmless.

Our Supreme Court has stated the proper standard of review for denial of a motion to suppress as follows:

> The applicable standard in reviewing a trial court's determination on a motion to suppress is that the trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." Any conclusions of law reached by the trial court in determining whether defendant was in custody "must be legally correct, reflecting a correct application of applicable legal principles to the facts found."

State v. Barden, 356 N.C. 316, 332, 572 S.E.2d 108, 120–21 (2002) (citations omitted). This Court has held:

> We review *de novo* a trial court's conclusions as to the voluntariness of a defendant's waiver of *Miranda* rights and statements. "The State bears the burden of proving that a defendant made a knowing and intelligent waiver of his rights and that his statement was voluntary." Where, as here, "a defendant's waiver of *Miranda* rights arises under the same circumstances as the making of his statement, the voluntariness issues may be evaluated as a single matter. Whether a waiver and statements were voluntarily made "must be found from a consideration of the entire record[.]" "[T]he reviewing court applies a totality-of-circumstances test."

State v. Ingram, __ N.C. App. __, __, 774 S.E.2d 433, 442 (2015) (citations omitted).

> There are a number of . . . relevant factors [in determining the voluntariness of a statement]:
>
> > whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

> . . . . Furthermore, for a waiver of *Miranda* rights to be valid, it "must be . . . given voluntarily 'in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception[.] "[W]here it appears that an incriminating statement was given under any circumstances indicating coercion or involuntary action, that statement will be inadmissible." "[T]he question of whether Defendant's incriminating statements were made voluntarily turns on an analysis of the circumstances Defendant was subjected to before making his incriminating statements and the impact those circumstances had upon him."

Id. at __, 774 S.E.2d at 442–43 (citations omitted).

In the present case, the trial court made the following relevant findings of fact:

> 3. Det. Ward and another CMPD detective, Brian Whitworth ("Det. Whitworth") sought to make contact with the Defendant on October 19, 2011.
>
> 4. The Defendant came to the police department headquarters on his own, without police escort, on October 24, 2011.
>
> 5. The Defendant was not told he was under arrest.
>
> 6. The Defendant was not shackled or handcuffed.
>
> 7. At times, during the interview with Det. Ward and Det. Whitworth, both detectives left the interview room.
>
> 8. There was not a guard or police officer stationed at the door to the interview room.
>
> 9. The Defendant was in possession of his personal cell phone while inside the interview room.
>
> 10. The Defendant was offered, and accepted, food and drink.
>
> 11. The Defendant was not hesitant to engage with, or otherwise speak to, the detectives.
>
> 12. At no point was the Defendant made any specific promises.

. . . .

18. At no time did the Defendant ask detectives to obtain for him, or to give him the opportunity to speak with, a defense lawyer.

19. The Defendant was emotional at times.

20. The Defendant cried at times.

21. The Defendant expressed concern with his ability to "keep food down."

22. The Defendant was 37 years old at the time of the interview.

23. The Defendant is high-school-educated through the 11th grade and obtained his GED.

24. The Defendant is articulate, intelligent, literate, and knowledgeable about the criminal justice system and its processes.

25. Det. Ward had previously interviewed the Defendant, in 1993, about a murder unrelated to the above-captioned case.

26. While there were no specific promises or threats made by law enforcement, the detectives conducting the interview did represent to the Defendant that the District Attorney "might look favorably" at the Defendant if he made a confession.

27. At one point, the Defendant was patted down, as a matter of course, for safety purposes.

28. Det. Ward had previously interviewed the Defendant, in 2007, about the above captioned case.

29. During his 2007 interview, the Defendant did not admit any involvement in the above-captioned case.

30. The Defendant had self-interest in staying and engaging with police in 2011.

31. The Defendant offered to help, offered to wear a wire, and offered to do whatever else he could to assist the detectives.

Defendant argues the trial court's findings of fact "seem to intentionally downplay the influence of hope and fear." Defendant specifically contends that findings of fact five, nineteen, twenty, twenty-one, and twenty-six are incorrect or incomplete.

Defendant argues that finding five: "Defendant was not told he was under arrest," "is at best an incomplete finding as [Defendant] was told he would be arrested if he did not state that he was there voluntarily. [Defendant] was also told that he was guilty of murder and would 'pay the price. In order to evaluate Defendant's arguments, we have reviewed the relevant parts of the video recordings of Defendant's interview on 24 October 2011, which are set forth above. We note that Defendant was told that he was under arrest at approximately 2:03 p.m. Concerning the time prior to formal arrest, when Defendant was being interrogated, we agree with Defendant that whether or not he was specifically told he was under arrest, the detectives' statements to Defendant, along with the attendant circumstances, made Defendant's position akin to a formal arrest at a point early in the interview.

Findings of fact nineteen, twenty, and twenty-one are all supported by competent evidence, though we agree with Defendant that finding Defendant "was emotional at times," and "cried at times" tends to understate Defendant's emotional state during much of the interview. Concerning Defendant's ability to keep food down, our review of the video interrogation demonstrates that Defendant did tell the detectives he felt sick to his stomach, and that he rejected an offer of food at one point, stating that he worried he would not be able to "keep it down." Defendant also on occasion spit into a cup in a manner indicating stomach upset. Finally, though we may agree with the wording of finding of fact twenty-six that "there were no specific promises or threats made by" the detectives (emphasis added), we agree with Defendant that viewing the totality of the circumstances, Defendant was induced by both fear and hope to make inculpatory statements to the detectives.

Defendant was asked to "voluntarily" show up at the police department for an interview. What Defendant did not know at that time was that the police had received DNA evidence suggesting the overwhelming likelihood that Defendant's DNA had been recovered from underneath Anita's fingernails. Defendant did not know this at the time he was asked to "voluntarily" submit to an interview at the police station, so at the time Defendant arrived at the police station, a reasonable person in Defendant's situation would not have "believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest." *Barden*, 356 N.C. at 337, 572 S.E.2d at 123 (citation omitted).

What is clear to this Court, however, is that Defendant was not going to leave the police station that day without being placed under arrest for Anita's murder.

As the State acknowledges:

> Both the United States Supreme Court and this Court have held that *Miranda* applies only in the situation where a defendant is subject to custodial interrogation. *Miranda v. Arizona*, 384 U.S. at 444, 16 L.Ed.2d at 706; *State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 404 (1997). The proper inquiry for determining whether a person is "in custody" for purposes of *Miranda* is "based on the totality of the circumstances, whether there was a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. In this case, we must examine "whether a reasonable person in defendant's position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest."

Id. (citations omitted); *see also J.D.B. v. North Carolina*, 564 U.S. 261, 269–71, 180 L. Ed. 2d 310, 321-22 (2011).

Approximately twenty minutes into the interview, Defendant was shown the DNA analysis indicating that his DNA had been recovered from under Anita's fingernails. This evidence, if true, placed Defendant not only at the scene of the murder, but in close physical proximity to the victim. We hold that at that time, "a reasonable person in [D]efendant's position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest." *Barden*, 356 N.C. at 337, 572 S.E.2d at 123. A reasonable person, who had previously denied ever having had contact with a murder victim, when confronted with DNA evidence recovered from underneath that murder victim's fingernails, would not believe he was free to exit a police interrogation room and go home. At that point in time, Defendant should have been informed that he was under arrest and should have been provided his rights under *Miranda*. *Id.*

We note that the detectives continued to reinforce the position that Defendant was not free to leave through their subsequent and continuing interrogation. At approximately 10:12 a.m., Detective Ward told Defendant that the DNA evidence locked Defendant in on charges of armed robbery and murder. The detectives told Defendant at

approximately 10:16 a.m. that this case would be a capital murder case, and, unless Defendant wanted "to wear" the whole charge, Defendant needed to tell them who else was involved. In the next few minutes, the detectives told Defendant that his DNA under Anita's fingernails provided enough probable cause to charge Defendant for murder, and showed that Anita had grabbed Defendant's arm or his hair before she was murdered. Approximately thirty-one minutes into the interview, the detectives told Defendant that he should stop denying his participation, because he was so locked into the charges that he could not "get out with a blow torch." Detective Ward again told Defendant that this case would be a capital case, but Defendant could help himself by cooperating, and that district attorneys "will work with people who are honest and true." Defendant was challenged in this manner for over four hours, as thoroughly set out above, until he was finally told he was under arrest. Though we do not apply a subjective test, we note that Defendant was eventually placed under arrest and *Mirandized*, even though he had continued to deny involvement in Anita's murder from the time his interrogation began until he was placed under arrest.

Defendant argues that *Missouri v. Seibert*, 542 U.S. 600, 159 L. Ed. 2d 643 (2004), renders his inculpatory statements involuntary. In *Seibert*, the United States Supreme Court stated that the "technique of interrogating in successive, unwarned and warned phases raises a new challenge to *Miranda*." *Id.* at 609, 159 L. Ed. 2d at 653. In *Seibert*, detectives first questioned the defendant without *Miranda* warnings until he confessed, then detectives got the *Mirandized* defendant to repeat his confession. This technique was

> a police protocol for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession. Although such a statement is generally inadmissible, since taken in violation of *Miranda*, the interrogating officer follows it with *Miranda* warnings and then leads the suspect to cover the same ground a second time.

Id. at 604, 159 L. Ed. 2d at 650 (citation omitted). The Supreme Court held:

> By any objective measure, applied to circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content. After

> all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble. Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision. What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail. Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." By the same token, it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle.

Id. at 613–14, 159 L. Ed. 2d at 655-56 (citations omitted).

We agree that the detectives in the present case used the same objectionable technique considered in *Seibert*. However, unlike in *Seibert*, Defendant in the present case did not confess until after he was given his *Miranda* warnings. For this reason, our analysis is whether the entirety of the interrogation, from when Defendant first should have been *Mirandized*, up until his inculpatory statements, rendered Defendant's inculpatory statements involuntary, even without Defendant having confessed prior to having been *Mirandized*.

We hold that resolution of the present case is determined by precedent, which is partially analyzed in *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975). In *Pruitt*, there was

> plenary evidence that the procedural safeguards required by the *Miranda* decision were recited by the officers and that defendant signed a waiver stating that he understood his constitutional rights, including his right to counsel. Even so, the ultimate test of the admissibility of a confession still remains whether the statement made by the accused was in fact voluntarily and understandingly made.

Id. at 454, 212 S.E.2d at 100 (citation omitted). Our Supreme Court in *Pruitt* reasoned:

> Another case factually similar to the case now before us is State v. Stevenson, 212 N.C. 648, 194 S.E. 81. There the evidence tended to show that the defendant had started to make a statement while in jail and was told by an officer that he need not lie because the officer already had more than enough evidence for his conviction. The defendant thereupon confessed. This Court awarded a new trial on the ground that the confession was not a free and voluntary confession but was instead a product of unlawful inducement on the part of the law enforcement officer.
>
> In *State v. Drake*, 113 N.C. 625, 18 S.E. 166, the facts showed that while the defendant was being carried from the place of his arrest to a Justice of the Peace, a law enforcement officer said to him, 'If you are guilty, I would advise you to make an honest confession. It might be easier for you. It is plain against you.' At that time the defendant denied his guilt, but after the Justice of the Peace had committed him to jail, he confessed. The Court again held the confession to be involuntary and, in part, stated:
>
> > ". . . The assertion of his innocence, in reply to the proposition that he should confess and thus make it easier for him, does not at all prove that the offer of benefit from the officer who had him in charge did not find a lodgment in his mind. If so, what could be more reasonable than that when he found himself on the way to prison in charge of the author of this hope that a confession would alleviate his condition, he should be tempted to act then upon a suggestion that he had rejected when the prospect did not seem to him so dark, and make a confession. It *may* have proceeded from this cause, from this hope so held out to him. If it

> *may* have proceeded from that cause, there is no guaranty of its truth, and it must be rejected."

In *State v. Livingston*, 202 N.C. 809, 164 S.E. 337, the defendants were arrested, and after measuring their shoes and tracks at the scene of the crime, the officers told defendants that "it would be lighter on them to confess" and that "it looks like you had about as well tell it." The defendants forthwith confessed to the crime charged. There the Court . . . held that the confessions were involuntary and inadmissible in evidence. *Accord: State v. Fox*, *Supra* (Officer told defendant that it would be better for him in court if he told the truth and that he might be charged with a lesser offense of accessory to the homicide charge rather than its principal.); *State v. Fuqua*, 269 N.C. 223, 152 S.E.2d 68 (A police officer told the incarcerated defendants that he [the officer] would be able to testify that they cooperated if they aided the State in its case.); *State v. Woodruff*, 259 N.C. 333, 130 S.E.2d 641 (Officer obtained favors and concessions on the part of State officials to induce defendant to aid in solving the homicide and promised that if the evidence obtained involved defendant, he would try to help defendant.); *State v. Davis*, 125 N.C. 612, 34 S.E. 198 (Officer told defendant that he had "worked up the case, and he had as well tell all about it.").

The rule set forth in *Roberts* has been consistently followed by this Court. The Court has, however, made it clear that custodial admonitions to an accused by police officers to tell the truth, standing alone, do not render a confession inadmissible. Furthermore, this Court has made it equally clear that any improper inducement generating hope must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage.

In instant case the interrogation of defendant by three police officers took place in a police-dominated atmosphere. Against this background the officers repeatedly told defendant that they knew that he had committed the crime and that his story had too many holes in it; that he was "lying" and that they did not want to "fool around." Under these circumstances one can infer that the language used by the officers tended to provoke fright. This language was then tempered by statements that the officers considered

> defendant the type of person "that such a thing would prey heavily upon" and that he would be "relieved to get it off his chest." This somewhat flattering language was capped by the statement that "it would simply be harder on him if he didn't go ahead and cooperate." Certainly the latter statement would imply a suggestion of hope that things would be better for defendant if he would cooperate, *i.e.*, confess.
>
> We are satisfied that both the oral and written confessions obtained from defendant were made under the influence of fear or hope, or both, growing out of the language and acts of those who held him in custody. We hold that both the oral and the written confessions obtained in the Sheriff's Department on 9 October 1973 were involuntary and that it was prejudicial error to admit them into evidence.

Id. at 456–58, 212 S.E.2d at 101–03 (citations omitted). We hold that the circumstances in the present case were at least as coercive as those in *Pruitt*. In the present case, Defendant was questioned for hours after he should have been *Mirandized* and, throughout this questioning, the detectives repeatedly told Defendant they knew he was lying; that they had DNA proof of Defendant's guilt; that only a guilty person would have known Anita was shot in the back of the neck; that this could be a capital case, and that Defendant's treatment would depend on his cooperation; that the district attorney's office would usually work with those who cooperated; that Detective Ward would consider testifying on Defendant's behalf;[3] that Defendant would feel better if he confessed and did right by God and his children; and that Defendant should get the "best seat on the bus" by giving statements against the two other men involved. It is also clear that the detectives decided to arrest Defendant at the time they did in order to shake him up and, in Detective Ward's words: "I felt in my heart like the only thing that's going to make you understand that this isn't going to go away is to charge you with murder. So I charged you with murder."[4]

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3. *See State v. Flood*, 237 N.C. App. 287, 297, 765 S.E.2d 65, 73 (2014), *disc. review denied*, 368 N.C. 245, 768 S.E.2d 854 (2015) (citing *State v. Fuqua*, 269 N.C. 223, 228, 152 S.E.2d 68, 72 (1967) "(statements inadmissible where an officer offered to testify on the suspect's behalf if he cooperated)."

4. *See Pruitt*, 286 N.C. at 457, 212 S.E.2d at 102 (citation and quotation marks omitted) ("The assertion of his innocence, in reply to the proposition that he should confess and thus make it easier for him, does not at all prove that the offer of benefit from the officer who had him in charge did not find a lodgment in his mind. If so, what could be

The facts before us are in contrast to those in cases where a defendant's statements were found to have been voluntary:

> Unlike the situations in *Pruitt* and *Stevenson*, the detective did not accuse defendant of lying, but rather informed defendant of the crime with which he might be charged and urged him to tell the truth and think about what would be better for him. Further, at the time Howard made the statements defendant contends were coercive, Howard had already identified for defendant, and defendant had acknowledged, the others with him the night of the murder. Earlier in the interview Howard had stated:
>
> > What I want to talk with you about is when you and Chuck and Brian and Bootsy and another guy from Clayton by the name of Brian Barbour come to Raleigh and ya'll robbed an old man and hit him with a bat. That's the incident I'm talking about, okay?
>
> Shortly thereafter, Howard asked defendant, "So who was together? Who was with ya'll that night?" Defendant responded, "Everybody that you named." Defendant knew at that point that the State had at least one witness.
>
> . . . .
>
> Under the totality of the circumstances test, the isolated statements by Howard do not support defendant's contention that his statements were made involuntarily out of fear or hope on the part of defendant. We conclude, therefore, that the trial court did not err in determining that the statements were freely and voluntarily given and in denying defendant's motion to suppress.

State v. McCullers, 341 N.C. 19, 28, 460 S.E.2d 163, 168 (1995); *see also State v. Thomas*, 310 N.C. 369, 379, 312 S.E.2d 458, 464 (1984) ("In *Pruitt*, unlike the case before us, the police repeatedly told defendant that they knew that he had committed the crime and that his story had

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more reasonable than that when he found himself on the way to prison in charge of the author of this hope that a confession would alleviate his condition, he should be tempted to act then upon a suggestion that he had rejected when the prospect did not seem to him so dark, and make a confession. It *may* have proceeded from this cause, from this hope so held out to him. If it *may* have proceeded from that cause, there is no guaranty of its truth, and it must be rejected.").

too many holes in it; that he was 'lying' and that they did not want to 'fool around.' In addition, the officers told defendant in that case that 'it would simply be harder on him if he didn't go ahead and cooperate.' ") (citations and quotation marks omitted); *Flood*, 237 N.C. App. at 296–99, 765 S.E.2d at 72–74 (lengthy analysis of *Pruitt* and other relevant opinions); *State v. Patterson*, 146 N.C. App. 113, 124, 552 S.E.2d 246, 255 (2001) ("In *Pruitt*, the investigating officers repeatedly told defendant that they knew that he had committed the crime and that his story had too many holes in it; that he was 'lying' and that they did not want to 'fool around.' They also told him that they considered [him] the type of person 'that such a thing would prey heavily upon' and that he would be 'relieved to get it off his chest.' The Court found that under these circumstances the defendant's confessions were made under the influence of fear or hope, or both, growing out of the language and acts of those who held him in custody.") (citations and quotation marks omitted).

The fact that the detectives at times managed to get Defendant to state that he thought he could leave does not change our analysis. *J.D.B.*, 564 U.S. at 271, 180 L. Ed. 2d at 322 ("[T]he 'subjective views harbored by either the interrogating officers or the person being questioned' are irrelevant. The test, in other words, involves no consideration of the 'actual mindset' of the particular suspect subjected to police questioning."). Based upon *Pruitt* and other cited cases, we hold that Defendant's inculpatory statements "were made under the influence of fear or hope, or both, growing out of the language and acts of those who held him in custody." *Pruitt*, 286 N.C. at 458, 212 S.E.2d at 103. Defendant's motion to suppress his confession should have been granted.

Because we have held that Defendant's constitutional rights were violated by the failure to suppress his inculpatory statements, it is the State's burden to prove this error was harmless beyond a reasonable doubt. " '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.G.S. § 15A–1443(b) (2011)." *State v. Ortiz-Zape*, 367 N.C. 1, 13, 743 S.E.2d 156, 164 (2013). In its brief, the State incorrectly attempts to place this burden on Defendant. However, we hold that the overwhelming evidence of Defendant's guilt of first-degree murder, based upon the evidence that Anita was murdered in the course of a robbery in which Defendant played an essential part, renders this error harmless beyond a reasonable doubt.

Both Josh and Tony, whose testimony Defendant did not move to suppress, identified Defendant as the third man involved in the robbery and shooting, and both stated Defendant was wearing a mask that covered his face. They both testified that Defendant and Tony entered the motel while Josh remained outside, and both claimed Defendant was carrying a gun. Brandy testified that there were two younger men without their faces covered, and an older, larger man whose face was covered by a mask. Brandy testified it was the older, larger man who held the gun, and who entered the motel with one of the younger men. Most importantly, Defendant's DNA[5] was recovered from under Anita's fingernails. Although Defendant's admission of participation in the crime, which we have held was involuntary, clearly prejudiced Defendant, in light of the overwhelming evidence presented pointing to Defendant as one of the three men involved in the robbery and murder, we hold the prejudice to Defendant was harmless beyond a reasonable doubt. We reach this holding on these particular facts, and because the jury was instructed on acting in concert and felony murder based upon killing in the course of a robbery. The State did not have to prove that Defendant shot Anita, only that he was one of the three men involved in the robberies and murder. The evidence that Defendant was one of the three men involved was overwhelming, and the State has shown beyond a reasonable doubt that Defendant would have been convicted even had his motion to suppress his inculpatory statements been granted.

[2] In Defendant's second argument, he contends the trial court erred in excluding evidence of bullet fragments recovered from the parking lot that might have indicated the presence of a second gun at the crime scene. We disagree.

Defendant argues he could have used this evidence to impeach the testimonies of Josh and Tony. Even assuming *arguendo* that there was a second gun involved in the crime, the State did not need to prove that Defendant was the person who shot Anita in order to obtain a conviction against him for first-degree murder, nor would the presence of an additional gun have weakened the plenary evidence of Defendant's involvement. This argument is without merit.

The trial court erred in denying Defendant's motion to suppress his inculpatory statements, but we hold this error was harmless in light of the plenary additional evidence of Defendant's guilt. For the same reason, we hold that, even assuming *arguendo* the trial court erred in

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5. To a stated certainty of 1 in 16,600,000 African-Americans, and all evidence presented demonstrated that all three of the men involved were African-American.

excluding evidence of bullet fragments recovered from the parking lot, any such error was harmless.

NO PREJUDICIAL ERROR.

Judges STROUD and INMAN concur.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
JOHNNY DARNELL MOBLEY, DEFENDANT

No. COA16-545

Filed 17 January 2017

Mental Illness—competency to stand trial—serious health problems—drowsiness during trial

Where defendant was on trial for drug charges and there was evidence before the trial court that defendant had a serious heart condition, for which he had been hospitalized for months; he had been diagnosed with bipolar schizophrenia, a major mental illness; he took 25 different pharmaceutical medications twice daily; his medications had psychoactive side effects; and he was unable to remain awake in the courtroom, even when kicked or prodded by counsel, the trial court erred by failing to appoint an expert to investigate defendant's competence to stand trial.

Appeal by defendant from judgment entered 12 February 2016 by Judge Carla Archie in Gaston County Superior Court. Heard in the Court of Appeals 15 November 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General David W. Boone, for the State.

Lisa Miles for defendant-appellant.

ZACHARY, Judge.

Johnny Darnell Mobley (defendant) appeals from a judgment entered upon his convictions for trafficking in marijuana by possession and transportation, and for having attained the status of an habitual

felon. On appeal defendant argues that the trial court erred by failing to appoint an expert to conduct an investigation into defendant's competence to proceed to trial, and by denying defendant's motion to dismiss the charges against him. After careful consideration of defendant's arguments in light of the record and the applicable law, we conclude that, on the facts of this case, the trial court erred by failing to appoint an expert to investigate defendant's competence to stand trial. Accordingly, we reverse and remand without reaching the issue of the sufficiency of the evidence to support defendant's convictions.

I. Factual and Procedural Background

On 29 January 2015, defendant was arrested on charges of trafficking in more than ten but fewer than 50 pounds of marijuana by possession and by transportation, in violation of N.C. Gen. Stat. § 90-95(h)(1) (2015). Counsel was appointed to represent defendant on 30 January 2015. Defendant was indicted for these offenses on 2 March 2015, and was indicted on 5 October 2015 for having attained the status of an habitual felon. The charges against defendant came on for trial at the 10 February 2016 criminal session of Gaston County Superior Court. Prior to the start of trial, defendant's counsel expressed concern about defendant's having fallen asleep in the courtroom. The trial court conducted a discussion with defendant and counsel, which is described in detail below, and then ruled that defendant was competent to proceed to trial.

The evidence presented by the State at trial tended to show the following: On 28 January 2015, Postal Inspector Justin Crooks inspected a package at the U.S. Post Office in Mount Holly, North Carolina. The package gave off an odor of marijuana; accordingly, he obtained assistance from a Charlotte-Mecklenburg Police Detective who worked with a dog that is trained to identify narcotics. After the dog indicated that the suspicious package contained narcotics, Inspector Crooks obtained a federal search warrant to inspect the contents of the package. Inside the package were two bundles of green vegetable matter weighing over 23 pounds. The contents appeared to be marijuana. This was later confirmed by forensic testing and the parties do not dispute that the package in fact contained marijuana.

After Inspector Crooks examined the contents of the package, he contacted Officer E. Kyle Yancey of the Gaston County Police Department, who arranged for a controlled delivery of the package. The controlled delivery took place on 29 January 2015. Postal Inspector Mark Heath drove a postal service vehicle and wore a mail carrier's uniform. When Inspector Heath arrived at the location to which the package was

addressed, he parked at the curb and got out of the postal service vehicle with the package. As Inspector Heath walked toward the house, he was met by defendant, who accepted the package and signed a postal form acknowledging delivery of the package. Upon Inspector Heath's return to the postal service vehicle, he saw defendant "placing the package into the cargo area of the Ford Explorer that was parked there in the driveway." Inspector Heath radioed law enforcement officers who were in the area and informed them that defendant had accepted the package before placing it a vehicle and driving away. A few minutes later the officers stopped defendant's vehicle. Defendant was arrested and charged with trafficking in marijuana by possession and transportation.

On 11 February 2016, the jury returned verdicts finding defendant guilty of trafficking in marijuana by possession and by transportation. Defendant entered a plea of guilty to having the status of an habitual felon. The trial court consolidated the offenses for purposes of sentencing, and sentenced defendant to 60 to 84 months' imprisonment. Defendant gave notice of appeal in open court.

II. Competency to Proceed

N.C. Gen. Stat. § 15A-1001(a) (2015) provides that:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

"[This] statute provides three separate tests in the disjunctive. If a defendant is deficient under any of these tests he or she does not have the capacity to proceed." *State v. Shytle*, 323 N.C. 684, 688, 374 S.E.2d 573, 575 (1989) (citations omitted). "The test of a defendant's mental capacity to stand trial is whether he has, at the time of trial, the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed." *State v. Cooper*, 286 N.C. 549, 565, 213 S.E.2d 305, 316 (1975) (citations omitted). In determining whether a defendant has the capacity to proceed, the fact that a defendant has been diagnosed with a mental illness does not, standing alone, require a finding that the defendant is incompetent to stand trial. In *Cooper*, our Supreme Court held that:

> In this instance, there was ample expert medical testimony to support the trial court's finding that the defendant was competent to plead to the charges against him and to stand trial. The fact that the defendant had to be given medication periodically during the trial, in order to prevent exacerbation of his mental illness by the tensions of the courtroom, does not require a finding that he was not competent to stand trial when, as here, the undisputed medical testimony is that the medication did not have the effect of dulling his mind and that the specified dosage was adequate to keep his mental illness in remission.

Cooper, 286 N.C. at 566, 213 S.E.2d at 317.

"[A] trial judge is required to hold a competency hearing when there is a *bona fide* doubt as to the defendant's competency even absent a request." *State v. Staten*, 172 N.C. App. 673, 678, 616 S.E.2d 650, 654-55, *disc. review denied*, 360 N.C. 180, 626 S.E.2d 838 (2005). "A trial court has a constitutional duty to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent." *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (internal quotation marks and citations omitted).

III. Defendant's Inability to Remain Awake During Trial

In the present case, defendant's trial began on the morning of Wednesday, 10 February 2016. Prior to the introduction of evidence, the trial court conducted pretrial proceedings lasting approximately three hours, including jury selection and a hearing on defendant's motion to suppress evidence. Before the trial court took a lunch recess, defendant's trial counsel asked to bring a matter to the trial court's attention. Following a brief unrecorded bench conference, the trial court asked defendant to stand, and conducted a colloquy with defendant:

> THE COURT: Your lawyer has raised some concerns with the Court about your attention this morning. Are you able to hear and understand me?
>
> THE DEFENDANT: Not really.
>
> THE COURT: Is it because you are having difficulty hearing, you have a hearing problem, or are your thoughts somewhere else?
>
> THE DEFENDANT: Really I don't even know. I think my thoughts are somewhere else.

THE COURT: All right. Are you under the influence of anything, alcohol or drugs?

THE DEFENDANT: My medication. That's it.

THE COURT: All right. What sort of medication do you take?

THE DEFENDANT: A bag full.

THE COURT: What sort of conditions do the medications treat?

THE DEFENDANT: My heart and my mental illness.

THE COURT: Your heart, and you have a mental illness?

THE DEFENDANT: Yes.

THE COURT: And how long have you had your heart condition?

THE DEFENDANT: Probably since 2007.

THE COURT: And have you been diagnosed with some sort of mental illness?

THE DEFENDANT: Yes.

THE COURT: What is that?

THE DEFENDANT: Bipolar schizophrenic.

THE COURT: How long ago were you diagnosed?

THE DEFENDANT: Probably about four years.

THE COURT: And do you take medication for both of those conditions, your heart and your mental illness?

THE DEFENDANT: Yes, ma'am.

THE COURT: How long have you been taking your current medications?

THE DEFENDANT: Since then; about four years.

THE COURT: And how do those medications affect you? Are there any side effects?

THE DEFENDANT: Yeah. I sleep less, and like memory loss. Stuff like that.

> THE COURT: How long have you experienced those side effects?
>
> THE DEFENDANT: Probably since that time.
>
> THE COURT: And how have you managed those side effects for the last four years?
>
> THE DEFENDANT: Just go with the flow, I guess. Just whatever happens.

Defendant told the trial court that despite having a full night's sleep the night before, he was having difficulty following the proceedings in court. The trial court conducted an additional inquiry into defendant's comprehension of the legal proceedings. Defendant's behavior was respectful and appropriate, and his answers to the court's questions were not irrational or delusional. Defendant demonstrated a general, if limited, understanding of the charges against him and of the prior history of the case. For example, he knew that he was charged with trafficking in marijuana and being an habitual felon, and that the significance of the habitual felon charge was that it exposed him to a longer prison sentence. The trial court asked defendant about the medications he took, and defendant agreed to allow the court to inspect a bag defendant had brought to court that contained his medications. After reviewing the contents of the bag, the trial court discussed the medications with defendant:

> THE COURT: All right. Mr. Mobley, I have not reached into the bag but I just counted the bottles. And there appear to be twenty-five plus bottles of medication in there. Do you take all of those every day?
>
> THE DEFENDANT: Yes; twice a day. I have a list of them right here.
>
> THE COURT: And have you shared that list of medications with your lawyer before today?
>
> THE DEFENDANT: No.
>
> THE COURT: And when is the last time you have seen a doctor for your heart condition?
>
> THE DEFENDANT: I go Friday. They gonna put another pacemaker in and another stint.

THE COURT: You go a day after tomorrow?

THE DEFENDANT: Yes, ma'am.

Defendant also told the court that he was scheduled to meet with a doctor regarding his mental illness in about six weeks. The trial court then asked defendant's counsel for further input. Defendant's trial counsel stated that she was appointed to represent defendant shortly after his arrest. Defense counsel met with defendant several times to discuss the case, and described defendant as having been "coherent and able to discuss his case" with counsel. Defendant's attorney expressed concern, however, about defendant's inability to remain awake during the pretrial proceedings:

> DEFENSE COUNSEL: It was only then during the jury selection that he was -- I noticed him snoring, or heard him snoring, looked over and he was asleep on more than one occasion. I attempted to explain the severity of his case and the importance of the jury and what they may think of him, simply his demeanor. And to no avail. It continued to keep happening, which of course is alarming to me and certainly to the State, and obviously to this Court. . . .
>
> THE COURT: So is it my understanding -- do I hear you saying that you have seen some noticeable deterioration in his ability to communicate and participate in his defense today that you have not seen before today?
>
> DEFENSE COUNSEL: I have -- well, first of all, I will say this. I have not been seated beside Mr. Mobley for three hours straight. So that being said, I'm not sure I would say it's a deterioration, I will say that I have never seen him be this lethargic. And I'm not -- I can't speak to what's causing it, but again, I've never been in his -- sitting beside of him for three hours.
>
> THE COURT: Have you noticed some deterioration today in the three-hour window that you have been -- has it been consistent all day or have you seen his attention span decline today?
>
> DEFENSE COUNSEL: No, I think his attention span has been waning. He did appear a little more engaged -- well, that's kind of hard for me to say too, because during the testimony I was more focused on the officers instead of

> him. And he did have some things to say to me after the motion. I guess that's hard for me to say. Because what really drew my attention to it was the snoring.
>
> THE COURT: All right.
>
> DEFENSE COUNSEL: And then I noticed it repeatedly. And I noticed the jurors, several of them appeared to be noticing it as well. When I spoke to him first thing this morning, no, I did not at all get the impression that he was in any way impaired by anything. It's just the sleeping that has me concerned.

At that point, the trial judge told the parties that she would consider the matter during the lunch recess. Following the break for lunch, the trial court addressed counsel and defendant:

> THE COURT: Okay. . . . [B]efore we broke for lunch, defense counsel raised some concerns about the defendant, Mr. Mobley. And, Mr. Mobley, we were having a discussion right before lunch about what you understood to be the charges against you and your physical condition and so forth. Do you remember that?
>
> THE DEFENDANT: Yeah; a little bit.

Thereafter, the trial court reviewed with defendant the charges against him and the possible sentences he might receive if convicted. Defendant indicated that he understood these circumstances, although he had little memory of meeting with counsel prior to trial. The court then returned to the subject of defendant's sleeping in court:

> THE COURT: Now, Mr. Mobley, your lawyer brought to my attention that you appeared to be sleeping, she heard you snoring, I believe.
>
> THE DEFENDANT: I'm tired right now. I was going to ask can I sit back down.

In response, the trial court explained to defendant that he was charged with serious offenses for which he might receive a significant prison sentence and that the jury would be assessing his demeanor:

> THE COURT: . . . But whether or not you testify the jury can see you. They can see whether or not you are asleep. And so it would be in your best interest to stay awake

and give the jury the very best impression. Do you understand that?

THE DEFENDANT: Yes. But right now I'm just tired and beat. This medicine, I just won't take it tomorrow, or whatever.

THE COURT: I'm sorry. Say that again.

THE DEFENDANT: My medicine, I just won't take it tomorrow, or something.

THE COURT: Well, what has your doctor told you about taking your medicine, and whether you should ---

THE DEFENDANT: Take it every day.

THE COURT: Are you able to reach your doctor on the telephone?

THE DEFENDANT: I don't know. I guess.

THE COURT: How many doctors do you have?

THE DEFENDANT: Seven.

THE COURT: Seven doctors? And what have they told you would happen if you stopped taking your medication?

THE DEFENDANT: Possibility of like dying.

THE COURT: And so do you think it is wise to stop taking your medication?

THE DEFENDANT: No.

THE COURT: Do you work normally, Mr. Mobley?

THE DEFENDANT: No, ma'am.

THE COURT: Are you on disability?

THE DEFENDANT: No. I just applied for it. I had a aortic valve dissection, electronic.

THE COURT: And how long were you in the hospital?

THE DEFENDANT: About seven months.

THE COURT: How long have you been out of the hospital?

THE DEFENDANT: Now probably about eight months.

. . .

> THE COURT: And what do you do during the day?
>
> THE DEFENDANT: Just stay at home.
>
> THE COURT: Do you sleep most of the day?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: All right. Based upon the Court's inquiry, the Court does not have any concerns about Mr. Mobley's competency to proceed. He appears to understand the charges against him and the maximum possible penalties of those charges if he is convicted of the same. He also appears to understand the importance of his appearance to the jury. So the Court is prepared to proceed.

At this point, several witnesses testified for the State. Before the trial court recessed court for an afternoon break, defendant's counsel informed the court that defendant had continued to sleep during trial:

> THE COURT: Counsel, anything before we break?
>
> PROSECUTOR: I just would ask that. . . [the witnesses] be released off their subpoenas, Your Honor.
>
> THE COURT: Any objection?
>
> DEFENSE COUNSEL: No, Your Honor. And I would just state for the record that I have kicked and I have hit Mr. Mobley three times during the course of this afternoon, and to no avail.
>
> THE COURT: So noted.

After the jury found defendant guilty of two counts of trafficking in marijuana, defendant agreed to plead guilty to having the status of an habitual felon. During the trial court's colloquy with defendant regarding his plea of guilty, the subject of defendant's mental condition was raised again:

> THE COURT: Are you now under the influence of alcohol, drugs, narcotics, medicines, pills, or any other substance?
>
> THE DEFENDANT: Just medicine.
>
> THE COURT: That we talked about earlier at the outset?
>
> THE DEFENDANT: Yes, ma'am.

> THE COURT: Does that affect your ability to understand what's going on today?
>
> THE DEFENDANT: Sometimes. I'm just ready to get this over with.
>
> THE COURT: Are you thinking clearly today?
>
> THE DEFENDANT: I hope so. Let's -- I'm just ready to get it over with.
>
> THE COURT: All right. Sir, I understand that you're ready to get it over with, but are you understanding what is going on today?
>
> THE DEFENDANT: Yes.

IV. Discussion

As discussed above, a "trial court has a constitutional duty to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent." *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221. A criminal defendant is incompetent to proceed to trial if he is "unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner." N.C. Gen. Stat. § 15A-1001(a). "[A] defendant's competency to stand trial is not necessarily static, but can change over even brief periods of time." *State v. Whitted*, 209 N.C. App. 522, 528-29, 705 S.E.2d 787, 792 (2011) (citing *State v. McRae*, 139 N.C. App. 387, 533 S.E.2d 557 (2000)). For this reason, a defendant's competency is assessed "at the time of trial." *Cooper*, 286 N.C. at 565, 213 S.E. 2d at 316.

"Where a defendant demonstrates or where matters before the trial court indicate that there is a significant possibility that a defendant is incompetent to proceed with trial, the trial court must appoint an expert or experts to inquire into the defendant's mental health[.]" *State v. Grooms*, 353 N.C. 50, 78, 540 S.E.2d 713, 730 (2000). In the present case, we conclude that the evidence indicated that defendant was able to "understand the nature and object of the proceedings against him, [and] to comprehend his own situation in reference to the proceedings[.]" § 15A-1001(a). We conclude, however, that "matters before the trial court" indicated more than a "significant possibility" that defendant, who suffered from serious physical and mental conditions, was unable to remain awake and therefore was unable to consult with his attorney

or participate in his defense. This evidence raised a "significant possibility" that at the time of trial defendant was incompetent.

We have reached this conclusion based on the specific facts and circumstances of this case, in which there was evidence before the trial court suggesting that:

> 1. Defendant had a serious heart condition, for which he had been hospitalized for several months.
>
> 2. Defendant had been diagnosed with bipolar schizophrenia, a major mental illness.
>
> 3. Defendant took 25 different medications twice daily.
>
> 4. Defendant's medications had psychoactive side-effects.
>
> 5. Defendant was unable to remain awake in the courtroom, even when kicked or prodded by counsel.

We hold that these circumstances required the trial court to appoint an expert in order to ascertain whether defendant was competent to proceed to trial. We also note that no evidence or arguments were presented in court to discredit defendant's contentions about his physical and mental condition, and that the trial court did not make any findings indicating that the court had doubts about defendant's credibility.

"[A] defendant does not have to be at the highest stage of mental alertness to be competent to be tried. So long as a defendant can confer with his or her attorney . . . the defendant is able to assist his or her defense in a rational manner." *Shytle*, 323 N.C. at 689, 374 S.E.2d at 575. However, as the United States Supreme Court held more than forty years ago:

> It has long been accepted that a person whose mental condition is such that he lacks the capacity to . . . consult with counsel, and to assist in preparing his defense may not be subjected to a trial. . . . Some have viewed the common-law prohibition as a by-product of the ban against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.

Drope v. Missouri, 420 U.S. 162, 171, 43 L. Ed. 2d 103, 113 (1975) (internal quotation and citations omitted). It is clear that a defendant who is incapable of remaining awake is, by definition, unable to "consult with counsel, and to assist in preparing his defense."

We emphasize that our conclusion is based upon the application of long-standing legal principles to the unusual facts of this case, and should not be interpreted as articulating a new rule or standard. We do not hold that a trial court is required to order a competency evaluation in every case in which a criminal defendant is drowsy or suffers from a mental or physical illness. However, the facts of the present case raise significant questions about defendant's competence, and these questions cannot be answered by reference to the record evidence. Defendant represented that he suffered from serious physical and mental conditions, but defendant's medical records were not in evidence. It is possible that defendant's overwhelming drowsiness simply required an adjustment in medication dosage or treatment protocol. Defendant's condition may have been transient, and may have been either more or less serious than he represented. As a result, our holding is not based on any opinion or speculation as to the likely result of an investigation into defendant's competence or any other factual issue in this case. Nonetheless, when the trial court was faced with a defendant who ostensibly suffered from serious mental and physical conditions and could not stay awake during his trial on serious felony charges, the trial court was constitutionally required to appoint an expert to investigate the issue of defendant's capacity to proceed.

For the reasons discussed above, we conclude that the trial court erred by failing to determine whether, at the time of trial, defendant was competent to stand trial and that defendant is entitled to a new trial.

REVERSED.

Judges CALABRIA and INMAN concur.

STATE OF NORTH CAROLINA
v.
FILEMON OLDMEDO SILVA

No. COA16-278

Filed 17 January 2017

Motor Vehicles—driving while impaired offenses—statutory formal arraignment

On appeal from a judgment entered upon defendant's convictions for habitual impaired driving and driving while license revoked for an impaired driving revocation, the Court of Appeals held that the trial court's failure to strictly follow the formal arraignment requirements of N.C.G.S. § 15A-928(c) was not reversible error.

Appeal by defendant from judgment entered 22 September 2015 by Judge Stanley L. Allen in Forsyth County Superior Court. Heard in the Court of Appeals 8 September 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Ashleigh P. Dunston for the State.

Paul F. Herzog for defendant-appellant.

McCULLOUGH, Judge.

Filemon Oldmedo Silva ("defendant") appeals from a judgment entered upon his convictions for habitual impaired driving and driving while license revoked (DWLR) for an impaired driving revocation. For the following reasons, we find no error.

I. Background

During the early morning hours of 22 February 2015, defendant was arrested for driving while impaired (DWI) and DWLR for an impaired driving revocation after a Winston Salem Police Department officer noticed defendant slumped over asleep in the driver's seat of a running automobile. On 20 April 2015, a Forsyth County Grand Jury indicted defendant on one count of habitual impaired driving and one count of DWLR for an impaired driving revocation. The charges came on for trial in Forsyth County Superior Court on 21 September 2015 before the Honorable Stanley L. Allen. At the conclusion of the trial, the jury returned verdicts finding defendant guilty of both habitual impaired

driving and DWLR for an impaired driving revocation. The offenses were consolidate for entry of judgment and judgment was entered on 22 September 2015 sentencing defendant to a term of 15 to 27 months imprisonment. Defendant appeals.

II. Discussion

On appeal, defendant contends the trial court erred by failing to personally address and arraign him regarding the prior DWI convictions serving as the basis of the habitual impaired driving charge and the prior impaired driving revocation serving as the basis of the DWLR for an impaired driving revocation charge. Defendant contends the alleged errors were in violation of N.C. Gen. Stat. §§ 15A-928, -941, and -1022, and the Fourteenth Amendment to the United States Constitution.

N.C. Gen. Stat. § 15A-941 provides that, generally, "[a] defendant will be arraigned . . . only if the defendant files a written request with the clerk of superior court for an arraignment not later than 21 days after service of the bill of indictment." N.C. Gen. Stat. § 15A-941(d) (2015). That statute further provides that "[a]rraignment consists of bringing a defendant in open court . . . before a judge having jurisdiction to try the offense, advising him of the charges pending against him, and directing him to plead." N.C. Gen. Stat. § 15A-941(a). This Court has long recognized that "the purpose of an arraignment is to advise the defendant of the crime with which he is charged[,]" *State v. Carter*, 30 N.C. App. 59, 61, 226 S.E.2d 179, 180 (1976), but "[t]he failure to conduct a formal arraignment itself is not reversible error . . . and the failure to do so is not prejudicial error unless defendant objects and states that he is not properly informed of the charges[,]" *State v. Brunson*, 120 N.C. App. 571, 578, 463 S.E.2d 417, 421 (1995).

Yet, the statute primarily at issue in this case, N.C. Gen. Stat. § 15A-928, provides special rules for the indictment and arraignment of a defendant "[w]hen the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter[.]" N.C. Gen. Stat. § 15A-928(a) (2015). Pertinent to this case, that statute, entitled "allegation and proof of previous convictions in superior court[,]" provides as follows:

> (c) After commencement of the trial and before the close of the State's case, the judge in the absence of the jury must arraign the defendant upon the special indictment or information, and must advise him that he may admit the previous conviction alleged, deny it, or remain silent.

> Depending upon the defendant's response, the trial of the case must then proceed as follows:
>
> (1) If the defendant admits the previous conviction, that element of the offense charged in the indictment or information is established, no evidence in support thereof may be adduced by the State, and the judge must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense. The court may not submit to the jury any lesser included offense which is distinguished from the offense charged solely by the fact that a previous conviction is not an element thereof.
>
> (2) If the defendant denies the previous conviction or remains silent, the State may prove that element of the offense charged before the jury as a part of its case. This section applies only to proof of a prior conviction when it is an element of the crime charged, and does not prohibit the State from introducing proof of prior convictions when otherwise permitted under the rules of evidence.

N.C. Gen. Stat. § 15A-928(c). This Court has explained that

> [t]he purpose of [section 15A-928], which is for the benefit of defendants charged with prior convictions, is not to require that the procedures referred to therein be accomplished at a certain time and no other, which would be pointless. Its purpose is to insure that defendants are informed of the prior convictions they are charged with and are given a fair opportunity to either admit or deny them before the State's evidence is concluded; because, as the statute makes plain, if the convictions are denied, the State can then present proof of that element of the offense to the jury, but cannot do so if the prior convictions are admitted.

State v. Ford, 71 N.C. App. 452, 454, 322 S.E.2d 431, 432 (1984).

As detailed above, in this case, defendant was indicted on one count of habitual impaired driving in file number 15 CRS 51679. That specialized indictment charged DWI in count one and charged three prior DWI convictions within ten years of the current DWI offense in count two,

in accordance with the requirements of N.C. Gen. Stat. § 15A-928(a) and (b). *See State v. Lobohe*, 143 N.C. App. 555, 558, 547 S.E.2d 107, 109 (2001) (explaining that an indictment that charged DWI in one count and alleged previous DWI convictions in count two followed precisely the format required in N.C. Gen. Stat. § 15A-928). In a separate indictment in file number 15 CRS 2755, defendant was indicted on one count of DWLR for an impaired driving revocation.

After defendant's case was called for trial, but before the jury was impaneled, the Assistant District Attorney (ADA) prosecuting the case raised the issue of whether defendant would be stipulating to any prior convictions, explaining that "[defense counsel] made the comment . . . that he was going to be stipulating to some items." Therefore, the ADA asked "the Court to do a colloquy with the defendant showing that he has agreed that his . . . attorney can admit these -- whatever items may be." At that point, defense counsel indicated that he had discussed with the prosecutor stipulating that defendant's license was revoked for an impaired driving revocation for purposes of the DWLR for an impaired driving revocation charge if the jury finds that defendant did "drive" for purposes of the DWLR charge. The ADA then indicated that she was under the impression that if defendant stipulated to prior DWI convictions for habitual impaired driving, the State would not be able to present any evidence of the prior convictions. The ADA, however, explained that she believed she was not required to accept a stipulation that defendant's license was revoked for an impaired driving revocation and indicated the State would put on evidence of all the elements of DWLR for an impaired driving revocation, unless defendant pleaded guilty to the charge. During the ADA's comments to the court, defense counsel indicated that the ADA was correct that defendant would not stipulate to the prior DWI convictions needed to prove habitual impaired driving. To be exact, when the prior DWI convictions were brought up, defense counsel unequivocally stated, "No. We're not stipulating to the three prior convictions." The case then proceeded to jury selection with both parties in agreement that there were no stipulations as to the prior DWI convictions or that defendant's license was revoked for an impaired driving revocation.

Now on appeal, defendant relies repeatedly on *State v. Jackson*, 306 N.C. 642, 295 S.E.2d 383 (1982), for the assertions that the offense of habitual impaired driving is the type of offense governed by N.C. Gen. Stat. § 15A-928 and that the statute must be strictly followed. Although defendant acknowledges that defense counsel refused to stipulate to defendant's prior DWI convictions, defendant argues the trial court

failed to strictly follow the arraignment requirement of N.C. Gen. Stat. § 15A-928(c) for the habitual impaired driving charge because the trial court did not personally address defendant to obtain a plea. Defendant contends both N.C. Gen. Stat. §§ 15A-928(c) and -941(a) require the court to personally address a defendant and that an admission of prior convictions is the "functional equivalent" of a guilty plea and, therefore, N.C. Gen. Stat. § 15A-1022(a) and the Fourteenth Amendment to the United States Constitution, concerning guilty pleas, require that a defendant be addressed directly. Defendant relies on cases in which defense counsel admitted the defendants' guilt.

In a footnote, defendant further contends the legal principles argued concerning habitual impaired driving apply equally to the related misdemeanor charge of DWLR for an impaired driving revocation.

At the outset, we hold that defendant is correct that habitual impaired driving is precisely the type of offense to which N.C. Gen. Stat. § 15A-928 applies. *See* N.C. Gen. Stat. § 20-138.5(a) (2015) ("A person commits the offense of habitual impaired driving if he drives while impaired as defined in [N.C. Gen. Stat. §] 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in [N.C. Gen. Stat. §] 20-4.01(24a) within 10 years of the date of this offense."). However, we note that defendant's reliance on *Jackson* is misplaced because the footnote repeatedly quoted by defendant is dicta. In *Jackson*, the Court held that N.C. Gen. Stat. § 15A-928 was not applicable because the defendant's prior conviction of armed robbery did not raise the offense for which the defendant was charged to one of a higher grade. *Jackson*, 306 N.C. at 652, 295 S.E.2d at 389. In a footnote, the Court merely provided an example of when N.C. Gen. Stat. § 15A-928 applied and cautioned the bench and bar about the application of the statute "in order to apprise [a] defendant of the offense for which he is charged and to enable him to prepare an effective defense." *Id.*, n.2.

Reaching the merits of defendant's arguments, we are not persuaded that the trial court's failure to strictly follow N.C. Gen. Stat. § 15A-928(c) is reversible error in the present case. We find *State v. Jernigan*, 118 N.C. App. 240, 455 S.E.2d 163 (1995), controlling.

In *Jernigan*, a defendant appealed his conviction for habitual impaired driving on the basis that "the trial court did not formally arraign [him] upon the charge alleging the previous convictions and did not advise [him] that he could admit the previous convictions, deny them, or remain silent, as required by [N.C. Gen. Stat. §] 15A–928(c)." *Id.* at 243, 455 S.E.2d at 165. The defendant contended the trial court's

failure to conduct a formal arraignment constituted reversible error and this Court disagreed. In *Jernigan*, this Court explained as follows:

> The purpose of [N.C. Gen. Stat. §] 15A-928 is to insure that the defendant is informed of the previous convictions the State intends to use and is given a fair opportunity to either admit or deny them or remain silent. This purpose is analogous to that of [N.C. Gen. Stat.] § 15A-941, the general arraignment statute. Under that statute, the defendant must be brought before a judge and must have the charges read or summarized to him and must be directed to plead. If the defendant does not plead, he must be tried as if he pled not guilty. The failure to arraign the defendant under [N.C. Gen. Stat. §] 15A-941 is not always reversible error. Where there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding.

Id. at 244, 455 S.E.2d at 166 (internal citations and quotation marks omitted). This Court then held that "there [was] no doubt that [the] defendant was fully aware of the charges against him and was in no way prejudiced by the omission of the arraignment required by [N.C. Gen. Stat. §] 15A-928(c)" where "[the] defendant's attorney informed the court that he had discussed the case with [the] defendant and that [the] defendant would stipulate to the previous convictions[]" and "[the d]efendant [made] no contention on appeal that he was not aware of the charges against him, that he did not understand his rights, or that he did not understand the effect of the stipulation." *Id.*

Additionally, in response to the defendant's argument "that the stipulation was ineffective because it was made by his attorney without defendant's having been advised by the court of his rights regarding the stipulation[,]" *id.* at 245, 455 S.E.2d at 166, this Court explained that

> it is clear that a defendant's attorney may stipulate to an element of the charged crime on behalf of the defendant . . . . Moreover, there is no requirement that the record show that the defendant personally stipulated to the element or that the defendant knowingly, voluntarily, and understandingly consented to the stipulation. . . . It is well-established that stipulations are acceptable and desirable substitutes for proving a particular act. Statements of

> an attorney are admissible against his client provided that they have been within the scope of his authority and that the relationship of attorney and client existed at the time. In conducting an individual's defense an attorney is presumed to have the authority to act on behalf of his client. The burden is upon the client to prove lack of authority to the satisfaction of the court.

Id. at 245, 455 S.E.2d at 166-67. Yet, in *Jernigan*, the defendant did not show, nor contend, that his attorney was acting contrary to his wishes. *Id.* at 245, 455 S.E.2d at 166. Thus, this Court held the trial court did not commit reversible error in *Jernigan* by failing to formally arraign the defendant as provided in N.C. Gen. Stat. § 15A-928(c).

The present case is distinguishable from *Jernigan* only by the facts that defense counsel refused to stipulate to the prior convictions, requiring the State to put on evidence of all the elements of the charged offenses, and that defendant was primarily Spanish speaking. However, those distinctions do not sway us to reach a different result in the present case. Defendant does not assert that defense counsel was acting contrary to his wishes when he refused to stipulate to the prior convictions, but instead contends it is not clear that defendant understood the law because of a limited ability to understand English. We are not persuaded because there is no indication that defendant was confused about the charges or that defense counsel was acting contrary to defendant's wishes. Additionally, interpreters were present throughout the proceedings to translate for defendant. Lastly, despite defendant's assertions to the contrary, the State presented overwhelming evidence of defendant's guilt through testimony of the arresting officer. As a result, we hold the trial court did not commit reversible error.

In a footnote at the conclusion of defendant's argument on appeal, defendant raises an issue as to the general competence of his trial counsel based on trial counsel's alleged fundamental misunderstanding of the methods the State may use to prove prior DWI convictions in habitual driving while impaired cases. Defendant asserts that "[i]t seems likely that his [trial counsel's] misunderstanding of basic traffic law could have led to a trial strategy that was fatal to his client's case" and requests that, in the event defendant is not awarded a new trial, this Court remand the matter for a hearing concerning his trial counsel's effectiveness. It appears that defendant is raising an ineffective assistance of counsel argument on appeal, but seeking review of the issue in superior court.

> It is well established that ineffective assistance of counsel claims "brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, *i.e.*, claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Thompson, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citations omitted) (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001)), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005). It is evident that defendant's ineffective assistance of counsel claim before this Court is premature. Thus, we dismiss any claim asserted in the footnote without prejudice and leave the matter for the trial court to consider upon a proper motion for appropriate relief by defendant.

III. Conclusion

For the reasons discussed above, the trial court did not commit reversible error when it failed to formally arraign defendant pursuant to N.C. Gen. Stat. § 15A-928(c).

NO ERROR.

Judges HUNTER, Jr., and DIETZ concur.

TATER PATCH ESTATES HOME OWNER'S ASSOCIATION,
A NORTH CAROLINA CORPORATION, PLAINTIFF
v.
TAMMY SUTTON, DEFENDANT

No. COA16-787

Filed 17 January 2017

1. Associations—homeowners'—assessments—combining lots—question for jury

In a case involving a dispute over homeowners' association assessments, the trial court did not err by denying plaintiff association's motion for a directed verdict on the issue of defendant's obligation to pay assessments. Defendant argued that, by combining Lots 20, 25, and 28, she reduced her obligation to one lot under the Declaration, while plaintiff argued that defendant owed assessments for four lots rather than two. There was sufficient evidence to present a question for the jury.

2. Associations—homeowners'—damage to property from work approved by association—question for jury

In a case involving a dispute over homeowners' association assessments, the trial court did not err by denying plaintiff association's motion for a directed verdict on defendant's counterclaim for damage allegedly done to her property by work approved by the association. There was sufficient evidence to create a question of fact as to whether the association was aware or approved of the grading of the road and the alteration it caused to defendant's lot.

3. Associations—homeowners'—evidence from auction and sales contract—no prejudice

In a case involving a dispute over homeowners' association assessments, where plaintiff association argued that the trial court erred by allowing testimony regarding statements made at auction and by admitting a land sales contract, the Court of Appeals held that, assuming arguendo that the evidence was improperly admitted, plaintiff failed to show a likelihood that the jury would have reached a different result without the evidence.

4. Associations—homeowners'—assessments—roads—pro rata share

In a case involving a dispute over homeowners' association assessments, the Court of Appeals rejected defendant's argument

that the trial court erred by instructing the jury that the law does not require defendant's lot to be adjacent to a subdivision road for her to be liable for road maintenance assessments by the association on that lot. The Declaration clearly indicated the intent to require all lot owners to pay a pro rata share of the road maintenance.

5. Associations—homeowners'—assessments—proportion of common expenses

In a case involving a dispute over homeowners' association assessments, the Court of Appeals rejected defendant's argument that the trial court erred by instructing the jury that lot purchasers have a right to presume that they would pay a certain proportion of the common expenses as shown by the plat, and to presume the owners of every other lot on the plat would pay an equal sum pursuant to the plan of road maintenance contained in the covenants. Defendant failed to show any prejudice on the instruction.

Appeal by plaintiff and defendant from judgment entered 3 February 2016 by Judge Donna Forga in Haywood County District Court. Heard in the Court of Appeals 1 December 2016.

Cannon Law, P.C., by William E. Cannon, Jr., Christopher Castro-Rappl and Martha S. Bradley, for plaintiff-appellant, cross-appellee.

Fred H. Moody, Jr. for defendant-appellee, cross-appellant.

TYSON, Judge.

Tater Patch Estates Home Owner's Association ("Plaintiff" or "the HOA") and Tammy Sutton ("Defendant") both appeal from judgment entered, following a jury trial and verdict, in favor of Plaintiff and against Defendant in the amount of $8,040.00, and in favor of Defendant on her counterclaim and against Plaintiff in the amount of $8,040.00. We find no error.

I. Background

Defendant purchased Lots 20, 25, and 28 within the Tater Patch Estates subdivision at an auction in November of 2000. All three lots were conveyed to Defendant within a single deed. Defendant additionally purchased Lot 2 within the Tater Patch Estates subdivision in August of 2001. Deeds for both of these purchases were recorded with the Haywood County Register of Deeds.

Each deed conveying title to Defendant states the property is "subject to restrictions recorded in Deed Book 471 at Page 136, Haywood County Registry." The referenced restrictions are contained within the recorded Declaration of Covenants, Conditions and Restrictions ("Declaration"), which was executed by the developers of Tater Patch Estates. The Declaration requires lot owners to pay "a pro rata share of the maintenance of the subdivision roads based on the number of lots." The Declaration further provides for the formation of a homeowner's association after the developers have conveyed seventy-five percent of the lots located in the subdivision.

The Declaration was recorded in 1999, prior to Defendant's purchases. Subsequent to the recording of the Declaration, but prior to Defendant's purchases, the developers recorded a plat, which divided the subdivision into individually numbered lots, including the lots referred to within Defendant's deeds.

In June 2002, Defendant filed a Notice of Intent to Combine Parcels with the Haywood County Register of Deeds. This notice proposed to re-combine Lots 20, 25, and 28 into a single parcel.

By 2007, the developers had conveyed seventy-five percent of the lots within Tater Patch Estates, which allowed for the formation of a homeowner's association pursuant to the terms of the Declaration. In April 2007, an entity claiming to be the Tater Patch Home Owner's Association sent 2007 billing statements to the lot owners for yearly fees and road maintenance assessments. The invoices were to be paid "ASAP or by June 15, 2007." Defendant was billed the yearly fee for each of her four lots, as well as separate road assessments for each of the lots, for a total of $3,200.00. At that time, no articles of incorporation were filed. No organizational meeting or election of officers and directors of the association had occurred, and Defendant's attorney asserted by letter to the purported HOA, that no one was "legally constituted to levy, collect or expend these funds." As a result, Defendant refused to pay the assessments for which she was billed at that time.

Articles of Incorporation for Plaintiff, Tater Patch Estates Home Owner's Association, were filed with the North Carolina Secretary of State on 31 May 2007. The organizational meeting was held on 2 November 2007. Plaintiff thereafter maintained the roads within the subdivision and the gated entrance. In 2009, Plaintiff changed the lock on the entrance gate, and failed to provide Defendant with a key to open the locked gate until 2014.

On 5 December 2012, Plaintiff sent to Defendant an invoice for assessments and yearly fees. This invoice billed the combined Lots 20, 25, and 28 as one lot. Defendant was billed for two assessments each year, from 2007 through 2012. One assessment was for the three combined lots, and another was for Lot 2. The invoice claimed Defendant owed $5,444.60. Defendant received another HOA invoice dated 6 February 2013, which showed she owed $5,924.60.

Defendant did not pay any of the money invoiced for the assessments or fees. On 31 January 2013, Plaintiff filed suit in district court, and claimed Defendant owed $5,684.60. Plaintiff later amended the complaint to claim Defendant owed $10,889.20.

In August 2013, after litigation had commenced, Plaintiff sent Defendant a letter, which stated Plaintiff had erroneously charged Defendant for two lots instead of four. The letter further stated Defendant's act of combining three of her lots, 20, 25, and 28, had no effect upon the amount she owed to the HOA for fees and assessments on all four lots. A corrected HOA invoice was enclosed, which asserted Defendant owed $15,209.20 for assessments on all four lots from 2007 through 2013.

On 13 May 2014, Defendant filed a counterclaim. She alleged the grading and significant lowering of the elevation of Viewpoint Road by an adjoining lot owner with the approval of the HOA had "ruined access" to combined Lots 20, 25, and 28, and rendered access to that lot "practically impossible." Defendant alleged damages in excess of $10,000.00 for the de-valuation of those combined lots.

Plaintiff's and Defendant's claims were submitted, adjudicated, and determined by a jury after a three day trial. Plaintiff moved for a directed verdict on its claim and Defendant's counterclaim, and renewed those motions at the close of all evidence. The jury awarded the sum of $8,040.00 in favor of Plaintiff, against Defendant, for the unpaid assessments and late fees. The verdict sheet specifically states the awarded assessments and late fees pertain to two lots. The jury also awarded an identical amount, $8,040.00, in favor of Defendant, against Plaintiff, for damages arising out of Defendant's counterclaim concerning the road and access. The trial court entered judgment in accordance with the jury's verdicts and awards. Both parties appeal.

II. Jurisdiction

The parties' appeals from the district court's final judgment are properly before this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2015).

III. Issues

Plaintiff argues the trial court erred by: (1) denying Plaintiff's motion for a directed verdict on its claim for assessments; (2) denying Plaintiff's motion for a directed verdict on Defendant's counterclaim; (3) admitting into evidence a copy of the sales contract between Defendant and the developers of Tater Patch Estates, and (4) allowing Defendant and two others to testify concerning the announcements at auction and what information they were told at the time Defendant purchased the three lots.

On cross-appeal, Defendant argues the trial court erred by instructing the jury: (1) the law does not require Lot 2 to be adjacent to a subdivision road for Defendant to be liable for road maintenance assessments by the HOA on that lot; and (2) lot purchasers have a right to presume they would pay a certain proportion of the common expenses as shown by the plat, and to presume the owners of every other lot on the plat will pay an equal sum pursuant to the plan of road maintenance contained in the covenants.

IV. Plaintiff's Motions for Directed Verdict

A. Standard of Review

Our Supreme Court has set forth the standard we review the trial court's rulings on motions for a directed verdict and judgment notwithstanding the verdict.

> The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury. Where the motion for judgment notwithstanding the verdict is a motion that judgment be entered in accordance with the movant's earlier motion for directed verdict, this Court has required the use of the same standard of sufficiency of evidence in reviewing both motions.

Davis v. Dennis Lilly Co., 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (internal citations omitted).

B. Motion for Directed Verdict on Plaintiff's Claim for Assessments

[1] Plaintiff argues the trial court erred by denying Plaintiff's motion for directed verdict on the issue of Defendant's obligation to pay assessments. We disagree.

Plaintiff asserts the covenants contained in the Declaration attached to all four of Defendant's lots, and argues Defendant's act of combining three of the four lots did not reduce her per lot assessment obligations. Plaintiff moved for directed verdict on its claim for assessments from 2008 through 2014. Plaintiff withdrew its claim for assessments for the year 2007, and stipulated the issue of late fees was appropriate for the jury to determine. The jury specifically determined Plaintiff is entitled to recover assessments from Defendant for two lots only, from January 2008 through January 2016, and awarded Plaintiff a total of $5,400.00. The balance of the jury's $8,040.00 award to the HOA was for late fees.

The parties do not contest Plaintiff's right to assess lot owners under the Declaration. Defendant argues that, by re-combing Lots 20, 25, and 28, she reduced her obligation to one lot under the Declaration. Plaintiff claims Defendant owes assessments for four lots, instead of two. Plaintiff asserts its motion for directed verdict on its claim for assessments was limited to the principal amount of Defendant's debt. As Defendant admittedly never paid any assessments, Plaintiff asserts the only issue for the court to determine on the motion for directed verdict was the proper amount for Plaintiff to have assessed Defendant for the years 2008 through 2016.

Regardless of Defendant's obligation to pay assessments on all four lots, sufficient evidence was introduced to present a question for the jury and to sustain the jury's verdict on this issue. *Id.* Plaintiff had the burden of proving the amount of its claims for assessments and any late charges due against Defendant. "A directed verdict in favor of the party upon whom rests the burden of proof is proper when there is *no conflict* in the evidence and *all* the evidence tends to support his right to relief, or when all material facts are admitted by the adverse party." *Hodge v. First Atlantic Corp.*, 10 N.C. App. 632, 636, 179 S.E.2d 855, 857 (citing *Chisholm v. Hall*, 255 N.C. 374, 121 S.E. 2d 726 (1961), *Smith v. Burleson*, 9 N.C. App. 611, 177 S.E. 2d 451 (1970)) (emphasis supplied).

Plaintiff's amended complaint claimed Defendant owed the sum of $10,889.20, as of 11 January 2013. In August of 2013, Defendant was invoiced the amount of $15,209.20. At the time of trial in January 2016, Plaintiff claimed Defendant owed the HOA a total of $20,729.20. It was

appropriate for the jury to determine the total amount of Defendant's indebtedness from the evidence presented. The trial court did not err by denying Plaintiff's motion for directed verdict.

C. Motion for Directed Verdict on Defendant's Counterclaim

[2] Plaintiff also argues the trial court erred by denying Plaintiff's motion for a directed verdict on Defendant's counterclaim. We disagree.

Defendant filed a counterclaim against Plaintiff for damage allegedly done to her property by the grading and lowering of Viewpoint Road. Defendant's counterclaim alleged the owner of Lot 1, located across Viewpoint Road from Defendant's combined Lots 20, 25, and 28, graded and lowered the elevation of Viewpoint Road approximately fifteen feet in conjunction with construction performed on Lot 1. Defendant alleged Plaintiff was responsible for damage done to her property, where the lowering and grading of the road was done with the "consent and approval of Plaintiff."

The Declaration requires plans for construction to be approved in writing by the developers. Plaintiff asserts the Declaration is silent on whether Plaintiff became vested with the right to approve construction plans when the developers relinquished control. At trial, Defendant offered into evidence the minutes of the 6 August 2011 HOA meeting, wherein Plaintiff continued to require a site plan to review prior to the commencement of construction of any house. No evidence of a site plan showing the proposed grading and finished elevation of Viewpoint Road was presented at trial.

Defendant testified that the lowering of Viewpoint Road "left [her lots] high up on the bank," about fifteen to twenty feet. She testified the road construction left her without a "way to build an easy driveway in there now." Prior to the construction, Plaintiff was able to drive directly onto her lots from Viewpoint Road. She was unable to do so after the lowering of the road due to the significant embankment and new road elevation. She testified Plaintiff never contacted her about the road construction.

Defendant argues "[f]rom this evidence, a jury could find [Plaintiff] owed a duty to [Defendant] to maintain the subdivision roads and prevent damage to them and that [Plaintiff] breached that duty by failing to protect Viewpoint Road." Plaintiff argues Defendant failed to present any evidence to show who altered the road or Defendant's property, and that Plaintiff has no affirmative duty to Defendant to ensure property owners do not cause damage to roadways within the subdivision.

Under the specific facts of this case, the trial court did not err by submitting Defendant's counterclaim to the jury. Defendant presented photographs of the steep and obvious embankment created by the lowering of the elevation of the road. A question of fact was presented of whether Plaintiff was aware or approved of the grading of the road and the obvious alteration it caused to Defendant's lots.

Furthermore, evidence was also presented to show the HOA had changed the lock on the entrance gate in 2009, and did not provide Defendant with a key until 2014, because she had failed to pay her assessments. *See* N.C. Gen. Stat. § 47F-3-102(11) (2015) (stating a HOA is prohibited from denying a lot owner access to their property for failure to pay assessments). Evidence was presented to allow the jury to determine Defendant was prevented access to her property, and unaware of the construction and lowering of the elevation of the road, to the detriment of her property. This argument is overruled.

V. Evidentiary Issues

[3] Plaintiff argues the trial court erred by allowing Defendant and two of Defendant's witnesses to testify they were told at auction, upon purchase of the three lots, that the lots could be re-combined and Defendant would only be liable for one assessment. Plaintiff argues statements made by the auctioneer are irrelevant, because all prior contracts and negotiations were merged into the deed conveying the lots to Defendant, and the testimony is inadmissible hearsay. *See Opsahl v. Pinehurst, Inc.*, 81 N.C. App. 56, 66-67, 344 S.E.2d 68, 75 (1986).

Plaintiff also argues the trial court erred by allowing into evidence a land sales contract between Defendant and the seller of Lots 20, 25, and 28, which stated the property was "Sold subject to announcements made from auction stand and all existing rights-of-way and easements." Plaintiff argues the contract was irrelevant, because the land contract was merged into the deed once the deed was executed, making its terms unenforceable and meaningless.

"The burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission." *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987).

Our Court has held:

> Verdicts and judgments are not to be set aside for mere error and no more. To accomplish this result it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, and

> that a different result likely would have ensued, with the burden being on the appellant to show this. . . . Presuming error, [the appellant] has not shown prejudice and we will not speculate whether such error was prejudicial.

Boykin v. Morrison, 148 N.C. App. 98, 102, 557 S.E.2d 583, 585 (2001) (citation and quotation marks omitted).

Under the specific facts presented in this case, Plaintiff has failed to show the likelihood a different result would have been reached, but for the admission of this evidence. *Id.* The jury's verdict sheet shows Defendant owed assessments specifically for two lots for January 2008 through January 2016, but it does not state which of Defendant's specific lots. The Declaration was offered into evidence, which specifically states lots can be re-combined. Plaintiff also publicly filed documentation to re-combine her lots. Also, for seven years Plaintiff invoiced Defendant for assessments for only two lots, and did not invoice her for four lots until after litigation had commenced. Furthermore, the land sales contract clearly states the purchaser "is not relying on any information provided by J.L. Todd Auction Company in regard to said property." Presuming, *arguendo*, evidence of the statements made at auction and the land sales contract were improperly admitted into evidence, Plaintiff has failed to show a likelihood the jury would have reached a different result without this evidence to establish prejudice.

VI. Jury Instructions

Defendant argues the trial court erred by instructing the jury contrary to law. We disagree.

A. Standard of Review

> On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.] The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Hammel v. USF Dungan, Inc., 178 N.C. App. 344, 347, 631 S.E.2d 174, 177 (2006) (internal citations and quotation marks omitted).

B. Obligation to Pay Assessments on Lot Not Adjacent to Subdivision Roads

[4] Defendant argues the trial court erred by instructing the jury "the law does not require that the Defendant's property be adjacent to a subdivision road in order for the defendant to be liable for assessments for road maintenance or other common expenses." We disagree.

The uncontroverted evidence shows Defendant's Lot 2 is part of the subdivision, but does not have access to a road located within the subdivision and maintained by the HOA. Defendant argues she should not be required to pay for road maintenance for Lot 2, because this lot is accessed by a public road located outside of the subdivision.

"The essential requirements for a real covenant are: '(1) the intent of the parties as can be determined from the instruments of record; (2) the covenant must be so closely connected with the real property that it touches and concerns the land; and, (3) there must be privity of estate between the parties to the covenant.' " *Four Seasons Homeowners Assoc. v. Sellers*, 62 N.C. App. 205, 210, 302 S.E.2d 848, 852 (1983) (quoting *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 669, 248 S.E. 2d 904, 908 (1978)).

In *Sellers*, this Court rejected the property owners' argument that a covenant allowing the collection of assessments to finance the community recreational facilities did not run with the land, because the lot owners' property was located several blocks away from the recreational facilities. *Id.* The Court held the covenant "runs with each lot in the entire subdivision of which defendants' lots are but a small part." *Id.*

Defendant's reliance upon N.C. Gen. Stat. § 47F-3-115(c)(1) (2015) is misplaced. That statute provides:

> (c) To the extent required by the declaration:
>
> (1) Any common expense associated with the maintenance, repair, or replacement of a limited common element shall be assessed against the lots to which that limited common element is assigned, equally, or in any other proportion that the declaration provides.

Id. A "limited common element" is defined as "a portion of the common elements *allocated by the declaration or by operation of law* for the exclusive use of one or more but fewer than all of the lots." N.C. Gen. Stat. § 47F-1-103(18) (2015) (emphasis supplied).

The Declaration unambiguously states, "[e]ach lot owner shall pay a pro rata share of the maintenance of the subdivision roads based on the number of lots." The Declaration does not allocate the roads, fronting on some lots but not others, for exclusive use by a subset of lots. The maintenance of the subdivision roads is the responsibility of all subdivision lot owners, and the right to use and maintain them is not limited to a particular group or specific lots. The Declaration clearly indicates the intent of the developers to require all lot owners to pay a pro rata share of the road maintenance. The subdivision roads are not limited common areas, and the trial court's instruction was proper. Defendant's assertion is without merit and is overruled.

C. Instruction Regarding Assumption of Lot Purchasers

[5] Defendant also argues the trial court erred by instructing the jury that "purchasers of lots from plats as filed have a right to assume they would pay a certain proportion of the common expenses as shown by the plat and to assume that the owners of each and every other . . . lot on the plat will pay an equal sum pursuant to the plan of road maintenance as contained on the restricted covenants."

Defendant has failed to show any prejudice by this instruction. As noted, Defendant was obligated to pay assessments for Lot 2. Presuming, *arguendo*, the act of combining Lots 20, 25, and 28 caused her to owe only one other lot assessment, she remained obligated for assessments on two lots. The jury specifically found Defendant owed assessments on two lots. Defendant has failed to show prejudice. This argument is overruled.

VII. Conclusion

The trial court properly denied Plaintiff's motions for directed verdict on Plaintiff's claim for assessments and Defendant's counterclaim. Plaintiff failed to show prejudice by the trial court's admission into evidence of a copy of the sales contract between Defendant and the developers of Tater Patch Estates, or by allowing Defendant and two others to testify concerning the announcements at auction and what they were told at the time Defendant bought Lots 20, 25, and 28.

Defendant failed to show error or prejudice in the trial court's instruction to the jury. Both parties received a fair trial, free from errors and prejudice they preserved and argued. *It is so ordered.*

NO ERROR.

Judges McCULLOUGH and DILLON concur.

DARRELL THOMPSON, EMPLOYEE, PLAINTIFF
v.
INTERNATIONAL PAPER CO., EMPLOYER, SELF-INSURED
(SEDGWICK CMS, THIRD-PARTY ADMINISTRATOR), DEFENDANT

No. COA15-1383

Filed 17 January 2017

Workers' Compensation—severe burns—attendant care services —ordered by physician

Where plaintiff suffered severe burns at work and the Industrial Commission awarded him attendant care services until 31 December 2012 but denied reimbursement to his wife after that date, the Court of Appeals held that the Commission erred in its findings and conclusions regarding the need to compensate plaintiff's wife for her continuing services. While there was evidence supporting the reduction of compensation to two hours per day after 1 June 2012, there was no evidence that plaintiff's need for attendant care, as ordered by his physician, was over as of 31 December 2012.

Appeal by plaintiff from opinion and award entered 11 September 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 May 2016.

Copeley Johnson & Groninger, PLLC, by Valerie A. Johnson and Narendra K. Ghosh, for plaintiff-appellant.

Scudder Law PLLC, by Sharon Scudder, for defendant-appellee.

STROUD, Judge.

Plaintiff Darrell Thompson appeals from the Commission's opinion and award awarding attendant care services until 31 December 2012 and denying reimbursement to his wife after this date. On appeal, plaintiff argues that the Commission erred in concluding that he did not require attendant care services for his severe burn injuries after 31 December 2012. We agree, since the Commission's findings do not support its conclusion of law denying payment for attendant care services after 31 December 2012. Accordingly, we reverse and remand for entry of an opinion and award consistent with this opinion.

Facts

The Full Commission's opinion and award sets forth the following uncontested facts. Defendant operates a paper plant in Riegelwood, North Carolina, which plaintiff began working at in 2005. Plaintiff's job involved helping respond to calls of the operator and helping oversee the process of wood chips being cooked into paper. On 23 February 2012, while at work, plaintiff and a co-worker were assigned to inspect a malfunctioning knotter, which is "a vessel in which [a chemical mixture referred to as] black liquor, along with steam, breaks down the wood chips." While checking on the knotter, plaintiff heard a loud noise and instinctively turned to his right and ran away. Plaintiff was then sprayed on the left side of his face, back of his head, his back, and his arms with "a black liquor and pulp mixture spewing from the knotter." Although plaintiff's co-workers immediately grabbed him and put him under an emergency eye washer, he still suffered severe burns that covered more than 23 percent of his body, most severely on his left shoulder and arm.

Plaintiff was initially taken to the New Hanover Regional Medical Center, but was then transferred and admitted to the UNC Burn Center in Chapel Hill, North Carolina, where he stayed from 23 February 2012 until 2 April 2012. While at the Burn Center, plaintiff underwent three major skin graft surgeries and was treated by several providers, including Dr. Cairns, the Director of the Burn Center.

The Burn Center encourages family to engage in the care of their injured family members, so plaintiff's wife, Marcee Swindell-Thompson ("Ms. Thompson"), took leave from her job as a social worker and stayed with plaintiff at the Burn Center during the months he was there to assist him with basic and specialized care, including walking, bathing, and caring for his wounds. Defendant paid for Ms. Thompson's room and board so that she could be close to plaintiff while he recovered at the Burn Center, but she was not compensated for any of the care and services she provided plaintiff during his recovery. Plaintiff received psychological counseling while at the Burn Center and was diagnosed with depression and post-traumatic stress disorder as a result of the event on 23 February 2012. Plaintiff also participated in physical therapy during his time at the Burn Center.

Plaintiff was discharged on 2 April 2012, though he was worried about "placing the burden on his wife to care for him at home." A social worker with the Burn Center, Monika Atanesian, wrote a letter to Ms. Thompson's employer asking that her FMLA leave be extended an additional two months, until 1 June 2012, because she "served as plaintiff's

primary caregiver and would need to provide him with attendant and wound care for the next two to three months." From 2 April 2012 until 1 June 2012, Ms. Thompson testified that she spent almost all of her time on a daily basis on plaintiff's care.

Plaintiff slowly regained his independence following his discharge from the Burn Center. Ms. Thompson would change his wraps twice a day, a process which took 45 minutes to an hour each time, and applied creams to his burns, which initially took 30 minutes but was down to just 10 minutes a day at the time of the hearing before the Deputy Commissioner. Plaintiff also participated in physical therapy after his discharge, and Ms. Thompson helped him get into the car and went with him to his sessions. Defendant provided plaintiff and Ms. Thompson with transportation to the physical therapy sessions until 29 June 2012, when they began to drive themselves because the Burn Center believed doing so would be therapeutic.

As plaintiff's recovery progressed, the amount of care provided by Ms. Thompson decreased. Ms. Thompson returned to work on 1 June 2012 but arranged an alternate work schedule so that she could continue to provide care to her husband. She continued to help plaintiff get ready for physical therapy and drove him there and back each morning. She would then go to work at 10:00 a.m. and return home midday to make lunch for plaintiff. In the evenings, Ms. Thompson would remove and reapply plaintiff's wraps after returning home from work.

Plaintiff underwent 12 sessions of laser treatments at UNC with a plastic surgeon, Dr. Hultman, from November 2012 through July 2014, "to reduce the impact of the hypertrophic scarring." Dr. Hultman testified that some level of attendant care would be necessary for plaintiff for life. He also noted that he had never written a prescription for attendant care for plaintiff and that typically a burn patient's general needs are addressed by the Burn Center.

Defendant filed a Form 60 Employer's Admission of Employee's Right to Compensation on or about 12 April 2012, accepting plaintiff's burn and skin graft injuries to his neck, back, shoulders, bilateral arms, and legs as compensable, but denied that his torn left rotator cuff was a result of the workplace accident and that Ms. Thompson was entitled to reimbursement for attendant care services she provided to plaintiff. On or about 10 February 2015, Deputy Commissioner Robert J. Harris issued an opinion and award finding that the attendant care Ms. Thompson had provided to plaintiff since 23 February 2012 was necessary and that further attended care is also "reasonably required to effect

a cure, provide relief and/or lessen the period of Plaintiff's disability." The Deputy Commissioner thus concluded that all of the attendant care provided by Ms. Thompson was medically necessary and compensable, as is the ongoing attendant care to be provided.

Defendant appealed to the Full Commission, and on 11 September 2015, the Commission issued its opinion and award, which affirmed much of the Deputy Commissioner's decision but found that plaintiff did not require attendant care services after 31 December 2012 and denied reimbursement to Ms. Thompson after that date. Specifically, the Full Commission found that "the attendant care services Ms. Thompson provided plaintiff following his hospital discharge, from April 2, 2012 through December 31, 2012, were reasonably required to effect a cure, provide relief, or lessen the period of plaintiff's disability." The Commission concluded that Ms. Thompson should be compensated for her services from 2 April 2012 until 1 June 2012 at a rate of $9.24 per hour, for six hours a day, and at the same rate from 2 June 2012 through 31 December 2012 for two hours per day.

The Commission then found, "based upon a preponderance of the evidence in view of the entire record, that plaintiff regained sufficient independence in his post-discharge recovery such that he no longer needed attendant care services subsequent to December 31, 2012." The Commission concluded that "attendant care became medically necessary as a result of plaintiff's compensable burn injuries at the time of plaintiff's discharge from the Burn Center on April 2, 2012 and continued through December 31, 2012. The Commission concludes that attendant care was no longer medically necessary thereafter." Plaintiff timely appealed to this Court.

Discussion

I. Standard of Review

This Court's review of an opinion and award filed by the Commission is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). "The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). The determination of whether a plaintiff is entitled to receive benefits for attendant care "is a conclusion of law which must be supported by findings of fact." *Ruiz v. Belk Masonry Co.*, 148 N.C. App. 675, 679, 559 S.E.2d 249, 252 (2002).

> On an appeal from an opinion and award from the Commission regarding attendant care benefits, the standard of review for this Court is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law.
>
> The Commission's conclusions of law are reviewed *de novo*. If the conclusions of the Commission are based upon a misapprehension of the law, the case should be remanded so that the evidence may be considered in its true legal light.

Shackleton v. S. Flooring & Acoustical Co., 211 N.C. App. 233, 244-45, 712 S.E.2d 289, 297 (2011) (citations, quotation marks, brackets, and ellipses omitted).

II. Attendant Care Services

On appeal, plaintiff argues that no competent evidence supports the Commission's finding that plaintiff has not required attendant care services since 1 January 2013.

Defendant, by contrast, argues that the Commission did not err in refusing to extend attendant care beyond 31 December 2012 because a written prescription is required in order to receive compensation for attendant care services, and plaintiff did not have one for care beyond 31 December 2012. Defendant contends that

> [t]he note from Ms. Atanesian that is the "prescriptive instrument" clearly states the time frame permitted. . . . There is no evidence, in the almost 1000 pages of medical records, that any additional prescription, letter or order was ever written to extend or renew this time, or that any specific, additional dates during which attendant care would be medically necessary have been enlarged beyond that date by the testimony or notes of any medical provider.

N.C. Gen. Stat. § 97-2(19) (2011), defines "Medical Compensation" as follows:

> (19) Medical Compensation. -- The term "medical compensation" means medical, surgical, hospital, nursing, and rehabilitative services, including, but not limited

> to, *attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission*, vocational rehabilitation, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

(Emphasis added).

In *Shackleton*, this Court reversed and remanded a portion of the Commission's opinion and award requiring a physician's prescription as "a prerequisite to attendant care compensation," finding that such requirement "constitutes a misapprehension of law[.]" 211 N.C. App. at 251, 712 S.E.2d at 301. The *Shackleton* Court found that "the liberal construction of the Workers' Compensation Act suggests, and the prior decisions by our appellate courts require, that the test for attendant care be less restrictive than that imposed by the Full Commission in this case." *Id.* at 250, 712 S.E.2d at 300. Ultimately, this Court concluded:

> The law of this State does not support an approach in which a physician's prescription is the sole evidence upon which the question of attendant care compensation hinges. Instead, we explicitly adopt what we believe has already been the practice in North Carolina -- a flexible case-by-case approach in which the Commission may determine the reasonableness and medical necessity of particular attendant care services by reviewing a variety of evidence, including but not limited to the following: a prescription or report of a healthcare provider; the testimony or a statement of a physician, nurse, or life care planner; the testimony of the claimant or the claimant's family member; or the very nature of the injury.

Id. at 250-51, 712 S.E.2d at 300-01.

Yet *Shackleton* was published on 19 April 2011, just a few weeks before an amendment to N.C. Gen. Stat. § 97-2(19) added the language: "including, but not limited to, attendant care services prescribed by a health care provider authorized by the employer[.]" *See* N.C. Sess. Law

2011-287 § 2 (eff. 24 June 2011). We have been unable to find any decisions by this Court addressing this issue since the amendment took effect. But the amendment does reject *Shackleton's* "flexible case-by-case approach" to determining the "reasonableness and medical necessity of particular attendant care services[,]" 211 N.C. App. at 250, 712 S.E.2d at 301, by requiring that these services be "prescribed by a health care provider authorized by the employer[.]" N.C. Gen. Stat. § 97-2(19).

The Commission addressed the need for attendant care in its "Findings of Fact" as follows:

> 65. Based upon a preponderance of the evidence in view of the entire record, the Commission finds plaintiff's need for attendant care services declined as his recovery progressed and his wife returned to full-time work on June 1, 2012. Accordingly, the Commission finds plaintiff needed attendant care services from Ms. Thompson for two hours per day from June 2, 2012 through December 31, 2012. The Commission finds reasonable compensation for such services to be $9.24 per hour.
>
> 66. The Commission finds, based upon a preponderance of the evidence in view of the entire record, that plaintiff regained sufficient independence in his post-discharge recovery such that he no longer needed attendant care services subsequent to December 31, 2012.

Plaintiff argues that he is challenging the Commission's "finding" that he is not entitled to attendant care benefits past 31 December 2012. He does not challenge any of the other findings of fact, nor has defendant cross-appealed or challenged any other findings. Although the Commission has labelled its determination of entitlement to attendant care benefits as a finding of fact, it is actually a conclusion of law which we review *de novo*. *Shackleton*, 211 N.C. App. at 244-45, 712 S.E.2d at 297. See also *Barnette v. Lowe's Home Centers, Inc.*, __ N.C. App. __, __, 785 S.E.2d 161, 165 (2016) ("Regardless of how they may be labeled, we treat findings of fact as findings of fact and conclusions of law as conclusions of law for purposes of our review."). The Commission also addressed the basis for its determination in its conclusions of law, as noted below. We therefore must determine as a matter of law whether the Commission's findings of fact support its legal conclusion that plaintiff's entitlement to attendant care ended as of 31 December 2012.

In reviewing the order on appeal in light of N.C. Gen. Stat. § 97-2(19), we have been unable to determine, based upon the evidence and findings

of fact, why the Commission chose 31 December 2012 as the ending date for plaintiff's attendant care. While to some extent it appears that the Commission may have interpreted the phrase "prescribed by a health care provider" to require a written prescription, as defendant contends would be proper, the Commission addressed this issue in its conclusions of law and determined quite correctly that a written prescription was not required. The Commission concluded as follows:

> 8. Section 97-2(19) of the Workers' Compensation Act does not require that a *written* prescription be issued by a medical provider in order for attendant care services to be payable by the employer. The statute merely requires that attendant care services be "prescribed" by the medical provider. "[S]tatutory interpretation properly commences with an examination of the plain words of a statute." *Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997). "An analysis utilizing the plain language of the statute and the canons of construction must be done in a manner which harmonizes with the underlying reason and purpose of the statute." *Electric Supply Co. v. Swaim Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). "[W]hen language used in a statute is clear and unambiguous, [the Court] must refrain from judicial construction and accord words undefined in the statute their plain and definite meaning." *Heib v. Lowery*, 244 N.C. 403, 409, 474 S.E.2d 323, 327 (1996) (quoting *Poole v. Miller*, 342 N.C. 349, 351, 464 S.E.2d 409, 410 (1995)). *See also Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 376, 553 S.E.2d 89, 93 (2001).
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> 9. The Workers' Compensation Act does not define "prescribed" as used within N.C. Gen. Stat. § 97-2(19). Merriam-Webster's Online Dictionary, which includes the main A-Z listing of *Merriam-Webster's Collegiate Dictionary, Eleventh Edition*, defines "prescribed" as "to officially tell someone to use (a medicine, therapy, diet, etc.) as a remedy or treatment" or "to make (something) an official rule." As an intransitive verb, it means "to lay down a rule" or "to write or give medical prescriptions." As a transitive verb, it means "to lay down as a guide, direction, or rule of action," "to specify with authority," or "to designate or order the use of as a remedy." *Merriam-Webster*, An Encyclopaedia Britannica Company, available

at http://www.merriam-webster.com/dictionary/prescribe. Similarly, *The American Heritage Dictionary of the English Language* defines prescribed as "To set down as a rule, law, or direction," "To order the use of (a medicine or other treatment)." *The American Heritage Dictionary of the English Language*, *Fifth Edition*, available online at https://ahdictionary.com/word/search.html?q=prescribed.

10. Dr. Cairns testified that, while plaintiff required specialized wound care post-discharge from the Burn Center, he leaves it to Ms. Atanesian, the hospital social worker, to determine whether admission to a long-term care facility is needed or if the patient's family is able to provide the necessary wound care. Only if someone directly approaches Dr. Cairns about the issue does he make a personal decision about such matters. In this case, Ms. Atanesian determined that plaintiff's wife, Ms. Thompson, was able to provide wound care for plaintiff at home. On April 3, 2012, one day after plaintiff's hospital discharge, Ms. Atanesian wrote a letter to Ms. Thompson's employer advising that Ms. Thompson would serve as plaintiff's "primary caregiver" for purposes of providing "attendant and wound care." Ms. Atanesian provided this written directive in her capacity as Case Manager for Adult and Pediatric Burn Surgery at UNC Hospitals, under the supervision and direction of Dr. Cairns. Accordingly, the Commission concludes that a preponderance of the evidence in view of the entire record shows Dr. Cairns prescribed at-home attendant care for plaintiff and, in the absence of a written prescription by Dr. Cairns, the April 3, 2012 letter written by Ms. Atanesian qualifies as a prescriptive instruction issued in accordance with the medical directives of Dr. Cairns.

11. Additionally, the North Carolina appellate courts have recognized certain instances in which common sense dictates that a particular result be reached when the facts of a case infer a logical conclusion. For instance, the state Supreme Court has held that, in some instances, the cause of a claimant's injuries will be evident to the "layman of average intelligence and experience" such that expert medical testimony is unnecessary to determine

> causation. *Click*, 300 N.C. at 167, 265 S.E.2d at 391. The state appellate court has also held that "[t]he ordinary person knows, without having to consult a medical expert, when it is necessary to lie down and rest because his or her own body is tired, exhausted, or in pain. . . ." *Perkins v. Broughton Hosp.*, 71 N.C. App. 275, 279, 321 S.E.2d 495, 497 (1984) (cited by *Britt v. Gator Woo Inc.*, 185 N.C. App. 677, 682, 648 S.E.2d 917, 921 (2007)). Given the extent of plaintiff's burn injuries, which necessitated approximately two months of in-patient care at the Burn Center, it logically follows that plaintiff continued to require specialized wound care for a period of time following his discharge therefrom and that he did, in fact, receive wound care from his wife who obtained training in how to provide such care from medical professionals at the Burn Center. Based upon a preponderance of the evidence in view of the entire record, and reasonable inferences drawn therefrom, the Commission concludes that Dr. Cairns prescribed attendant care for plaintiff by directing the Burn Center's social worker, Ms. Atanesian, to evaluate Ms. Thompson's ability to provide such care in lieu of transferring plaintiff to a long-term care facility. The Commission concludes that Dr. Cairns "prescribed" at-home attendant care for plaintiff by providing this medical directive to Ms. Atanesian, who, in turn, approved Ms. Thompson to provide the at-home attendant care. N.C. Gen. Stat. § 97-2(19).

We agree with the Commission's determination that a *written* prescription is not necessary. As the order noted, one of the most basic rules of statutory interpretation is that courts may not delete or add words to clear statutory language.

> The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature. If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms. Thus, in effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used.

Lunsford v. Mills, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (citations and quotation marks omitted).

Yet since all of plaintiff's physicians said that plaintiff required and would continue to require attendant care for his burn injuries, it appears that the Commission relied upon the social worker's letter, at least to some extent, precisely because it was the only *written* directive regarding attendant care. But as we have already noted, the Commission also recognized that N.C. Gen. Stat. § 97-2(19) does not require a written prescription for attendant care. *Id.* The statute simply requires that attendant care be prescribed by an authorized "health care provider," and this term is defined in the next subsection:

> (20) Health care provider. -- The term "health care provider" means physician, hospital, pharmacy, chiropractor, nurse, dentist, podiatrist, physical therapist, rehabilitation specialist, psychologist, and any other person providing medical care pursuant to this Article.

N.C. Gen. Stat. Ann. § 97-2 (20).

Dr. Cairns was plaintiff's "health care provider authorized by the employer[,]" and he ordered that plaintiff receive care initially under the supervision of the Burn Center and then with attendant care continuing at home. N.C. Gen. Stat. § 97-2(19). Chapter 97, which contains the Worker's Compensation Act in full, does not provide a definition for a "prescription" or "prescribe." Elsewhere in state and federal law, certain controlled substances do specifically require a *written* prescription from an authorized medical provider. *See*, *e.g.*, N.C. Gen. Stat. § 90-106(a) (2015) ("Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance included in Schedule II of this Article may be dispensed without the written prescription of a practitioner."); N.C. Gen. Stat. § 90-87(23) (2015) (defining "prescription" under the Controlled Substances Act as "[a] written order or other order which is promptly reduced to writing for a controlled substance as defined in this Article[.]"). The most general definition of "prescription order" we can find in the North Carolina General Statutes is found in the North Carolina Pharmacy Practice Act:

> "Prescription order" means a written or verbal order for a prescription drug, prescription device, or pharmaceutical service from a person authorized by law to prescribe such drug, device, or service. A prescription order includes an order entered in a chart or other medical record of a patient.

N.C. Gen. Stat. § 90-85.3(t) (2015).

Although the Commission did not, according to its findings and conclusions, interpret the phrase "prescribed by a health care provider" to require a written prescription, its conclusions still seem to rely upon the FMLA letter from the social worker, Ms. Atanesian, as a written expression of the physician's orders. Of course, the social worker could not write a prescription, since she was not a "health care provider[,]" but she could and did convey the instructions of the treating physician, as an employee of the Burn Center. The Commission found that Ms. Atanesian's letter "qualifies as a prescriptive instruction issued in accordance with the medical directives of Dr. Cairns." Use of the adjective "prescriptive" does not make the social worker's letter a "prescription," and as we have explained, there was no need for a written prescription. Dr. Cairns directed that plaintiff continue to receive attendant care, and the Burn Center oversaw the care and assisted plaintiff as needed.

We recognize that attendant care services are quite different from a bottle of pills, and they are certainly not dispensed at pharmacies. But we believe it is instructive that a prescription, except in certain limited situations set forth in various statutes, can be *either* a "written or verbal order." *Id.* There was no need for the Commission to try to turn the FMLA letter into a written "prescription" when the statute merely requires that the attendant care be "prescribed by a health care provider authorized by the employer[.]" N.C. Gen. Stat. § 97-2(19). Dr. Cairns was plaintiff's authorized "health care provider" and he obviously "prescribed" that plaintiff needed attendant care, both just after his release from the hospital and ongoing care for the future. In fact, he noted that if Ms. Thompson could not continue to provide this care, another medical intervention would be necessary.

In addition, we recognize that the amendment to N.C. Gen. Stat. § 97-2(19) may have been intended to limit the scope of attendant care allowed under *Shackleton*, and there is no need to insert the words "in writing" into the statute to accomplish this intent. The statute, as written, allows attendant care services only where such services have been determined medically necessary by a health care provider authorized by the employer, N.C. Gen. Stat. § 97-2(19), and thus cannot be based only upon "a variety of evidence" including "testimony of the claimant or the claimant's family member; or the very nature of the injury." *Shackleton*, 211 N.C. App. at 250, 251, 712 S.E.2d at 301.

Yet the Commission's order extends the care to 31 December 2012, after the period of time set forth in the FMLA letter, so we must also consider the basis for this time period. It seems that Conclusion of Law No. 11 addresses this and that the Commission extended attendant care

past 1 June 2012 based upon the reduction in time needed for care each day and because "common sense dictates that a particular result be reached when the facts of a case infer a logical conclusion." But to the extent that the Commission relied upon "common sense" to set an ending date, its conclusion cannot comport with N.C. Gen. Stat. § 97-2(19), which requires that attendant care be "prescribed by a health care provider authorized by the employer[.]" Based upon the findings of fact, it is apparent that the Commission determined that plaintiff's attendant care services were medically necessary beyond 1 June 2012. But, in light of the actual medical evidence in this case, it is not apparent from its findings of fact why the Commission ultimately concluded that "attendant care was no longer medically necessary" after 31 December 2012.

Defendant argues that

> [e]ven if the legal requirement for a prescription is ignored or diluted, there is still competent evidence in the record to support the Commission's findings that attendant care was simply not medically necessary after 31 December 2012. Competent evidence showed that Plaintiff returned to normal life activities during 2012, including social activities, serving on a church committee, having a normal intimate life with his spouse, and playing golf, and he was simply not a candidate for attendant care services at that time.

We first note that although there was evidence about plaintiff's activities, the Commission did not make any finding that plaintiff had returned to "normal life activities" as defendant contends as of the date of the hearing, although he was moving in that direction. Instead, the Commission found as follows:

> 53. As of the date of hearing before Deputy Commissioner Harris, plaintiff was not yet back to playing a full golf game at a course. Plaintiff testified that he was able to chip the ball around in his yard. He was also doing some recreational shooting, holding the handgun in his right hand and using his left hand for support and balance under his right triceps.
>
> 54. Also, as of the date of hearing before the Deputy Commissioner, plaintiff was able to drive himself short distances, but his medications prevented him from driving long distances. Plaintiff testified that he continued to have sharp pains in and about his left shoulder throughout each day, and he was unable to lift with that shoulder,

> although he had not received any medical restrictions against use of the left upper extremity.
>
> 55. Plaintiff testified that he continued to avoid going outside in the sun because it is too painful for him.
>
> 56. As of the date of hearing before the Deputy Commissioner, plaintiff had not returned to work. Defendant did not contend that plaintiff is no longer disabled, either before the Deputy Commissioner or at the Full Commission hearing.

These findings are not challenged by either party. Thus, defendant's argument implicitly recognizes that the Commission relied upon the letter up to 1 June 2012, but awarded attendant care until 31 December 2012 upon its determination that some care was medically necessary after 1 June, but in a reduced amount as the time needed to care for plaintiff decreased.

Essentially, it appears that the Commission used a hybrid approach, basing its award upon a written "prescriptive instruction" up to 1 June 2012 and "common sense" until 31 December 2012. But the statute now sets forth a clear basis for an award of attendant care: the care must be "prescribed by a health care provider authorized by the employer[.]" Based upon the record, all of the attendant care in this case was directed by plaintiff's authorized physicians, from immediately after his injury and continuing through the date of the hearing. The evidence shows that the time needed for care was reduced, but does not show that it disappeared entirely. There was no evidence, medical or otherwise, that set 31 December 2012 as the time plaintiff's need for attendant care ended. The evidence and findings all indicate that plaintiff will need some care for life, and the evidence is essentially uncontroverted. Ms. Thompson testified that for the period of time after 2012, it took her about 30 minutes a day to assist plaintiff with his compression garments and to apply lotion, sunscreen, and Cetaphil to his skin. Plaintiff similarly testified that it took about 10 minutes per day for Ms. Thompson to apply creams and 15 to 30 minutes per day to attend to his wounds.

Regarding attendant care for the time period the Commission approved or beyond, Dr. Hultman stated in a deposition that he "would be happy to order that[,]" but that it would be hard to put a specific number on the amount of care per day that a patient would need and that he would go with whatever Dr. Cairns said. Plaintiff's physicians, Dr. Cairns and Dr. Hultman, agreed in separate depositions that Ms. Thompson's

attendant care has all been medically necessary. Dr. Cairns explained that "[i]f we didn't have his wife participating in his care, we would have had to come up with another plan, which would have meant that . . . another medical intervention would have been required[.]"

Dr. Hultman explained plaintiff's ongoing medical need, noting that "attendant care is going to be a necessary part of [plaintiff's] lifelong needs" and that "as a burn surgeon . . . I would say with confidence that he is going to require some type of attendant care." He noted that plaintiff's scars would "need to be massaged and have a moisturizing agent put on every day, indefinitely." Additionally, he stated that "given [plaintiff's] limited mobility with his shoulder, it makes it harder for him to care for himself." Dr. Hultman estimated that massaging and moisturizing plaintiff's scars and assisting with his compression garments could take between 90 to 120 minutes. Thus, while the amount of time needed for attendant care may change over the years, all of his treating physicians agreed he will continue to need *some* amount of care. The Commission's reduction of compensation to two hours per day after 1 June 2012 is supported by the evidence, but there is no evidence that plaintiff's need for attendant care, as ordered by his physicians, was over as of 31 December 2012. We therefore conclude that the Commission erred in its findings and conclusions of law regarding Ms. Thompson's attendant care services provided to plaintiff after 31 December 2012 and the need to compensate her for those continuing services. Attendant care must be "prescribed by a health care provider" and all of plaintiff's physicians agreed that he would continue to need attendant care. The extent of his needs will certainly change over time, but based upon all of the evidence in this case and the Commission's findings of fact, we cannot determine why it set 31 December 2012 as the ending date for attendant care.

Conclusion

Accordingly, we reverse the Full Commission's opinion and award and remand for entry of an amended opinion and award with additional findings of fact and conclusions of law on the issue of Ms. Thompson's attendant care services to plaintiff consistent with this opinion.

REVERSED AND REMANDED.

Judges BRYANT and DIETZ concur.

WILLIAMS v. ADVANCE AUTO PARTS, INC.

[251 N.C. App. 712 (2017)]

HARRY WILLIAMS, PLAINTIFF
v.
ADVANCE AUTO PARTS, INC., AND ADVANCE STORES COMPANY, INCORPORATED D/B/A ADVANCE AUTO PARTS, DEFENDANTS

No. COA16-625

Filed 17 January 2017

1. Civil Procedure—amendment to complaint—addition of party—after expiration of statute of limitations

Where plaintiff tripped and fell in an Advance Auto Parts store, filed a complaint that named the defendant as "Advance Auto Parts, Inc.," and—after the expiration of the statute of limitations—filed a notice of amendment to complaint adding "Advance Stores Company, Incorporated" as a named defendant, the trial court properly concluded that plaintiff's amendment was not the correction of a mere misnomer but an impermissible attempt to add a new defendant after the statute of limitations had expired.

2. Estoppel—named wrong entity as defendant—no evidence of intent to deceive—no showing of due diligence

Where the trial court concluded that plaintiff's amendment to his complaint was an impermissible attempt to add a new defendant after the statute of limitations had expired, the Court of Appeals concluded that plaintiff could not invoke equitable estoppel. Plaintiff submitted a letter from the third-party claims administrator for "Advance Auto" or "Advance Auto Parts" but brought no evidence to suggest that the letter was intended confuse plaintiff. Plaintiff also could not show that he exercised due diligence in discovering the legal owner of the retail store where he was injured.

3. Appeal and Error—swapping horses on appeal

Where the trial court concluded that plaintiff's amendment to his complaint was an impermissible attempt to add a new defendant after the statute of limitations had expired, the Court of Appeals declined to consider plaintiff's argument that he was entitled to relief because the one entity failed to file a certificate of assumed name and because it was merely the other entity's alter ego. Plaintiff failed to bring either theory before the trial court and could not swap horses on appeal.

Appeal by Plaintiff from orders entered 3 and 7 March 2016 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 30 November 2016.

Riddle & Brantley, LLP, by Donald J. Dunn and Jonathan M. Smith for Plaintiff-Appellant.

Millberg Gordon Stewart PLLC, by B. Tyler Brooks and John C. Millberg for Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

Harry Williams ("Plaintiff") appeals two orders from the Cumberland County Superior Court granting summary judgment to both Advance Stores Company, Inc. ("Stores") and Advance Auto Parts, Inc. ("Parts"). Plaintiff contends his failure to name the correct plaintiff in his complaint was a mere misnomer which the trial court should have granted him permission to amend and relate back to the original complaint. We disagree.

I. Facts and Background

On 30 October 2012, Plaintiff tripped and fell, injuring himself inside an Advance Auto Parts retail store in Fayetteville, North Carolina. After the incident, Plaintiff submitted a claim for his injuries to a third party administrator, Sedgwick CMS ("Sedgwick"), who administered the liability policy for the store. In a 25 November 2012 letter ("Sedgwick letter"), Sedgwick named the insured as "Advance Auto." Sedgwick subsequently advised Plaintiff it was "the Third Party claims Administrator (TPA) for Advance Auto Parts" and denied Plaintiff's claim for failure to "find negligence on the part of Advance Auto Parts for this loss."

On 26 October 2015, Plaintiff filed a complaint in Cumberland County Superior Court naming the defendant as "Advance Auto Parts, Inc." Plaintiff directed a civil summons to Parts the same day. On 21 December 2015, Plaintiff filed a notice of amendment to complaint, adding "Advance Stores Company, Incorporated" as a named defendant. Plaintiff also directed a civil summons to both Parts and Stores and filed his amended complaint on 21 December 2015.

On 30 December 2015, Parts filed its answer to the original complaint, seeking dismissal pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim. In the alternative, Parts asked for summary judgment pursuant to Rule 56 on the grounds it

did not "own, lease, operate, control, or maintain the premises identified in the plaintiff's complaint." The same day, Parts filed a separate motion for summary judgment, arguing it had no duty to Plaintiff because it did not own the store in question. Parts further argued the statute of limitations had expired on Plaintiff's claim, and any amendment could not be held to relate back to the original complaint under Rule 15(c) of the North Carolina Rules of Civil Procedure.

Parts attached as an exhibit the affidavit of Pamela R. Webster ("Ms. Webster") the senior claims manager for Parts. Ms. Webster stated Parts is a holding company organized under Delaware law with a principle place of business in Virginia. Stores is a wholly owned subsidiary of Parts, organized under Virginia law and with a principal place of business in Virginia. Ms. Webster stated Stores, not Parts, is the owner and operator of the Advance Auto Parts store where Plaintiff was injured.

On 3 February 2016, Parts filed its answer to the amended complaint, seeking dismissal for failure to state a claim and requesting summary judgment in its favor in the alternative, arguing it did not own the premises identified in Plaintiff's complaint. Parts attached no affidavits or exhibits to its answer.

On 3 February 2016, Stores filed its answer to the amended complaint and moved to dismiss, arguing Stores and Parts were separate legal entities, the statute of limitations had expired, and Plaintiff sought to "impermissibly add a new defendant to the case after the expiration of the statute of limitations." Stores attached no affidavits or exhibits to its answer.

On 24 February 2016, Plaintiff filed a memorandum of law in opposition to Parts' motion for summary judgment. Along with its memorandum, Plaintiff submitted an affidavit from Plaintiff's counsel and two exhibits to the affidavit. The affidavit described counsel's attempts to locate the correct defendant, noting counsel's paralegal used the Sedgwick letter as a basis for searching the North Carolina Secretary of State's corporate registry for the name "Advance Auto." The paralegal confirmed the choice of Advance Auto Parts Inc. as the proper defendant by searching Google for "Advance Auto" and inspecting Advance Auto Parts' website. The Sedgwick letter and a printout showing "Advance Auto Parts, Inc." as one of the results for a search for "Advance Auto" on the Secretary of State's website were appended as exhibits to the affidavit.

Stores filed its memorandum of law in support of its motion to dismiss the amended complaint on 26 February 2016. Stores included several exhibits with its memorandum, including Ms. Webster's affidavit

and a deed from the Cumberland County Register of Deeds for the store where Plaintiff was allegedly injured, showing the store was owned by Stores. Stores also presented the court with Parts' application for a North Carolina certificate of authority showing Parts is a Delaware corporation.

On 26 February 2016, Parts submitted its memorandum of law supporting its motion for summary judgment on the original complaint. Parts appended Ms. Webster's affidavit, the copy of the store's deed, and its application for certificate of authority as exhibits.

On 3 March 2016, the trial court issued an order granting summary judgment to Stores on the amended complaint. Based on the deed from the Cumberland County Register of Deeds, the court found Stores, not Parts, "is the corporate entity that operates and controls the Advance Auto Parts retail store where the plaintiff's alleged fall occurred." The court further found the statute of limitations on plaintiff's claim expired on 30 October 2015.

As to the amendment, the court found Plaintiff amended his complaint after the statute of limitations expired, seeking to "add Advance Stores Company, Inc. as a defendant." The court found Rule 15(c) did not allow relation back to add a party to an existing claim, except as to correct a "misnomer or mistake in the party's name." It further held:

> The evidence in this case establishes that the plaintiff filed his original complaint against Advance Auto Parts, Inc. The statute of limitations for plaintiff's claim expired on 30 October 2015. Approximately seven weeks after the expiration of the statute of limitations, plaintiff amended the complaint to name a different corporate entity, Advance Stores Company, Inc. The amendment to add Advance Stores Company, Inc., sought to bring in a new defendant to the case and was not the mere correction of a misnomer or a mistake in the name of the originally named defendant. Accordingly, because the plaintiff's amended complaint was filed after the expiration of the statute of limitations and the amendment sought to add a new defendant, it cannot relate back as a matter of law to the original date of filing under Rule 15.

The court also found Plaintiff failed to prove equitable estoppel, holding the Sedgwick letter was not evidence Sedgwick "misled or misrepresented to the plaintiff that [its] insured was the corporation Advance Auto Parts, Inc." As a result, the trial court held there was "no genuine

issue of material fact that plaintiff amended his complaint to name a new defendant after the statute of limitations expired," and granted summary judgment to Stores.

On 7 March 2016, the trial court issued an order granting summary judgment to Parts on the original complaint. The court found Stores was a subsidiary of Parts and that Stores was the legal owner of the store where Plaintiff fell. It further found Plaintiff provided no evidence to support "any contention that Advance Auto Parts Inc., exercises the degree of control over Advance Stores Company, Inc." necessary to pierce the corporate veil. As such, the court held Parts was "improperly named . . . as a defendant in this case." Because Parts owed no legal duty with regard to a premises it did not own, the trial court held there was no genuine issue of material fact to justify disregarding the corporate form and granted summary judgment to Parts.

Plaintiff entered notice of appeal to both the 3 March 2016 and 7 March 2016 orders on 20 March 2016.

II. Jurisdiction

Plaintiff appeals the trial court's 3 and 7 March 2016 orders granting summary judgment in favor of Stores and Parts, respectively. Because these orders are the final judgments of the superior court in a civil action, jurisdiction is proper in this court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2015).

III. Standard of Review

Although both Parts and Stores moved to dismiss the respective claims against them, "[a] Rule 12(b)(6) motion to dismiss for failure to state a claim is indeed converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court." *Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979). Here, both Parts and Stores asked for summary judgment in the alternative to dismissal. Moreover, Parts, Stores, and Plaintiff each submitted memoranda of law and documentary evidence to the trial court, which the court used to render its rulings. As a result, we review the orders as grants of summary judgment.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015).

A defendant may show he is entitled to summary judgment by "(1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing the plaintiff cannot surmount an affirmative defense which would bar the claim." *Frank v. Funkhouser*, 169 N.C. App. 108, 113, 609 S.E.2d 788, 793 (2005) (internal quotation marks and citation omitted).

The court must review the record in the light most favorable to the non-movant and draw all inferences in the non-movant's favor. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). *See also Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975); *Norfolk & W. Ry. Co. v. Werner Indus.*, 286 N.C. 89, 98, 209 S.E.2d 734, 739 (1974).

This Court reviews the trial court's grant of summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

IV. Analysis

A. Amendment and Relation Back of the Complaint

[1] Plaintiff contends the trial court improperly granted summary judgment to both Parts and Stores because its amended complaint should have related back to the date of the original filing under Rule 15(c) of the North Carolina Rules of Civil Procedure. We disagree.

Plaintiff does not dispute the statute of limitations expired on his personal injury claim prior to the filing of the amended complaint. The statute of limitations is three years for personal injury cases. N.C. Gen. Stat. § 1-52(16) (2015). Because Plaintiff was under no disability when the action accrued and no other exception applies, the statute of limitations was not tolled. *Accord* N.C. Gen. Stat. § 1-17 (2015). As a result, the statute of limitations on Plaintiff's claim expired on 30 October 2015, seven weeks before the amended complaint was filed.

Under the North Carolina Rules of Civil Procedure, a party may amend a pleading "once as a matter of course at any time before a responsive pleading is served[.]" N.C. Gen. Stat. § 1A-1, Rule 15(a) (2015). Amendment to substitute a party is within the scope of the rule, although doing so represents the creation of "a new and independent [cause] of action and cannot be permitted when the statute of limitations has run." *Callicut v. American Honda Motor Co.*, 37 N.C. App. 210, 212, 245 S.E.2d 558, 560 (1978) (quoting *Kerner v. Rockmill*, 111 F. Supp. 150, 151 (M.D. Pa. 1953)).

If the statute of limitations has expired in the interim between the filing and the amendment, a plaintiff may preserve his claim only if the amendment can be said to relate back to the date of the original claim under Rule 15(c):

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C. Gen. Stat. § 1A-1, Rule 15(c) (2015); *Franklin v. Winn Dixie Raleigh*, 117 N.C. App. 28, 38, 450 S.E.2d 24, 30 (1994), *aff'd per curiam*, 342 N.C. 404, 464 S.E.2d 46 (1995). However, the plain language of Rule 15(c) makes clear the rule applies only to amendments to add claims, not parties. Our courts have repeatedly held that Rule 15(c) is "not authority for the relation back of a claim against a new party." *Crossman v. Moore*, 341 N.C. 185, 187, 459 S.E.2d 715, 716 (1995). *See also Brown v. Kindred Nursing Ctrs. East, LLC.*, 364 N.C. 76, 81, 692 S.E.2d 87, 91 (2010).

Nevertheless, the trial court possesses discretion to amend "any process or proof of service thereof 'unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued. *Harris v. Maready*, 311 N.C. 536, 545-46, 319 S.E.2d 912, 918 (1984) (quoting N.C. Gen. Stat. § 1A-1, Rule 4(i) (2015). Thus, although time barred claims may not be amended under Rule 15(c) to add new parties, they may be amended in order to correct a misnomer in the "description of the party or parties actually served [with process]." *Maready*, 311 N.C. at 546-547, 319 S.E.2d at 919. *See also Pierce v. Johnson*, 154 N.C. App. 34, 39, 571 S.E.2d 661, 664-65 (2002); *Liss v. Seamark Foods*, 147 N.C. App. 281, 283-84, 555 S.E.2d 365, 367 (2001); *Piland v. Hertford County Bd. of Comm'rs*, 141 N.C. App. 293, 299, 539 S.E.2d 669, 673 (2000). A misnomer is a "mistake in name; giving an incorrect name to the person in accusation, indictment, pleading, deed, or other instrument." *Pierce*, 154 N.C. App. at 39, 571 S.E.2d at 665 (internal alterations omitted) (quoting Black's Law Dictionary 1000 (6th ed. 1990)). It is "technical in nature[.]" *Liss*, 147 N.C. App. at 285, 555 S.E.2d at 368.

This Court has generally distinguished between situations in which the plaintiff has used the wrong name of "one legal entity which uses two names," and situations in which the plaintiff attempts to "substitute one legal entity for another as defendant." *Liss*, 147 N.C. at 286, 555

S.E.2d at 369 (quoting *Tyson v. L'Eggs Products Inc.*, 84 N.C. App. 1, 6, 351 S.E.2d 834, 837 (1987)). The former may be corrected as a misnomer provided there is evidence the intended defendant was properly served and would not be prejudiced by the amendment. *Pierce*, 154 N.C. App. at 39, 571 S.E.2d at 665. The latter are barred even where the correct defendant may have received notice of the impending suit. *Piland*, 141 N.C. App. at 299-300, 539 S.E.2d at 673 (whether the new defendant received notice "is irrelevant under *Crossman's* analysis of the limited reach of Rule 15(c). [The plaintiff] sought to add a party, and such action is not authorized by the rule"). *See also Treadway v. Diez*, 209 N.C. App. 152, 157, 703 S.E.2d 832, 835 (Jackson, J., dissenting) ("[N]otice is immaterial with respect to the operation of amendments to pleadings pursuant to Rule 15(c)."), *rev'd per curiam per the dissent*, 365 N.C. 289, 715 S.E.2d 852 (2011).

In the instant case, the record establishes Plaintiff's amendment was an attempt to substitute one legal entity for another. The evidence before the trial court, even when construed in the light most favorable to Plaintiff, establishes Parts and Stores are separate corporations. Parts and Stores presented the court with the same three pieces of evidence: (1) Ms. Webster's affidavit stating Stores is a wholly owned subsidiary of Parts; (2) the Cumberland County deed establishing Stores as the owner of the store where Plaintiff was injured; and (3) the application for a certificate of authority showing Parts is a Delaware corporation. Plaintiff's evidence, consisting of his attorney's affidavit, the printout of results from the Secretary of State's website, and the Sedgwick letter, does not dispute the ownership of the store or the nature of the corporate relationship between Parts and Stores. It is probative only of the process by which Plaintiff came to name the wrong defendant in his original complaint.

While Plaintiff argues Stores was properly served and would suffer no prejudice from allowing the amendment to relate back, this analysis applies only when the evidence shows the complaint was amended to substitute the proper legal name of a single legal entity with multiple names. *Piland*, 141 N.C. App. at 300, 539 S.E.2d at 673. Here the record is clear; "[q]uite simply, plaintiff[] sued the wrong corporation." *Franklin*, 117 N.C. App. at 35, 450 S.E.2d at 28. Consequently, we hold the trial court properly concluded Plaintiff's amendment was not the correction of a mere misnomer, but an impermissible attempt to add a new defendant after the statute of limitations had expired.

B. Equitable Estoppel

[2] Plaintiff argues Stores should be estopped from invoking the statute of limitations defense because it negligently allowed Sedgwick to make an affirmative representation that Parts was legally responsible for the store in which Plaintiff was injured. We disagree.

Generally, equitable estoppel may be invoked to prevent a defendant from relying upon the statute of limitations as an affirmative defense. *Nowell v. Great Atlantic & Pacific Tea Co.*, 250 N.C. 575, 579, 18 S.E.2d 889, 891 (1959). The party seeking to invoke the doctrine must satisfy several essential elements:

> (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.

Parker v. Thompson-Arthur Paving Co., 100 N.C. App. 367, 370, 396 S.E.2d 626, 628-29 (1990). In satisfying these elements, the party asserting estoppel need not show the other party acted with bad faith, fraud, or intent to deceive. *Friedland v. Gales*, 131 N.C. App. 802, 807, 509 S.E.2d 793, 797 (1998). However, even where the other party has engaged in misrepresentation, the proponent must have exercised due diligence in attempting to discover the relevant facts or omissions. *Bailey v. Handee Hugo's, Inc.*, 173 N.C. App. 723, 727, 620 S.E.2d 312, 315 (2005).

Plaintiff cannot invoke equitable estoppel in this case. Plaintiff's lone piece of evidence supporting his claim, the Sedgwick letter, states only that Sedgwick is the third party claims administrator for "Advance Auto" or "Advance Auto Parts." Plaintiff brings no evidence to suggest that Sedgwick's intent was to cause Plaintiff to act on its representation. Nor does he show that Sedgwick had actual or constructive knowledge that the owner of the retail store in question was Stores.

Furthermore, Plaintiff cannot show he exercised due diligence in discovering the legal owner of the retail store where he was injured. The record shows Sedgwick sent its letter to Plaintiff on 25 November 2012, almost three years before Plaintiff filed his original complaint on 26 October 2015. In the interim, a deed was on file with the Cumberland

County Register of Deeds identifying Stores as the true owner of the store where Plaintiff was injured. Although Plaintiff's examination of Advance Auto Parts' website and the Secretary of State's database proved insufficient to discover the legal owner of the store, "it is not an onerous burden for this Court to impose the task of a title search upon one filing suit." *Bailey*, 173 N.C. App. at 727, 620 S.E.2d at 316. Consequently, Plaintiff may not use equitable estoppel to prevent Stores from invoking the statute of limitations defense.

[3] Plaintiff also argues he is entitled to relief because Stores failed to file a certificate of assumed name and because Stores is merely Parts' alter ego. The record shows Plaintiff brought neither of these theories before the trial court. Because a party "cannot swap horses between courts in order to obtain a better mount on appeal," we decline to consider these arguments. *Bailey*, 173 N.C. App. at 727, 620 S.E.2d at 316.

As a result, we hold there was no genuine issue of material fact before the trial court and both Parts and Stores were entitled to judgment as a matter of law. The orders of the trial court are:

AFFIRMED.

Judges STROUD and DAVIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 JANUARY 2017)

ALMASON v. ALMASON No. 16-258	Mecklenburg (12CVD17617)	Remanded
BAKER v. GIBBONS No. 16-417	Hoke (13CVS871)	Affirmed
BREWINGTON v. N.C. AGRIC. & TECH. STATE UNIV. No. 15-1331	Wake (14CVS1374)	Affirmed
GOODYEAR TIRE & RUBBER CO. v. BERRY No. 16-520	Cumberland (15CVS2782)	Affirmed
HATTON v. GARRETT No. 15-1322	Mecklenburg (08CVD19133)	Affirmed in part, Vacated in part and Remanded
IN RE E.S.E. No. 16-616	New Hanover (14JT147-148)	Affirmed
STATE v. ANDREW No. 16-512	Mecklenburg (13CRS212231) (15CRS15980)	NO ERROR IN PART; VACATED AND REMANDED IN PART.
STATE v. ESTEBAN No. 16-716	Moore (12CRS52308)	Dismissed
STATE v. FIABEMA No. 16-560	Wake (14CRS211375)	Affirmed
STATE v. JAMES No. 16-314	Mecklenburg (13CRS247458) (14CRS8779-80)	No Error
STATE v. KERSEY No. 16-654	Mecklenburg (12CRS217536) (12CRS33966)	Affirmed
STATE v. LANHAM No. 16-387	Union (13CRS51627)	No Error
STATE v. MILES No. 16-562	Alamance (13CRS57279-80) (13IFS5081)	VACATED AND REMANDED FOR RESENTENCING

STATE v. MOSS No. 16-665	Cleveland (14CRS54997)	No Error
STATE v. POTEAT No. 16-535	Cabarrus (12CRS052151) (12CRS052152) (15CRS000274)	No Error
STATE v. SEARLS No. 16-676	Mecklenburg (13CRS246712)	No Error
STATE v. SUTTON No. 16-405	Pitt (13CRS60078)	No Error
STATE v. TAYLOR No. 16-723	Henderson (14CRS54122-23)	Affirmed
STATE v. WILLIAMS No. 16-229	Guilford (14CRS80806) (14CRS80954)	No error in part, vacated and remanded for resentencing
THORNTON v. C & J CARRIAGE HOUSE No. 16-538	N.C. Industrial Commission (860685)	Affirmed

BURNS v. KINGDOM IMPACT GLOBAL MINISTRIES, INC.

[251 N.C. App. 724 (2017)]

GEORGE BURNS, MACK McCANN AND CHARLES BARTLETT, TRUSTEES OF PARK'S CHAPEL FREE WILL BAPTIST CHURCH, PLAINTIFF(S)
v.
KINGDOM IMPACT GLOBAL MINISTRIES, INC., DEFENDANT

No. COA15-1313

Filed 7 February 2017

1. Discovery—late discovery requests—protective order—sanctions

The trial court did not abuse its discretion in a quiet title action by entering a sanctions order and a protective order. It was within the trial court's discretion to determine the scope of the sanctions order with respect to later discovery requests.

2. Jurisdiction—standing—trustees—quiet title action

The trial court did not err by concluding that plaintiffs had standing in a quiet standing action in their capacities as the Trustees of Parks Chapel.

3. Real Property—quiet title action—motion for summary judgment—sufficiency of evidence

The trial court did not err in a quiet title action by granting plaintiffs' motion for summary judgment. The undisputed evidence demonstrated that the deed from Parks Chapel to Kingdom Impact was invalid.

Appeal by Defendant from orders entered 18 December 2014 by Judge Richard T. Brown and 19 June 2015 by Judge Tanya T. Wallace[1] in Cumberland County Superior Court. Heard in the Court of Appeals 24 May 2016.

Yarborough, Winters & Neville, P.A., by J. Thomas Neville, for Plaintiffs-Appellees.

James H. Locus, Jr., for Defendant-Appellant.

INMAN, Judge.

1. The order below incorrectly spells Judge Wallace's name as Judge Tonya T. Wallace.

Kingdom Impact Global Ministries, Inc. ("Defendant" or "Kingdom Impact") appeals from the 19 June 2015 order granting a motion for summary judgment in favor of George Burns, Mack McCann, and Charles Bartlett, in their capacity as trustees of Parks Chapel Free Will Baptist Church (collectively "Plaintiffs"), as the rightful title holder to several tracts of land located at 868 Amye Street in Fayetteville, North Carolina. Defendant also appeals the trial court's 18 December 2014 order imposing sanctions for Defendant's failure to respond to Plaintiffs' discovery requests. Defendant argues that Plaintiffs lacked standing, and that the trial court erred in imposing discovery sanctions and granting Plaintiffs' motion for summary judgment because there existed genuine issues of material facts. After careful review, we affirm the trial court's discovery sanctions and summary judgment orders.

Factual History

This appeal arises out of the disputed ownership of real property located at 868 Amye Street, in Fayetteville, North Carolina ("the Property"). The Property, conveyed seventy years ago to the trustees of Free Will Baptist Church, is comprised of several tracts of land and includes a church sanctuary. Over the years, parishioners deeded various tracts of land to the "Trustees of the Freewill Baptist Church and their successors" and later to the "Trustees of Parks Chapel Free Will Baptist Church and their successors." The church was affiliated with the United American Free Will Baptist Denomination (the "Denomination").

The tracts central to this dispute, where the sanctuary is sited, have been historically identified as Lots 12, 13, and 14 according to the plat of "Mac's Park." In 1947, Emily McMillan conveyed Lots 13 and 14 by deed to the trustees of Freewill Baptist Church to be used for church purposes. In 1967, Mabel McNeill conveyed Lot 12 by deed to the trustees of Free Will Baptist Church to be used by the Denomination.

Contained within the 1947 deed conveying Lots 13 and 14 to Free Will Baptist Church is the following restrictive language:

> TO HAVE AND TO HOLD, the aforesaid lots of land and all privileges and appurtenances thereto belonging, to the said parties of the second part, and their successors in office, to their only use and behood for so long as said property is used only for church purposes, and no longer, upon the trust, nevertheless, that said property be held by the parties of the second part, and their successors in office, for the sole use, benefit, and enjoyment of said FREEWILL

BAPTIST CHURCH, its successors and assigns.

The 1967 deed conveying Lot 12 to Free Will Baptist Church includes the following restrictive language:

> In trust that said premises shall be used, maintained and disposed of as a place of Divine worship for the use of the United American Free Will Baptist Church in America, subject to the discipline, usage, and ministerial elections of said church, as may be authorized and declared from time to time by the General Conference of said church and the Annual Conference in whose bounds the premises are situated.

In 1984, the trustees of Free Will Baptist Church conveyed Lots 13 and 14 to the trustees of Parks Chapel Free Will Baptist Church ("Parks Chapel") as successor to Free Will Baptist Church. It is undisputed that the church simply changed its name at that time. It is also undisputed that the trustees of Free Will Baptist Church, for reasons that do not appear in the record, did not convey title in Lot 12 to the trustees of Parks Chapel when they conveyed Lots 13 and 14 when the church changed its name.

In 1999, Parks Chapel became incorporated under North Carolina law as a registered charitable or religious nonprofit corporation. The corporate bylaws required that the church be governed by the Book of Discipline of the Denomination, stating "this local church shall maintain its' [sic] affiliation with the United American Freewill Baptist Denomination and agrees to recognize and be governed by the United American Freewill Baptist Discipline . . . ."

On 3 April 2009, at the conclusion of a worship service, then acting pastor of Parks Chapel, William Thomas Ford ("Pastor Ford"), held a conference meeting to propose withdrawing Parks Chapel from the Denomination and the regional conference to which it was assigned, Cape Fear Conference B (the "Conference"). The parties submitted conflicting evidence before the trial court regarding whether notice of the meeting was provided, who was permitted the opportunity to vote on the withdrawal, and the outcome of a vote held during the meeting.

A month later, on 8 May 2009, Pastor Ford sent a letter to the Denomination and the Conference notifying them that Parks Chapel was withdrawing its membership and would cease paying dues.

In February 2010, Pastor Ford signed Articles of Incorporation for Kingdom Impact, which were filed with the North Carolina Secretary

of State's Office, declaring Kingdom Impact a non-profit religious organization. In May 2010, Frances Jackson, identified as a trustee of Parks Chapel, signed Articles of Merger of Parks Chapel Freewill Baptist Church, Inc. into Kingdom Impact Global Ministries, Inc. with the Secretary of State's Office. The affidavit testimony before the trial court however, challenged whether the merger was properly voted on by the members of Parks Chapel.

In June 2010, one month after the Articles of Merger were filed, the Denomination appointed Nathaniel Jackson as the Interim Pastor of Parks Chapel. The members of Parks Chapel who had opposed the withdrawal from the Denomination continued their affiliation with the Denomination and met for worship at the sanctuary on the Property until Defendant denied them access to the Property.

On 12 September 2011, Frances Jackson signed a deed transferring title of the Property from the trustees of Parks Chapel to the trustees of Kingdom Impact. This deed expressly transferred Lots 13 and 14 of Mac's Park, but does not mention Lot 12. Unlike the 1984 deed conveying the Property from the trustees of Free Will to the trustees of Parks Chapel, which was signed by all church trustees, no one other than Ms. Jackson signed the 2011 deed. Plaintiffs dispute that Ms. Jackson was a trustee of Parks Chapel at that time. Plaintiffs contend that Kingdom Impact, claiming ownership and control of the Property based on the deed, dispossessed Plaintiffs of the Property and prevented them from continuing to worship there.[2]

Procedural History

Plaintiffs filed a civil action on 12 November 2013 alleging that Kingdom Impact was not authorized to transfer title to the Property and sought to quiet the title for their claims to the Property as the trustees of Parks Chapel. Plaintiffs also filed notice of *lis pendens* with the Clerk of Court in Cumberland County. Defendant filed an answer and counterclaim to quiet title in the Property.

Discovery Disputes

In 2014, several months after commencing this action, Plaintiffs served Defendant with interrogatories and a request for production of

2. The record indicates that by 2009, when Pastor Ford proposed and took a vote to withdraw from the Denomination, Parks Chapel's parishioners were gathering for worship at 2503 Murchison Road, Fayetteville, North Carolina, a location different from the Property. The real property at the Murchison Road address is not at issue in this appeal.

documents. Defendant failed to respond within the time allowed and did not seek an extension of time to respond. Plaintiffs sought responses without success before filing a motion to compel discovery. The trial court entered a consent order on 14 October 2014 ("Consent Order") requiring Defendant "to produce full and accurate responses[,]" and "produce all documents responsive" to Plaintiffs' discovery request within forty-five days.

Defendant served Plaintiffs with discovery responses on 20 November 2014. Instead of providing factual responses to each interrogatory, Defendant objected to many of the interrogatories as "over broad and vague." Plaintiffs argued the response was inadequate and filed a motion to show cause and sanctions. The trial court entered an order on 18 December 2014 ("Sanctions Order") finding that "Defendant has failed to fully respond to the Plaintiffs' discovery requests and Orders of this [c]ourt" and required that Defendant provide substantive responses no later than 19 January 2015. The Sanctions Order also prohibited Defendant from offering in evidence, at trial or in any motion, any documents responsive to the discovery requests which were not tendered to Plaintiffs by 19 January 2015.

On 20 January 2015, Defendant served Plaintiffs with a request for admissions. Plaintiffs moved for a protective order from the request on the basis that as a result of the Sanctions Order, Defendants would be prohibited from introducing in evidence any admissions obtained after 19 January 2015. The trial court granted the motion in a protective order entered 27 February 2015 ("Protective Order").

Motions for Summary Judgment

The parties then filed cross motions for summary judgment. The motions were heard over multiple sessions of court in which counsel disputed the legal merits as well as the admissibility of various affidavits.[3] The trial court took the matter under advisement. On 19 June 2015, the trial court entered an order granting Plaintiffs' motion for summary judgment and denying Defendant's motion for summary judgment. Defendant timely appealed.

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3. Defendant filed with its motion an affidavit by Francis Jackson dated 17 April 2015. Plaintiffs filed a motion to strike the affidavit on the grounds that it violated the 18 December 2014 discovery sanctions order. The trial court overruled the motion to strike and permitted the affidavit. When counsel appeared for the second session of the hearing, counsel disputed the admissibility of additional affidavits, including two that were filed but not served before the second hearing. The trial court overruled all objections and allowed the affidavits.

Analysis

I. Discovery Sanctions

[1] Defendant argues the trial court erred in the Sanctions Order and in the Protective Order by expanding the scope of the sanctions beyond the language of the Sanctions Order. Specifically, Defendant asserts that the facts do not support the trial court's finding that Defendant substantially violated any of the discovery rules and that the Sanctions Order did not preclude Defendant from pursuing discovery after 19 January 2015. We conclude that the trial court did not abuse its discretion in entering either the Sanctions Order or the Protective Order.

A. Sanctions Order

The imposition of sanctions under Rule 37 for failure to comply with discovery requests and orders is a matter within the sound discretion of the trial court and cannot be overturned on appeal absent a showing of abuse of discretion. *Bumgarner v. Reneau*, 332 N.C. 624, 631, 422 S.E.2d 686, 690 (1992) (citation omitted). "An abuse of discretion may arise if there is no record evidence which indicates that [a] defendant acted improperly, or if the law will not support the conclusion that a discovery violation has occurred." *In re Pedestrian Walkway Failure*, 173 N.C. App. 254, 264, 618 S.E.2d 796, 803 (2005) (citations omitted). The specific choice of sanctions imposed by the trial court is likewise within its sound discretion. *Brooks v. Giesey*, 106 N.C. App. 586, 592, 418 S.E.2d 236, 239 (1992) (citation omitted). As an appropriate sanction for a failure to comply with a discovery order, Rule 37(b) explicitly grants the trial court authority to "refus[e] to allow the disobedient party to support or oppose designated claims or defenses, or prohibit[] the party from introducing designated matters in evidence" and to "require the party failing to obey the order to pay the reasonable expenses, including attorney's fees[.]" N.C. Gen. Stat. § 1A-1, Rule 37(b) (2015).

Here, the record is replete with information supporting the Sanctions Order. Defendant failed to respond to Plaintiffs' initial discovery requests for three months, leading to a consent order being entered in favor of Plaintiffs. While Defendant did serve Plaintiffs with discovery responses within the designated timeframe of the Consent Order, the record shows the responses failed to produce complete factual information and asserted objections that had long been waived. *See Golding v. Taylor*, 19 N.C. App. 245, 248, 198 S.E.2d 478, 480 (1973) ("[I]n the absence of an extension of time, failure to object to interrogatories

within the time fixed by the rule is a waiver of any objection . . .”); N.C. Gen. Stat. § 1A-1, Rule 33 (2015) (“[t]he party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories . . . .”).

Defendant argues the trial court abused its discretion by not making findings of fact and conclusions of law regarding how its responses were deficient or inconsistent with the Consent Order. Defendant fails to cite any authority supporting the contention that a trial court is required to make findings regarding specific discovery violations when imposing sanctions against a party. Contrary to Defendant's assertion, Rule 52(a)(2) of the North Carolina Rules of Civil Procedure states that “findings of fact and conclusions of law are necessary on decisions of any motion . . . only when requested by a party . . . .” N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2015). Our Supreme Court has held it is within the discretion of the trial court “whether to make a finding of fact if a party does not choose to compel a finding through the simple mechanism of so requesting.” *Watkins v. Hellings*, 321 N.C. 78, 82, 361 S.E.2d 568, 571 (1987) (“It has been held repeatedly by this Court that ‘[w]hen the trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the court on proper evidence found facts to support its judgment.’ ”) (alteration in original) (quoting *Estrada v. Burnham*, 316 N.C. 318, 324, 341 S.E.2d 538, 542 (1986)). The record here does not reveal that Defendant asked the trial court to make factual findings.

We hold the trial court did not abuse its discretion by precluding Defendant from offering into evidence documents not produced before the aforementioned date.

B. Protective Order

Defendant further argues that the trial court exceeded the scope of the Sanctions Order by entering the Protective Order, preventing Defendant from obtaining admissions from Plaintiffs. Defendant asserts that this sanction amounts to a bar on Defendant's ability to pursue discovery. This argument is without merit. Defendant had ample opportunity to seek discovery prior to 19 January 2015. The Protective Order was an effectuation of the Sanctions Order, which provided a further extension of time to Defendant to provide long past due discovery responses. It was within the trial court's discretion to determine the scope of the Sanctions Order with respect to later discovery requests. Accordingly, the trial court did not abuse its discretion in entering the Protective Order.

II. Standing

[2] Defendant also challenges Plaintiffs' standing to bring this action in their capacities as the "Trustees of Parks Chapel." Defendant argues Plaintiffs ceased to be Trustees of Parks Chapel on 6 May 2010 following the merger of Parks Chapel into Kingdom Impact, and that because of this cessation Plaintiffs were divested of standing. We disagree.

Defendant's argument misinterprets the capacity in which Plaintiffs bring this suit. Defendant asserts that Parks Chapel ceased to exist following the merger, and that Plaintiffs could not possibly have brought suit on behalf of a non-entity. But Plaintiffs' complaint specifically states the suit is being brought by Plaintiffs as trustees of Parks Chapel, a "non-incorporated entity." Defendant concedes in its answer and counterclaim that Plaintiffs were trustees of Parks Chapel at all relevant times. Regardless of the validity of the merger and the incorporation status of Parks Chapel, Plaintiffs have the ability to bring a suit as trustees of a non-incorporated religious organization seeking to assert property rights. *See* N.C. Gen. Stat. §§ 59B-4, 59B-5, 59B-15, and 61-2 (2015).

Although Defendant presented evidence by affidavit before the trial court that raises a factual dispute about Frances Jackson's status as a trustee of Parks Chapel, Defendant presented no evidence raising a factual dispute regarding Plaintiffs' status as trustees of Parks Chapel. Plaintiffs' claim is not dependent upon them comprising all of the trustees of Parks Chapel, but merely upon Defendant's failure to obtain the consent of all trustees to transfer the Property.

For more than two centuries, Chapter 61 of the North Carolina General Statutes has provided special protections for real property owned by churches. N.C. Gen. Stat. § 61-2 provides that "[t]he trustees and their successors have power to . . . take and hold property, real and personal, in trust for such church or denomination, religious society or congregation; and they may sue or be sued in all proper actions, for or on account of the . . . property so held or claimed by them . . . ." N.C. Gen. Stat. § 61-3 (2015) provides, *inter alia:*

> All glebes, lands and tenements, heretofore purchased, given, or devised for the support of any particular ministry, or mode of worship, and all churches and other houses built for the purpose of public worship, and all lands and donations of any kind of property or estate that have been or may be given, granted or devised to any church or religious denomination, religious society or congregation

> within the State for their respective use, shall be and remain forever to the use and occupancy of that church or denomination, societies or congregations . . . and the estate therein shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees respectively of such churches, denominations, societies and congregations, for their several use, according to the intent expressed in the conveyance . . . .

North Carolina statute recognizes that real property can be held by an unincorporated association. "Real and personal property in this State may be acquired, held, encumbered, and transferred by a nonprofit association, whether or not the nonprofit association or a member has any other relationship to this State." N.C. Gen. Stat. § 59B-4. N.C. Gen. Stat. § 59B-15(a) further states that "[n]othing in this Chapter changes the law with reference to the holding and conveyance of land by the trustees of churches under Chapter 61 of the General Statutes where the land is conveyed to and held by the trustees." Plaintiffs, as trustees of Parks Chapel, are asserting a claim for real property held by them in trust for Parks Chapel. Accordingly, we hold Plaintiffs have standing to bring this quiet title action.

III. Summary Judgment

[3] Lastly, Defendant argues that the trial court erred in granting Plaintiffs' motion for summary judgment because there existed before the trial court some evidence that raised genuine issues of material fact. We disagree.

An appeal from an order granting summary judgment is reviewed *de novo* by this Court. *Andresen v. Progress Energy, Inc.*, 204 N.C. App. 182, 184, 696 S.E.2d 159, 160 (2010) (citation omitted). "Summary judgement is appropriate when there is no genuine issues as to any material fact and any party is entitled to a judgment as a matter of law." *Id.* at 184, 696 S.E.2d at 160-61 (internal quotation marks and citations omitted). "[A]n issue is genuine if it is supported by substantial evidence, and . . . is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action[.]" *DeWitt v. Eveready Battery Co., Inc.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (internal quotation marks and citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and means more than a scintilla or a permissible inference[.]" *Id.* (internal quotation marks and citations omitted).

"The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact." *Id.* (citing *Nicholson v. Am. Safety Util. Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997)). "The movant may meet this burden by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Collingwood v. General Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted). Once this burden is met, the nonmoving party must "produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial" to avoid dismissal. *Id.* (citation omitted). "All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Id.* (citing *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972)).

"In order to establish a *prima facie* case for removing a cloud on title, a plaintiff must meet two requirements: (1) plaintiff must own the land in controversy, or have some estate or interest in it; and (2) defendant must assert some claim in the land which is adverse to plaintiff's title, estate or interest." *Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 461, 490 S.E.2d 593, 597 (1997) (citing *Wells v. Clayton*, 236 N.C. 102, 107, 72 S.E.2d 16, 20 (1952)).

Here, Defendant failed to show any genuine issue as to material facts existed or that Plaintiffs were not entitled to judgment as a matter of law. Defendant argues that there remain questions regarding: (1) whether "corporate formalities" were followed by Defendant related to the merger with Parks Chapel, including whether adequate notice was provided prior to the meeting to vote on the withdrawal from the Denomination; (2) whether a sufficient majority of the congregation of Parks Chapel actually voted to withdraw from the Denomination and the Conference; and (3) whether Frances Jackson, as a trustee of Parks Chapel, had authority to sign the deed transferring the title from Parks Chapel to Defendant.

Plaintiffs, as trustees of Parks Chapel, have standing to bring this action pursuant to N.C. Gen. Stat. §§ 59B-4, 59B-5, 59B-15, and 61-2, regardless of the validity of the merger and the vote to withdraw from the Denomination. These factual disputes need not be resolved to affirm the trial court's entry of summary judgment in favor of Plaintiffs. Plaintiffs have shown that there is no evidence in the record to support

Defendant's contention that Frances Jackson, acting alone, had sole authority to transfer the Property. The undisputed evidence demonstrates that the deed from Parks Chapel to Kingdom Impact was invalid because (1) the deeds conveying the Property to the trustees of Free Will Baptist Church, predecessor to Parks Chapel, included restrictive language requiring that the Property be used by a church affiliated with the Denomination; (2) Parks Chapel, successor to Free Will Baptist Church, continued the church's affiliation with the Denomination; and (3) Kingdom Impact is not affiliated with the Denomination. The undisputed evidence also demonstrates that France Jackson did not have sole authority to transfer the Property without the signatures of all trustees.

Because the purported transfer of real property to Kingdom Impact violated real property statutes, the trial court did not need to resolve any factual dispute regarding corporate governance to invalidate the transfer and enter summary judgment quieting title in the Property to Plaintiffs.

Conclusion

For the above reasons, we hold that the trial court did not err in ordering sanctions or in granting Plaintiffs' motion for summary judgment because there did not exist any genuine issues of material fact and Plaintiffs were entitled to judgment as a matter of law. Accordingly, we affirm the trial court's sanctions and order for summary judgment.

AFFIRMED.

Judges BRYANT and TYSON concur.

FRANCISCO FAGUNDES AND DESIREE FAGUNDES, PLAINTIFFS
v.
AMMONS DEVELOPMENT GROUP, INC.; EAST COAST DRILLING & BLASTING, INC.; SCOTT CARLE; AND JUAN ALBINO, DEFENDANTS

No. COA16-776

Filed 7 February 2017

1. Appeal and Error—interlocutory orders and appeals—exclusivity provisions of Workers' Compensation Act—substantial right

The denial of a motion concerning the exclusivity provision of the Workers' Compensation Act affects a substantial right and thus is immediately appealable.

2. Workers' Compensation—jurisdiction—exclusive remedy—strict liability claim against employer—Woodson claim—inherent danger—ultrahazardous occupation

The trial court lacked jurisdiction to adjudicate plaintiff employee's strict-liability claims against defendant employer. Plaintiff employee was injured in a work-related accident, and the Workers' Compensation Act provided the exclusive remedy for his injuries. The portion of *Woodson* addressing jurisdiction under the Workers' Compensation Act did not depend on the inherent danger of the occupation.

3. Workers' Compensation—liability of co-employee—supervisor—failure to show willful, wanton, or reckless actions

The trial court erred by denying defendant supervisor Albino's motion for summary judgment on plaintiff employee's claim under *Pleasant v. Johnson*, 312 N.C. 710. Plaintiff employee did not forecast any evidence showing that Albino's actions while supervising the blast were willful, wanton, or reckless.

Appeal by defendants from order entered 8 March 2016 by Judge Michael J. O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 30 November 2016.

The Jernigan Law Firm, by Leonard T. Jernigan, Jr. and Anthony L. Lucas, and Edwards Kirby, LLP, by William W. Plyler, for plaintiff-appellee.

Young Moore and Henderson, P.A., by Jay P. Tobin, for defendants-appellants.

DIETZ, Judge.

The central issue in this appeal is whether employees injured while working in "ultrahazardous" jobs may sue their employers in the court system despite the provisions of the Workers' Compensation Act requiring those claims to be pursued at the Industrial Commission.

Plaintiff Francisco "Frank" Fagundes, who seeks to sue his employer for injuries suffered during a blasting accident, acknowledges that this is a novel argument. But he contends that his position is simply a logical extension of our Supreme Court's decision in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

We disagree. The portion of *Woodson* addressing jurisdiction under the Workers' Compensation Act does not depend on the inherent danger of the occupation. *Woodson* permits injured workers to sue in court if their employer engaged in "misconduct knowing it is substantially certain to cause serious injury or death," regardless of whether the job, ordinarily, is a dangerous one. 329 N.C. at 340, 407 S.E.2d at 228. Fagundes does not argue that he can satisfy the *Woodson* substantial certainty test. He instead argues that his job at a blasting company involved an "ultrahazardous" activity which, at common law, was the subject of a strict liability cause of action in the court system. He argues that, because of the danger of his job and the common law remedies traditionally available to him, he should be permitted to sue in court.

Put another way, what Fagundes wants is not for this Court to extend the reasoning of *Woodson* to a closely analogous set of facts, but to rewrite the Workers' Compensation Act to create an exception that he believes serves important policy purposes. That is not what courts do. When the General Assembly established the exclusive jurisdiction of the workers' compensation system, it chose not to create the exception that Fagundes seeks from the courts. We have no authority to override that legislative decision.

Accordingly, as explained in more detail below, we reverse the trial court's denial of Defendants' motions for summary judgment and remand for entry of an appropriate order and judgment consistent with this opinion.

Facts and Procedural History

Defendant East Coast Drilling & Blasting, Inc. is a company that provides construction services, including drilling, blasting, and crushing rock. Defendant Scott Carle is the company's president and CEO. Defendant Juan Albino is a blaster for the company.

On 25 July 2013, Plaintiff Frank Fagundes was performing rock crushing services for the company when debris ejected from a blasting operation that Albino was supervising struck and seriously injured Fagundes. On 29 January 2015, Fagundes sued the company, Carle, and Albino. Among other claims, Fagundes asserted a strict liability claim against all three defendants and a willful, wanton, or reckless negligence claim against Albino.

[1] Defendants moved for summary judgment on 17 December 2015. Among other grounds, Defendants argued that Fagundes failed to forecast sufficient evidence to overcome the exclusivity provision in the Workers' Compensation Act, which severely limits the types of workplace injury claims that can be pursued in the court system.[1] On 8 March 2016, the trial court entered an order partially granting the motion, but denying the motion with respect to Fagundes's strict liability claim and his willful, wanton, or reckless negligence claim against Albino. Defendants timely appealed. This Court has appellate jurisdiction because the denial of a motion concerning the exclusivity provision of the Workers' Compensation Act affects a substantial right and thus is immediately appealable. *Blue v. Mountaire Farms, Inc.*, __ N.C. App. __, __, 786 S.E.2d 393, 397–98 (2016).

Analysis

I. Strict liability claim for injury during an ultrahazardous activity

[2] Defendants first argue that Fagundes's claims are barred because he was injured on the job. Thus, Defendants argue, the Industrial Commission has exclusive jurisdiction over his claims. Fagundes contends that, because he worked in an ultrahazardous occupation (involving blasting), he should be permitted to sue in the courts. Fagundes concedes that this is a novel argument but asserts that it is a logical extension of our Supreme Court's holding in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). As explained below, we agree with Defendants.

In general, the provisions of the Workers' Compensation Act "are the exclusive remedy in the event of [an] employee's injury by accident in connection with [his or her] employment." *Reece v. Forga*, 138 N.C. App. 703, 705, 531 S.E.2d 881, 882–83 (2000). Under the Act, "the injured employee may not elect to maintain a suit for recovery of damages for

1. Defendants first raised this argument in a 14 April 2015 motion to dismiss. But based on the appellate record, it appears the trial court never ruled on that motion.

his injuries, but must proceed under the Act." *Id.* As a result, claims stemming from workplace injuries "are within the exclusive jurisdiction of the Industrial Commission; the superior court has been divested of jurisdiction by statute." *Id.*

In *Woodson*, our Supreme Court created a narrow exception to the exclusivity provision of the Act. *See* 329 N.C. at 340–41, 407 S.E.2d at 228. Under *Woodson*, "if an employer 'intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death' and that conduct causes injury or death, a plaintiff can pursue a civil action against his or her employer." *Trivette v. Yount*, 366 N.C. 303, 306, 735 S.E.2d 306, 309 (2012) (quoting *Woodson*, 329 N.C. App. at 340, 407 S.E.2d at 228). Importantly, nowhere in this analysis did the Supreme Court suggest that the dangerousness of the job itself impacted the *Woodson* test. *Woodson*, 329 N.C. at 337–44, 407 S.E.2d at 226–30.

Fagundes argues that this Court should extend *Woodson* to recognize "that an employer who engages in blasting . . . is not protected by the exclusivity provision" and may be held strictly liable for injuries in a court proceeding. This proposed holding does not follow from *Woodson*'s reasoning—indeed, it runs counter to *Woodson*'s core premise. To be sure, a separate portion of the *Woodson* opinion discussed how a general contractor could be held strictly liable for injuries caused by a subcontractor engaged in an ultrahazardous activity, such as blasting. *Id.* at 350–56, 407 S.E.2d at 234–38. But that analysis came in an entirely separate section of the opinion, well after the portion addressing the exclusivity provision of the Workers' Compensation Act. In the portion of the opinion that addressed exclusive jurisdiction over workplace injuries, the Court focused on the employer's knowledge and intent, not the dangerousness of the job itself. *Compare id.* at 337–44, 407 S.E.2d at 226–30, *with id.* at 350–56, 407 S.E.2d at 234–38. This is noteworthy because the job at issue in *Woodson*—trenching—also is extremely dangerous. If the Supreme Court believed the dangerousness of the job played a role in its analysis, it would have said so.

Fagundes also focuses on the fact that his job (involving blasting) is the only type of job that our State's courts have found to be "ultrahazardous." *See generally Kinsey v. Spann*, 139 N.C. App. 370, 374, 533 S.E.2d 487, 491 (2000). At common law, one who caused injury or property damage while engaged in an ultrahazardous activity like blasting was held strictly liable. Courts imposed strict liability because ultrahazardous activities were so dangerous that "reasonable care [could not] eliminate the risk of serious harm." *Woodson*, 329 N.C. at 350, 407 S.E.2d at 234. Fagundes argues that, because this special common law rule

applied to workers injured on the job, he should be permitted to assert his strict liability claim in the court system.

The obvious flaw in this argument is that the workers' compensation system also imposes strict liability on employers. *See id.* at 338, 407 S.E.2d at 227. Thus, as Fagundes conceded at oral argument, the only difference between pursuing his claim in court and pursuing it in the Industrial Commission is the possibility of a larger monetary recovery in court. Put another way, Fagundes's argument has nothing to do with the exclusivity analysis our Supreme Court conducted in *Woodson*; rather, Fagundes believes this Court should create a new exception to the Workers' Compensation Act because of the high risk of serious injury in these types of ultrahazardous jobs and the robust common law remedies that were available to workers injured in these types of jobs before our General Assembly created the workers' compensation system.[2]

We must reject this argument. This Court is "an error-correcting body, not a policy-making or law-making one." *Times News Pub. Co. v. Alamance-Burlington Bd. of Educ.*, __ N.C. App. __, __, 774 S.E.2d 922, 927 (2015). We lack the authority to change the law on the ground that it might make good policy sense to do so. If Fagundes believes the Workers' Compensation Act should provide an exception for workers engaged in ultrahazardous activities, he must seek that policy change at the General Assembly.

In sum, because Fagundes was injured in a work-related accident, the Workers' Compensation Act provides the exclusive remedy for his injuries, and the trial court lacked jurisdiction to adjudicate his strict-liability claims against his employer. *See Bowden v. Young*, __ N.C. App. __, __, 768 S.E.2d 622, 624 (2015). We therefore reverse the trial court's denial of summary judgment on those claims and remand for entry of an order dismissing those claims for lack of jurisdiction.[3]

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2. True enough, there were robust remedies at common law. But there were also robust defenses. Even in strict liability cases, for example, defendants could assert assumption of the risk as a defense. *See Pleasant v. Johnson*, 312 N.C. 710, 711, 325 S.E.2d 244, 246 (1985). The General Assembly enacted our workers' compensation system to eliminate much of the uncertainty in workplace accident cases by providing employees with limited but assured remedies. *Id.* at 711–12, 325 S.E.2d at 246–47.

3. Fagundes also argues that this Court is bound by our decision in *Hargrove v. Billings & Garrett, Inc.*, 137 N.C. App. 759, 529 S.E.2d 693 (2000). That case involved suit by an injured worker against the city that contracted with his employer and whether the city was immune from suit under the public duty doctrine. *Hargrove*, 137 N.C. App. at 761, 529 S.E.2d at 695. The injured worker's employer was not a party to the appeal, and the Court did not address the exclusivity provision of the Workers' Compensation Act.

II. *Pleasant* claim against Fagundes's co-employee

[3] Defendant Juan Albino also challenges the trial court's denial of his motion for summary judgment on Fagundes's claim against him under *Pleasant v. Johnson*, 312 N.C. 710, 716, 325 S.E.2d 244, 249 (1985). Because Fagundes did not forecast any evidence showing that Albino's actions while supervising the blast were willful, wanton, or reckless, we agree that the trial court should have entered summary judgment in Albino's favor on this claim.

"[A] defendant, as the moving party, may meet its burden on summary judgment by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim." *Camalier v. Jeffries*, 340 N.C. 699, 710–11, 460 S.E.2d 133, 138 (1995).

In *Pleasant*, our Supreme Court held that the Workers' Compensation Act "does not shield a co-employee from common law liability for willful, wanton and reckless negligence." 312 N.C. at 716, 325 S.E.2d at 249. The Court described "wanton" and "reckless" conduct as "manifesting a *reckless disregard* for the rights and safety of others" and defined "willful negligence" as "the *intentional* failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed." *Id.* at 714, 325 S.E.2d at 248 (emphasis added). "[T]he burden of proof is heavy on a plaintiff who seeks to recover under *Pleasant*." *Trivette*, 366 N.C. at 310, 735 S.E.2d at 311. "[E]ven unquestionably negligent behavior rarely meets the high standard of 'willful, wanton and reckless' negligence established in *Pleasant*." *Id.* at 312, 735 S.E.2d at 312.

The only evidence on which Fagundes relies to support his *Pleasant* claim is five citations for OSHA safety violations stemming from the accident that injured him. He offers proof that Albino was responsible for these five safety violations. But Fagundes concedes that, before his accident, neither Albino nor the company had ever been cited for any OSHA violations, nor had anyone been injured as a result of the company's blasting activities. His argument turns entirely on the fact that the State Department of Labor characterized the safety violations as "egregious."

We hold that these safety violations, while troubling, are insufficient to survive a motion for summary judgment under *Pleasant*. In *Pendergrass v. Card Care, Inc.*, our Supreme Court rejected a *Pleasant* claim against two co-employees who ordered the injured worker "to

work at the final inspection machine when they knew that certain dangerous parts of the machine were unguarded, in violation of OSHA regulations and industry standards." 333 N.C. 233, 238, 424 S.E.2d 391, 394 (1993). The Supreme Court held that the knowing violation of these safety regulations did "not rise to the level of the negligence in *Pleasant*." *Id.* The Court elaborated as follows:

> Although [the co-employees] may have known certain dangerous parts of the machine were unguarded when they instructed [the injured employee] to work at the machine, we do not believe this supports an inference that they intended that [the employee] be injured or that they were manifestly indifferent to the consequences of his doing so.

Id.

We are unable to distinguish this case from *Pendergrass*. Indeed, the facts in this case arguably are weaker than the facts in *Pendergrass* because Fagundes has not forecast any evidence that Albino *knowingly* violated these safety regulations. In short, after an opportunity to fully engage in discovery, Fagundes remains unable to forecast any evidence for trial that would prove Albino was willfully, wantonly, or recklessly negligent. Accordingly, the trial court should have entered summary judgment in favor of Albino on this claim.

Conclusion

The trial court erred in denying Defendants' motion for summary judgment. We reverse the trial court's order and remand for entry of an order and judgment consistent with this opinion.

REVERSED AND REMANDED.

Judges CALABRIA and ZACHARY concur.

MARTHA HOLMES, EMPLOYEE, PLAINTIFF
v.
ASSOCIATED PIPE LINE CONTRACTORS, INC., EMPLOYER, OLD REPUBLIC CONSTRUCTION PROGRAM GROUP, INC., CARRIER (GALLAGHER BASSETT SERVICES, THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA16-593

Filed 7 February 2017

Workers' Compensation—lack of jurisdiction—mandatory drug test in another state before work—last act to form employment contract

The Industrial Commission did not err in a workers' compensation case by denying plaintiff employee's claim based on lack of jurisdiction. The employee's submission to a mandatory drug test in another state before beginning work constituted the last act necessary to form an employment contract between the employee and her employer.

Appeal by plaintiff from opinion and award entered 2 March 2016 by the North Carolina Industrial Commission. Heard in the Court of Appeals 2 November 2016.

Oxner + Permar, PLLC, by John R. Landry, Jr., for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones and Thomas W. Page, for defendants-appellees.

DAVIS, Judge.

This workers' compensation case presents the jurisdictional question of whether an employee's submission to a mandatory drug test in another state before beginning work constitutes the last act necessary to form an employment contract between the employee and her employer. Martha Holmes ("Plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission dismissing her claims for benefits under the North Carolina Workers' Compensation Act based on lack of jurisdiction. Because we conclude that the last act necessary to create her employment contract occurred in Texas, we affirm.

Factual and Procedural Background

Associated Pipe Line Contractors, Inc. ("Associated") is headquartered and has its principal place of business in Houston, Texas. In the fall of 2013, Associated was in need of workers for a project in Huntsville, Texas. Associated's superintendent contacted the on-site union steward at the work site in Huntsville and informed the steward that Associated needed union workers for the project. The steward then contacted "Local 798," a local trade union based in Tulsa, Oklahoma.

Since 2007, Plaintiff, a member of Local 798, had been working as a welder helper for various contractors. On 29 October 2013 — while Plaintiff was living in Fayetteville, North Carolina — she was contacted by telephone by a representative of Local 798 and told to report to an assignment in Huntsville, Texas. Plaintiff was instructed that "she had 24 hours to be in route to the jobsite" and that Associated would reimburse her for her travel expenses.

When she arrived in Huntsville, Plaintiff was required to submit to a drug test and complete various forms — including an authorization for a Department of Transportation background check — before she could begin working. Within two hours after taking the drug test, Plaintiff began work at the Huntsville jobsite.

On 8 and 26 January 2014, Plaintiff suffered injuries on the jobsite. On 24 March 2014, Plaintiff filed a Form 18 Notice of Accident for the first injury, and on 5 September 2014, she submitted a Form 18 for the second injury. Associated filed a Form 61 denying liability on 12 May 2014 and an amended Form 61 on 21 August 2014. Its denial of liability was based on the assertion that "the North Carolina Industrial Commission does not have jurisdiction over this claim, which occurred outside of North Carolina."

On 13 May 2014, Plaintiff filed a Form 33 Request that Claim be Assigned for Hearing. On 25 June 2014, Associated filed a Form 33R disputing that Plaintiff had sustained a compensable injury and once again contending that the Industrial Commission lacked jurisdiction over her claims. Plaintiff subsequently filed an amended Form 33 to include her second injury.

On 9 December 2014, a hearing was held before Deputy Commissioner George T. Glenn, II. Plaintiff, Ryan Wilcox, Associated's Vice President of Safety and Compliance, and Gary Allison, the welding foreman for the project, appeared as witnesses at the hearing. Wilcox testified that when Associated is in need of laborers for a project, it requests the workers

through an on-site union steward. The steward then contacts a trade union, who, in turn, dispatches workers from various locations around the country. When the workers arrive at the jobsite, they are required to take a drug test and consent to a background check. Unless the worker submits to both the drug test and the background check, she will not be hired. Because it takes several days for Associated to receive the results, the worker begins work immediately upon taking the drug test and signing a form acknowledging consent to the background check.

On 25 February 2015, the Deputy Commissioner issued an opinion and award dismissing Plaintiff's claims based on lack of subject matter jurisdiction. Plaintiff appealed to the Full Commission on 2 March 2015. On 1 October 2015, the Full Commission heard arguments from the parties as to whether the Commission possessed jurisdiction over Plaintiff's claims.

On 2 March 2016, the Commission issued its Opinion and Award, which contained the following pertinent findings of fact:

> 6. Plaintiff was working for [Associated] on a job site located in Huntsville, Texas at the time of her alleged injuries. This was the only location at which plaintiff ever worked for [Associated].
>
> 7. While performing a contract job in Huntsville, Texas, [Associated] contacted the on-site union steward and requested union workers for the job. The union steward contacted the Local 798 union in Tulsa, Oklahoma. A dispatcher with the Local 798 union in Oklahoma then contacted plaintiff at her home in Fayetteville, North Carolina.
>
> 8. The Local 798 dispatcher told plaintiff to report to an assignment in Huntsville, Texas as a welder's helper. The union dispatcher informed plaintiff that she had 24 hours to be *en route* to the job site in Huntsville, Texas, and she was required to travel 500 miles per day.
>
> 9. [Associated] did not specifically request plaintiff for the job in Huntsville, Texas when requesting workers through the Local 798 union, nor did [Associated] directly contact plaintiff in North Carolina for the Huntsville, Texas job.
>
> 10. Neither plaintiff nor [Associated] could negotiate plaintiff's rate of pay or her work schedule for her work on the Huntsville, Texas job. Plaintiff's rate of pay was predetermined by an agreement between [Associated] and the Pipe Line Contractors Association. Further, plaintiff's

working hours on the Huntsville, Texas job were predetermined by an agreement between [Associated], the union, and Texas state requirements.

11. Ryan Michael Wilcox testified as Vice President of Safety and Compliance for [Associated]. In this position, Mr. Wilcox assists union workers with completing necessary paperwork required as part of [Associated]'s hiring process. This hiring process includes obtaining consent from union workers to perform a background check. Mr. Wilcox was not involved in contacting the Local 798 union to request workers.

12. Mr. Wilcox testified that if any union member does not provide a urine sample for purposes of a drug screen or consent to a background check, then those union members are not employable and [Associated] does not pay the union member any compensation for travel to the job site or otherwise. Once the union member provides the urine sample and consents to the background check, that individual reports to the safety office for safety training, environmental training, and other orientation presentations. Once the union member has successfully completed the orientation process, that individual is allowed to begin work at the job site and continue work until results of the drug test and background check are returned.

13. Plaintiff completed the necessary paperwork, consented to the background check, and provided a urine sample for the drug test on October 29, 2013. Upon completion of these pre-employment processes, [Associated] hired plaintiff and she began work at the Huntsville, Texas job site.

14. Mr. Wilcox testified that if plaintiff's drug test or background check had not "come back clean," she would have been terminated from the Huntsville, Texas job and paid a per-day rate for the time she worked versus the full hourly rate required by the union agreement.

15. Plaintiff contends that she was automatically hired by [Associated] once she received the call from the Local 798 union dispatcher to present to the Huntsville, Texas job. However, plaintiff testified that she did not begin work on

> the Huntsville, Texas job until after she consented to the drug screen required by [Associated].
>
> . . . .
>
> 18. The preponderance of the evidence in view of the entire record establishes that plaintiff's submission to a drug test and background check and completion of certain paperwork were conditions precedent to her hire by [Associated] for the Huntsville, Texas job.
>
> 19. The preponderance of the evidence in view of the entire record establishes that plaintiff submitted to the drug test, consented to the background check, and completed all necessary paperwork upon her arrival in Huntsville, Texas. It was only upon the completion of these processes that [Associated] hired plaintiff and she began work on the Texas job. Accordingly, the Commission finds that the last act required to create a contract of employment between plaintiff and [Associated] occurred in Texas.

Based on these findings of fact, the Commission made the following pertinent conclusions of law:

> 3. "To determine where a contract for employment was made, the Commission and the courts of this state apply the 'last act' test." *Murray v. Ahlstrom Indus. Holdings, Inc.*, 131 N.C. App. 294, 296, 506 S.E.2d 724, 726 (1998) (internal citations omitted).
>
> 4. "[F]or a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here." *Thomas v. Overland Express, Inc.*, 101 N.C. App. 90, 96, 398 S.E.2d 921, 926 (1990) (internal citations omitted). The completion of paperwork generally constitutes an administrative task that serves as a consummation of the employment relationship and is not the "last act" for purposes of making the relationship a binding obligation. *Murray*, 131 N.C. App. at 296-97, 506 S.E.2d at 726-27 (citing *Warren v. Dixon and Christopher Co.*, 252 N.C. 534, 114 S.E.2d 250 (1960)). However, the completion of such things as an orientation program, a physical examination, a road test, or a drug test as part of the hiring process extends "well beyond 'mostly administrative' paperwork." *Taylor v. Howard Transp., Inc.*, ___

N.C. App. ___, ___, 771 S.E.2d 835, 839 (2015), *disc. rev. denied*, ___ N.C. ___ (2015).

5. Based upon a preponderance of the evidence in view of the entire record, the Commission concludes that plaintiff's submission to the drug test and consent to a background check outside of North Carolina, upon her arrival in Huntsville, Texas, were conditions precedent to her hire by [Associated] and such contingences [sic] were more than administrative paperwork. Had plaintiff not submitted to the drug test and consented to the background check, [Associated] would not have hired plaintiff to work on the Huntsville, Texas job. Consequently, the Commission concludes the "last act" necessary to create an employment contract and a binding obligation between plaintiff and [Associated] occurred in Texas. N.C. Gen. Stat. § 97-36; *Taylor*, 771 S.E.2d at 839; *Thomas*, 101 N.C. App. at 96, 398 S.E.2d at 926; *Murray*, 131 N.C. App. at 296, 506 S.E.2d at 726.

6. Because the contract of employment between plaintiff and [Associated] was not made in North Carolina; [Associated]'s principal place of business is not in North Carolina; and plaintiff's principal place of employment was not in North Carolina, the North Carolina Industrial Commission cannot assert subject matter jurisdiction over these claims. N.C. Gen. Stat. § 97-36.

Based on these conclusions, the Commission dismissed Plaintiff's claims. Deputy Commissioner Bernadine S. Ballance dissented based on her belief that the Commission possessed jurisdiction in light of the fact that Plaintiff's contract of employment was, in fact, made in North Carolina. On 23 March 2016, Plaintiff filed a timely notice of appeal.

Analysis

Appellate review of an opinion and award of the Industrial Commission is typically "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." *Philbeck v. Univ. of Mich.*, 235 N.C. App. 124, 127, 761 S.E.2d 668, 671 (2014) (citation and quotation marks omitted). "The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is also evidence that would support a contrary finding. The Commission's conclusions of law, however, are reviewed

de novo." *Morgan v. Morgan Motor Co. of Albemarle*, 231 N.C. App. 377, 380, 752 S.E.2d 677, 680 (2013) (internal citation omitted), *aff'd per curiam*, 368 N.C. 69, 772 S.E.2d 238 (2015). However,

> [w]hen reviewing an Opinion and Award, the jurisdictional facts found by the Commission are not conclusive even if there is evidence in the record to support such findings. Instead, reviewing courts are obliged to make independent findings of jurisdictional facts based upon consideration of the entire record.

Salvie v. Med. Ctr. Pharm. of Concord, Inc., 235 N.C. App. 489, 491, 762 S.E.2d 273, 276 (2014) (internal citations and quotation marks omitted).

The North Carolina Workers' Compensation Act provides, in pertinent part, as follows:

> Where an accident happens while the employee is employed elsewhere than in this State and the accident is one which would entitle him or his dependents or next of kin to compensation if it had happened in this State, then the employee or his dependents or next of kin shall be entitled to compensation *(i) if the contract of employment was made in this State*, (ii) if the employer's principal place of business is in this State, or (iii) if the employee's principal place of employment is within this State; provided, however, that if an employee or his dependents or next of kin shall receive compensation or damages under the laws of any other state nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this Article.

N.C. Gen. Stat. § 97-36 (2015) (emphasis added).

Here, it is undisputed that Associated's principal place of business is in Texas, and Plaintiff does not contend that her principal place of employment is within North Carolina. Thus, the only remaining question is whether Plaintiff's contract of employment was made in Texas or North Carolina.

In determining where a contract of employment was made, our courts apply the "last act" test. *Murray v. Ahlstrom Indus. Holdings, Inc.*, 131 N.C. App. 294, 296, 506 S.E.2d 724, 726 (1998). "For a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here." *Id.* (citation, quotation marks, and brackets omitted). In the present case, Plaintiff contends that the

last act necessary to form her employment contract occurred in North Carolina because she accepted the job for Associated by telephone from her North Carolina home. Associated, conversely, argues that her employment was conditioned upon her submission to a drug test and written consent to a background check — acts that did not occur until she arrived in Texas.

Plaintiff relies primarily on our decision in *Murray*. In that case, the defendant-employer's agent contacted the plaintiff-employee in North Carolina for a position as an instrument and pipe foreman at a jobsite in Mississippi. The plaintiff, who had previously performed work for the employer, negotiated his salary over the telephone in North Carolina with the agent. When the plaintiff arrived at the jobsite in Mississippi, he was required to fill out paperwork before he could begin work. However, "because he was a rehire (as opposed to a new hire) he was not required to submit to a physical, drug test, or go to the local employment security office." *Murray*, 131 N.C. App. at 295, 506 S.E.2d at 725.

Shortly thereafter, the plaintiff was injured on the job. He filed a workers' compensation claim with the North Carolina Industrial Commission, and the Commission determined it possessed jurisdiction over the claim. *Id.* at 295, 506 S.E.2d at 726.

On appeal, this Court affirmed, holding that "[t]he paperwork appears to be more of a consummation of the employment relationship than the 'last act' required to make it a binding obligation." *Id.* at 297, 506 S.E.2d at 727. In reaching this conclusion, we noted that "[a]lthough the paperwork filled out by plaintiff was required before he could begin work," the employer had conceded that the paperwork was "mostly administrative." *Id.* Thus, we held that "[t]he Commission's findings were based upon ample competent evidence, and the conclusion that the contract was made in North Carolina was correct." *Id.*

In *Murray*, we cited our prior opinion in *Thomas v. Overland Express, Inc.*, 101 N.C. App. 90, 398 S.E.2d 921 (1990), *disc. review denied*, 328 N.C. 576, 403 S.E.2d 522 (1991). In *Thomas*, an employer arranged for the plaintiff — who lived in North Carolina — to fly to Indiana along with other prospective employees before officially hiring them as truck drivers. Upon arriving in Indiana, "the plaintiff was given a physical and road test by [the employer]." *Id.* at 94, 398 S.E.2d at 924. Four days after his arrival in Indiana, he was informed that he was being hired as a truck driver by the employer and signed employment-related paperwork that same day. The plaintiff subsequently sustained an injury arising out of his employment. *Id.* at 93, 398 S.E.2d at 924.

The plaintiff filed a workers' compensation claim in North Carolina, which the Industrial Commission dismissed for lack of jurisdiction. *Id.* We affirmed, explaining that "our review of the record in the present case reveals that the events which culminated in plaintiff accepting employment with defendant, and the 'last act' for purposes of conferring extraterritorial jurisdiction on the Commission, occurred in Indiana rather than in North Carolina." *Id.* at 97, 398 S.E.2d at 926.

Associated contends that the present case is most analogous to *Taylor v. Howard Transp., Inc.*, __ N.C. App. __, 771 S.E.2d 835, *disc. review denied*, __ N.C. __, 775 S.E.2d 857 (2015). In *Taylor*, an employer sent the plaintiff a letter "inviting him to reapply to work for [the employer]." *Id.* at __, 771 S.E.2d at 837-38. The plaintiff responded that he would only do so if the employer provided a better truck for him and assigned him to a different dispatcher. The employer told the plaintiff that his conditions would be met if he would "come back to work." *Id.* at __, 771 S.E.2d at 838 (quotation marks omitted). The plaintiff agreed, and the employer arranged for a van to pick the plaintiff up from his home in North Carolina and take him to the employer's headquarters in Mississippi. *Id.* at __, 771 S.E.2d at 838.

After the plaintiff successfully completed in Mississippi the employer's "orientation, a road test, a drug test, and a physical exam[,]" the employer hired the plaintiff as a truck driver. *Id.* at __, 771 S.E.2d at 836. The plaintiff was subsequently injured in Maryland in the course of his employment. The plaintiff brought a workers' compensation claim in North Carolina, and the Industrial Commission determined that it lacked jurisdiction over the plaintiff's claim. *Id.* at __, 771 S.E.2d at 836.

Concluding that "this case is more closely analogous to *Thomas* than to *Murray*[,]" *id.* at __, 771 S.E.2d at 839, we affirmed the Commission's decision. We reasoned that the employer "did not consider plaintiff an employee until after he had successfully completed the orientation, road test, drug test, and physical exam." *Id.* at __, 771 S.E.2d at 839. Thus, we held that the "plaintiff would not have been hired as an employee if he had failed one of these tests[.]" *Id.* at __, 771 S.E.2d at 838. Moreover, we stated that "[t]he fact that plaintiff was paid for [the three-day orientation period] does not vitiate the fact that plaintiff's employment was contingent upon his successful completion of the orientation, road test, drug test, and physical exam." *Id.* at __, 771 S.E.2d at 839. Therefore, we concluded that the last act forming the plaintiff's employment contract occurred in Mississippi. *Id.* at __, 771 S.E.2d at 839.

We believe that the present facts are more similar to *Taylor* and *Thomas* than *Murray*. The evidence is undisputed that Associated made Plaintiff's submission to a drug test a prerequisite to her employment. It is clear that she would not have been permitted to begin work for Associated had she refused to provide a urine sample. We are unable to agree with Plaintiff that a prospective employee's submission to a mandatory drug test is akin to the completion of routine paperwork that was determined to be merely a "consummation of the employment relationship" in *Murray*. *See Murray*, 131 N.C. App. at 297, 506 S.E.2d at 727. Rather, a prospective employee's demonstrated willingness to submit to a drug test is more than simply an administrative formality given that — unlike the completion of garden-variety personnel forms — the taking of a drug test carries the risk of failing the test. Moreover, while Plaintiff argues that requiring a drug test as a condition of employment makes sense only if the employee is not permitted to begin work until the *results* of the test are received by the employer, the employer possesses the discretion to determine how soon a new employee may begin working after taking the drug test.

Quite simply, had Plaintiff refused to submit to a drug test upon her arrival in Texas, she would not have been permitted to begin employment with Associated. Therefore, her taking of the drug test was the last act necessary to form a binding employment relationship between her and Associated. Because this act occurred in Texas rather than North Carolina, the Commission lacked jurisdiction over her claims pursuant to N.C. Gen. Stat. § 97-36.[1]

Plaintiff also cites *Warren v. Dixon & Christopher Co.*, 252 N.C. 534, 114 S.E.2d 250 (1960), to support her argument that because Local 798 was an agent of Associated, the 29 October 2013 telephone conversation between the Local 798 representative and Plaintiff formed a binding employment contract between Plaintiff and Associated. In *Warren*, the plaintiff contracted with a local union in North Carolina to work as a pipe fitter for the employer. After arriving at the jobsite in Virginia, the plaintiff began work, was subsequently injured, and filed a workers' compensation claim in North Carolina. *Id.* at 536-37, 114 S.E.2d at 251-52.

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1. In light of our holding that Plaintiff's submission to a drug test was a condition of her employment, we need not determine whether her consent to a background check likewise constituted a separate act necessary to form an employment contract between Plaintiff and Associated.

Our Supreme Court affirmed the Commission's determination that it possessed jurisdiction over the plaintiff's claim. The Supreme Court held that even though "[t]he employer had a right to reject [the plaintiff] if work was not available . . . [a]ccepting the worker on the job was merely the consummation of what had been previously arranged, that is, the employment." *Id.* at 537-38, 114 S.E.2d at 252-53.

Here, while it appears from the record that Local 798 was authorized to select prospective employees for Associated, it is undisputed that Associated ultimately retained the right to deny employment to any such person who refused to submit to a drug test upon arrival in Texas. Therefore, the role played by Local 798 in Plaintiff's hiring process does not alter our conclusion that because her employment was contingent upon her submission to a drug test in Texas before she could begin work for Associated, the last act necessary to form a binding employment relationship occurred in Texas. Accordingly, the Commission correctly determined that it lacked jurisdiction over Plaintiff's workers' compensation claims.

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Chief Judge MCGEE and Judge INMAN concur.

IN THE MATTER OF D.E.P.

No. COA16-838

Filed 7 February 2017

1. Juveniles—dispositional order—sufficiency of findings of fact

The trial court did not err by allegedly failing to include appropriate findings of fact in a juvenile dispositional order. The trial court was not required by N.C.G.S. § 7B-2512 to make findings of fact that expressly tracked each of the statutory factors listed in N.C.G.S. § 7B-2501(c). Even so, the order did in fact demonstrate the court's consideration of the statutory factors.

2. Juveniles—dispositional order—Level 3—training school

The trial court did not abuse its discretion by imposing a Level 3 disposition that committed a juvenile to a training school for a minimum of six months and a maximum not to exceed his eighteenth birthday. The juvenile continued to violate his probation even after being given another chance to continue on a Level 2 disposition. Difficult family circumstances and the fact that the juvenile successfully completed some of the requirements of probation did not support a conclusion that the trial court's decision was unreasonable.

Appeal by juvenile from order entered 25 April 2016 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 11 January 2017.

Blass Law, PLLC, by Danielle Blass, for juvenile-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jennie Wilhelm Hauser, for the State.

ZACHARY, Judge.

The juvenile-appellant, Daniel,[1] appeals from a disposition order that committed him to the Department of Juvenile Justice for placement in a training school for a minimum of six months and a maximum not to exceed his eighteenth birthday. On appeal Daniel argues that the trial court erred in its disposition order by failing to enter findings that reflected its consideration of the factors set out in N.C. Gen. Stat. § 7B-2501(c), and abused its discretion by entering a Level 3 disposition committing him to training school. For the reasons that follow, we disagree.

I. Factual and Procedural Background

Daniel was born in 1999 and grew up in Charlotte, North Carolina. On 22 December 2014, the Mecklenburg County Department of Juvenile Justice filed petitions alleging that Daniel was a delinquent juvenile in that he had committed the misdemeanor offenses of communicating a threat, second-degree trespass, simple assault, and assault on a government official. On 20 February 2015, a petition was filed alleging that Daniel was guilty of simple possession of less than a half ounce of

1. We refer to the juvenile by the pseudonym Daniel in this opinion for ease of reading and to protect the juvenile's privacy.

marijuana. On 6 March and 31 March 2015, petitions were filed alleging that Daniel had committed the offense of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. Daniel's father and older brother were identified in the petition as Daniel's co-conspirators.

In connection with the juvenile petitions, a juvenile court counselor filed a report for the trial court's use. This report described Daniel's attitude towards authority figures as "very rude and disrespectful" and stated that Daniel's mother was unable to effectively discipline Daniel. At school, Daniel had a "history of suspensions for aggressive behaviors, being disruptive, insubordinate, and fighting" and had admitted to skipping school on occasion. Daniel had been diagnosed with Type 2 diabetes for which he took insulin, as well as ADHD (attention deficit hyperactivity disorder) and ODD (oppositional defiant disorder), for which he was prescribed a psychoactive medication.

On 15 July 2015, a hearing was conducted on the juvenile petitions filed in this case. Daniel admitted that he had committed the offense of robbery with a dangerous weapon, and the State dismissed the other petitions. On 23 July 2015, the trial court entered an order that adjudicated Daniel to be a delinquent juvenile and imposed a Level 2 disposition, pursuant to N.C. Gen. Stat. § 7B-2508 (2015). Daniel was placed on juvenile probation for a period of 12 months and was required to comply with a 6:00 p.m. curfew, attend school regularly, and not violate any laws or possess any controlled substances.

On 1 September 2015, juvenile petitions were filed alleging that on 27 July 2015, just four days after being placed on probation, Daniel committed the offenses of resisting, delaying, or obstructing a law enforcement officer (when he jumped from a stolen vehicle), and possession of less than a half ounce of marijuana. Daniel's court counselor filed a motion for review alleging that Daniel had violated the terms of his juvenile probation by committing the offenses alleged in the petitions, by failing to adhere to the court-imposed curfew, and by being suspended from school for ten days. At a hearing conducted on 21 October 2015, Daniel admitted to possession of marijuana and the State dismissed the petition alleging that Daniel had resisted an officer. The trial court entered an order that continued Daniel on juvenile probation. On 8 January 2016, Daniel's court counselor filed a motion for review, alleging that Daniel had violated probation by failing to abide by his curfew and by being suspended from school for ten days. Another motion for review was filed on 2 February 2016, alleging that Daniel had violated his

probation by leaving the home of his grandmother, with whom he had been directed to reside.

On 1 March 2016, the trial court conducted a hearing on the motions for review, at which Daniel admitted to violating the terms of his probation. The trial court continued the disposition until 11 April 2016, and entered an order that stated in relevant part that "[i]f [Daniel] does what he needs to do then he will remain at a Level 2 disposition[;] if not he will be committed to training school." On 30 March 2016, a motion for review was filed, alleging that Daniel had violated probation by skipping school and being suspended from school. Following a dispositional hearing, the trial court entered an order on 25 April 2016, imposing a Level 3 disposition and committing Daniel to training school for a period of at least six months until no later than his 18th birthday. Daniel has appealed to this Court from this order.

II. Standard of Review

On appeal, Daniel does not dispute the validity of his adjudication as a delinquent juvenile or dispute the fact that he violated the terms of his probation. Nor does Daniel challenge the trial court's statutory authority pursuant to N.C. Gen. Stat. § 7B-2510(e) (2015) to impose a Level 3 disposition committing him to training school upon Daniel's admission to violating his probation. Daniel argues instead that the trial court failed to comply with the statutory requirements for entry of a dispositional order and that the trial court's choice of disposition constituted an abuse of the court's discretion. Accordingly, we first review the standards to which a trial court must adhere in fashioning an appropriate disposition for a delinquent juvenile.

N.C. Gen. Stat. § 7B-2500 (2015) provides that:

> The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction, including the protection of the public. The court should develop a disposition in each case that:
>
> (1) Promotes public safety;
>
> (2) Emphasizes accountability and responsibility of both the parent, guardian, or custodian and the juvenile for the juvenile's conduct; and
>
> (3) Provides the appropriate consequences, treatment, training, and rehabilitation to assist the juvenile toward

> becoming a nonoffending, responsible, and productive member of the community.

The three levels of disposition for a delinquent juvenile are set out in N.C. Gen. Stat. § 7B-2508, which correlates the permissible disposition level to the offense for which the juvenile is being adjudicated delinquent and his prior history of juvenile adjudications. Daniel was initially given a Level 2-Intermediate disposition. Upon his repeated violation of the terms of probation, the trial court was authorized under N.C. Gen. Stat. § 7B-2510(e) to "order a new disposition at the next higher level on the disposition chart[,]" in this case a disposition under Level 3-Commitment. Daniel does not dispute that the disposition in the present case represented a legally valid choice under the relevant statutes.

The standard of review in such cases is well established: "In instances involving permissive statutory language, such as the language contained in N.C. Gen. Stat. § 7B-2510(e), the validity of the trial court's actual dispositional decision is reviewed on appeal using an abuse of discretion standard of review." *In re Z.T.W.*, 238 N.C. App. 365, 370, 767 S.E.2d 660, 664-65 (2014) (citation omitted). "[A]n abuse of discretion is established only upon a showing that a court's actions are manifestly unsupported by reason, or so arbitrary that [they] could not have been the result of a reasoned decision." *In re E.S.*, 191 N.C. App. 568, 573, 663 S.E.2d 475, 478 (2008) (internal quotation marks and citation omitted). "[A] trial court's dispositional decision should be upheld on appeal unless the decision in question could not have been a reasoned one." *Z.T.W.*, 238 N.C. App. at 370, 767 S.E.2d at 665.

III. Sufficiency of Findings of Fact in the Dispositional Order

[1] Daniel argues first that the trial court erred by failing to include appropriate findings of fact in the dispositional order. N.C. Gen. Stat. § 7B-2501(c) (2015) provides that, in "choosing among statutorily permissible dispositions," the trial court "shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile" and that the trial court's selection should be based upon:

> (1) The seriousness of the offense;
>
> (2) The need to hold the juvenile accountable;
>
> (3) The importance of protecting the public safety;
>
> (4) The degree of culpability indicated by the circumstances of the particular case; and

> (5) The rehabilitative and treatment needs of the juvenile as indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2512 (2015) provides in relevant part that the "dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law." On appeal, Daniel asserts that in order for a trial court's findings in a disposition order to constitute the "appropriate" findings of fact required by N.C. Gen. Stat. § 7B-2512, these findings must reference the specific factors listed in N.C. Gen. Stat. § 7B-2501(c) and must document the trial court's consideration of each of these factors. On the other hand, the State argues on appeal that "neither statute requires the trial court to make written findings of fact for each of the five considerations under [N.C. Gen. Stat. §] 7B-2501(c)." After careful review, we agree with the State.

The position taken by Daniel on appeal is based upon the discussion in some of our prior cases concerning the holding of *In re Ferrell*, 162 N.C. App. 175, 589 S.E.2d 894 (2004). However, upon thorough examination, it is apparent that the standard posited rests upon the mischaracterization of *Ferrell* and subsequent repetition of this error.

As discussed above, N.C. Gen. Stat. § 7B-2501(c) directs the court to consider specific factors in its determination of the appropriate level or type of disposition in a juvenile delinquency case. In *Ferrell*, the juvenile appealed from a specific provision of the disposition order that removed him from the custody of his mother and placed him in the custody of his father. Although the juvenile did not challenge the dispositional level or type of disposition chosen by the trial court, the *Ferrell* opinion observed that a court's discretion to fashion an appropriate disposition is not unlimited, noting the statutory parameters for selection of a disposition level that are set out in N.C. Gen. Stat. § 7B-2501(c). The opinion in *Ferrell* also quoted the requirement in N.C. Gen. Stat. § 7B-2512 that the court's order "shall be in writing and shall contain *appropriate* findings of fact and conclusions of law." (emphasis in original). We held that "the findings of fact in the dispositional order do not support the trial court's decision to transfer custody of the juvenile from the mother to the father" and set aside that part of the disposition order. *Ferrell*, 162 N.C. App. at 177, 589 S.E.2d at 895.

Significantly, the issue addressed by our opinion in *Ferrell* was confined to the adequacy of the trial court's findings to support its transfer of custody from the child's mother to his father. The case did not involve any consideration of the court's determination of the appropriate disposition level, which was not implicated in any manner by the court's

custody decision. Our opinion in *Ferrell* did not discuss the extent, if any, to which a disposition order must reference the factors set out in N.C. Gen. Stat. § 7B-2501 in order to justify the court's selection of a particular disposition. Moreover, the provision of the disposition order that was at issue in *Ferrell* - whether the juvenile's custody should be with his mother or with his father - is entirely separate from the determination of an appropriate disposition level. Thus, *Ferrell* did not hold that it is reversible error for a trial court to enter a disposition order that fails to include findings that demonstrate its consideration of the factors in N.C. Gen. Stat. § 7B-2501. In fact, *Ferrell* said nothing at all on this subject.

In *In re V.M.*, 211 N.C. App. 389, 391-92, 712 S.E.2d 213, 215 (2011), this Court stated as the basis for its ruling that "we have previously held that the trial court is required to make findings demonstrating that it considered the N.C.G.S. § 7B-2501(c) factors in a dispositional order entered in a juvenile delinquency matter[,]" and cited *Ferrell* as authority for this statement. However, *Ferrell* did *not* address the degree to which a court's findings must specifically reflect consideration of the factors listed in N.C. Gen. Stat. § 7B-2501(c), and did not set out any rule regarding this issue. Nonetheless, V.M.'s mischaracterization of *Ferrell* was repeated in several later cases. For example, in *In re J.J.*, 216 N.C. App. 366, 375, 717 S.E.2d 59, 65 (2011), the opinion quoted *V.M.* as follows:

> [T]he trial court was required to make written findings of fact in its dispositional order. "[T]he trial court is required to make findings demonstrating that it considered the N.C.G.S. § 7B-2501(c) factors in a dispositional order entered in a juvenile delinquency matter." *In re V.M.*, [211] N.C. App. [389, 392], 712 S.E.2d 213, 215 (2011). Thus, the trial court erred in failing to include the requisite findings of fact in its dispositional order. Accordingly, we must vacate the trial court's dispositional order and remand the matter to the trial court to make the statutorily mandated findings of fact in the juvenile's written dispositional order.

See also, e.g., *In re K.C.*, 226 N.C. App. 452, 462, 742 S.E.2d 239, 246 (2013) ("We have interpreted [§ 7B-2512] to require the juvenile court 'to make findings demonstrating that it considered the N.C.G.S. § 7B-2501(c) factors in a dispositional order entered in a juvenile delinquency matter.' *In re V.M.*, 211 N.C. App. 389, 391, 712 S.E.2d 213, 215 (2011)"), and *In re G.C.*, 230 N.C. App. 511, 520, 750 S.E.2d 548, 554 (2013) ("in *Ferrell*, the trial court's findings of fact were deemed to be insufficient because they did not fully address the factors laid out in § 7B-2501").

It is axiomatic that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). However, the opinion in *Ferrell* did not arrive at a determination or "decide" the issue of a trial court's duty to include findings in its disposition order that match the factors in N.C. Gen. Stat. § 7B-2501. Nor did *V.M.* analyze or decide this issue; rather, the opinion merely referenced an erroneous characterization of the earlier opinion in *Ferrell*. As a result, our clarification of the actual holding of the *Ferrell* opinion does not constitute "overruling" *Ferrell* or any of the later cases that cited *Ferrell*.

The requirements for a dispositional order are governed by N.C. Gen. Stat. § 7B-2512, which states in relevant part that:

> The dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law. The court shall state with particularity, both orally and in the written order of disposition, the precise terms of the disposition including the kind, duration, and the person who is responsible for carrying out the disposition and the person or agency in whom custody is vested.

Upon careful review of the statutory language and our prior jurisprudence, we find no support for a conclusion that in every case the "appropriate" findings of fact must make reference to all of the factors listed in N.C. Gen. Stat. § 7B-2501(c), including those factors that were irrelevant to the case or in regard to which no evidence was introduced. However, because Daniel's sole challenge to the sufficiency of the trial court's findings of fact is that they fail to demonstrate consideration of the factors in N.C. Gen. Stat. § 7B-2501(c), we have reviewed this argument and conclude that the court's findings indicate its consideration of these factors.

The trial court's findings of fact are contained in an attachment to its dispositional order that is titled "Findings of Fact for [Daniel] Level 3 Commitment Order." This attachment states that:

> The juvenile was adjudicated on a serious charge of Robbery with a Dangerous weapon on July 16th, 2015, at a level 2. Eleven days later, he was charged with misdemeanor possession of marijuana, and was adjudicated on that charge on October 21st, 2015. The juvenile was originally compliant with the probationary term during

> October and November of 2015, engaging in the GAP program and doing his community service while residing with his grandmother. Starting in December, the juvenile [began] violating curfew orders, leaving his home all night on December 15th, and eventually leaving his grandmother's home permanently on December 29th, as well as moving in with his father who was a co-defendant on the underlying RWDW, in violation of his court order. He was also suspended 10 days from school for fighting. The juvenile admitted an MFR relating to these violations on March 1st 2016, and disposition was continued until April in order to give the juvenile one last opportunity to comply with the court orders. The court's orders required that the juvenile was placed back into the grandmother's home with his mother, the juvenile was to obtain a substance abuse assessment at McLeod, not be suspended from school or be late to school unexcused, cooperate with YFS, complete his community service hours, and cooperate with Access treatment. On March 3rd, the juvenile was suspended from school for fighting with another student. On March 22nd, the juvenile was absent from his second block class unexcused. An MFR was filed on 3/30/16 for these violations, and the juvenile admitted the MFR on 4/18/2016. The juvenile had also not received substance treatment at McLeod since the previous court date. While the juvenile did complete his community service hours and the GAP program, due to the serious nature of the underlying offense adjudicated, and the continued noncompliance with court orders regarding school, curfew, substance abuse treatment, and having contact with his father, the Court finds that a YDC is the most appropriate structure for the juvenile and the community's needs.

As discussed above, the factors upon which the trial court is directed to base its determination of the appropriate dispositional level include (1) the seriousness of the offense; (2) the need to hold the juvenile accountable; (3) the importance of protecting the public safety; (4) the degree of culpability indicated by the circumstances of the particular case; and (5) the rehabilitative and treatment needs of the juvenile as indicated by a risk and needs assessment. We conclude that the trial court's findings of fact demonstrate its consideration of these criteria.

The parties do not dispute that robbery with a dangerous weapon is a serious offense, and the trial court found that Daniel "was adjudicated

on a serious charge of Robbery with a Dangerous weapon," thereby demonstrating the court's consideration of the "seriousness of the offense." The trial court's findings set out in some detail Daniel's repeated failure to comply with the terms of his probation, despite being given several opportunities to remain on probation. These findings establish the court's consideration of the "need to hold the juvenile accountable." The trial court's consideration of the need to protect the public is illustrated by its findings that Daniel was adjudicated for committing an armed robbery and that he has been suspended from school for fighting.

We next examine the extent to which the trial court's findings demonstrate its consideration of Daniel's "degree of culpability." Upon Daniel's adjudication as delinquent, the trial court had the authority to impose either a disposition Level 2-Intermediate or 3-Commitment. N.C. Gen. Stat. § 7B-2508(f) (2015). Daniel stresses on appeal that his co-defendant in this offense was his father. We presume that the trial court considered Daniel's reduced level of culpability when it imposed a Level 2 disposition. The disposition order at issue on appeal is, however, based primarily upon Daniel's repeated violations of probation rather than upon the offense for which Daniel was originally adjudicated delinquent. Accordingly, it is Daniel's "degree of culpability" for his probation violations that is most relevant, rather than his role in the robbery. The court's findings set out various ways in which Daniel violated probation, including possessing marijuana, violating curfew, missing school, and being suspended from school. These violations are based upon Daniel's own actions and do not suggest that some other person was partly responsible for Daniel's violating probation. As a result, these findings indicate that the trial court considered the degree to which Daniel was culpable as regards the violations of the terms of his probation. Finally, the dispositional order expressly references Daniel's failure to obtain treatment for substance abuse, thus indicating the court's consideration of Daniel's rehabilitative and treatment needs. We conclude that the trial court's findings of fact adequately demonstrate its consideration of the factors set out in N.C. Gen. Stat. § 7B-2501(c).

We have considered Daniel's appellate argument urging us to reach a contrary result. We conclude, however, that Daniel is essentially contending that the trial court should have made different findings, based on Daniel's assessment of the evidence, or that the trial court should have weighed the evidence differently. "It is, however, the 'duty of the trial judge 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.' 'It is

not the function of this Court to reweigh the evidence on appeal.' " *Burger v. Smith*, __ N.C. App. __, __, 776 S.E.2d 886, 896 (2015) (quoting *Sauls v. Sauls*, __ N.C. App. __, __, 763 S.E.2d 328, 330 (2014) (internal quotations omitted)).

We hold that the trial court was not required by N.C. Gen. Stat. § 7B-2512 to make findings of fact that expressly tracked each of the statutory factors listed in N.C. Gen. Stat. § 7B-2501(c). However, because this is the sole basis of Daniel's challenge to the trial court's findings, we have carefully reviewed the dispositional order and conclude that the order does, in fact, demonstrate the court's consideration of the statutory factors. Given that Daniel has not challenged the court's findings on any other basis, we are not required to further define the requirements for a court's findings in a dispositional order, beyond the general requirement of N.C. Gen. Stat. § 7B-2512 that the findings be "appropriate." In this regard, we note that N.C. Gen. Stat. § 1A-1 Rule, 52(a)(1) (2015) provides in relevant part that in "all actions tried upon the facts without a jury" the trial court "shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." Thus, in every case in which a trial court sits without a jury, it must enter "appropriate" findings of fact. "What the evidence does in fact show is a matter the trial court is to resolve, and its determination should be stated in appropriate and adequate findings of fact." *Farmers Bank v. Distributors*, 307 N.C. 342, 352, 298 S.E.2d 357, 363 (1983).

Trial Court's Exercise of Discretion

[2] Daniel also contends that the trial court abused its discretion by imposing a Level 3 disposition. We conclude that Daniel has failed to establish that the trial court abused its discretion.

It has long been the rule that:

> The abuse of discretion standard of review is applied to those decisions which necessarily require the exercise of judgment. The test for abuse of discretion is whether a decision "is manifestly unsupported by reason," or "so arbitrary that it could not have been the result of a reasoned decision." The intended operation of the test may be seen in light of the purpose of the reviewing court. Because the reviewing court does not in the first instance make the judgment, the purpose of the reviewing court is not to substitute its judgment in place of the decision maker. Rather, the reviewing court sits only to insure that

> the decision could, in light of the factual context in which it is made, be the product of reason.

Little v. Penn Ventilator Co., 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985), and *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985)).

On appeal, Daniel acknowledges his repeated violations of probation, but directs our attention to evidence in the record tending to show that Daniel faced difficult family circumstances and that he successfully completed some of the requirements of probation. The existence of such evidence, although it might have supported a decision by the trial court to impose a Level 2 disposition, does not support a conclusion that the trial court's decision to impose a Level 3 disposition was unreasonable. As discussed above, during the eight months following Daniel's placement on juvenile probation, his court counselor filed motions for review alleging violations of probation for, among other things, possession of marijuana, fighting at school, failing to attend school, failing to cooperate with his court counselor, failing to comply with his curfew, and absconding from the home where he had been ordered to reside. Despite Daniel's repeated probation violations, the trial court continued him on probation several times. The last time that Daniel was in court to address an alleged violation of probation, the trial court continued disposition for a month and entered an order expressly warning that if Daniel failed to comply with the terms of his probation, he would be sent to training school. However, Daniel continued to violate his probation even after being given another chance to continue on a Level 2 disposition. Under these circumstances, we cannot conclude that the trial court's decision to impose a Level 3 disposition was manifestly unsupported by reason.

For the reasons discussed above, we conclude that the trial court did not err in its disposition order, and that its order is hereby

AFFIRMED.

Judges ELMORE and DILLON concur.

IN RE FORECLOSURE OF COLLINS

[251 N.C. App. 764 (2017)]

IN THE MATTER OF THE FORECLOSURE OF REAL PROPERTY UNDER A DEED OF TRUST EXECUTED BY ROBERT C. COLLINS AND RHONDA B. COLLINS DATED JUNE 20, 2006 AND RECORDED ON JUNE 23, 2006 IN BOOK K-30 AT PAGE 975 IN THE MACON COUNTY PUBLIC REGISTRY, NORTH CAROLINA

No. COA16-655

Filed 7 February 2017

Mortgages and Deeds of Trust—deed of trust—foreclosure sale—power-of-sale provision—affidavit of default—holder of note

The trial court did not err by authorizing substitute trustee (Trustee Services of Carolina, LLC) to proceed with a foreclosure sale in accordance with the power-of-sale provision of the Deed of Trust. Beneficial Financial I Inc.'s (Beneficial) Assistant Secretary of Administrative Services' affidavit of default was properly admitted into evidence, and the trial court properly concluded that Beneficial was the holder of the Note.

Appeal by respondents from order entered 20 January 2016 by Judge Marvin Pope in Macon County Superior Court. Heard in the Court of Appeals 29 November 2016.

Katten Munchin Rosenman LLP, by Rebecca K. Lindahl and Daniel S. Trimmer, for petitioner-appellee.

Jones, Key, Melvin & Patton, P.A., by Fred H. Jones, for respondents-appellants.

ZACHARY, Judge.

Respondents appeal from an order authorizing Beneficial Financial I Inc., through substitute trustee Trustee Services of Carolina, LLC (Trustee Services), to proceed with foreclosure in accordance with the terms of the Deed of Trust secured by real property located at 212 Cedar Ridge Road, Franklin, North Carolina (the property). For the reasons that follow, we affirm.

I. Background

On 20 June 2006, Respondents borrowed $102,726.34 by executing a loan agreement (the Note) in favor of Beneficial Mortgage Company of North Carolina (BMCNC). The Note was secured by a Deed of Trust that encumbered the property. In 2009, BMCNC merged with Beneficial Mortgage Company of Virginia (BMCV), which then merged with Beneficial Financial I Inc. (Beneficial).

Respondents later defaulted under the terms of the Note. As a result, Beneficial, through Trustee Services, initiated foreclosure proceedings pursuant to the power-of-sale provision contained in the Deed of Trust. The Notice of Hearing, dated 10 June 2013, indicated that "the current holder of the above-described Deed of Trust and the indebtedness secured thereby is: Beneficial I Inc Successor by Merger to Beneficial Mortgage Co of North Carolina."

On 17 October 2013, the Clerk of Superior Court of Macon County conducted a hearing on the matter pursuant to N.C. Gen. Stat. § 45-21.16 and found, *inter alia*, that notice was given to the record owners of the property, that Beneficial was the holder of the Note, that the Note was in default, and that Beneficial had the right to foreclose under the power-of-sale provision in the Deed of Trust. That same day, the clerk entered an order allowing Trustee Services to proceed with the foreclosure sale. Respondents appealed the clerk's order to Macon County Superior Court for *de novo* review.

On 19 January 2016, Judge Marvin Pope conducted the *de novo* hearing in the power-of-sale foreclosure proceeding. At the hearing, Beneficial introduced into evidence an Affidavit of Default that had been executed by Beneficial's Assistant Secretary of Administrative Services, Cherron Martin. In Paragraph 3 of the affidavit, Martin averred that, based on her own personal knowledge of the business and loan records at issue, "BENEFICIAL is in possession of the original promissory note and/or loan agreement ("Note") for this Loan. . . ." A number of exhibits were attached to Martin's affidavit, including photocopies of the Note, the Deed of Trust, and merger documents pertaining to both BMCNC's merger with BMCV and BMCV's merger with Beneficial.

Respondents objected to the admission of Martin's affidavit on three grounds: (1) the affidavit was signed in July 2013 and there was no indication as to whether the Note had been negotiated since then; (2) none of the averments established that Martin had personal knowledge of Beneficial's possession of the Note; and (3) the affidavit was not accompanied by the original Note. After noting that Paragraph 3 of the affidavit says "Beneficial is in possession of the original promissory note and/or loan agreement for this loan[,]" Judge Pope overruled respondents' objection.

Respondents also moved for a directed verdict "on the basis that [Beneficial] has failed to prove they're the holder of the note and can't proceed." Judge Pope denied the motion. As a result, Martin's affidavit was admitted into evidence, together with the accompanying exhibits.

On 20 January 2016, Judge Pope entered an order that authorized Trustee Services to proceed with the foreclosure on the property in accordance with the terms of the Deed of Trust. Respondents appeal.

II. Standard of Review and General Principles

"The applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings." *In re Foreclosure of Adams*, 204 N.C. App. 318, 320, 693 S.E.2d 705, 708 (2010) (citation and quotation marks omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *Id.* at 321, 693 S.E.2d at 708 (citations and quotations marks omitted). "[T]he [trial] court's findings of fact are conclusive if supported by competent evidence, even though other evidence might sustain contrary findings." *Stephens v. Dortch*, 148 N.C. App. 509, 515, 558 S.E.2d 889, 892 (2002) (citations omitted). The trial court's conclusions of law are subject to *de novo* review. *In re Foreclosure of Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013).

Foreclosure by power-of-sale proceedings conducted pursuant to N.C. Gen. Stat. § 45-21.16 are limited in scope. A power-of-sale provision contained in a deed of trust vests the trustee with the " power to sell the real property mortgaged without any order of court in the event of a default." *In re Foreclosure of Michael Weinman Assocs. Gen. P'ship*, 333 N.C. 221, 227, 424 S.E.2d 385, 388 (1993) (citation and internal quotation marks omitted). After the trustee files a notice of hearing with the clerk of superior court and serves that notice on the necessary parties, the clerk must conduct a hearing on the matter. N.C. Gen. Stat. § 45-21.16(a), (d) (2015). At the hearing, the petitioner must present evidence that establishes the following six criteria before the clerk of court may authorize the trustee to proceed with the foreclosure under a power-of-sale provision:

> (i) [a] valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) [a] right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b) . . . and (vi) that the sale is not barred by G.S. 45-21.12A[.]

Id. § 45-21.6(d). At a section 45-21.16 foreclosure hearing, "the clerk . . . is limited to making the six findings of fact specified under subsection (d)[.]" *In re Foreclosure of Young*, 227 N.C. App. 502, 505, 744

S.E.2d 476, 479 (2013). Although the clerk's decision may be appealed to superior court for a hearing *de novo*, N.C. Gen. Stat. § 45-21.16(d1), the superior court is similarly limited to determining whether the petitioner has satisfied the six criteria contained in subsection 45-21.16(d). *In re Foreclosure of Carter*, 219 N.C. App. 370, 373, 725 S.E.2d 22, 24 (2012). However, upon *de novo* review, the superior court may consider evidence of legal defenses that would negate the findings required under subsection 45-21.16(d). *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 375, 432 S.E.2d 855, 859 (1993).

Moreover, in a power-of-sale foreclosure hearing, "the clerk shall consider the evidence of the parties and may consider . . . affidavits and certified copies of documents." N.C. Gen. Stat. § 45-21.16(d). Affidavits may also be used as competent evidence to establish the required statutory elements in *de novo* foreclosure hearings. *In re Foreclosure of Brown*, 156 N.C. App. 477, 486-87, 577 S.E.2d 398, 404-05 (2003).

III. Analysis

On appeal, Respondents make a series of separate but related arguments that no competent evidence demonstrated that Beneficial was the holder of the Note at the time of the *de novo* hearing. We disagree.

Determination that a party is the holder of a valid debt requires competent evidence (1) of a valid debt and (2) that the party seeking to foreclose is the holder of the promissory note that secures the debt. *In re Foreclosure of Adams*, 204 N.C. App. at 321-22, 693 S.E.2d at 709. "[T]he definition of 'holder' under the Uniform Commercial Code ("UCC"), as adopted by North Carolina, controls the meaning of the term as it is used in section 45-21.16 of our General Statutes[.]" *In re Foreclosure by David A. Simpson, P.C.*, 211 N.C. App. 483, 490, 711 S.E.2d 165, 171 (2011). The UCC's definition of a "holder" includes "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession[.]" N.C. Gen. Stat. § 25-1-201(b)(21)(a) (2015). In determining whether a person is the holder of an instrument, "[i]t is the fact of possession which is significant . . . , and the absence of possession defeats that status." *Connolly v. Potts*, 63 N.C. App. 547, 550, 306 S.E.2d 123, 125 (1983). Yet so long as "there is no evidence that photocopies of a note or deed of trust are not exact reproductions of the original instruments, a party need not present the original note or deed of trust and may establish that it is the holder of the instruments by presenting photocopies of the note or deed of trust." *Dobson v. Substitute Tr. Servs., Inc.*, 212 N.C. App. 45, 48, 711 S.E.2d 728, 730 (2011).

Respondents first argue that because over two and half years passed between the execution of Martin's affidavit (July 2013) and the *de novo* hearing in superior court (January 2016), "the possibility exists that the Note had been negotiated at some point" during that period of time.

Other than engaging in speculation, Respondents neither offer a colorable reason nor cite any pertinent case law as to why their contention should prevail. Nothing in the record suggests that Beneficial negotiated or transferred the Note to another party before the *de novo* hearing was held. As a result, we conclude that this argument is without merit.

Respondents next argue that the terminology used in Martin's affidavit "provides no basis to conclude that she has personal knowledge of the alleged fact that Beneficial was 'in possession' of the original note[.]" The affidavit states, in pertinent part, that "[i]n the regular performance of my job functions, I have access to and am familiar with business records maintained by BENEFICIAL for the purpose of servicing mortgage loans." According to Respondents, this language established that Martin's area of responsibility concerns only "servicing" loans, and there is no "indication that Ms. Martin's responsibilities extend to knowledge of the lender's inventory of negotiable instruments, or the status of its corporate existence—including merger or succession." Thus, Respondents insist that the affidavit is not competent evidence of Beneficial's physical possession of the Note or the merger.

Generally, a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself." N.C. Gen. Stat. § 8C-1, Rule 602 (2015).

Rule 56(e) of the North Carolina Rules of Civil Procedure provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Civil Procedure Rule 43(e) provides, in relevant part, that "[w]hen a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties. . . ." While Rule 56(e) specifically applies to summary judgment motions, "this Court has held the N.C. R. Civ. Pro. 56(e) requirement that affidavits must be based upon personal knowledge applies to Rule 43(e)." *Lemon v. Combs*, 164 N.C. App. 615, 621, 596 S.E.2d 344, 348 (2004). As noted by the *Lemon* Court, " '[a]lthough an affidavit must be verified by a person with personal knowledge of the facts, the court may

rely on reasonable inferences drawn from the facts stated.' " *Id.* at 622, 596 S.E.2d at 348 (citation omitted).

Here, there was an ample basis upon which to infer that Martin had personal knowledge of the Note's existence and status. Martin's affidavit established that she was an executive in Beneficial's Administrative Services Division, that she had "personal knowledge of the manner in which [Beneficial's loan documents were] created," and that she had "reviewed and relied on those business records concerning the loan which [was] the subject of [the foreclosure] proceeding." The affidavit also correctly identified the amount of the loan evidenced by the Note and the Deed of Trust that secured the Note. Accordingly, Martin's affidavit was based on her personal knowledge and respondent's argument is overruled.

Moreover, based on the facts stated in the affidavit, we conclude that Martin had personal knowledge of Beneficial's corporate status. Even so, it is irrelevant whether Martin had any knowledge of the mergers that resulted in the formation of Beneficial—in addition to Martin's affidavit, several other documents establish that Beneficial is the successor by merger to BMCNC. Beneficial's Exhibit 3 contains official documents from the Secretaries of State of North Carolina, Delaware, and California showing that BMCNC merged with BMCV, and that BMCV merged with Beneficial. Exhibit 4, an Appointment of Substitute Trustee form in which the original trustee is replaced by Trustee Services, specifically states that "Beneficial Financial I Inc. Successor by Merger to Beneficial Mortgage Co. of North Carolina ("Holder") is the holder of the Note." As Respondents make no challenge to the content of these exhibits, we conclude that the trial court had competent evidence of the merger and transfer of rights before it. In sum, our review of the record reveals that the trial court did not abuse its discretion in admitting Martin's affidavit into evidence. *See In re Simpson*, 211 N.C. App. at 488, 711 S.E.2d at 170 ("The admissibility of evidence in the trial court is based upon that court's sound discretion and may be disturbed on appeal only upon a finding that the decision was based on an abuse of discretion.") .

Respondents' final argument is that the trial court erred by concluding that Beneficial was the holder of the Note without making a specific finding that Beneficial was in physical possession of the Note.

This Court has previously held that when a trial court's findings of fact do not address the actual physical possession of a promissory note, the court's findings will not support a conclusion that the petitioner in a

foreclosure proceeding is the holder of the note at issue. *Id.* at 492, 711 S.E.2d at 172; *Connolly*, 63 N.C. App. at 551, 306 S.E.2d at 125. However, " '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 Foreclosure of Yopp*, 217 N.C. App. 488, 499, 720 S.E.2d 769, 775 (2011) (brackets omitted) (quoting *Green Tree Financial Servicing Corp. v. Young*, 133 N.C. App. 339, 341, 515 S.E.2d 223, 224 (1999)).

Here, Beneficial produced a copy of the original Note at the *de novo* hearing. While Respondents opposed the admission of the Note and Deed of Trust into evidence based on alleged deficiencies in Martin's affidavit, they did not dispute Beneficial's assertion that the photocopy of the Note was a true copy of the original instrument. There being no requirement that the original Note be produced, the photocopy was competent evidence that Beneficial was the holder of Respondent's Note. *See Dobson*, 212 N.C. App. at 48, 711 S.E.2d at 730 (noting that unless evidence demonstrates that photocopies of a note or deed of trust "are not exact reproductions of the original instruments, "a party . . . may establish that it is the holder of the instruments by presenting photocopies of the note or deed of trust").

Furthermore, Martin's affidavit, which we have held was properly admitted, contained additional evidence indicating that Beneficial was in physical possession of Respondent's Note. Martin specifically averred that "BENEFICIAL is in possession of the original promissory note and/or loan agreement ("Note") for this Loan. . . ."

Finally, the record contains sufficient evidence of the merger and transfer of rights from BMCNC to Beneficial to support the trial court's conclusion that Beneficial is the holder of the Note. *See Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 204, 271 S.E.2d 54, 58 (1980) (noting that "if the alleged merger had occurred, then plaintiff, as the surviving corporation, would have succeeded by operation of law to Econo-Travel Corporation's status as owner and holder of the promissory note, and would have had standing to enforce the note in its own name"); *In re Foreclosure of Carver Pond I, L.P.*, 217 N.C. App. 352, 356, 719 S.E.2d 207, 210-11 (2011) (holding that evidence of a merger between former assignee of a promissory note and the petitioner in an action to foreclose pursuant to the terms of the deed of trust that secured that note was competent evidence that the petitioner was the holder of the note). The inferences that Beneficial merged with BMCNC, thereby succeeding by operation of law to BMCNC's status as holder

of the Note, and that Beneficial was in physical possession of the Note at the time of the *de novo* hearing, are easily drawn from the evidence cited above. Accordingly, the trial court properly concluded that Beneficial was the holder of the note.

IV. Conclusion

For the reasons stated above, Martin's affidavit was properly admitted into evidence and the trial court did not err in concluding that Beneficial was the holder of the Note. Consequently, we affirm the trial court's order authorizing Trustee Services to proceed with the foreclosure sale.

AFFIRMED.

Judges CALABRIA and INMAN concur.

JACKSON/HILL AVIATION, INC., PLAINTIFF
v.
TOWN OF OCEAN ISLE BEACH; DEBBIE S. SMITH, MAYOR; DAISY IVEY, TOWN ADMINISTRATOR; LARRY SELLERS, ASSISTANT TOWN ADMINISTRATOR; D.B. GRANTHAM, COMMISSIONER; R. WAYNE ROWELL, COMMISSIONER; BETTY WILLIAMSON, COMMISSIONER; BOB WILLIAMS, COMMISSIONER; AND DEAN WALTERS, COMMISSIONER, DEFENDANTS

No. COA16-396

Filed 7 February 2017

Cities and Towns—operation of airport—motion to dismiss—judicial notice of municipal ordinances improper

The trial court erred in a contract dispute case, arising out of the operation of a small airport, by allowing defendant town's motion to dismiss. The town's ordinance was not mentioned in the complaint, and courts cannot take judicial notice of the provisions of municipal ordinances. Even if the ordinance could be considered at the pleadings stage, plaintiff asserted waiver and estoppel arguments that would preclude judgment as a matter of law.

Appeal by plaintiff from order and judgment entered 2 November 2015 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 3 October 2016.

Thorp & Clarke, P.A., by F. Stuart Clarke, for plaintiff-appellant.

Crossley, McIntosh, Collier, Hanley & Edes, PLLC, by Clay Allen Collier, for defendants-appellees.

DIETZ, Judge.

This case concerns the operation of a small airport in the town of Ocean Isle Beach. Jackson/Hill Aviation, Inc. contracted with the town to operate the airport. A dispute later broke out because Jackson/Hill did not always staff the airport with an employee. Ocean Isle Beach asserted that the provisions of a town ordinance require the airport to be staffed during normal business hours and that the contract requires Jackson/Hill to comply with that ordinance. Thus, the town argued, Jackson/Hill breached the contract.

After the town took over control of the airport and locked Jackson/Hill out, the company sued. Ocean Isle Beach moved to dismiss, pointing to Jackson/Hill's admission in the complaint that it did not staff the airport during all normal business hours, to the terms of the contract (attached to the complaint), and to the terms of the town's ordinance, which the town attached to its motion to dismiss. The trial court granted the motion and dismissed all claims.

We reverse. The town's ordinance is not mentioned in the complaint, and it is well-settled that courts "cannot take judicial notice of the provisions of municipal ordinances." *McEwen Funeral Serv., Inc. v. Charlotte City Coach Lines, Inc.*, 248 N.C. 146, 150–51, 102 S.E.2d 816, 820 (1958). Because all of the town's arguments for dismissal require consideration of the terms of the ordinance, dismissal under Rule 12(b)(6) was improper. Moreover, even if the ordinance could be considered at the pleadings stage, Jackson/Hill asserts waiver and estoppel arguments that would preclude judgment as a matter of law at the pleadings stage. Accordingly, we reverse the trial court and remand for further proceedings consistent with this opinion.

Facts and Procedural History

Jackson/Hill Aviation, Inc. operated a small airport on property it leased from the Town of Ocean Isle Beach. In 2014, the parties began to dispute the scope of the contract and, in particular, whether the contract required Jackson/Hill to staff the airport with at least one employee during all normal business hours. The contract, which is attached to the complaint, provides as follows:

> Both parties anticipate that the property shall be used as a fixed based [sic] operation, with fuel services and other services as may be reasonable due to the traffic and clientele demands. . . . LESSOR agrees that the structure, while intended to permit it to operate a business for the repair, maintenance, painting, refurbishing, tooling and retooling and outfitting of aircraft shall be open and operational during regular business hours based upon the following schedule:
>
> a) From Good Friday of each year through Labor Day, Monday through Saturday from 9:00 a.m. until 5:00 p.m.;
>
> b) At all other times of the year the facility will be open from 9:00 a.m. until 5:00 p.m. on Saturday and Sunday of each week;
>
> c) The facility will provide a fuel operation that will provide fuel at all times of the day and night, every day of the year;
>
> d) The facility will provide for access to a restroom and a telephone for pilots who will be provided with a means to gain safe access to the facility that is in keeping with general FAA rules and regulations.
>
> . . .
>
> TENANT shall, at all times, in the use and occupancy of the Demised Premises and the performance of this lease, comply with all State, Federal and local governmental laws, regulatory, statutory or other, rules or regulations applicable to the use and occupancy of the Demised Premises . . . .

A town ordinance, which Ocean Isle Beach attached to its motion to dismiss, states as follows:

> Regulations governing minimum requirements for all fixed base operations.
>
> (a) [*Full-time business.*] All fixed base operations at the airport shall be a full-time business, with manned office facility at the airport during business hours. No fixed base operator shall be allowed to operate on the airport without a fully executed lease agreement with the owner.

(brackets in original).

Ultimately, the town asserted that Jackson/Hill breached the contract. Town officials changed the locks on the airport facilities and took over all operations.

Jackson/Hill sued the town and various town officials for wrongful eviction, wrongful termination of the lease, breach of the covenant of quiet enjoyment, unfair and deceptive trade practices, tortious interference with contract, trespass, interference with use and enjoyment of property, and claims for declaratory and injunctive relief.

Ocean Isle Beach moved to dismiss the complaint for failure to state a claim on which relief could be granted. The trial court granted the motion and dismissed all claims. Jackson/Hill appealed. As initially filed, the record on appeal indicated that the appeal was untimely. After this Court requested supplemental briefing concerning our jurisdiction, Jackson/Hill supplemented the record with documents indicating the appeal was timely.

Argument

Jackson/Hill argues that dismissal was improper because its complaint properly states claims against the town and its officials. We agree.

"This Court reviews the grant of a Rule 12(b)(6) motion to dismiss *de novo*." *Shannon v. Testen*, __ N.C. App. __, __, 777 S.E.2d 153, 156 (2015). "We examine whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Id.* "Dismissal is only appropriate if it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim."[1] *Id.*

The town does not dispute that the complaint, standing alone, properly states a claim with respect to each cause of action. But the town argues that the allegations in the complaint, combined with the terms of a town ordinance, demonstrate that Jackson/Hill cannot prove any set of facts that would entitle it to recover.

Specifically, the town points to the provision in its ordinances stating that "[a]ll fixed base operations at the airport shall be a full-time business, with manned office facility at the airport during business hours."

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1. In a single filing, the town moved to dismiss under Rule 12(b)(6) and moved for judgment on the pleadings under Rule 12(c). Because the town had not yet filed an answer, the pleadings were not "closed" and thus a Rule 12(c) motion was not yet available. *See Carpenter v. Carpenter*, 189 N.C. App. 755, 762, 659 S.E.2d 762, 767 (2008). Thus, we review the dismissal order as one allowed solely under Rule 12(b)(6).

The lease agreement, which is attached to the complaint and thus can be considered on a motion to dismiss, contains a provision requiring Jackson/Hill to "comply with all State, Federal and local government laws, regulatory, statutory or other, rules or regulations applicable to the use and occupancy" of the airport. The town argues that, because Jackson/Hill admits in the complaint that it did not staff the airport with an employee "during business hours," the facts alleged in the complaint (when considered along with the relevant terms of the contract and the ordinance) defeat Jackson/Hill's claims, all of which depend on Jackson/Hill proving that it did not breach the terms of the lease.

There is an obvious (and fatal) flaw in the town's reasoning: the complaint does not allege the existence of the town ordinance or describe what that ordinance says. At the motion to dismiss stage, the trial court (and this Court) may not consider evidence outside the four corners of the complaint and the attached contract. *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 203–04, 652 S.E.2d 701, 707 (2007).

The town notes that courts may use judicial notice "to consider laws, administrative regulations, important public documents and a range of miscellaneous facts" and suggests that this is precisely what the trial court did when it considered the ordinance below. But, as the town then concedes in the following paragraph of its brief, our Supreme Court repeatedly has held that courts "cannot take judicial notice of the provisions of municipal ordinances." *McEwen Funeral Serv., Inc. v. Charlotte City Coach Lines, Inc.*, 248 N.C. 146, 150–51, 102 S.E.2d 816, 820 (1958).

The town also argues that it attached the ordinance to its motion to dismiss and thus the ordinance appears "in the Record before this Court." But the fact that the ordinance is in the *appellate record* is irrelevant. What matters is whether the terms of the ordinance properly could be considered by the trial court *at the pleadings stage* under Rule 12(b)(6). Perhaps the most fundamental concept of motions practice under Rule 12 is that evidence outside the pleadings—such as a document attached to a motion to dismiss—cannot be considered in determining whether the complaint states a claim on which relief can be granted. *See Weaver*, 187 N.C. App. at 203, 652 S.E.2d at 707.

Simply put, the town's ordinance cannot be considered on a motion to dismiss under Rule 12(b)(6). Because all of the town's arguments require us to consider the ordinance, we must reject those arguments.

We also note that, even if we agreed with the town's interpretation of the contract and could consider the terms of the town's ordinance,

that would not end this case. Jackson/Hill argues that the town waived application of the portions of the contract concerning the ordinance. *See Wheeler v. Wheeler*, 299 N.C. 633, 639, 263 S.E.2d 763, 766–67 (1980). It also argues that the town is estopped from using the ordinance against it in light of the terms of the contract and statements and actions by town officials. *See Parkersmith Props. v. Johnson*, 136 N.C. App. 626, 632–33, 525 S.E.2d 491, 495–96 (2000). Thus, many legal issues remain to be resolved before final judgment may be entered in this case.

Conclusion

The trial court erred by granting Ocean Isle Beach's motion to dismiss for failure to state a claim and alternative motion for judgment on the pleadings. We reverse the trial court's order and judgment and remand for further proceedings.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge TYSON concur.

DONALD WAYNE PERRY SR. AND WIFE PATSY K. PERRY, PLAINTIFFS
v.
BANK OF AMERICA, N.A., DEFENDANT

No. COA16-234

Filed 7 February 2017

1. Declaratory Judgments—motion to dismiss—actual dispute—fraud

The trial court erred by dismissing plaintiffs' claim for declaratory judgment. Plaintiffs alleged an actual dispute over whether they were obligated to pay balances on lines of credit which they contended were the result of fraud.

2. Damages and Remedies—N.C.G.S. § 45–36.9—debtor relief—statutory damages—attorney fees—court costs

The trial court did not err by dismissing plaintiffs' claim for violation of N.C.G.S. § 45–36.9 that permits a debtor to seek statutory damages, attorney fees, and court costs if a creditor fails to record a satisfaction when required to do so. The complaint, on its face, failed to allege any point at which the line of credit had a zero balance and plaintiffs requested that the bank record a satisfaction.

PERRY v. BANK OF AM., N.A.

[251 N.C. App. 776 (2017)]

Appeal by plaintiffs from order entered 29 December 2015 by Judge Kevin M. Bridges in Stanly County Superior Court. Heard in the Court of Appeals 8 September 2016.

Scarbrough & Scarbrough, PLLC, by James E. Scarbrough and John F. Scarbrough, for plaintiffs-appellants.

McGuireWoods LLP, by Scott I. Perle and Monica E. Webb, for defendant-appellee.

DIETZ, Judge.

Plaintiffs Donald Wayne Perry, Sr. and Patsy K. Perry appeal from the dismissal of their lawsuit against Bank of America. The Perrys have home equity lines of credit with Bank of America and are in default on their payments. The Perrys contend that they are not obligated to pay the outstanding balances because those balances were procured through fraud by their son, who withdrew funds from the credit lines without his parents' authorization.

As explained below, we affirm in part and reverse in part. The Perrys sought a declaration that they were not obligated to repay the balances on the lines of credit. The sole basis on which Bank of America defends the dismissal of that declaratory judgment claim is that the claim does not allege an actual controversy. As explained below, although there may be other grounds to dismiss the claim, the claim satisfies the legal criteria for declaratory relief, and thus we reverse the dismissal of that claim and remand for further proceedings. We affirm the trial court's dismissal of the Perrys' claim under N.C. Gen. Stat. § 45–36.9 because it fails to state a claim on which relief can be granted.

Facts and Procedural History

On 17 December 2014, Plaintiffs Donald Wayne Perry, Sr. and Patsy K. Perry sued Defendant Bank of America, N.A. The Perrys' complaint, as amended, asserted claims for declaratory judgment, violation of N.C. Gen. Stat. § 45–36.9, injury to credit, and punitive damages. The claims arise from two home equity lines of credit that the Perrys obtained from Bank of America or its predecessors.

In 1996, Plaintiffs obtained an equity line loan with a credit limit of $33,100.00 secured by a deed of trust on real property located in Locust, North Carolina. In 2003, the Perrys used a mortgage loan to pay off the balance on the 1996 equity line. In 2007, the Perrys obtained a second

home equity line of credit with a credit limit of $124,000.00 secured by a deed of trust on real property located in Charlotte, North Carolina.

In 2014, the Perrys received a notice from Bank of America that the 1996 equity line was delinquent with an outstanding balance of $19,451.27. The Perrys also discovered that there was a balance owed on the 2007 line of credit in excess of the $124,000 limit. According to the complaint, the Perrys believed the 1996 line of credit had been cancelled when they paid off the balance using the proceeds of their mortgage loan in 2003. The Perrys also alleged that the balances on both lines of credit were incurred through fraud by their son, who was not authorized to withdraw funds from the lines of credit. Finally, the Perrys alleged that they demanded that Bank of America cancel the deeds of trust securing the lines of credit because they owed no balance on either account but the bank refused to do so.

On 23 September 2015, Bank of America moved to dismiss the Perrys' amended complaint. After a hearing, the trial court granted the bank's motion and dismissed all claims in the amended complaint.[1] The Perrys timely appealed.

Analysis

I. Dismissal of Declaratory Judgment Claim

[1] The Perrys first argue that the trial court erred in dismissing their claim for declaratory judgment. As explained below, in light of the only argument Bank of America asserts on appeal, we agree that the trial court erred by dismissing this claim.

As a general principle, the North Carolina Uniform Declaratory Judgment Act permits a litigant to seek a declaration of the rights or obligations of parties to a written contract when there is some dispute among the parties concerning those respective rights or obligations:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other

1. In this appeal, the Perrys do not challenge the dismissal of their claim for injury to credit and their request for punitive damages, and thus any issues concerning those portions of the trial court's order are abandoned. *See* N.C. R. App. P. 28(b)(6).

> legal relations thereunder. A contract may be construed either before or after there has been a breach thereof.

N.C. Gen. Stat. § 1–254.

Here, the Perrys allege that they have home equity lines of credit with Bank of America, that Bank of America informed them that they are in default for failure to make required payments on those lines of credit, and that the Perrys believe they are not obligated to pay the balances on those lines of credit because the balances were procured by fraud.

On appeal, Bank of America does not contend that the Perrys cannot succeed on the merits of their request for declaratory relief. Instead, the bank contends that the Perrys failed to allege "any actual, genuine controversy" and thus the trial court properly dismissed the claim. Specifically, the bank contends that the Perrys "do not seek construction or interpretation of any contract here, instead merely asking the trial court to resolve purported issues of fact regarding the balances on the account."

We agree with Bank of America that resolving a dispute over the balance in a bank account, or the amount due on a loan, is not the type of controversy that can be resolved using the Declaratory Judgment Act. The Act exists to permits courts "to declare rights, status, and other legal relations," not to serve as arbiters of routine fact disputes that arise in people's dealings with one another. N.C. Gen. Stat. § 1–253.

But to say that the Perrys seek only a declaration of what they owe the bank would mischaracterize their claim for relief. The Perrys allege that they are not legally obligated to pay the balances on the lines of credit because those balances were procedure by fraud. They further allege that the bank believes they must pay and has threatened to act on their purported default.

As the Georgia Court of Appeals succinctly explained, "the object of the declaratory judgment is to permit determination of a controversy before obligations are repudiated or rights are violated." *Watts v. Promina Gwinnett Health Sys., Inc.*, 242 Ga. App. 377, 381, 530 S.E.2d 14, 18 (2000). Declaratory relief serves "to permit one who is walking in the dark to ascertain where he is and where he is going, to turn on the light before he steps rather than after he has stepped in a hole." *Id.*

That is precisely what the Perrys seek to do here. They contend that they have no legal obligation to repay the loans because the balance was procured through fraud, and they seek a declaration of that legal obligation so that they can know now whether they must repay the loans—without having to wait for the bank to foreclose on their home when

they refuse to pay. This is an actual, genuine controversy concerning the parties' respective legal rights and obligations under the contracts governing the lines of credit. *Goldston v. State*, 361 N.C. 26, 37, 637 S.E.2d 876, 883 (2006).

To be sure, Bank of America also argues that the Perrys failed to provide any "legal authority" to support their argument that they are not obligated to pay the balance on their credit lines. But on appeal (and, from the record before us, in the trial court as well) Bank of America never provided any legal authority on this issue either. If the bank had shown that, as a matter of law, the Perrys still would be obligated to repay the line of credit even if the balance was the result of fraud by their son, we readily could affirm the trial court's dismissal on this alternative ground. *See State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987). But we are unwilling to address this issue on our own without the benefit of briefing by the parties. "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). Because neither party addressed this legal issue—either on appeal or in the trial court—we decline to address it as well.

Bank of America also contends that the trial court had discretion to decline to hear the Perrys' request for declaratory judgment. The bank asserts that the trial court's dismissal was simply an exercise of this discretion. But a trial court's discretion to decline a request for declaratory relief has been limited by our Supreme Court. As the Supreme Court explained in *Augur v. Augur*, the Declaratory Judgment Act "permits a trial court, in the exercise of its discretion, to decline a request for declaratory relief when (1) the requested declaration will serve no useful purpose in clarifying or settling the legal relations at issue; or (2) the requested declaration will not terminate or afford relief from the uncertainty, insecurity, or controversy giving rise to the proceeding." 356 N.C. 582, 588–89, 573 S.E.2d 125, 130 (2002). For the reasons discussed above, neither of these two criteria are satisfied here. If the trial court entered the requested declaration, it would settle a legal dispute—whether the Perrys are required by the contract to pay the balance on their lines of credit despite their allegations of fraud—and it would afford the Perrys relief from the uncertainty and controversy surrounding their purported default on those lines of credit.

In short, we are constrained to reverse the trial court's dismissal of this claim. The Perrys alleged more than a "mere difference of opinion

between the parties, without any practical bearing on any contemplated action." *Calton v. Calton*, 118 N.C. App. 439, 442, 456 S.E.2d. 520, 522 (1995). They alleged an actual dispute over whether they are obligated to pay balances on lines of credit which they contend are the result of fraud.

Of course, our holding does not mean that the Perrys are likely to succeed on this claim or that the trial court cannot dismiss the claim on other grounds on remand. We merely reject the argument that this claim is not suitable for resolution under the Declaratory Judgment Act—the sole basis on which the bank defended the trial court's ruling on appeal.

II. Dismissal of N.C. Gen. Stat. § 45–36.9 Claim

[2] The Perrys next contend that the trial court erred in dismissing their claim for violation of N.C. Gen. Stat. § 45–36.9. We disagree.

Section 45–36.9 permits a debtor to seek statutory damages, attorneys' fees, and court costs if a creditor fails to record a satisfaction when required to do so. To state a claim under N.C. Gen. Stat. § 45–36.9 with respect to a line of credit, the plaintiff must allege that the line of credit was paid in full *and* that the plaintiff notified the creditor that it requested termination:

> 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. *If a security instrument secures a line of credit or future advances, the secured obligation is fully performed only if, in addition to full payment, the secured creditor has received (i) a notification requesting the creditor to terminate the line of credit*, (ii) a credit suspension directive, or (iii) a notification containing a clear and unambiguous statement sufficient to terminate the effectiveness of the provision for future advances in the security instrument including, but not limited to, a request to terminate an equity line of credit given pursuant to G.S. 45–82.2 or a notice regarding future advances given pursuant to 45–82.3.

N.C. Gen. Stat. § 45–36.9(a) (emphasis added).

Here, the complaint alleges that the accounts at issue were lines of credit. But the complaint, on its face, fails to allege any point at which the line of credit had a zero balance *and* the Perrys requested that the bank record a satisfaction under section 45–36.9. The complaint alleges that the accounts had a zero balance in 2003, but does not allege that the

Perrys notified the bank to cancel the security instrument at that time. Likewise, the complaint alleges that the Perrys requested cancelation of the security instrument in September 2014. But by that time, according to the complaint, the account had a balance of $19,451.27. Thus, the Perrys' complaint fails to state a claim on which relief could be granted under section 45–36.9, and the trial court properly dismissed that claim.

Conclusion

For the reasons discussed above, we affirm the portion of the trial court's order dismissing the Perrys' claim under N.C. Gen. Stat. § 45–36.9. We reverse the portion of the trial court's order dismissing the Perrys' claim under the North Carolina Uniform Declaratory Judgment Act.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judges HUNTER, JR. and McCULLOUGH concur.

CHRISTOPHER S. REED, EMPLOYEE, PLAINTIFF
v.
CAROLINA HOLDINGS, WOLSELEY MANAGEMENT, EMPLOYER,
ACE USA/ESIS, CARRIER, DEFENDANTS

No. COA15-1034

Filed 7 February 2017

1. Appeal and Error—preservation of issues—attorney fees—failure to raise issue before Industrial Commission

Defendants' appeal of the Industrial Commission's award of attorney fees in a workers' compensation case was dismissed. There was no indication in the record that defendants raised the issue before the Commission and there was no indication that the Commission addressed the issue.

2. Workers' Compensation—attendant care compensation—sufficiency of findings—reasonable and necessary

The Industrial Commission did not err in a workers' compensation case by awarding attendant care compensation. The Commission's findings of fact were supported by competent evidence and supported the Commission's conclusion of law that the services were reasonable and necessary.

Judge TYSON concurring in part and dissenting in part.

Appeal by Defendants from an Opinion and Award entered 17 April 2015 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 7 June 2016.

Lennon, Camak & Bertics, PLLC, by George W. Lennon and Michael W. Bertics, for Plaintiff-Appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Paul C. Lawrence and M. Duane Jones, for Defendant-Appellants.

INMAN, Judge.

A defendant may not argue on appeal that the North Carolina Industrial Commission lacks the authority to award fees for attorneys to be paid out of an award of medical compensation without preserving the issue before the Commission. An award of attendant care compensation will be upheld where the Commission's findings of fact are supported by competent evidence and the findings of fact support the Commission's conclusion of law that the attendant care services are reasonable and necessary.

Carolina Holdings, Wolseley Management, and ACE USA/ESIS ("Defendants") appeal from an Opinion and Award of the Full Commission of the North Carolina Industrial Commission (the "Commission"), wherein the Commission awarded retroactive and ongoing medical compensation for attendant care services for Christopher S. Reed ("Mr. Reed" or "Plaintiff"), and twenty-five percent of the retroactive medical compensation to be paid to Mr. Reed's attorney as an attorney's fee.

Defendants contend the Commission erred in awarding attendant care services and exceeded its authority in granting an attorney's fee award to be deducted from the retroactive award of attendant care. Mr. Reed filed a motion to dismiss Defendants' appeal for failure to properly preserve their challenge to the attorney's fee award below. After careful review, we affirm the Commission's award of attendant care services and grant Mr. Reed's motion to dismiss Defendant's appeal as to the award of attorney's fees.

Factual and Procedural History

Mr. Reed began working with Defendants on 20 May 1998. On 26 June 1998, Mr. Reed sustained a traumatic brain injury along with

injuries to his shoulder, back, and other body parts when a stack of building supplies collapsed on top of him. Defendants accepted liability for Mr. Reed's injuries and provided compensation for Mr. Reed's lost income and medical treatment resulting from the injury. Psychological and psychiatric evaluations over the next decade indicated that Mr. Reed's cognitive and emotional condition continued to deteriorate and that Mr. Reed was not reliably taking prescribed medication. In 2010, a forensic psychiatrist diagnosed Mr. Reed with a cognitive disorder, obsessive compulsive disorder, and a mood disorder.

On 18 March 2011, Mr. Reed filed a Form 33 requesting that the Commission hear his claim for attendant care compensation. Following a hearing, Deputy Commissioner George R. Hall, III entered an Opinion and Award requiring Defendants to pay Mr. Reed's mother ("Mrs. Reed") ten dollars per hour for twenty-four hours per day, seven days per week from 27 June 1998 through the date of the Opinion and Award and continuing, and allowing Mr. Reed's counsel to deduct twenty-five percent of the back due attendant care owed from the award as a reasonable attorney's fee. The Deputy Commissioner denied Mr. Reed's counsel's request to deduct twenty-five percent of the compensation for future attendant care as an attorney's fee.

Defendants appealed the award to the Full North Carolina Industrial Commission pursuant to N.C. Gen. Stat. § 97-85 and Rule 701 of the North Carolina Industrial Commission. Mr. Reed appealed to the Full Commission pursuant to N.C. Gen Stat. § 97-90(c) that portion of the award denying the claim for attorney's fee to be deducted from future medical compensation.

On appeal from the Deputy Commissioner's decision, the Commission received additional evidence with respect to Mr. Reed's attendant care claim. Defendants offered surveillance evidence conducted from July 2012 through November 2012 in support of their contention that Mr. Reed does not require attendant care. This evidence included testimony by three private investigators regarding Mr. Reed's ability to perform daily activities, his physical limitations, and his regular residence. Mr. Reed introduced additional deposition testimony by himself, his mother, his friend Jessica Lloyd, and two of his doctors.

After reviewing the additional evidence, the Commission entered its Opinion and Award on 17 April 2015. The Commission made extensive findings of fact and conclusions of law and issued the following award:

> 1. Plaintiff's request for compensation for attendant care services provided to him from March 18, 2007 to March 17,

> 2011 is DENIED. Plaintiff's request for attendant care services provided to him beginning March 18, 2011 to the present and continuing is GRANTED. From March 18, 2011, through the present and continuing, Defendants shall pay Plaintiff's mother, Mrs. Reed, for 8 hours per day, 7 days per week of attendant care services she has provided and continues to provide to Plaintiff at a reasonable rate agreed upon by the parties. The amounts awarded are subject to the attorneys' fee set forth below.
>
> 2. As a reasonable attorney's fee, Plaintiff's counsel is entitled to be paid 25% of all accrued retroactive attendant care compensation herein. Defendants shall deduct 25% from the accrued amount and pay it directly to Plaintiff's counsel as a reasonable attorney's fee. Plaintiff's counsel request for 25% of future attendant care payments is DENIED. However, Plaintiff's counsel may seek additional compensation if future attendant care issues arise.

Following the Commission's Opinion and Award, the parties respectively filed a series of pleadings in three forums:

- On 30 April 2015, Mr. Reed filed with the Wake County Superior Court a notice of appeal from the Opinion and Award pursuant N.C. Gen. Stat. § 97-90(c) regarding the Commission's denial of his request for attorney's fees to be deducted from future attendant care compensation.
- On 5 May 2015, Defendants filed with the Commission a Motion for Reconsideration arguing—apparently for the first time—that the Commission had erred in awarding any attorney's fees from medical compensation awarded to Mr. Reed. The Motion cited the same legal authorities that would later be raised in Defendants' appeal to this Court. The record does not reflect that Defendants raised this issue or presented these legal arguments previously before either Deputy Commissioner Hall or the Commission.[1]

1. The Motion also asked the Commission to amend the Opinion and Award to require Mr. Reed's mother to report her attendant care earnings to the government and to be responsible for paying all taxes applicable to the earnings.

- On 13 May 2015, Defendants filed with this Court a notice of appeal from the Commission's Opinion and Award.
- Two days later, on 15 May 2015, Defendants filed with the Wake County Superior Court a pleading captioned "Defendants' Response to Plaintiff's Notice of Appeal of Award of Attorney's Fees," asserting the same argument Defendants presented to the Commission in their Motion for Reconsideration. Defendants asked the Wake County Superior Court to reverse the Commission's award of attorney's fees to Mr. Reed "or at the very least allow for this matter to be decided by the Full Commission" based on Defendants' then pending Motion for Reconsideration.[2]
- On 2 June 2015, the Commission filed an Order concluding that Defendants' appeal to the Wake County Superior Court deprived the Commission of jurisdiction to reconsider its Opinion and Award.
- On 10 June 2015, Defendants filed a Motion to Intervene in the Wake County Superior Court proceeding initiated by Mr. Reed.
- On 23 June 2015, the Superior Court entered an order allowing Defendants to intervene in that proceeding, but holding the case in abeyance pending the outcome of Defendants' appeal to this Court.

On appeal before this Court, Defendants challenge the Commission's findings of fact related to Mr. Reed's ability to function independently, his need for around the clock monitoring, the medical necessity of his attendant care services, and the weight given to Defendants' surveillance evidence. Defendants also challenge the Commission's authority to award attorney's fees pursuant N.C. Gen. Stat. § 97-90(c) to be deducted from an award of attendant care compensation. Mr. Reed has filed a motion to dismiss Defendants' appeal as to the issue of attorney's fees.

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2. Defendants represented to the Superior Court that their Motion for Reconsideration concerned the Commission's "decision with regards to Award No. 1." However, Award No. 1 addressed attendant care compensation, not attorney's fees.

Plaintiff's Motion to Dismiss Defendants' Appeal

[1] Mr. Reed's motion to dismiss asserts (1) that Defendants lack standing to challenge an award of attorney's fees; (2) that our Court lacks subject matter jurisdiction regarding attorney's fees because the Superior Court has exclusive jurisdiction regarding such fees; and (3) that our Court lacks subject matter jurisdiction because Defendants failed to preserve their argument regarding the Commission's authority to grant attorney's fee awards from medical compensation. After careful review, we agree that Defendants failed to preserve their argument regarding the Commission's authority to award attorney's fees to be deducted from attendant care compensation. We therefore dismiss Defendants' appeal with respect to that issue.

Rule 701 of the North Carolina Industrial Commission states:

> (2) After receipt of notice of appeal, the Industrial Commission will supply to the appellant a Form 44 Application for Review upon which appellant must state the grounds for appeal. The grounds must be stated with particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the transcript on which the alleged errors are recorded.
>
> (3) Particular grounds for appeal not set forth in the application for review shall be deemed abandoned, and argument thereon shall not be heard before the Full Commission.

Workers' Comp. R. of N.C. Indus. Comm'n 701, 2011 Ann. R. (N.C.) 1070-71. It is well established that "the portion of Rule 701 requiring appellant to state with particularity the grounds for appeal may not be waived by the Full Commission." *Roberts v. Wal-Mart, Inc.*, 173 N.C. App. 740, 744, 619 S.E.2d 907, 910 (2005). "[T]he penalty for non-compliance with the particularity requirement is waiver of the grounds, and where no grounds are stated, the appeal is abandoned." *Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 245, 249, 652 S.E.2d 713, 715-16 (2007) (citations omitted). Applying established precedent to the record in this case, we conclude that although Defendants preserved their objection to the award of attorney's fees as a derivative of their objection to the award of attendant care compensation, Defendants failed to preserve a challenge to the Commission's authority to award attorney's fees deducted from such compensation. There is no indication in the record that this issue was raised at all before the Commission prior to the Opinion and

Award from which this appeal arises. Defendants pleaded only a generalized assignment of error regarding the attorney's fee award. There is no indication in the record that Defendants stated in any form or fashion the basis of their objection to the award of attorney's fees with sufficient particularity to give Mr. Reed or the Commission notice of a legal issue to be addressed on appeal from the Deputy Commissioner's decision.

Defendants argue they preserved the issue of attorney's fees on appeal to the Full Commission because the fifteenth—and last—assignment of error in their Form 44 referred to the Deputy Commissioner's award of attorney's fees. Assignment of Error 15 stated:

> For all the reasons stated above, Award #2 is contrary to law, is not supported by the findings of fact and is contrary to the competent and credible evidence of record.

Although neither the word "attorney" nor the word "fee" is mentioned in the assignment of error, Paragraph No. 2 under the heading "Award" in the Deputy Commissioner's Opinion and Award provides for the award of attorney's fees. Therefore, the fifteenth assignment of error could be said to identify the attorney's fee award in general. As for the basis of the objection, however, the assignment simply states it is "[f]or all the reasons stated above . . . ." The reasons stated above, *i.e.*, assignments of error 1 through 14, challenge factual findings and conclusions of law related to whether Mr. Reed requires attendant care and whether Mr. Reed and his mother are entitled to reimbursement for attendant care services. So Defendants' objection to the award of attorney's fees appears to be based solely on their objections to the award of attendant care compensation. None of the prior assignments challenge the Commission's authority to award attorney's fees to be deducted from attendant care compensation.

The fifteenth assignment of error is similar to the assignment of error that this Court found insufficient to preserve a challenge to a deputy commissioner's award of attorney's fees in *Adcox v. Clarkson Bros. Constr. Co.*, 236 N.C. App. 248, 254, 773 S.E.2d 511, 516 (2015). That assignment of error challenged an award

> on the grounds that it is based upon Findings of Fact and Conclusions of Law which are erroneous, not supported by competent evidence or evidence of record, and are contrary to the competent evidence of record, and are contrary to law: Award Nos. 1-3.

Id.

Although the assignment of error in *Adcox* mentioned the paragraph number corresponding to attorney's fees in the deputy commissioner's award, this Court held that the generalized assignment "covers everything and touches nothing." *Id.* at 255, 773 S.E.2d at 516 (citation and quotation marks omitted). The assignment did "not state the basis of any objection to the attorneys' fee award with sufficient particularity to give [the] plaintiff notice of the legal issues that would be addressed by the Full Commission such that he could adequately prepare a response." *Id.* (citation omitted). The Court in *Adcox* compared the insufficient assignment of error there to the appellant's assignment of error in *Walker v. Walker*, 174 N.C. App. 778, 782, 624 S.E.2d 639, 642 (2005). *Adcox*, 236 N.C. App. at 255, 773 S.E.2d at 516. The assignment of error in *Walker*, analogous to that in *Adcox* and in this case, asserted that several rulings of the trial court were "erroneous as a matter of law." *Walker*, 174 N.C. App. at 782, 624 S.E.2d at 642. This Court held that the assertion "that a given finding, conclusion, or ruling was 'erroneous as a matter of law' completely fails to *identify* the issues actually briefed on appeal." *Id.* (emphasis in original).

Defendants contend that they did properly raise sufficient grounds in their brief to the Commission to preserve their challenge to the Commission's authority to grant attorney's fees from an award of attendant care compensation. They rely on this Court's decision in *Cooper v. BHT Enters.*, 195 N.C. App. 363, 672 S.E.2d 748 (2009). In *Cooper*, the plaintiff asserted that the defendant's failure to file a Form 44 constituted abandonment of the grounds for the defendant's appeal from a deputy commissioner's decision to the Commission, and therefore the Commission erred in hearing the appeal. *Id.* at 368, 672 S.E.2d at 753. But this Court concluded that "both this Court and the plain language of the Industrial Commission's rules have recognized the Commission's discretion to waive the filing requirement of an appellant's Form 44 where the appealing party has stated its grounds for appeal with particularity in a brief or other document filed with the Full Commission," and overruled the plaintiff's argument. *Id.* at 369, 672 S.E.2d at 753-54. Thus, the Court in *Cooper* refused to put form over substance and affirmed the Commission's discretion to hear an issue that had been stated with particularity.

Here, unlike in *Cooper*, we find in the record no substance that can mend the insufficiency of Defendants' Form 44. Although Defendants contend in response to the Motion to Dismiss that they stated their challenge to the Commission's authority to award attorney's fees in their brief to the Commission on appeal from the Deputy Commissioner's

decision, they did not include the referenced brief in the record. Nor did Defendants seek to supplement the record with the referenced brief in response to the Motion to Dismiss. We have searched the record and find no such pleading filed with the Commission by Defendants regarding attorney's fees other than the Defendants' Motion for Reconsideration, which Defendants filed *after* the Commission had issued its Opinion and Award. Like the defendants in *Adcox*, Defendants do not point to any support in the record indicating that they raised this issue in their appeal from the Deputy Commissioner's decision. Nor do Defendants point to any indication in the record that the Commission sought to exercise its discretion to determine this issue. As discussed further *infra*, the only pleadings in the record regarding this issue were filed *after* the Commission had issued its Opinion and Award. Accordingly, we hold Defendants abandoned their argument that the Commission lacked the authority under the Act to grant an award of attorney's fees out of an award of attendant care compensation, and dismiss Defendants' appeal as to this issue.

The dissenting opinion asserts that we decline to address the issue of attorney's fees "solely because Defendants did not include a copy of their supporting legal brief to the Full Commission in the long settled record on appeal." To be clear, we hold that because there is no indication in the record that Defendants raised the issue before the Commission and there is no indication that the Commission addressed the issue, we have no jurisdiction to review it. This is not a case of a technicality foreclosing review based on an inadvertent omission in the record. Not only did Defendants not include in the record the brief they now claim preserved the issue, but they failed to supplement the record with the referenced brief when challenged to point to any portion of the record preserving the issue for review. Indeed, the record reflects only that after the Commission issued its Opinion and Award, Defendants filed a Motion for Reconsideration regarding the attorney's fee issue. That pleading tellingly does not refer to Defendants having raised the issue in any prior brief or argument to the Commission.

The dissent seeks to justify a different result by relying on inapposite case authority. In *Tucker v. Workable Company*, 129 N.C. App. 695, 701, 501 S.E.2d 360, 365 (1998) the parties had mistakenly stipulated before the Commission that the worker's weekly salary was $659.70 per week although it was actually $157.80 per week. The employer discovered the error after the Commission's Opinion and Award and sought reconsideration, which the Commission denied. *Id.* This Court reversed the denial and remanded the matter to the Commission. *Id.*

The award of attorney's fees from attendant care compensation does not arise from a factual mistake or a legal error that has previously been recognized by this Court or the Supreme Court of North Carolina. It is an issue of first impression requiring careful interpretation of the Workers' Compensation Act. We cannot circumvent the limits of our jurisdiction to address a watershed issue with broad reaching consequences.

Because we dismiss Defendants' appeal regarding the Commission's authority to award attorney's fees from attendant care compensation based on their abandonment of the issue before the Commission, we need not address the other arguments presented by Plaintiff in his Motion to Dismiss.

Award of Attendant Care Compensation

[2] Defendants assign error to the Commission's award of attendant care compensation by asserting there was insufficient evidence to support the Commission's findings of fact and therefore, the findings of fact do not support the Commission's conclusions of law. We disagree.

A. Standard of Review

When reviewing an award from the Commission, our review is limited to determining: (1) whether the findings of fact are supported by competent evidence, and (2) whether those findings support the Commission's conclusions of law. *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006). Unchallenged findings of fact "are 'presumed to be supported by competent evidence' and are, thus 'conclusively established . . . .' " *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (quoting *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003)). "The Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted). "An opinion and award of the Industrial Commission will only be disturbed upon the basis of a patent legal error." *Roberts v. Burlington Indus., Inc.*, 321 N.C. 350, 354, 364 S.E.2d 417, 420 (1988).

B. Analysis

In North Carolina, the Workers' Compensation Act provides employees compensation for injuries sustained within the course and scope of employment, charging employers with the responsibility to cover costs such as medical compensation. N.C. Gen. Stat. § 97-1 *et seq.* (2015). The Act defines medical compensation as:

> medical, surgical, hospital, nursing, and rehabilitative services, including, but not limited to, attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission, vocational rehabilitation, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonable be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

N.C. Gen. Stat. § 97-2(19).[3] To award medical compensation, and specifically attendant care services, the Commission must make findings from competent evidence to support its conclusion that the attendant care services were reasonable and necessary as a result of the employee's injury. *See Shackleton v. Southern Flooring & Acoustical Co.*, 211 N.C. App. 233, 245, 712 S.E.2d 289, 297 (2011). Such competent evidence includes, but is not limited to: "a prescription or report of a healthcare provider; the testimony or a statement of a physician, nurse, or life care planner; the testimony of the claimant or the claimant's family member; or the very nature of the injury." *Id.* at 250-51, 712 S.E.2d at 300.

Here, the Commission made the following findings of fact, which Defendants challenge, in support of its conclusion that Mr. Reed's attendant care services were reasonable and necessary:

> 6. Dr. Prakken [Mr. Reed's physician] also opined that Plaintiff is not able to function independently. Plaintiff cannot effectively shop for himself, pay his own bills, or set up his own appointments because of his obsessive compulsive symptoms and his high level of anxiety. He is inconsistent with his activities of daily living. Dr. Prakken compared Plaintiff's levels of function with that of an 8-year-old child and testified that Plaintiff could

3. The General Assembly amended the Act in 2011 to include attendant care services within the definition of medical compensation. 2011 N.C. Sess. Laws ch. 287, § 2. This definition was not in effect at the time this claim was filed; however, the North Carolina Supreme Court has previously included attendant care services within the statute's "other treatment." *Mehaffey v. Burger King*, 367 N.C. 120, 125, 749 S.E.2d 252, 255 (2013). Neither party disputes attendant care services as being other than medical compensation.

not function outside an institution without his mother, Elizabeth Reed.

7. Since Plaintiff's injury, Mrs. Reed has been caring for him. The attendant care services Mrs. Reed provides for Plaintiff include shopping for him, cooking, transporting and attending with Plaintiff most medical visits, cleaning, providing money management, scheduling medical appointments, reminding him to bathe and attend to personal hygiene, making sure he takes his prescription medications, monitoring his status 24 hours per day, seven days per week since Plaintiff's behavior and sleeping habits are unpredictable, calming him down during an anxiety attack or other crisis. Mrs. Reed has not worked in the competitive labor market since Plaintiff's accident.

8. Prior to his injury, Plaintiff was a fully functional college student who was able to function independently. There is no evidence that he would have become wholly dependent on the care of his mother, but for the compensable accident at work and resulting traumatic brain injury.

. . .

33. Dr. Prakken was deposed for a second time after the reopening of the record in this matter. Dr. Prakken is board certified in psychiatry and pain management. He reviewed the surveillance taken by Defendants and testified that the surveillance evidence did not show Plaintiff's mental or emotional states and that Plaintiff's impairment is not the kind of impairment you can easily see in a snapshot. Dr. Prakken testified that his opinion regarding Plaintiff's need for attendant care has not changed and that Plaintiff need around the clock passive medical monitoring. Dr. Prakken explained that Plaintiff was one of the most anxious and ill patients he has had in his practice and that Plaintiff required attendant care because he has grave difficulties from his traumatic brain injury. Dr. Prakken testified that Plaintiff's decision-making process is so concrete and centered on what he feels at that moment that it leaves him very impulsive and he doesn't have the capacity to modulate those feelings and understand that he may feel differently later. Dr. Prakken further testified

that Plaintiff's actions and his choices change moment to moment like his feelings do and that is something that requires management and he cannot live independently for even a moderate amount of time. For example, Dr. Prakken testified that living independently would leave Plaintiff impulsive about potential medication use and he would not be able to consistently pay bills, feed himself, or take care of his activities of daily living.

34. As a part of his anxiety, Plaintiff also suffers from obsessive compulsive disorder which according to Dr. Prakken is like a "double whammy, where he's not only in this very, very short decision-making loop based solely on how he feels, but how he feels is just profused with anxiety." Dr. Prakken testified that if Plaintiff did not have attendant care he would need to be institutionalized and that Plaintiff has difficulty getting out of his internal anxiety state long enough to attend to the social needs of others and to efficiently be able to hold a job. With respect to Plaintiff's relationship with Ms. Lloyd, Dr. Prakken testified that Plaintiff longs to be normal and has a tendency to attach to people in a profound way if they show caring or liking for him. Dr. Prakken Believed that Ms. Lloyd was likely giving Mrs. Reed some extended care support.

. . .

38. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that the surveillance evidence submitted by Defendants does not show any activity in excess of Plaintiff's physical limitations, does not show Plaintiff performing any work activity and only showed Plaintiff performing very limited activities of daily living. The Full Commission gives great weight to the opinion testimony of Dr. Prakken and finds as fact that the surveillance videos and reports do not show Plaintiff's mental and emotional state.

. . .

45. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Mrs. Reed has provided reasonable and medically necessary, attendant care services for Plaintiff for which she should be compensated. Plaintiff needs 24 hours per day, 7 days

per week attendant care services. Plaintiff has needed this level of care since his release from the hospital following his injury. As a result of his June 26, 1998 injury by accident, Plaintiff sustained severe injuries including fractures of the jaw, broken teeth, injuries to his head, shoulder, back and other body parts, and a traumatic brain injury. Plaintiff was hospitalized and underwent numerous surgeries for his injuries. Upon his release from the hospital, Plaintiff was no longer able to live by himself and he moved into his parents' house. Mrs. Reed testified that upon his release from the hospital, Plaintiff was no longer able to function independently and she had to "pretty much keep an eye on-on him." Defendants did not offer Plaintiff any attendant care services upon his release from the hospital and Mrs. Reed testified that she began providing Plaintiff attendant care services for his activities of daily living such as cooking, cleaning, and shopping for Plaintiff, transporting Plaintiff to his medical visits, and reminding Plaintiff to bathe and take his medication and assisting him with his physical and emotional needs. There are both active and passive elements to the medically necessary attendant care provided by Mrs. Reed. The passive elements of care include general monitoring of Plaintiff's medical and emotional state to some extent throughout each day and the fact that Mrs. Reed is "on-call" to help Plaintiff 24 hours per day 7 days per week. Even when Plaintiff is sleeping, which is sporadic and sometimes not at all on some nights, Mrs. Reed is available to assist Plaintiff. However, since Plaintiff is able to actually perform his own basic activities of daily living with prompting, spends long periods of time alone where only monitoring of him is required and asserts his desire to be independent by leaving home and going places on his own, the Full Commission finds that Mrs. Reed actually spends an average of 8 hours per day providing attendant care services to Plaintiff, even though he requires constant monitoring. The Full Commission further finds that Ms. Lloyd assists Plaintiff's mother with the passive monitoring Plaintiff requires when Plaintiff is visiting her.

Based on these findings of fact, the Commission made and entered the following conclusion of law and award:

3. With respect to attendant care services provided to Plaintiff from March 18, 2007 to March 17, 2011, Defendants did not have actual or written notice that Plaintiff needed attendant care services as a result of conditions related to his compensable injury and Plaintiff did not seek approval of those attendant care services until March 18, 2011 when he filed a Form 33. Plaintiff's request for attendant care services during the period from March 18, 2007 to March 17, 2011 was not sought within a reasonable time. N.C. Gen. Stat. §§ 97-2(19), 97-25; *Mehaffey v. Burger King*, __ N.C. __, 749 S.E.2d 252 (2013). However, Defendants had written notice through the Form 33 filed by Plaintiff on March 18, 2011 that Plaintiff needed attendant care services as a result of conditions related to his compensable injury. Under the circumstances of this case, the Full Commission concludes that Plaintiff sought approval from the Industrial Commission for attendant care services that were being provided by Mrs. Reed and that it is reasonable to retroactively compensate Mrs. Reed for attendant care services provided to Plaintiff from the date Defendants had actual notice that these services were being provided and Plaintiff was seeking reimbursement. *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 593, 264 S.E.2d 56, 63 (1980). As a result of his compensable injury, Plaintiff is entitled to attendant care services in the amount of 8 hours per day, 7 days a week. Plaintiff is entitled to retroactive compensation for the attendant care services provided by Mrs. Reed for 8 hours per day, 7 days per week, from March 18, 2011 and continuing to through the present. N.C. Gen. Stat. §§ 97-2(19), 97-25; *Mehaffey v. Burger King*, __ N.C. __, 749 S.E.2d 252 (2013).

. . .

1. Plaintiff's request for compensation for attendant care services provided to him from March 18, 2007 to March 17, 2011 is DENIED. Plaintiff's request for attendant care services provided to him beginning March 18, 2011 to the present and continuing is GRANTED. From March 18, 2011, through the present and continuing, Defendants shall pay Plaintiff's mother, Mrs. Reed, for 8 hours per day, 7 days per week of attendant care services she has provided and continues to provide to Plaintiff at a reasonable

rate agreed upon by the parties. The amounts awarded are subject to the attorneys' fee set forth below.

If these findings of fact are supported by competent evidence, they are conclusive on appeal, "even if there is evidence to support a contrary finding." *Kelly v. Duke University*, 190 N.C. App. 733, 738, 661 S.E.2d 745, 748 (2008) (citing *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981)). We consider the following testimony by Dr. Steven Prakken:

> Q. To your knowledge, has Christophor [sic] ever moved to any t -- any place other than the home of his mother, Elizabeth?
>
> A. No, not to my knowledge.
>
> Q. And, to your knowledge, has he continued to require the attendant care you have prescribed and testified as medically necessary in his case?
>
> A. Yes, his condition has not changed.
>
> Q. And, in your opinion, is that attendant care more likely than not going to be required in the future by his mother or friends and family members regardless of where he may be?
>
> A. Attendant -- Attendant care will be needed.
>
> . . .
>
> In my clinical experience, [Chris] is one of the most anxious and ill people that I have in my practice.
>
> . . .
>
> His actions, and his choices, and his decisions change moment-to-moment like his feelings do. That is something that requires management. That is something that cannot live independently for an extern -- for even a moderate amount of time, certainly not for an extended period of time.
>
> It will leave him impulsive about potentially medication use. It will leave him impulsive about taking a trip that he can't survive doing, like some f -- you know, f -- a thousand mile drive to somewhere that he suddenly has kind of a sudden passion to go do. He won't be able to be

consistent about paying bills, or feeding himself, or taking care of his activities of daily living consistently.

. . .

Obsessive compulsive disorder, which everybody is diagnosing him with, is an anxiety spectrum illness[.]

. . .

And, so, that's -- so, him, it's kind of a double whammy where he's not only in this very, very short decision-making loop based solely on how he feels, but how he feels is just perfused with anxiety. And that combination just makes his life quite miserable.

And it's not something that he's going to be able to do -- sorry -- his -- his life is not something he's going to be able to manage or handle on his own for any -- even mildly extended period of time.

Q. In your previous deposition, you indicated if he did not have attendant care, that he would probably have to be institutionalized or in some type of group facility. Is that still your opinion?

A. Clearly. . . .

. . .

Q. And would it be helpful to Chris to visit friends in his own age group, such as Jessica Lloyd?

A. Yes, it would be helpful for him to -- to actually visit with any age group. And if it happens to be somebody in his own age group, that's even better, yes.

. . .

So, [Ms. Lloyd], to me, is most likely giving the mom some attendant care support, so she can actually -- mom can have a day or an ert -- emergency, or a -- a night out without Chris, with somebody. I mean -- I mean, I'm sure she just goes nuts with him as much of the time -- with -- with -- with -- with the amount of time she has to spend with him.

. . .

> Q. And from your familiarity with the surveillance evidence, just generally, would surveillance evidence show his mental and emotional status in any way?
>
> A. It would not.
>
> . . .
>
> Q. And if the surveillance evidence showed many days when no activity was observed, would that be consistent with Chris's condition?
>
> A. Certainly.

In addition to the deposition of Dr. Prakken, the Commission heard testimony from Mr. Reed's mother, Mrs. Elizabeth Reed. The following excerpts of her testimony are relevant to our review:

> Q. The – can you tell us what Chris' condition was before his admittedly compensable injury?
>
> A. Yes, Chris was perfectly normal with no disabilities. He had graduated from high school. He had graduated from Lewis College and he was a student at Western Carolina University and he came home for a summer job and that's when the doors fell on him.
>
> . . .
>
> Q. Have you taken him to most of these medical appointments?
>
> A. Yes, sir. I have.
>
> . . .
>
> Q. And can you tell us what your role has been in this process since the injury in June of 1998?
>
> A. . . . I tried to take care of him the best that I could. . . . be there to – to monitor him, to sit at the hospital, to sit at the doctor's offices, prepare whatever food we needed to prepare for him . . . . I realized after the accident that he was no longer able to take care of any money that he had . . . we have to pretty much keep an eye on – on him because of the depression . . . . We have had case managers on his case before and communicating with them, communicating with the doctors, dispensing his medications, just doing what a parent would do for their child.

. . .

Q. Can you tell us from your own observations what problems, if any, he has with – with sleeping and resting?

A. He has difficulty with sleeping. . . .

. . .

Q. Does he need help shopping?

A. He does. . . .

. . .

Q. Is he able to cook for himself?

A. Well, he used to cook a lot for himself before the accident. He, like I said, he lived independently. . . . [A]fter the accident we thought we could resume letting him take care of himself which that's what I would have preferred but he would forget and leave the stove on. So, he is not allowed to use the stove. . . .

Q. So, do you do most of the cooking?

A. I do.

. . .

Q. Does he need reminders about bathing and shaving and things like that?

A. He does. . . .

. . .

Q. And is the need for monitoring somethings that's present twenty-four hours a day, seven days a week?

. . .

A. Yes . . .

The testimony by Dr. Prakken and Mrs. Reed is competent evidence that supports the Commission's findings of fact challenged by Defendants. Dr. Prakken's testimony supports the Commission's finding that attendant care services are medically necessary for Mr. Reed. Mrs. Reed's testimony describing the attendant care she provides to Mr. Reed to help him with hygiene, shopping, cooking, taking medications, and managing his finances supports the Commission's finding that the attendant care services she provides are reasonable.

While there may be additional contrary evidence in the record, it is the Commission that "is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adam v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). As such, we conclude that competent evidence supports the Commission's findings of fact.

Because we hold the Commission's findings of fact are supported by competent evidence, they are conclusive on appeal. *Id.* at 681, 509 S.E.2d at 414 (citing *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)). The Commission's findings establish that while Mr. Reed requires attendant care services twenty-four hours per day, seven days per week, these services are both "active and passive." The findings further establish that Mrs. Reed is merely "on-call" twenty-four hours per day, seven days per week, as opposed to actively monitoring Mr. Reed twenty-four hours per day, seven days per week. This in turn, supports the Commission's conclusion of law that Mr. Reed's attendant care compensation for Mrs. Reed is only reasonable and necessary for eight hours per day, seven days per week.

We conclude that the Commission's findings of fact are supported by competent evidence and that these findings support its conclusions of law. Accordingly, we affirm the Commission's award of attendant care compensation to Mr. Reed.

Conclusion

For the foregoing reasons, we dismiss Defendants' appeal of the Commission's award of attorney's fees and affirm the Commission's award of attendant care.

DISMISSED IN PART AND AFFIRMED IN PART.

Judge BRYANT concurs.

Judge TYSON concurs in part and dissents in part with separate opinion.

TYSON, Judge, concurring in part, dissenting in part.

Under our standard of review of appeals from the Industrial Commission, competent evidence supports the Commission's award of attendant care to a third-party medical provider. The majority's

conclusion to dismiss Defendants' appeal from the Commission's unauthorized award of attorney's fees from attendant care compensation, by asserting that issue was not properly before the Full Commission and is not properly before this Court is error. I respectfully dissent from that conclusion.

Whether the Industrial Commission has statutory or other authority to award attorney's fees from attendant care medical compensation due to a third-party medical provider was addressed before the Full Commission, was properly preserved by Defendants, and is properly before this Court. The Industrial Commission is without any lawful authority, and erred as a matter of law by ordering the payment of additional Plaintiff's attorney's fees from the award of attendant care medical compensation due and payable to a third-party medical provider.

I. Plaintiff's Motion to Dismiss Defendant's Appeal

More than six months after the record on appeal was settled and after Defendants' brief was filed, Plaintiff filed a motion to dismiss Defendants' appeal. Plaintiff argues this Court is without subject matter jurisdiction to review the attorney's fee award because: (1) Defendants failed to properly preserve their challenge to the attorney's fee award in their Form 44 before the Full Commission; (2) Defendants lack standing to contest the award of Plaintiff's attorney's fee; and (3) jurisdiction lies solely with the Wake County Superior Court, and Defendants have appealed to the improper tribunal. Defendants fully responded to and challenged each assertion in Plaintiff's motion.

The majority disposes of Defendants' appeal solely on the grounds Defendants failed to preserve their challenge to the attorney's fee award in their Form 44 before the Full Commission. I respectfully disagree to dismiss this issue which was fully addressed before the Commission, and also address the additional two threshold jurisdictional issues asserted in Plaintiff's motion to dismiss to reach the substantive merits of Defendants' appeal: the legality of awarding attorney's fees out of payments due for attendant care delivered by a third-party medical provider.

A. Preservation of the Issue Before the Industrial Commission

The majority's opinion partially dismisses Defendants' appeal, and holds Defendants failed to show before this Court that the issue of the award of attorney's fees was properly preserved before and addressed by the Full Commission. I disagree.

The majority notes, after giving sufficient notice of appeal from the Deputy Commissioner to the Full Commission, an appellant must

complete a Form 44 *Application for Review*, which is supplied by the Commission. The Form 44 should assert the grounds for the appeal "with particularity." Workers' Comp. R. of N.C. Indus. Comm'n 701(2), 2011 Ann. R. (N.C.) 1070. The appellant is required to file and serve the completed Form 44 and an accompanying brief within the specified time limitations "unless the Industrial Commission, in its discretion, waives the use of the Form 44." *Id.* Defendants clearly met all these requirements.

If an appellant fails to state "with particularity" the grounds for appeal, such grounds are "deemed abandoned and argument thereon shall not be heard before the Full Commission." Workers' Comp. R. of N.C. Indus. Comm'n 701(2)-(3), 2011 Ann. R. (N.C.) 1070. The appellant may "compl[y] with Rule 701(2)'s requirement to state the grounds for appeal with particularity by timely filing their brief after giving notice of their appeal to the Full Commission." *Cooper v. BHT Enters.*, 195 N.C. App. 363, 368, 672 S.E.2d 748, 753 (2009).

The majority correctly recognizes our Court has refused to place "form over substance" with regard to the Rule 701 requirements. Plaintiff was and is clearly on notice of Defendants' challenges to the award of attorney's fees out of the challenged award of attendant care medical compensation. Defendants' Form 44 clearly challenges the Deputy Commissioner's "Award 2" as "contrary to law," which award deals solely with attorney's fees. Defendants also filed a motion for reconsideration in the Full Commission, which also deals specifically with attorney's fees.

In *Tucker v. Workable Company*, 129 N.C. App. 695, 700, 501 S.E.2d 360, 365 (1998), the defendant argued the Commission had erred by failing to modify the amount of the plaintiff's average weekly wage. The Full Commission determined the average weekly wage issue was not preserved and did not consider the issue. *Id.* at 700-701, 501 S.E.2d at 365.

This Court noted "that if findings of fact made by the Industrial Commission 'are predicated on an erroneous view of the law or a misapplication of the law, they are not conclusive on appeal.' " *Id.* at 701, 501 S.E.2d at 365 (quoting *Radica v. Carolina Mills*, 113 N.C. App. 440, 446, 439 S.E.2d 185, 189 (1994)). Our Court concluded that while Rule 701 requires the appellant to state the grounds for appeal with particularity,

> [t]his Court has held that when the matter is "appealed" to the full Commission pursuant to G.S. 97-85, it is the duty and responsibility of the full Commission to *decide all of the matters in controversy between the parties. Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 374 S.E.2d 610 (1998). In *Joyner*, we said, "[i]nsamuch as the Industrial

> Commission decides claims without formal pleadings, it is the duty of the Commission to *consider every aspect of plaintiff's claim* whether before a hearing officer or on appeal to the full Commission." *Id.* at 482, 374 S.E.2d at 613.

Id. (quoting *Vieregge v. N.C. State University*, 105 N.C. App. 633, 638, 414 S.E.2d 771, 774 (1992), *disc. review denied*, 345 N.C. 354, 483 S.E.2d 192 (1997)) (emphasis original). In *Tucker*, this Court considered the issue of the plaintiff's average weekly wage, and held the Commission erred in its determination of the amount of the plaintiff's average weekly wage. *Id.* at 702, 501 S.E.2d at 365; *see also Hauser v. Advanced Plastiform, Inc.*, 133 N.C. App. 378, 388-89, 514 S.E.2d 545, 552 (1999) (relying upon the quoted language from *Tucker*, and holding the issue of attorney's fees was before the Full Commission, even though the plaintiff did not raise the issue in the Form 44).

The majority recognizes *Cooper*'s controlling authority, but declines to address the issue of attorney's fees and grants Plaintiff's tardy motion to dismiss, because Defendants did not include a copy of their supporting legal brief to the Full Commission in the long-settled record on appeal.

The record on appeal was settled by the parties and filed in with this Court on 15 September 2015. Plaintiff's motion to dismiss was filed over six months later on 14 April 2016. Plaintiff does not show any prejudice and cannot argue he failed to receive adequate notice of Defendants' appeal from the issue of the award of attendant care medical compensation and the additional Plaintiff's attorney's fees to be paid therefrom. Adequate notice is "the underlying consideration behind the spirit of Rule 701." *Lowe v. Branson Auto.*, __ N.C. App. __, __ , 771 S.E.2d 911, 919-20 (2015).

The Full Commission reduced the Deputy's award of attendant care, which also reduced any purported attorney's fee to be paid therefrom. Plaintiff does not challenge that the Commission clearly considered and ruled upon Defendants' arguments regarding the award of medical attendant care compensation payable to a third-party provider and Plaintiff's attorney's fee to be paid from those proceeds. The attorney's fee award was an inseparable part and parcel of the award of attendant care compensation, which was undoubtedly before the Full Commission and is properly before this Court now. The Commission's purported award of attorney's fees from attendant care compensation "is predicated on an erroneous view of the law or a misapplication of the law," and "is not conclusive on appeal." *Tucker*, 129 N.C. App. at 701, 501 S.E.2d at 365.

Like in *Tucker* and *Hauser*, "the opinion and award of the Full Commission indicates that the issue of attorneys' fees was before the Commission." *Hauser*, 133 N.C. App. at 388, 514 S.E.2d at 552. This issue was preserved and is properly before this Court. Plaintiff's motion to dismiss is wholly without merit, and should be denied.

B. Standing to Contest the Award of Plaintiff's Attorney's Fees

Plaintiff's motion to dismiss also argues Defendants have not suffered pecuniary loss from the award of attorney's fees to be paid from proceeds of medical compensation, and have not suffered an injury to confer jurisdiction upon this Court. This issue is settled law.

This Court concluded in *Saunders v. ADP TotalSource Fi Xi, Inc.*, __ N.C. App. __, __, 791 S.E.2d 466, 472 (2016):

> Having both the duty and right to direct medical care and treatment provided to their injured employee, Defendants have a continuing interest in the pool of resources available for medical care and benefits for their employees' injuries and assuring the medical providers do not reduce care and are fully compensated for services they render to an injured employee. Defendants have shown their legal rights have been denied or directly and injuriously affected by the superior court's purported . . . award of attorney's fees from funds stipulated as medical compensation, and have standing to challenge that order before this Court.

(citations and quotation marks omitted).

Also, because Plaintiff's additional attorney's fees were ordered to be paid from the proceeds of the retroactive attendant care compensation awarded by the Commission and due a third-party medical provider, which Defendants clearly have standing to appeal and have, in fact, properly appealed, Defendants also have standing to appeal from any purported award of attorney's fees associated with and to be deducted from those awarded attendant care proceeds. *See id.*

Defendants' arguments against the overall compensation and the attorney's fees include as a common thread: the contention that Plaintiff's counsel and health care providers have directed his care and rehabilitation in such a manner to undermine his ability to rehabilitate, and creates for Plaintiff, his mother, and counsel an additional pecuniary interest in Plaintiff remaining in attendant care for the foreseeable future, never rehabilitating and returning to work. Defendants' standing to dispute this issue and the resultant attorney's fee claim before

the Commission would be rendered meaningless, without standing to appeal from the Commission's order.

Furthermore, the attorney's fee is part of the attendant care medical compensation awarded by the Commission, which Defendants, as parties before the Commission, clearly have standing to challenge on appeal and have correctly appealed to this Court. *Id.*; N.C. Gen. Stat. § 97-86 (2015). Plaintiff's argument is wholly without merit.

C. Proper Tribunal for Appeal

Plaintiff also argues this Court does not have subject matter jurisdiction, because the issue Defendants contest regarding the attorney's fees is within the sole jurisdiction of the superior court. The law is also settled on this issue.

The issue of whether attorney's fees may be deducted from the proceeds of an award of third-party attendant care medical compensation and paid directly to Plaintiff's attorney is properly before this Court. In *Saunders*, this Court stated:

> [T]he superior court in its order apparently found facts and ruled far beyond an appellate review of the "reasonableness" of the attorney's fee, for legal services rendered to the injured worker by his attorney. The superior court purported to adjudicate a question of workers' compensation law, *i.e.*, whether the Commission may order an attorney's fee to be paid from the award of medical compensation. This determination is outside the scope of the superior court's appellate jurisdiction under N.C. Gen. Stat. § 97-90(c), and rests within the statutes governing the Industrial Commission, subject to appeal to this Court. N.C. Gen. Stat. § 97-91 (2015). Our Court has determined "medical compensation is solely in the realm of the Industrial Commission, and § 97-90(c) gives no authority to the superior court to adjust such an award under the guise of attorneys' fees. Doing so constitutes an improper invasion of the province of the Industrial Commission, and constitutes an abuse of discretion." *Palmer I*, 157 N.C. App. at 635, 579 S.E.2d at 908.

Saunders, __ N.C. App. at __, 791 S.E.2d at 476-77.

The appeal from the Industrial Commission's order, which adjudicated a question of worker's compensation law, is properly before this Court *de*

novo, and not the Wake County Superior Court for any "reasonableness" review. *Id.* Plaintiff's motion and argument are wholly without merit.

II. Award of Attorney's Fees

Defendants argue the Commission cannot award attorney's fees under these facts, and erred as a matter of law by purporting to award Plaintiff's attorney additional fees to be paid directly from the award of attendant care compensation payable to a third-party medical provider. I agree.

A. Standard of Review

The Commission's award of attorney's fees is a conclusion of law, which is reviewable by this Court *de novo*. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998).

B. Analysis

The Full Commission purported to award Plaintiff's attorney a fee of twenty-five percent, to be paid directly from the proceeds of all retroactive attendant care medical compensation awarded to Ms. Reed from 18 March 2011 until 13 May 2015, the date of the Commission's award. The Commission denied Plaintiff's attorney's request for twenty-five percent of future attendant care medical payments. Defendants were ordered to deduct twenty-five percent from the accrued retroactive proceeds awarded to a third-party medical provider, and to pay it directly to Plaintiff's counsel. Defendant correctly asserts this attorney's fee award by the Commission was ordered without any statutory basis, and is not authorized as a matter of law.

The employer is statutorily required to provide "medical compensation" as benefits to an injured employee. N.C. Gen. Stat. § 97-25 (2015). Medical compensation is defined as services "as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability." N.C. Gen. Stat. § 97-2 (2015). "[An] employer's right to direct medical treatment (including the right to select the treating physician) attaches once the employer accepts the claim as compensable." *Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 624, 540 S.E.2d 785, 788 (2000).

The Workers Compensation Act presumes the injured worker will heal, recover from the injuries for which he is receiving medical care, and will return to work. *Effingham v. Kroger Co.*, 149 N.C. App. 105, 114-15, 561 S.E.2d 287, 294 (2002) ("Temporary disability benefits are for

a limited period of time. There is a presumption that [the employee] will eventually recover and return to work. Therefore, the employee must make reasonable efforts to go back to work or obtain other employment." (internal citation and quotation marks omitted)).

Here, Plaintiff was injured after a month on the job on 26 June 1998. Plaintiff retained counsel soon after the injury. On 18 March 2011, Plaintiff filed a Form 33 to request a hearing before the Commission, and alleged Defendants had failed to pay attendant care medical compensation to which he was entitled. Three months later, in June 2011, the General Assembly amended N.C. Gen. Stat. § 97-2, to include attendant care services within the definition of "medical compensation."

N.C. Gen. Stat. § 97-2(19) (2015) specifically defines "medical compensation" to include "attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission[.]" Prior to the statute's amendment, and at the time Plaintiff's claim for attendant care arose, the phrase "other treatment" set forth in N.C. Gen. Stat. § 97-2(19) had been interpreted to include attendant care medical services. *See Mehaffey v. Burger King*, 367 N.C. 120, 124-25, 749 S.E.2d 252, 255 (2013) (citing *Ruiz v. Belk Masonry Co.*, 148 N.C. App. 675, 681, 559 S.E.2d 249, 253-54, *appeal dismissed and disc. rev. denied*, 356 N.C. 166, 568 S.E.2d 610 (2002)). All parties stipulated during oral arguments and the majority correctly notes that payment for third-party provided "attendant care services" constitutes "medical compensation".

1. *Palmer v. Jackson ("Palmer I")*

Medical compensation paid by the employer for medical services previously rendered are payments and reimbursements to third-party providers. These payments are neither entitlements nor indemnity wages or benefits payable to the injured worker or his attorney. Payments for medical compensation are not subject to any offsets from those proceeds to pay Plaintiff's attorney additional fees under the Worker's Compensation Act. *Palmer v. Jackson*, 157 N.C. App. 625, 579 S.E.2d 901 (2003) ("*Palmer I*").

In *Palmer I*, the injured employee had incurred substantial medical bills owed to the University of North Carolina Hospitals and University of North Carolina Physicians and Associates. *Id.* at 626, 579 S.E.2d at 903. Plaintiff's attorneys "exert[ed] much time, money and expertise," to prove to the Commission that that the plaintiff's heatstroke was compensable as an occupational disease. *Id.* As part of the award, the

defendant-employer was ordered to pay for past and future medical expenses incurred by the plaintiff. *Id.* at 627, 579 S.E.2d at 903.

The superior court in *Palmer I* awarded twenty-five percent of both the wage indemnity and the medical compensation proceeds, either already paid or still outstanding, to be paid to plaintiff's attorneys. *Id.* at 630, 579 S.E.2d at 906. This Court noted, "[t]he trial court's order effectively reduced the award of medical compensation to the hospitals. As can be gleaned from the order, the trial court determined that [the plaintiff's attorneys] had done the hospitals a great service, and therefore felt that the deduction was justified in the interest of fairness and equity." *Id.*

On appeal by the defendant-employer, this Court held "[t]he trial court may not […] reduce the compensation paid to medical providers in order to fund the fee award." *Id.* at 638, 579 S.E.2d at 909. Here, like in *Palmer I* and contrary to this Court's holding, the Commission, without any statutory or other authority, purported to order additional attorney's fees to be deducted from the proceeds of attendant care medical compensation due to a third-party medical provider. *Id.*

Under *Palmer I*, and N.C. Gen. Stat. 97-90 this purported award is clearly prohibited and unlawful. We are bound by our prior decisions. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.") Plaintiff has failed to demonstrate the rule set forth in *Palmer I* does not control the issue before us. *Id.*

This Court later revisited the *Palmer* case in *Palmer v. Jackson*, 161 N.C. App. 642, 590 S.E.2d 275 (2003) ("*Palmer II*"). The Court upheld the Commission's determination that the plaintiff's caretakers were entitled to payment of $7.00 per hour and interest accrued for providing past and future attendant medical care to the plaintiff. The defendants were ordered to pay the plaintiff's counsel "a fee equal to twenty-five percent of the lump sum amount retroactively paid for attendant care for attorney's fees." *Id.* at 650, 590 S.E.2d at 279. Nothing in the Commission's award required the fees to be paid from the compensation due to a third-party medical provider.

Defendants in *Palmer II* did not argue before this Court that the Commission had erred by awarding an attorney's fee to be paid from the award of attendant care medical compensation. The plaintiff argued "the Commission failed to address whether defendants wrongfully defended the claim for retroactive care without reasonable grounds."

Id. at 649, 590 S.E.2d at 279. This Court overruled the plaintiff's argument and determined, "[i]t is apparent that the Commission did consider plaintiff's claim and awarded those fees which it believed to be appropriate." *Id.* at 650, 590 S.E.2d at 279.

This Court did not rule upon the Commission's authority to award attorney's fees to be paid directly from the proceeds of attendant care medical compensation due to a third-party provider absent statutory authority. The *Palmer II* case is wholly uninstructive on this issue.

2. "[E]very litigant is responsible for his or her own attorney's fees."

The statute and this Court's decision in *Palmer I* are wholly consistent with the long established common and statutory law of North Carolina regarding the award of attorney's fees. "[T]he general rule has long obtained that a successful litigant *may not recover attorneys' fees*, whether as costs or as an item of damages, unless such a recovery is *expressly authorized by statute*." *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980) (citing *Hicks v. Albertson*, 284 N.C. 236, 200 S.E. 2d 40 (1972)) (emphasis supplied).

"Even in the face of a carefully drafted contractual provision indemnifying a party for such attorney's fees as may be necessitated by a successful action . . . , our courts have consistently refused to sustain such an award absent statutory authority therefor." *Id.* at 289, 266 S.E.2d at 814-15 (citing *Howell v. Roberson*, 197 N.C. 572, 150 S.E. 32 (1929); *Tinsley v. Hoskins*, 111 N.C. 340, 16 S.E. 325 (1892)); *see also Bailey v. State*, 348 N.C. 130, 159, 500 S.E.2d 54, 71 (1998) ("[T]he general rule in this country [is] that every litigant is responsible for his or her own attorney's fees.")

The Workers' Compensation Act provides very specific circumstances by the General Assembly under which the Commission may award an attorney a fee for representation of the injured employee, none of which apply here. *See* N.C. Gen. Stat. § 97-88 (2015) (allows attorney's fees to an injured employee if the insurer has appealed a decision to the Full Commission or to any court, and on appeal, the Commission or court has ordered the insurer to make, or continue making, payments of benefits to the employee); N.C. Gen. Stat. § 97-88.1 (2015) (where a hearing was brought, prosecuted, or defended without reasonable ground, the Commission may assess the whole cost of the proceedings including reasonable fees for either party's attorney upon the party who has brought or defended them); N.C. Gen. Stat § 97-90(c) (2015) (allows for Commission to award fees resulting from a contract between the employee and his or her attorney).

The Workers' Compensation Act contains no statutory authority to allow the Commission to award an additional plaintiff's attorney's fee to be paid from an award of attendant care medical compensation provided by and due a third-party medical provider. In the absence of specific statutory authority for such award, the Commission is without any authority whatsoever to award attorney's fees therefrom, and the long-standing common law and general rule controls. Each party is responsible to pay for his or her own attorney's fees. *Enterprises*, 300 N.C. at 289, 266 S.E.2d at 814.

Our binding precedent in *Palmer I*, and the well-settled Supreme Court precedents adopting and affirming the common law rule controls the Commission's unlawful award of additional Plaintiff's attorney's fees. Absent specific statutory authority for fee shifting, a litigant is responsible to pay his or her own attorney's fees. *Id.* The Commission is without any statutory or case law authority to award Plaintiff additional attorney's fees to be deducted and paid from proceeds of attendant care or other compensation due and payable to a third party medical provider. *Palmer I*, 157 N.C. App. at 638, 579 S.E.2d at 909. That portion of the Commission's Opinion and Award is contrary to the Workers' Compensation Act and controlling case law, and should be vacated.

III. Conclusion

Defendants have standing to bring this appeal to this Court as parties aggrieved by entry of the Industrial Commission's award of attendant care medical compensation. *Saunders*, __ N.C. App. at __, 791 S.E.2d at 472. All issues raised by Defendants before the Deputy Commissioner and Full Commission are properly appealed and before this Court. Plaintiff's tardy motion to dismiss is without merit, and should be denied in its entirety.

Payments for attendant care provided by a third-party, as conceded by all counsel, are defined as medical compensation under N.C. Gen. Stat. § 97-2(19) and in *Palmer I*, 157 N.C. App. at 638, 579 S.E.2d at 909. Under *Palmer I*, medical compensation proceeds due a third-party provider cannot be reduced or offset to fund additional fees for Plaintiff's attorney. *Id.*

No statutory authority exists under the Workers' Compensation Act or under any case law for the Commission to order payment of Plaintiff's attorney's fees from an award of attendant care services provided by, and from medical compensation proceeds payable and due, a third-party provider. In the absence of specific statutory authority for the

Commission to order such award, the North Carolina precedents affirming the long standing common law and general rule controls: "every litigant is responsible for his or her own attorney's fees." *Bailey*, 348 N.C. at 159, 500 S.E.2d at 71.

The Commission is without statutory authority, and erred as a matter of law by purporting to award Plaintiff's attorney an additional fee to be offset from the proceeds of attendant care compensation that is awarded and payable to a third-party medical provider. *Id.* The opinion and award of the Full Commission on this issue should be vacated. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
JAMES PAUL BRODY

No. COA16-336

Filed 7 February 2017

Search and Seizure—motion to suppress evidence—residence—search warrant—confidential informant—probable cause

The trial court did not err in a drug trafficking case by denying defendant's motion to suppress evidence obtained from his residence pursuant to a search warrant. The search warrant application relying, principally on information obtained from a confidential informant, was sufficient to support a magistrate's finding of probable cause.

Appeal by defendant from judgment entered 1 October 2015 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 September 2016.

Joshua H. Stein, Attorney General, by Jeremy D. Lindsley, Assistant Attorney General, for the State.

Knox, Brotherton, Knox & Godfrey, by Allen C. Brotherton, for defendant-appellant.

DAVIS, Judge.

In this appeal, we consider whether a search warrant application relying principally upon information obtained from a confidential informant was sufficient to support a magistrate's finding of probable cause. James Paul Brody ("Defendant") appeals from the trial court's order denying his motion to suppress evidence obtained from his residence pursuant to a search warrant. Because we conclude that the affidavit in support of the search warrant application was sufficient to establish probable cause, we affirm.

Factual and Procedural Background

On 14 October 2014, the Charlotte-Mecklenburg Police Department began an investigation into possible drug trafficking by Defendant. On 28 October 2014, Detective E.D. Duft applied for a warrant to search Defendant's home located at 3124 Olde Creek Trail in Matthews, North Carolina. The application was supported by an affidavit in which Detective Duft described his investigation of Defendant, including information about Defendant's drug dealing activity that was obtained through a confidential informant (the "CI"). A magistrate issued the search warrant that same day.

Upon executing the search warrant, Detective Duft seized evidence of illegal drugs in Defendant's home. On 30 March 2015, Defendant was indicted for maintaining a place to keep controlled substances, possession with intent to sell or deliver marijuana, possession of marijuana, possession with intent to sell or deliver cocaine, carrying a concealed weapon, and possession of drug paraphernalia.

On 19 August 2015, Defendant filed a motion to suppress the evidence seized pursuant to the search warrant, arguing that the affidavit submitted by Detective Duft was insufficient to establish probable cause to issue the warrant. The motion was heard before the Honorable Carla N. Archie in Mecklenburg County Superior Court on 1 October 2015. After hearing arguments from the parties, the trial court denied the motion.

That same day, pursuant to a plea agreement, Defendant subsequently pled guilty to the charge of possession with intent to sell or deliver cocaine, and the remaining charges were dismissed. As part of the plea arrangement, Defendant reserved his right to appeal the denial of his motion to suppress. The trial court sentenced Defendant to 5 to 15 months imprisonment, suspended the sentence, and placed him on 18 months of supervised probation. On 22 December 2015, the trial court issued a written order denying Defendant's motion to suppress. Defendant filed a timely notice of appeal.

Analysis

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress evidence found during the search of his home because the search warrant obtained by Detective Duft was not supported by probable cause. A defendant "is entitled to mandatory appellate review of an order denying a motion to suppress when his conviction judgment was entered pursuant to a guilty plea" if he expressly preserved the right to appeal that ruling. *State v. Banner*, 207 N.C. App. 729, 731, 701 S.E.2d 355, 357 (2010). Here, because Defendant specifically reserved his right to appeal when he entered his guilty plea, his appeal is properly before us.

An application for a search warrant must include (1) a statement that there is probable cause to believe that items subject to seizure may be found in the place described; and (2) "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 (2015). In determining whether to issue a warrant, the magistrate must "make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 257-58 (1984) (citation omitted).

When the motion to suppress is based upon a defendant's contention that the search warrant obtained was not supported by probable cause, the trial court must determine whether, based on the totality of the circumstances, "the evidence as a whole provides a substantial basis for concluding that probable cause exists." *State v. Sinapi*, 359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005) (citation and quotation marks omitted); *see also State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) ("The standard for a court reviewing the issuance of a search warrant is whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." (citation and quotation marks omitted)).

> Probable cause . . . means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause, nor does it import absolute certainty. . . . .

> If the apparent facts set out in an affidavit for a search warrant are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a search warrant.

State v. Campbell, 282 N.C. 125, 128-29, 191 S.E.2d 752, 755 (1972) (internal citations and quotation marks omitted).

In the present case, Detective Duft's affidavit in support of his warrant application stated, in pertinent part, as follows:

> Detective E. Duft, #1847, has received information from a confidential and reliable informant that James Paul BRODY is possessing and selling cocaine from his residence at 3124 Olde Creek Trail, Matthews, NC.
>
> On October 14, 2014, investigators received information and began an investigation into the cocaine trafficking activities of James Paul BRODY. This informant has arranged, negotiated and purchased cocaine from BRODY under the direct supervision of Detective Duft. This informant has been to 3124 Olde Creek Trail, Matthews, NC within the past 48 hours and has observed BRODY possessing and selling cocaine. This informant has been to this location on approximately 30 plus occasions and has observed BRODY possessing and selling cocaine on each occasion. This informant has also described seeing a firearm at this location.
>
> Investigators have known this informant for approximately two weeks. This informant has provided information on other persons involved in drug trafficking in the Charlotte area which we have investigated independently. Through interviews with the informant, detectives know this informant is familiar with drug pricing and how controlled substances are packaged and sold for distribution in the Charlotte area.
>
> Detective E.D. Duft, #1847, has eighteen (18) years of law enforcement experience with three (3) years as a street drug interdiction officer, five (5) years as a vice and narcotics detective for the Charlotte-Mecklenburg Police Department and ten (10) years as a Task Force Officer for the Drug Enforcement Administration (DEA).

> [Detective Duft] has attended narcotics schools on both the state and federal level including: a two day Street Drug Interdiction school, an Undercover Drug School, a Pipeline Drug School, Jetway Drug Training, DEA Basic Drug Investigators School, DEA Task Force Officer school, Rave and Club Drug Investigations, Financial Investigations, Telephone Exploitation and Basic, Advanced Internet Communication Exploitation and Clandestine Lab Training and certification.

Based upon this affidavit, the magistrate determined that there was probable cause to issue the search warrant. The trial court subsequently ruled that the magistrate had properly granted the warrant, concluding that (1) "[s]ufficient detail was present in the search warrant to assure the magistrate of the informant's reliability"; (2) "[t]here was a substantial basis to believe that a fair probability existed that a controlled substance would be found in the residence identified in the search warrant"; and (3) "[p]robable cause existed to issue the search warrant."

On appeal, Defendant argues that probable cause was not established because the affidavit failed to show that the CI was reliable and that drugs were likely to be found in Defendant's home. It is well established that probable cause may be shown through the use of information provided by informants. *State v. Brown*, 199 N.C. App. 253, 257, 681 S.E.2d 460, 463 (2009). "In utilizing an informant's tip, probable cause is determined using a totality-of-the-circumstances analysis which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip." *State v. Holmes*, 142 N.C. App. 614, 621, 544 S.E.2d 18, 22 (2001) (citation and quotation marks omitted).

> The indicia of reliability of an informant's tip may include (1) whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be independently corroborated by the police.

Brown, 199 N.C. App. at 258, 681 S.E.2d at 463 (citation and quotation marks omitted).

"A known informant's information may establish probable cause based upon a reliable track record in assisting the police." *State v. Leach*, 166 N.C. App. 711, 716, 603 S.E.2d 831, 835 (2004), *appeal dismissed*, 359 N.C. 640, 614 S.E.2d 538 (2005); *see also State v. McRae*, 203 N.C. App.

319, 324, 691 S.E.2d 56, 60 (2010) ("[A] tip from a reliable, confidential informant may supply probable cause[.]").

Our caselaw emphasizes the importance of distinguishing between anonymous informants and informants who are known to the officers and have provided reliable information in the past. "[T]he difference in evaluating an anonymous tip as opposed to a reliable, confidential informant's tip is that the overall reliability is more difficult to establish, and thus some corroboration of the information or greater level of detail is generally necessary." *McRae*, 203 N.C. App. at 325, 691 S.E.2d at 61 (citation, quotation marks, and brackets omitted); *see also State v. Crowell*, 204 N.C. App. 362, 366, 693 S.E.2d 370, 373 (2010) (concluding that corroboration by police was not required to establish reliability of tip provided by known informant who had demonstrated past reliability); *Chadwick*, 149 N.C. App. at 203, 560 S.E.2d at 209 ("A known informant's information may establish probable cause based on a reliable track record, or an anonymous informant's information may provide probable cause if the caller's information can be independently verified.").

We find instructive our decision in *State v. Barnhardt*, 92 N.C. App. 94, 373 S.E.2d 461, *disc. review denied*, 323 N.C. 626, 374 S.E.2d 593 (1988). In *Barnhardt*, a detective stated in his affidavit supporting a search warrant application that he had received information from a confidential informant who had "personally observed a large amount of cocaine at the residence of [the defendant]" within 24 hours prior to the affidavit being sworn and had provided a detailed description of the outside of the defendant's home. *Id.* at 97, 373 S.E.2d at 463. The detective's affidavit also reflected that the informant knew what cocaine looked like because he had purchased the drug in the past. *Id.* at 98, 373 S.E.2d at 463. The detective acknowledged in the affidavit that the informant had "never given any information to me before." *Id.*

Based on this affidavit, the magistrate found probable cause to issue a search warrant for the defendant's home. On appeal, we held that the affidavit was sufficient to support the magistrate's probable cause determination, explaining that it

> provided timely information, exact detail of the premises to be searched, and it described the informant's ability to identify cocaine. These circumstances, supplemented by the officer's credentials and experience, amount to a substantial basis for the magistrate's determination that probable cause existed.

Id.

The affidavit in the present case provided an even stronger basis for a probable cause finding. Here, Detective Duft's affidavit stated that investigators had known the CI for two weeks, the CI had previously provided them with information on other persons involved in drug trafficking in the area, and Detective Duft considered the CI to be a "reliable informant." The CI had demonstrated to Detective Duft that he was "familiar with drug pricing and how controlled substances are packaged and sold for distribution in the Charlotte area." Moreover, the CI had previously "arranged, negotiated and purchased cocaine from [Defendant] under the direct supervision of Detective Duft."[1] In addition, the CI revealed to Detective Duft that he had visited Defendant's home approximately 30 times — including a visit that occurred within 48 hours prior to the affidavit being sworn — and "observed [Defendant] possessing and selling cocaine on each occasion." Finally, the affidavit reflected that Detective Duft possessed 18 years of law enforcement experience, including significant experience and training relating to the investigation of drug trafficking.

Accordingly, viewing all of these facts under the totality of the circumstances, we conclude that the magistrate had a substantial basis for determining that probable cause existed to believe cocaine was present in Defendant's home based on Detective Duft's affidavit and the permissible inferences that could be drawn from it. *See State v. Taylor*, 191 N.C. App. 587, 590, 664 S.E.2d 421, 423 (2008) ("[T]he duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." (citation, quotation marks, brackets, and ellipsis omitted)); *State v. Benters*, 367 N.C. 660, 665, 766 S.E.2d 593, 598 (2014) ("[A] magistrate is entitled to draw reasonable inferences from the material supplied to him by an applicant for a warrant." (citation and quotation marks omitted)).

We are unpersuaded by Defendant's contention that Detective Duft's affidavit failed to adequately demonstrate the CI's reliability. The affidavit stated both that (1) law enforcement officers independently investigated prior information provided by the CI; and (2) Detective Duft

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1. Defendant points out that the affidavit does not specify whether or not this purchase occurred at Defendant's home. However, regardless of whether it took place at Defendant's residence or at some other location, this purchase nevertheless (1) added support to Detective Duft's determination that the CI was reliable; and (2) demonstrated that Defendant was engaged in the sale of drugs. Thus, the purchase, in conjunction with the CI having previously observed cocaine at Defendant's home on numerous occasions (including within the prior 48 hours), added support to the magistrate's probable cause determination.

considered the CI to be a "reliable informant." The fact that the affidavit did not describe the precise outcomes of the previous tips from the CI did not preclude a determination that the CI was reliable. Although a general averment that an informant is "reliable" — taken alone — might raise questions as to the basis for such an assertion, the fact that Detective Duft also specifically stated that investigators had received information from the CI in the past allows for a reasonable inference that such information demonstrated the CI's reliability. *See*, *e.g.*, *State v. Edwards*, 185 N.C. App. 701, 705, 649 S.E.2d 646, 649 ("Even though Officer Warren did not spell out in exact detail the connection between the informant and the previous drug investigations, the magistrate could properly infer the confidential informant had provided reliable information to Officer Warren in previous situations."), *disc. review denied*, 362 N.C. 89, 656 S.E.2d 281 (2007). Moreover, Detective Duft had further opportunity to gauge the CI's reliability when "he arranged, negotiated and purchased cocaine from [Defendant] under the direct supervision of Detective Duft."

We also reject Defendant's assertion that this case is controlled by *Taylor*. In that case, a special agent for the sheriff's office with two years of law enforcement experience submitted an affidavit in support of a search warrant for a location containing both a mobile home and a house. *Taylor*, 191 N.C. App. at 588, 664 S.E.2d at 422. In his affidavit, the special agent averred that a confidential informant — whom he had previously found to be reliable — had "visited the described location at the direction and surveillance of this [a]pplicant and while at the location . . . made a purchase of the controlled substance." *Id.*

A magistrate issued a warrant, and drugs were found in the house when the warrant was executed. The defendant filed a motion to suppress, which the trial court granted on the ground that the special agent's affidavit did not establish probable cause. *Id.* at 589, 664 S.E.2d at 422. The State appealed, and we affirmed the trial court's ruling, explaining as follows:

> [N]o facts were alleged in the affidavit that particularly set forth where on the premises the drug deals occurred. The affidavit merely stated that the CI "had visited the described location" and made controlled purchases of cocaine "while at the location," without particularly stating which, if any, of the two dwellings he entered to make the purchases. There were also no facts alleged in the affidavit that identified the defendant as the owner of either residence. Additionally, Special Agent Perry had only been

> working in law enforcement for two years at the time he applied for the search warrant. He also failed to include facts regarding whether he observed the transactions between the CI and the seller himself, and did not establish the identity of the seller of the cocaine as defendant. Finally, Special Agent Perry's affidavit failed to identify the Sampson County Sheriff's Office procedure for controlled purchases of controlled substances and was silent as to whether he followed that procedure with the CI. Special Agent Perry merely stated that the CI had been proven reliable in the past by following the controlled purchase procedure, but did not allege that the procedure was followed in the present investigation, alleging only that "while at the location the [CI] made a purchase of the controlled substance. Immediately after leaving the location, the [CI] met with the applicant and turned over the controlled substance."

Id. at 590-91, 664 S.E.2d at 423-24 (emphasis omitted).

The present case is distinguishable from *Taylor* for a number of reasons. First, there is no ambiguity here as to which of multiple dwellings listed in an affidavit was likely to contain the contraband sought or whether the defendant was the owner of the home at issue. Detective Duft's affidavit stated that the CI had seen Defendant inside the one residence listed in the affidavit — Defendant's home — approximately 30 times in the past, including within 48 hours of the affidavit being sworn. Moreover, unlike the officer in *Taylor* — who possessed only limited law enforcement experience — Detective Duft has worked in law enforcement for 18 years and has extensive drug enforcement experience and training.

In reaching our decision in this case, we are mindful that our Supreme Court has cautioned that a "grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner." *State v. Riggs*, 328 N.C. 213, 222, 400 S.E.2d 429, 434-35 (1991) (citation, quotation marks, and brackets omitted). "[G]reat deference should be paid a magistrate's determination of probable cause and . . . after-the-fact scrutiny should not take the form of a *de novo* review." *Benters*, 367 N.C. at 665, 766 S.E.2d at 598 (citation and quotation marks omitted). Therefore, "[t]he resolution of

doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *Id.* at 675, 766 S.E.2d at 604 (citation and quotation marks omitted).

We are satisfied that Detective Duft's affidavit contained sufficient information to support the magistrate's determination that probable cause existed to issue the search warrant. Accordingly, we affirm the trial court's denial of Defendant's motion to suppress.

Conclusion

For the reasons stated above, we conclude that the trial court did not err in denying Defendant's motion to suppress.

AFFIRMED.

Judges CALABRIA and TYSON concur.

STATE OF NORTH CAROLINA,
v.
DEREK JACK CHOLON, DEFENDANT

No. COA16-4

Filed 7 February 2017

1. Constitutional Law—effective assistance of counsel—concessions in argument

Defendant's counsel was not per se ineffective in a prosecution for first-degree sexual offense and indecent liberties with a child where his counsel maintained his innocence and did not expressly admit all of the elements of the crimes, although counsel made some concessions in his argument.

2. Criminal Law—motion for appropriate relief on appeal—ineffective assistance of counsel—no prejudice

Defendant's motion for appropriate relief on appeal, based on a claim for ineffective assistance of counsel, was denied where there was overwhelming evidence of his guilt and he did not meet his burden of showing that, but for his counsel's statements in closing argument, the result of the proceeding would have been different.

Appeal by Defendant from judgment entered 9 July 2015 by Judge Jack W. Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 24 May 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexandra Gruber, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for Defendant-Appellant.

INMAN, Judge.

Defense counsel's closing arguments, which admitted some elements of the charged offenses, while maintaining Defendant's innocence, did not constitute *per se* ineffective assistance of counsel.

Derek Jack Cholon ("Defendant") appeals the judgment entered after a jury found him guilty of statutory sexual offense and taking indecent liberties with a child. On appeal, Defendant contends that he received ineffective assistance of counsel. After careful review, we hold that Defendant has failed to demonstrate reversible error in his direct appeal.

I. Factual And Procedural History

The State's evidence tended to show the following:

On 6 March 2013, Defendant met M.B. through Jack'd, described as "an application where you can meet gay men and have sex." M.B. was 15 years old at the time; however, he indicated on his online profile that he was 18 years old, the minimum age requirement for Jack'd. M.B. received a signal on Jack'd indicating that Defendant wanted to speak with M.B. Defendant and M.B. exchanged messages and nude photographs. They agreed to meet later that night in Jacksonville, North Carolina, at a stop sign at the end of the street where M.B. lived.

Defendant arrived at the stop sign at approximately 10:30 pm. M.B. got into the front passenger seat of Defendant's car and instructed him to drive to a dirt road in a wooded area located in the back of the neighborhood. Once there, Defendant performed oral sex on M.B. and M.B. "fingered" Defendant. They remained in Defendant's car for twenty to thirty minutes until a Jacksonville Police Department patrol car arrived, turned on bright "takedown lights," and Officer Taylor Wright approached Defendant's car. Officer Wright, who had been patrolling the neighborhood following a series of break-ins, had driven down the dirt road in response to a suspicious vehicle report.

Defendant and M.B. each initially told Officer Wright that they were just sitting and talking. Officer Wright requested that her backup, Officer David Livingston, question M.B. alone while she spoke with Defendant. M.B. initially told Officer Livingston that he was 18 years old and provided a false address. However, after Officer Livingston expressed doubt as to M.B.'s truthfulness, M.B. admitted that he was 15 years old and provided his correct address.

Defendant told Officer Wright that "he had performed oral sex on [M.B.], and that they were kissing." Defendant said he believed that M.B. was 18 years old. Officer Wright confirmed Defendant's birth date as 16 December 1971. After determining that Defendant had outstanding warrants, Officer Wright arrested Defendant and transported him to the Jacksonville Police Department. At the station, Defendant made a written statement, containing in pertinent part:

> We proceeded to a secluded area and sat in the car and talked. After about ten minutes, the police arrived. Before the police arrived, I gave [M.B.] oral and we kissed. I advised the police that I have screen shots of his two profiles on my phone, and that I asked [M.B.] his age and he said he was 18.

On 8 April 2014, Defendant was indicted on one count each of first degree statutory sexual offense, crime against nature, and indecent liberties with a child. The charges[1] came on for trial on 7 July 2015 in Onslow County Superior Court, Judge Jack W. Jenkins presiding.

On the first day of trial, defense counsel filed a motion to suppress Defendant's alleged verbal statements to police and his subsequent written statement. In support of the motion to suppress, counsel submitted an affidavit by Defendant stating under oath that he did not tell Officer Wright at any time that he engaged in oral sex or kissing with M.B. and stating that he does not remember giving an oral statement to police, because of a medical condition that makes him prone to blackout. The trial court denied the motion, and the oral and written statements were admitted into evidence.

Defendant did not testify or present evidence at trial. In his closing argument to the jury, defense counsel conceded that M.B. was a minor at the time of the sexual encounter and that Defendant's oral and written confessions to police were true. Specifically, defense counsel said about M.B.: "He, apparently was, and I don't think otherwise, that on this

1. Prior to trial, the State abandoned the crime against nature charge.

occasion he was 15 years old." In reviewing with the jury Defendant's statements to officers, defense counsel remarked:

> What does [Defendant] say? The officer comes back there, Officer Wright comes back there and begins to talk to him and he tells this officer the truth; tells her what happened between the two of them. "I gave him oral, and we were kissing." But now we know that there's more than kissing going on with [M.B.]. He gets on the stand and he admits that he was massaging or using his fingers to massage [Defendant's] anus. So now he admits that.
>
> . . .
>
> [Defendant] did not say anything that was not truthful, apparently except, "We were just talking." And when the officers persisted with the asking about what happened, he told them the truth. He didn't lie to them. He wrote it down in a statement, which you read. So here he is. He's looking—subject to go to prison for such a long time.

The jury found Defendant guilty of both charges. He was sentenced to concurrent prison terms of 144 to 233 months for statutory sexual offense and 10 to 21 months for taking indecent liberties with a minor. The trial court also ordered Defendant to register as a sex offender for thirty years. Defendant gave oral notice of appeal in open court.

One week later, Defendant submitted a *pro se* letter to the trial court requesting a mistrial on the basis that his counsel "entered an admission of guilt on my behalf without my permission during his closing statement."

II. Ineffective Assistance of Counsel

Defendant argues that his trial counsel admitted guilt to each disputed element of the charged offenses in closing argument without his consent, constituting *per se* ineffective assistance of counsel. Because defense counsel only implicitly conceded some—but not all—of the elements of each charge and urged jurors to find Defendant not guilty of each charge, we hold that counsel was not *per se* ineffective.

A. Standard of Review and Legal Standards for Ineffective Assistance of Counsel Claims

"On appeal, this Court reviews whether a defendant was denied effective assistance of counsel *de novo*." *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014) (citation omitted).

In general, state appellate courts including this Court determine claims of ineffective assistance of counsel following the standards established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674 (1984). To establish ineffective assistance of counsel under *Strickland*, "[f]irst, the defendant must show that counsel's performance was deficient." *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). "Second, the defendant must show that the deficient performance prejudiced the defense." *State v. Campbell*, 359 N.C. 644, 690, 617 S.E.2d 1, 29 (2005) (quoting *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693). However, the North Carolina Supreme Court has identified one type of ineffective assistance of counsel that is *per se* prejudicial. In *State v. Harbison*, the North Carolina Supreme Court held that "ineffective assistance of counsel, *per se* in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985).

B. Analysis

[1] Defendant contends that he received ineffective assistance of counsel *per se* when his trial counsel conceded all of the elements of the State's case in closing argument without Defendant's consent, so that pursuant to *Harbison*, this Court must order a new trial.

In *Harbison*, the defendant's counsel maintained throughout trial that the defendant had acted in self-defense; however, during closing arguments, defense counsel urged the jury to convict the defendant of manslaughter rather than first-degree murder. *Id.* at 177-78, 337 S.E.2d at 506. The North Carolina Supreme Court held that counsel rendered *per se* ineffective assistance to the defendant, explaining:

> [T]he gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands. When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

Id. at 180, 337 S.E.2d at 507.

In a line of cases following *Harbison*, our appellate courts have found that "a defendant receives ineffective assistance of counsel *per se*

when the defendant's counsel concedes the defendant's guilt to either the offense charged or a lesser-included offense without the defendant's consent." *State v. Holder*, 218 N.C. App. 422, 424, 721 S.E.2d 365, 367 (2012) (citation omitted). But our courts have distinguished *Harbison* in cases in which defense counsel did not *expressly concede* the defendant's guilt or admitted only certain elements of the charged offense. *See*, *e.g.*, *State v. Gainey*, 355 N.C. 73, 92-93, 558 S.E.2d 463, 476 (2002) (holding no *Harbison* violation occurred when defense counsel stated "if he's guilty of anything, he's guilty of accessory after the fact," because the statement did not amount to an admission of murder and the defendant was not charged as an accessory); *State v. Hinson*, 341 N.C. 66, 78, 459 S.E.2d 261, 268 (1995) (holding no *Harbison* violation occurred when defense counsel did not concede to the jury that the defendant himself had committed any crime); *State v. Fisher*, 318 N.C. 512, 532-33, 350 S.E.2d 334, 346 (1986) (holding no *Harbison* violation occurred when defense counsel conceded malice—an element of first-degree murder—but did not clearly admit guilt and told the jury it could find the defendant not guilty); *State v. Wilson*, 236 N.C. App. 472, 475-78, 762 S.E.2d 894, 896-97 (2014) (holding no *Harbison* violation occurred when defense counsel conceded that the defendant, who was charged with attempted first degree murder, was guilty of assault by pointing a gun, a charge not presented to the jury); *State v. Randle*, 167 N.C. App. 547, 551-52, 605 S.E.2d 692, 695 (2004) (noting that "our Supreme Court has found no *Harbison* violation where defense counsel did not expressly admit the defendant's guilt"); *State v. Maniego*, 163 N.C. App. 676, 684, 594 S.E.2d 242, 247 (2004) (holding that defense counsel's opening statement placing the defendant at the scene of the crime was not a concession of guilt under *Harbison*).

Here, Defendant was charged with statutory sexual offense pursuant to N.C. Gen. Stat. § 14-27.7A(a) (2013)[2], providing for a defendant's guilt "if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person," and indecent liberties pursuant to N.C. Gen. Stat. § 14-202.1(a)(2) (2013), providing for a defendant's guilt if, "being 16 years of age or more and at least five years older than the child in question, he . . . [w]illfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years."

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2. N.C. Gen. Stat. § 14-27.7A was recodified as N.C. Gen. Stat. § 14-27.25, effective 1 December 2015. 2015 N.C. Sess. Laws. ch. 181, § 7(a).

Defense counsel did not expressly concede Defendant's guilt. *See Maniego*, 163 N.C. App. at 683, 594 S.E.2d at 246 ("To establish a *Harbison* claim, the defendant must first show that his trial attorney has made a concession of guilt."). Defense counsel did not admit each element of each offense. For example, defense counsel did not admit that Defendant was six or more years older than M.B. and did not admit that Defendant willfully committed a lewd or lascivious act. N.C. Gen. Stat. § 14-27.7A; N.C. Gen. Stat. § 14-202.1(a)(2). And at the close of his argument, defense counsel asked the jury to find Defendant not guilty of the charged offenses.

"Admission by defense counsel of an element of a crime charged, while still maintaining the defendant's innocence, does not necessarily amount to a *Harbison* error." *Wilson*, 236 N.C. App. at 476, 762 S.E.2d at 897. Accordingly, we hold that the principles set out in *Harbison* do not require a finding of *per se* ineffective assistance of counsel in this case.

III. The Trial Court's Failure to Conduct an Inquiry or Take Further Action Following Defense Counsel's Concessions in Closing Argument

Defendant also contends, related to his *Harbison* argument, that the trial court erred by failing to inquire into defense counsel's concession of Defendant's guilt. Because we conclude that the record before us does not establish a *Harbison* error, we reject this argument as well.

IV. Motion for Appropriate Relief

[2] Defendant has filed concurrently with his direct appeal a motion for appropriate relief contending that he received ineffective assistance of counsel. Defendant argues that if this Court does not order a new trial, we should hold the appeal in abeyance, order the trial court to hold an evidentiary hearing, and direct the trial court to transmit the order to this Court so that it can rule on the motion. The record precludes Defendant's claim for ineffective assistance of counsel and no additional evidence could change the outcome of his claim. We therefore deny Defendant's motion.

Because this case "does not fall with the *Harbison* line of cases where violation of the defendant's Sixth Amendment rights are presumed, [Defendant's] claim of ineffective assistance of counsel must be analyzed using the *Strickland* factors." *Fisher*, 318 N.C. at 533, 350 S.E.2d at 346; *see also Strickland*, 346 N.C. at 460–61, 488 S.E.2d at 205. To obtain relief pursuant to *Strickland*, a defendant must demonstrate not only that his counsel's performance was deficient, but that it prejudiced

the defense. *Braswell*, 312 N.C. at 562, 324 S.E.2d at 248; *Campbell*, 359 N.C. at 690, 617 S.E.2d at 29. If defense counsel's performance did not prejudice the defense, we need not determine whether counsel's performance was deficient. *State v. Phillips*, 365 N.C. 103, 122, 711 S.E.2d 122, 138 (2011). "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." *Campbell*, 359 N.C. at 690, 617 S.E.2d at 29 (quoting *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693). Here, the record reveals such overwhelming evidence of Defendant's guilt that we cannot conclude that but for defense counsel's ineffective assistance, the result of the trial would have been different.

This Court has explained:

> In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal. This is so because this Court, in reviewing the record, is without the benefit of information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor, that could be provided in a full evidentiary hearing on a motion for appropriate relief. However, ineffective assistance of counsel claims are appropriately reviewed on direct appeal when the cold record reveals that no further investigation is required, *i.e.*, claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.

State v. James, __ N.C. App. __, __, 774 S.E.2d 871, 876 (2015), *aff'd*, 368 N.C. 728, 782 S.E.2d 509 (2016) (internal quotation marks and citations omitted).

Here, the record is sufficient to conduct a *Strickland* analysis and no further investigation is required in order to conduct a meaningful review. The record precludes Defendant from demonstrating that, but for the alleged deficient performance of his counsel, he would have received a different verdict.

The State presented overwhelming evidence of Defendant's guilt as to both charges. At trial, Officer Wright testified that shortly after the incident, Defendant admitted that he had performed oral sex on M.B. and that they had kissed. Defendant's written statement, wherein he admitted that "I gave [M.B.] oral and we kissed," was also admitted into evidence. Testimonial evidence also established that Defendant was born in 1971, and that M.B. was 15 years of age at the time of the incident.

M.B. testified about the sexual encounter. In a hearing outside the presence of the jury, the trial court conducted a colloquy with Defendant regarding his right to testify. Defendant stated that he had previously decided not to testify and that it was still his decision not to testify.

Defendant has not met his burden to show that, but for his counsel's statements in closing argument, the result of the proceeding would be any different. Given our holding—based on careful consideration of the record—that Defendant did not receive ineffective assistance of counsel, we deny Defendant's motion for appropriate relief.

V. Conclusion

For the aforementioned reasons, we hold that Defendant has failed to establish prejudicial error.

NO ERROR.

Judges BRYANT and TYSON concur.

STATE OF NORTH CAROLINA
v.
GLENWOOD EARL DOWNEY

No. COA16-302

Filed 7 February 2017

Search and Seizure—traffic stop—extended—reasonable suspicion

A traffic stop was not unduly extended, and defendant's motion to dismiss was properly denied, where the officer had reasonable suspicion to detain defendant due to defendant's nervous behavior; defendant's use of a particular brand of powerful air freshener favored by drug traffickers; defendant's prepaid cellphone; the fact that defendant's car was registered to someone else; defendant's vague and suspicious answers to the officer's questions concerning what he was doing in the area; and defendant's prior conviction on a drug offense.

Judge HUNTER, JR., dissenting in a separate opinion.

Appeal by defendant from order entered 16 September 2015 by Judge Thomas H. Lock and judgment entered 1 October 2015 by Judge Reuben F. Young in Johnston County Superior Court. Heard in the Court of Appeals 8 September 2016.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant.

DIETZ, Judge.

Defendant Glenwood Earl Downey appeals the denial of his motion to suppress. Downey argues that law enforcement impermissibly extended the duration of his traffic stop without reasonable suspicion that he committed some other crime.

As explained below, there is ample competent evidence in the record to support the trial court's findings on various factors that this Court (and others) have found sufficient to establish reasonable suspicion. Before and during the time in which the officer prepared the warning citation, the officer observed the following: Downey's nervous behavior; Downey's use of a particular brand of powerful air freshener favored by drug traffickers; Downey's prepaid cellphone; the fact that Downey's car was registered to someone else; Downey's vague and suspicious answers to the officer's questions concerning what he was doing in the area; and Downey's prior conviction on a drug offense. These findings, supported by the record, readily support the trial court's conclusion that the officer had reasonable suspicion to detain Downey before the traffic stop concluded.

Facts and Procedural History

On 26 July 2011, Deputy Brian Clifton of the Johnston County Sherriff's Office stopped Defendant Glenwood Earl Downey for a traffic violation. Deputy Clifton approached Downey's vehicle and asked to see his driver's license and registration. As Downey handed over the requested documentation, Deputy Clifton noticed that Downey's hands were shaking, that his breathing was rapid, and that he failed to make eye contact.

Deputy Clifton also noticed a prepaid cellphone inside the vehicle and a Black Ice air freshener hanging from the rearview mirror. Deputy

Clifton had received special training in drug interdiction, during which he learned that Black Ice air fresheners, because of their strong scent, are frequently used by drug traffickers. As a result of that same training, he also knew that prepaid cellphones were commonly used by persons involved in narcotics trafficking.

Deputy Clifton further noted that the car was not registered to Downey. Based on his training, Deputy Clifton had learned that third-party vehicles are often used by drug traffickers because it makes it more difficult for police to track those individuals or tie them to a specific address.

Deputy Clifton asked Downey to exit the vehicle and accompany him to his patrol car. Once inside the patrol car, Deputy Clifton asked Downey why he was in the area. Downey vaguely responded that he was searching for a place to rent. Deputy Clifton asked Downey his motive for moving and offered the high cost of living in Downey's current town as a potential motive. Downey indicated that the expensive cost of living in his current town was indeed the reason he wanted to move. When Deputy Clifton further inquired as to whether Downey was able to find any places for rent, he vaguely responded that he had seen a few places on "what's that, 231?"

Based on indicators gleaned from a warrants check, Deputy Clifton also asked Downey about his criminal history. Downey responded (honestly) that he had served prison time for several breaking and entering convictions and that he had a cocaine-related drug conviction.

Deputy Clifton issued Downey a warning ticket for the traffic violation and returned his documentation. But Deputy Clifton continued to question Downey about his criminal history and eventually asked Downey for consent to search his vehicle. Downey declined to give consent. Deputy Clifton then asked Downey if he would consent to a canine sniff of the exterior of the vehicle. Again, Downey declined.

Deputy Clifton then called for a K-9 unit. The K-9 team arrived fourteen minutes after Deputy Clifton retuned Downey's documentation and issued him the warning citation. A dog sniffed the exterior of the vehicle and alerted to the presence of drugs inside. Officers searched the vehicle and found a digital scale, several cellphones in the glove compartment, and a paper napkin containing approximately 3.2 grams of crack cocaine in the center console ashtray area.

On 6 September 2011, the State indicted Downey for possession with intent to sell and deliver cocaine, maintaining a place to keep

controlled substances, possession of drug paraphernalia, and attaining habitual felon status.

On 21 September 2012, Downey filed a motion to suppress all evidence obtained from his traffic stop. On 3 December 2012, the trial court held a hearing on Downey's motion to suppress and, on 31 December 2012, issued an order denying the motion.

Downey pleaded guilty but reserved his right to appeal the denial of his motion to suppress. He then timely appealed.

On 3 March 2015, in an unpublished opinion, this Court vacated the trial court's judgment and instructed the trial court on remand to determine whether Deputy Clifton had developed reasonable articulable suspicion of criminal activity before the officer returned Downey's documentation and issued the warning citation. *State v. Downey (Downey I)*, __ N.C. App. __, 771 S.E.2d 633 (2015) (unpublished).

On remand, both parties agreed that no further evidence was necessary for the court to determine the issue. On 16 September 2015, the trial court issued a new order denying Downey's motion to suppress. On 30 September 2015, Downey again pleaded guilty while reserving his right to appeal the denial of his motion to suppress and timely appealed.

Analysis

Downey argues that the trial court's findings on remand from this Court do not support its conclusion that the officer had reasonable suspicion to extend his traffic stop. We disagree.

"On review of a motion to suppress evidence, an appellate court determines whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law." *State v. Haislip*, 362 N.C. 499, 499, 666 S.E.2d 757, 758 (2008). "The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. The conclusions of law, however, are reviewed de novo." *Id.* at 500, 666 S.E.2d at 758.

When a law enforcement officer initiates a valid traffic stop, as happened here, the officer may not extend the duration of that stop beyond the time necessary to issue the traffic citation unless the officer has reasonable, articulable suspicion of some other crime. *State v. Bedient*, __ N.C. App. __, __, 786 S.E.2d 319, 323 (2016). This Court vacated and remanded the trial court's initial order denying Downey's motion to suppress for the trial court to make findings concerning whether the officer

had reasonable suspicion to extend the stop. *Downey I*, __ N.C. App. __, 771 S.E.2d 633.

On remand, the trial court made the following pertinent findings in support of its conclusion that the officer had reasonable suspicion:

> 16. Deputy Clifton formed the suspicion that Defendant was engaged in illegal drug activity at that time based on: Defendant's nervousness, rapid breathing, and lack of eye contact; the presence of the Black Ice air freshener in the BMW automobile Defendant was driving; the fact that the BMW was registered to a third person; the presence of the Boost prepaid cell phone in the BMW; Defendant's statements as to his reason for being in the area; and Defendant's admission that he had been arrested and imprisoned for possession of cocaine in the past.
>
> 17. At 2:45 p.m., Deputy Clifton issued a written warning citation to Defendant for driving left of the center line.
>
> 18. Deputy Clifton formed the suspicion that Defendant was engaged in illegal drug activity before he issued the written warning citation to Defendant and returned Defendant's driver's license and the vehicle registration card to Defendant.

Downey first challenges the trial court's finding concerning his nervousness during the traffic stop. Downey contends that the trial court failed to specify whether the nervousness on which the court relied occurred before or after the officer issued the citation. As explained below, we hold that the trial court's finding addressed Downey's nervousness before the officer issued the traffic citation, and that finding is supported by competent evidence in the record.

To be sure, the record indicates that Downey displayed significant nervousness throughout the encounter, including after the traffic stop concluded. But the trial court's reference to Downey's nervousness "at that time" in the relevant finding demonstrates that the court considered only nervousness evident before the officer issued the warning citation. The preceding paragraphs of the court's findings indicate that "at that time" referred to the time period "[w]hile preparing the warning citation." Moreover, the trial court's finding concerning nervousness is contained within a list of other factors—including the type of air freshener in the car, the third-party vehicle registration, and the prepaid

cellphone—all of which the officer observed before, and *only* before, issuing the citation.

Finally, in the initial appeal, this Court expressly instructed the trial court on remand to determine if reasonable suspicion existed *before* the officer issued the warning citation, citing applicable Fourth Amendment jurisprudence concerning extension of a traffic stop. This Court presumes that the trial court knows the law. *State v. Newson*, 239 N.C. App. 183, 195, 767 S.E.2d 913, 920 (2015). Thus, we are confident that the trial court's finding addressed Downey's nervousness before the traffic stop concluded, as this Court instructed in its mandate. *See id.*

Downey next argues that the record does not support the trial court's finding of nervousness before the traffic stop concluded. Again, we disagree. The officer testified that Downey's "hands were shaking as he handed [him] his documents, driver's license and registration" and confirmed that timing later in his testimony:

> Q. Deputy Clifton, you've testified that what you described in your testimony concerning that his hands were shaky and that he was breathing heavy, that was when you first approached the vehicle?
>
> A. Yes, sir.

The officer also testified that, when Downey initially got into the officer's patrol car, while the officer still was preparing to issue the citation, Downey "didn't make eye contact and his breathing was elevated." This testimony provides sufficient competent evidence to support the trial court's finding that Downey exhibited nervous behavior before the traffic stop terminated. We are therefore bound by this finding, regardless of whether there is other, conflicting evidence in the record. *See Haislip*, 362 N.C. at 500, 666 S.E.2d at 758.

Finally, Downey argues that, even if the record supports the trial court's findings concerning nervousness, all of the court's findings, taken together, are insufficient to support its conclusion that the officer developed reasonable suspicion before the traffic stop ended. Once again, we disagree.

In addition to the trial court's finding that Downey exhibited "nervousness, rapid breathing, and lack of eye contact" during the traffic stop, the trial court made a number of other, unchallenged findings concerning factors that contributed to the officer's reasonable suspicion. The court found that Downey's car had a specific brand of air freshener that the officer testified was "a trend that is involved in the drug

smuggling community" because of the strength of its odor. The court also found that Downey used a prepaid cellphone and was driving a car registered to a third party, both of which, in the officer's experience and based on training he had received, were indicators of potential drug trafficking. The court also found that Downey admitted he had a previous drug conviction. Finally, the court found that the officer relied on "Defendant's statements as to his reason for being in the area," which the officer testified were vague and suspicious.

These six factors taken together—Downey's nervous behavior, his use of a particular type of air freshener favored by drug traffickers, his prepaid cellphone, his use of a car registered to someone else, his suspicious responses to Deputy Clifton's questioning, and his prior drug conviction—are sufficient to support the trial court's conclusion that reasonable suspicion existed. *See State v. Castillo*, __ N.C. App. __, __, 787 S.E.2d 48, 55–56 (2016) (finding reasonable suspicion based on defendant's unusual story regarding travel; a masking odor; third-party car registration; nervousness; and defendant's prior drug convictions); *State v. Euceda-Valle*, 182 N.C. App. 268, 274–75, 641 S.E.2d 858, 863 (2007) (finding reasonable suspicion based on defendant's nervousness; smell of air freshener coming from vehicle; vehicle not registered to occupants; occupants' suspicious responses when questioned about travel plans); *see also United States v. Valenzuela-Rojo*, 139 F. Supp. 3d 1252, 1260 (D. Kan. 2015) (noting that "[t]he following may contribute to reasonable suspicion for extending a traffic stop: an officer's knowledge that drug couriers frequently use rental cars; a motorist's extreme nervousness"; "[s]trong odors" potentially "being used to mask the smell of drugs"; and the use of a type of cellphone that the officer "knows to be commonly used as [a] 'burner' phone[] in the drug trade").

The dissent, citing *State v. Bullock*, ___ N.C. App. ___, ___, 785 S.E.2d 746, 751, *writ of supersedeas allowed*, ___ N.C. ___, 786 S.E.2d 927 (2016), contends that "the tolerable duration of the traffic stop ended when Deputy Clifton communicated he was issuing Defendant a warning citation for the violation, not when Deputy Clifton actually issued the warning citation." This is a misreading of *Bullock*. *Bullock* does not hold that, once an officer tells the defendant he will receive a citation and then returns to the patrol car to prepare it, the stop is over and the defendant is free to drive away without waiting to receive it. *Bullock* merely holds, as *Rodriguez v. United States*, __ U.S. __, 135 S. Ct. 1609 (2015) requires, that an officer may not delay issuing a traffic ticket (or warning citation), or delay returning a suspect's driver's license or registration, beyond the time reasonably necessary to complete the traffic stop:

> Officer McDonough completed the mission of the traffic stop when he told defendant that he was giving defendant a warning for the traffic violations as they were standing at the rear of defendant's car. . . . *Officer McDonough was still permitted to check defendant's license and check for outstanding warrants.* But, he was not allowed to do so *in a way that prolong[ed] the stop*, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.

Bullock, __ N.C. App. at __, 785 S.E.2d at 751 (second alteration in original) (emphasis added).

Here, the record does not contain any evidence that the officer delayed the preparation of the warning citation in order to further question Downey. Indeed, the video recording of the officer's interaction with Downey inside the patrol car appears to show him diligently preparing the warning citation as he questions Downey. And, in any event, this is not an argument Downey made, either in his appellate briefs or in the trial court; it is newly raised by the dissent. This Court does not address constitutional arguments not raised by a criminal defendant in his appellate briefing. *State v. Allen*, 360 N.C. 297, 308, 626 S.E.2d 271, 281 (2006).[1]

The dissent also contends that all of the factors identified by the trial court are "consistent with innocent travel." That is certainly true. And any one of those factors, or perhaps even several together, might not be enough to constitute reasonable suspicion. But *all six* factors taken together are sufficient, as this Court and others repeatedly have held. *See Castillo*, __ N.C. App. at __, 787 S.E.2d at 55–56; *Euceda-Valle*, 182 N.C. App. at 274–75, 641 S.E.2d at 863; *Valenzuela-Rojo*, 139 F. Supp. 3d at 1260.

The reasonable suspicion test, by its nature, will rely on factors that are suspicious, but which could be associated with innocent behavior, as well as criminal behavior. *United States v. Sokolow*, 490 U.S. 1, 9–10 (1989). Were we to require otherwise, as the dissent suggests, reasonable suspicion would become synonymous with probable cause. Fourth Amendment jurisprudence distinguishes these two tests for a reason. *See Alabama v. White*, 496 U.S. 325, 329–31 (1990).

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1. We also note that Downey has never asserted—either in this appeal or his previous appeal—that it was unconstitutional for the officer to instruct Downey to get out of his car and accompany the officer to the patrol car, where Downey could be questioned while the officer prepared the citation. So, again, this argument is waived. *See Allen*, 360 N.C. at 308, 626 S.E.2d at 281.

Thus, "the trial court's findings support the conclusion that the officer had developed *reasonable suspicion* of illegal drug activity during the course of his investigation of the traffic offense and was therefore justified to prolong the traffic stop to execute the dog sniff." *State v. Warren*, __ N.C. App. __, __, 775 S.E.2d 362, 365 (2015), *aff'd per curiam*, 368 N.C. 756, 782 S.E.2d 509 (2016). Accordingly, the trial court properly denied Downey's motion to suppress.

Conclusion

We affirm the trial court.

AFFIRMED.

Judge McCULLOUGH concurs.

Judge HUNTER, JR. dissents by separate opinion.

HUNTER, JR., Robert N., Judge, dissenting in a separate opinion.

I respectfully dissent from the majority affirming the trial court's denial of Defendant's motion to suppress. Instead, I would reverse the trial court.

This Court recently addressed the tolerable duration of a traffic stop and the requirements to extend a traffic stop in *State v. Reed*, ___ N.C. App. ___, 791 S.E.2d 486 (2016). *See also State v. Bullock*, ___ N.C. App. ___, 785 S.E.2d 746 (2016), *writ of supersedeas allowed*, 786 S.E.2d 927 (2016); *State v. Bedient*, ___ N.C. App. ___, 786 S.E.2d 319 (2016). *Reed*, *Bullock*, and *Bedient* provided guidance to our courts based on the United States Supreme Court's decision in *Rodriguez v. United States*, ___ U.S. ___, 191 L. Ed. 2d 492 (2015).

"[T]he tolerable duration of police inquires in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop, and attend to related safety concerns." *Bedient*, ___ N.C. App. at ___, 786 S.E.2d at 322 (quoting *Rodriguez*, ___ U.S. at ___, 191 L. Ed. 2d at 498 (internal citations omitted) (brackets in original)). "In addition to deciding whether to issue a traffic ticket, a law enforcement officer's 'mission' includes 'ordinary inquires incident to the traffic stop.' " *Reed*, ___ N.C. App. at ___, 791 S.E.2d at 491 (quoting *Bedient*, ___ N.C. App. at ___, 791 S.E.2d at 322). "This inquiry typically includes checking the driver's license, determining if the driver has any outstanding warrants, inspecting the vehicle's registration and

proof of insurance . . . ." *Id.* at ___, 791 S.E.2d at 491 (citing *Bedient*, ___ N.C. App. at ___, 786 S.E.2d at 322–23; *Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 751). However, an officer is not allowed to conduct his inquiry "in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Rodriguez*, ____ U.S. at ____.

An officer has completed the mission of the traffic stop when the officer communicates he is giving a citation. *See Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 751. To detain a driver beyond a traffic stop, an officer must have "reasonable articulable suspicion that illegal activity is afoot." *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 166–67 (2012) (citing *Florida v. Royer*, 460 U.S. 491, 497–98, 75 L. Ed. 2d 229, 236 (1983)).

The trial court found "Deputy Clifton formed the suspicion that Defendant was engaged in illegal drug activity before he issued the written warning citation to Defendant and returned Defendant's driver's license and the vehicle registration card to Defendant."

Here, the tolerable duration of the traffic stop ended when Deputy Clifton communicated he was issuing Defendant a warning citation for the violation, not when Deputy Clifton actually issued the warning citation. *See Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 751. However, after Deputy Clifton communicated he was issuing the citation, he engaged Defendant in further conversation and questioned Defendant about Defendant's criminal history. Further, Deputy Clifton asked Defendant for consent to search his vehicle. Deputy Clifton also asked Defendant if Defendant would consent to a canine sniff of the exterior of the vehicle. Lastly, Deputy Clifton called for a K-9 unit, which arrived *fourteen minutes* after Deputy Clifton issued Defendant's citation and returned Defendant's documentation. Thus, for the extension, which lasted *at least* fourteen minutes, to be constitutional, Deputy Clifton must have possessed reasonable articulable suspicion that illegal activity was afoot.

Here, the trial court's findings do not support its conclusion that Deputy Clifton had reasonable suspicion of criminal activity to extend the traffic stop and conduct a search. The behaviors in the trial court's findings do not amount to "reasonable suspicion that illegal activity is afoot." *Williams*, 366 N.C. at 116, 726 S.E.2d at 166–67 (citation omitted). "In order to preserve an individual's Fourth Amendment rights, it is of the utmost importance that we recognize that the presence of [a suspicious but legal behavior] is not, by itself, proof of any illegal conduct

and is often quite consistent with innocent travel." *State v. Fields*, 195 N.C. App. 740, 745, 673 S.E.2d 765, 768 (2009) (citing *United States v. Sokolow*, 490 U.S. 1, 9, 104 L. Ed. 2d 1, 11 (1989)). Reasonable suspicion may arise from "wholly lawful conduct." *Reid v. Georgia*, 448 U.S. 438, 441, 65 L. Ed. 2d 890(1980) (citation omitted). However, " 'the relevant inquiry is . . . the degree of suspicion that attaches to particular types of noncriminal acts.' " *Sokolow*, 490 U.S. at 10, 104 L. Ed. 2d at 12 (citation omitted).

The majority relies on six factors in affirming the trial court—Defendant's "nervous behavior, his use of a particular type of air freshener favored by drug traffickers, his prepaid cellphone, his use of a car registered to someone else, his ["]suspicious["] responses to Deputy Clifton's questioning, and his prior drug convictions . . . ." As held in *Reed*, "Defendant's nervousness is 'an appropriate factor to consider,' but it must be examined 'in light of the totality of the circumstances' because 'many people do become nervous when [they are] stopped by an officer . . . .' " ___ N.C. App. at ___, 791 S.E.2d at 493 (quoting *State v. McClendon*, 350 N.C. 630, 638, 517 S.E.2d 128, 134 (1999)) (brackets in original). The degree of suspicion attached to Defendant's use of an air freshener, prepaid cellphone, and car registered to someone else is minimal, as it is consistent with innocent travel. *See id.* at ___, 791 S.E.2d at 493.

Notably, a case relied upon by the majority, *United States v. Valenzuela-Rojo*, 139 F. Supp. 3d 1252, 1260 (D. Kan. 2015), is not binding on this Court. Instead, we are bound by the decisions of the United States Supreme Court, the North Carolina Supreme Court, and our precedent. Moreover, *Valenzuela-Rojo* does not discuss or acknowledge the *Rodriquez* decision.

To affirm the trial court, as the majority does, fails to emphasize the United States Supreme Court's direction in *Rodriquez* and our Court's holding in *Reed*. I recognize that search and seizure cases are sui generis and reasonable jurists can disagree.

Accordingly, I would reverse the trial court.

STATE OF NORTH CAROLINA
v.
TARA MAY FRAZIER, DEFENDANT

No. COA 16-449

Filed 7 February 2017

Indictment and Information—indictment amendment—substantial alteration—negligent child abuse

The trial court committed reversible error in a negligent child abuse case by permitting the State to amend the indictment. The indictment amendment constituted a substantial alteration and alleged conduct that was not set forth in the original indictment.

Appeal by Defendant from judgment entered 8 October 2015 by Judge Michael D. Duncan in Randolph County Superior Court. Heard in the Court of Appeals 5 October 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Bethany A. Burgon, for the State.

Sean P. Vitrano for the Defendant.

DILLON, Judge.

Tara May Frazier ("Defendant") appeals from the trial court's judgment convicting her of negligent child abuse. For the following reasons, we vacate and remand.

I. Background

Defendant was indicted for negligent child abuse based on injuries discovered on her young child. A jury found Defendant guilty of the charge. The trial court entered judgment based on the jury verdict. Defendant timely appealed.

II. Standard of Review

We review a trial court's ruling permitting amendment of an indictment *de novo*. *See State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994).

III. Analysis

On appeal, Defendant contends that the trial court committed reversible error during the trial by permitting the State to amend the

indictment.[1] After careful review, we agree with Defendant for the reasons stated below. Accordingly, we vacate the judgment and remand the matter to the trial court for further proceedings not inconsistent with this opinion.

Defendant was indicted for negligent child abuse under N.C. Gen. Stat. § 14-318.4(a5) (2015) after Asheboro police discovered her unconscious in her apartment with track marks on her arms and her nineteen-month old child exhibiting signs of physical injury. Under § 14-318.4(a5), a parent of a young child is guilty of negligent child abuse if the parent's "willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life" *and* the parent's act or omission "results in serious bodily injury to the child." N.C. Gen. Stat. § 14-318.4(a5).

The indictment here alleged the following:

> [T]he defendant named above unlawfully, willfully and feloniously did
>
> show a reckless disregard for human life by committing a grossly negligent omission, by not treating a burn on the victim's chest, a scratch on the lower left side of chest, a laceration on right side of jaw, a scratch on left eye brow, and an abrasion to the lower lip of [the child] . . . , who was 19 months old and thus under 16 years of age. The defendant's omission resulted in serious physical injury to the child. At the time the defendant committed the offense, the defendant was the child's parent.

Put simply, the indictment alleges that Defendant committed negligent child abuse because: (1) she negligently failed to treat her child's chest and facial wounds; (2) her failure caused these wounds to worsen; and (3) the resulting aggravation of these wounds caused the child to suffer serious bodily injury. During the trial, however, the State moved to amend the indictment "to include failure to provide a safe environment as the grossly negligent omission as well," in order to better reflect the evidence presented at trial.

The General Assembly has provided that a "bill of indictment may not be amended." N.C. Gen. Stat. § 15A-923(e) (2015). However, our

1. Defendant has raised additional arguments on appeal. However, as the indictment amendment constitutes reversible error, we need not reach these other arguments.

Supreme Court has construed this provision as only prohibiting changes "which would substantially alter the charge set forth in the indictment." *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984) (internal quotation marks omitted). *See also State v. Silas*, 360 N.C. 377, 379–80, 627 S.E.2d 604, 606 (2006). This rule helps ensure that "the accused [is able] to prepare for trial." *Silas*, 360 N.C. at 380, 627 S.E.2d at 606 (internal quotation marks omitted). Thus, an amendment sought by the State at trial which alleges conduct by the defendant not previously alleged and which touches on an essential element of the charged crime would be a substantial, and therefore prohibited, alteration. *See* N.C. Gen. Stat. § 15A-924(a)(5) (stating that a criminal pleading—which includes an indictment—must contain a "concise factual statement" that "asserts facts supporting every element of a criminal offense" to apprise the defendant "of the conduct which is the subject of the accusation"). A defendant is entitled to a dismissal if the State attempts to substantially alter an indictment because of a "fatal variance" between the original indictment and the evidence presented at trial. *State v. Overman*, 257 N.C. 464, 468, 125 S.E.2d 920, 924 (1962).

For example, in a previous felony child abuse case, we have held that there was no fatal variance between an indictment alleging that the defendant's conduct caused a *subdural* hematoma and trial evidence establishing that the defendant's alleged conduct caused an *epidural* hematoma. *State v. Qualls*, 130 N.C. App. 1, 8, 502 S.E.2d 31, 36 (1998), *aff'd*, 350 N.C. 56, 510 S.E.2d 376 (1999). Specifically, we reasoned that though serious bodily injury was an essential element, an allegation regarding the *location* of the injury was "surplusage" and therefore not necessary in charging the offense. *Id.*

In the present case, we conclude that the indictment amendment granted by the trial court constituted a substantial alteration. The amendment alleged conduct that was not set forth in the original indictment and which constituted Defendant's "willful act or grossly negligent omission," an essential element of the negligent child abuse charge. In the original indictment, the State alleged that Defendant's negligent omissions consisted of *her failure to treat the child's pre-existing chest and facial wounds*. These omissions occurred *after* the wounds had already been inflicted on the child. The amendment granted at trial, however, alleged that Defendant *failed to provide a safe environment*: an omission that occurred *prior* to her child incurring the wounds. Under this new theory, the jury could convict based on a finding that Defendant's failure to provide a safe living environment for her child was the cause

of her child's wounds in the first instance, irrespective of whether she attempted to treat the wounds after they had been inflicted.[2]

Admittedly, the amendment sought by the State may seem minor. However, since the amendment allowed the jury to convict Defendant of conduct not alleged in the original indictment and found by the grand jury, we must vacate the judgment against her. In addition to violating N.C. Gen. Stat. § 15A-923(e), the indictment amendment was prohibited under the Declaration of Rights contained in our North Carolina Constitution, which requires the grand jury to indict and the petit jury to convict for offenses charged by the grand jury. N.C. CONST. art. I, § 22 (amended 1971). As our Supreme Court has explained, "[t]hese principles are dear to every [citizen]; they are his shield and buckler against wrong and oppression, and lie at the foundation of civil liberty; they are declared to be [rights] of the citizens of North Carolina, and ought to be vigilantly guarded." *State v. Moss*, 47 N.C. 66, 68 (1854). "Every [citizen] . . . has a right to the decision of twenty-four of his fellow-citizens upon the question of his guilt; first, by a grand jury, and secondly, by a petty jury of good and lawful [citizens]." *Id.* at 69.

IV. Conclusion

As the trial court committed reversible error by permitting the State to amend the indictment, we vacate the judgment and remand the matter to the trial court for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges ELMORE and HUNTER, JR., concur.

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2. As Defendant notes in her brief, the jury verdict form did not provide jurors an option to indicate under what theory they were convicting Defendant.

STATE v. GLISSON

[251 N.C. App. 844 (2017)]

STATE OF NORTH CAROLINA
v.
DEBORAH LYNN GLISSON, DEFENDANT

No. COA16-426

Filed 7 February 2017

1. Appeal and Error—preservation of issues—general motion to dismiss—one aspect of evidence argued

The question of the sufficiency of evidence of conspiracy to traffic in opium (oxycodone) was preserved for appellate review where counsel made a general motion to dismiss all charges at trial but only argued a single aspect of the evidence.

2. Conspiracy—trafficking in opium—person accompanying defendant

The evidence, though circumstantial, was sufficient to withstand defendant's motion to dismiss a charge of conspiracy to traffic in opium (oxycodone). It would be reasonable for the jury to infer that the person who accompanied defendant to the transactions was present at defendant's behest to provide safety and comfort to defendant during the transaction.

3. Conspiracy—trafficking in opium—multiple transactions

The evidence in the record supported charges of multiple conspiracies to traffic in opium (oxycodone) even though defendant contended that the evidence showed multiple transactions indicating one conspiracy. The evidence was sufficient to support a reasonable inference that defendant and a coconspirator planned each transaction in response to separate, individual requests by the buyers and completed each plan upon the transfer of money for oxycodone.

Appeal by Defendant from judgment entered 12 September 2014 by Judge Kenneth F. Crow in Jones County Superior Court. Heard in the Court of Appeals 2 November 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General David D. Lennon, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for Defendant-Appellant.

INMAN, Judge.

Deborah Lynn Glisson ("Defendant") appeals from a judgment finding her guilty of, *inter alia*, felonious conspiracy to traffic opium by sale and delivery and possession of oxycodone with intent to sell and deliver. Defendant contends the trial court erred by denying her motion to dismiss the conspiracy charge related to the controlled buy on 13 September 2012 for insufficiency of the evidence. After careful review, we hold that Defendant has failed to demonstrate error.

I. Factual and Procedural History

Defendant was indicted on 5 August 2013, 28 April 2014, and 4 August 2014 for eighteen drug-related offenses arising from three separate controlled buys arranged by the Jones County Sheriff's Office between August and December 2012. The evidence at trial tended to show the following:

On or about August 2012, an informant with the Jones County Sheriff's Office contacted Detective Timothy Corey ("Detective Corey") and informed him that a couple, believed to be husband and wife, were selling oxycodone. At Detective Corey's direction, the informant arranged for a controlled buy from Defendant.

On 16 August 2012, Detective Corey and the informant met Defendant, who was accompanied by James Adkins ("Adkins"), in a parking lot in Pottersville, North Carolina. Defendant and Adkins arrived in a Ford Focus, which Defendant was driving. Defendant exited the Ford and walked over to the informant's vehicle to talk with him. The informant introduced Detective Corey as a family member from out of town who wanted to buy oxycodone. After a short conversation, Detective Corey requested oxycodone and paid Defendant $140. Defendant then turned to the passenger side front seat of the Ford and spoke with Adkins, who produced a pill bottle. Defendant counted out a number of pills and gave them to Detective Corey. The pills were later confirmed to be oxycodone.

Detective Corey and the informant then arranged for a second controlled buy from Defendant. On or about 13 September 2012,[1] Detective Corey met the informant in an unfinished subdivision, and shortly thereafter, at dusk, Defendant and Adkins arrived in the same Ford Focus Defendant had driven to the initial controlled buy. Defendant told

1. There were several errors made at trial as to the date of the second controlled buy. However, defense counsel raised no objections and did not offer an alibi defense for the events of 13 September 2012 or any of the other mistaken dates.

Detective Corey that she did not like the meeting location "because it's a subdivision that, you know, she don't know where anybody is coming from." Defendant gave Detective Corey twenty oxycodone pills in exchange for $80.

Detective Corey set up a third controlled buy to take place on 7 December 2012 in the same unfinished subdivision as the second controlled buy. Defendant told Detective Corey that she had to pick up Adkins before the meeting. Detective Corey met Defendant and Adkins and paid Defendant $200. Adkins then handed Detective Corey thirty-four oxycodone pills. Defendant was arrested immediately after delivering the pills to Detective Corey.

At the close of the State's evidence, Defendant made an oral motion to dismiss on all charges. Defendant's trial counsel argued that the State's evidence and testing methods were insufficient to satisfy the minimum weight requirement element for the charge of trafficking opium. The trial court dismissed one trafficking in opium by possession charge and reduced the other two charges from trafficking in opium to sale and delivery of opium. Defendant chose not to testify and presented no evidence. Her counsel renewed her general motion to dismiss all remaining charges based on the insufficiency of the evidence. The trial court denied the motion to dismiss. Following a meeting with counsel in chambers, the trial court dismissed the trafficking allegations in the conspiracy charges, reducing those charges to conspiracy to sell opium, conspiracy to deliver opium, and conspiracy to possess with intent to sell or deliver opium. The trial court reviewed the jury instructions with Defendant's trial counsel, who agreed with the proposed instructions regarding each conspiracy charge.

The jury returned a guilty verdict on all remaining charges, except that the jury found the lesser included offense of knowingly (rather than intentionally) maintaining a motor vehicle to possess and sell oxycodone on the dates of all three transactions. Defendant gave oral notice of appeal.

II. Analysis

On appeal, Defendant challenges the sufficiency of the evidence for the charge of felonious conspiracy to traffic opium by sale and delivery and possession of oxycodone with intent to sell and deliver related to the events of the second controlled buy on 13 September 2012. Defendant contends the State failed to present evidence, aside from Adkins's mere presence at the transaction on 13 September 2012, that Defendant conspired with Adkins to traffic opium on that date.

A. Appellate Jurisdiction

[1] The State first contends that Defendant failed to preserve this issue for appeal because her counsel argued before the trial court only that the State had presented insufficient evidence of the weight of the pills involved in each transaction. We disagree, based upon the record before us and our precedent holding that a general motion to dismiss for insufficiency of the evidence preserves all issues regarding the insufficiency of the evidence, even those issues not specifically argued before the trial court. *State v. Pender*, ___ N.C. App. ___, 776 S.E.2d 352, 360 (2015) (holding that although trial counsel presented a specific argument addressing only two elements of two charges, the defendant's general motion to dismiss "preserved his insufficient evidence arguments with respect to all of his convictions,"); *State v. Mueller*, 184 N.C. App. 553, 559, 647 S.E.2d 440, 446 (2007) (holding that although trial counsel presented a specific argument addressing only five charges, the defendant's general motion to dismiss preserved arguments regarding fourteen charges on appeal).

Defendant's motion to dismiss required the trial court to consider whether the evidence was sufficient to support each element of each charged offense. *State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 626 (2011). The trial court acknowledged Defendant's contention that the State "simply failed to offer sufficient evidence on each and every count as to justify these cases to survive a motion to dismiss." The trial court referred to the motion as "global" and "prophylactic," acknowledging on the record that Defendant's motion was broader than the single oral argument presented. In ruling on the motion to dismiss, the trial court stated that "the State has offered sufficient evidence on each and every element of all the surviving charges to justify these cases being advanced to the jury." Counsel's oral argument challenging a single aspect of the evidence does not preclude Defendant from arguing other insufficiencies in the evidence on appeal. So we will address the merits of Defendant's argument challenging the sufficiency of the evidence to support the conspiracy charge.

B. Standard of Review

A trial court, on a motion to dismiss for insufficient evidence, "must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992) (citation omitted). "Whether evidence presented constitutes substantial evidence is a question of law for the court" and is reviewed *de novo*. *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991) (citation

omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Olson*, 330 N.C. at 564, 411 S.E.2d at 595 (citation omitted). In reviewing the denial of a motion to dismiss for insufficiency of the evidence, "we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citation omitted). "Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal." *Olson*, 330 N.C. at 564, 411 S.E.2d at 595 (citation omitted).

C. Sufficiency of the Evidence

[2] "A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful way." *State v. Bell*, 311 N.C. 131, 141, 316 S.E.2d 611, 617 (1984) (citation omitted). To prove the crime of conspiracy, "the State need not prove an express agreement;" rather, "evidence tending to show a mutual, implied understanding will suffice." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citation omitted). "The existence of a conspiracy may be established by direct or circumstantial evidence, although it is generally established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Worthington*, 84 N.C. App. 150, 162, 352 S.E.2d 695, 703 (1987) (internal quotation marks and citations omitted). "In 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the twelve and to avoid unnecessary appeals." *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985) (citations omitted).

Here, the State presented evidence of indefinite acts amounting to substantial evidence that Defendant conspired with Adkins to traffic opium on 13 September 2012. Defendant brought Adkins in her vehicle to the unfinished subdivision just as she had brought Atkins with her for the initial transaction with Detective Corey, and just as she would bring Adkins with her again for the third transaction in December. The area of the exchange was one Defendant did not like and the sale took place at or near dark. The drugs were maintained in the same vehicle as Adkins, and Defendant exchanged the drugs and counted the money in front of him. From this, it would be reasonable for the jury to infer that Adkins was present at Defendant's behest to provide safety and comfort to Defendant during the transaction. *See State v. Jackson*, 103 N.C. App. 239, 244, 405 S.E.2d 354, 357 (1991) ("[I]t is reasonable for the jury to infer that the defendant was present merely to ensure the

safety of the cocaine. This evidence, while circumstantial in nature . . . allowed the state to withstand the defendant's motion to dismiss [a conspiracy charge.]"). This evidence was sufficient for the State to withstand Defendant's motion to dismiss.

D. Single Conspiracy

[3] Defendant argues that evidence of Adkins' participation in the other two transactions cannot be considered to support the separate conspiracy charge related to the 13 September 2012 transaction, but instead establishes a single conspiracy to engage in three transactions, so that Defendant could be convicted of only one conspiracy charge. We disagree.

"There is no simple test for determining whether single or multiple conspiracies are involved: the essential question is the nature of the agreement or agreements, . . . factors such as time intervals, participants, objectives, and number of meetings all must be considered." *State v. Rozier*, 69 N.C. App. 38, 52, 316 S.E.2d 893, 902 (1984). By electing to charge separate conspiracies, the State "must prove not only the existence of at least two agreements but also that they were separate." *Id.* at 53, 316 S.E.2d at 902 (citation omitted). "Although the offense of conspiracy is complete upon formation of the unlawful agreement, the offense continues until the conspiracy comes to fruition or is abandoned." *State v. Medlin*, 86 N.C. App. 114, 122, 357 S.E.2d 174, 179 (1987) (citation omitted). Ultimately, "[t]he question of whether multiple agreements constitute a single conspiracy or multiple conspiracies is a question of fact for the jury." *State v. Tirado*, 358 N.C. 551, 577, 599 S.E.2d 515, 533 (2004) (citing *Rozier*, 69 N.C. App. at 54, 316 S.E.2d at 903).

Here, the evidence in the record, including the evidence from the other two controlled buys, supports the existence of multiple separate conspiracies. Approximately one month passed between the first and second controlled buys, and approximately three months passed between the second and third controlled buys. There was no evidence to suggest that Defendant planned the transactions as a series. Rather, the informant or Detective Corey initiated each transaction. The evidence was sufficient to support a reasonable inference that Defendant and Atkins planned each transaction in response to separate, individual requests by the buyers and completed each plan upon the transfer of money for oxycodone. While the objectives of each controlled buy may have been similar—to purchase oxycodone—the agreed upon amount differed and none of the transactions contemplated future transactions.

In light of the foregoing, we conclude that the evidence in the record supports the charges of multiple conspiracies. We hold that Defendant has not met her burden of establishing that the trial court erred in denying her motion to dismiss for insufficiency of the evidence on the multiple conspiracy charges.

III. Conclusion

For the above mentioned reasons, we hold the trial court did not err by denying Defendant's motion to dismiss and submitting to the jury the charge of conspiracy to traffic a Schedule II controlled substance as related to the 13 September 2012 transaction.

NO ERROR.

Chief Judge McGEE and Judge DAVIS concur.

STATE OF NORTH CAROLINA
v.
JAMES McLEAN

No. COA16-484

Filed 7 February 2017

1. Indictment and Information—discharging a firearm within an enclosure—improperly worded

An indictment was insufficient to confer jurisdiction where it attempted to charge defendant with discharging a firearm *within* an enclosure to incite fear, N.C.G.S. § 14-34.10, but instead alleged that defendant discharged a firearm *into* an occupied structure.

2. Robbery—sufficiency of evidence—taking of property

The trial court did not err by denying defendant's motion to dismiss a charge of robbery with a dangerous weapon where there was substantial evidence that defendant took personal property from the victim's person or presence.

3. Evidence—officer vouching for witness—not prejudicial

There was error, but not plain error, in a prosecution for armed robbery and other offenses where an officer testified that the victim "seemed truthful." The officer vouched for the veracity of the witness, but there was no prejudice in light of other corroborating evidence.

4. Evidence—hearsay—what a jailer told the witness—not offered to prove the truth of the matter—no prejudice

There was no error in a prosecution for armed robbery and other offenses where a witness testified that a jailer had told her that defendant was in the jail cell next to hers. The challenged testimony was not offered to prove the truth of the matter asserted but to explain why the witness was afraid to testify. Even if the testimony amounted to hearsay, there was no plain error in light of substantial evidence of defendant's guilt.

5. Sentencing—early release condition—payment of State's expert witness expenses—no authority

The trial court erred in a prosecution for armed robbery and other offenses by requiring defendant, as a condition of early release or post-release supervision, to pay the expenses of the State's expert witness. There did not appear to be any statutory authority for the requirement.

Appeal by defendant from judgments entered 15 October 2015 by Judge James M. Webb in Scotland County Superior Court. Heard in the Court of Appeals 20 October 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Kenneth Sack, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

McCULLOUGH, Judge.

James McLean ("defendant") appeals from judgments entered upon his convictions of assault with a deadly weapon inflicting serious injury, robbery with a dangerous weapon, and discharging a firearm from within a building with the intent to incite fear. On appeal, defendant argues that judgment entered upon his conviction for discharging a firearm within a building with the intent to incite fear must be vacated, the trial court erred by denying his motion to dismiss the robbery with a dangerous weapon charge, the trial court erred by allowing Lieutenant Jason Butler to vouch for the credibility of a victim, the trial court erred by allowing Shaquana McInnis to provide testimony amounting to inadmissible hearsay, and the trial court erred by assessing a fee against defendant to pay for the State's expert witness. For the reasons stated herein, we hold no error in part and vacate in part.

I. Background

On 27 October 2014, defendant was indicted for the following: attempted first degree murder in violation of N.C. Gen. Stat. § 14-17; assault with a deadly weapon with intent to kill inflicting serious injury in violation of N.C. Gen. Stat. § 14-32(a); robbery with a dangerous weapon in violation of N.C. Gen. Stat. § 14-87; and, discharging a firearm within an enclosure to incite fear in violation of N.C. Gen. Stat. § 14-34.10.

Defendant's trial commenced at the 12 October 2015 criminal session of Scotland County Superior Court, the Honorable James M. Webb presiding. The State's evidence tended to show as follows: On 25 April 2014, approximately nine people, including the State's witnesses Rodrigues McRae ("McRae"), Vincent Smith ("Smith"), John Shaw ("Shaw"), Acey Braddy ("Braddy"), and Shaquana McInnis ("McInnis"), were playing cards in a cinder-block building behind a residence located at 508 Morris Street in Laurinburg, North Carolina. Sometime between 3:00 and 4:00 a.m., four individuals, each armed, entered the building. Three of the intruders had on masks and one was unmasked. The unmasked man said, "Don't move[]" and "Y'all killed my brother. I'm going to terrorize you Laurinburg mother****ers[.]" The unmasked man then fired two shots. Braddy was shot in his chest and said "Man, you shot me. You shot me." McRae and Braddy identified the unmasked shooter who shot Braddy as defendant.

Defendant ordered everyone to "get facedown on the ground and take our clothes off[]" and then said, "Give me all your money." Braddy testified that the three masked intruders "just stood like soldiers[]" while defendant "did everything by hisself [sic]." McRae testified that "I just took my pants and my wallet and everything, and my keys and my cell phone, and just gave it all to them." The following items were taken from the State's witnesses: a cell phone and twenty dollars from Smith; $800.00 from Shaw; a cell phone and money from Braddy; and "a couple hundred dollars" from McInnis. The testimony from Smith, Shaw, and McInnis corroborated Braddy and McRae's testimony.

Lieutenant Jason Butler ("Lieutenant Butler") from the Laurinburg Police Department testified that in the early morning hours of 26 April 2014, he was dispatched to Scotland Memorial Hospital in reference to a gunshot wound. Lieutenant Butler was directed to a trauma room where he interviewed Braddy. Braddy had suffered a single gunshot wound. Braddy informed Lieutenant Butler that he was playing cards with several people when four people ran into the room, three of them wearing masks, and one of them made the statement, "Y'all killed my brother.

I'm going to terrorize you n****** in Laurinburg." Braddy stated that the intruders ordered them "to take their clothes off and lay on the ground, where some cash and cell phones and things like that were taken from them." As the intruders were exiting, Braddy heard a gunshot and felt pain in his back. Braddy told Lieutenant Butler that the unmasked person was "the brother of Chris McKoy." Lieutenant Butler testified that Braddy "was agitated and seemed to be in some pain. But he was – to me, he seemed truthful."

Officer Merica Zabitosky ("Officer Zabitosky"), who was employed with the City of Laurinburg, interviewed Braddy later that morning on 26 April 2014. Braddy identified defendant as the masked shooter, gave a description of defendant's appearance, and stated that defendant "[l]ook[ed] just like his brother Chris McKoy[.]"

At trial, McInnis testified that after the robbery, she was incarcerated. While in a holding cell with a few other females, she heard one of the females having a conversation with a man in a nearby cell. The man wanted to know the identity of all the females in the cell. McInnis provided her name and the man said through the cell wall, "You wrote a statement against me[.]" McInnis testified that she recognized the voice as that of the unmasked shooter from the 26 April 2014 robbery. McInnis responded that she did not write a statement and the male voice said "that they were going to put him in a cell with me, and 'We'll see what you say then.' " McInnis testified that she asked the jailer whether "James McLean" was in there and "she did say he was in there." McInnis testified that because of this incident, she was scared to testify.

On 15 October 2015, a jury found defendant not guilty of attempted first degree murder. The jury found defendant guilty of assault with a deadly weapon inflicting serious injury, robbery with a firearm, and discharging a firearm from within a building with the intent to incite fear.

Defendant was sentenced as a prior record level IV to 38 to 58 months for his assault with a deadly weapon inflicting serious injury conviction, 97 to 129 months for his robbery with a dangerous weapon conviction, and 25 to 39 months for discharging a firearm from within a building with the intent to incite fear conviction.

Defendant appeals.

II. Discussion

Defendant presents five issues on appeal. We address each in turn.

A. Discharging a Firearm Within an Enclosure to Incite Fear

[1] In his first argument on appeal, defendant contends that the judgment entered upon his conviction for discharging a firearm *within* an enclosure to incite fear must be vacated because the indictment was insufficient to charge defendant with that crime. The State concedes and we agree.

"This Court reviews the sufficiency of an indictment *de novo*." *State v. Mann*, 237 N.C. App. 535, 539, 768 S.E.2d 138, 141 (2014). "[A] valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Miranda*, 235 N.C. App. 601, 605, 762 S.E.2d 349, 353 (2014) (citation omitted). "An indictment for a statutory offense is sufficient, as a general rule, when it charges the offense in the language of the statute." *State v. Penley*, 277 N.C. 704, 707, 178 S.E.2d 490, 492 (1971).

Here, the "discharging a firearm within enclosure to incite fear" indictment charged that "defendant named above unlawfully, willfully and feloniously did discharge a handgun, a firearm, *into* an occupied structure with the intent to incite fear in others. This act was in violation of North Carolina General Statutes Section *14-34.10*." (emphasis added).

N.C. Gen. Stat. § 14-34.10, entitled "Discharge firearm within enclosure to incite fear[,]" provides that "any person who willfully or wantonly discharges or attempts to discharge a firearm *within* any occupied building, structure, motor vehicle, or other conveyance, erection, or enclosure with the intent to incite fear in another shall be punished as a Class F felon." N.C. Gen. Stat. § 14-34.10 (2015) (emphasis added). N.C. Gen. Stat. § 14-34.1, entitled "Discharging certain barreled weapons or a firearm into occupied property[,]" provides that

> [a]ny person who willfully or wantonly discharges or attempts to discharge any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony.

N.C. Gen. Stat. § 14-34.1(a) (2015) (emphasis added).

The indictment in question attempted to charge defendant of violating N.C. Gen. Stat. § 14-34.10 but failed to accurately and sufficiently charge that offense. Instead, the indictment alleged that defendant discharged a firearm "into" an occupied structure. As such, we hold that the

indictment was insufficient to confer jurisdiction upon the trial court. Defendant's judgment entered upon his conviction for discharging a firearm from within a building with the intent to incite fear is vacated.

B. Robbery with a Dangerous Weapon

[2] In the second issue on appeal, defendant contends that the trial court erred by denying his motion to dismiss the robbery with a dangerous weapon charge. Specifically, defendant argues that there was insufficient evidence that he committed a taking from Braddy's person or presence. We disagree.

Our Court reviews *de novo* the trial court's motion to dismiss. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007). "A trial court should deny a motion to dismiss if, considering the evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference, there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Lawson*, 194 N.C. App. 267, 278, 669 S.E.2d 768, 775-76 (2008) (internal quotation marks and citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991) (citation and quotation marks omitted).

> The elements of robbery with a dangerous weapon are: (1) the unlawful *taking* or an attempt to take personal property *from the person or in the presence of another* (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened.

State v. Hill, 365 N.C. 273, 275, 715 S.E.2d 841, 843 (2011) (citation and internal quotation marks omitted) (emphasis added). Our Court has stated that:

> [t]he word "presence" . . . must be interpreted broadly and with due consideration to the main element of the crime-intimidation or force by the use or threatened use of firearms. "Presence" here means a possession or control by a person so immediate that force or intimidation is essential to the taking of the property.

State v. Cole, 199 N.C. App. 151, 156, 681 S.E.2d 423, 427 (2009) (citation omitted).

To establish that defendant took personal property from Braddy's person or presence, the State presented the following evidence: Four intruders, three masked and one unmasked, entered a cinderblock building in the early morning hours of 25 April 2014. All four men were armed. McRae and Braddy identified the unmasked shooter who shot Braddy as defendant. McRae testified that defendant, as well as others, were ordering the occupants of the building to "get facedown on the ground and take our clothes off." McRae testified that defendant said, "Get butt-a** naked. Give me all your money." Braddy testified that "Mr. McLean did everything by hisself [sic][]" while the other three intruders "just stood like soldiers." Braddy further testified that "everybody got robbed. A few people got their clothes took off. He took cell phones." In addition, the following exchange occurred:

> [THE STATE:] When you were laying there on the ground, was anything taken from you as far as property?
>
> [BRADDY:] My cell phone.
>
> [THE STATE:] Anything else?
>
> [BRADDY:] No. The money had been tooken [sic].

Viewing the foregoing evidence in the light most favorable to the State, we hold that there was substantial evidence that defendant took personal property from Braddy's person or presence. *See State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988) ("If there is substantial evidence — whether direct, circumstantial, or both — to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.") (citation omitted). Accordingly, the trial court did not err by denying defendant's motion to dismiss the robbery with a dangerous weapon charge.

C. Testimony of Lieutenant Jason Butler

[3] In the third issue on appeal, defendant argues that the trial court committed plain error by allowing Lieutenant Butler to testify that Braddy "seemed truthful" and that he felt Braddy wanted police to find the perpetrator. Defendant contends that Lieutenant Butler's testimony constituted an opinion which tended to vouch for the credibility of Braddy.

On 26 April 2014, Lieutenant Butler interviewed Braddy at the hospital. Defendant challenges the following exchange between the State and Lieutenant Butler:

> Q. Okay. Generally, what was Mr. Braddy's demeanor like when he was talking to you?
>
> A. He was agitated and seemed to be in some pain. But he was - to me, he seemed truthful. I mean, I think he wanted - I felt that he wanted me to - or us, the police department, to find the people that had injured him.

We first note that because defendant failed to object to the admission of this testimony, "the proper standard of review is a plain error analysis[.]" *State v. Gary*, 348 N.C. 510, 518, 501 S.E.2d 57, 63 (1998).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted).

Rule 701 of the North Carolina Rules of Evidence provides that "[i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2015). Our Courts have held that "when one witness vouch[es] for the veracity of another witness, such testimony is an opinion which is not helpful to the jury's determination of a fact in issue and is therefore excluded by Rule 701." *State v. Global*, 186 N.C. App. 308, 318, 651 S.E.2d 279, 286 (2007) (citation and internal quotation marks omitted).

In the present case, Lieutenant Butler testified that Braddy "seemed truthful[.]" This was an opinion that vouched for the veracity of another witness. The jury had the opportunity to make an independent determination of Braddy's veracity when Braddy testified at trial. Therefore, Lieutenant Butler's opinion of Braddy's veracity was not helpful to the

jury and admission of this testimony amounted to error. However, we conclude that it did not amount to plain error given the testimony from four other witnesses, McRae, Smith, Shaw, and McInnis, which corroborated Braddy's testimony.

D. Testimony of Shaquana McInnis

[4] In the fourth issue on appeal, defendant argues that the trial court committed plain error by allowing Shaquana McInnis to testify that after the 25 April 2014 incident, while she was incarcerated, a jailer told her that defendant was in a jail cell adjacent to hers. Defendant argues that because the jailer did not testify at trial and her testimony was offered for the truth of the matter asserted, that defendant was in the holding cell, McInnis' testimony amounted to inadmissible hearsay.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1(a), Rule 801 (2015). Generally, hearsay evidence is inadmissible. *State v. Valentine*, 357 N.C. 512, 515, 591 S.E.2d 846, 851 (2003). However, "[o]ut-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Castaneda*, 215 N.C. App. 144, 147, 715 S.E.2d 290, 293 (2011) (citation omitted).

At trial, McInnis testified that she was afraid to give a formal written statement to police and to testify. She explained that she was afraid to testify because of an incident that occurred previously. While incarcerated and in a holding cell with other females, McInnis heard one of the women having a conversation with a man in an adjacent cell. The man wanted to know the identity of all the women. McInnis provided her name and the man said through the cell wall, "You wrote a statement against me[.]" McInnis testified that she recognized the voice as that of the unmasked shooter from the 26 April 2014 robbery. McInnis responded by denying that she wrote a statement and the male voice replied "that they were going to put him in a cell with me, and 'We'll see what you say then.' " McInnis could not see into the men's holding cell. McInnis then asked a jailer whether "James McLean" was in the adjacent cell and the jailer confirmed that he was. Defendant did not object to the admission of the foregoing testimony.

Upon thorough review, we hold that defendant's argument has no merit. The challenged testimony in the case *sub judice* was not offered to prove the truth of the matter asserted. Rather, it was offered to explain why McInnis was afraid to testify. Even assuming *arguendo* that McInnis' testimony amounted to inadmissible hearsay, the admission of

this testimony did not amount to plain error in light of the substantial evidence of defendant's guilt.

E. Fee for the State's Witness

[5] In his last argument on appeal, defendant contends that the trial court erred by assessing a fee against him to pay for the State's expert witness, Doctor Scott Martinelli ("Dr. Martinelli"). We agree.

At trial, the State called on Dr. Martinelli, an emergency-room physician who worked at Scotland Memorial Hospital. Dr. Martinelli was accepted as an expert in the field of emergency medicine and testified regarding the treatment he administered to Braddy on 26 April 2014. During sentencing, the trial court ordered that defendant, as a condition of any early release or post-release supervision, must reimburse the State $5,075.00 for the services of his court-appointed attorney, $60.00 appointment fee, and $780.00 for the testimony of Dr. Martinelli.

The trial court also signed a form "CR-231" from the Administrative Office of the Courts on 15 October 2015. The form was entitled "Order for Expert Witness Fee in Criminal Cases at the Trial Level" and provided as follows:

> The Court finds that:
>
> The person named below[, Dr. Martinelli,] was compelled to attend court and testify as an expert, or provided necessary expert services pursuant to a prior court order, and the person named below was duly sworn and gave testimony of such nature and character as to qualify as an expert witness, or provided services that were necessary expenses of prosecution; and
>
> Therefore, it is ORDERED that the amount listed as Total Compensation and Reimbursables To Be Paid be allowed this expert, *to be paid from Judicial Branch funds by the North Carolina Administrative Office of the Courts*. It is further ORDERED that all reasonable and necessary expenses already incurred, in accordance with G.S. 7A-343(9f), by the North Carolina Administrative Office of the Courts associated with this witness' appearance to be paid from the Judicial Branch funds by the North Carolina Administrative Office of the Courts.

(emphasis added). The total compensation and reimbursables to be paid was listed as $780.00.

The order listed several statutes regarding the authority of the trial court to order compensation for an expert: N.C. Gen. Stat. §§ 7A-300, 7A-314, 7A-343, 7A-454, and 8C-1, Rule 702. N.C. Gen. Stat. § 7A-300 lists the various expenses necessary for the proper functioning of the Judicial Department, including "[f]ees and travel expenses . . . of witnesses required to be paid by the State[,]" and provides that the operating expenses of the Judicial Department "shall be paid from State funds, out of appropriations for this purpose made by the General Assembly, or from funds provided by local governments pursuant to G.S. 7A-300.1, 153A-212.1, or 160A-289.1." N.C. Gen. Stat. § 7A-300(a)(6) (2015). N.C. Gen. Stat. § 7A-314 sets out how witness fees and compensation are to be determined. N.C. Gen. Stat. § 7A-343 lists the duties of the Director of the Administrative Officer of the Courts, including "[p]rescrib[ing] policies and procedures for payment of those experts acting on behalf of the court or prosecutorial offices, as provided for in G.S. 7A-314(d)." N.C. Gen. Stat. § 7A-343(9f) (2015). N.C. Gen. Stat. § 7A-454 provides that "[f]ees for the services of an expert witness . . . for an indigent person and other necessary expenses of counsel shall be paid by the State in accordance with rules adopted by the Office of Indigent Defense Services." N.C. Gen. Stat. § 7A-454 (2015). Lastly, N.C. Gen. Stat. § 8C-1, Rule 702 states that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion[.]" N.C. Gen. Stat. § 8C-1, Rule 702(a) (2015).

From the record, there does not appear to be any statutory authority for the trial court to require defendant, as a condition of any early release or post-release supervision, to pay the expenses of the State's expert witness, Dr. Martinelli. The 15 October 2015 order of the trial court explicitly states that Dr. Martinelli is "to be paid from Judicial Branch funds by the North Carolina Administrative Office of the Courts." As such, we vacate the trial court's assessment of an expert witness fee as a condition of any early release or post-release supervision.

III. Conclusion

Defendant's judgment entered upon his conviction for discharging a firearm within a building with intent to incite fear is vacated. The trial court did not err by denying defendant's motion to dismiss the robbery with a dangerous weapon charge. The trial court did not commit plain error by allowing Lieutenant Butler to testify that Braddy "seemed truthful" or by allowing McInnis to testify that a jailer informed her that defendant was in an adjacent holding cell. We vacate the trial court's

assessment of an expert witness fee as a condition of any early release or post-release supervision.

NO ERROR IN PART; VACATED IN PART.

Judges ELMORE and STROUD concur.

STATE OF NORTH CAROLINA
v.
JEFFREY ROBERT PARISI

No. COA16-635

Filed 7 February 2017

1. Motor Vehicles—impaired driving—motion to suppress—district court—appeal to appellate division—governing statute

An appeal in a driving while impaired case was governed by N.C.G.S. § 20-38.7 and N.C.G.S. § 15A-1432 where the superior court did not grant defendant's motion to suppress but only affirmed the district court's preliminary determination and again later affirmed the district's court's final order.

2. Motor Vehicles—impaired driving—motion to suppress—district court—appellate division jurisdiction

The Court of Appeals lacked jurisdiction to hear the State's appeal on defendant's motion to suppress in a DWI prosecution. The State does not possess a statutory right to appeal to the appellate division from a district court's final order granting defendant's pretrial motion to suppress evidence. While the district court order in this case was labeled "Preliminary Order of Dismissal," this heading was mere surplusage, as the district's court's written order granted only the motion to suppress, and neither the record nor the written order indicated that defendant also made a pretrial motion to dismiss under N.C.G.S. § 20-38.6(a) or that the district court addressed a dismissal motion.

Appeal by the State from order entered 6 April 2016 by Judge Michael D. Duncan in Wilkes County Superior Court. Heard in the Court of Appeals 9 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellee.

TYSON, Judge.

The State appeals from the superior court's order affirming the district court's final order, which granted Jeffrey Robert Parisi's ("Defendant") motion to suppress and dismissed the charge of driving while impaired ("DWI"). We dismiss in part, vacate in part, and remand.

I. Factual Background

On 1 April 2014, at approximately 11:30 p.m., Wilkesboro Police Officer Anderson was operating a checkpoint and observed Defendant as he drove up to the checkpoint. While Officer Anderson observed nothing illegal about Defendant's driving, he overheard a "disturbance" between the occupants inside the vehicle. When the vehicle approached where Officer Anderson was standing, the occupants became silent.

Officer Anderson approached the driver's door and shined his light into the vehicle to look at the occupants. At that point, Officer Anderson observed an opened carton, or "box," used to carry alcohol located on the passenger side floorboard. He did not observe any opened individual bottles or cans of alcohol. He also noticed an odor of alcohol coming from the vehicle.

Officer Anderson spoke with Defendant and observed Defendant had glassy and watery eyes. Officer Anderson asked Defendant to pull off to the side of the road and requested Defendant to exit the vehicle. At this point, Officer Anderson realized the moderate smell of alcohol was coming from Defendant and not from inside the vehicle. Defendant admitted he had consumed three beers earlier in the evening.

Officer Anderson testified Defendant "did not appear grossly impaired," but had Defendant perform three field sobriety tests: the walk-and-turn test, the one-leg-stand test, and the Horizontal Gaze Nystagmus ("HGN") test. Before each test, Officer Anderson gave Defendant instructions on how to perform the test, which Defendant was able to follow.

On the walk-and-turn test, Defendant had a gap, greater than a half an inch, between his heel and toe on two steps. Officer Anderson

testified this counted as one clue out of eight possible clues of impairment. On the one-leg-stand test, Defendant swayed and used his arms for balance, which Officer Anderson counted as two out of four possible clues of impairment. Officer Anderson also administered the HGN test and, over Defendant's objection, was allowed to testify as an expert on the test. Officer Anderson testified all six clues of impairment were present on the test.

Based upon these tests, Officer Anderson formed an opinion that Defendant had consumed a sufficient quantity of alcohol to impair his mental and physical faculties. Defendant was charged with driving while impaired. The next day, a magistrate's order was entered finding probable cause to detain.

On 17 June 2015, Defendant appeared in Wilkes County District Court and made a pre-trial, oral motion to "suppress pc & checkpoint." The district court denied the checkpoint motion, but granted the motion to suppress. The State gave oral notice of appeal.

Before the district court entered its written order, the State filed a written notice of appeal to the superior court on 27 July 2015 to ensure that its appellate rights were preserved. The sole basis for the State's appeal was "that there was probable cause to arrest Defendant for the charge of driving while impaired."

The district court entered a written order on 23 September 2015. While the written order was labeled "Preliminary Order of Dismissal," it only granted Defendant's motion to suppress and did not dismiss Defendant's charge. The State again filed a written notice of appeal to the superior court pursuant to N.C. Gen. Stat. § 20-38.7. The State argued "no competent evidence was presented to support the motion to suppress."

Aside from the district court's order being labeled as a "dismissal," nothing indicates the district court actually entered a preliminary dismissal or that the State had appealed from such a dismissal. Each of the State's notices of appeal specifically and solely addressed Defendant's motion to suppress. However, on appeal, the superior court granted "Defendant's Motion to Suppress *and Motion to Dismiss*" and remanded the case to the district court for entry of a final order "consistent with [its] Order." (emphasis supplied). On 11 March 2016, the district court entered its final order, which suppressed evidence supporting Defendant's arrest and dismissed the DWI charge.

The State appealed the district court's final order to the superior court, along with the proper certification. *See* N.C. Gen. Stat. § 15A-1432

(2015). On 6 April 2016, the superior court affirmed the district court's final order suppressing the evidence supporting the arrest of Defendant and dismissing the charge. The State appeals.

II. Issues

The State argues the district court erred by (1) concluding that Officer Anderson lacked probable cause to arrest Defendant for driving while impaired, and (2) granting Defendant's motion to suppress and dismissing the case. The State further argues the superior court erred by affirming the district court's final order and requests this Court to reverse the superior court's order.

Defendant argues this Court lacks jurisdiction to hear this case. He asserts he did not make a pre-trial motion to dismiss and the district court never entered a preliminary order dismissing the case. As a result, the superior court on its review of the district court's preliminary order lacked subject matter jurisdiction to remand the case for dismissal. If so, the superior court possessed jurisdiction to solely consider the district court's preliminary order granting Defendant's motion to suppress. Defendant argues the superior court and district court orders dismissing the case are nullities and the State has no statutory right to appeal the district court's final order suppressing the evidence.

Defendant further argues, even if this Court has jurisdiction to hear the State's appeal, the district court did not err in granting Defendant's motion to suppress. Defendant argues the district court's findings of fact support its conclusion of law that he was arrested without probable cause.

III. Standard of Review

The issue of subject matter jurisdiction may be raised at any time, including for the first time on appeal. *Huntley v. Howard Lisk Co., Inc.*, 154 N.C. App. 698, 700, 573 S.E.2d 233, 235 (2002). Our standard of review for questions of subject matter jurisdiction is *de novo*. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

IV. Jurisdiction

The procedure and appeals process for implied-consent offenses has been the subject of several recent cases before our courts. *See e.g.*, *State v. Miller*, __ N.C. App. __, 786 S.E.2d 367 (2016); *State v. Bryan*, 230 N.C. App. 324, 749 S.E.2d 900 (2013), *disc. review denied*, 367 N.C. 330, 775 S.E.2d 615 (2014); *State v. Osterhoudt*, 222 N.C. App. 620, 731 S.E.2d 454 (2012); *State v. Palmer*, 197 N.C. App. 201, 676 S.E.2d 559 (2009); *State v. Fowler*, 197 N.C. App. 1, 676 S.E.2d 523 (2009).

A. Grounds for the State's Appeal

[1] The State bases its appeal in this case upon N.C. Gen. Stat. §§ 20-38.7, 15A-979(c), 15A-1432, and 15A-1445. Neither N.C. Gen. Stat. §§ 15A-979 nor 15A-1445 are applicable to this appeal.

Our case law clearly provides that N.C. Gen. Stat. § 15A-1432 controls an appeal from a judgment of the superior court affirming the district court's final order, not N.C. Gen. Stat. § 15A-1445(a)(1). *Bryan*, 230 N.C. App. at 327, 749 S.E.2d at 902. N.C. Gen. Stat. §§ 15A-1445(b) and 15A-979 are also inapplicable. *See Osterhoudt*, 222 N.C. App. at 625, 731 S.E.2d at 458. These statutes allow the State to appeal to this Court when a superior court grants a defendant's motion to suppress. N.C. Gen. Stat. §§ 15A-1445(b) and 15A-979 (2015).

This Court has clarified "the State receives an automatic appeal as of right *only* from decisions by a superior court acting in its normal capacity." *Bryan*, 230 N.C. App. at 327-28, 749 S.E.2d at 903 (emphasis added) (citing *Osterhoudt*, 222 N.C. App. at 625, 731 S.E.2d at 458). In this case, the superior court did not grant Defendant's motion to suppress, but only affirmed the district court's preliminary determination on the motion to suppress, and again later affirmed the district court's final order. The provisions of N.C. Gen. Stat. §§ 20-38.7 and 15A-1432 govern this appeal.

B. Jurisdiction to Dismiss

[2] Defendant argues this Court lacks jurisdiction to hear the State's appeal on Defendant's motion to suppress. We agree.

"[T]he State cannot appeal proceedings from a judgment in favor of the defendant in a criminal case in the absence of a statute clearly conferring that right." *State v. Dobson*, 51 N.C. App. 445, 446, 276 S.E.2d 480, 481 (1981). N.C. Gen. Stat. § 20-38.6 (2015) details the procedure for pre-trial motions in implied-consent offense cases:

> The defendant may move to suppress evidence or dismiss charges only prior to trial, except the defendant may move to dismiss the charges for insufficient evidence at the close of the State's evidence and at the close of all of the evidence without prior notice. If, during the course of the trial, the defendant discovers facts not previously known, a motion to suppress or dismiss may be made during the trial.

N.C. Gen. Stat. § 20-38.6(a).

When a defendant makes a pre-trial motion to suppress or motion to dismiss, the district court may only enter a "preliminary determination" indicating whether the motion should be granted or denied. N.C. Gen. Stat. § 20-38.6(f). The district court cannot enter a final judgment on the pre-trial motion until after the State has appealed to the superior court, has indicated it does not intend to appeal, or fails to appeal within the time allowed. *Id.*

N.C. Gen. Stat. § 20-38.7 (2015) provides the process by which the State may appeal the district court's preliminary determination on a defendant's pre-trial motion:

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

N.C. Gen. Stat. § 20-38.7(a).

After the superior court considers the State's appeal from the district court's preliminary determination pursuant to N.C. Gen. Stat. § 20-38.7(a), the court must "enter an order remanding the matter to the district court with instructions to finally grant or deny the defendant's pretrial motion." *Fowler*, 197 N.C. App. at 11, 676 S.E.2d at 535. The State does not have a statutory right to appeal and cannot appeal to the appellate division from a superior court's interlocutory order remanding the case to the district court for entry of a final order. *Id.* at 7, 676 S.E.2d at 532.

On remand, the district court may properly enter a final order on the defendant's pre-trial motion. *See id.* North Carolina's statutes and case law differentiate the process by which the State can appeal the final order, depending upon whether the district court's final order pertains to a pre-trial motion to suppress or a motion to dismiss. *See id.*; N.C. Gen. Stat. § 15A-1432. The State does not possess a statutory right to appeal to the appellate division from a district court's final order granting a defendant's pretrial *motion to suppress* evidence. *Fowler*, 197 N.C. App. at 29, 676 S.E.2d at 546.

On the other hand, this Court has held "the State has a right of appeal *to the superior court* from a district court's final *dismissal* of criminal charges against a defendant pursuant to N.C.G.S. § 15A-1432(a)(1)."

Id. at 30, 676 S.E.2d at 546 (emphasis supplied). The State also has a right to appeal to the appellate division from a superior court's order affirming a district court's pre-trial *dismissal* pursuant to N.C. Gen. Stat. § 15A-1432(e). *Id.*

Here, the district court entered a preliminary determination granting Defendant's *motion to suppress*. While the written order was labeled "Preliminary Order of Dismissal," this heading is surplusage, as the district court's written order solely granted Defendant's pre-trial motion to suppress the evidence supporting the arrest of Defendant. Neither the record nor the written order indicated Defendant also made a pre-trial motion to dismiss under N.C. Gen. Stat. § 20-38.6(a), or that the district court addressed a dismissal motion. The State appealed the district court's "preliminary determination . . . granting defendant's *pre-trial motion to suppress the arrest* of Defendant." Nothing in the State's appeal to the superior court indicated it was appealing from the district court's preliminary determination granting a pre-trial motion to dismiss or that the district court intended *to dismiss* Defendant's charge pre-trial. (emphasis supplied).

Despite this fact, the superior court granted "Defendant's Motion to Suppress and Motion to Dismiss" and "remanded to the District Court for a final Order consistent with this Court's order." The superior court possessed jurisdiction to remand the motion to suppress to the district court with instructions to grant that motion.

However, the superior court did not possess jurisdiction to remand and order the district court to dismiss Defendant's charges. No motion to dismiss or preliminary determination granting a motion to dismiss had been made by the District Court, and the State did not indicate that it was appealing from such a motion.

The district court followed the superior court's instructions on remand, entered its final order granting Defendant's motion to suppress, and also dismissed the case. Pursuant to N.C. Gen. Stat. § 15A-1432(a), the State again appealed to the superior court, which affirmed the district court's order granting the motion to suppress and its dismissal of the case.

The State purported to appeal the superior court's second order to this Court pursuant to N.C. Gen. Stat. § 15A-1432(e). The superior court's first order remanding the case to the district court with instructions to dismiss was entered without jurisdiction. The subsequent orders dismissing the charges and affirming that dismissal were also without jurisdiction and erroneous.

The State relies upon a recent case of this Court to argue the district court's authority is not solely dependent upon a pre-trial motion from the parties and that the district court possesses the authority to dismiss an action *sua sponte* following the grant and affirmation of a motion to suppress. *State v. Loftis*, __ N.C. App. __, 792 S.E.2d 886 (2016). As such, the State contends the district court had authority to dismiss the case *ex mero motu* after the superior court remanded with instructions to grant the motion to suppress. On the facts before us, this contention is without merit.

Our courts' controlling precedents hold that a district court has no authority to dismiss a case pre-trial. *See State v. Joe*, 365 N.C. 538, 539, 723 S.E.2d 339, 340 (2012) (holding the trial court did not have authority to dismiss the case on its own motion); *State v. Overrocker*, 236 N.C. App. 423, 436, 762 S.E.2d 921, 929-30 (2014) (holding the trial court erred in dismissing DWI charge after allowing motion to suppress).

This Court's decision in *Loftis* is distinguishable from these cases. In *Loftis*, the trial court dismissed the pending action due to the State's failure to prosecute. *Loftis*, __ N.C. App. at __, 792 S.E.2d at 888. This Court upheld that dismissal on the basis of the trial court's "inherent power to manage its own docket." *Id.* at __, 792 S.E.2d at 890.

Here, the State did not fail to prosecute, which would have allowed the district court to dismiss the case *sua sponte*. *See id.* The trial courts' orders dismissing the case pre-trial were entered without jurisdiction. This argument is overruled.

V. Conclusion

The superior court erred in its review of the district court's preliminary determination to suppress, when it remanded the case to the district court with instructions to dismiss the case.

As such, all subsequent orders dismissing the case were also entered erroneously. We vacate those portions of the trial courts' orders dismissing the case.

The superior court possessed jurisdiction to review the district court's pre-trial preliminary determination on Defendant's motion to suppress. However, the State has no right to appeal the district court's final order granting Defendant's motion to suppress. *See Fowler*, 197 N.C. App. at 28-29, 676 S.E.2d at 545. We do not address the merits of the State's appeal regarding allowance of the motion to suppress and dismiss that portion of the State's appeal to this Court. The district court's final order to suppress remains undisturbed.

As noted in *Fowler*, "[a] trial court's decision to grant a pretrial motion to *suppress* evidence 'does not mandate a pretrial dismissal of the underlying indictments' because '[t]he district attorney may elect to dismiss or proceed to trial without the suppressed evidence and attempt to establish a *prima facie* case.' " *Fowler*, 197 N.C. App. at 28-29, 676 S.E.2d at 545 (emphasis original) (quoting *State v. Edwards*, 185 N.C. App. 701, 706, 649 S.E.2d 646, 650, *disc. review denied*, 362 N.C. 89, 656 S.E.2d 281 (2007)). As such, we vacate the trial courts' orders of dismissal and remand to superior court for further remand to the district court for trial or further proceedings. *It is so ordered.*

DISMISSED IN PART; VACATED IN PART; AND REMANDED.

Chief Judge McGEE and Judge STROUD concur.

STATE OF NORTH CAROLINA
v.
ANTWARN LEE ROGERS

No. COA16-48

Filed 7 February 2017

1. Drugs—maintaining a vehicle for drugs—sufficiency of evidence—continuous maintenance or possession of the vehicle

The trial court should have dismissed a charge of maintaining a vehicle for keeping or selling a controlled substance where the evidence failed to demonstrate continuous maintenance or possession of the vehicle by defendant beyond the period of time he was surveilled on the afternoon of his arrest, or to show that defendant had used the vehicle on a prior occasion to keep or sell drugs.

2. Evidence—detectives' opinion—defendant as drug dealer

There was no plain error in a prosecution for maintaining a vehicle for keeping or selling a controlled substance and related offenses where defendant contended that detectives offered improper opinions to the effect that defendant was a drug dealer. The detectives expressed their own experience and observations in ordinary testimony.

3. Evidence—hearsay—police informant—background of investigation

There was no plain error in a prosecution for maintaining a vehicle for keeping or selling a controlled substance and related offenses where defendant alleged that the trial court admitted hearsay evidence by allowing a detective to testify about information collected from non-testifying witnesses. It was clear that the testimony at issue was not introduced to prove defendant's guilt but to establish the background and reasons for the detective's investigation.

4. Evidence—prior investigations and warrants—context of investigation—police conduct

There was no plain error in a prosecution for maintaining a vehicle for keeping or selling a controlled substance and related offenses in the admission of testimony that defendant had been the subject of prior investigations and had outstanding warrants. The testimony was not admitted to demonstrate that defendant was guilty of any offenses but to explain the context of the police investigation and the detectives' conduct.

Judge STROUD concurring in part and dissenting in part.

Appeal by defendant from judgment entered 13 August 2015 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 8 August 2016.

Attorney General Roy Cooper[1], *by Special Deputy Attorney General Heather H. Freeman, for the State.*

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

CALABRIA, Judge.

Antwarn Lee Rogers ("defendant") appeals from jury verdicts finding him guilty of possession with intent to manufacture, sell and deliver cocaine; intentionally keeping and/or maintaining a vehicle used for the keeping and/or selling of controlled substances; possession of drug paraphernalia; possession of one-half ounce or less of marijuana; and having attained the status of habitual felon. Because the evidence did

1. When the briefs and records in this case were filed, Roy Cooper was Attorney General. Joshua H. Stein was sworn in as Attorney General on 1 January 2017.

not establish continuous possession of a vehicle for the purpose of keeping or selling a controlled substance, the trial court erred in denying defendant's motion to dismiss the charge of maintaining a vehicle for the keeping and/or selling of a controlled substance. However, with respect to defendant's other arguments, the trial court did not commit plain error.

I. Factual and Procedural Background

Between December of 2012 and August of 2013, Detective Evan Luther of the Vice and Narcotics Unit of the New Hanover Sheriff's Department ("Detective Luther") "bec[a]me familiar with the name of Antwarn Rogers[]" through his narcotics investigations. On 8 August 2013, Detective Luther was investigating defendant, and determined that he was driving a particular vehicle and staying in a particular hotel room. He assembled a search warrant and notified assisting detectives to monitor the hotel room. Detective Luther also advised the assisting detectives that defendant "was wanted on outstanding warrants[,]" so that they knew that they could initiate contact with defendant to serve outstanding processes, irrespective of whether the search warrant was granted. After the detectives detained defendant, Detective Luther executed the search warrant, which authorized him to search both the hotel room and the vehicle in connection with defendant.

In the hotel room, detectives located "a baggy that was in the toilet dispenser roll" containing narcotics. Detectives located "another baggy with white rock substance[]" and "a black digital scale[.]" Detective Luther swabbed the scale with a field test kit, which revealed the presence of cocaine.

In the vehicle, detectives located "two baggies with a white rock substance . . . inside of the gas cap" of the vehicle. They also found money folded and placed inside of a Timberland boot in the car. A detective also located a rolled marijuana cigarette inside the ashtray in the front of the vehicle.

Defendant was indicted for possession with intent to manufacture, sell, and deliver cocaine; manufacture of cocaine; felony possession of cocaine; maintaining a vehicle for the sale of a controlled substance; possession of drug paraphernalia; possession of one-half ounce or less of marijuana; and having attained the status of an habitual felon.

At the outset of trial, the State declined to proceed on the charge of manufacture of cocaine. At the close of the State's evidence, defendant moved to dismiss the charges. The trial court granted defendant's motion to dismiss with respect to the charge of felony possession of

cocaine, and denied the motion with respect to the remaining charges. Defendant offered no evidence.

The jury returned verdicts finding defendant guilty of possession with intent to manufacture, sell, and deliver cocaine; maintaining a vehicle for the sale of a controlled substance; possession of drug paraphernalia; and possession of one-half ounce or less of marijuana. The jury further found that defendant had attained the status of an habitual felon.

Defendant failed to attend the trial, and the trial court entered an order finding that he could be tried *in absentia*, and that entry of judgment would be continued until defendant could be brought before the court.

On 13 August 2015, the trial court entered judgment upon the jury's verdicts, and sentenced defendant to consecutive active sentences of 35-54 months for maintaining a vehicle, possession of drug paraphernalia, and possession of marijuana, and 111-146 months for possession with intent to manufacture, sell, and deliver cocaine, in the North Carolina Department of Adult Correction.

Defendant appeals.

II. Motion to Dismiss

In his first argument, defendant contends that the trial court erred by denying his motion to dismiss the charge of maintaining a vehicle for the sale of a controlled substance. We agree.

A. Standard of Review

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

> Upon review of a motion to dismiss, the court determines whether there is substantial evidence, viewed in the light most favorable to the State, of each essential element of the offense charged and of the defendant being the perpetrator of the offense.

*State v. Lan*e, 163 N.C. App. 495, 499, 594 S.E.2d 107, 110 (2004) (citations omitted). "The [trial] court should grant a motion to dismiss if the State fails to present substantial evidence of every element of the crime charged." *State v. McDowell*, 329 N.C. 363, 389, 407 S.E.2d 200, 214 (1991). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

B. Analysis

[1] N.C. Gen. Stat. § 90-108(a)(7) (2015) makes it unlawful to "knowingly keep or maintain any . . . vehicle . . . which is used for the keeping or selling of [controlled substances]." "This statute prohibits the maintaining of a vehicle only when it is used for 'keeping or selling' controlled substances[.]" *State v. Mitchell*, 336 N.C. 22, 32, 442 S.E.2d 24, 29 (1994). "The focus of the inquiry is on the *use*, not the contents, of the vehicle." *Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30 (emphasis in original).

> Thus, the fact that an individual within a vehicle possesses marijuana on one occasion cannot establish the vehicle is used for keeping marijuana; nor can one marijuana cigarette found within the car establish that element. Likewise, the fact that a defendant was in his vehicle on one occasion when he sold a controlled substance does not by itself demonstrate the vehicle was kept or maintained to sell a controlled substance.

State v. Dickerson, 152 N.C. App. 714, 716, 568 S.E.2d 281, 282 (2002) (citation, quotation marks, brackets, and ellipses omitted). N.C. Gen. Stat. § 90-108(a)(7) does not require the State to demonstrate a defendant's ownership of a vehicle, or that a sale was actually transacted from the vehicle. "The totality of the circumstances controls, and whether there is sufficient evidence of the 'keeping or maintaining' element depends on several factors, none of which is dispositive." *State v. Hudson*, 206 N.C. App. 482, 492, 696 S.E.2d 577, 584. In *Mitchell*, in interpreting N.C. Gen. Stat. § 90-108(a)(7), our Supreme Court observed that

> [t]he word 'keep' is variously defined as follows: '[t]o have or retain in one's power or possession; not to lose or part with; to preserve or retain. . . . To maintain continuously and methodically. . . . To maintain continuously and without stoppage or variation . . . [; t]o take care of and to preserve . . . .'"

Id. at 32, 442 S.E.2d at 29 (quoting *Black's Law Dictionary* 868 (6th ed. 1990)).Thus, " '[k]eep' . . . denotes not just possession, but possession that occurs *over a duration of time*." *Id.* at 32, 442 S.E.2d at 30 (emphasis added).

In *Hudson*, a law enforcement officer had stopped a car carrier truck driven by the defendant after being alerted of the vehicle's "possible drug activity" and observing the truck weaving over the center line and fog line twice. 206 N.C. App. at 483-84, 696 S.E.2d at 579. The officer

asked to see the bills of lading for the cars being transported on the truck. *Id.* at 484, 696 S.E.2d at 579. One of the bills of lading for a particular car was different from those for the other cars and aroused the officer's suspicion due to the contact information, pick-up address, and drop-off address listed. *Id.* Ultimately, the defendant consented for officers to search the carrier truck as well as the vehicles it was carrying. In the course of their search, officers found 7.5 pounds of marijuana in the trunk of the car with the unusual bill of lading. *Id.* at 484, 696 S.E.2d at 579-80. The defendant was subsequently convicted of, *inter alia*, maintaining a vehicle for the keeping of a controlled substance in violation of N.C. Gen. Stat. § 90-108(a)(7).

On appeal, the defendant argued his motion to dismiss the charge of keeping or maintaining a vehicle used for the keeping or selling of a controlled substance should have been granted because there was no evidence that the possession of the marijuana in the trunk of the vehicle " 'occurred over a duration of time or that [he] used the vehicle on any prior occasion to keep or sell controlled substances.' " *Id.* at 492, 696 S.E.2d at 584. This Court disagreed, noting that the bill of lading showed that the defendant had picked up the car two days before he was arrested and that he had possessed the car since then while transporting it from Miami *en route* to New York. *Id.* We stressed that this evidence demonstrated "[the d]efendant had *maintained possession* as the authorized bailee of the vehicle *continuously and without variation for two days before being pulled over*[.]" *Id.* at 492, 696 S.E.2d at 584 (emphases added). The defendant "retained control and disposition over the vehicle" over the course of multiple days, which we deemed "indisputably . . . a duration of time." *Id. See also Lane*, 163 N.C. App. at 500, 594 S.E.2d at 111 (providing that a conviction under N.C. Gen. Stat. § 90-108(a)(7) requires evidence of either "possession of [a controlled substance] in the vehicle that occurred over a duration of time, [or] . . . evidence that [a] defendant . . . used the vehicle on a prior occasion to sell [a controlled substance].")

In the present case, Detective Luther testified that he had been investigating defendant since approximately December 2012. He also testified that he had "information that [defendant] had been in possession [of the white Cadillac] for some period of time[.]" However, it appears from the transcript that Detective Luther obtained that information earlier on the day of defendant's arrest, from two individuals pulled in an unrelated traffic stop. The State seems to confirm this in their brief to this Court, noting that

> *[a]s a result of that traffic stop*, Detective Luther was provided with information that assisted in an ongoing

> investigation of Defendant, *including the description of a vehicle Defendant would be driving* and an address where he would be located. *Based on that information*, Detective Luther set up surveillance during the afternoon of 8 August 2013 and *notified other detectives to look out for Defendant in a white Cadillac* and at room 129 at the Econo Lodge on Market Street in Wilmington.

(Emphasis added.) We find no indication that law enforcement officers had information, prior to the day of defendant's arrest, linking defendant to the white Cadillac.

Detective Luther also testified that once he obtained certain identifying information about defendant on 8 August 2013, he "notified all the assisting detectives places to go, *a vehicle specifically to be looking for*, a room number at a hotel to be specifically focused on, and for any comings or goings from that hotel room." Specifically, "based upon the information that [Detective Luther had] received[,]" he "relay[ed] to other officers to be looking for [a] white Cadillac with the license number that [he] gave."

Officers began surveilling the Econo Lodge between 3:00 and 3:30 p.m. Lieutenant Leslie Wyatt ("Lt. Wyatt") testified that he drove by the Econo Lodge, observed a white Cadillac parked at the adjacent Ramada Inn, and then drove to a nearby gas station to get gas. When Lt. Wyatt returned minutes later, the Cadillac was gone. Lt. Wyatt parked in the Ramada Inn parking lot to begin surveillance of Room 129 at the Econo Lodge, and "roughly [ten] minutes after . . . set[ting] up [the] surveillance, [he] saw the same white Cadillac that was parked at the Ramada pull in the parking lot of the Econo Lodge and park . . . almost directly in front of Room 129." Lt. Wyatt observed only one person, whom he recognized as defendant, in the vehicle at that time. Lt. Wyatt saw defendant enter Room 129. He testified that defendant was in the hotel room "[a] total of probably [forty-five] minutes" before "[h]e came out of the room, shut the door behind him, and got into the white Cadillac." Lt. Wyatt and several other officers followed as defendant drove to an apartment complex, left the complex, and continued driving. Shortly thereafter, officers "were able to conduct a vehicle stop on the Cadillac and place [defendant] under arrest for outstanding warrants."

While other officers set up surveillance at the Econo Lodge, Detective Luther began preparing a search warrant. During preparation of the search warrant, at approximately 3:30 p.m., Detective Luther learned that "the white Cadillac was confirmed to be at the Ramada, [consistent

with] *the information that [he] had received* [during the unrelated traffic stop].” (Emphasis added.) The search warrant was signed at 4:20 p.m. Detective Luther drove to the Econo Lodge with the warrant, arriving at approximately 4:30 p.m. By the time Detective Luther arrived, defendant was already “detained in another detective’s vehicle[.]” After searching the hotel room and seizing evidence, officers searched “the 2000 Cadillac DeVille that [defendant] was stopped and detained in.”

The evidence thus showed that defendant was surveilled and observed to be the sole driver and occupant of the Cadillac for, at most, one-and-a-half hours on the afternoon of his arrest. *Cf. State v. Calvino*, 179 N.C. App. 219, 222-23, 632 S.E.2d 839, 842-43 (2006) (finding sufficient evidence of keeping a motor vehicle for the purpose of selling a controlled substance, where informant purchased drugs from defendant in the same vehicle on two separate occasions, one week apart, and “[b]oth of these transactions were observed and recorded by police.”); *State v. Bright*, 78 N.C. App. 239, 240, 337 S.E.2d 87, 87 (1985) (upholding defendant’s conviction under N.C. Gen. Stat. § 90-108(a)(7), and noting that defendant was stopped while driving a car arresting officer “had seen defendant operating . . . on several occasions.”). The evidence did not show that defendant had “maintained possession . . . of the [Cadillac] *continuously and without variation*” for anything beyond a couple of hours on that single day. *See Hudson*, 206 N.C. App. at 492, 696 S.E.2d at 584 (emphasis added).

The evidence showed only that, earlier on the day of defendant’s arrest, officers received information from two individuals pulled in an unrelated traffic stop indicating they should look for defendant in a specific vehicle and at a specific hotel room. The State failed to establish that no other individual accessed, occupied, operated, or otherwise used the Cadillac prior to the brief period officers surveilled defendant on the afternoon of his arrest. *See State v. Boswell*, ___ N.C. App. ___, 680 S.E.2d 901, 2009 WL 2139184 at *3 (2009) (unpublished) (finding insufficient evidence of keeping or maintaining a vehicle, where “the vehicle driven by defendant was owned by his father, and numerous people were allowed to use the vehicle on a regular basis.”). The Cadillac was registered in the name of another individual, whose criminal history included a prior drug charge. Detective Luther testified he “didn’t know whether or not [that individual] was at [the Econo Lodge] hotel room” on 8 August 2013 “before the [surveillance] started[.]” Detective Luther also testified several items were found in the Cadillac, including a hat, that he “couldn’t classify [as belonging to defendant].” He testified only that “[b]ased off of the information that was provided to [him], [he]

had reason to believe [defendant] had been in that car for quite some time and was using that vehicle."

Even if, as Detective Luther contended, there was reason to believe defendant had been "in possession of [the Cadillac] for some period of time," there was insufficient evidence that defendant used that vehicle on any prior occasion *for the purpose of keeping or selling a controlled substance*, which N.C. Gen. Stat. § 90-108(a)(7) requires. *See, e.g.*, *State v. Craven*, 205 N.C. App. 393, 403, 696 S.E.2d 750, 756 (2010), *rev'd in part on other grounds*, 367 N.C. 51, 744 S.E.2d 458 (2013) (finding sufficient evidence of keeping and maintaining a vehicle under N.C. Gen. Stat. § 90-180(a)(7), where witness testified she and defendant transported cocaine in the vehicle on two separate dates, and expert testified defendant was found to possess cocaine in the vehicle on a third date; evidence was "adequate to support a conclusion that defendant had possession of cocaine in his mother's car *over a duration of time and/or on more than one occasion*" (emphasis added)); *cf. State v. Horton*, 189 N.C. App. 211, 657 S.E.2d 448, 2008 WL 565485 at *2 (2008) (unpublished) (finding insufficient evidence of keeping or maintaining a vehicle, where "the vehicle driven by [d]efendant was owned by another person and loaned to him on the day he was pulled over and searched. No evidence was presented that [d]efendant used this vehicle on any other occasion to keep a controlled substance"). On the afternoon of defendant's arrest, surveilling officers did not report seeing defendant "[go] to [the Cadillac's] gas cap [or] open[] and close[] the gas cap." However, this was insufficient to support an inference that the drugs found in the Cadillac's locked gas cap had been hidden in the car on a prior date, because nothing was known about the use or maintenance of the vehicle prior to 3:00 or 3:30 p.m. *that day*, much less in the preceding days or months.

The receipt found in the Cadillac was likewise insufficient to "support[] a logical and legitimate deduction" that defendant had used the Cadillac on a previous occasion to keep or sell drugs. *State v. Piggott*, 331 N.C. 199, 207, 415 S.E.2d 555, 559-60 (1992) (noting evidence is insufficient to withstand a motion to dismiss if it "merely raise[s] a suspicion or conjecture" as to the existence of a fact in issue). Detective Luther testified "[it was] not [his] contention that the receipt [found in the Cadillac] was in any way involved in any drug-related matter[.]" He further conceded he "[didn't] know if [the receipt] was in [the Cadillac] the day before [8 August 2013]." The receipt did not amount to substantial evidence that defendant had used the Cadillac, *over a period of time*, to *keep or sell a controlled substance*.

Because the State failed to demonstrate continuous maintenance or possession of the Cadillac by defendant beyond the period of time he was surveilled on the afternoon of his arrest, or show that defendant had used the Cadillac on a prior occasion to keep or sell drugs, it could not rely on evidence seized from the hotel room to support a charge under N.C. Gen. Stat. § 90-108(a)(7). The evidence showed defendant possessed drugs in the Cadillac on one occasion. There was insufficient evidence to show that, even on the day of his arrest, defendant's use and control of the Cadillac was exclusive. While there was evidence, obtained from two individuals who happened to be arrested earlier on the same day as defendant's arrest, that defendant "possessed" the Cadillac "for some period of time," there was insufficient evidence to show defendant had used the vehicle on any prior occasion for keeping or selling a controlled substance. Accordingly, the trial court should have dismissed the charge of maintaining a vehicle for the purpose of keeping or selling a controlled substance. We reverse the trial court's denial of defendant's motion to dismiss that charge, and remand for resentencing.

III. Plain Error

In his remaining arguments, defendant contends that the trial court committed various errors which were not properly preserved by objection. We therefore review them for plain error.

A. Standard of 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); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

The North Carolina Supreme Court "has elected to 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).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. 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." *See id.* (citations and quotation marks omitted); *see also Walker*, 316 N.C. at 39, 340 S.E.2d at 83 (stating "that absent the error the jury probably would have reached a different verdict" and concluding that although the evidentiary error affected a fundamental right, viewed in light of the entire record, the error was not plain error).

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

B. Defendant's Conduct

[2] Defendant first contends that the trial court committed plain error in admitting the opinions of detectives regarding defendant's conduct. We disagree.

Defendant contends that Detective Luther and Lt. Wyatt offered improper opinions "to the effect that Mr. Rogers was a drug dealer". Defendant contends that their testimony about the manner in which defendant conducted himself with regards to both the hotel room and the vehicle, and Detective Luther's testimony that the baggies of cocaine found in defendant's hotel room were "indicative of sale, not use" conveyed to the jury that defendant was a drug dealer. In essence, defendant contends that the testimony of Detective Luther and Lt. Wyatt invaded the province of the jury by constituting an opinion of defendant's guilt.

In the instant case, Detective Luther testified that he has "investigated or been assisting" fifty drug cases involving hotels and motels. He testified that, in his experience in these investigations, there are "common characteristics" associated with such cases. He then testified, again based on his experience, that defendant's conduct in how he rented the hotel room and kept it mostly bare was consistent with the patterns he had observed in prior drug cases. He further testified that, based on his experience, the plastic baggies found in the bathroom were of a sort commonly associated with the sale, not the personal use, of drugs.

Lt. Wyatt testified to his observations when defendant arrived at the hotel. Specifically, he testified that, shortly after entering the room, defendant opened the blinds on the window. He testified that, in his experience, "people that are involved in the narcotics trade like to keep an eye outside their houses for law enforcement, [or] potential buyers[.]" Lt. Wyatt also testified that, when defendant left the hotel, he drove to an apartment complex, drove onto another road, then turned around and went back in the direction from which he came. He testified that this was common to drug dealers, as it was "[i]ndicative of someone seeing if they're being followed."

We hold that the testimony of Detective Luther and Lt. Wyatt was not improper opinion testimony concerning defendant's guilt, but rather ordinary testimony expressing their own experience and observations. On plain error review, the burden falls to defendant to demonstrate that, absent the admission of this testimony, the jury probably would have reached a different verdict. In light of the fact that this testimony was based upon the officers' own experience and knowledge, and in light of the physical evidence of drugs and paraphernalia found in the hotel room and vehicle, we hold that defendant has failed to meet the burden of showing plain error.

This argument is without merit.

C. Hearsay Evidence

[3] In his next argument, defendant contends that the trial court erred by admitting alleged hearsay testimony. Specifically, defendant contends that the trial court erred by allowing Detective Luther to testify about information collected from non-testifying witnesses during an investigation of defendant because it was hearsay. 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.' " *State v. Morgan*, 359 N.C. 131, 154, 604 S.E.2d 886, 900 (2004) (quoting N.C. Gen. Stat. § 8C-1, Rule 801(c) (2003)). "Hearsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802 (2015). In *State v. Rollins*, regarding the testimony given by an agent about information he learned from a third-party, this Court held that "statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed." *State v. Rollins*, 226 N.C. App. 129, 138-39, 738 S.E.2d 440, 448 (2013) (citation and quotations omitted).

In the instant case, Detective Luther testified that he spoke about defendant during his investigation with several people involved with the distribution of drugs. Detective Luther stated that he received information about defendant's vehicle, location, telephone number, and other addresses at which defendant may be located from the people he interviewed.

We have previously held that hearsay testimony given by an informant to the witness concerning a defendant's conduct was admissible to "explain how the investigation of [d]efendants unfolded, why [d]efendants were under surveillance . . . and why [the witness] followed the [defendants'] vehicle[.]" *State v. Wiggins*, 185 N.C. App. 376, 383-84,

648 S.E.2d 865, 871 (2007); *see also State v. Levya*, 181 N.C. App. 491, 500, 640 S.E.2d 394, 399 (2007) (holding that an informant's explanation was admissible to explain an officer's presence at a restaurant); *State v. Batchelor*, 202 N.C. App. 733, 737, 690 S.E.2d 53, 56 (2010) (holding that an informant's identification of the defendant was admissible to explain the officer's presence at a car wash, rather than to prove the defendant's guilt).

In the instant case, it is clear that the testimony at issue was not introduced to prove defendant's guilt, but to establish the background and reasons for Detective Luther's investigation. We hold that defendant has failed to show that, absent this evidence, the jury probably would have reached a different verdict.

This argument is without merit.

D. Drug Investigations and Arrest Warrants

[4] Defendant lastly contends that the trial court committed plain error by admitting testimony that defendant was the subject of prior investigations and had outstanding warrants. We disagree.

Defendant contends that the evidence was hearsay and irrelevant and should not have been admitted. However, much like the evidence of Detective Luther's sources, this evidence was not admitted for the truth of the matter asserted, but to explain detectives' conduct. Specifically, this evidence was introduced at trial to explain Detective Luther's instruction to his assisting detectives to detain defendant pending the execution of the search warrant. The assisting detectives were able to do so due to the outstanding warrants on which defendant was wanted.

This evidence was not introduced to demonstrate that defendant was guilty of the instant offenses or any others, but rather to explain the context of the police investigation. As such, we hold that defendant has not shown that, absent this evidence, the jury probably would have reached a different verdict.

This argument is without merit.

IV. Conclusion

Because the evidence, taken in the light most favorable to the State, did not support the elements of the charge of maintaining a vehicle for keeping or selling a controlled substance, the trial court erred in denying defendant's motion to dismiss. That denial is therefore reversed, and this matter is remanded for resentencing. Because defendant has failed to show that, absent the additional errors he alleges, the jury would

probably have reached a different verdict, we hold that he has failed to demonstrate plain error.

NO ERROR IN PART; REVERSED AND REMANDED IN PART.

Chief Judge McGEE concurs.

Judge STROUD concurs in part and dissents in part by separate opinion.

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

I concur with the majority opinion on all issues except the first, regarding sufficiency of the evidence to support defendant's conviction of maintaining a vehicle for the "keeping or selling of [controlled substances]." N.C. Gen. Stat. § 90-108(a)(7) (2015). On this issue, I dissent because I believe the evidence is sufficient when viewed "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

Under N.C. Gen. Stat. § 90-108(a)(7), it is unlawful to "knowingly keep or maintain any . . . vehicle . . . which is used for the keeping or selling of [controlled substances]." The majority correctly notes that the word "keep" in the statute "denotes not just possession, but possession that occurs over a duration of time." *State v. Mitchell*, 336 N.C. 22, 32, 442 S.E.2d 24, 30 (1994). However, as the majority also notes, "[t]he totality of the circumstances controls, and whether there is sufficient evidence of the 'keeping or maintaining' element depends on several factors, none of which is dispositive." *State v. Hudson*, 206 N.C. App. 482, 492, 696 S.E.2d 577, 584 (2010). Our disagreement is how long the "duration of time" of the "keeping" must be. *Mitchell*, 336 N.C. at 32, 442 S.E.2d at 30.

After evaluating the totality of the circumstances in the present case, I believe the State presented substantial evidence that defendant "knowingly [kept] or maintain[ed]" the vehicle within the meaning of N.C. Gen. Stat. § 90-108(a)(7). The majority implies that because there is "no indication law enforcement officers had information, prior to the day of Defendant's arrest, linking Defendant to the white Cadillac[,]" a reasonable jury could not have found "possession that occurs over a duration of time" to support the keeping element. *Mitchell*, 336 N.C. at 32, 442 S.E.2d at 30.

First, our case law does not establish what specific "duration of time" is sufficient. The majority references *Hudson*, where two days of possession and use of the vehicle in question was deemed "indisputably . . . a duration of time." 206 N.C. App. at 492, 696 S.E.2d at 584. But would *Hudson* have been decided differently if defendant had been pulled over two hours after picking up the car, rather than two days? *Hudson* is an easier case and "indisputably" occurred over "a duration of time." *Id.* But the analysis does not change just because the situation in this case is less clear cut.

We review the evidence in the light most favorable to the State, drawing reasonable inferences therefrom. *See, e.g.*, *State v. Santiago*, 148 N.C. App. 62, 68, 557 S.E.2d 601, 606 (2001) ("In reviewing the denial of a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom." (quotation marks and ellipses omitted)). Specifically, our job on appeal of a motion to dismiss is simply to evaluate whether the jury heard "substantial evidence, viewed in the light most favorable to the State, of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Lane*, 163 N.C. App. 495, 499, 594 S.E.2d 107, 110 (2004) (citations omitted).

The majority views the evidence in this case as showing that defendant was "the sole driver and occupant of the Cadillac for, at most, one-and-a-half hours on the afternoon of his arrest." In doing so, the majority interprets testimony from Detective Luther that defendant had been in possession of the vehicle "for some period of time" as only referring to information received the day he was arrested. But the jury also heard evidence that a narcotics investigation had been ongoing regarding defendant since December 2012, and that upon searching the Cadillac on the day defendant was arrested, officers found a receipt in the front seat dated 29 May 2013, for a $30.00 "service fee" made out to defendant.

In addition, during the surveillance of the vehicle by law enforcement, defendant was the only driver of the vehicle; no one else rode in it. And in the Cadillac, in which only defendant had been seen, police found a marijuana cigarette in the ashtray, money folded inside of a boot on the back seat, and plastic baggies "with a white rock substance packaged in the baggies" hidden inside the gas cap. The gas cap was locked and had to be opened with a latch on the inside of the car, and the baggies were of the same color, type, and size -- purple plastic bags -- as those found in defendant's hotel room.

This evidence shows that defendant had been keeping the car for a period of time and that drugs had been hidden in the car at some time prior to when the officers stopped him, since he could not have put drugs into the gas cap while he was driving. Officers had been watching defendant's comings and goings in the car most of the day, and he had not placed anything in the gas cap while they were watching him, so the jury could infer that the baggies had to have been placed there sometime before their surveillance began. Based on all of these facts, I believe that while it is a closer call, this case is similar to *Hudson*, 206 N.C. App. at 492-93, 696 S.E.2d at 584, and that the evidence supports all of the essential elements of the crime charged, including "keeping" the vehicle over a period of time for the purpose of keeping drugs (cocaine in this case). The totality of the evidence in this case shows that defendant was "keeping" the Cadillac -- as its the sole driver and occupant over a period of time -- and that he was "keeping" cocaine in this vehicle, hidden inside the gas cap door, as required by N.C. Gen. Stat. § 90-108(a)(7).

Evidence was admitted at trial without objection indicating that defendant was in possession of the Cadillac "for some period of time[,]" which the jury could properly consider when making its determination. Furthermore, even accepting the majority's assumption of just one and a half hours of "keeping" the cocaine hidden in the gas cap of the vehicle, I find no case law or indication in N.C. Gen. Stat. § 90-108(a)(7) that this is an insufficient amount of time -- under the totality of the circumstances in this case -- to demonstrate defendant was "keeping" the vehicle for the purpose of "keeping" drugs.

Although I am usually opposed to citing unpublished opinions, in this dissent I believe it is useful to note a recent unpublished opinion of this Court, *State v. Rousseau*, __ N.C. App. __, 793 S.E.2d 292, 2016 WL 7100567, 2016 N.C. App. LEXIS 1191 (COA 16-380) (Dec. 6, 2016) (unpublished). While not binding on this Court, *Rousseau* addresses this same issue, and based primarily upon the facts in that case, where the marijuana was found hidden in the engine compartment of the vehicle, this Court found there was sufficient evidence to support the conviction of "keeping" a controlled substance in the vehicle. *Id.*, 2016 WL 7100567, at *3, 2016 N.C. App. LEXIS 1191, at *8. This Court concluded in *Rousseau* that "the State presented substantial and uncontroverted evidence that the vehicle was used to 'keep' the marijuana" where drugs were found "inside the vehicle's engine compartment outside of the passenger area." *Id.* Although there was evidence in *Rousseau* that defendant "regularly drove the vehicle" and that he had recently been stopped during a routine traffic stop, he similarly did not own the vehicle. *Id.*,

2016 WL 7100567, at *1, 2016 N.C. App. LEXIS 1191, at *3. Unlike this case, there was no evidence that law enforcement was already investigating the defendant for selling controlled substances or that they had reason to believe that the defendant was keeping drugs in the vehicle prior to his arrest. *Id.*

This Court distinguished *Rousseau* from prior cases due to the "additional" evidence "that a controlled substance was hidden in a storage space in the engine compartment, and that remnants of this controlled substance were found throughout the interior." *Id.*, 2016 WL 7100567, at *2, 2016 N.C. App. LEXIS 1191, at *6. This Court also noted:

> Furthermore, the evidence tended to show that the vehicle was most recently used to facilitate a breaking and entering, not anything related to the controlled substance. From this evidence, the jury could infer that the vehicle was being used for the "keeping" of a controlled substance. Therefore, the trial court was correct in denying Defendant's motion to dismiss.

Id., 2016 WL 7100567, at *3, 2016 N.C. App. LEXIS 1191, at *8. I believe that the majority's analysis of this issue in *Rousseau* was correct, although I also note that there was a dissent and the defendant filed a notice of appeal to our Supreme Court on that basis on 9 January 2017.

Here, there is no issue of whether defendant had constructive possession of the cocaine found in the gas cap, since that was determined by his conviction for possession with intent to manufacture, sell, or deliver cocaine. All of the evidence, viewed collectively and in the light most favorable to the State, suggests that defendant had made use of the vehicle for at least an hour and a half prior to his arrest -- or possibly even since May of 2013 -- and that on the day in question, his use was exclusive. At some time prior to his arrest and the hour and a half surveillance of defendant before the arrest, he hid cocaine behind the gas cap, where he was "keeping" it. These facts suggest that defendant was "keep[ing]" the vehicle and did so for the purpose of "keeping" controlled substances, namely the cocaine found in the gas cap. N.C. Gen. Stat. § 90-108(a)(7). I would therefore hold that the trial court did not err in denying defendant's motion to dismiss the charge of maintaining a vehicle for the keeping or selling of a controlled substance.

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

STATE OF NORTH CAROLINA
v.
RACHEL SHERI WILSON-ANGELES

No. COA16-677

Filed 7 February 2017

1. Evidence—prior bad act—admissible

The trial court did not err in an arson prosecution by admitting evidence of a prior arson where the evidence was sufficiently similar, logically relevant, and not too remote in time. The trial court did not abuse its discretion by determining that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence, given the similarities of the two incidents and the trial court's deliberate determination of the admissibility of the testimony.

2. Criminal Law—defenses—voluntary intoxication—evidence not sufficient

Defendant was not entitled to a voluntary intoxication instruction in an arson prosecution where there was evidence that defendant was intoxicated to some degree, but the evidence did not establish how much alcohol defendant had consumed prior to committing the crime or the length of time over which defendant had consumed alcohol. The uncertainty about defendant's level of intoxication plus defendant's purposeful manner of carrying out the crime and her reaction when law enforcement approached her did not support the conclusion that defendant was so completely intoxicated as to be utterly incapable of forming the requisite intent.

3. Sentencing—prior record level—notice

The trial court erred by adding a prior record level point attributable to the time she spent on probation, parole, or post supervision where the State failed to give proper notice of its intention to use the probation point in the calculation of defendant's sentence.

4. Appeal and Error—mandate—issued immediately upon filing

Pursuant to N.C. R. App. P. 32(b), the Court of Appeals directed that the mandate issue immediately upon the filing of an opinion where there was an error in sentencing and the possibility that defendant would be entitled to immediate release on resentencing because she would have served her entire sentence.

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

Appeal by Defendant from judgment entered 9 October 2014 by Judge Tanya T. Wallace in Superior Court, Iredell County. Heard in the Court of Appeals 9 January 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General James M. Stanley, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jon H. Hunt, for Defendant.

McGEE, Chief Judge.

Rachel Sheri Wilson-Angeles ("Defendant") appeals from judgment entered after a jury found her guilty of attempted first-degree arson and being intoxicated and disruptive in public.

I. Background

Defendant was casually talking to her neighbor, Sharon Houston ("Houston"), outside Houston's apartment in their apartment complex in Mooresville, North Carolina, just before midnight on 20 December 2011. The two had been neighbors for a few years, and were known to occasionally visit and talk with each other in the evenings. That evening, Defendant had been drinking, and "flipped out." Defendant began cursing at Houston and accusing her of being responsible for Defendant's children being taken away from her. After a brief physical altercation, Houston retreated into her apartment and locked the door. About five minutes later, Houston heard a commotion just outside her door. Houston peered through the peephole, and observed Defendant outside with a Mad Dog 20-20 bottle (a brand of fortified wine) in her hand. A rag was protruding from the bottle, effectively making a "Molotov cocktail," that Defendant lit and threw against Houston's door. Houston testified at trial that she heard a "whoosh" sound as the flame "went up." Houston also heard Defendant "cussing" and "saying she was going to burn me out." Houston called 911.

As Houston waited for law enforcement to arrive, she went outside her apartment to assess the damage. The fire had gone out on its own, leaving behind black soot, roughly three inches in diameter, on the brick wall near her front door. Houston swept up the pieces of broken glass from the bottle and disposed of them in the trash. When law enforcement arrived at the apartment complex, they immediately observed a woman, later identified as Defendant, yelling obscenities and loudly proclaiming

she "was the victim." As law enforcement approached Defendant, she quickly handed a container she was holding to another person, who poured out the liquid. Despite the liquid being poured out, the container had a strong odor of alcohol. Defendant claimed to law enforcement that she was bleeding, and repeatedly attempted to remove her clothing to show the officers her injuries. One of the officers who encountered Defendant, Officer Brian Plyler ("Officer Plyler"), noticed a strong odor of alcohol emanating from Defendant's mouth, and observed that she appeared "extremely intoxicated." Defendant was, according to Officer Plyler, screaming at a large group of people who had assembled to witness the spectacle, and it seemed to him that Defendant was attempting to "incite more violence." Based on these observations, Officer Plyler placed Defendant under arrest for being intoxicated and disruptive in public. During the ride to the police station, and while at the station, Defendant exhibited other signs of being intoxicated, including inexplicably singing hymns, repeatedly claiming to be the victim, and later passing out at the police station.

Subsequent to Defendant's arrest, Officer Plyler's superior, Captain Joseph Cooke ("Captain Cooke"), talked with Houston. Houston described the physical altercation between herself and Defendant, and told Captain Cooke about Defendant's attempt to start a fire at her front door. Captain Cooke explained at trial what he observed at Houston's front door:

> I saw broken glass from what looked like a bottle had been shattered on the door. There was liquid on the door. There was also carbon mark or a charring -- not really charring, but a mark about three inches in diameter on the concrete in front of her door that I had could see that something had just been recently burned. Basically it looked like, you know, bottle was thrown on the bottom of her door, shattered, and liquid was all over the place, and something had been tried to set on fire.[1]

Based on his observations and conversation with Houston, Captain Cooke instructed the other officers to also charge Defendant with attempted first-degree arson.

Defendant's trial began on 7 October 2014. During the course of the trial, the State sought to introduce the testimony of three witnesses

1. We note the discrepancy between Captain Cooke's and Houston's testimony: Captain Cooke asserted he observed the broken glass, while Houston repeatedly maintained she cleaned up the glass before law enforcement arrived.

– Jason Workman, Chris Jorgenson, and Gary Styers ("the 404(b) witnesses") – who were to testify regarding Defendant's perpetration (or attempted perpetration) of two prior arsons, both occurring at properties in Mooresville, North Carolina in August 2008: one at a property on Main Street (the "Main Street Arson"), and another at a property on Mills Street (the "Mills Street Arson").

After *voir dire* of the 404(b) witnesses, the trial court ruled that evidence regarding the Mills Street Arson was relevant, but its probative value was outweighed by its unduly prejudicial effect, rendering it inadmissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 403. The trial court further ruled that the testimony regarding the Main Street Arson was relevant and would be admitted pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) for the sole purpose of showing Defendant's intent to commit arson. In so ruling, the trial court also held that evidence of the Main Street Arson was more probative than prejudicial, and admissible pursuant to N.C.G.S. § 8C-1, Rule 403. Defendant was found guilty of attempted first-degree arson and being intoxicated and disruptive in public. The trial court determined Defendant to be a prior record level III offender for sentencing purposes, and sentenced her to a prison term of thirty to forty-eight months. Defendant appeals.

II. Analysis

Defendant argues the trial court erred by: (1) admitting evidence, pursuant to N.C. Gen. Stat. §§ 8C-1, Rules 401, 403 and 404(b), that she had previously committed the Main Street Arson; and (2) by including Defendant's probation, parole, or post-release supervision in her prior record level calculation for sentencing purposes in violation of N.C. Gen. Stat. § 15A-1340.16(a6)'s notice requirements. Defendant also argues that she received ineffective assistance of counsel when her trial counsel failed to request a jury instruction on voluntary intoxication.

A. Admission of Prior Bad Acts to Show Intent

[1] Defendant argues the trial court erred in admitting evidence of the Main Street Arson, and that the admission of this evidence violated N.C. Gen. Stat. §§ 8C-1, Rules 401, 403, and 404(b). We address these arguments together.

Rule 404(b) of the North Carolina Rules of Evidence provides, in relevant part:

> 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). Rule 404(b) has been characterized as a "clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original). This clear rule of inclusion is "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." *Id.* (emphases in original). Despite these sweeping and inclusive statements, our Supreme Court has also stated that Rule 404(b) is "consistent with North Carolina practice prior to [the Rule's] enactment." *State v. Carpenter*, 361 N.C. 382, 386, 646 S.E.2d 105, 109 (2007) (citation and quotation marks omitted). "Before the enactment of Rule 404(b), North Carolina courts followed the general rule that in a prosecution for a particular crime, the State *cannot offer evidence* tending to show that the accused has committed another distinct, independent, or separate offense." *Id.* (emphasis added) (citation, ellipsis, and brackets omitted). Attempting to reconcile these seemingly disparate commands, our Supreme Court has stated that "while we have interpreted Rule 404(b) broadly, we have also long acknowledged that evidence of prior convictions must be carefully evaluated by the trial court." *Id.* at 387, 646 S.E.2d at 109.

When determining whether evidence of a prior crime or bad act is admissible under Rule 404(b), two considerations are paramount:

> Though it is a rule of inclusion, Rule 404(b) is still constrained by the requirements of similarity and temporal proximity. Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them. We do not require that the similarities rise to the level of the unique and bizarre.

State v. Beckelheimer, 366 N.C. 127, 131, 726 S.E.2d 156, 159 (2012) (citation and quotation marks omitted). While cases examining the admissibility of evidence under Rule 404(b) often focus exclusively on similarity and temporal proximity, we remain cognizant that Rule 404(b) "is, at bottom, one of relevancy." *State v. Jeter*, 326 N.C. 457, 459, 389 S.E.2d 805, 807 (1990); *accord Carpenter*, 361 N.C. at 388, 646 S.E.2d at 110 ("In light of the perils inherent in introducing prior crimes under Rule 404(b),

several constraints have been placed on the admission of such evidence. Our Rules of Evidence require that in order for the prior crime to be admissible, it must be relevant to the currently alleged crime." (citing N.C.G.S. § 8C-1, Rule 401)).

"When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, . . . we look to whether the evidence supports the findings and whether the findings support the conclusions." *Beckelheimer*, 366 N.C. at 159, 726 S.E.2d at 159. "We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *Id.* The trial court made the following oral findings of fact regarding the admissibility of testimony related to the Main Street Arson[2]:

> The State's 404(b) evidence would show the following. That in August of 2008 the Defendant used gasoline to set fire to a home at 600 -- on the 600 block of Main Street in Mooresville during the nighttime hours. Actually earlier to -- closer to morning. That this gas was purchased at a nearby Pantry gas station. That the Defendant tried to set the fire with [cigarettes] but ultimately succeeded with a lighter. That she knew that the home was inhabited because she saw a vehicle belonging to [the homeowner]. [The homeowner] had, according to the Defendant, beat her while his father watched and done nothing at the time of this beating. It's unclear whether the beating -- when this beating allegedly occurred. Sometime in the month to a year before.
>
> A K-9 trained in fires sniffed to locate possible incendiary material. Two pieces of wood were retrieved by the Fire Marshal and sent to a lab which turned out positive for gasoline. [Defendant] did not report the assault by [the homeowner] to the police at any time. [Defendant] admitted to drinking [Peach] Mad Dog 20-20 Vodka [, drinking several Bud Lights,] and also taking prescription [Clonozapine] pills which were prescribed to her. This

2. At the time the trial court made these oral findings of fact and conclusions of law, it declared the ruling to be a "very rough copy of the ruling," and that it would "look at it and make [the ruling] prettier as the week [went] on." Despite this statement, no revised copy of the trial court's ruling (oral or written) appears in the transcript or record on appeal. Immediately following the trial court's ruling, several minor factual errors were brought to the court's attention by the State and agreed to by Defendant. For clarity and ease of reading, we have removed the erroneous information and placed the correct information in brackets.

> fire was at the regular entrance way to the building -- to the house or apartment. As in the instant case the fire was on the outside which, according to the Fire Marshal, makes it harder to detect by those inside. The damage in [the Main Street Arson] was much more extensive as shown by pictures introduced by the State.
>
> Unlike the instant case, the Defendant in [the Main Street Arson], her involvement, and also unlike the instant case, there's no real timeline between the beating and the fire. In the 2008 August case with – on Main Street, there was a Department of Social Services correlation in that apparently the Defendant was upset because her two year old had suffered a cut for which she believes the Department of Social Services blames her. The cut was treated on the Friday before the fire purportedly happened on the following early hours of Sunday morning. Unlike the instant case, the [Main Street Arson] appears planned, at least to the extent of purchasing gasoline and also the Defendant had another person with her.
>
> . . . .
>
> In [both the Main Street Arson and the Mills Street Arson], we find temporal closeness to the actual event for which we are trying the Defendant. Both events occurred within four years of this incident. In each of these cases -- in all three cases there is evidence of use of incendiary materials and attempted burning at night in Mooresville in retaliation for a perceived wrong by the person or persons occupying a home. And in each case the Defendant claims to have been a victim but not follow through with police involvement or government involvement in assisting her to lawfully address the wrong but instead addresses it herself.

After making these findings of fact, the trial court made the following oral conclusion of law regarding the admissibility of testimony related to the Main Street Arson:

> The State has offered [evidence regarding the Main Street Arson] as evidence of -- allowed by 404(b), identity, intent, common scheme, plan, or motive. The Court will allow it to show intent. Finding that in both cases the commonalities are that they happened -- each happened in Mooresville in

> the nighttime hours using an incendiary method; and the Court notes that fire is an unusual incendiary -- unusual attack . . . -- well, attack method. That they each occurred against -- at an entrance way which appears to be either the only entrance way or most common entrance way to the apartments against persons that the Defendant knew to be within. That she knew the buildings to be occupied, and that she had some grievance with or perceived harm from, and which she believed to be the victim; and on each occasion she was impaired by alcohol or some controlled substances in addition to alcohol. And she never reported such to the police. And in that occasion the probative value outweighs any prejudice to the Defendant.

After review of the transcript of the proceedings and the trial court's findings and conclusions, we are convinced that the evidence presented during *voir dire* by the three 404(b) witnesses supports the trial court's findings of fact, which support the conclusion that the evidence was probative of Defendant's intent, rendering the evidence admissible pursuant to Rule 404(b). As found by the trial court, the Main Street Arson and the present case contained key similarities. Both arsons occurred in Mooresville during the nighttime hours, and both were set on the exterior of a building at a regular entranceway. In both cases, the perpetrator was intoxicated, knew the buildings to be occupied, and was angry about a "perceived harm" perpetrated against Defendant by the occupant of the residence. While Defendant, in her brief to this Court, has pointed to various differences between the Main Street Arson and the present case, we must not "focus[] on the differences between the [prior and current] incidents," but rather "review[] the[] similarities noted by the trial court." *Beckelheimer*, 366 N.C. at 160, 726 S.E.2d at 159 (citation omitted). Reviewing those similarities here, we conclude the unusual facts of the two incidents are sufficiently similar to be admissible pursuant to Rule 404(b).

We also find the evidence of the Main Street Arson to be logically relevant to Defendant's intent to commit the present crime. Defendant admitted to perpetrating the Main Street Arson, and both crimes displayed the similarities discussed above. The fact that Defendant attempted to commit arson at night, in the same town, and against a person from whom she had experienced a "perceived harm" logically bears on Defendant's intent to commit arson in similar circumstances in the present case.

On the issue of temporal proximity, the Main Street Arson occurred approximately four years before the present incident. Cases from our Supreme Court have upheld the admissibility of 404(b) evidence with significantly longer periods between the past and present incidents. *E.g.*, *State v. Carter*, 338 N.C. 569, 588-89, 451 S.E.2d 157, 167-68 (1994) (affirming admissibility of 404(b) evidence of prior crime despite an eight-year lapse between assaults), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995). Considering that temporal proximity "is less significant when the prior conduct is used to show intent," we hold that the four-year gap between incidents does not affect the admissibility of the Main Street Arson evidence. *State v. Locklear*, 363 N.C. 438, 448, 681 S.E.2d 293, 302 (2009) (holding that "remoteness in time generally affects only the weight to be given such evidence, not its admissibility").

Having determined that the 404(b) evidence was sufficiently similar, logically relevant, and not too remote in time, we now review the trial court's Rule 403 determination. As relevant to this case, a trial court may exclude relevant evidence under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2015). A trial court's Rule 403 determination is reviewed for abuse of discretion. *Beckelheimer*, ___ N.C. at ___, 726 S.E.2d at 160. A review of the record in the present case reveals that the trial court was aware of the potential danger of unfair prejudice to Defendant, and excluded evidence of the Mills Street Arson under Rule 403.

The trial court heard the testimony of the 404(b) witnesses outside the presence of the jury, considered the arguments of counsel, ruled on the admissibility of the evidence, and gave a proper limiting instruction to the jury for the Main Street Arson evidence admitted under Rule 404(b). Given the similarities between the Main Street Arson and the present case, and the trial court's deliberate determination of the admissibility of the 404(b) witnesses' testimony, we conclude that it was not an abuse of discretion for the trial court to determine that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. *See id.*; *see also State v. Hipp*s, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998).

B. Ineffective Assistance of Counsel

[2] Defendant argues that she received ineffective assistance of counsel when her trial counsel declined to request a jury instruction on voluntary intoxication based upon counsel's misapprehension of the law. Generally, "claims of ineffective assistance of counsel should be

considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). However, an ineffective assistance of counsel claim brought on direct review "will be decided on the merits when the cold record reveals that no further investigation is required[.]" *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). "[O]n direct appeal, the reviewing court ordinarily limits its review to material included in the record on appeal and the verbatim transcript of proceedings, if one is designated." *Id.* at 167, 557 S.E.2d at 524-25 (citation and quotation marks omitted). Here, the record on appeal and transcript of the proceedings suffice to show that Defendant's ineffective assistance of counsel claim is without merit; we therefore decide the claim on the merits on direct review.

In order to show ineffective assistance of counsel, a defendant must satisfy the two-prong test announced by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, (1984). This test for ineffective assistance of counsel has been explicitly adopted by our Supreme Court for state constitutional purposes in *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). Pursuant to *Strickland*:

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

466 U.S. at 687, 80 L. Ed. 2d at 693; *accord Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248. "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248 (citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698. Therefore, "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would

have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. "[T]o 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. Poindexter*, 359 N.C. 287, 291, 608 S.E.2d 761, 764 (2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 534, 156 L. Ed. 2d 471, 493 (2003)).

Defendant claims her trial counsel rendered ineffective assistance when counsel declined to request a jury instruction on voluntary intoxication because counsel believed the defense was required to present evidence before being entitled to request such an instruction. Presuming counsel's performance was deficient for incorrectly asserting that Defendant was not entitled to ask for a voluntary intoxication instruction without presenting some evidence, Defendant cannot show there to be a "reasonable probability" that the result of the trial would have been different, because Defendant was not entitled to a voluntary intoxication instruction, had one been requested.

Voluntary intoxication in and of itself is not a legal excuse for a criminal act. *State v. Gerald*, 304 N.C. 511, 521, 284 S.E.2d 312, 318 (1981). It is only a viable defense "if the degree of intoxication is such that a defendant could not form the specific intent required for the underlying offense." *State v. Golden*, 143 N.C. App. 426, 430, 546 S.E.2d 163, 166 (2001). Before the trial court will be required to instruct on voluntary intoxication, a defendant must "produce substantial evidence which would support a conclusion by the trial court that at the time of the crime for which he is being tried defendant's mind and reason were so completely intoxicated and overthrown as to render him *utterly incapable* of forming the requisite specific intent." *State v. Ash*, 193 N.C. App. 569, 576, 668 S.E.2d 65, 70-71 (2008) (emphasis added) (citation and quotation marks omitted). "In the absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon." *Id.* at 576, 668 S.E.2d at 71. The evidence must be viewed in the light most favorable to the defendant, *e.g. State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988), and a defendant is entitled to rely exclusively on the evidence produced by the State. *See, e.g.*, *State v. Herring*, 338 N.C. 271, 275, 449 S.E.2d 183, 186 (1994) ("A defendant who wants to raise the issue of whether he was so intoxicated by the voluntary consumption of alcohol or other drugs that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence,

or relying on the evidence produced by the state, of his intoxication." (emphasis added) (citation and quotation marks omitted)).

In the present case, Defendant argues that the evidence produced by the State was sufficient to entitle her to a voluntary intoxication instruction. To support her argument, Defendant points to various behaviors exhibited by Defendant on the night in question, including, *inter alia*, yelling profanities, inexplicably singing hymns, claiming to be the victim, attempting to take her shirt off to show law enforcement an injury, and passing out at the police department. While the evidence shows Defendant was intoxicated to some degree on 20 December 2011, we believe the evidence was insufficient to entitle her to a voluntary intoxication instruction.

The evidence presented by the State did not establish how much alcohol Defendant had consumed prior to committing the crime at issue, which case law suggests is information of significant consequence to the determination of whether a defendant is entitled to a voluntary intoxication instruction. *See Ash*, 193 N.C. App. at 576, 668 S.E.2d at 71-72 (concluding that a defendant was not entitled to a voluntary intoxication instruction when "there was no evidence as to exactly how much [intoxicating substance] he consumed prior to the commission of the crime at issue"). Nor did the State's evidence tend to show the length of time over which Defendant had consumed alcohol before committing the attempted arson in this case, a showing which must be made before a defendant is entitled to the instruction. *See State v. Geddie*, 345 N.C. 73, 95, 478 S.E.2d 146, 157 (1996), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997) (concluding that "[e]vidence tending to show only that defendant drank some unknown quantity of alcohol over an indefinite period of time before the [crime] does not satisfy the defendant's burden of production" necessitating a voluntary intoxication instruction). The evidence presented in the present case revealed only that Defendant had consumed some amount of some type of alcohol over some unknown period of time prior to attempting arson. While Defendant's level of consumption before committing the crime is unknown, the evidence did establish that Defendant consumed some amount of alcohol after committing the attempted arson but before encountering law enforcement: at the time law enforcement approached Defendant, she had in her possession a "sports drink container" which had a "strong odor of alcoholic beverage."

Defendant also took deliberate actions that suggest a clear purpose in carrying out the attempted arson. After engaging in a physical altercation with Houston, Defendant: (1) obtained a Mad Dog 20-20 bottle, a rag, and a lighter; (2) placed the rag partially into the bottle to form a

"Molotov cocktail;" (3) lit the rag and threw the bottle at Houston's door; (4) exclaimed her desire to "burn [Houston] out," and (5) subsequently left the scene. These actions were not instantaneous and required Defendant to leave the scene, gather supplies, and return to Houston's door to carry out the crime. In addition to actions directly related to the attempted arson, when law enforcement approached Defendant, she quickly handed a container containing an alcoholic beverage to another person, indicating at least some level of awareness of her surroundings. *See State v. Long*, 354 N.C. 534, 538-39, 557 S.E.2d 89, 93 (2001) (stating that steps "designed to hide the defendant's participation" in the crime demonstrates the ability to "plan and think rationally" and shows that the defendant was not so intoxicated that intent could not be formed); *see also State v. Lemons*, 225 N.C. App. 266, 736 S.E.2d 647, 2013 N.C. App. LEXIS 41, *12-13 (2013) (unpublished) (noting that a voluntary intoxication instruction was not warranted when the defendant "acted with a clear purpose and intent in carrying out" the crime).

While the behavior exhibited by Defendant, and cited by her appellate counsel to highlight her level of intoxication, was indeed bizarre, our courts have held that "a person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary plan, design, or intention." *Mash*, 323 N.C. at 347, 372 S.E.2d at 537 (citation and quotation marks omitted). While the evidence presented was sufficient to show Defendant was intoxicated to some degree, "[e]vidence of mere intoxication . . . is not enough." *Id.* at 346, 372 S.E.2d at 536. Given the lack of any evidence regarding Defendant's level of alcohol consumption on 20 December 2011 before committing the attempted arson, the uncertainty surrounding how quickly Defendant consumed that alcohol, the evidence establishing that Defendant was consuming alcohol after committing the attempted arson but before encountering law enforcement, evidence of a purposeful manner of carrying out the attempted arson, and evidence showing Defendant quickly handed off a container of alcohol as law enforcement approached her, indicating some level of awareness of her surroundings, we conclude that the evidence did not support a conclusion that Defendant was "so completely intoxicated and overthrown as to render [her] utterly incapable of forming the requisite specific intent." *Ash*, 193 N.C. App. at 576, 668 S.E.2d at 70-71. Defendant was, therefore, not entitled to a voluntary intoxication instruction.

While a claim of ineffective assistance of counsel will be dismissed without prejudice when the claim has been "prematurely asserted on direct appeal," *State v. Warren*, ___ N.C. App. ___, ___, 780 S.E.2d 835,

841-42 (2015), dismissal without prejudice is not appropriate when the "cold record reveals that no further investigation is required[.]" *Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). In the present case, no further investigation into Defendant's ineffective assistance of counsel claim is required; the cold record reveals all of the evidence and testimony that was presented at trial regarding Defendant's level of intoxication, and shows that the evidence presented by the State fell short of the exacting standard our case law requires before entitling a defendant to a jury instruction on voluntary intoxication. *E.g. Mash*, 323 N.C. at 347, 372 S.E.2d at 536-37; *Geddie*, 345 N.C. at 95, 478 S.E.2d at 157; *Ash*, 193 N.C. App. at 576, 668 S.E.2d at 71-72. As Defendant was not entitled to a voluntary intoxication instruction, she has failed to show "that in the absence of counsel's alleged errors the result of the proceeding would have been different[.]" *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. We therefore reject Defendant's claim of ineffective assistance of counsel.

C. Prior Record Level Calculation

[3] Defendant contends the trial court erred in adding a prior record level point to her prior record level calculation for sentencing purposes attributable to the time she spent on probation, parole, or post supervision. She argues the State failed to give proper notice of its intention to use the probation point in the calculation of her sentence, as required by N.C. Gen. Stat. § 15A-1340.16(a6). We agree.

"The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citing *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007)). Pursuant to North Carolina's felony sentencing system, the prior record level of a felony offender is determined by assessing points for prior crimes using the method delineated in N.C. Gen. Stat. § 15A-1340.14(b)(1)-(7). *See generally* N.C. Gen. Stat. §§ 15A-1340.14(a)-(b) (2015). As relevant to the present case, a trial court sentencing a felony offender may assess one prior record level point "[i]f the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision[.]" N.C. Gen. Stat. § 15A-1340.14(b)(7) (2015). Prior to being assessed a prior record level point pursuant to N.C.G.S. § 15A-1340.14(b)(7), however, our General Statutes require the State to provide written notice of its intent to do so:

> The State must provide a defendant with written notice of its intent to prove the existence of . . . a prior record level point under G.S. 15A-1340.14(b)(7) at least 30 days

> before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

N.C. Gen. Stat. § 15A-1340.16(a6) (2015).

In the present case, the parties agreed, in a stipulation in the record on appeal, to the following:

> [The assistant district attorney] informed appellate counsel for [Defendant] that she gave notice of the State's intent to seek an extra point in the determination of [Defendant's] prior record level by including a copy of an AOC-CR-600 form . . . with the discovery materials [the assistant district attorney] provided to the attorneys who represented [Defendant] in Iredell County Superior Court. The form . . . contain[ed] contain[ed] a handwritten '+1' in the space beside the cell captioned "if the offense was committed: (a) while on supervised or unsupervised probation, parole, or post-release supervision." . . . The [assistant district attorney] stated this is the standard manner the Iredell County District Attorney's Office provides notice of the State's intent to seek an additional prior record level point when an offense has been committed during a period in which the defendant was on probation.

In addition to this stipulation, the following exchange occurred between the trial court and the prosecutor regarding whether Defendant had received notice of the State's intent to seek an extra prior record level point:

> THE COURT: And the extra point was noticed?
>
> [Prosecutor]: Yes, Ma'am. I gave them notice of that. I mean I provided that to [Defendant's counsel] in discovery.
>
> THE COURT: All right.

This Court recently held in a factual situation similar to the present case, that the State's notice of its intent to prove a prior record level point authorized by N.C. Gen. Stat. § 15A-1340.14(b)(7) by including a prior record level worksheet in discovery materials is insufficient to meet N.C.G.S. § 15A-1340.16(a6)'s notice requirement. *See State v. Crook*, ___ N.C. App. ___, 785 S.E.2d 771 (2016). In *Crook*, the defendant argued the trial court erred by including the probation, parole, or

post-release supervision point and sentencing him as a prior record level II offender because the State did not provide him with notice of intent under N.C.G.S. § 15A-1340.16(a6). *Crook*, ___ N.C. App. at ___, 785 S.E.2d at 780.

In response, the State contended that the "defendant's prior record level worksheet was made available to [him] in discovery . . . more than 30 days prior to the trial" and that, as such, "the defendant was provided notice of his prior record level calculation of a prior record level II with two prior record level points[.]" *Id.* In rejecting this argument, this Court held that including a prior record level worksheet during discovery "[a]t most . . . constituted a possible calculation of [the d]efendant's prior record level and did not provide affirmative notice that the State intended to prove the existence of the prior record point authorized by N.C. Gen. Stat. § 15A-1340.14(b)(7) as required by N.C. Gen. Stat. § 15A-1340.16(a6)." *Crook*, ___ N.C. App. at ___, 785 S.E.2d at 780 (citation omitted). This court noted that "the State had the ability to comply with the statute using regular forms promulgated for this specific purpose by the Administrative Office of the Courts." *Id.* (citation and quotation marks omitted).

Pursuant to this Court's recent holding in *Crook*, the State must provide a defendant with notice of intent to prove the existence of a prior record level point authorized by N.C.G.S. § 15A-1340.14(b)(7) at least thirty days prior to trial, and must provide notice of its intent in some manner other than including a prior record level worksheet in the discovery documents made available to a defendant. In the present case, notice to Defendant was lacking, as the State only communicated its intent to prove the aggravating factor by including a handwritten notation on a form provided through discovery. This notation "[a]t most. . . constituted a possible calculation of Defendant's prior record level and did not provide affirmative notice that the State intended to prove the existence of the prior record point[.]" *Crook*, ___ N.C. App. at ___, 785 S.E.2d at 780 (citation omitted). The fact that there was a short exchange between the prosecutor and the trial court in no way changes this calculus, because no separate notice was provided to Defendant as required by Crook. Although Defendant failed to object at trial to the State's failure to provide notice, "[i]t is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review." *Bohler*, 198 N.C. App. at 633, 681 S.E.2d at 804.

The State's argument that *State v. Snelling*, 231 N.C. App. 676, 752 S.E.2d 739 (2014) controls the present case and requires an opposite conclusion is unavailing. In *Snelling*, the defendant argued, *inter alia*, that the trial court erred by sentencing him as a higher prior record level offender because it failed to comply with the sentencing procedure mandated by N.C. Gen. Stat. § 15A-1022.1. *Snelling*, 231 N.C. App. at 680-81, 752 S.E.2d at 743. N.C.G.S. § 15A-1022.1 requires a trial court to inform a defendant of his or her right to have a jury determine the existence of an aggravating factor, and the right to prove the existence of any mitigating factor. *Snelling*, 231 N.C. App. at 680, 752 S.E.2d at 743; N.C. Gen. Stat. § 15A-1022.1 (2015). After examining the statute and the facts of the case, the *Snelling* Court held that because the defendant stipulated to his prior record level status, such status was a "non-issue." *Snelling*, 231 N.C. App. at 681-82, 752 S.E.2d at 744. "Within the context of defendant's sentencing hearing," the Court reasoned, "the procedures specified by N.C. Gen. Stat. § 15A-1022.1 would have been inappropriate." *Snelling*, 231 N.C. App. at 682, 752 S.E.2d at 744 (citation omitted).

The State argues that, like in *Snelling*, Defendant's prior record level status was a non-issue, and she "waived any requirement for notice pursuant to N.C. Gen. Stat. § 15A-1340.16(a6) by failing to respond to the trial court's direct inquiry as to whether the extra point was noticed." This argument fails for several reasons.

First, the "trial court's direct inquiry" regarding notice was not directed at Defendant or her counsel; rather, it was a conversation between the trial court and the prosecutor. Second, to hold that Defendant's argument was waived would contravene this Court's longstanding precedent that an objection is not necessary in order to preserve a "claim that the record evidence does not support the trial court's determination of a defendant's prior record level[.]" *Bohler*, 198 N.C. App. at 633, 681 S.E.2d at 804. Third, the portion of *Snelling* on which the State relies was discussing N.C.G.S. § 15A-1022.1, a separate statute from the one at issue in the present case, N.C.G.S. § 15A-1340.16(a6). The purposes of these two statutes are very different: N.C.G.S. § 15A-1022.1 deals with sentencing procedure to be followed by the *sentencing judge*, while N.C.G.S. § 15A-1340.16(a6) deals with notice *the State* must provide to a defendant of its intent to prove a fact which will increase his or her sentence. Finally, after the *Snelling* Court addressed, and dismissed, the defendant's argument related to N.C.G.S. § 15A-1022.1, the Court *agreed with the defendant* that N.C.G.S. § 15A-1340.16(a6)'s notice requirements had been violated, and that violation required a new sentencing hearing. *See Snelling*, 231 N.C. App. at 682, 752 S.E.2d at 744 ("Here, the trial court

never determined whether the statutory requirements of N.C. Gen. Stat. § 15A-1340.16(a6) were met. Additionally, there is no evidence in the record to show that the State provided sufficient notice of its intent to prove the probation point. Moreover, the record does not indicate that defendant waived his right to receive such notice.").

[4] Under this Court's holding in *Crook*, the notice provided to Defendant in the present case was insufficient to meet the notice requirements of N.C.G.S. § 15A-1340.16(a6), and the record does not indicate Defendant waived her right to such notice. Accordingly, the trial court erred in sentencing Defendant as a prior record level III offender. We therefore vacate Defendant's sentence and remand this case for Defendant to be resentenced as a prior record level II offender. As Defendant has noted in briefing to this Court, there is at least some possibility that, upon resentencing, Defendant may be entitled to her immediate release because she would have served her entire sentence. We express no opinion on resentencing or on Defendant's proper sentence. However, due to this possibility and to hasten Defendant's resentencing, we direct, pursuant to N.C. R. App. P. 32(b), that the mandate issue immediately upon the filing of this opinion.

NO ERROR IN PART; JUDGMENT VACATED; REMANDED FOR RESENTENCING.

Judges STROUD and TYSON concur.

T AND A AMUSEMENTS, LLC; AND CRAZIE OVERSTOCK PROMOTIONS, LLC, PLAINTIFFS

v.

PATRICK McCRORY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA; FRANK L. PERRY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY; MARK J. SENTER, IN HIS OFFICIAL CAPACITY AS BRANCH HEAD OF THE ALCOHOL LAW ENFORCEMENT DIVISION; JODY WILLIAMS, IN HIS OFFICIAL CAPACITY AS THE CHIEF OF POLICE OF THE CITY OF ASHEBORO, NORTH CAROLINA; AND MAYNARD B. REID, JR., IN HIS OFFICIAL CAPACITY AS THE SHERIFF OF RANDOLPH COUNTY, DEFENDANTS

No. COA16-161

Filed 7 February 2017

Declaratory Judgments—justiciability—electronic sweepstakes

The trial court erred by granting defendants' motion to dismiss a claim for declaratory and injunctive relief on the grounds of justiciability where a promotional rewards program was deemed to have the elements of an illegal electronic sweepstakes. Uncertainty about whether the rewards program violated North Carolina's gambling and sweepstakes statutes impacted plaintiffs' ability to operate a business.

Appeal by plaintiffs from order entered 19 November 2015 by Judge Michael D. Duncan in Randolph County Superior Court. Heard in the Court of Appeals 24 August 2016.

Morningstar Law Group, by William J. Brian, Jr. and Keith P. Anthony, for plaintiffs-appellants.

Joshua H. Stein, Attorney General, by Hal F. Askins, Special Deputy Attorney General, and J. Joy Strickland, Assistant Attorney General, for defendants-appellees Patrick McCrory, Frank L. Perry, and Mark J. Senter.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch and Patrick H. Flanagan, for defendant-appellee Jody Williams.

No brief filed on behalf of defendant-appellee Maynard B. Reid, Jr.

DAVIS, Judge.

This case requires us to revisit the issue of whether lawsuits brought by companies in the business of licensing and distributing promotional

rewards programs seeking declaratory and injunctive relief as to the legality of those programs are barred by sovereign immunity or are otherwise nonjusticiable. Crazie Overstock Promotions, LLC ("Crazie Overstock") and T and A Amusements, LLC ("T&A") (collectively "Plaintiffs") argue that the trial court erred in dismissing their amended complaint pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. Because we conclude that Plaintiffs' claims are neither barred by sovereign immunity nor nonjusticiable, we reverse the trial court's order and remand for further proceedings.

Factual and Procedural Background

Crazie Overstock, a retailer of various discount goods, licenses "retail establishments" to promote and display its goods, which may then be purchased through Crazie Overstock's website. Customers may purchase items through the website with either a credit card or an electronic gift certificate. In order to incentivize the sale of such gift certificates, Crazie Overstock has created a promotional rewards program (the "CO Rewards Program").

The CO Rewards Program allows customers to receive a certain number of "game points" for each dollar of gift certificates they purchase through kiosks located in the retail establishments. Game points may then be used to play "reward games" on machines in these establishments. The reward games require no skill, and their results are determined randomly. Customers who are successful at reward games receive "reward points" as a result. Reward points, in turn, may be used by the customer to play a "dexterity test," which tests players' hand-eye coordination and reflexes by requiring them "to stop a simulated stopwatch within specified ranges." Customers who are successful at the dexterity test then receive "dexterity points," which may be redeemed for cash rewards.

T&A is a distributor for Crazie Overstock and, as such, is responsible for recruiting persons to operate retail establishments and for helping to set up and service those establishments. In the spring of 2015, T&A recruited an entity called Mighty Enterprises, LLC ("Mighty Enterprises") to operate a store in Asheboro, North Carolina. The Mighty Enterprises store, which opened in May 2015, offered the CO Rewards Program to its customers.

Based on their knowledge that the Alcohol Law Enforcement Division ("ALE") of the North Carolina Department of Public Safety and local law enforcement agencies had previously investigated other businesses offering similar promotional rewards programs, the principals

of Mighty Enterprises contacted the Asheboro Police Department and offered to conduct a demonstration of the CO Rewards Program in the hope of demonstrating that the program did not violate North Carolina's gambling and sweepstakes statutes.

On 17 June 2015, a demonstration of the CO Rewards Program was conducted for Detective Daniel Shropshire of the Asheboro Police Department and Agent Stephen Abernathy of ALE. After the demonstration, the officers stated that they would review the legality of the CO Rewards Program with their respective supervisors as well as the district attorney.

On 25 June 2015, Detective Shropshire contacted Dawn Moffitt, a principal of Mighty Enterprises, to inform her that "the City Police Chief, the ALE, the Office of the District Attorney, and the Randolph [County] Sheriff considered the CO Rewards Program to have the same elements of an illegal electronic sweepstakes which violates both the Video Sweepstakes Law and the Gambling Statutes." He also warned Moffitt that "if Mighty Enterprises did not cease all operations, including the CO Rewards Program[,] by June 30, 2015, she and the other principals and employees of Mighty Enterprises would be charged criminally, and . . . the company's equipment and other personal property would be confiscated." As a result, Mighty Enterprises shut down its operations until the legality of the CO Rewards Program could be determined by a court.

On 20 August 2015, Plaintiffs filed the present action in Randolph County Superior Court requesting, *inter alia*, that the trial court (1) declare that the CO Rewards Program does not violate North Carolina law; and (2) enjoin the defendants from taking law enforcement action against retail establishments for offering the CO Rewards Program. The complaint named as defendants Patrick McCrory, Governor of North Carolina; Frank L. Perry, Secretary of the North Carolina Department of Public Safety; Mark J. Senter, Branch Head of ALE; Jody Williams, Asheboro Police Chief; and Maynard B. Reid, Jr., Sheriff of Randolph County (collectively "Defendants"). All of the defendants were sued solely in their official capacities.

Plaintiffs alleged in their amended complaint that "ALE and other state officials desire to eradicate all electronic sweepstakes or electronic rewards programs from the State of North Carolina, including the CO Rewards Program, without regard to whether such sweepstakes or rewards programs violate the Gambling Statutes or the Video Sweepstakes Statute, or other applicable law." Plaintiffs also asserted that ALE officers, in conjunction with local law enforcement agencies,

have participated in numerous raids of businesses offering rewards programs, resulting in both threatened and actual prosecutions. Plaintiffs further alleged that "[a]s a direct result of threats by ALE and increased activity by ALE and other local and state officials, [T&A] and Crazie Overstock are being harmed because current and potential Retail Establishments are afraid to offer the CO Rewards Program, even though that program complies fully with all applicable laws."

On 1 October 2015, Defendants McCrory, Perry, and Senter filed a motion to dismiss pursuant to Rule 12(b)(1) based on sovereign immunity and under Rule 12(b)(6) on the ground that the complaint failed to state a claim upon which relief could be granted against them. On 7 October 2015, Chief Williams filed a motion to dismiss under Rules 12(b)(1), (2), and (6) in which he asserted that Plaintiffs' claims against him were "barred by sovereign and/or government immunity" and that Plaintiffs had failed to show the existence of an actual controversy.

A hearing on Defendants' motions was held on 12 October 2015 before the Honorable Michael D. Duncan. The arguments at the hearing were limited to the issues of whether Defendants were entitled to sovereign or governmental immunity and whether a justiciable controversy existed. The trial court issued an order on 19 November 2015 granting Defendants' motions and concluding that (1) dismissal of Plaintiffs' claims was proper under Rule 12(b)(6); and (2) "in the absence of any allegation of waiver, sovereign/governmental immunity bars the Plaintiff[s'] claims against all of the Defendants in this action pursuant both to Rule 12(b)(1) and Rule 12(b)(2) . . . ."[1] Plaintiffs filed a timely notice of appeal.

Analysis

Plaintiffs argue on appeal that the trial court erred in granting Defendants' respective motions to dismiss because (1) neither sovereign nor governmental immunity bars this action; and (2) Plaintiffs'

1. Our review of the hearing transcript reveals that no arguments were made at the 12 October 2015 hearing on the issue of whether the CO Rewards Program actually violated any North Carolina statutes. Nor do the parties contend on appeal that the trial court's ruling was based upon that issue. Accordingly, we construe the trial court's order as based solely on the issues of immunity and justiciability. *See Myers v. McGrady*, 170 N.C. App. 501, 509, 613 S.E.2d 334, 340 (2005) ("Where the record does not contain anything in the pleadings, transcripts, or otherwise, to indicate that an issue was presented to the trial court we refuse to address the issue for the first time on appeal." (citation, quotation marks, ellipses, and brackets omitted)), *rev'd on other grounds*, 360 N.C. 460, 628 S.E.2d 761 (2006).

pleadings demonstrated the existence of a justiciable controversy. We address each of these issues in turn.

I. Sovereign Immunity

Under the doctrine of sovereign immunity, "a state may not be sued in its own courts or elsewhere unless by statute it has consented to be sued or has otherwise waived its immunity from suit." *N.C. Ins. Guar. Ass'n v. Bd. of Trs. of Guilford Tech. Cmty. Coll.*, 364 N.C. 102, 107, 691 S.E.2d 694, 697 (2010) (citation omitted). This immunity encompasses "subordinate division[s] of the state, or agenc[ies] exercising statutory governmental functions . . . ." *Id.* (citation omitted). Where, as here, public officials are sued in their official capacities, the claims against them are deemed to be claims against the entities for which they are employed. *See Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21 (1997) ("[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." (citation and quotation marks omitted)).[2]

However, our Supreme Court has recognized the existence of a limited exception to sovereign immunity in certain cases where plaintiffs seek declaratory or injunctive relief against State agencies that act "in excess of the authority granted [to them] under [a] statute and invade or threaten to invade personal or property rights of a citizen in disregard of the law." *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm'n*, 336 N.C. 200, 208, 443 S.E.2d 716, 721 (1994), s*uperseded by statute on other grounds as stated in Mehaffey v. Burger King*, 367 N.C. 120, 749 S.E.2d 252 (2013).

North Carolina's appellate courts have recently applied this principle in *Sandhill Amusements, Inc. v. Sheriff of Onslow County*, 236 N.C.

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2. As an initial matter, with regard to Plaintiffs' claims against Chief Williams, the parties disagree as to whether the State's sovereign immunity — if otherwise applicable in this case — would cover him given that he is a local official rather than a State official. It is true that the doctrine of *governmental* immunity generally applies to local entities whereas *sovereign* immunity applies to State entities and that sovereign immunity is broader in scope than governmental immunity. *See Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 335 n.1, 678 S.E.2d 351, 353 n.1 (2009) (noting that immunity possessed by county agencies is "identified as governmental immunity, while sovereign immunity applies to the State and its agencies"); *Evans v. Hous. Auth. of City of Raleigh*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (explaining that governmental and sovereign "immunities do not apply uniformly"). Plaintiffs argue that local law enforcement entities are not entitled to the State's sovereign immunity even when sued for declaratory or injunctive relief (rather than for monetary damages) in lawsuits arising from enforcement of state laws. However, we need not resolve this issue because, for the reasons explained below, we hold that sovereign immunity does not serve as a bar to Plaintiffs' claims in this action.

App. 340, 762 S.E.2d 666 (2014), *rev'd per curiam for the reasons stated in the dissenting opinion*, 368 N.C. 91, 773 S.E.2d 55 (2015), which rejected a similar sovereign immunity argument raised by a defendant on analogous facts. In that case, one of the plaintiffs, Gift Surplus, LLC ("Gift Surplus"), licensed to retail stores certain "sweepstakes promotion devices used to promote the sale of gift cards and e-commerce business." *Sandhill Amusements*, 236 N.C. App. at 341 n.1, 762 S.E.2d at 669 n.1. Through kiosks provided by Gift Surplus, customers could purchase gift certificates to use in Gift Surplus's online store. When customers bought these gift certificates, they also received credits to play electronic games on the kiosks. The first phase of these games was based purely on chance while the second phase required players to make a judgment regarding which way to turn a reel. *Id.* at 343, 762 S.E.2d at 670. Another plaintiff, Sandhill Amusements, LLC ("Sandhill"), was the distributor of Gift Surplus's kiosks in the Onslow County, North Carolina area. *Id.* at 344 n.1, 762 S.E.2d at 669 n.1.

After receiving complaints regarding these games, officers from the Onslow County Sheriff's Office visited a store featuring Gift Surplus kiosks and documented how the machines worked. After subsequently receiving an opinion from ALE that the kiosks were "illegal video sweepstakes machines," the sheriff and the district attorney sent a letter to the owner of Sandhill warning him that if the promotion was not stopped the kiosks would be seized as evidence and persons in possession of them would be criminally prosecuted. *Id.* at 344, 762 S.E.2d at 670. As a result of this letter, Sandhill removed kiosks from two Onslow County locations and decided not to place kiosks in five other locations. *Id.*

Sandhill and Gift Surplus filed a lawsuit against the sheriff and the district attorney[3] seeking a declaration that the promotion was "not prohibited gambling, lottery or gaming products" and an injunction against further enforcement action by the defendants in relation to the promotion. *Id.* at 344, 762 S.E.2d at 671. The sheriff moved to dismiss under Rules 12(b)(1), (2), and (6) based in part on sovereign immunity and the absence of a justiciable controversy. The trial court denied the motion to dismiss and entered a preliminary injunction barring the sheriff from initiating criminal action against the plaintiffs in connection with the promotion. *Id.* at 345, 762 S.E.2d at 671.

In a divided opinion by this Court, the majority disagreed with the sheriff's argument that the plaintiffs' claims were barred by sovereign

3. The plaintiffs subsequently dismissed the district attorney as a party to the action.

immunity, explaining that because "the declaratory judgment procedure is the only method by which Plaintiffs have recourse to protect their property interests in the kiosks, we hold that . . . sovereign immunity did not bar Plaintiffs' claim for injunctive relief." *Id.* at 351, 762 S.E.2d at 675. After further determining that the plaintiffs had shown the existence of a justiciable controversy, the majority considered the merits of the appeal and ultimately affirmed in part and vacated in part the preliminary injunction that the trial court had issued. *Id.* at 357, 762 S.E.2d at 679.

The dissenting judge filed a separate opinion stating his agreement with the majority's determination of the immunity and justiciability issues but concluding that the preliminary injunction should be vacated in its entirety because the plaintiffs had failed to demonstrate a likelihood that they would ultimately be able to prove that the promotion did not violate North Carolina's sweepstakes statute. *Id.* at 358, 762 S.E.2d at 679 (Ervin, J., dissenting).

The State appealed to our Supreme Court, which reversed the majority in a *per curiam* opinion "[f]or the reasons stated in the dissenting opinion[.]" *Sandhill Amusements*, 368 N.C. at 91, 773 S.E.2d at 56. Accordingly, the determination that sovereign immunity did not bar the plaintiffs' claims — which was agreed to by both the majority and the dissent and was left undisturbed by the Supreme Court — continues to have precedential value and serves to foreclose Defendants' sovereign immunity argument in the present case.

Defendants argue, in the alternative, that even if sovereign immunity does not serve as an absolute bar to this type of lawsuit, they are nevertheless entitled to immunity based on Plaintiffs' failure to expressly plead a waiver. *See Can Am S., LLC v. State*, 234 N.C. App. 119, 125, 759 S.E.2d 304, 309 ("Sovereign immunity is not merely a defense to a cause of action; it is a bar to actions that requires a plaintiff to establish a waiver of immunity." (citation omitted)), *disc. review denied*, 367 N.C. 791, 766 S.E.2d 624 (2014).

Citing *Phillips v. Orange County Health Department*, 237 N.C. App. 249, 765 S.E.2d 811 (2014), Plaintiffs respond by contending that because sovereign immunity does not apply at all in this context, it is illogical to require them to have pled a waiver of such immunity. *See id.* at 256-57, 765 S.E.2d at 817 ("It is true that plaintiffs failed to allege that [the defendant] had waived . . . immunity in their complaint. . . . Although defendant enjoys . . . immunity, such immunity does not bar the claims brought by plaintiffs in the instant case. Therefore, this argument is overruled.").

However, we need not resolve this issue because even assuming — without deciding — that such a pleading requirement existed, Plaintiffs met that burden in paragraph 89 of their amended complaint by alleging that "Defendants are not entitled to sovereign immunity . . . ." While Defendants argue that the waiver language contained in this paragraph was legally insufficient because it failed to plead with specificity a recognized exception to sovereign immunity, we have previously held that "precise language alleging that the State has waived the defense of sovereign immunity is not necessary, but, rather, the complaint need only contain sufficient allegations to provide a reasonable forecast of waiver." *Can Am S.*, 234 N.C. App. at 125, 759 S.E.2d at 309 (citation, quotation marks, and brackets omitted); *see also Fabrikant v. Currituck Cty.*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005) ("[A]s long as the complaint contains sufficient allegations to provide a reasonable forecast of waiver, precise language alleging that the State has waived the defense of sovereign immunity is not necessary.").[4]

Accordingly, even if Plaintiffs were, in fact, required to specifically plead a waiver of Defendants' sovereign immunity in their complaint, they met that burden because the above-quoted language in paragraph 89 in conjunction with the substantive allegations in their amended complaint clearly served to "provide a reasonable forecast of waiver." *See Can Am S.*, 234 N.C. App. at 125, 759 S.E.2d at 309 (citation and quotation marks omitted). Thus, we hold that the trial court erred in dismissing this action based on sovereign immunity.

II. Justiciability

Plaintiffs also argue that the trial court erred in dismissing this action pursuant to Rule 12(b)(6) based on their failure to present a justiciable controversy.[5] Pursuant to the North Carolina Declaratory

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4. We note that at oral argument counsel for Defendants were unable to state precisely how such a waiver allegation should have been worded in Plaintiffs' pleadings in order to properly allege a waiver of sovereign immunity.

5. While the trial court appears to have viewed Rule 12(b)(6) as the appropriate provision of Rule 12 under which to dismiss a claim on nonjusticiability grounds, the failure to present a justiciable controversy is actually an issue of subject matter jurisdiction and, therefore, within the scope of Rule 12(b)(1). *See Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 584, 347 S.E.2d 25, 29 (1986) ("[I]n order for a court to have subject matter jurisdiction to render a declaratory judgment, an actual controversy must exist between the parties . . . ."); *Yeager v. Yeager*, 228 N.C. App. 562, 565, 746 S.E.2d 427, 430 (2013) ("[A] trial court does not have subject matter jurisdiction over a nonjusticiable claim.").

Judgment Act, "[a]ny 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 (2015). In construing this statute, the Supreme Court has explained that

> [a]lthough a declaratory judgment action must involve an actual controversy between the parties, plaintiffs are not required to allege or prove that a traditional cause of action exists against defendants in order to establish an actual controversy. A declaratory judgment should issue (1) when it will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding.

Goldston v. State, 361 N.C. 26, 33, 637 S.E.2d 876, 881 (2006) (internal citations, quotation marks, and brackets omitted). The Supreme Court has also stated that "[p]laintiffs are not required to sustain actual losses in order to make a test case; such a requirement would thwart the remedial purpose of the Declaratory Judgment Act." *Charlotte-Mecklenburg Hosp. Auth.*, 336 N.C. at 214, 443 S.E.2d at 725 (citation, quotation marks, and brackets omitted).

We have addressed on several prior occasions the issue of whether justiciable controversies existed under the Declaratory Judgment Act where plaintiffs alleged that law enforcement agencies were improperly seeking to prohibit them from offering promotional rewards programs. Most recently, in *Sandhill Amusements* — as discussed above — a disagreement existed between the plaintiffs and the sheriff, the district attorney, and ALE regarding the legality of the kiosks that Gift Surplus licensed and Sandhill distributed to retail stores. *Sandhill Amusements*, 236 N.C. App. at 356, 762 S.E.2d at 678. The controversy culminated in the sheriff and district attorney sending the owner of Sandhill a letter threatening enforcement action. *Id.*

The majority in this Court held that a justiciable controversy existed given that the plaintiffs' allegations centered on "whether the kiosks at issue were illegal and the uncertainty concerning the legality of these kiosks ultimately impacts Plaintiffs' ability to operate a business going forward." *Id.* at 357, 762 S.E.2d at 678. As further support for its conclusion that the plaintiffs' claims were justiciable, the majority noted that the "Plaintiffs alleged in their complaint that, since Sheriff Brown issued

the . . . letter [threatening criminal action], existing retail outlets that used Plaintiffs' products had removed the kiosks or chosen not to use the kiosks due to the uncertainty surrounding their legality." *Id.*[6]

In making this determination, the majority relied upon our decision in *American Treasures, Inc. v. State*, 173 N.C. App. 170, 617 S.E.2d 346 (2005). In that case, the plaintiff, Treasured Arts, Inc. ("Treasured Arts"), was in the business of selling pre-paid long-distance phone cards, which it distributed through convenience stores. Attached to each phone card was a free promotional "scratch-off" game piece that allowed purchasers to win cash awards. Although the State did not actually bring — or even threaten — enforcement action against Treasured Arts itself, Treasured Arts received reports that ALE agents were threating to revoke the alcoholic beverage licenses of convenience stores carrying its phone cards on the ground that the accompanying promotional scratch-off game constituted illegal gambling. *Id.* at 173-74, 617 S.E.2d at 348.

The plaintiff brought an action for declaratory and injunctive relief against the Governor, the Department of Crime Control and Public Safety, and ALE to determine the legality of the promotion. The trial court entered an order declaring that the promotion did not constitute illegal gambling and enjoining the defendants from interfering with the alcohol licenses or sale of Treasured Arts' phone cards by convenience stores. *Id.* at 174, 617 S.E.2d at 349.

On appeal, this Court rejected the defendants' argument that the plaintiffs had failed to show a justiciable controversy. We acknowledged that, as a general matter, "courts of equity are without jurisdiction to interfere by injunction to restrain a criminal prosecution for the violation of statutes . . . whether it has been merely threatened or has already been commenced." *Id.* at 175, 617 S.E.2d at 349 (citation, quotations marks, ellipses, and brackets omitted). However, citing our Supreme Court's decision in *McCormick v. Proctor*, 217 N.C. 23, 6 S.E.2d 870 (1940), we explained that "equity may nevertheless be invoked as an exception to those principles and may operate to 'interfere, even to prevent criminal prosecutions, when this is necessary to protect effectually property rights and to prevent irremediable injuries to the rights of persons.' " *American Treasures*, 173 N.C. App. at 175, 617 S.E.2d at 349 (quoting *McCormick*, 217 N.C. at 29, 6 S.E.2d at 874).

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6. The dissent in *Sandhill Amusements* — which, as noted above, was adopted by our Supreme Court — stated its agreement with the majority's holding regarding the justiciability of the plaintiffs' claims. *See id.* at 358, 762 S.E.2d at 679 (Ervin, J., dissenting).

We ultimately concluded that the complaint in *American Treasures* presented a justiciable controversy because "the declaratory judgment procedure is the only way plaintiff can protect its property rights and prevent ALE from foreclosing the sale of its product in convenience stores." *Id.* at 176, 617 S.E.2d at 350. Moreover, we noted that although "[t]here is no indication in the record that a prosecution is pending against plaintiff," the existence of an actual prosecution was not necessary in order to present a justiciable controversy "in light of the State's ability to curtail the sale of plaintiff's product by threatening retail stores with the loss of their alcohol licenses upon failure to cease such sales." *Id.*[7]

In the present case, Plaintiffs have presented a justiciable controversy for reasons similar to those set forth in *Sandhill Amusements* and *American Treasures*. Plaintiffs are the licensor and distributor of the CO Rewards Program, which law enforcement officers have determined to be in violation of North Carolina's criminal laws. Moreover, officers have threatened criminal enforcement action against establishments offering this promotion, and such threats impede Plaintiffs' ability to license and distribute the program. Therefore, the uncertainty as to whether the CO Rewards Program violates North Carolina's gambling and sweepstakes statutes "impacts Plaintiffs' ability to operate a business going forward." *Sandhill Amusements*, 236 N.C. App. at 357, 762 S.E.2d at 678. Accordingly, we conclude that because Plaintiffs have presented a justiciable controversy, the trial court erred in granting Defendants' motions to dismiss on the ground of nonjusticiability.[8]

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7. There are a number of other reported decisions in which our appellate courts have reached the merits of declaratory judgment claims involving the proper construction of North Carolina's gambling statutes without first explicitly addressing the issue of justiciability. *See, e.g.*, *Joker Club, L.L.C. v. Hardin*, 183 N.C. App. 92, 93, 643 S.E.2d 626, 628 (2007) (declaratory judgment as to legality of poker club plaintiff planned to open); *Collins Coin Music Co. of N.C. v. N.C. Alcoholic Beverage Control Comm'n*, 117 N.C. App. 405, 405, 451 S.E.2d 306, 307 (1994) (declaratory judgment regarding whether video games offered by plaintiff were illegal slot machines), *disc. review denied*, 340 N.C. 110, 456 S.E.2d 312 (1995); *Animal Prot. Soc'y of Durham, Inc. v. State*, 95 N.C. App. 258, 262, 382 S.E.2d 801, 803 (1989) (declaratory and injunctive relief sought as to whether charitable sales promotion violated bingo statute). Defendants here have failed to offer any valid explanation as to why the controversies existing in those cases were justiciable while the present action is not.

8. We express no opinion on the ultimate issue in this litigation as to whether the CO Rewards Program is legal under North Carolina law.

Conclusion

For the reasons stated above, we reverse the trial court's 19 November 2015 order and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges CALABRIA and TYSON concur.

TROPIC LEISURE CORP., MAGEN POINT, INC. D/B/A MAGENS POINT RESORT, PLAINTIFFS
v.
JERRY A. HAILEY, DEFENDANT

No. COA15-1254-2

Filed 7 February 2017

This opinion supersedes and replaces the opinion filed 16 August 2016.

Constitutional Law—small claims court—Virgin Islands—no counsel allowed—due process—full faith and credit

A judgment from the small claims division of the Virgin Islands Superior Court was not entitled to full faith and credit in North Carolina because it was obtained in a manner that denied defendant due process. Defendant was not allowed to be represented by counsel in small claims court, which was the only stage at which facts were determined; could not opt out of small claims court; and appeal from small claims court involved only legal issues.

Appeal by defendant from order entered 10 September 2015 by Judge Debra Sasser in Wake County District Court. Heard in the Court of Appeals 25 May 2016. Opinion filed 16 August 2016. Petition for rehearing granted 30 September 2016. The following opinion supersedes and replaces the opinion filed 16 August 2016.

Warren, Shackleford & Thomas, P.L.L.C., by R. Keith Shackleford, for plaintiffs-appellees.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, Jr. and Daniel K. Keeney, for defendant-appellant.

DAVIS, Judge.

This case presents the question of whether a North Carolina court must give full faith and credit to a judgment rendered in a foreign jurisdiction under procedural rules prohibiting the defendant from being represented by counsel at trial. Jerry A. Hailey ("Defendant") appeals from an order denying his motion for relief from a foreign judgment that Tropic Leisure Corp. and Magens[1] Point, Inc., d/b/a Magens Point Resort (collectively "Plaintiffs") sought to enforce against him in North Carolina. On appeal, Defendant argues that the foreign judgment should not be enforced because it was rendered in violation of his due process rights. After careful review, we vacate the trial court's order.

Factual and Procedural Background

On 2 April 2014, Plaintiffs, who are corporations organized under the laws of the United States Virgin Islands, obtained a default judgment (the "Judgment") in the small claims division of the Virgin Islands Superior Court against Defendant, who is a resident of North Carolina, in the amount of $5,764.00 plus interest and costs. Defendant did not appeal the default judgment. On 17 February 2015, Plaintiffs filed a Notice of Filing Foreign Judgment in Wake County District Court along with a copy of the Judgment and a supporting affidavit.

Defendant filed a motion for relief from foreign judgment on 6 April 2015 in which he argued that the Judgment was not entitled to full faith and credit in North Carolina because it was obtained in violation of his constitutional rights and was against North Carolina public policy. Plaintiffs subsequently filed a motion to enforce the foreign judgment.

The parties' motions were heard before the Honorable Debra Sasser on 30 July 2015. On 10 September 2015, the trial court entered an order denying Defendant's motion for relief and concluding that Plaintiffs were entitled to enforcement of the Judgment under the Full Faith and Credit Clause of the United States Constitution, U.S. Const. art. IV, § 1, and North Carolina's Uniform Enforcement of Foreign Judgments Act ("UEFJA"), N.C. Gen. Stat. §§ 1C-1701 *et seq.* Defendant filed a timely notice of appeal.

1. While this entity's name appears as "Magen Point, Inc." in the trial court's order, it is referred to elsewhere in the record as "Magens Point, Inc."

Analysis

On appeal, Defendant argues that the trial court erred in extending full faith and credit to the Judgment. This issue involves a question of law, which we review *de novo*. *See DOCRX, Inc. v. EMI Servs. of N.C., LLC*, 367 N.C. 371, 375, 758 S.E.2d 390, 393, *cert. denied*, __ U.S. __, 135 S. Ct. 678, 190 L. Ed. 2d 390 (2014) (applying *de novo* review to whether Full Faith and Credit Clause required North Carolina to enforce foreign judgment).

I. UEFJA

The Full Faith and Credit Clause "requires that the judgment of the court of one state must be given the same effect in a sister state that it has in the state where it was rendered."[2] *State of New York v. Paugh*, 135 N.C. App. 434, 439, 521 S.E.2d 475, 478 (1999) (citation omitted). "[B]ecause a foreign state's judgment is entitled to only the same validity and effect in a sister state as it had in the rendering state, the foreign judgment must satisfy the requisites of a valid judgment under the laws of the rendering state before it will be afforded full faith and credit." *Bell Atl. Tricon Leasing Corp. v. Johnnie's Garbage Serv., Inc.*, 113 N.C. App. 476, 478-79, 439 S.E.2d 221, 223, *disc. review denied*, 336 N.C. 314, 445 S.E.2d 392 (1994).

The UEFJA "governs the enforcement of foreign judgments that are entitled to full faith and credit in North Carolina." *Lumbermans Fin., LLC v. Poccia*, 228 N.C. App. 67, 70, 743 S.E.2d 677, 679 (2013) (citation and quotation marks omitted). In order to domesticate a foreign judgment under the UEFJA, a party must file a properly authenticated foreign judgment with the office of the clerk of superior court in any North Carolina county along with an affidavit attesting to the fact that the foreign judgment is both final and unsatisfied in whole or in part and setting forth the amount remaining to be paid on the judgment. *See* N.C. Gen. Stat. § 1C-1703(a) (2015).

The introduction into evidence of these materials "establishes a presumption that the judgment is entitled to full faith and credit." *Meyer v. Race City Classics, LLC*, 235 N.C. App. 111, 114, 761 S.E.2d 196, 200,

2. The Full Faith and Credit Clause applies to the Virgin Islands because it is a territory of the United States. *See* 48 U.S.C. § 1541 (designating the Virgin Islands as a territory); 28 U.S.C. § 1738 (applying Full Faith and Credit Clause to judgments filed "in every court within the United States and its Territories and Possessions"); *see also Bergen v. Bergen*, 439 F.2d 1008, 1013 (3d Cir. 1971) (holding that the Full Faith and Credit Clause "is applicable to judgments of the Territory of the Virgin Islands").

disc. review denied, 367 N.C. 796, 766 S.E.2d 624 (2014). The party seeking to defeat enforcement of the foreign judgment must "present evidence to rebut the presumption that the judgment is enforceable . . . ." *Rossi v. Spoloric*, __ N.C. App. __, __, 781 S.E.2d 648, 654 (2016). A properly filed foreign judgment "has the same effect and is subject to the same defenses as a judgment of this State and shall be enforced or satisfied in like manner[.]" N.C. Gen. Stat. § 1C-1703(c). Thus, a judgment debtor may file a motion for relief from the foreign judgment on any "ground for which relief from a judgment of this State would be allowed." N.C. Gen. Stat. § 1C-1705(a) (2015).

Our Supreme Court has held that "the defenses preserved under North Carolina's UEFJA are limited by the Full Faith and Credit Clause to those defenses which are directed to the validity and enforcement of a foreign judgment." *DOCRX*, 367 N.C. at 382, 758 S.E.2d at 397. In *DOCRX*, the Supreme Court provided the following examples of potential defenses to enforcement of a foreign judgment:

> that the judgment creditor committed extrinsic fraud, that the rendering state lacked personal or subject matter jurisdiction, that the judgment has been paid, that the parties have entered into an accord and satisfaction, that the judgment debtor's property is exempt from execution, that the judgment is subject to continued modification, or *that the judgment debtor's due process rights have been violated.*

Id. (emphasis added).

II. Virgin Islands Court System

In the present case, Defendant argues that he was denied due process during the Virgin Islands proceeding because the rules governing small claims cases in that jurisdiction do not (1) permit parties to be represented by counsel; or (2) allow for trial by jury. An understanding of the structure of the Virgin Islands court system is necessary in order to evaluate Defendant's arguments.

Congress has created the District Court of the Virgin Islands, which possesses jurisdiction equivalent to that of a United States district court. *See* 48 U.S.C. § 1611; *Edwards v. HOVENSA, LLC*, 497 F.3d 355, 358 (3rd Cir. 2007). In addition, the legislature of the Virgin Islands has established (1) the Supreme Court of the Virgin Islands, a court of last resort; and (2) the Superior Court of the Virgin Islands, a trial court of local jurisdiction. V.I. Code Ann. tit. 4, § 2.

The Virgin Islands Superior Court contains a small claims division "in which the procedure shall be as informal and summary as is consistent with justice." V.I. Code Ann. tit. 4, § 111. The small claims division has jurisdiction over all civil actions where the amount in controversy does not exceed $10,000. V.I. Code Ann. tit. 4, § 112(a). In proceedings before the small claims court, "[n]either party may be represented by counsel and parties shall in all cases appear in person except for corporate parties, associations and partnerships which may appear by a personal representative." V.I. Code Ann. tit. 4, § 112(d). In addition, small claims cases are heard before a magistrate without a jury. *See* V.I. Super. Ct. R. 64.

In the event that a party is unsatisfied with a judgment in the small claims division, it can appeal to the Appellate Division of the Superior Court. *See H & H Avionics, Inc. v. V.I. Port Auth.*, 52 V.I. 458, 462-63 (2009); V.I. Super. Ct. R. 322.1(a). However, "[n]o additional evidence shall be taken or considered" in the Appellate Division. V.I. Super. Ct. R. 322.3(a). If a party does not agree with the decision of the Appellate Division, it may then appeal to the Supreme Court of the Virgin Islands. *See* V.I. Code Ann. tit. 4, § 32; V.I. Super. Ct. R. 322.7(b); *H & H Avionics*, 52 V.I. at 462-63. Parties are permitted to be represented by counsel on appeal to the Virgin Islands Supreme Court. *See* V.I. Sup. Ct. R. 4(d).

III. Due Process Right to Employ Counsel at Trial

In the present case, Defendant does not dispute the fact that Plaintiffs complied with the UEFJA by filing a properly authenticated copy of the Judgment and an accompanying affidavit in a North Carolina court. Accordingly, Plaintiffs are entitled to a "presumption that the judgment is entitled to full faith and credit." *Meyer*, 235 N.C. App. at 114, 761 S.E.2d at 200. However, Defendant argues that the Judgment is not entitled to full faith and credit because he was deprived of his right to due process by the rules of the rendering jurisdiction's small claims court, which does not allow Defendant to be represented by counsel or provide the right to a trial by jury.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no state may "deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, §1. Congress has applied this rule of law to the Virgin Islands through enactment of the Revised Organic Act of the Virgin Islands. *See* 48 U.S.C. § 1561 ("No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law . . . ."); *see also United States v. Christian*, 660 F.2d 892, 899 (3d Cir. 1981)

(noting that 48 U.S.C. § 1561 "expresses the congressional intention to make the federal constitution applicable to the Virgin Islands to the fullest extent possible consistent with its status as a territory." (citation and quotation marks omitted)). Therefore, we apply "the same due process analysis that would be utilized under the federal constitution." *Hendrickson v. Reg O Co.*, 657 F.2d 9, 13 n.2 (3d Cir. 1981).

The question of whether a rendering jurisdiction's prohibition on a party being represented by counsel is a due process violation that can serve as a defense to the enforcement of a foreign judgment presents an issue of first impression in North Carolina. After carefully considering the arguments of the parties in this case and thoroughly reviewing the pertinent caselaw from other jurisdictions, we hold that the Judgment was issued in violation of Defendant's due process rights because he was not provided a meaningful opportunity to be heard.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 32 (1976) (citation and quotation marks omitted). The United States Supreme Court has explained that "[i]f in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Powell v. Alabama*, 287 U.S. 45, 69, 77 L. Ed. 158, 170-71 (1932).

Litigants in most types of civil proceedings are not entitled to court-appointed counsel. However, it has been widely recognized that civil litigants have a due process right to be heard though counsel that they themselves provide. For example, in *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287 (1970), the United States Supreme Court explained that

> [t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. We do not say that counsel must be provided at the pre-termination [of public assistance payments] hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient.

Id. at 270-71, 25 L. Ed. 2d at 300 (internal citation and quotation marks omitted).

A number of state and federal courts have expressly recognized this principle over the past few decades. *See*, *e.g.*, *Danny B. ex rel. Elliott v. Raimondo*, 784 F.3d 825, 831 (1st Cir. 2015) ("Civil litigants have a constitutional right, rooted in the Due Process Clause, to retain the services of counsel."); *Anderson v. Sheppard*, 856 F.2d 741, 747 (6th Cir. 1988) ("While case law in the area is scarce, the right of a civil litigant to be represented by retained counsel, if desired, is now clearly recognized."); *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1118 (5th Cir.) ("[A] civil litigant has a constitutional right to retain hired counsel . . . . [T]he litigant usually lacks the skill and knowledge to adequately prepare his case, and he requires the guiding hand of counsel at every step in the proceedings against him."), *cert. denied*, 449 U.S. 820, 66 L. Ed. 2d 22 (1980); *R.G. v. Hall*, 37 Mass. App. Ct. 410, 412, 640 N.E.2d 492, 493 (1994) ("On due process grounds . . . parties have a constitutional right to retain counsel in a civil case."); *Aspen Props. Co. v. Preble*, 780 P.2d 57, 58 (Colo. App. 1989) ("A civil litigant's right to due process of law includes the right to cross-examine witnesses and to have an opportunity for rebuttal. In order to exercise these rights fully, due process requires that civil litigants be allowed to secure assistance of counsel." (internal citation and quotation marks omitted)).

Courts in several jurisdictions have specifically considered the constitutionality of procedures under which parties are not permitted to be represented by counsel at trial in small claims court. These cases make clear that while due process is satisfied when a party may appeal from a small claims court judgment and receive a trial *de novo* with the opportunity to be represented by counsel, a due process violation occurs where the laws of a jurisdiction prohibit a civil litigant from ever being represented by counsel at the fact-finding stages of the proceedings.

In *Frizzell v. Swafford*, 104 Idaho 823, 663 P.2d 1125 (1983), the Idaho Supreme Court considered whether the procedure governing Idaho's small claims court was consistent with due process. Under this procedure, litigants were not permitted to be represented by counsel in small claims court, but if a party was dissatisfied with a small claims court judgment, it had the right on appeal to a trial *de novo* in which it could employ counsel. *Id.* at 827, 663 P.2d at 1129. One of the issues presented in *Frizzell* was whether it constituted a deprivation of property without due process of law to permit the prevailing party in a small claims court proceeding to execute on its judgment before the other party had the opportunity to appeal and receive a trial *de novo* with counsel. *Id.*

In analyzing this issue, the Idaho Supreme Court explained that "the constitutional infirmity created by the statutory prohibition of attorneys

in small claims court was overcome by the fact that an opportunity for a trial *de novo* is always available to the litigants. Counsel can appear in the *de novo* proceeding, and this satisfies the due process requirement." *Id.* (citation and quotation marks omitted). The court further held that "a small claims court trial is constitutionally incomplete; it cannot stand on its own. *Without the guaranty of a trial de novo, a proceeding in which the litigants are denied counsel is unconstitutional.*" *Id.* (emphasis added).

Similarly, in *Simon v. Lieberman*, 193 Neb. 321, 226 N.W.2d 781 (1975), judgment was entered for the plaintiff in small claims court where, by statute, the parties were not permitted to appear with counsel. The defendant then appealed to the district court for a trial *de novo* as permitted by state law. However, the district court refused to allow the parties to be represented by counsel because the case had originated in the small claims court. The defendant proceeded *pro se*, and after losing his trial in district court he appealed on due process grounds. *Id.* at 322, 226 N.W.2d at 782. On appeal, the Nebraska Supreme Court held that he had been denied due process because "[i]n an appeal to the District Court from a judgment of the small claims court . . . a party has the right to provide his own counsel and appear by such counsel in the District Court." *Id.* at 326, 226 N.W.2d at 784.

Other jurisdictions have reached similar conclusions. *See, e.g.*, *North Central Servs., Inc. v. Hafdahl*, 191 Mont. 440, 443, 625 P.2d 56, 58 (1981) (small claims court procedure not permitting representation by counsel or providing for trial *de novo* on appeal was "unconstitutional because it effectively denies counsel at all levels of factual determination"); *Windholz v. Willis*, 1 Kan. App. 2d 683, 683, 685, 573 P.2d 1100, 1101-02 (1977) (holding that defendant's right to due process was violated where he was not permitted "to appear by or with counsel at any stage during which evidence was introduced . . . ." but noting that "[t]he exclusion of counsel from the small claims proceeding is not fatal where a trial de novo with counsel is available"); *Brooks v. Small Claims Court*, 8 Cal. 3d 661, 665-66, 504 P.2d 1249, 1252 (1973) (reasoning that due process requirements were satisfied because if defendant "is dissatisfied with the judgment of the small claims court he has a right of appeal to the superior court where he is entitled to a trial de novo" in which he may appear through counsel).

An alternative method for satisfying due process in this context was recognized in *Johnson v. Capital Ford Garage*, 250 Mont. 430, 820 P.2d 1275 (1991). In that case, Montana's procedures neither allowed the defendant to be represented by counsel in his small claims court

trial nor permitted a trial *de novo* from the small claims court judgment. However, pursuant to statute, he was given the opportunity before trial to remove his case from the small claims court docket to a trial court in which he could be represented by counsel. *Id.* at 434, 820 P.2d at 1277.

The defendant argued that this statutory scheme violated his due process rights because it did not provide for a trial *de novo* — in which he could be represented by counsel — on appeal from the small claims court. *Id.* The Montana Supreme Court disagreed, holding that the statutory procedure was consistent with due process

> because it does not absolutely prohibit counsel at all stages in the litigation. Instead, it places the responsibility for preservation of that right on the defendant who must choose between the peace of mind that comes from representation by counsel, and the quick, affordable justice available in small claims court. . . .

Id.

These cases demonstrate the constitutional invalidity of the statutory framework in the Virgin Islands for handling small claims cases. Litigants in such cases are prohibited from securing the representation of counsel in the small claims court and are not given the opportunity to either (1) opt out of the small claims court entirely by removing the case to a trial court that permits representation by counsel; or (2) appeal from a small claims court judgment for a trial *de novo* in a court that allows representation by counsel. Instead, the only appeal allowed from the small claims court is to the Appellate Division of the Superior Court where "[n]o additional evidence shall be taken or considered." *See* V.I. Super. Ct. R. 322.3(a).[3]

Thus, there is no opportunity whatsoever for a small claims court litigant to be represented by counsel during any portion of the critical fact-finding phase of the litigation. The utility to such a litigant of having his attorney make purely legal arguments during the appellate phase of the proceeding is simply no substitute for the opportunity to have his chosen counsel develop a factual record at trial. Thus, we conclude that

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3. We note that it is unclear whether parties may even appear through counsel in the Appellate Division of the Superior Court. *See Wild Orchid Floral & Event Design v. Banco Popular de P.R.*, 62 V.I. 240, 249 (V.I. Super. Ct. 2015) ("[I]t is not at all clear, despite [the plaintiff's] contention, that counsel[ ] should be allowed to appear on appeal to the Appellate Division from a case filed in the Small Claims Division and tried in the Magistrate Division[.]").

Defendant was denied "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333, 47 L. Ed. 2d at 32 (citation and quotation marks omitted).

Accordingly, because the Judgment was obtained in a manner that denied Defendant his right to due process, it is not entitled to full faith and credit in North Carolina.[4] The trial court therefore erred in its 10 September 2015 order allowing enforcement of the Judgment.

Conclusion

For the reasons stated above, we vacate the trial court's 10 September 2015 order and remand to the trial court for any additional steps that may be necessary in order to effectuate our ruling.

VACATED AND REMANDED.

Judges ELMORE and DIETZ concur.

4. Because we hold that the Virgin Islands rule barring Defendant from being represented by counsel in small claims court violated his right to due process — thus rendering the Judgment unenforceable in North Carolina — we need not address Defendant's companion argument that the lack of a right to a trial by jury was likewise a due process violation.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 FEBRUARY 2017)

ABDIN v. CCC-BOONE, LLC No. 16-17	Watauga (14CVS397)	Affirmed
BIZZARRO v. CTY. OF ASHE No. 16-211	Ashe (15CVS320)	Affirmed
BRUNS v. BRYANT No. 16-699	Cumberland (15CVS8375)	Dismissed in Part; Affirmed in Part.
CRAMER v. PERRY No. 16-375	Wake (07CVD11079)	Dismissed
DAWKINS v. WILMINGTON TR. CO. No. 16-240	Mecklenburg (15CVS16227)	Dismissed
EDWARDS v. COLE No. 16-395	Alexander (15CVD329)	Vacated
G.S.C. HOLDINGS, LLC v. McCRORY No. 16-160	Randolph (15CVS1732)	Reversed and Remanded
IN RE C.A.W. No. 16-668	Guilford (14JT302)	Affirmed
IN RE D.A.W. No. 16-719	Pender (15JT22)	Vacated and Remanded
IN RE E.C. No. 16-736	Surry (14JA22-23)	Affirmed
IN RE FORECLOSURE OF IANNUCCI No. 16-738	Buncombe (15SP261)	Affirmed
IN RE H.S. No. 16-749	Bladen (13JA37)	Affirmed
IN RE J.H. No. 16-732	Robeson (13JT46) (13JT47) (13JT64)	Affirmed
IN RE P.M. No. 16-775	Mecklenburg (15JA503)	Affirmed
IN RE R.D. No. 16-660	Henderson (16JA1) (16JA2)	Affirmed

IN RE S.C.H. No. 16-790	Robeson (13JA130) (16JA2)	Affirmed
IN RE T.Y. No. 16-623	Lee (13JT104-107)	Affirmed
IN RE WADSWORTH No. 16-370	Watauga (13E70)	AFFIRMED IN PART; DISMISSED IN PART AS MOOT.
IN RE Y.L.M.C. No. 16-662	Wake (13JT660-662)	Affirmed
IN RE Z.A.W. No. 16-833	Alamance (15JT150-151)	Affirmed
PARKER v. COLSON No. 16-780	Anson (15CVS102)	Dismissed
STATE v. ADAMS No. 16-397	New Hanover (12CRS58024) (12CRS9328)	No Error
STATE v. ARNOLD No. 16-667	Ashe (14CRS50561-62) (14CRS50882) (15CRS100)	Affirmed
STATE v. BROCKINGTON No. 16-516	Mecklenburg (14CRS233415-17) (14CRS233420) (14CRS233422) (14CRS248893)	No Error
STATE v. CESNIK No. 16-590	Wake (14CRS224935)	Affirmed
STATE v. CROWDER No. 16-269	Mecklenburg (14CRS204013) (14CRS20700)	NO ERROR IN PART; REMANDED FOR RESENTENCING
STATE v. HARGETT No. 16-452	Craven (12CRS52460-61) (14CRS837-839)	No Error
STATE v. ROGERS No. 16-15	Wake (12CRS11750) (12CRS213646)	No Error

STATE v. SYMMES No. 16-579	Rockingham (14CRS54122) (15CRS131)	No Error
STATE v. THOMPSON No. 16-459	Columbus (14CRS51130)	No Error
STATE v. WEAVER No. 16-378	Currituck (12CRS845) (12CRS846)	Affirmed
TERRY v. STATE OF N.C. No. 16-153	Wake (14CVS12342)	Affirmed
WESTON MEDSURG CTR., PLLC v. BLACKWOOD No. 16-621	Mecklenburg (13CVS17539) (14CVS8092)	Affirmed in part; remanded in part

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

Briefs—argument incorporated by reference—abandoned—The Court of Appeals rejected an attempt by defendant to incorporate an argument by reference due to the page limitations of the Court of Appeals, which defendant conceded it sought to avoid by referencing outside arguments rather than presenting them in the brief. The argument was treated as abandoned. **Wiley v. L3 Commc'ns Vertex Aerospace, LLC, 354.**

Equitable distribution—motion for contempt—motion to dismiss—not the proper mechanism for relief—The trial court lacked the authority to void an equitable distribution order where the order was entered by a trial court judge, the parties reconciled and subsequently separated again, plaintiff demanded compliance with the terms of the order and defendant refused, plaintiff filed a motion for contempt, and the trial court dismissed that motion. A motion to dismiss a contempt motion is not the proper mechanism to seek relief from a final order or judgment. **Hogue v. Hogue, 425.**

Improper notice of appeal—certiorari—Rule 2—Defendant's petition for certiorari was allowed and, to the extent defendant challenged a guilty plea not normally appealable, Rule 2 of the Rules of Appellate Procedure was invoked where defendant did not give a proper notice of appeal from his motion to suppress and sought to challenge the procedures in his plea hearing. **State v. Kirkman, 274.**

Improper notice of appeal—resentencing—Defendant's argument that the trial court was divested of jurisdiction when he appealed from the first, erroneous judgment against him was not considered where defendant had conceded that his notice of appeal was defective. Certiorari was granted. **State v. Kirkman, 274.**

Interlocutory order—inverse condemnation—substantial right—An order in an inverse condemnation case was interlocutory but was properly before the Court of Appeals because it affected a substantial right. **Wilkie v. City of Boiling Spring Lakes, 514.**

Interlocutory orders and appeals—denial of pretrial motion in limine—no substantial right—Defendants' appeal of the trial court's denial of certain portions of their pretrial motion in limine was from an interlocutory order. Defendants failed to establish that their appeal affected a substantial right that would be lost or inadequately addressed absent immediate review. **Smith v. Polsky, 589.**

Interlocutory orders and appeals—exclusivity provisions of Workers' Compensation Act—substantial right—The denial of a motion concerning the exclusivity provision of the Workers' Compensation Act affects a substantial right and thus is immediately appealable. **Fagundes v. Ammons Dev. Grp., Inc., 735.**

Interlocutory orders and appeals—final child custody and visitation order—Plaintiff's appeal from an interlocutory child custody order was immediately appealable under N.C.G.S. § 50-19.1. The child custody order was permanent since all issues relating to child custody and visitation had been resolved. **Kanellos v. Kanellos, 149.**

Interlocutory orders and appeals—substantial right—common factual nexus—potential for inconsistent verdicts—Plaintiff's appeal from an interlocutory order affected a substantial right and was immediately appealable. The present appeal presented overlapping factual issues concerning plaintiff's business relationship with defendants. There was a potential for inconsistent verdicts based upon a common factual nexus. **Head v. Gould Killian CPA Grp., P.A., 81.**

APPEAL AND ERROR—Continued

CRIMINAL LAW—Continued

Prosecutor's argument—scenario of the crime—The trial court did not abuse its discretion in a prosecution for possession of a firearm by a felon by allowing the prosecutor to make statements in his closing argument that allegedly asserted facts not in evidence. Prosecutors may create a scenario of the crime as long as the record contains sufficient evidence from which the scenario is reasonably inferable. **State v. Martinez, 284.**

Prosecutor's closing argument—demonstration—no gross impropriety—Defendant did not show gross impropriety and the trial court did not commit reversible error by not intervening ex mero motu in a prosecution for possession of a firearm by a felon where the prosecutor pointed a rifle at himself during a demonstration. Defendant failed to show gross impropriety. **State v. Martinez, 284.**

Wearing or possessing bulletproof vest—alternative instruction—The trial court did not err by instructing the jury that, if it found defendant guilty of any the crimes charged (attempted first-degree murder and assault with a deadly weapon), it was required to determine whether defendant wore or had in his immediate possession a bulletproof vest. Although defendant contended that the instruction was improper because it presented two alternative theories, only one of which was supported by the evidence, the evidence submitted was sufficient to allow jurors to find either of the alternative theories. **State v. Robinson, 326.**

DAMAGES AND REMEDIES

Arbitration agreement not presented at trial—no effect on calculation—Any error from defendant being prevented from presenting the parties' arbitration agreement in a trial for damages was harmless where defendant did not show that the exclusion would have affected the calculation of compensatory damages by the jury. **Wiley v. L3 Commc'ns Vertex Aerospace, LLC, 354.**

Default judgment—set aside as to damages—The trial court did not abuse its discretion in a case involving discrimination and wage claims by setting aside the damages portion of the trial court's initial default judgment. The size of the judgment, including punitive damages that had not been requested, was a relevant factor toward the existence of extraordinary circumstances, and defendant's conduct in the case and its innocent explanation for missing the deadline provided a reasonable basis for the trial court to set aside the damages portion of the judgment. **Wiley v. L3 Commc'ns Vertex Aerospace, LLC, 354.**

Failed auto repairs—remittitur—The trial court properly denied defendant a new trial where defendant argued that the jury ignored the instructions on damages, but the trial court properly calculated the remittitur of damages to put plaintiff in the same position he would have been in had he not been the victim of fraud. **Ridley v. Wendel, 452.**

N.C.G.S. § 45–36.9—debtor relief—statutory damages—attorney fees—court costs—The trial court did not err by dismissing plaintiffs' claim for violation of N.C.G.S. § 45–36.9 that permits a debtor to seek statutory damages, attorney fees, and court costs if a creditor fails to record a satisfaction when required to do so. The complaint, on its face, failed to allege any point at which the line of credit had a zero balance and plaintiffs requested that the bank record a satisfaction. **Perry v. Bank of Am., N.A., 776.**

EVIDENCE—Continued

Detectives' opinion—defendant as drug dealer—There was no plain error in a prosecution for maintaining a vehicle for keeping or selling a controlled substance and related offenses where defendant contended that detectives offered improper opinions to the effect that defendant was a drug dealer. The detectives expressed their own experience and observations in ordinary testimony. **State v. Rogers, 869.**

Expert testimony—auto repair—damage not noticed—The trial court did not err in a case arising from a failed auto repair following a collision by allowing plaintiff's expert to testify that defendant did not "just accidentally miss all this damage." The witness was tendered as an expert in automotive repair without objection and was so admitted, the testimony followed his expert opinion, which was not objected to, about the obviousness of the damage to the vehicle, and the testimony was provided in response to a general question and assisted the jury in understanding the evidence. **Ridley v. Wendel, 452.**

Expert testimony—auto repair—motivation not to repair—The trial court did not err in a case arising from a failed auto repair following a collision by allowing an expert witness to testify that the there was "motivation for not fixing the damaged areas." The testimony did not address defendant's motivations but instead gave a general overview based upon the witness's area of expertise of why a body shop may not repair certain damage to a vehicle. **Ridley v. Wendel, 452.**

Expert witness—qualifications—weight of testimony—cabinets—The trial court did not abuse its discretion in qualifying Haddock as an expert witness on cabinetry. Any lingering questions or controversy concerning the quality of the expert's conclusions went to the weight of the testimony rather than its admissibility. **Bradley Woodcraft, Inc. v. Bodden, 27.**

Hearsay—police informant—background of investigation—There was no plain error in a prosecution for maintaining a vehicle for keeping or selling a controlled substance and related offenses where defendant alleged that the trial court admitted hearsay evidence by allowing a detective to testify about information collected from non-testifying witnesses. It was clear that the testimony at issue was not introduced to prove defendant's guilt but to establish the background and reasons for the detective's investigation. **State v. Rogers, 869.**

Hearsay—same evidence admitted without objection—The Court of Appeals declined to consider defendant's argument that the trial court erroneously admitted hearsay from a police detective in defendant's trial for theft-related charges, because the same evidence was admitted on several other occasions without objection, including by another detective. **State v. Greene, 627.**

Hearsay—what a jailer told the witness—not offered to prove the truth of the matter—no prejudice—There was no error in a prosecution for armed robbery and other offenses where a witness testified that a jailer had told her that defendant was in the jail cell next to hers. The challenged testimony was not offered to prove the truth of the matter asserted but to explain why the witness was afraid to testify. Even if the testimony amounted to hearsay, there was no plain error in light of substantial evidence of defendant's guilt. **State v. McLean, 850.**

Officer vouching for witness—not prejudicial—There was error, but not plain error, in a prosecution for armed robbery and other offenses where an officer testified that the victim "seemed truthful." The officer vouched for the veracity of the witness, but there was no prejudice in light of other corroborating evidence. **State v. McLean, 850.**

WORKERS' COMPENSATION

WORKERS' COMPENSATION—Continued