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[9]Retired 24 April 2017. [10]Appointed 1 August 2016. Term ended 31 December 2016.
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CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

MARY N. GURGANUS, PLAINTIFF
v.
CHARLES M. GURGANUS, DEFENDANT

No. COA16-163

Filed 21 February 2017

1. Divorce—equitable distribution—subject matter jurisdiction —date of separation

The trial court had jurisdiction to enter an equitable distribution order. Regardless of whether the parties were separated at the time plaintiff wife filed the complaint, the record was clear that the parties were separated by the time defendant husband asserted his claim for equitable distribution.

2. Divorce—equitable distribution—marital property—military retirement benefits—alimony

The trial court did not err by entering summary judgment in favor of plaintiff wife on claims to alter the split of defendant husband's military retirement benefits and to terminate alimony.

Appeal by defendant from orders entered 3 September 2015 by Judge William M. Cameron III in Onslow County District Court. Heard in the Court of Appeals 25 August 2016.

Sullivan & Tanner, P.A., by Mark E. Sullivan and Ashley L. Oldham, for plaintiff-appellee.

The Lea/Schultz Law Firm, P.C., by James W. Lea III and Paige E. Inman, for defendant-appellant.

McCULLOUGH, Judge.

Charles M. Gurganus ("defendant") appeals from summary judgment orders entered in favor of Mary N. Gurganus ("plaintiff") concerning the termination of alimony, plaintiff's share of defendant's military retirement benefits, and maintenance of a Survivor Benefit Plan ("SBP") to the benefit of plaintiff. For the following reasons, we affirm.

I. Background

Plaintiff and defendant were married on 1 April 1978. On 15 March 2001, plaintiff filed a complaint in Onslow County District Court seeking a divorce from bed and board on grounds of adultery, constructive abandonment, alcohol abuse, and other indignities to render plaintiff's condition intolerable and life burdensome. Along with the divorce from bed and board, plaintiff sought alimony, custody of their minor child, child support, possession of the marital residence, attorneys fees, post separation support, and equitable distribution.

On 2 May 2001, the trial court entered a temporary order requiring "defendant . . . to pay to plaintiff as postseparation and as support for the minor daughter, the sum of $3,500.00 per month . . . ." The temporary order was entered *nunc pro tunc* to the hearing date, 27 April 2001.

Defendant filed an answer and counterclaim on 29 May 2001, in which defendant denied the allegations asserted as the bases of plaintiff's claim for divorce from bed and board. Defendant also asserted his own claims for a divorce from bed and board and equitable distribution, while seeking to avoid paying alimony and attorneys fees. Plaintiff submitted a reply on 22 June 2001.

The matter came on for hearing during the 10 September 2001 term of Onslow County District Court. Judgment was entered on 5 April 2002, *nunc pro tunc* 10 September 2001. That judgment granted plaintiff a divorce from bed and board from defendant, ordered defendant to pay alimony to plaintiff, and equitably distributed the marital property with an unequal distribution to the benefit of plaintiff. As part of the equitable distribution, plaintiff was to receive a percentage of defendant's military retirement benefits, including amounts to be paid under defendant's SBP. An additional order concerning defendant's SBP coverage was entered with the consent of the parties on 8 April 2003.

Following a 31 July 2003 hearing on the court's own Rule 60(a) motion, an order was entered on 8 August 2003, *nunc pro tunc* 31 July 2003, to correct a clerical mistake in the 5 April 2002 judgment.

Years later after defendant retired from the military, on 7 July 2014, defendant filed a motion in the cause asserting three claims. First, defendant sought termination or reduction of alimony because plaintiff would be receiving a percentage of his military retirement benefits. Second, defendant sought a declaratory judgment regarding use of the "Seifert Formula" in the 5 April 2002 judgment to calculate plaintiff's allotment of defendant's military retirement benefits contending that plaintiff should not benefit from his rise in the military ranks and the corresponding increase in his retirement benefits that was attained due to his active efforts post-separation. Third, defendant sought to have the expense of the SBP assigned to plaintiff.

On 23 September 2014, defendant filed a motion to amend his motion in the cause to add a fourth claim, that his active efforts to rise in the military ranks and improve his income and plaintiff's actions against him to impede his advancement "constitutes a material and substantial change in circumstances warranting a modification of the [judgment] pursuant to the case of *White v. White*, 152 N.C. App. 588, 568 S.E.2d 283 (N.C. Ct. App. 2002), aff'd, 579 S.E.2d 248 (N.C. 2003)." Discovery then ensued.

On 1 April 2015, plaintiff filed a motion for summary judgment on grounds that *res judicata* barred reconsideration of plaintiff's share of defendant's retirement benefits and defendant's SBP coverage. Plaintiff's summary judgment motion came on for hearing in Onslow County District Court before the Honorable William M. Cameron III on 19 August 2015. On 3 September 2015, the court entered three separate orders granting summary judgment in favor of plaintiff on each of the three claims asserted in defendant's 7 July 2014 motion in the cause. The court determined there was no basis in the law for granting defendant's motion in the cause; therefore, plaintiff was entitled to a percentage of defendant's retirement benefits as calculated in the 5 April 2002 judgment and defendant was responsible for the SBP premium as set forth in the 8 April 2003 order.

Defendant filed notice of appeal from each of the three summary judgment orders on 22 September 2015.

II. Discussion

On appeal, defendant argues the trial court erred in entering summary judgment because genuine issues of material fact exist as to whether purposeful acts by both parties amount to a substantial change in circumstances that warrants modification of the 5 April 2002 judgment. Defendant also asserts that the equitable distribution in the 5 April 2002 judgment is invalid because the trial court lacked subject matter jurisdiction. We address these issues in reverse order.

1. Jurisdiction

[1] For the first time in the long history of this case, defendant now challenges the court's jurisdiction to enter the equitable distribution portion of the 5 April 2002 judgment. While it is clear that this is the first time the trial court's subject matter jurisdiction has been challenged in this case, our law is equally clear that issues challenging subject matter jurisdiction may be raised at any time, even for the first time on appeal. *See Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986) ("The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court."). Thus, the issue is properly before this Court.

"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). "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). Regarding equitable distribution, N.C. Gen. Stat. § 50-21(a) provides, in pertinent part, that:

> [a]t any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed and adjudicated, either as a separate civil action, or together with any other action brought pursuant to Chapter 50 of the General Statutes, or as a motion in the cause as provided by G.S. 50-11(e) or (f).

N.C. Gen. Stat. § 50-21(a) (2015).

As detailed above, in this case plaintiff filed a complaint for divorce from bed and board on 15 March 2001 and defendant responded by filing an answer and counterclaim for a divorce from bed and board on 29 May 2001. In those pleadings, both plaintiff and defendant prayed that the court equitably distribute the marital property unequally in their respective favors. Yet, there is no separation date alleged in those pleadings. The first mention of a separation date in the record is in the 2 May 2001 temporary support order, in which the court found that plaintiff and defendant "lived together as husband and wife until on or about March 22, 2001 when the defendant began to move his personal clothing and items from the marital residence." The court then found, again, that the parties separated on approximately 22 March 2001 in the 5 April 2002 judgment.

Both parties agree that, under N.C. Gen. Stat. § 50-21(a), the separation of the parties provides the court with subject matter jurisdiction to

adjudicate a claim for equitable distribution. But defendant claims the court lacked jurisdiction to enter the equitable distribution portion of the judgment in this case because neither party alleged a separation date in their pleadings. Defendant also claims that neither plaintiff nor his pleadings contained a proper claim for equitable distribution because it was only mentioned in the prayers for relief and, in both pleadings, was paired with a claim for divorce from bed and board, indicating the parties had not separated. We disagree with both of defendant's arguments.

We first note that this Court has held that "a pleading requesting the court to enter an order distributing the parties' assets in an equitable manner is sufficient to state a claim for equitable distribution." *Coleman v. Coleman*, 182 N.C. App. 25, 28, 641 S.E.2d 332, 336 (2007) (citing *Hunt v. Hunt*, 117 N.C. App. 280, 450 S.E.2d 558 (1994)). Thus, the prayers for relief in both pleadings put the parties on notice that both sought equitable distribution and those requests were sufficient to state a claim for equitable distribution. Moreover, the mere fact that the equitable distribution claims were asserted alongside claims for a divorce from bed and board does not defeat the equitable distribution claims. Defendant has cited no authority for his assertion that such claims are improper together and we have found no such authority. In fact, a review of cases shows that claims for a divorce from bed and board and equitable distribution are often paired together in pleadings.

Concerning the required separation of the parties as a prerequisite for jurisdiction to adjudicate an equitable distribution claim, there is no indication in the record that the parties were separated at the time plaintiff filed her complaint. The record does show, however, that the parties separated on or about 22 March 2001, before defendant filed his answer and counterclaim. Defendant also alleges in his answer and counterclaim that he commuted weekly to North Carolina from where he was stationed in Virginia to visit plaintiff and their children until it became clear that reconciliation was impossible, then defendant stopped making weekly trips. Therefore, regardless of whether the parties were separated at the time plaintiff filed the complaint, the record is clear that the parties were separated by the time defendant asserted his claim for equitable distribution. Therefore the trial court did have subject matter jurisdiction to equitably distribute the marital property.

2. Summary Judgment

[2] Defendant also challenges the trial court's grant of summary judgment in favor of plaintiff on the claims in his 7 July 2014 motion in the cause. Specifically defendant contends the trial court erred in entering

summary judgment with respect to his claims to alter the plaintiff's share of his military retirement benefits and to terminate alimony. We disagree in both instances.

"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)).

A. Retirement Benefits

Concerning the division of defendant's military retirement benefits for purposes of equitable distribution, the Court has previously addressed the permissible methods of division in *Seifert v. Seifert*, 319 N.C. 367, 354 S.E.2d 506 (1987). In that case, the issue before the Court was "whether the trial court erred in deferring, until actual receipt, an anticipated award of military pension and retirement benefits calculated under a present value valuation method." *Id.* at 367, 354 S.E.2d at 507. In deciding that the court did err, the Court concluded that "both present value and fixed percentage are permissible methods of evaluating pension and retirement benefits in arriving at an equitable distribution of marital property." *Id.* at 371, 354 S.E.2d at 509. The Court further explained the fixed percentage method as follows:

> Under this method if, after valuing the marital estate, the court finds a distributive award of retirement benefits necessary to achieve an equitable distribution, the nonemployee spouse is awarded a percentage of each pension check based on the total portion of benefits attributable to the marriage. The portion of benefits attributable to the marriage is calculated by multiplying the net pension benefits by a fraction, the numerator of which is the period of the employee spouse's participation in the plan during the marriage (from the date of marriage until the date of separation) and the denominator of which is the total period of participation in the plan. The nonemployee spouse receives this award only if and when the employee spouse begins to receive the benefits.
>
> Under the fixed percentage method, deferral of payment is possible without unfairly reducing the value of the award. The present value of the pension or retirement benefits is not considered in determining the percentage to which the

> nonemployee spouse is entitled. Moreover, because the nonemployee spouse receives a percentage of the benefits actually paid to the employee spouse, the nonemployee spouse shares in any growth in the benefits. Yet, the formula gives the nonemployee spouse a percentage only of those benefits attributable to the period of the marriage, and that spouse does not share in benefits based on contributions made after the date of separation.
>
> Finally, so long as the trial court properly ascertains the net value of the pension and retirement benefits to determine what division of the property will be equitable, application of the fixed percentage method does not . . . violate the mandate that the court must identify the marital property, ascertain its net value, and then equitably distribute it. On the contrary, valuation of these benefits, together with other marital property, is necessary to determine the percentage of these benefits that the nonemployee spouse is equitably entitled to receive.

Id. at 370-71, 354 S.E.2d at 509 (internal citations omitted). Subsequent to *Seifert*, the Court's analysis was codified in N.C. Gen. Stat. § 50-20.1.

In this case, the court used the fixed percentage method to determine the portion of defendant's military retirement benefits to allocate to plaintiff. The Court provided the following formula in the 5 April 2002 judgment: (23 years / total years of defendant's service) x 50% = % to be paid to the plaintiff.

On appeal, defendant recognizes that *Seifert* controls the division of military retirement benefits in North Carolina. Yet, defendant claims that he "raises a novel question of law regarding the application of *Seifert* to pension division and whether there should be a narrow set of circumstance that allow modification of an equitable distribution order if the failure to do so results in manifest unfairness . . . ." Defendant further claims "[t]he instant case is an example of how while the fixed percentage method does not unfairly reduce a non-employee spouse's award, it does, at times, unfairly *inflate* the amount received by the non-employee spouse and results in a grossly different valuation than the present value method of valuation." Thus, defendant requests that this Court consider a different method of valuation based on changes in circumstances. Those changes in circumstances are alleged acts by plaintiff to thwart defendant's advancement in the military and defendant's active efforts to advance his military career.

Upon review, we are not convinced that the equitable distribution portion of the judgment should be altered due to the alleged changes in circumstances. Although defendant admits that the law favors finality of equitable distribution judgments, defendant relies on this Court's decision in *White v. White*, 152 N.C. App. 588, 568 S.E.2d 283 (2002), *aff'd per curiam*, 357 N.C. 153, 579 S.E.2d 248 (2003), to argue that this Court has allowed modification of orders based on changes of circumstances in the past.

Upon the parties divorce in *White*, a consent order was entered incorporating an agreement by the parties for the distribution of the marital property, including that defendant was entitled to one-half of the plaintiff's pension accumulated during the marriage. *Id.* at 590, 568 S.E.2d at 284. Years later, after the plaintiff retired and defendant began receiving benefits from plaintiff's pension, plaintiff applied for and began receiving disability benefits, which in turn caused the amount of benefits classified as retired pay to decrease and resulted in a significant decrease in the amount of benefits available to defendant. *Id.* at 590-91, 568 S.E.2d at 284. As this Court explained, "[i]n short, [the] plaintiff unilaterally acted so as to diminish [the] defendant's share of [the] plaintiff's monthly benefits while simultaneously maintaining his own monthly benefits, as well as increasing his after-tax income." *Id.* at 591, 568 S.E.2d at 284. As a result, the defendant filed a motion in the cause seeking a modified or amended qualifying order increasing her percentage of plaintiffs' retired pay. *Id.* at 591, 568 S.E.2d at 284. On appeal of the denial of her motion, this Court held the trial court erred. *Id.* at 592, 568 S.E.2d at 285.

Upon review of *White*, we agree with plaintiff's assertion that *White* is distinguishable from the present case. In *White*, this Court allowed modification where the plaintiff had, subsequent to the equitable distribution order, elected to receive disability benefits in place of retired pay and, thereby, diminished the benefits to be received by the defendant. In that instance, modification was allowed to enforce the intent of the original equitable distribution order. In the present case, defendant attempts to modify plaintiff's allocation of his military retirement benefits because those benefits have increased post-separation as a result of his continued military service; which was foreseeable at the time the court entered the 5 April 2002 judgment. We hold *White* does not control in this case.

The formula used by the court to calculate the fixed percentage of defendant's military retirement benefits to be awarded to plaintiff is exactly the formula set forth in *Seifert* and N.C. Gen. Stat. § 50-20.1(d). We decline defendant's request to consider a new formula and agree

with the trial court that "[t]here is no basis in law for granting [d]efendant's motion or amended motion[;]" therefore, "[p]laintiff is entitled to a share of the [d]efendant's military retired pay as stated in the April 5, 2002 judgment . . . ."

B. Alimony

On appeal, defendant also argues the trial court erred in entering summary judgment on his claim to terminate the alimony awarded in the 5 April 2002 judgment. We are not convinced the order sought by defendant is necessary.

The pertinent decretal portions of the judgment required defendant to pay $2,500.00 per month to plaintiff as alimony and provided for the reduction of alimony payments as follows:

> Further, at such time as plaintiff begins to receive her portion of the defendant's military retirement pay, the defendant may reduce the amount of alimony he pays by the actual sum received by the plaintiff from the military retirement pay such that the plaintiff receives a total of $2,500.00 per month.

Defendant asserts, and the record shows, that the amount of defendant's retirement pay received by plaintiff is greater than the alimony ordered in the judgment. Therefore, under the terms of the judgment, and without further order of the court, defendant is entitled to reduce the alimony paid to zero. Because defendant is no longer required to pay any alimony under the terms of the judgment, an additional order terminating alimony would be of no consequence. Thus, we hold the trial court did not err in entering summary judgment.

III. Conclusion

For the reasons discussed above, we hold the trial court had jurisdiction to equitably distribute the marital property in the 5 April 2002 judgment and did not later err in granting summary judgment in favor of plaintiff on the claims asserted in defendant's 7 July 2014 motion in the cause. The trial court's orders are affirmed.

AFFIRMED.

Judges HUNTER, Jr., and DIETZ concur.

TERESA KAY HAUSER, PLAINTIFF
v.
DARRELL S. HAUSER AND ROBIN E. WHITAKER HAUSER, DEFENDANTS

No. COA16-606

Filed 21 February 2017

1. Wrongful Interference—tortious interference with expected inheritance—not recognized in North Carolina

The trial court did not err by dismissing plaintiff daughter's claim for tortious interference with an expected inheritance. North Carolina law does not recognize a cause of action for tortious interference with an expected inheritance by a potential beneficiary during the lifetime of the testator.

2. Fiduciary Relationship—breach of fiduciary duty—constructive fraud

The trial court did not err by dismissing plaintiff daughter's claims for breach of fiduciary duty and constructive fraud. While plaintiff's complaint alleged the existence of a fiduciary relationship between defendant son and his wife with the parties' mother, nowhere did plaintiff allege the existence or breach of a fiduciary duty owed by defendants to plaintiff.

3. Estates—request for accounting—potential beneficiary

The trial court did not err by dismissing plaintiff daughter's request for an accounting. Plaintiff failed to cite any legal authority for the proposition that her present status as a potential beneficiary of her mother's estate would entitle her to an accounting of defendant son's actions as the mother's attorney-in-fact.

Appeal by plaintiff from order entered 3 March 2016 by Judge John O. Craig, III, in Forsyth County Superior Court. Heard in the Court of Appeals 16 November 2016.

The Law Office of Michelle Vincler, by Michelle Vincler, for plaintiff-appellant.

David E. Shives, PLLC, by David E. Shives, for defendants-appellees.

DAVIS, Judge.

This appeal presents the issues of whether (1) North Carolina law recognizes a cause of action for tortious interference with an expected inheritance by a potential beneficiary during the lifetime of the testator; and (2) in cases where a living parent has grounds to bring claims for constructive fraud or breach of fiduciary duty such claims may be brought instead by a child of the parent based upon her anticipated loss of an expected inheritance. Teresa Kay Hauser ("Plaintiff") appeals from the trial court's 3 March 2016 order granting the motion to dismiss of Darrell S. Hauser and Robin E. Whitaker Hauser (collectively "Defendants") as to her claims for tortious interference with an expected inheritance, constructive fraud, and breach of fiduciary duty as well as her request for an accounting.[1] Because Plaintiff's claims for relief are not legally viable in light of the facts she has alleged, we affirm the trial court's order.

Factual and Procedural Background

We have summarized the pertinent facts below using Plaintiff's own statements from her complaint, which we treat as true in reviewing the trial court's order granting a motion to dismiss under Rule 12(b)(6). *Feltman v. City of Wilson*, 238 N.C. App. 246, 247, 767 S.E.2d 615, 617 (2014).

Plaintiff and Darrell S. Hauser ("Darrell") are the only children of Hilda Hege Hauser ("Mrs. Hauser") and her late husband, James Hauser ("Mr. Hauser"). Before his death, Mr. Hauser set up a trust (the "Trust"), naming Edward Jones Investments as trustee and listing Plaintiff, Darrell, and Mrs. Hauser as the Trust's beneficiaries. On 31 December 1998, Mrs. Hauser executed a will, devising all of her real and personal property to Plaintiff and Darrell per stirpes in the event that Mr. Hauser predeceased her. Her real property included a residence located on Harper Road in Lewisville, North Carolina (the "Harper Road Property"). The 1998 will also devised her residual estate to the trustee of the Hilda Hege Hauser Revocable Trust Agreement.

On 8 March 2005, Mrs. Hauser executed a power of attorney, naming Plaintiff as her attorney-in-fact. In late 2011, Darrell's wife, Robin Hauser ("Robin"), began caring for Mrs. Hauser. Mrs. Hauser's primary sources of income at this time consisted of payments from the Trust and

1. The trial court also dismissed Plaintiff's claim for undue influence but Plaintiff has not appealed the dismissal of that claim. *See* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's briefs are deemed abandoned.").

her social security benefits. She also maintained checking and savings accounts with Wells Fargo.

Beginning in December 2011, as a result of the exercise of undue influence over Mrs. Hauser by Defendants, Mrs. Hauser began transferring money from the Trust to her Wells Fargo accounts and withdrawing cash from these accounts. Between 27 December 2011 and 24 April 2012, these transfers and withdrawals totaled approximately $20,000.

During March 2012, Plaintiff "was alerted to questionable transfers of funds from the Trust to [Mrs.] Hauser's Wells Fargo accounts by a trustee at Edward Jones Investments." Upon learning of these transactions, Plaintiff transferred $12,000 from Mrs. Hauser's Wells Fargo account to Plaintiff's personal account pursuant to her authority as Mrs. Hauser's attorney-in-fact.

On 12 July 2012, Mrs. Hauser revoked the 8 March 2005 power of attorney naming Plaintiff as her attorney-in-fact and executed a new power of attorney (the "2012 Power of Attorney"), appointing Darrell as her attorney-in-fact.[2] That same day, she executed a new will, which devised the Harper Road Property to Darrell and left the remainder of her real and personal property to Plaintiff and Darrell in equal shares.

On 22 January 2015, Mrs. Hauser created the Hilda Hege Hauser Irrevocable Trust (the "Irrevocable Trust"). On that same day, she signed a quitclaim deed for the Harper Road Property to Darrell and an attorney, George M. Cleland, IV, as trustees of the Irrevocable Trust.

Plaintiff filed a complaint in Forsyth County Superior Court on 17 December 2015 alleging constructive fraud, breach of fiduciary duty, tortious interference with an expected inheritance, and undue influence. In her complaint, she sought, *inter alia*, the return of any of Mrs. Hauser's funds that had been fraudulently transferred from her accounts, the removal of Darrell as Mrs. Hauser's attorney-in-fact, the revocation of Mrs. Hauser's July 2012 will, and an order requiring Darrell to "render an accounting of his actions as [Mrs.] Hauser's attorney-in-fact from July 12, 2012 to the date of the filing of th[e] Complaint."

On 12 February 2016, Defendants filed a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and filed an answer twelve days later. A hearing was held on Defendants' motion

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2. Mrs. Hauser was eighty-seven years old at the time she executed the 2012 Power of Attorney.

to dismiss before the Honorable John O. Craig, III, on 29 February 2016. On 3 March 2016, the trial court entered an order dismissing Plaintiff's complaint. Plaintiff filed a timely notice of appeal.

Analysis

> The standard of review of an order granting 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. On appeal, we review the pleadings de novo to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Feltman, 238 N.C. App. at 251, 767 S.E.2d at 619. "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." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013) (citation omitted).

I. Tortious Interference with an Expected Inheritance

[1] Plaintiff's first argument on appeal is that the trial court erred in dismissing her claim for tortious interference with an expected inheritance. In support of this claim, Plaintiff alleges that Defendants' wrongful acts in causing the transfer and withdrawal of Mrs. Hauser's funds have "deplete[d] the assets of [her] eventual estate[,]" thereby diminishing Plaintiff's expected inheritance.

In her brief, Plaintiff cites several cases from North Carolina's appellate courts that she claims recognize the existence of a cause of action for tortious interference with an expected inheritance. *See, e.g.*, *Bohannon v. Wachovia Bank & Tr. Co.*, 210 N.C. 679, 685, 188 S.E. 390, 394 (1936) ("If the plaintiff can recover against the defendant for the malicious and wrongful interference with the making of a contract, we see no good reason why he cannot recover for the malicious and wrongful interference with the making of a will."). However, none of the North Carolina cases cited by Plaintiff stand for the proposition that an expected beneficiary can bring such a claim *during the lifetime of the testator*.

The legal invalidity of Plaintiff's claim is clearly demonstrated by our Supreme Court's decision in *Holt v. Holt*, 232 N.C. 497, 61 S.E.2d 448

(1950). In *Holt*, the plaintiff brought an action for fraud and undue influence against his brothers in which he asserted that they had fraudulently induced their father to convey property to them prior to his death. *Id.* at 499, 61 S.E.2d at 450. The trial court dismissed the plaintiff's action. *Id.* Our Supreme Court affirmed, holding that the plaintiff lacked standing to maintain the action until such time as the will was declared to be invalid in a caveat proceeding. *Id.* at 503, 61 S.E.2d at 453. In its opinion, the Court stated the following:

> A child possesses no interest whatever in the property of a living parent. He has a mere intangible hope of succession. His right to inherit the property of his parent does not even exist during the lifetime of the latter. Such right arises on the parent's death, and entitles the child to take as heir or distributee nothing except the undevised property left by the deceased parent.
>
> In so far as his children are concerned, a parent has an absolute right to dispose of his property by gift or otherwise as he pleases. He may make an unequal distribution of his property among his children with or without reason. These things being true, a child has no standing at law or in equity either before or after the death of his parent to attack a conveyance by the parent as being without consideration, or in deprivation of his right of inheritance.
>
> When a person is induced by fraud or undue influence to make a conveyance of his property, a cause of action arises in his favor, entitling him, at his election, either to sue to have the conveyance set aside, or to sue to recover the damages for the pecuniary injury inflicted upon him by the wrong. But no cause of action arises in such case in favor of the child of the person making the conveyance for the very simple reason that the child has no interest in the property conveyed and consequently suffers no legal wrong as a result of the conveyance.

Id. at 500-01, 61 S.E.2d at 451-52 (internal citations and quotation marks omitted).

The above-quoted principles remain the law of this State and defeat Plaintiff's claim — brought during Mrs. Hauser's lifetime — for tortious interference with an expected inheritance. All of the allegations in the complaint relate to property owned by Mrs. Hauser rather than by Plaintiff. Plaintiff filed this action solely on her own behalf rather than

in a representative capacity on behalf of Mrs. Hauser. Indeed, Plaintiff makes no allegation that Mrs. Hauser has ever been adjudicated to be incompetent.

In her brief, Plaintiff acknowledges the novelty of her claim based on existing North Carolina law but nevertheless urges us to adopt the reasoning of the Maine Supreme Court in *Harmon v. Harmon*, 404 A.2d 1020 (Me. 1979). In *Harmon*, a mother had executed a prior will under which one of her two sons — the plaintiff — would receive a one-half interest in her property upon her death, but her other son and his wife — the defendants — subsequently induced her to instead transfer all of her property to them, effectively disinheriting the plaintiff. *Id.* at 1021. While the mother was still living, the plaintiff filed suit against the defendants for wrongful interference with an intended legacy, and the trial court dismissed the claim. *Id.* at 1021-22.

The Maine Supreme Court reversed the trial court's order, holding that the Plaintiff had stated a valid claim for relief.

> We conclude that where a person can prove that, but for the tortious interference of another, he would in all likelihood have received a gift or a specific profit from a transaction, he is entitled to recover for the damages thereby done to him. We apply this rule to the case before us where allegedly the Defendant son and his wife have tortiously interfered with the Plaintiff son's expectation that under his mother's will he would receive a substantial portion of her estate.
>
> That an expectant legatee or an expectant heir has an interest of immediate economic value is implicit in the decisions holding that the expectant heir may effectively convey his interest for valuable consideration. Protection of this interest from tortious interference comports with recognition of this valuable right.

Id. at 1024-25 (internal citations omitted).

Even if we were persuaded by the reasoning in *Harmon* — which we are not[3] — this Court lacks the authority to expand the limited cause of

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3. We note that *Harmon* has not achieved broad acceptance by courts in other jurisdictions. *See, e.g.*, *Labonte v. Giordano*, 426 Mass. 319, 322, 687 N.E.2d 1253, 1256 (1997) ("[W]e remain unpersuaded by the conclusions in the *Harmon* opinion and decline to recognize a new cause of action that [the plaintiff] seeks here.").

action recognized in *Bohannon* and its progeny in the manner requested by Plaintiff in this case. *See Johnson v. Pearce*, 148 N.C. App. 199, 202, 557 S.E.2d 189, 191 (2001) ("Only our General Assembly and Supreme Court have the authority to abrogate or modify a common law tort." (citation omitted)). Accordingly, the trial court properly dismissed this claim under Rule 12(b)(6).

II. Breach of Fiduciary Duty and Constructive Fraud

[2] Plaintiff next argues that the trial court erred in dismissing her claims for breach of fiduciary duty and constructive fraud. Defendants, conversely, contend that Plaintiff lacks standing to pursue these claims because she is not the real party in interest and no fiduciary relationship exists between Plaintiff and Defendants.

In order "[f]or a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 268 (2013) (citation and quotation marks omitted). "A fiduciary relationship may arise when there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Id.* (citation and quotation marks omitted).

Similarly, in order "[t]o survive a motion to dismiss, a cause of action for constructive fraud must allege (1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured." *White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004) (citation omitted), *disc. review denied*, 359 N.C. 286, 610 S.E.2d 717 (2005). "The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself." *Id.*

It is well established that "a lack of standing . . . may be challenged by a motion to dismiss for failure to state a claim upon which relief may be granted." *Teague v. Bayer AG*, 195 N.C. App. 18, 22, 671 S.E.2d 550, 554 (2009). It is axiomatic that "[e]very claim must be prosecuted in the name of the real party in interest." *Street v. Smart Corp.*, 157 N.C. App. 303, 306, 578 S.E.2d 695, 698 (2003) (citation and quotation marks omitted). "[F]or purposes of reviewing a 12(b)(6) motion made on the grounds that the plaintiff lacked standing, a real party in interest is a party who is benefitted or injured by the judgment in the case." *Woolard v. Davenport*, 166 N.C. App. 129, 135, 601 S.E.2d 319, 323 (2004) (citation, quotation marks, and brackets omitted).

We agree with Defendants that Plaintiff's claims for both breach of fiduciary duty and constructive fraud fail as a matter of law. While Plaintiff's complaint alleges the existence of a fiduciary relationship between Defendants and Mrs. Hauser, nowhere does she allege the existence — or breach — of a fiduciary duty owed by Defendants *to Plaintiff*. Indeed, in her brief Plaintiff concedes "that she was not in an agency relationship with either Defendant." North Carolina law simply does not permit her to proceed on these claims based solely on her theory that her "expected inheritance of [Mrs.] Hauser's assets was substantially reduced" as a result of Defendants' alleged breach of their fiduciary duty owed to Mrs. Hauser.

While Mrs. Hauser remains living, any claim arising out of a fiduciary relationship between her and Defendants can only be brought by Mrs. Hauser herself or someone legally authorized to act on her behalf. Therefore, Plaintiff lacks standing to bring a claim on her own behalf alleging that Defendants have breached a fiduciary duty owed by them to Mrs. Hauser. Absent allegations of the existence of a relationship of trust and confidence between Plaintiff and Defendants, Plaintiff's claims for constructive fraud and breach of fiduciary duty fail as a matter of law. *See Green*, 367 N.C. at 141, 749 S.E.2d at 268 (requiring existence of fiduciary relationship between the parties in order for plaintiff to succeed on breach of fiduciary duty claim); *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) ("In order to maintain a claim for constructive fraud, plaintiffs must show that they and defendants were in a relation of trust and confidence . . . ." (citation and quotation marks omitted)).

III. Request for Accounting

[3] Finally, Plaintiff argues that the trial court erred in dismissing her request for an accounting. We disagree.

Plaintiff's complaint stated the following with regard to this claim:

> 114. Pursuant to the 2012 Power of Attorney, Plaintiff demands the Defendant Darrell S. Hauser render an accounting of his actions as [Mrs.] Hauser's attorney-in-fact from July 12, 2012 to the date of the filing of this Complaint.
>
> 115. As a beneficiary of [Mrs.] Hauser's 2012 Will and other assets, Plaintiff is entitled to an accounting of Defendant's actions while acting as [Mrs.] Hauser's attorney-in-fact to determine whether [Darrell] has

> breached his fiduciary duty and intentionally interfered with Plaintiff's expected inheritance.

Plaintiff did not attach the 2012 Power of Attorney to her complaint. Nor has she referenced in her complaint any specific provision of the 2012 Power of Attorney purporting to confer upon her the right to demand such an accounting. We are not at liberty to simply assume that such a provision may exist. *See Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 394, 537 S.E.2d 248, 252 (2000) ("While the well-pled allegations of the complaint are taken as true . . . unwarranted deductions of fact are not deemed admitted." (citation and quotation marks omitted)), *disc. review denied*, 353 N.C. 378, 547 S.E.2d 13 (2001).

Moreover, Plaintiff has failed to cite any legal authority for the proposition that her present status as a potential beneficiary of Mrs. Hauser's estate would — without more — entitle her to an accounting of Darrell's actions as Mrs. Hauser's attorney-in-fact. Her attempt to rely upon Darrell's alleged breach of his fiduciary duty to Mrs. Hauser is, once again, insufficient to provide a basis for the relief she seeks. Therefore, the trial court correctly denied her request for an accounting.

Conclusion

For the reasons stated above, we affirm the trial court's 3 March 2016 order.

AFFIRMED.

Judges STROUD and HUNTER, JR. concur.

IN RE J.T.

[252 N.C. App. 19 (2017)]

IN THE MATTER OF J.T.

No. COA16-774

Filed 21 February 2017

Termination of Parental Rights—permanency planning hearing—failure to receive oral testimony—ceasing reunification—no findings in termination order

The trial court erred by conducting permanency planning hearings and ceasing reunification efforts without receiving any oral testimony in open court. The trial court's termination order did not include the necessary findings, and thus did not cure the defect.

Appeal by Respondent-father from orders entered 9 July 2015, 5 October 2015, and 8 April 2016 by Judge Joseph Moody Buckner in Orange County District Court. Heard in the Court of Appeals 30 January 2017.

No brief filed for Petitioner-Appellee Orange County Department of Social Services.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

W. Michael Spivey for Respondent-Appellant father.

INMAN, Judge.

Respondent-father ("Father") appeals from orders ceasing reunification efforts and establishing a permanent plan of adoption for his son, J.T. ("Jason"),[1] and an order terminating his parental rights to Jason. Jason's mother ("Mother") is not a party to this appeal. For the reasons set forth below, we vacate the orders and remand for further proceedings consistent with this opinion.

Factual and Procedural History

Father and Mother were married in September 2009, and Mother gave birth to Jason in April 2010. Father and Mother separated in June

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

2012. In July and September 2014, Mother alleged that Father had abused Jason and Mother's oldest son, who had a different father. Following a medical examination of the children, an evaluator found that Mother had allowed the children "to be exposed to severe, chronic: physical abuse, domestic violence, substance abuse, and mood instability."

On 16 October 2014, the Orange County Department of Social Services ("DSS") filed a juvenile petition alleging that Jason was abused, neglected, and dependent. DSS obtained nonsecure custody of Jason the same day. Following a 5 March 2015 hearing, the trial court adjudicated Jason neglected and dependent by consent order on 8 April 2015. The trial court held a dispositional hearing on 7 May 2015 and entered an order on 29 May 2015 continuing Jason's custody with DSS, relieving DSS of any reunification efforts with Mother, and ordering a visitation schedule for Father and Jason.

Following an 18 June 2015 permanency planning hearing, the trial court entered an order on 9 July 2015 ceasing further reunification efforts with Father and establishing a concurrent plan of adoption and guardianship. The trial court held a second permanency planning hearing on 17 September 2015, after which the court entered an order on 5 October 2015 changing the permanent plan to adoption only and relieving DSS of further reunification efforts.

On 14 August 2015, DSS filed a motion to terminate Father's parental rights, alleging dependency as the sole ground to support termination. *See* N.C. Gen. Stat. § 7B-1111(a)(6) (2015). After a hearing on the motion, the trial court entered an order on 8 April 2016 terminating Father's parental rights after adjudicating Jason dependent. Father filed notice of appeal on 19 April 2016.

Analysis

On appeal, Father first contends that the trial court erred by conducting permanency planning hearings and ceasing reunification efforts without receiving any oral testimony in open court. We agree.

> This Court's review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal. The trial court's conclusions of law are reviewable *de novo* on appeal.

In re P.O., 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (internal quotation marks and citations omitted).

The determinative facts of the present case are indistinguishable from those in this Court's prior decisions in *In re D.Y.*, 202 N.C. App. 140, 688 S.E.2d 91 (2010), and *In re D.L.*, 166 N.C. App. 574, 603 S.E.2d 376 (2004), in which court reports were the only admissible evidence offered by DSS at the permanency planning hearings. *See In re D.Y.*, 202 N.C. App. at 142-43, 688 S.E.2d at 93; *In re D.L.*, 166 N.C. App. at 582, 603 S.E.2d at 382. The trial court's findings of fact thus were based only on the court reports, prior orders, and the arguments of counsel. *In re D.Y.* 202 N.C. App. at 142-43, 688 S.E.2d at 93; *In re D.L.* 166 N.C. App. at 582, 603 S.E.2d at 382. In both cases, this Court held that the trial court's conclusions of law were in error without additional evidence offered to support the trial court's findings of fact, and this Court reversed the permanency planning orders. *In re D.Y.* 202 N.C. App. at 142-43, 688 S.E.2d at 93; *In re D.L.* 166 N.C. App. at 582-83; 603 S.E.2d at 382.

Here, the trial court heard no oral testimony at either the 18 June or 17 September 2015 permanency planning hearings, but only heard statements from the attorneys involved in the case. "Statements by an attorney are not considered evidence." *In re D.L.*, 166 N.C. App. at 582, 603 S.E.2d at 382. At both hearings, the trial court accepted into evidence court reports submitted by the guardian ad litem and a DSS social worker and incorporated those reports by reference in its orders. However, reports incorporated by reference in the absence of testimony are insufficient to support the trial court's findings of fact. *See id.* at 583, 603 S.E.2d at 382 ("The adoption of the DSS summary into the Order is insufficient to constitute competent evidence to support the trial court's findings of facts."). Because the trial court did not hear evidence at either of the permanency planning hearings, the findings in the court's orders were unsupported by competent evidence, and its conclusions of law were in error.

The trial court's failure to hear evidence at the permanency planning hearings does not automatically require us to vacate the orders ceasing reunification efforts. Our Supreme Court has held that incomplete findings of fact in an order ceasing reunification can be cured by findings of fact in a related termination order. *In re L.M.T.*, 367 N.C. 165, 170-71, 752 S.E.2d 453, 456-57 (2013). In this case, however, the trial court's termination order does not include findings addressing the criteria for ceasing reunification efforts. *See* N.C. Gen. Stat. §§ 7B-906.1, 906.2 (2015). As a result, the trial court's termination order does not cure the defects in the orders ceasing reunification efforts, and the orders ceasing reunification efforts must therefore be vacated. *See In re A.E.C.*, 239 N.C. App. 36, 45, 768 S.E.2d 166, 172 (vacating the trial court's termination

and permanency planning orders where "the termination order, taken together with the earlier orders, does not contain sufficient findings of fact to cure the defects in the earlier orders"), *disc. review denied*, 368 N.C. 264, 772 S.E.2d 711 (2015).

Finally, because the trial court erred in ceasing reunification efforts with respect to Father, it erred in entering its order terminating Father's parental rights to Jason. *See id.* Accordingly, we vacate the orders ceasing reunification efforts with Father and the order terminating Father's parental rights, and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges CALABRIA and ZACHARY concur.

SEN LI, PLAINTIFF
v.
HENG Q. ZHOU, DEFENDANT

No. COA16-755

Filed 21 February 2017

1. Appeal and Error—interlocutory orders and appeals—failure to comply with discovery—contempt proceeding

Although as a general rule an order compelling discovery is not immediately appealable, a contempt proceeding for failure to comply with an earlier discovery order is immediately appealable.

2. Contempt—civil contempt—sufficiency of evidence

The trial court did not err in a conspiracy, fraud, and unjust enrichment case by holding defendant in civil contempt. The evidence defendant challenged as insufficient was not in the record.

3. Contempt—civil contempt—missed depositions—attorney fees and costs

The trial court did not err in a conspiracy, fraud, and unjust enrichment case by requiring defendant to pay plaintiff's legal fees and costs related to missed depositions and subsequent litigation as a condition of purging himself of contempt.

4. Judgments—default judgment—requirement to attend deposition—damages—title to property

The trial court did not abuse its discretion in a conspiracy, fraud, and unjust enrichment case by requiring defendant to appear for a deposition after entry of default against defendant. The amount of damages and the state of title to the pertinent property remained unresolved by the default judgment.

Judge DIETZ concurring.

Appeal by defendant from order entered 11 April 2016 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 24 January 2017.

Smith Law Group, PLLC, by Matthew L. Spencer and Steven D. Smith for Plaintiff-Appellee.

Bennett and Guthrie, P.L.L.C. by Joshua H. Bennett, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Heng Q. Zhou ("Defendant") appeals the 11 April 2016 order by Judge David L. Hall in Forsyth County Superior Court holding him in contempt of court and ordering him to pay Sen Li's ("Plaintiff") attorney's fees and costs related to his missed depositions and subsequent failure to comply with a court order. After review, we affirm the trial court's order.

I. Facts and Background

On 13 June 2014, Plaintiff filed a verified complaint alleging civil conspiracy, actual fraud, constructive fraud, and unjust enrichment against Defendant and Ping Chung ("Chung"). Li sought to recover formerly foreclosed investment property in Greensboro, North Carolina, along with actual and punitive damages. Plaintiff and Defendant purchased the property in 2003 and gave a promissory note and deed of trust to the sellers. Defendant allegedly convinced the sellers to assign the note and deed of trust to Chung without notifying Plaintiff. Plaintiff claimed this caused her to send monthly payments to the wrong party, resulting in default on the note and then foreclosure.

Chung timely filed an answer denying all allegations. Defendant, however, failed to timely respond. Plaintiff moved for entry of default

against Defendant on 20 August 2014, and the clerk filed an entry of default. Thereafter, on 15 April 2015, Plaintiff voluntarily dismissed her claims against Chung.

To establish evidence of her damages, Plaintiff noticed Defendant's deposition for 13 May 2015. In addition, Plaintiff subpoenaed Defendant for this deposition, with notice given by personal service on Defendant by the county sheriff. On 13 May 2015, Defendant appeared at the deposition. At that time, Plaintiff's counsel agreed to continue the deposition until 29 May 2015 in order to hire a Chinese interpreter.

On 14 May 2015, Plaintiff noticed Defendant's deposition for 29 May 2015. Plaintiff subpoenaed Defendant for this deposition by personal service on Defendant. Defendant failed to appear.

On 26 June 2015, Plaintiff filed a verified motion to show cause why Defendant should not be held in contempt for failure to appear at the 29 May 2015 deposition. The motion was scheduled for 10 August 2015. Defendant did not appear for the hearing, and was subsequently held in civil contempt for "failing to appear and fully testify" at the 13 May and 29 May 2015 depositions. In an order filed 11 August 2015, the court ordered Defendant to be deposed on 26 August 2015 and obtain and pay the cost of an interpreter. Finally, pursuant to Rule 37(d) of the North Carolina Rules of Civil Procedure, the court ordered Defendant to pay Plaintiff's attorney's fees of $3,176.00 and costs of $379.00 incurred in scheduling, preparing, and appearing at the two depositions. When Defendant failed to comply, Plaintiff filed a second verified motion to show cause. A show cause hearing was scheduled for the week beginning 30 November 2015.

Defendant appeared at the 30 November 2015 calendar call and indicated he did not understand English. When the judge scheduled a hearing to be held on 1 December 2015, Defendant indicated in English that he understood. At the 1 December hearing, Defendant appeared but "refused to answer questions posed by the Court."

Subsequently, on 2 December 2015, the court found Defendant willfully failed to comply with the court orders and could have taken "reasonable measures that would enable him to comply" with these orders. The court found Defendant understood English and was able to understand the proceedings. Further, Defendant "failed to show the Court any reason as to why he should not be held in contempt of Court." The trial court concluded Defendant was in civil contempt of Court and ordered him to appear for questioning in open court on 8 December 2015 with a Chinese interpreter and all costs taxed to his expense.

Defendant appeared at the 8 December 2015 hearing and was deposed through an interpreter. Unfortunately, the record does not contain a transcript of these or any other court proceedings. On 11 April 2016, the trial court issued an order regarding the 8 December 2015 hearing, making the following findings of fact:

> 10. During the defendant's deposition taken in open court on December 8, 2015 the Defendant testified that he owned 4 vans and that Defendant regularly made trips to Harrah's Casino in Cherokee, North Carolina to gamble.
>
> . . . .
>
> 12. Defendant testified that he did not testify at the May 13, 2015 deposition and appear at May 29, 2015 deposition because he was seeking medical treatments for cancer.
>
> 13. The Court allowed the defendant to provide a medical excuse or other documentation that would show good cause why he did not appear and testify at deposition as described above. The defendant provided the Court with a manila envelope containing several documents apparently printed on a medical provider's stationary, but none of which was sufficient to show good cause why the defendant did not appear and testified on the subject dates.

The trial court concluded Defendant's failure to comply with the 11 August 2015 order "appears to be willful in that he has made no payment to Plaintiff pursuant to the Order to Appear at Deposition and For Attorney's fees, and that based upon his testimony the Defendant appears to have sufficient funds and assets to do so." The court ordered Defendant to pay Plaintiff's attorney's fees and costs related to the two missed depositions, related motions, and hearings in the amount of $7,584.00. The court also ordered Defendant to pay the cost of his interpreter in the amount of $492.30. Finally, the court ordered Defendant to appear on 6 June 2016 for review to determine whether he complied with the order.

Defendant filed his notice of appeal on 11 May 2016, naming the 11 April 2016 order, and "to the extent necessary" to appeal the 11 April order, the 2 December and 11 August 2015 orders.

II. Jurisdiction

[1] "As a general rule, an order compelling discovery is not immediately appealable because it is interlocutory and does not affect a substantial

right which would be lost if the ruling is not reviewed before final judgment." *Wilson v. Wilson*, 124 N.C. App. 371, 374, 477 S.E.2d 254, 256 (1996). However:

> when a civil litigant is adjudged to be in contempt for failing to comply with an earlier discovery order, the contempt proceeding is both civil and criminal in nature and the order is immediately appealable for the purpose of testing the validity of both the original discovery order and the contempt order itself where, as here, the contemnor can purge himself of the adjudication of contempt only by, in effect, complying with the discovery order of which he essentially complains.

Willis v. Duke Power Co., 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976). Because Defendant may only purge himself of contempt by complying with the 11 April 2016 order, appeal of all three orders named in the notice of appeal is properly before this Court.

III. Standard of Review

Defendant contends the trial court relied on incompetent evidence in its 11 April 2016 order holding him in contempt. This Court's review of a contempt order is "limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Williams v. Chaney*, ___ N.C. App. ___, ___, 792 S.E.2d 207, 209 (2017). "In contempt proceedings the judge's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment." *Clark v. Clark*, 294 N.C. 554, 571, 243 S.E.2d 129, 139 (1978).

Defendant also asserts the trial court committed errors of law when it required him to appear for a deposition with no proper purpose, and when it required him to pay Plaintiff's legal fees and costs as a condition of purging contempt. "It is a general rule that orders regarding matters of discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion." *Hudson v. Hudson*, 34 N.C. App. 144, 145, 237 S.E.2d 479, 480 (1977). An error of law is by definition an abuse of discretion. *Cooter & Gell v. Hartmarx Corp*, 496 U.S 384, 405, 110 L. Ed. 2d 359, 382 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."); *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 150 (4th Cir.

2002) ("Of course, an error of law by a district court is by definition an abuse of discretion.").

IV. Analysis

A. Findings of Fact

[2] Defendant challenges the 11 April 2016 order, contending there was no competent evidence to support the findings (1) Defendant willfully disobeyed the 11 August 2015 order to appear for deposition and (2) Defendant lacked good cause for failing to appear at the missed depositions. Unfortunately, Defendant failed to order a transcript of any of the hearings in this case, including the 8 December 2015 hearing. As a result, we are unable to review the evidence Defendant contests.

North Carolina Rule of Appellate Procedure 9(a) states appellate "review is solely upon the record on appeal[.]" In compiling the record, the parties must provide

> so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating the portions of the transcript to be so filed[.]

N.C.R. App. P. 9(a)(1)(e) (2016). The burden is on the appellant to "commence settlement of the record on appeal, including providing a verbatim transcript if available." *State v. Berryman*, 360 N.C. 209, 216, 624 S.E.2d 350, 356 (2006).

The North Carolina Rules of Appellate Procedure are "mandatory and not directory." *Reep v. Beck*, 360 N.C. 34, 38, 619 S.E.2d 497, 500 (2005) (internal quotation marks and citation omitted). While "every violation of the rules does not require dismissal of the appeal or the issue," *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007), dismissal for a non-jurisdictional error may be proper, depending on "whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process." *Dogwood Dev. & Mgmt. Co, LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366-67 (2008).

Here, Defendant designated in the record the transcript of his 8 December 2015 hearing would be filed with this Court, but failed to file the transcript as required by N.C.R. App. P. 9(c)(3)(b). Although his error is non-jurisdictional, the evidence Defendant challenges as insufficient

is not before us in the record. Consequently, we cannot review the trial court's decision and dismiss this issue.

B. Attorney's Fees and Costs

[3] Defendant argues the trial court committed reversible error when it required him to pay Plaintiff's legal fees and costs related to the missed depositions and subsequent litigation as a condition of purging himself of contempt. Defendant is mistaken.

Courts can award attorney's fees in contempt matters when specifically authorized by statute. *Blevins v. Welch*, 137 N.C. App. 98, 103, 527 S.E.2d 667, 671 (2000). The trial court based its sanctions on North Carolina Rule of Civil Procedure 37(d), which provides when a party has failed to attend a deposition, "the court shall require the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." N.C. Gen. Stat. § 1A-1, Rule 37(d) (2015). This Court has previously recognized when a party to an action fails to comply with a discovery order, attorney's fees may be awarded as a sanction for contempt under the Rules of Civil Procedure. *See First Mt. Vernon Indus. Loan Ass'n v. ProDev XXII, LLC*, 209 N.C. App. 126, 134, 703 S.E.2d 836, 841 (2011) (overturning sanctions ordered under Rule 45 for failing to respond to a subpoena because the contemnor was not a party to the action, but noting the court could have awarded attorney's fees and costs had plaintiffs moved to compel defendant under Rule 37). Consequently, we affirm the trial court's award of attorney's fees and costs to Plaintiff.

C. Proper Purpose

[4] Finally, Defendant argues the trial court erred in requiring him to appear for his deposition. He contends there was no proper purpose for a deposition after the entry of default against him. He is mistaken. Entry of default does not establish an amount of monetary damages or equitable relief. A plaintiff is entitled in advance of a hearing to inquire as to facts to establish the amount of damages in a default and inquiry hearing.

Rule 26 of the North Carolina Rules of Civil Procedure sets a broad scope for discovery, providing the "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.]" N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (2015).

Plaintiff requested both actual and punitive damages and asked the court to impose a constructive trust to transfer title of the investment property at issue in this case back to Plaintiff. As the amount of damages and the state of title to the property remained unresolved by the default judgment, we conclude the trial court did not abuse its discretion in requiring the Defendant to appear at a deposition.

AFFIRMED.

Judge BRYANT concurs.

Judge DIETZ concurring in separate opinion.

DIETZ, Judge, concurring.

I concur in the judgment in this case but note that the record does not disclose whether the transcript of the 8 December 2015 hearing (which is designated in the record on appeal) does not exist, or whether it exists but due to inadvertence was never electronically filed in this Court. I am willing to consider rehearing the case under Rule 31, with the benefit of the missing transcript, if that transcript was requested and prepared before the Court docketed this appeal but was inadvertently omitted from the record.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
NATHANIEL MALONE CHINA, DEFENDANT

No. COA16-721

Filed 21 February 2017

1. Appeal and Error—preservation of issues—failure to object

Although defendant contended that the trial court erred by admitting testimony indicating that he had spent time in prison, defendant failed to preserve this issue for appellate review or for plain error review.

2. Kidnapping—second-degree kidnapping—motion to dismiss—no additional restraint—first-degree sex offense—misdemeanor assault inflicting serious injury

The trial court erred by denying defendant's motion to dismiss the charge of second-degree kidnapping. There was no evidence in the record that the victim was subjected to any restraint beyond that inherent in defendant's commission of first-degree sex offense and misdemeanor assault inflicting serious injury.

Judge DILLON concurring in part and dissenting in part.

Appeal by defendant from judgments entered 5 February 2016 by Judge Henry W. Hight, Jr. in Durham County Superior Court. Heard in the Court of Appeals 25 January 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

Richard Croutharmel for defendant-appellant.

ZACHARY, Judge.

Nathaniel Malone China (defendant) appeals from judgments entered upon his convictions for felonious breaking and entering, second-degree kidnapping, first-degree sex offense, intimidating a witness, misdemeanor assault inflicting serious injury, and having attained the status of a habitual felon. On appeal, defendant argues that the trial court erred by admitting evidence that defendant committed these offenses shortly after being released from prison, and by denying defendant's

motion to dismiss the charge of second-degree kidnapping for insufficiency of the evidence. Upon careful review of defendant's arguments, in light of the record on appeal and the applicable law, we conclude that defendant has failed to preserve for appellate review the admissibility of testimony indicating that defendant had spent time in prison, and that the trial court erred by denying defendant's motion to dismiss the charge of second-degree kidnapping. Accordingly, we find no error in defendant's convictions for felonious breaking or entering, first-degree sex offense, intimidating a witness, misdemeanor assault inflicting serious injury, and having attained the status of a habitual felon. We vacate defendant's conviction for second-degree kidnapping and remand for correction of the judgments to reflect this.

I. Factual and Procedural Background

On 4 November 2013, the Durham County Grand Jury indicted defendant for first-degree kidnapping, felonious breaking or entering, and felonious assault inflicting serious bodily injury. The Grand Jury indicted defendant for first-degree sex offense, crime against nature, and intimidating a witness on 7 April 2014, and on 1 June 2015, defendant was indicted for being a habitual felon. On 26 January 2016, the State dismissed the indictment charging defendant with intimidating a witness and defendant agreed to proceed on that charge pursuant to a criminal bill of information. Prior to trial, the State dismissed the charge of crime against nature. The remaining charges against defendant came on for trial at the 26 January 2016 criminal session of Durham County Superior Court. Defendant did not present evidence at trial. The State's evidence tended to show, in relevant part, the following.

Nichelle Brooks and defendant began a romantic relationship in 2008. At some point before 2013, defendant was confined to prison. In 2012 or 2013, while defendant was in prison, Ms. Brooks began a romantic relationship with Mark.[1] Ms. Brooks did not visit defendant in prison; however, they sometimes talked on the phone and, during one of their phone calls, Ms. Brooks told defendant that she had a new boyfriend. In early October 2013, after defendant had been released from prison, he called Ms. Brooks and asked if they could resume their relationship. Ms. Brooks agreed to meet with defendant at her apartment to discuss their situation, in "the hope that he would just understand" her "decision in ending what we had and moving on." Shortly thereafter, defendant visited Ms. Brooks overnight at her apartment.

1. We refer to the complaining witness in this case by the pseudonym "Mark" for ease of reading and to protect his privacy.

After defendant's overnight stay, Ms. Brooks told Mark that she had previously had a relationship with defendant and asked Mark to stay away for a few days to enable Ms. Brooks to "get things in order" with defendant. Mark testified that in October 2013 he and Ms. Brooks had been dating for about a year. They did not discuss their past relationships and Mark was not aware that Ms. Brooks had been involved with defendant until she asked Mark to stay away for a few days.

On 14 October 2013, after Mark had absented himself from Ms. Brooks' apartment for several days, Ms. Brooks told Mark that things were "cordial" with defendant and that Mark could resume visiting Ms. Brooks at her home. Mark spent that night with Ms. Brooks at her apartment. On the morning of 15 October 2013, Ms. Brooks took her daughter to school and went to school at the Durham Beauty Academy, leaving Mark alone in the apartment.

Shortly after Mark awoke, he heard knocking at Ms. Brooks' door, and when he looked through a peephole in the door he saw two men whom he did not recognize. At trial, Mark identified one of the two men as defendant. Mark returned to the bedroom and hurriedly dressed for work. Mark heard banging noises and just as Mark finished dressing he heard a "boom, like the door was just kicked in." Defendant ran back to the bedroom cursing, and immediately punched Mark, who "never [had] a chance to hit him back." Defendant punched Mark "straight in the face" with his fist, and Mark fell onto the bed. Defendant "got on top of" Mark and continued punching him in the face while cursing at Mark. As a result of the beating, Mark felt "weak" and rolled over onto his face. While defendant was on the bed punching Mark in the back of the neck, he pulled Mark's pants down, spread his "anal cheek[s]" and "rammed" his erect penis into Mark's anus several times. Mark swung his arms and defendant jumped up and dragged Mark off the bed by his ankles. Defendant and his companion started "kicking and stomping" Mark, who curled up on the floor, trying to protect himself. When an opportunity arose, Mark ran out of the house and drove to his place of employment. When he arrived there, he asked for help and was taken to the hospital. As a result of the assault, Mark suffered physical injuries and emotional damage.

At the close of the State's evidence and again at the end of all the evidence, defendant moved for dismissal of the charges. The trial court agreed to submit the charge of misdemeanor assault inflicting serious injury to the jury, rather than the charge of felonious assault inflicting serious bodily injury, and denied defendant's motion with respect to the other charges. On 1 February 2016, the jury returned verdicts finding

defendant guilty of felonious breaking or entering, intimidation of a witness, second-degree kidnapping, first-degree sex offense, and misdemeanor assault inflicting serious injury. Defendant entered a plea of guilty to being a habitual felon. The trial court imposed a sentence of 150 days' imprisonment for misdemeanor assault inflicting serious injury, and consecutive prison sentences totaling 590 to 799 months for the other offenses. On 5 February 2016, the trial court conducted a resentencing proceeding, imposing the same sentences but arresting judgment on defendant's conviction for misdemeanor assault inflicting serious injury. Defendant gave notice of appeal in open court.

II. Admission of Evidence Concerning Defendant's Previous Incarceration

[1] At trial, Ms. Brooks testified that she had received phone calls from defendant while he was in a federal prison. She told the jury that she could recognize that defendant's calls were from a prison facility based on a recording that identified the call as coming from a federal prison. She identified a later call from defendant as originating from outside prison, because of the absence of this recording. On appeal, defendant argues that the trial court committed reversible error by admitting this testimony. Defendant contends that this evidence was not admissible under North Carolina Rule of Evidence 404(b), and that its admission was prejudicial to defendant.

"For us to assess defendant's challenge, however, he was required to properly preserve the issue for appeal by making a timely objection at trial." *State v. Joyner*, __ N.C. App. __, __, 777 S.E.2d 332, 335 (2015) (citing *State v. Thibodeaux*, 352 N.C. 570, 577, 532 S.E.2d 797, 803 (2000),[2] and N.C.R. App. P. 10(a)(1) (2015)). "[T]o preserve for appellate review a trial court's decision to admit testimony, 'objections to [that] testimony must be contemporaneous with the time such testimony is offered into evidence' and not made only during a hearing out of the jury's presence prior to the actual introduction of the testimony." *Ray*, 364 N.C. at 277, 697 S.E.2d at 322 (quoting *Thibodeaux*, 352 N.C. at 581-82, 532 S.E.2d at 806).

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2. "Following this Court's opinion in *Thibodeaux*, the General Assembly amended N.C. Rule of Evidence 103(a) to provide that once the trial court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. . . . However, in *State v. Oglesby* this Court held that the 2003 amendment to Rule 103(a) is unconstitutional[.]. . . Therefore, we consider the statements taken from *Thibodeaux* and referenced herein an accurate statement of the current law." *State v. Ray*, 364 N.C. 272, 277 n1, 697 S.E.2d 319, 322 n1 (2010) (internal quotation and citations omitted).

Defendant asserts on appeal that this "error was preserved for appellate review by [defendant's] pretrial motion to preclude evidence of his recent release from prison and his timely objection during trial to the State's proffer of testimony concerning his recent release from prison." It is true that defendant made a pretrial motion to exclude this evidence, and that he objected during trial to the State's intention to elicit the challenged testimony from Ms. Brooks. However, defendant made no objection to Ms. Brooks' testimony in the presence of the jury regarding defendant's incarceration. For example, we note the following excerpts from the transcript:

> PROSECUTOR: How often would [defendant] call?
>
> MS. BROOKS: Not . . . not often. . . .
>
> PROSECUTOR: Where was he calling you from?
>
> MS. BROOKS: He was calling from prison.
>
> . . .
>
> PROSECUTOR: Do you remember the last time that you spoke to him on the phone when he was calling from incarceration?
>
> MS. BROOKS: I want to say the summer[.] . . .
>
> . . .
>
> PROSECUTOR: When's the next time that you did speak to [defendant]?
>
> MS. BROOKS: I spoke with him [in] October, early October.
>
> . . .
>
> PROSECUTOR: Previously when you said that he was calling from custody, how do you know that he was in custody?
>
> MS. BROOKS: The recording that you get, you know, when you receive the call, the recording.
>
> PROSECUTOR: Does it identify something?
>
> MS. BROOKS: The actual recording identifies it as a federal prison or something like that.

Defendant did not object to any of the testimony quoted above. "It is insufficient to object only to the presenting party's forecast of the

evidence." *Ray*, 364 N.C. at 277, 697 S.E.2d at 322. In the present case, "defendant objected to the admission of [the challenged] evidence . . . during a hearing out of the jury's presence . . . but did not then subsequently object when the evidence was actually introduced at trial. Thus, defendant failed to preserve for appellate review the trial court's decision to admit [this] evidence[.]" *Id.* (internal quotation omitted). "And since defendant failed to specifically and distinctly allege plain error in his brief, he waived his right to have this issue reviewed under that standard." *Joyner*, __ N.C. App. at __, 777 S.E.2d at 335 (citing N.C.R. App. P. 10(a)(4), and *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012)). We conclude that defendant failed to preserve this issue for appellate review or for plain error review. Accordingly, we do not reach the merits of defendant's argument.

III. Sufficiency of the Evidence of Kidnapping

[2] Defendant argues next that the trial court erred by denying his motion to dismiss the charge against him of second-degree kidnapping. Defendant was indicted on a charge of first-degree kidnapping; however, prior to trial, the State elected to proceed on the lesser-included offense of second-degree kidnapping. On appeal, defendant asserts that there was no evidence that he restrained Mark beyond that degree of restraint that is inherent in the commission of a sexual or physical assault. After careful review of the transcript, in view of our jurisprudence on this issue, we conclude that defendant's argument has merit.

"When a defendant moves for dismissal, the trial court must determine whether the State has presented substantial evidence of each essential element of the offense charged and substantial evidence that the defendant is the perpetrator." *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997) (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) (citations omitted). "[I]f 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." *State v. Hunt*, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012) (internal quotation omitted). "In considering the motion, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence, and resolving any contradictions in favor of the State." *State v. Anderson*, 181 N.C. App. 655, 659, 640 S.E.2d 797, 801 (2007) (citation omitted).

In this case, the jury was instructed that it should find defendant guilty of second-degree kidnapping if the evidence established beyond a reasonable doubt that defendant had unlawfully restrained Mark for the purpose of terrorizing him. Defendant does not dispute that this was a valid instruction on the offense of kidnapping. N.C. Gen. Stat. § 14-39(a) (2015) provides, in relevant part, that:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of [one of the following statutorily defined purposes, including] . . . [d]oing serious bodily harm to or terrorizing the person so confined, restrained or removed[.]

"The offense of kidnapping, as it is now codified in N.C.G.S. § 14-39, did not take form until 1975, when the General Assembly . . . abandoned the traditional common law definition of kidnapping for an element-specific definition." *State v. Ripley*, 360 N.C. 333, 337, 626 S.E.2d 289, 292 (2006). However:

> In 1978, . . . [the Supreme Court of North Carolina] perceived that with this new definition came the potential for a defendant to be prosecuted twice for the same act. . . . Accordingly, this Court noted:
>
> > "It is self-evident that certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. . . . We construe the word 'restrain,' as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony."

Id. (quoting *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978)). "To be sure, more than one criminal offense may arise out of the same criminal course of action. When, for example, the kidnapping offense is a wholly separate transaction, completed before the onset of the accompanying felony, conviction for both crimes is proper."

State v. Boyce, 361 N.C. 670, 672-73, 651 S.E.2d 879, 881 (2007) (citing *Ripley*, 360 N.C. at 337-38, 626 S.E.2d at 292).

In the present case, defendant argues that there is no evidence in the record that Mark was subjected to any restraint beyond that inherent in defendant's commission of first-degree sex offense and misdemeanor assault inflicting serious injury. We agree.

We have closely reviewed the portion of the transcript in which Mark testified about defendant's assaults upon him, as well as the statements that Mark gave to the Durham Police Department. All of the relevant evidence describes a sudden attack, in which defendant broke down the door of Ms. Brooks' apartment, ran into the bedroom where Mark was dressing, and assaulted him. Mark testified that after defendant entered the bedroom, he immediately punched Mark hard enough to throw Mark back onto the bed. Defendant continued punching Mark while he committed a brief, brutal sexual attack. After the sexual offense occurred, defendant dragged Mark off the bed by his ankles and then defendant and defendant's companion kicked Mark in the head and body.

There is no evidence in the record suggesting that Mark was "restrained" beyond the degree of restraint required to overpower Mark and assault him. For example, there is no evidence that defendant bound Mark's hands or feet, or that defendant's friend restrained Mark to facilitate defendant's assault. The entire incident took no more than a few minutes, after which Mark ran out of the apartment. We conclude that there was insufficient evidence that Mark was subjected to any restraint beyond the restraint that is inherent in defendant's commission of the assaults on Mark. Therefore, the trial court erred by denying defendant's motion to dismiss the charge of second-degree kidnapping. Defendant was sentenced to consecutive prison terms totaling 590 to 799 months, to be served in the following order: first-degree sex offense, second-degree kidnapping, intimidating a witness, and felonious breaking or entering. Upon remand, the trial court should vacate defendant's conviction for second-degree kidnapping and correct the judgments so that the sentence for intimidating a witness is served at the expiration of the sentence for first-degree sex offense, and the sentence for felonious breaking or entering is served at the expiration of the sentence for intimidating a witness. The resulting sentence will total 502 to 681 months, which is approximately 41 to 56 years.

IV. Conclusion

For the reasons discussed above, we conclude that defendant failed to preserve the issue of the admissibility of evidence that defendant

committed these offenses shortly after being released from prison, and that the trial court erred by denying defendant's motion to dismiss the charge of second-degree kidnapping. Accordingly, we find no error in part, vacate in part, and remand to the trial court for correction of the judgments in accordance with this opinion.

NO ERROR IN PART, VACATED AND REMANDED IN PART.

Judges ELMORE concurs.

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

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

I concur with the holding in Section II of the majority opinion regarding the admission of evidence concerning Defendant's previous incarceration.

I disagree, however, with the majority's conclusion that the kidnapping conviction should be vacated. I conclude that there was sufficient evidence to sustain the jury's finding that Defendant restrained the victim *beyond* the restraint inherent to the sexual assault. Specifically, as the majority concedes, the evidence showed that *after* Defendant completed his sexual assault of the victim on the bed, he dragged the victim onto the floor. *Then*, while the victim was on the floor, Defendant restrained the victim by beating and kicking the victim, preventing the victim from getting up. Granted, this separate restraint did not last long. But this restraint which occurred while the victim was on the floor was not inherent to the sexual assault which was completed while the victim was on the bed. The restraint was a separate act. Therefore, the jury's verdict should not be disturbed.[1]

In conclusion, my vote is that Defendant received a fair trial, free from prejudicial error.

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1. I note that the jury *also* convicted Defendant of assault, for punching and kicking the victim while the victim was on the floor. Judge Hight, though, properly arrested judgment on the assault conviction, as the conduct supporting the jury's assault conviction was the same conduct that supported the jury's kidnapping conviction.

STATE OF NORTH CAROLINA, Plaintiff
v.
MARIO DONYE GULLETTE, Defendant

No. COA16-815

Filed 21 February 2017

Appeal and Error—preservation of issues—motion to suppress identification

Although defendant argued that the trial court erred by denying his motion to suppress any identifications conducted in violation of the Eyewitness Identification Reform Act, defendant failed to preserve this issue.

Appeal by defendant from judgment entered 25 January 2016 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Susannah P. Holloway, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

ZACHARY, Judge.

Mario Donye Gullette (defendant) appeals from the judgment entered upon his conviction of trafficking in heroin and having attained the status of a habitual felon. On appeal, defendant argues that the trial court erred by denying his motion to suppress "any in-court and out-of-court identifications conducted in violation of the Eyewitness Identification Reform Act." We have carefully reviewed the record and the transcript of the proceedings in this case, and conclude that defendant did not preserve this issue for appellate review. Accordingly, we do not reach the merits of defendant's argument. Given that this is the only basis upon which defendant has challenged his convictions, we conclude that defendant had a fair trial, free of reversible error.

I. Factual and Procedural Background

On 8 April 2014, Charlotte-Mecklenburg Police Officer Charlie Davis was acting as an undercover detective who was assigned to make a purchase of heroin from a suspected drug dealer. In the course of this investigation, Officer Davis met with defendant, who sold the officer heroin

for which Officer Davis paid $600. The day after the undercover drug buy, another officer showed Officer Davis a photograph of defendant and Officer Davis confirmed that the photograph depicted the person from whom he had purchased the drugs. Officer Davis had not met defendant prior to conducting the undercover purchase. However, during the sale, Officer Davis spent several minutes in close proximity to defendant, and identified defendant in court as the man who had sold him the heroin.

On 13 October 2014, the Mecklenburg County Grand Jury indicted defendant for trafficking in heroin by selling a quantity of heroin greater than four grams but less than fourteen grams. On 27 July 2015, defendant was indicted for being a habitual felon. On 15 December 2015, defendant filed a motion to suppress "both the in-court and out-of-court identification" of defendant by Officer Davis, on the grounds that when another officer showed Officer Davis a photograph of defendant, this constituted "a 'show up' procedure seeking identification of the defendant" that was "unnecessarily suggestive" and that was conducted "in deliberate disregard of the identification procedures required by the Eyewitness Identification Reform Act."

The charges against defendant came on for trial at the 18 January 2016 criminal session of Mecklenburg County Superior Court before the Honorable Hugh B. Lewis, judge presiding. Immediately prior to trial, the trial court conducted a hearing on defendant's suppression motion. The court heard testimony from the law enforcement officers involved in the investigation that resulted in defendant's arrest. The arguments of counsel focused on whether the provisions of the Eyewitness Identification Reform Act, N.C. Gen. Stat. § 15A-284.52 (2015), applied to the facts of this case. The State argued that under the version of N.C. Gen. Stat. § 15A-284.52 in effect at the time that Officer Davis was shown a photograph of defendant, "a single photo did not constitute a lineup and did not fall under the [Eyewitness Identification Reform Act]." The prosecutor cited several cases from this Court in support of this position. The prosecutor also argued that in a subsequent amendment to the Eyewitness Identification Reform Act, under which the Act would arguably be applicable to the situation in this case, the General Assembly explicitly stated that the amended version of the statute was "effective December 1st of 2015 and applies to anything after that date."

Defendant did not dispute the accuracy of the State's characterization of the history of the Eyewitness Identification Reform Act. Instead, defendant asserted that the State was asking the trial court to "use a technicality in the statute" and asserted that he did not "believe the intent of the legislature was merely to give somebody who was in court

on November 30th, versus someone who was in court on December 1st, different treatment." Thus, defendant argued that for equitable reasons the trial court should apply the current version of the statute to this case, despite the fact that the show-up took place prior to the effective date of the amendment.

After hearing the law enforcement officers' testimony and the arguments of counsel, the trial court ruled that it was denying defendant's motion to suppress. The court found that Officer Davis was an experienced law enforcement officer who had been in defendant's presence during the sale of heroin. Regarding the applicability of the Eyewitness Identification Reform Act, the trial court stated that:

> [T]he Court concludes that the identification by Detective Davis on April 9 of 2014 was appropriate and followed the law that was enforced on that date. The Court also finds that the photo lineup act, as is presently enforced and came into force on December the 1st, 2015, was not in place or applicable law at the time of the identification by Detective Davis.

During the trial, Officer Davis testified about his undercover purchase of heroin from defendant and about the photograph of defendant that he was shown the following day. Defendant did not object when Officer Davis identified defendant as the person from whom he had bought heroin, or when the officer testified about the photograph of defendant he had been shown the following day. Nor did defendant object when the State introduced the photograph into evidence.

Following the presentation of evidence, the arguments of counsel, and the instructions from the trial court, the jury returned a verdict finding defendant guilty of trafficking in heroin. Thereafter, defendant entered a plea of guilty to having the status of a habitual felon, and the trial court imposed a sentence of 88 to 118 months' imprisonment. Defendant gave notice of appeal in open court.

II. Preservation of Alleged Error

Defendant's sole argument on appeal is that the trial court erred by denying his motion to suppress Officer Davis' identification of defendant as the person from whom he made an undercover purchase of heroin. Defendant contends that the trial court erred by ruling that the current version of N.C. Gen. Stat. § 15A-284.52 was not applicable to the instant case. The State argues on appeal that "Defendant's argument on appeal should be barred" because defendant failed to preserve the issue for

review or to argue that it constituted plain error. We agree with the State and conclude that defendant has failed to preserve this issue for our review.

N.C. R. App. P. 10(a)(1) (2015) provides in relevant part that "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make" and that it "is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." "The law in this State is now well settled that 'a trial court's evidentiary ruling on a pretrial motion [to suppress] is not sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.' " *State v. Hargett*, __ N.C. App. __, __, 772 S.E.2d 115, 119 (quoting *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (citations omitted; emphasis in original)), *cert. denied*, 368 N.C. 290, 776 S.E.2d 191 (2015). "[T]o preserve for appellate review a trial court's decision to admit testimony, objections to [that] testimony must be contemporaneous with the time such testimony is offered into evidence and not made only during a hearing out of the jury's presence prior to the actual introduction of the testimony." *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (internal quotation omitted).

Defendant acknowledges on appeal that he failed to object to the admission at trial of Officer Davis' testimony identifying defendant as the person who had sold heroin to him, or to the evidence concerning the photograph that Officer Davis was shown. Defendant argues, however, that the trial court's alleged error "is preserved for normal appellate review." Defendant contends that "the error here is a failure by the trial court to apply the statutory mandate expressed in N.C. Gen. Stat. § 15A-284.52" and that "[v]iolations of statutory mandates are preserved for appellate review without the need for an objection to the trial court." In support of his position, defendant cites *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985). We conclude that *Ashe* does not support defendant's argument.

In *Ashe*, our Supreme Court discussed N.C. Gen. Stat. § 15A-1233(a), which provides in relevant part that "[i]f the jury after retiring for deliberation requests a review of . . . evidence, the jurors must be conducted to the courtroom" and that the trial court "in his discretion" could allow the jury to review the requested parts of the trial testimony or to reexamine exhibits that had been admitted into evidence. *Ashe*, 314 N.C. at 33-34, 331 S.E.2d at 656. The Court held that this statute "imposes two duties upon the trial court when it receives a request from the jury to review evidence. First, the court must conduct all jurors to

the courtroom. Second, the trial court must exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury[.]" *Ashe* at 34, 331 S.E.2d at 656. The trial court in *Ashe* failed either to summon the jurors to the courtroom or to exercise its discretion. The State argued that the defendant had waived review of the trial court's error by failing to object at trial. Our Supreme Court held that:

> As a general rule, defendant's failure to object to alleged errors by the trial court operates to preclude raising the error on appeal. . . . [W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial.

Ashe at 39, 331 S.E.2d at 659.

Defendant argues that, as in *Ashe*, the trial court "fail[ed] to apply [a] statutory mandate[.]" However, defendant fails to identify the "statutory mandate" to which he refers or any mandatory responsibility that the trial court neglected. In *State v. Hill*, 235 N.C. App. 166, 170, 760 S.E.2d 85, 88, *disc. review denied*, 367 N.C. 793, 766 S.E.2d 637 (2014), the defendant argued that "holding a charge conference is a statutory mandate," and this Court stated that " 'ordinarily, the word 'must' and the word 'shall,' in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory[.]' " (quoting *State v. Inman*, 174 N.C. App. 567, 570, 621 S.E.2d 306, 309 (2005)). With this in mind, we have carefully reviewed the text of N.C. Gen. Stat. § 15A-284.52. We observe that N.C. Gen. Stat. § 15A-284.52(d) provides in both the original and the amended versions of the statute that:

> (d) Remedies. -- All of the following shall be available as consequences of compliance or noncompliance with the requirements of this section:
>
> (1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress eyewitness identification.
>
> (2) Failure to comply with any of the requirements of this section shall be admissible in support of claims of eyewitness misidentification, as long as such evidence is otherwise admissible.
>
> (3) When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider

> credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications.

Given that this is the only part of the statute that refers to the trial court's responsibilities, we will assume that this section is the "statutory mandate" to which defendant refers. N.C. Gen. Stat. § 15A-284.52(d) mandates that, upon a trial court's review of the State's compliance or noncompliance with the statute: (1) the failure to comply with Eyewitness Identification Reform Act "shall be considered" by the court in adjudicating motions to suppress eyewitness identification; (2) evidence of the failure to comply with the Eyewitness Identification Reform Act, if otherwise admissible, "shall be admissible" to support claims of eyewitness misidentification; and (3) if evidence of compliance or noncompliance is offered at trial, the jury "shall be instructed" on the proper consideration of such evidence (emphasis added). These remedies appear to be mandatory and if, for example, a trial court found that the State had failed to comply with the Eyewitness Identification Reform Act in a given case, but then stated that it would not consider this fact in its determination of a defendant's suppression motion, that would be a violation of a statutory mandate.

However, the issue of a trial court's compliance with this part of the statute does not arise unless the court first reviews a party's compliance or noncompliance with the Eyewitness Identification Reform Act. In the present case, the trial court ruled that the Eyewitness Identification Reform Act did not apply to the facts of this case. The trial court did not consider evidence of compliance or noncompliance with the statute, did not make any findings or conclusions on this issue, and was not asked to admit evidence or to instruct the jury concerning the Eyewitness Identification Reform Act. Because the trial court ruled that, as a matter of law, the Eyewitness Identification Reform Act did not apply to this case, it never conducted the type of hearing on the Eyewitness Identification Reform Act that might have triggered the court's statutorily-mandated responsibilities arising from the statute. We conclude that the trial court did not violate a "statutory mandate" because the mandates of the statute arise only if a court determines that the Eyewitness Identification Reform Act *does* apply to a case and conducts the appropriate inquiry on the issue.

Defendant has not offered any other argument in support of his assertion that the trial court's alleged error was preserved for appellate review. We conclude that, by failing to object to the challenged evidence at the time it was introduced in the jury's presence, defendant has failed to preserve this issue for review. "And since defendant

failed to specifically and distinctly allege plain error in his brief, he waived his right to have this issue reviewed under that standard." *State v. Joyner*, __ N.C. App. __, __, 777 S.E.2d 332, 335 (2015) (citing N.C.R. App. P. 10(a)(4), and *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012)).

We also note that defendant, who does not acknowledge his failure to preserve the alleged error for appellate review, has not asked this Court to apply N.C. R. App. P. 2 in order to reach the merits of his argument.

> 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.

State v. Biddix, __ N.C. App. __, __, 780 S.E.2d 863, 868 (2015) (internal quotations omitted). Defendant has not requested that we invoke Rule 2, and we discern no "exceptional circumstances" that would warrant its application.

For the reasons discussed above, we conclude that defendant failed to preserve for appellate review the issue of the trial court's ruling on his suppression motion. As this is the only basis upon which he has challenged his conviction, we conclude that defendant had a fair trial, free of reversible error.

NO ERROR.

Judges ELMORE and DILLON concur.

STATE OF NORTH CAROLINA
v.
TERRENCE LOWELL HYMAN, DEFENDANT

No. COA16-398

Filed 21 February 2017

1. Criminal Law—motion for appropriate relief—claim raised at first opportunity

The trial court erred when considering a motion for appropriate relief in a first-degree murder prosecution by applying a procedural bar to defendant's exculpatory witness claim. One of the statutory grounds for denial of a motion for appropriate relief is that defendant was in a position earlier to adequately raise the issue but did not. While perhaps unartfully, defendant adequately raised the exculpatory witness claim when he was first in a position to do so. That the issue was never explicitly addressed thereafter should not bar defendant's claim.

2. Criminal Law—motion for appropriate relief—findings—not germane

The conclusion that defendant's claim in a motion for appropriate relief was meritless for lack of evidentiary support was not supported by the findings, which were not germane to defendant's claim. The issue involved an exculpatory witness claim involving a prior conversation between one of defendant's counsel and a State's witness and the counsel's contemporaneous notes.

3. Constitutional Law—ineffective assistance of counsel—failure to withdraw and testify

Defendant's representation by counsel was ineffective in a first-degree murder prosecution where one of his counsel had represented a State's witness in a prior unrelated probation matter; his counsel had a conversation with the witness in an investigative capacity prior to defendant's trial, outside the scope of her prior representation of the witness; the witness's prior statement to her about the identity of the shooter was witnessed only by counsel, who made notes; and counsel did not withdraw after she became a necessary witness so that she could testify.

4. Constitutional Law—ineffective assistance of counsel—motion for appropriate relief—prejudice

Defendant made the requisite showing of prejudice in a motion for appropriate relief regarding the failure of one of his counsel to

withdraw so that she could present evidence. In a case that came down to the credibility of witnesses, there was a reasonable probability that, had counsel withdrawn and testified about the prior inconsistent statement of a State's witness, the result would have been different.

Judge DILLON dissenting.

Appeal by defendant from order entered 12 May 2015 by Judge Cy A. Grant in Bertie County Superior Court. Heard in the Court of Appeals 5 October 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary Carla Babb and Nicholaos G. Vlahos, for the State.

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

ELMORE, Judge.

On 16 September 2003, Terrence Lowell Hyman (defendant) was convicted of first-degree murder and sentenced to life in prison without parole. After a series of post-trial motions and appeals in state and federal court, defendant filed a motion for appropriate relief in Bertie County Superior Court claiming, *inter alia*, that he was denied his right to effective assistance of counsel based upon his trial counsel's failure to withdraw and testify as a necessary witness. The trial court denied defendant's motion.

We allowed defendant's petition for writ of certiorari to review the trial court's order denying his motion for appropriate relief. Upon review, we hold the trial court erred in concluding that (1) defendant's exculpatory witness claim was procedurally barred under N.C. Gen. Stat. § 15A-1419(a); (2) defendant's exculpatory witness claim had no evidentiary support; and (3) defendant could demonstrate neither deficient performance nor prejudice which would entitle him to relief under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Reversed.

I. Background

On 30 July 2001, a Bertie County grand jury indicted defendant for the murder of Ernest Lee Bennett Jr., who was shot and killed during a brawl at a crowded nightclub. The trial court appointed Teresa Smallwood and W. Hackney High to represent defendant. He was tried

capitally at the 25 August 2003 Special Criminal Session in Bertie County Superior Court, the Honorable Cy A. Grant presiding.

At trial, the State offered testimony from two eyewitnesses, Robert Wilson and Derrick Speller, who both testified that defendant shot Bennett. Wilson testified that he saw defendant enter the nightclub with a .380 caliber handgun. A few seconds later, Wilson heard two gunshots inside and saw Bennett run out of the door. A man following Bennett hit him in the head with a bottle, knocking him out. As Bennett lay on the ground, Wilson saw defendant exit the nightclub and shoot Bennett four times.

Speller testified that defendant walked into the nightclub with a handgun and shot Bennett during the fight. Bennett ran toward the door, clenching his side as defendant continued to shoot. Speller followed out the main entrance where he saw Bennett lying on the ground. He watched defendant kneel over Bennett and shoot him again. As Speller ran toward his car, he heard more gunshots behind him. He turned and saw another man, Demetrius Jordan, shooting a nine-millimeter handgun into the air.

The State's medical examiner, Dr. Gilliland, testified that Bennett had four gunshot wounds and blunt force injuries to his scalp. Bennett was shot in the back of his head, the right side of his back, the left side of his back, and his left buttock. According to Dr. Gilliland, either of the two wounds to Bennett's back would have been fatal. A .380 caliber bullet was recovered from the wound to the right side of Bennett's back. Law enforcement found two .380 caliber casings inside the nightclub. More .380 caliber casings and bullets were recovered outside along with six nine-millimeter casings.

At the close of the State's evidence, defendant offered testimony from two witnesses, Lloyd Pugh (L. Pugh) and Demetrius Pugh (D. Pugh), who testified that defendant was not the shooter. L. Pugh, the owner of the nightclub, testified that he heard two gunshots ring out as he was trying to break up the fight. When the shots were fired, he was "looking at [defendant] telling him you all get out of here." Defendant did not have a gun. L. Pugh saw defendant and Bennett leave and heard more gunshots coming from outside. At that point or shortly thereafter, L. Pugh ran into defendant at the door as defendant was coming back inside to tend to his cousin, who had been knocked out during the fight. Defendant was still unarmed.

D. Pugh testified that he saw Demetrius Jordan shoot Bennett inside the nightclub with a .380 caliber handgun. Jordan shot Bennett again

as Bennett broke for the door and two more times outside. Jordan then retrieved a nine-millimeter handgun from his car and shot Bennett one last time before firing the remaining rounds into the air. D. Pugh never saw defendant with a gun. He testified that defendant had already left through the back door when Jordan first shot Bennett inside the nightclub.

Derrick Speller's Cross-Examination

When the State called Speller to testify at trial, Smallwood informed High for the first time that she had interviewed Speller. She previously represented Speller in an unrelated probation matter and, around that time, had spoken to him about defendant's case. During recess after Speller's direct examination, Smallwood retrieved a set of handwritten notes dictating their conversation:

> 11/20/01 Derrick Speller
>
> Saw the whole thing
>
> Demet had a .380 and a 9 mm.
>
> He shot the guy and then ran out the back door
>
> Somebody else shot at the guy with a chrome looking small gun but "I don't know who it was."
>
> "I heard Demetrius shot him again outside but I don't know for sure."
>
> "I think it was a 9 mm he (Demet) had outside.["]
>
> Never gave a statement to police because he hustled for Demet and Turnell and them niggers are lethal.
>
> Can you shoot me a couple of dollars.

Smallwood attempted to cross-examine Speller about their conversation to show that Speller had previously identified Demetrius Jordan as the shooter. Speller conceded that he spoke with Smallwood about the case before trial but denied making any of the statements reflected in her notes. He testified: "I told you at that time that I couldn't help you on this case, that I would harm [defendant] more than I could help him if I was brought on the stand to testify. That's the only conversation that you and I ever had about this case." The trial court did not allow Smallwood to show Speller her notes from the conversation or to admit the notes into evidence at trial.

First Appeal: Hyman I

After his conviction, defendant filed his first appeal with the North Carolina Court of Appeals. *State v. Hyman (Hyman I)*, No. COA04-1058,

2005 WL 1804345 (N.C. Ct. App. Aug. 2, 2005). As characterized by the Court, defendant argued that the trial court failed to conduct a hearing when it became aware of a potential conflict of interest on the part of Smallwood, who had previously represented Speller in an unrelated case. *Id.* at *4. The Court determined:

> Although the trial court was made aware of this representation, the trial court failed to conduct an inquiry and "'determine whether there exist[ed] such a conflict of interest that . . . defendant [would have been] prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the [S]ixth [A]mendment.'"

Id. at *5 (citing *State v. James*, 111 N.C. App. 785, 791, 433 S.E.2d 755, 758 (1993)). Because the Court could not "find from the face of the record that defendant's attorney's prior representation of Speller affected her representation of defendant," however, it remanded "for an evidentiary hearing to determine if the actual conflict adversely affected [Smallwood's] performance." *Id.* at *6 (citation and internal quotation marks omitted).

Evidentiary Hearing on Remand

The evidentiary hearing was held on 3 October and 2 November 2005 before Judge Grant. Defendant and his trial counsel, Smallwood and High, were all present. The trial court had determined it was in defendant's best interest to have new counsel for the hearing and appointed Jack Warmack to represent him.

Warmack had previously represented Telly Swain, a co-defendant charged with Bennett's murder. The State eventually dropped the first-degree murder charge as part of a plea agreement in which Swain pleaded guilty on two lesser offenses and agreed "to testify truthfully against any co-defendant upon request by the State." On Warmack's advice, Swain also gave a written statement to police implicating defendant in the murder but Swain did not testify at trial.

Warmack expressed concern over the potential conflict of interest arising from his prior involvement in the case. He informed defendant that he had represented Swain and contacted the State Bar. Warmack ultimately determined he had no conflict of interest because he viewed his role at the remand hearing as a limited one: "I didn't think my purpose was to establish that there were—there was no conflict, but to get what [Smallwood] had to say about it on the record so the Court of Appeals could determine whether in their opinion there was a conflict or

not." If his appointment had required him to conduct his own investigation to prove that Smallwood had an actual conflict of interest, Warmack explained, then he himself would have been "conflicted out."

At the evidentiary hearing, Smallwood testified about her interaction with Speller leading up to defendant's trial. Speller had retained Smallwood's law partner, Tonza Ruffin, to represent him on a probation violation matter and at some point Smallwood stepped in for Ruffin to enter a plea on defendant's behalf. Smallwood testified that the scope of her representation in the matter lasted "maybe five or ten minutes." During that time, Smallwood did not speak to Speller about defendant's case. She insisted "there was nothing as a result of my representation of [Speller] that I would have obtained regarding [defendant]." Smallwood explained that the conversation with Speller which she alluded to at trial "took place from an investigatory standpoint" after her representation of Speller and incident to her preparation for defendant's trial.

During a recess of the hearing, Judge Grant spoke with the deputy clerk of court about the dates of Speller's probation violation matter. The records indicated that Speller was served with an order of arrest on 18 July 2002 and he appeared in court for a hearing on 26 September 2002. Ruffin was listed as the attorney of record but Smallwood had represented Speller at the hearing. Smallwood was appointed to represent defendant on 14 May 2001.

The trial court entered an order on 28 November 2005 following the evidentiary hearing. In its order, the trial court found:

> 12. That Ms. Smallwood never spoke with Derrick Speller about his case prior to September 26, 2002 and only spoke with him five or ten minutes prior to the violation hearing.
>
> 13. That Attorney Smallwood during her five to ten-minute conversation with Derrick Speller never spoke with Derrick Speller concerning any matter relating to her representation of Terrence Hyman.
>
> 14. During her five to ten-minute conversation with Derrick Speller Attorney Smallwood did not obtain any information for or about Derrick Speller that she could have used to impeach or attack Derrick Speller's credibility as a witness during the trial of the defendant Terrence Hyman.

The court ultimately concluded that Smallwood's representation of defendant was not adversely affected by her previous representation of Speller.

Second Appeal: Hyman II

Defendant appealed the order to the North Carolina Court of Appeals, arguing that the trial court erred in concluding Smallwood's prior representation of Speller did not adversely affect her representation of defendant. *State v. Hyman (Hyman II)*, No. COA06-939, 2007 WL 968753, at *3 (N.C. Ct. App. Apr. 3, 2007). The Court affirmed the order because the uncontested findings showed, *inter alia*, that there was no overlap of representation, and that during her representation of Speller, Smallwood did not obtain any information about defendant from Speller that she could have used to impeach him at trial. *Id.* at *4–5. The North Carolina Supreme Court denied defendant's petition for writ of certiorari. *State v. Hyman*, 362 N.C. 685, 671 S.E.2d 325 (2008).

Writ of Habeas Corpus in U.S. District Court

Defendant filed a petition for writ of habeas corpus in the U.S. District Court for the Eastern District of North Carolina pursuant to 28 U.S.C. § 2254. *See Hyman v. Beck*, No. 5:08-hc-02066-BO (E.D.N.C. Mar. 31, 2010). Defendant maintained that his Sixth Amendment right to effective assistance of conflict-free counsel was violated. The state court's decision to the contrary, he argued, was an objectively unreasonable application of clearly established federal law to the facts of his case.

Granting defendant's petition, the court first concluded that defendant had exhausted "his state remedies for purposes of § 2254 because the North Carolina Court of Appeals [and] the North Carolina Supreme Court were given a 'full and fair opportunity' to consider the substance of his claim." The court focused its substantive discussion on whether Smallwood had a conflict of interest in that she could have served as a material witness at defendant's trial and, in her role as counsel, her questions on cross-examination could not be considered evidence. The attorney-client privilege, the court noted, was not at issue because the lower court found that Smallwood did not obtain any information from Speller about defendant during her representation of Speller.

Guided by *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the court concluded that defendant was entitled to relief and vacated his conviction. The court explained that Smallwood "became a material witness with a conflict of interest" when Speller "testified in direct contravention to a conversation she had with him and for which she had taken contemporaneous notes." Smallwood ignored that her testimony "may have changed the outcome of trial" and chose instead "to continue as counsel in light of the need to testify herself and proffer impeaching testimony."

Because "Smallwood's actual conflict of interest adversely affected her performance," defendant was denied his Sixth Amendment right to effective assistance of conflict-free counsel and any contrary conclusion by the state courts "was an objectively unreasonable application of clearly established federal law to the facts of his case."

Appeal to the U.S. Court of Appeals for the Fourth Circuit

The State appealed the district court's order granting the writ of habeas corpus, contesting both the substance and procedural posture of defendant's Sixth Amendment claim in federal court. *Hyman v. Keller*, No. 10-6652, 2011 WL 3489092, at *8 (4th Cir. Aug. 10, 2011). The State argued that defendant "procedurally defaulted federal review" because he "did not fairly raise the exculpatory witness component in the North Carolina courts." *Id.* at *8–9. The Fourth Circuit agreed that defendant had failed to exhaust his federal claim:

> [N]either the Court of Appeals nor the Supreme Court of North Carolina has directly confronted the procedural or substantive propriety of the exculpatory witness component. Instead, the court of appeals decisions in *Hyman I* and *Hyman II* each focused on the dual representation conflict issue, and the state supreme court summarily denied Hyman's petition for certiorari.
>
> Unfortunately, the basis for the North Carolina courts' lack of attention to the exculpatory witness conflict is unclear—perhaps they did not consider that component of Hyman's Sixth Amendment claim to be fairly presented, perhaps they meant to implicitly reject it on the merits, or perhaps they simply overlooked it.

Id. at *9–10. In reaching its disposition, the Fourth Circuit explained that dismissing without prejudice "mixed" habeas petitions, i.e., those involving both exhausted and unexhausted constitutional claims, "is no longer a feasible option for a federal court, in that the § 2254 petition could ultimately be adjudged time-barred under [the Antiterrorism and Effective Death Penalty Act of 1996]." *Id.* at *10. The court decided, based on the unusual circumstances of the case, "to employ the 'stay and abeyance procedure' approved by the Supreme Court in connection with unexhausted § 2254 claims." *Id.* (citing *Rhines v. Weber*, 544 U.S. 269, 275–78 (2005)). Accordingly, the court stayed the appeal "to provide the North Carolina courts with an opportunity to weigh in on the procedural and substantive issues." *Id.* at *11.

Motion for Appropriate Relief

After the Fourth Circuit's decision, defendant filed a motion for appropriate relief (MAR) in Bertie County Superior Court. In defendant's first and principal claim, characterized by the trial court as "Claim 1," he argued that his "Sixth Amendment right to effective, conflict-free counsel was violated because one of his trial attorneys was also a crucial defense witness who did not testify due [to] her conflict as his attorney." He separated his claim further into three components, maintaining that each independently entitled him to relief: (a) "Smallwood had a conflict between her duties to her former client, the State's witness, and her duties to [defendant] ('the prior representation component')"; (b) "Smallwood had a conflict in that she was a critical witness for [defendant] but could not testify because she was his attorney ('the witness component')"; and (c) "there was a conflict between [defendant's] interest in having Smallwood withdraw and present impeachment evidence against a key State's witness and Smallwood's own financial interest in remaining on [defendant's] case ('the financial component')."

An evidentiary hearing for defendant's MAR was held on 3 June 2014 before Judge Grant in Hertford County Superior Court.[1] Defendant was present, represented by attorneys Mary Pollard and Nicholas C. Woomer-Deters, and offered testimony from W. Hackney High, defendant's trial counsel; Tonza Ruffin, Smallwood's law partner; Andrew Warmack, defendant's counsel from the evidentiary hearing; and Ravi Manne, an attorney with North Carolina Prisoner Legal Services. Despite his efforts, defendant was unable to produce Smallwood as a witness. Smallwood was disbarred almost three and a half years after defendant's trial for separate misconduct and had since left the state.

Ruffin's testimony tended to authenticate Smallwood's notes and confirm Smallwood's purported conversation with Speller. Prior to defendant's trial, Ruffin was "under the impression that [Derrick] Speller had information that would be helpful to the case." She was familiar with Smallwood's handwriting and identified the notes dated 20 November 2001 with Speller's name at the top as those written by Smallwood. She did not remember being present when the notes were written but she was present when Speller and Smallwood met in the parking lot of her law office:

1. The State and defendant had both consented to a change of venue from Bertie County to Hertford County.

> A. I remember him coming having [sic] a conversation. I remember believing that he was going to be helpful to Ms. Smallwood. But I don't remember the exact conversation.
>
> THE COURT: Do you remember anything Teresa may have said to you after he left about what he may have said?
>
> A. Yes.
>
> THE COURT: Go ahead.
>
> A. I remember him—I mean, I remember Teresa saying that he claimed that he saw everything. I remember him —I don't remember her seeking him out. I remember him seeking her out saying that basically I can help you; I was there that night; I saw everything that went down.
>
> BY MS. ASBELL:
>
> Q. And that's your memory of what Ms. Smallwood told you?
>
> A. That's my memory of what Ms. Smallwood told me and that's my memory of his attitude when he was in the parking lot that day. But I can't tell you verbatim what he said in the parking lot. But he definitely wanted to be helpful in the case.

Ruffin later testified that Speller "came over on other occasions" but she did not participate in those meetings.

During Ruffin's cross-examination, the State presented a copy of Smallwood's time sheet, which showed no entry for 20 November 2001 and no entry for an interview of Derrick Speller. (There was a 30 November 2001 entry for "file review, witness interview.") Ruffin confirmed that attorneys submit their time sheets with Indigent Defense Services (IDS) to be paid and agreed that Smallwood's entries were otherwise "very specific." But when asked if she would list "every single thing that you do" for a client, Ruffin replied, "We try to but a lot of times we don't." Later at the hearing, Manne offered his own opinion about the time sheets: "I don't know that I would view the time sheets as controlling. I know for my time keeping [ ] I don't put everything on the exact date at the same time."

High testified about his professional relationship with Smallwood and how the events involving Speller unfolded at trial. High and Smallwood had some problems when they first began working on

defendant's case. There was even an occasion when Smallwood attempted to have High removed as co-counsel but they "were able to put that aside" and work together "fairly well" from that point forward. Prior to trial, High had some indication that Speller would testify against defendant. Because Speller never provided a written statement to police, however, High did not know "specifically what [Speller] was going to say."

High and Smallwood initially agreed that High would cross-examine Speller if the State called him as a witness. High explained that they had divided the witness list in a way "that would even out the work" but if Smallwood "had a particular knowledge of a witness or what their style was she might say well it's better for me to handle this one, why don't you get the next one." That plan changed in a "spur of the moment decision" when Smallwood revealed to High that she had previously spoken to Speller. High testified:

> We do our best to anticipate the witness order that the state will call the witnesses in. But you never know for sure and so it's always a crapshoot until you actually hear the District Attorney say the next witness who will be called will be so and so.
>
> So when [Derrick] Speller's name was called as the next witness in that manner, Ms. Smallwood kind of leaned over to me and said don't worry about this one, I've got it.

High recalled Smallwood leaving court during recess and returning from her office with several documents. She told High that she had notes from a prior conversation with Speller, and she would use her notes to impeach Speller on cross-examination.

The trial court also heard arguments at the hearing on the admissibility of Smallwood's testimony had it been offered at trial. The State argued that Smallwood's testimony would not have been admissible because once Speller denied the conversation, Smallwood was "stuck" with his answer and could not introduce extrinsic evidence as to what Speller allegedly told her. And even if she had withdrawn to take the stand, the extent of her permissible testimony would have been: "[Derrick] Speller told me something different than what he testified to." Defendant, in response, argued that Smallwood's testimony would have been admissible because it went to a material fact in issue, i.e., the identity of the shooter.

After the hearing, the trial court notified the parties in writing that it would enter an order denying defendant's MAR. As the sole basis for

its denial, the court concluded that "Smallwood could not have testified about Derrick Speller's prior inconsistent statement to her, and introduced her notes or the conversation where he made that statement, after Derrick Speller denied making the statement on cross-examination." The court thereafter adopted a forty-five-page order, prepared by the State, denying all claims within defendant's MAR.

Notably, the trial court made the following findings in its order regarding the alleged conversation between Smallwood and Speller:

> 32. Defendant presented no credible evidence that the conversation which Ms. Smallwood claimed she had with Speller ever took place.
>
> 33. Defendant presented no credible evidence that Defendant's MAR Exhibit 1 contained, as he purported, notes taken contemporaneously with any conversation between Ms. Smallwood and Speller.
>
> 34. Defendant presented no credible evidence that the purported conversation between Ms. Smallwood and Speller took place on the date appearing on Defendant's MAR Exhibit 1, i.e., November 20, 2001.
>
> 35. Given the evidence presented at the MAR evidentiary hearing, the Court cannot definitely find based only upon Defendant's MAR Exhibit 1 and Ms. Smallwood's cross-examination of Speller at Defendant's trial that Ms. Smallwood wrote the notes admitted as Defendant's MAR Exhibit 1 contemporaneously with any conversation she had with Speller; that the purported conversation took place on the date appearing on the exhibit, i.e., November 20, 2001; or that the conversation ever took place.

Although the court recognized the significance of Ruffin's testimony at the hearing, evidence that Smallwood's time sheet contained no entry for 20 November 2001 and that High did not learn about the conversation until trial both indicated to the court that the conversation never took place.

Regarding defendant's Claim 1(b) (the "exculpatory witness claim"), the trial court concluded that defendant's claim was procedurally barred under N.C. Gen. Stat. § 15A-1419(a) and, alternatively, without merit. Applying the standard set forth in *Strickland*, 466 U.S. at 687, the court concluded that defendant could demonstrate neither deficient performance nor prejudice based upon Smallwood's failure to withdraw and

testify as a witness. And to the extent *Sullivan*, 446 U.S. at 350, applied to defendant's exculpatory witness claim, the court concluded that the claim was still meritless because he "failed to present evidence establishing that any actual conflict of interest existed which had an adverse effect on Ms. Smallwood's representation of defendant."

Defendant filed a petition for writ of certiorari, which we allowed, seeking review of the trial court's order denying his MAR. Defendant contends that (1) he was not procedurally barred from raising the exculpatory witness claim and, alternatively, any failure to properly assert the claim in *Hyman I* was due to ineffective assistance of appellate counsel; (2) he was not procedurally barred from raising the dual representation claim and, alternatively, any failure to properly assert the claim in *Hyman II* was due to ineffective assistance of counsel owing to Warmack's conflict of interest; (3) the trial court's material factual findings were entered pursuant to an incorrect evidentiary standard and are not supported by the evidence; and (4) defendant was denied his right to effective assistance of counsel and is entitled to relief under *Sullivan* or, alternatively, under *Strickland*.

II. Discussion

We review the trial court's rulings on motions for appropriate relief "to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Steven*s, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). The trial court's findings of fact "are binding on appeal if they are supported by competent evidence." *State v. Morganherring*, 350 N.C. 701, 714, 517 S.E.2d 622, 630 (1999). The trial court's conclusions of law, however, " 'are fully reviewable on appeal.' " *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (quoting *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998)).

A.

[1] We first address whether the trial court erred in applying a procedural bar to defendant's exculpatory witness claim.

N.C. Gen. Stat. § 15A-1419(a) (2015) provides four grounds for the denial of a motion for appropriate relief, including: "Upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C. Gen. Stat. § 15A-1419(a)(3). Where such grounds exist, the trial court must deny

the motion unless the defendant can show (1) "good cause for excusing the grounds for denial" and "actual prejudice resulting from the defendant's claim"; or that (2) the "failure to consider the defendant's claim will result in a fundamental miscarriage of justice." N.C. Gen. Stat. § 15A-1419(b) (2015).

The statute clarifies that "good cause" exists only where "the defendant establishes by a preponderance of the evidence that his failure to raise the claim or file a timely motion was," among other reasons, due to "ineffective assistance of trial or appellate counsel." N.C. Gen. Stat. § 15A-1419(c)(1) (2015). And to demonstrate "actual prejudice," the defendant must show "by a preponderance of the evidence that an error during the trial or sentencing worked to the defendant's actual and substantial disadvantage, raising a reasonable probability, viewing the record as a whole, that a different result would have occurred but for the error." N.C. Gen. Stat. § 15A-1419(d) (2015). Finally, the trial court's failure to consider the otherwise barred claim results in "a fundamental miscarriage of justice" only if "[t]he defendant establishes that more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense." N.C. Gen. Stat. § 15A-1419(e)(1) (2015).

The trial court concluded that defendant's claim was procedurally barred under N.C. Gen. Stat. § 15A-1419(a)(3). In the record on appeal in *Hyman I*, defendant included the following assignment of error:

> 10. Defendant was denied the assistance of counsel because his attorney failed to withdraw from representation when it became apparent that she had a conflict of interest.

The trial court viewed defendant's tenth assignment of error as "a clear indication that defendant contemplated arguing an ineffective assistance of counsel claim based upon Ms. Smallwood's failure to withdraw and testify." In his appellate brief, however, defendant "did not identify what he is now squarely raising in Claim 1(b) as a ground for reversal on appeal." While "defendant made references in the body of his brief to Ms. Smallwood's failure to withdraw and testify," he did so under the following assignment of error: "The trial court erred in failing to conduct a hearing when the court became aware of a conflict of interest on the part of one of defendant's attorneys who had previously represented Derrick Speller, one of the State's witnesses." The trial court concluded, therefore, that defendant's claim was procedurally barred because he was in a position to adequately raise his claim in *Hyman I* but failed

to do so. The court further concluded that because defendant's claim was meritless, "the procedural bar has not been excused pursuant to N.C.G.S. § 15A-1419(b) by showing good cause and actual prejudice, or that a fundamental miscarriage of justice would occur for this Court's failure to review the barred claim."

An examination of defendant's "references" to the exculpatory witness claim within his first appellate brief, alluded to by the trial court, reveals the extent to which defendant attempted to raise the claim on appeal in *Hyman I*:

> Defense counsel Smallwood had a conflict of interest in that she was in possession of information which could be used to impeach Derrick Speller, one of the State's most crucial witnesses. This information consisted of statements he made to her implicating Demetrius Jordan and exonerating Defendant, which directly contradicted his testimony at trial. Although she chose to remain as counsel and used the information she acquired in her representation of Speller to impeach his testimony, rather than withdrawing as counsel and testifying as a witness, it is not at all clear that this was the correct decision. It is certainly arguable that the information she had to impart would have carried more weight had she been on the stand testifying under oath. Nor is it clear that Defendant was aware of the conflict and had acquiesced in counsel's actions.

Reviewing defendant's brief with the benefit of hindsight, it would have been more helpful had defendant argued his claim pursuant to the tenth assignment of error. Nevertheless, the foregoing excerpt from his brief and a fair reading of the cases cited for support therein, *see, e.g.*, *State v. Green*, 129 N.C. App. 539, 551–52, 500 S.E.2d 452, 459–60 (1998) (holding that trial court properly conducted an inquiry into conflict of interest owing to counsel's decision not to pursue line of questioning which could have required counsel himself to withdraw and testify), indicates that the Court could have addressed the claim as it was presented despite the formerly rigid rule of appellate procedure requiring assignments of error. While perhaps unartfully, defendant adequately raised the exculpatory witness claim when he was first in a position to do so. That the issue was never explicitly addressed thereafter—for whatever reason—should not bar defendant's claim under N.C. Gen. Stat. § 15A-1419(a), and the trial court erred in concluding otherwise.

B.

[2] Next, we address defendant's challenge to the trial court's material factual findings regarding the conversation between Smallwood and Speller.

The trial court found that defendant offered no credible evidence at the MAR hearing that Smallwood transcribed the handwritten notes contemporaneously with any conversation she had with Speller, that the purported conversation took place on 20 November 2001, or that the conversation ever took place. Based solely upon Smallwood's notes and her cross-examination of Speller at trial, the court also could not "definitely find" any of the foregoing had occurred, implying that Smallwood fabricated the evidence at trial. Relying on these findings, the court concluded that there was no evidence to support defendant's exculpatory witness claim.

At an evidentiary hearing on a motion for appropriate relief, "the moving party has the burden of proving *by a preponderance of the evidence* every fact essential to support the motion." N.C. Gen. Stat. § 15A-1420(c)(5) (2015) (emphasis added). As defendant points out, therefore, he was not required to "definitely" prove that Smallwood transcribed the handwritten notes contemporaneously with any conversation she had with Speller, that the purported conversation took place on 20 November 2001, or that the conversation ever took place. More importantly, that the court was unable to "definitely find" any of the foregoing occurred is not dispositive of defendant's exculpatory witness claim.

It is undisputed that, at the time of defendant's trial, Smallwood possessed evidence tending to show that Speller made a prior inconsistent statement concerning the identity of the shooter. The exculpatory witness claim raised in defendant's MAR was whether Smallwood's failure to withdraw and testify as to that alleged prior inconsistent statement constitutes ineffective assistance of counsel. Evidence that Smallwood was privy to a conversation in which Speller identified the shooter as someone other than defendant would have been both relevant and material had it been offered at trial. Admissibility is, of course, a separate issue but one that does not depend upon a preliminary finding by the court that a witness's testimony is credible. *See* N.C. Gen. Stat. § 8C-1, Rule 104(e) (2015) ("This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.").

If otherwise competent, therefore, Smallwood's testimony would have been admissible and within the purview of the jury to assign weight

and credibility thereto. *See State v. Scott*, 323 N.C. 350, 353, 372 S.E.2d 572, 575 (1988) ("The credibility of the witnesses and the weight to be given their testimony is exclusively a matter for the jury." (citing *State v. Wilson*, 293 N.C. 47, 235 S.E.2d 219 (1977))); *State v. Gamble*, ___ N.C. App. ____, ____, 777 S.E.2d 158, 165 (Oct. 6 2015) (No. COA15-71) ("The witness's credibility is a matter for the court when the only testimony justifying submission of the case to the jury is inherently incredible and in conflict with [the proponent's] own evidence." (citations and internal quotation marks omitted)). The jury could have believed Smallwood's testimony, in which case her failure to withdraw and testify would tend to support defendant's claim for ineffective assistance of counsel. Because the trial court's findings were not germane to the adjudication of defendant's exculpatory witness claim, they do not support its conclusion that defendant's claim is meritless for lack of evidentiary support.

C.

[3] Next, we address the substance of defendant's exculpatory witness claim and his challenge to the trial court's conclusions that he received effective assistance of counsel despite Smallwood's failure to withdraw and testify at trial.

Defendant maintains that he received ineffective assistance of counsel due to Smallwood's failure to withdraw as counsel and testify as to Speller's alleged prior inconsistent statement regarding the identity of the shooter. In her role as counsel, Smallwood's questions on cross-examination could not be considered evidence by the jury. Therefore, defendant argues, when Speller denied the prior inconsistent statement during cross-examination, Smallwood had an actual conflict of interest between continuing as counsel or withdrawing to testify as a necessary witness. Defendant contends that because Smallwood's actual conflict of interest adversely affected her performance as counsel, he is entitled to relief under *Sullivan*, 446 U.S. at 348. Alternatively, defendant claims he is entitled to relief under *Strickland*, 466 U.S. at 687, because Smallwood's decision to remain as counsel fell below an objective standard of reasonableness and prejudiced his defense.

A criminal defendant's Sixth Amendment right to counsel means "the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). Effective assistance of counsel includes a "right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (citations omitted). In counsel's role, he or she owes the client a duty of loyalty, which is "perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 688, 692.

To prevail on a claim of ineffective assistance of counsel, a defendant typically must show that "counsel's performance was deficient" and "the deficient performance prejudiced the defense." *Id.* at 687; *see also State v. Braswell*, 312 N.C. 553, 562–63, 324 S.E.2d 241, 248 (1985) (adopting the standard set forth in *Strickland* to review claims of ineffective assistance of counsel under the North Carolina Constitution). The U.S. Supreme Court has applied a different standard, however, to review claims of ineffective assistance of counsel based upon a conflict of interest. *Sullivan*, 446 U.S. at 349–50. Under *Sullivan*, a defendant who "shows that his counsel actively represented conflicting interests" and that "conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Id.*; *see also Mickens v. Taylor*, 535 U.S. 162, 172–73 (2002); *State v. Choudhry*, 365 N.C. 215, 219, 717 S.E.2d 348, 352 (2011). A presumption of prejudice arises because "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland*, 466 U.S. at 692.

The North Carolina Supreme Court has previously addressed whether an attorney's decision not to withdraw and testify as a witness for his client created an actual conflict of interest reviewable under *Sullivan* rather than *Strickland*. In *State v. Phillips*, 365 N.C. 103, 711 S.E.2d 122 (2011), the defendant moved to suppress evidence of his confession because "he was substantially impaired from drugs and alcohol and unable to understand the consequences of his actions when he waived his *Miranda* rights." *Id.* at 109–11, 711 S.E.2d at 130–31. The police chief, Gary McDonald, had apparently told the defendant's attorney, Bruce Cunningham, that the defendant was "stoned out of his mind" when he confessed to shooting four people. *Id.* at 115, 117, 711 S.E.2d at 133, 134. When Cunningham confronted Chief McDonald about the alleged statement on cross-examination and presented handwritten notes of the conversation, Chief McDonald testified that he did not recall making the statement. *Id.* at 117–18, 711 S.E.2d at 134–35.

The defendant appealed his conviction, arguing that he was deprived of his Sixth Amendment right to conflict-free counsel because Cunningham "failed to withdraw and testify as a witness for defendant, depriving him of conflict-free counsel." *Id.* at 116–17, 711 S.E.2d at 134. He claimed that "a withdrawal was necessary because attorney Cunningham remembered Chief McDonald making certain statements to Cunningham that Chief McDonald did not himself recall." And because Cunningham could not serve as both an advocate and a necessary

witness at trial, *see* N.C. St. B. Rev. R. Prof. Conduct 3.7 ("Lawyer as a Witness"), 2017 Ann. R. N.C. 1242, Cunningham had an "actual conflict of interest" which entitled the defendant to relief under *Sullivan*. *Id.* at 117–18, 711 S.E.2d at 135. Our Supreme Court concluded, however, that the defendant's claim should be reviewed under *Strickland*:

> The applicability of the *Sullivan* line of cases has been carefully cabined by the United States Supreme Court. "The purpose of our *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland* . . . is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." Here, unlike the circumstances posited in *Holloway* where counsel has been effectively silenced and any resulting harm difficult to measure, defendant has identified the single matter to which attorney Cunningham could have testified had he withdrawn as counsel. Because the facts do not make it impractical to determine whether defendant suffered prejudice, we conclude that *Strickland*'s framework is adequate to analyze defendant's issue.

Id. at 121–22, 711 S.E.2d at 137 (quoting *Mickens*, 535 U.S. at 176).

Guided if not bound by *Phillips*, we believe *Strickland* provides an adequate framework to review defendant's exculpatory witness claim. Despite Smallwood's prior representation of Speller, the record shows that the purported conversation between Smallwood and Speller "took place from an investigatory standpoint" in preparation for defendant's trial. Because that conversation was outside the scope of her representation, Smallwood would not have bound by a duty of confidentiality. By the same token, Smallwood was not "effectively silenced" from testifying about the conversation and the information she learned from Speller. As the facts of this case do not "make it impractical to determine whether defendant suffered prejudice," *Phillips*, 365 N.C. at 122, 711 S.E.2d at 137, we apply *Strickland*'s framework to evaluate defendant's exculpatory witness claim.

As stated above, *Strickland* requires a defendant to first show that "counsel's performance was deficient." *Strickland*, 466 U.S. at 687. To establish deficient performance, the defendant "must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.' " *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*,

466 U.S. at 688); *see also State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286, *cert. denied*, 549 U.S. 867 (2006).

The trial court concluded that defendant could not demonstrate deficient performance because Smallwood's testimony would not have been admissible at trial. And even if it would have been admissible, the court concluded, Smallwood could only have testified that "Demet had a .380" and "[h]e shot the guy and ran out the back door." We disagree.

Our common law rules have restricted the use of extrinsic evidence to impeach the credibility of a witness. As articulated in *State v. Stokes*, 357 N.C. 220, 581 S.E.2d 51 (2003), a case decided prior to defendant's murder trial, "when a witness is confronted with prior statements that are inconsistent with the witness' testimony, the witness' answers are final as to collateral matters, but where the inconsistencies are material to the issue at hand in the trial, the witness' testimony may be contradicted by other testimony." *Id.* at 226, 581 S.E.2d at 55 (citing *State v. Green*, 296 N.C. 183, 192–93, 250 S.E.2d 197, 203 (1978)); *see also* 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* §§ 159–61 (7th ed. 2011). If the prior inconsistent statement relates to a material matter, then it "may be proved by other witnesses without first calling [it] to the attention of the main witness on cross-examination." *Green*, 296 N.C. at 193, 250 S.E.2d at 203 (citations omitted). If it is collateral but tends to show bias, motive, or interest of the witness, the inquirer must first confront the witness with the "prior statement so that he may have an opportunity to admit, deny or explain it." *Id.*; *see also State v. Long*, 280 N.C. 633, 639, 187 S.E.2d 47, 50 (1972). If the witness denies making the statement, "the inquirer is not bound by the witness's answer and may prove the matter by other witnesses." *Green*, 296 N.C. at 193, 250 S.E.2d at 203.

It cannot seriously be disputed that the identity of the shooter was a material issue in defendant's murder trial. Smallwood, who possessed evidence of Speller's prior inconsistent statement regarding the shooter's identity, was not bound to accept Speller's answers on cross-examination. Smallwood's testimony, had it been offered, would have been admissible to impeach Speller by showing that he had previously identified Jordan as the shooter. And contrary to the trial court's conclusion, we do not believe such exculpatory evidence would have been inconsequential so as to justify Smallwood's failure to withdraw.

Smallwood's testimony would have also been admissible to show Speller's bias or interest in the trial. Jordan was initially charged with Bennett's murder and spent two years in jail before he was released.

Speller testified that he and Jordan "work[ed] the same job." After the charges against Jordan were dropped, he sent Speller to the district attorney to offer a statement implicating defendant in the murder. The trial court even expressed concern over this aspect of the case during the charge conference:

> I think Mr. Jordan's credibility is at issue in this case . . . . At least one of your witnesses—one of your very key witnesses . . . Derrick Speller testified that he came to you as a result of what Demetrius Jordan said to him, if I'm not mistaken. Demetrius Jordan told him to go see you. Had it not been for that he may not even have been involved in the case. So the question is, why is Demetrius Jordan running around rounding up witnesses for the State.
>
> At the same time . . . you have a situation where the State of North Carolina has dismissed very serious cases against Mr. Jordan—a case of second-degree murder—and allowed him to plea to something much less to the point where he is now out of jail . . . .

Speller testified at trial that he never gave a statement to police because "nobody never asked me." That explanation was different than what Smallwood had dictated in her notes: "[Speller] never gave a statement to the police because he hustled for Demet and Turnell and them niggers are lethal."

While the admissibility of Smallwood's testimony does not in and of itself establish deficient performance, the circumstances surrounding her decision to remain as counsel leads us to that conclusion. Smallwood was the only witness to Speller's prior inconsistent statement. Her questions to Speller could not be considered as evidence and, after her ineffective cross-examination, she became a necessary witness at trial with a duty to withdraw. *See* N.C. St. B. Rev. R. Prof. Conduct 3.7(a) ("A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness . . . ."), 2017 Ann. R. N.C. 1242. Her testimony undoubtedly related to a contested issue in the case and tended to discredit one of the State's two key witnesses. High could have remained as defendant's counsel and the court could have appointed a second attorney even if it meant declaring a mistrial. By failing to withdraw and testify, Smallwood's conduct fell below an objective standard of reasonableness and was deficient under *Strickland*.

[4] Next, we address whether defendant satisfied the requisite showing of prejudice for relief under *Strickland*. To show 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." *Strickland*, 466 U.S. at 694.

The trial court concluded that defendant could not establish prejudice in light of Smallwood's "effective cross-examination" of Speller, Wilson's testimony, and the State's cross-examination of D. Pugh based upon his prior inconsistent statement to law enforcement. We disagree.

If Smallwood had properly withdrawn, she could have testified that Speller, one of only two key witnesses for the State, had previously told her that it was Jordan—not defendant—who shot Bennett. She could have attacked Speller's credibility through his prior inconsistent statement and evidence of his interest in the trial. Her testimony tended to discredit nearly half the State's case and, in conjunction with the testimony of L. Pugh and D. Pugh, would have provided an evidentiary advantage to the defense.

Wilson, the only other witness to identity defendant as the shooter, had his own credibility issues. He had testified as a State's witness in the past and, during defendant's trial, revealed that he had been convicted of breaking and entering, two counts of second-degree burglary, larceny of a firearm, larceny of a motor vehicle, four counts of driving while license revoked, four counts of driving while impaired, two counts of injury to property, communicating threats, assault with a deadly weapon, and forgery and uttering—*all within the last ten years*. Judge Grant even remarked at the MAR hearing: "We all know Robert Wilson. . . . And a record like that, right, we know him."

The State's cross-examination of D. Pugh also does not foreclose a showing of prejudice. D. Pugh denied making a prior inconsistent statement to police, asserting that when he was arrested days after the murder on unrelated charges, police gave him a blank sheet of paper to sign and initial, which he did, and they later wrote out a statement implicating defendant. The statement was not introduced at trial, and despite the State's cross-examination, D. Pugh's testimony implicating Jordan as the shooter would nevertheless have bolstered Smallwood's impeachment evidence against Speller.

Finally, we agree with defendant that, as a practical matter, Smallwood's testimony could have rehabilitated her own credibility as an advocate at trial, which has been described as "[a] cardinal tenet of successful advocacy." *State v. Moorman*, 320 N.C. 387, 400, 358 S.E.2d 502, 510 (1987). Even from a cold record we can tell that Smallwood's

cross-examination was, in defendant's own words, "disastrous." Speller denied her every attempt to establish that he had given a prior inconsistent statement or that their conversation took place. His steadfast repudiation bolstered his own credibility and impeached Smallwood's credibility as an advocate. In a case that came down to the credibility of the witnesses, there is a reasonable probability that, had Smallwood withdrawn and testified as to Speller's prior inconsistent statement, the result would have been different.

III. Conclusion

We conclude that defendant was denied his right to effective assistance of counsel based upon Smallwood's failure to withdraw and testify as a necessary witness at trial. Because defendant is entitled to relief under Strickland on his exculpatory witness claim, we need not address his remaining arguments to this Court. The trial court's order denying his MAR is reversed.

REVERSED.

Judge HUNTER, JR. concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

My vote is to affirm Judge Grant's order denying Defendant's motion for appropriate relief ("MAR"). Therefore, I respectfully dissent.

Defendant was charged with the murder of Ernest Bennett, who was shot and killed at a nightclub. At Defendant's trial, the State's evidence included the testimony of two eyewitnesses, both of whom stated that they saw Defendant shoot the victim. Defendant's evidence included the testimony of an eyewitness who stated that he saw *another* man, Demetrius Jordan, shoot the victim. The jury found Defendant guilty, and Defendant's conviction was upheld by this Court in a prior appeal.

More recently, Defendant filed an MAR for a new trial. Defendant's MAR was denied by the trial court, and Defendant appealed.

Defendant's arguments at his MAR hearing and on appeal concern an alleged conversation that one of Defendant's attorneys, Teresa Smallwood, had with one of the State's witnesses prior to trial. On direct, after the State witness testified that he saw Defendant shoot the victim, he further testified that he had spoken with Ms. Smallwood about the

shooting prior to the trial. Ms. Smallwood cross-examined the State witness about the prior conversation, suggesting during her questioning that the State witness had told her that he had seen Demetrius Jordan, and not Defendant, shoot the victim. Ms. Smallwood also attempted to show the State witness her "notes" from their alleged conversation; however, the trial court did not allow her to do so. Throughout Ms. Smallwood's cross-examination, the State witness remained steadfast in his testimony that he saw Defendant kill the victim.

Defendant essentially argues two points in this MAR phase. First, he makes an "exculpatory witness claim," contending that Ms. Smallwood should have withdrawn and then offered testimony to impeach the testimony of the State witness. Second, he makes an ineffective assistance of counsel ("IAC") claim, contending that Ms. Smallwood should have withdrawn and testified and that his appellate attorney failed to argue this point in the first appeal.

I. Exculpatory Witness Claim

The State contends that Defendant's exculpatory witness claim is procedurally barred because the claim could have been raised in Defendant's prior appeal. The majority concludes that Defendant *did* raise this claim, though inartfully, in his appellate brief in the prior appeal. However, our Court apparently did not recognize that the claim was being argued in the prior appeal, as our Court did not address the claim in its opinion.

My view is that Defendant's exculpatory witness claim is barred in either case. That is, if Defendant's "inartful" brief *failed* to make an exculpatory witness claim, then Defendant is procedurally barred because he could have raised it. Alternatively, if Defendant's brief *did* raise an exculpatory witness claim, Defendant is still procedurally barred because he failed to raise it through a petition for rehearing to this Court following the issuance of our prior opinion, which ostensibly ignored his claim. Our Appellate Rule 31 provides that a party may file a petition for rehearing after an opinion to argue "the points of fact or law that, in the opinion of the petitioner, the [Court of Appeals] overlooked or misapprehended and shall contain such argument in support of the petition as petitioner desires to present." N.C. R. App. P. 31. However, Defendant did not petition this Court for rehearing to consider his exculpatory witness claim that he now contends we overlooked.

Defendant argues that he was still entitled to have his exculpatory witness claim reviewed in an MAR hearing, notwithstanding that he could have raised it in the prior appeal. Specifically, he contends that

the trial court's failure to review his claim resulted in a fundamental miscarriage of justice. We disagree.

Here, Defendant has failed to establish that "more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense[.]" N.C. Gen. Stat. § 15A-1419(e)(1). As discussed more fully in the IAC section below, Defendant did not present evidence to show exactly what Ms. Smallwood would have said had she taken the stand. Even if she had testified that she remembered the State witnesss informing her that he did not see Defendant shoot the victim, I believe that it still would not have been unreasonable for the jury to convict. The jury could have lent very little weight to Ms. Smallwood's testimony; *see Ward v. Carmona*, 368 N.C. 35, 37, 770 S.E.2d 70, 72 (2015) ("The function of the jury is to weigh the evidence and determine the credibility of any witnesses."); for instance, her timesheets do not reflect that she had any interaction with the State witness on the day that her "notes" indicate that she met with him. In addition, the testimony of the State witness was corroborated by the testimony of another eyewitness.

II. Ineffective Assistance of Counsel Claim

I do not believe that the trial court erred in its conclusion regarding Defendant's IAC claims. Defendant failed to present evidence at the MAR hearing to show a reasonable probability that a different result would have occurred had Ms. Smallwood withdrawn and then attempted to testify *or* had his appellate counsel filed a petition for rehearing with this Court to consider his exculpatory witness claim.

To establish reasonable probability, it was Defendant's burden at the MAR hearing to show exactly what the substance of Ms. Smallwood's testimony would have been. Otherwise, it is impossible on review to determine whether Ms. Smallwood's testimony would have been admissible and what impact it might have had. But as Judge Grant points out in his Order, Defendant did not present Ms. Smallwood as a witness at the MAR hearing. No one else testified at the MAR hearing with any detail as to what Ms. Smallwood would have stated had she been allowed to take the stand. There is no competent evidence in the record to demonstrate that Ms. Smallwood had *any* independent recollection that the State witness told her that he saw someone other than Defendant kill the victim *or* whether her "notes" from the alleged conversation would have refreshed her memory. It may be that Ms. Smallwood would have offered admissible, persuasive testimony to impeach the State witness.

However, Defendant simply failed to meet his burden of proof to show as much at the MAR hearing.

At the MAR hearing, Defendant did offer a copy of the "notes" which Ms. Smallwood attempted to show the State witness at trial. However, these notes are not admissible to show how Ms. Smallwood might have testified. The notes do not suggest that the State witness told Ms. Smallwood that he saw Demetrius Jordan fire the fatal shot. Rather, the notes suggest, at best, that the State witness told Ms. Smallwood that he did not see who fired the fatal shot, after Demetrius Jordan had fled the scene.[2]

I conclude that Judge Grant's conclusions are supported by his findings. Accordingly, my vote is to affirm the trial court's order.

2. The State stresses that Judge Grant found that Defendant, at the MAR hearing, failed to produce any credible evidence that the alleged conversation between Ms. Smallwood and the State witness ever took place. However, I do not view as relevant whether Judge Grant believed the conversation took place. Rather, what is relevant is how Ms. Smallwood *would have testified* concerning the alleged conversation, leaving it *to the jury* to make any credibility determination regarding what, if anything, the State witness told Ms. Smallwood prior to trial.

TOWN OF BELVILLE, PLAINTIFF
v.
URBAN SMART GROWTH, LLC, AND MICHAEL WHITE, DEFENDANTS

No. COA16-817

Filed 21 February 2017

Arbitration and Mediation—arbitration—belatedly demanded —waiver

The trial court did not err by concluding that plaintiff had waived its right to compel arbitration where defendant had expended significant resources to prepare for litigation before plaintiff belatedly demanded arbitration.

Appeal by plaintiff from order entered 13 April 2016 by Judge Gary E. Trawick in Brunswick County Superior Court. Heard in the Court of Appeals 26 January 2017.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Andrew L. Rodenbough and Charles S. Baldwin, IV, and Eldridge Law Firm, PC, by James E. Eldridge, for plaintiff-appellant.

Hamlet & Associates, PLLC, by H. Mark Hamlet, for defendant-appellee.

BERGER, Judge.

The Town of Belville ("Plaintiff") appeals the April 13, 2016 order entered by the Honorable Gary Trawick in Brunswick County Superior Court. The order denied Plaintiff's motion to compel Urban Smart Growth, LLC ("Defendant") to submit to binding arbitration and to stay all other proceedings in the dispute between these parties. Plaintiff argues in this interlocutory appeal that it has the contractual right to demand arbitration. However, after careful review, we affirm the trial court's order denying this motion because Plaintiff took actions contrary to its contractual rights and waived any right to arbitration.

Factual & Procedural Background

In October 2007, Plaintiff entered into an agreement ("Agreement") with Defendant concerning a revitalization project in the town of Belville, North Carolina. The project would include a "large-scale mixed use development to be constructed in multiple phases extending over

a period of 20 years, and which may include multi-family homes and/or other residential uses; professional space; recreational and/or entertainment events park; and, a multi-purpose municipal building that will include a gathering hall and administrative offices."

Pursuant to Section 8.05 of the Agreement, any dispute, claim or controversy between the parties was to be resolved first through negotiation, and then through arbitration. This section set forth the necessary procedures, requirements and time-frames to conduct arbitration. Either party could initiate negotiations by notifying the other party in writing the subject of the dispute and the relief sought. The party that received such a writing had ten days to respond with their position on and recommended solution to the dispute. If this did not resolve the dispute, then a representative of each party would meet within 30 days to attempt a resolution. If at this point there is still no resolution, the matter would be resolved through binding arbitration. Following arbitration, the party who was determined to be in default by breaching the Agreement had 120 days to cure or begin the process to cure any such default.

On May 30, 2013, Plaintiff notified Defendant by letter that it was in default, and enumerated the reasons for default. Plaintiff further notified Defendant that, because of this default, Plaintiff wished to either renegotiate or terminate the Agreement. Plaintiff had taken the first step outlined by Section 8.05 to resolve any dispute, but the parties never engaged in negotiations or arbitration.

On July 7, 2015, more than two years later, Plaintiff filed an Application and Order Extending Time to File Complaint to assert claims against Defendant for breach of contract by non-performance and breach of contract by repudiation of the Agreement. Plaintiff stated it was seeking damages in excess of $100,000.00, a jury trial, attorney's fees, and costs, and any further relief the court determined to be necessary and proper. The order extending time was granted.

On July 27, 2015, Plaintiff filed a complaint in this action alleging breach of contract, non-performance, anticipatory repudiation, and wrongful interference with contract. Plaintiff's prayer for relief included compensatory damages, attorney's fees, costs, and a demand for a jury trial.

On September 24, 2015, Defendant filed an Answer to Plaintiff's Complaint and Counterclaims. Defendant asserted multiple defenses, along with a counterclaim in which it alleged breach of contract and breach of duty of good faith by Plaintiff, and sought specific performance.

On October 7, 2015, Plaintiff and Defendant filed a joint motion for Recommendation for Designation of Exceptional Civil Case pursuant to Rule 2.1 of the General Rules of Practice for Superior and District Courts due to the complex evidentiary and legal issues involved in the case, as well as the voluminous amount of pretrial discovery anticipated by the parties. The Honorable Ola M. Lewis, Senior Resident Superior Court Judge for Brunswick County, entered an order on October 8, 2015, recommending the designation of this case as exceptional to the Honorable Mark D. Martin, Chief Justice of the North Carolina Supreme Court. On October 13, 2015, Chief Justice Martin ordered that the case be designated as exceptional pursuant to Rule 2.1, and also ordered that the Honorable Gary E. Trawick be assigned to handle all matters relating to the case.

On November 25, 2015, Plaintiff filed its reply to Defendant's counterclaims, asserting its defenses, and again requesting a jury trial. Counsel for Defendant forwarded a proposed Discovery Plan, Consent Confidentiality Order, and Scheduling Order to Plaintiff's counsel on December 30, 2015. Counsel for both parties met on February 10, 2016 to discuss this case. It was at this meeting that Plaintiff initiated a discussion of whether mediation and arbitration would be in the parties' interest. Plaintiff, however, did not assert its right to arbitration at this time. Defendant, anticipating continued litigation, moved forward with discovery by serving Plaintiff with Request for Admissions, Interrogatories, Requests for Production of Documents, and a Notice to Take Depositions.

On February 17, 2016, over 32 months after Plaintiff alleged it had notified Defendant of default, and over seven months after Plaintiff had instituted this action, Defendant received a letter from Plaintiff in which Plaintiff gave notice that it would be initiating negotiations pursuant to Section 8.05 of the Agreement.

The following day, Plaintiff filed and served Defendant with a Motion to Compel Arbitration and Stay Proceedings. Judge Trawick entered an order on March 14, 2016, staying the proceedings until a hearing could be held on the Motion.

In preparation for the hearing on the Motion to Compel Arbitration, Defendant served Plaintiff with a brief in opposition to its motion. Attached to the brief were affidavits of both Daniel L. Brawley and Jessica S. Humphries, counsel for Defendant, that reflected the amount of attorney's fees expended by Defendant in preparation for this litigation.

Plaintiff did not object to or contest the sufficiency of these affidavits at the hearing. At the conclusion of the hearing, Judge Trawick denied Plaintiff's motion, and asked that amended affidavits be submitted to the court that set forth with more specificity the actions Defendant had taken since the previous September.

An order was entered on April 13, 2016 denying Plaintiff's Motion to Compel Arbitration. It is from this order that Plaintiff timely appeals.

Analysis

We must initially note that, even though an order denying a party's motion to compel arbitration is interlocutory, "[it] is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991) (citing *Sims v. Ritter Constr., Inc.*, 62 N.C. App. 52, 302 S.E.2d 293 (1983); N.C. Gen. Stat. §§ 1-277(a), 7A-27(d)(1) (1991)).

Plaintiff contends that the trial court erred in concluding that Plaintiff had waived its right to compel arbitration. Plaintiff specifically alleges that the evidence submitted by Defendant to substantiate the expenditures preparing for continued litigation was insufficient to support the court's findings. Plaintiff also argues that the trial court erred in concluding that the attorney's fees incurred by Defendant constituted sufficient prejudice for a finding that Plaintiff had waived its right to compel arbitration.

The trial court based its denial of Plaintiff's motion on the following conclusions of law:

> 1. A party has waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party is prejudiced by the order compelling arbitration.
>
> 2. The [Plaintiff] has waived any right to arbitration of the claims in this action by virtue of (a) its delay in demanding arbitration; (b) its actions taken inconsistent with a right to arbitration; (c) seeking designation of this case as [an] exceptional case under Rule 2.1 of the General Rules of Practice; (d) seeking significant involvement of the judiciary, and (e) the prejudice that would result to [Defendant] if the court were to order arbitration.

With regard to the trial court's findings of fact supporting these conclusions of law, Plaintiff specifically challenges the following findings as not being supported by the evidence:

> 27. [Plaintiff] has taken numerous actions inconsistent with any right to arbitration, to wit, instituting this action, making five filings in this action without any mention of arbitration but rather in two (2) filings requesting a jury trial, actively seeking a Rule 2.1 designation, and actively requesting and determining the availability of, a Special Judge to preside over this action.
>
> 29. An Order compelling arbitration would be prejudicial to [Defendant] in that it has incurred costs that it would not have incurred had [Plaintiff] not delayed in making its demand for arbitration. Those costs exceed $34,600 and relate to: participating in the process of the Rule 2.1 designation, reviewing the reply, communicating with opposing counsel, co-counsel, and client concerning litigation matters, preparing the Discovery Plan, Consent Confidentiality Order, and Scheduling Order, conference with opposing counsel, dealing with the proposed stay order, reviewing and responding to the Motion to Compel Arbitration and Stay Proceedings and Brief, and representing [Defendant] at the hearing on the Motion to Compel Arbitration and Stay Proceedings.

"Findings of fact, when supported by any evidence, are conclusive on appeal," *Fairchild Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 465, 98 S.E.2d 871, 876 (1957) (citations omitted), "even when there may be evidence to the contrary." *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980) (citations omitted). "While facts found below which are supported by the evidence are conclusive on this Court, we are not bound by the inferences or conclusions that the trial court draws from them." *Prime South Homes*, 102 N.C. App. at 258, 401 S.E.2d at 825 (citation omitted). "In accordance with these principles, we must determine whether there is evidence in the record which would support the trial court's findings of fact and if so, whether those findings of fact support the conclusion that plaintiff has waived its right to compel arbitration." *Id.*

In North Carolina, parties are free to contract and bind themselves to any terms that are not contrary to the public policies of this state or prohibited by statute. *Hlasnick v. Federated Mut. Ins. Co.*, 353 N.C.

240, 242-43, 539 S.E.2d 274, 276 (2000). In fact, North Carolina has a strong public policy in favor of resolving disputes through alternative dispute resolution mechanisms, such as arbitration. *See Prime South Homes*, 102 N.C. App. at 258, 401 S.E.2d at 825 (1991) ("[T]here exists in North Carolina a strong public policy in favor of settling disputes by arbitration.").

"Because of the strong public policy in North Carolina favoring arbitration, … courts must closely scrutinize any allegation of waiver of such a favored right." *Cyclone Roofing Co. v. Lafave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984) (citations omitted). A party has impliedly waived its contractual right to arbitration only if, by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration. *Id.* "A party may be prejudiced if, for example, ... by reason of delay, a party has taken steps in litigation to its detriment or expended significant amounts of money thereupon." *Id.* at 229-30, 321 S.E.2d at 876-77 (citations omitted).

Because Defendant has expended significant amounts of money in defense of Plaintiff's initiation of this suit, before Plaintiff belatedly demanded arbitration, we affirm the trial court's order based upon the prejudice to Defendant. Of the two findings of fact to which Plaintiff objects, the evidence which supports Findings 27 and 29 can be found in affidavits filed by Defendant in this action.

Defendant submitted affidavits of Daniel L. Brawley and Jessica S. Humphries which demonstrate that Defendant incurred costs in excess of $34,600.00 from the time of service of its Answer and Counterclaims to the Motion to Compel Arbitration. As the trial court detailed in Finding 29, Defendant did in fact "incur[ ] costs that it would not have incurred had [Plaintiff] not delayed in making its demand for arbitration." The evidence before the trial court tended to show that more than $34,600.00 was expended "in participating in the process of the Rule 2.1 designation, reviewing the reply, communicating with opposing counsel, co-counsel, and client concerning litigation matters, preparing the Discovery Plan, Consent Confidentiality Order, and Scheduling Order, conference with opposing counsel, dealing with the proposed stay order, and reviewing and responding to the Motion to Compel Arbitration and Stay Proceedings and Brief." The trial court concluded that, because Defendant had expended significant resources to prepare for litigation, an order compelling arbitration would result in prejudice to the Defendant.

Here, as in *Prime South Homes*, "[t]he accrual of these costs was by reason of [P]laintiff's delay in demanding arbitration and would not have been incurred had [P]laintiff made a timely demand." *Prime South Homes*, 102 N.C. App. at 261, 401 S.E.2d at 827.

Conclusion

In conclusion, the trial court's findings of fact are supported by the evidence and support its conclusions of law. Therefore, we affirm the judgment of the trial court that Plaintiff has impliedly waived its right to compel arbitration.

AFFIRMED.

Chief Judge McGEE and Judge DAVIS concur.

OLLIE WILLIAMS JR., PLAINTIFF

v.

RAMON ROJANO (BOTH PERSONALLY AND IN HIS ROLE OF FORMER DIRECTOR OF HUMAN SERVICES); REGINA Y. PETTEWAY (INTERIM DIRECTOR OF WAKE COUNTY HUMAN SERVICES); PATRICIA BAKER (BOTH PERSONALLY AND IN HER ROLE AS SOCIAL SERVICES DIRECTOR); LOUIS JACKSON; TOMIKO HICKS; WAKE COUNTY; WAKE COUNTY DEPARTMENT OF HUMAN SERVICES; WAKE COUNTY DIVISION OF SOCIAL SERVICES; AND SYSTEMS & METHODS, INC., D/B/A NORTH CAROLINA CENTRALIZED COLLECTIONS, DEFENDANTS

No. COA16-6

Filed 21 February 2017

1. Statutes of Limitation and Repose—excess garnishment of wages—back child support—continuing wrong—federal action

The statute of limitations barred plaintiff's claims arising from the excess garnishment of wages for back child support where plaintiff was or had reason to be aware of the violation when he received his first wage-garnished pay check, resulting in the three-year statute of limitations running approximately two years before the action was filed. The continuing wrong action does not apply to actions under 42 U.S.C. § 1983.

2. Constitutional Law—North Carolina Constitution—excess garnishment of wages

The trial properly dismissed claims under the North Carolina Constitution for the excess garnishment of wages for back child support where there were adequate state remedies.

3. Statutes of Limitation and Repose—excess garnishment—continuing wrong

Plaintiff's state claims for trespass to chattels, conversion, and negligence arising from the excess garnishment of wages for back child support were barred by the statute of limitations. The continuing wrong doctrine did not apply because the excess garnishment constituted continuing ill effects from the original garnishment, not continual violations.

4. Fraud—constructive—excess garnishment of wages—no fiduciary relationship

The trial court did not err by granting defendants' motion to dismiss plaintiff's claims for constructive fraud/breach of fiduciary duty by finding that plaintiff's complaint failed to state a claim upon which relief could be granted. The courts in North Carolina have not found a fiduciary relationship where the relationship between the parties is that of debtor-creditor.

5. Appeal and Error—objection below—no ruling obtained

Plaintiff's contentions concerning the allegations of opposing counsel and evidence were not considered on appeal where plaintiff did not receive a ruling on his objection below.

Appeal by plaintiff from order entered 13 July 2015 by Judge G. Bryan Collins Jr. in Wake County Superior Court. Heard in the Court of Appeals 24 May 2016.

Kisala Watkins Law Group, PLLC, by Andrew J. Kisala, for plaintiff-appellant.

Office of the Wake County Attorney, by County Attorney Scott W. Warren and Senior Assistant County Attorney Allison Pope Cooper, for defendant-appellees Ramon Rojano, Regina Y. Petteway, Patricia Baker, Louis Jackson, Tomiko Hicks, Wake County, Wake County Department of Human Services, and Wake County Division of Social Services.

Batten Lee PLLC, by Arienne P. Blandina for defendant-appellee Systems & Methods, Inc., d/b/a North Carolina Centralized Collections.

BRYANT, Judge.

Where the trial court did not err in dismissing plaintiff's claims for constructive fraud/breach of fiduciary duty, trespass to chattels, conversion, negligence, violations of the N.C. Constitution, as well as section 1983 claim, as barred by the statute of limitations, we affirm. Where plaintiff failed to obtain a ruling after an objection at trial, we decline to review the issue plaintiff attempts to appeal.

Plaintiff Ollie Williams, Jr., is the biological parent of a child who has since attained the age of majority. On 19 September 2001, a child support action was commenced against plaintiff by Lenoir County and an order of support was entered on 3 March 2002. Pursuant to the order, plaintiff agreed to a monthly child-support payment in the amount of $284.00, $50.00 of which would be applied toward arrears. Plaintiff also agreed to pay $15,052.00 in arrears at the rate of $50.00 per month as reimbursement for public assistance paid on behalf of his daughter.

On 7 September 2007, part of the initial $15,052.00 obligation was transferred to defendant Wake County for enforcement by Wake County Child Support enforcement. A year later, a hearing was held in Wake County wherein the trial court found that plaintiff was in arrears in the amount of $7,273.00. Plaintiff was held in civil contempt for failure to comply with the support order and thereafter ordered to be imprisoned in the Wake County jail until purge payments of $250.00 in total were made. The court then set plaintiff's child support obligation at $309.00 per month, consisting of $284.00 in ongoing support and $25.00 applied to arrears.

On 5 January 2009, defendant Wake County initiated income withholding against monies earned by plaintiff through employment with the City of Raleigh for the full amount of his monthly support obligation ($309.00), including arrears. On 3 September 2010, defendants[1] initiated income withholding against monies plaintiff earned through employment with Penske Logistics. In 2011, plaintiff's tax refunds totaling $4,138.30 were also intercepted.

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1. As pled by plaintiff, defendants include the following individuals and entities: Ramon Rojano, the director of Wake County Department of Human Services for the time period relevant to this complaint; Regina Y. Petteway, current interim-director of Wake County Department of Human Services; Patricia Baker, current director of Wake County Division of Social Services; defendant Tomiko Hicks, the Child Support Program Manager; Louis Jackson, a Wake County Child Support Enforcement employee; and Systems and Methods, Inc., a corporation with a business operation in Raleigh, North Carolina, d/b/a North Carolina Centralized Collections ("SMI/Centralized Collections").

Pursuant to an order dated 12 April 2011, plaintiff's case was closed. However, defendant Wake County continued to enforce the unpaid arrearages through April 2013, at a rate of garnishment of $618.00 per month. In April 2013, when plaintiff's attorney contacted defendant Louis Jackson, a Wake County Child Support Enforcement employee, defendant Jackson stopped the garnishment of plaintiff's wages.

On 9 February 2015, plaintiff filed this action in Wake County Superior Court to recover monies taken from him in excess of the amount authorized by law. Specifically, plaintiff alleged that in 2010, his wages were garnished at double the rate allowable by the court's order. Plaintiff alleged that the approximate amount of $31,233.07 was taken from him, exceeding the amount he was legally required to pay in child support in arrears ($15,981.12) by approximately $15,241.95.

Defendants filed motions to dismiss which were heard in Wake County Superior Court on 29 June 2015. On 13 July 2015, the trial court entered an order dismissing with prejudice plaintiff's claims against all defendants and finding that plaintiff's complaint in its entirety failed to state a claim upon which relief could be granted. The trial court determined the claims for violation of the Fourteenth Amendment of the U.S. Constitution; Violation of Article I, Section 19 of the N.C. Constitution; Violation of 42 U.S.C. § 1983; Trespass to Chattels; Conversion; and Negligence, were all barred by the applicable statute of limitations. Plaintiff's claims for constructive fraud/breach of fiduciary duty were dismissed for failure to state a claim upon which relief can be granted. Plaintiff appeals.

On appeal, plaintiff contends the trial court erred by (I) granting defendants' motion to dismiss (A) plaintiff's U.S. constitutional and section 1983 claims, (B) plaintiff's N.C. constitutional claims, (C) plaintiff's claims for trespass to chattels, conversion, and negligence, (D) plaintiff's claims for constructive fraud/breach of fiduciary duty, and (E) the complaint in its entirety by finding it failed to state any claim upon which relief could be granted; and (II) considering allegations of counsel and evidence not contained or supported in the pleadings.

I

Plaintiff argues the trial court erred by granting defendants' motion to dismiss plaintiff's claims for (A) violation of the Fourteenth Amendment of the U.S. Constitution and 42 U.S.C. § 1983, (B) violation of Article 1, Section 19 of the N.C. Constitution, and (C) claims

for trespass to chattels, conversion, and negligence by finding that such claims were barred by the applicable statutes of limitations. Plaintiff further argues the trial court erred (D) in dismissing plaintiff's breach of fiduciary duty/constructive fraud claim for failure to state a claim and (E) in finding that the complaint in its entirety failed to state any claim upon which relief could be granted. We disagree.

Standard of Review

"This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods.*, Inc., 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

> The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

Robinson v. Wadford, 222 N.C. App. 694, 696, 731 S.E.2d 539, 541 (2012) (quoting *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979)). "The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Sain v. Adams Auto Grp.*, ___ N.C. App. ___, ___, 781 S.E.2d 655, 659 (2017) (quoting *Holleman v. Aiken*, 193 N.C. App. 484, 491, 668 S.E.2d 579, 584–85 (2008)).

> A 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. Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has expired.

Bissette v. Harrod, 226 N.C. App. 1, 7, 738 S.E.2d 792, 797 (2013) (citations omitted) (quoting *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996)).

A. Federal Claims (Fourteenth Amendment and 42 U.S.C. § 1983)

[1] "The three year statute of limitations as set forth in N.C.G.S. § 1-52 applies to 42 U.S.C. § 1983 actions brought in the North Carolina court system." *Faulkenbury v. Teachers' & State Emps.' Ret. Sys. of N.C.* (*Faulkenbury I*), 108 N.C. App. 357, 367, 424 S.E.2d 420, 424 (1993) (citing *Nat'l Advert. Co. v. City of Raleigh*, 947 F.2d 1158, 1162 n.2 (4th Cir. 1991)). A cause of action accrues, and the applicable statute of limitations begins to run, as soon as the right to institute and maintain a suit arises. *Penley v. Penley*, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985).

In the instant case, plaintiff's claims accrued in 2010, when plaintiff alleges his wages were first garnished at double the rate allowed by the contempt order, or at the latest in April 2011, when plaintiff claims there was no longer legal authority to garnish his wages. *See id.* Thus, applying the latest possible accrual date of April 2011, the three-year statute of limitations would have run as of April 2014, nearly one year prior to plaintiff's filing of the instant action on 9 February 2015. Plaintiff's complaint alleged the following:

> 56. Defendants garnished Plaintiff's wages at double the rate allowable by the Court's Order.
>
> 57. Pursuant to Order dated April 12, 2011, the case was closed.
>
> 58. Despite closure of the case, Defendants continued to garnish Plaintiff's wages at double the rate allowable by the Court's Order prior to closure of the case, which totaled $618.00 per month.
>
> 59. Defendants continued to garnish Plaintiff's wages until approximately April 2013, when Plaintiff's attorney contacted Defendant Jackson.
>
> 60. On or about 2011, Plaintiff's tax refunds were intercepted totaling approximately $4,138.30.
>
> 61. Upon information and belief, throughout the period between August 2008 and January 2011 additional amounts of money were withheld from Plaintiff by tax intercept totaling approximately $1,746.77.
>
> . . . .
>
> 64. At Plaintiff's rate of garnishment of $618.00 per month, Plaintiff had paid all amounts legally owed,

and satisfied all existing judgments and Orders on or before April 2011.

65. There was no legal authority to collect funds from Plaintiff after April 2011.

Plaintiff, however, argues that the "continuing wrong" doctrine applies. "The continuing wrong doctrine is an exception to the general rule that a cause of action accrues as soon as the plaintiff has the right to sue." *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 86, 712 S.E.2d 221, 229 (2011) (citations omitted). In order to determine whether the "continuing wrong" doctrine applies, "[t]he particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged must all be considered." *Ocean Acres Ltd. P'ship v. Dare Cnty. Bd. of Health*, 707 F.2d 103, 106 (4th Cir. 1983) (quoting *Cooper v. United States*, 442 F.2d 908, 912 (7th Cir. 1971)). "For the continuing wrong doctrine to apply, the plaintiff must show '[a] continuing violation' by the defendant that 'is occasioned by continual unlawful acts, not by continual ill effects from an original violation.' " *Marzec v. Nye*, 203 N.C. App. 88, 94, 690 S.E.2d 537, 542 (2010) (quoting *Babb v. Graham*, 190 N.C. App. 463, 481, 660 S.E.2d 626, 637 (2008)). *Compare Faulkenbury I*, 108 N.C. App. at 368–69, 424 S.E.2d at 425–26 (holding that the continuing wrong doctrine did not apply where plaintiffs "suffer[ed] from the continuing effects of the defendants' original action of amending a statute" for calculating plaintiffs' retirement benefits), *with Amward Homes, Inc. v. Town of Cary*, 206 N.C. App. 38, 57, 698 S.E.2d 404, 418 (2010) (holding that acceptance of illegal fees by the Town was a continuing wrong as each violation was the result of "continual unlawful acts" where "[e]ach time a builder-plaintiff applied for a permit and paid the fee to the town, the Town perpetuated its 'custom' . . . under 'color of . . . ordinance' to unlawfully deprive the builders of their money").

"When this doctrine applies, a statute of limitations does not begin to run until the violative act ceases." *Amward Homes, Inc.*, 206 N.C. App. at 56, 698 S.E.2d at 418 (quoting *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 179, 581 S.E.2d 415, 423 (2003)). "The tolling of the statute of limitations for section 1983 claims is governed by state law unless the state law is inconsistent with 'either § 1983's chief goals of compensation and deterrence or its subsidiary goals of uniformity and federalism[.]' " *Id.* at 57, 698 S.E.2d at 418 (alteration in original) (quoting *Hardin v. Straub*, 490 U.S. 536, 539, 104 L. Ed. 2d 582, 588–89 (1989)).

But this Court has previously declined to accept an almost identical argument put forth by plaintiffs facing a statute of limitations defense to their class action claim for unpaid retirement benefits. *See Faulkenbury I*, 108 N.C. App. at 363, 368, 424 S.E.2d at 422, 425 ("Our research uncovered no state cases in North Carolina where the continuing wrong doctrine was applied in a section 1983 case in which the statute of limitations had been raised as a defense."). Because we hold that the continuing wrong doctrine does not apply, *see infra* section C, and because we are persuaded that plaintiff was aware or had reason to know of the alleged violation when he received his first wage-garnished paycheck from his second place of employment, Penske Logistics, in September 2010, we overrule plaintiff's argument.

B. N.C. Constitutional Claim

[2] The statute of limitations for claims made under Article I, Section 19 of the North Carolina Constitution is three years. *See Staley v. Lingerfelt*, 134 N.C. App. 294, 297, 517 S.E.2d 392, 395 (1999). However, "[a] direct cause of action to enforce the rights contained in Article I of the North Carolina Constitution is permitted in circumstances where there is an 'absence of an adequate state remedy.' " *Amward Homes, Inc.*, 206 N.C. App. at 58, 698 S.E.2d at 419 (citation omitted) (quoting *Davis v. Town of S. Pines*, 116 N.C. App. 663, 675, 449 S.E.2d 240, 247 (1994)). Here, there are adequate state remedies which were, in fact, pled by plaintiff: trespass to chattels, conversion, and negligence. *See infra* Section C. Accordingly, we affirm the trial court's dismissal of plaintiff's N.C. Constitutional claim.

C. Trespass to Chattels, Conversion, and Negligence Claims

[3] A claimant has three years from the date of accrual to bring their claims for trespass to chattels, conversion, and negligence. N.C. Gen. Stat. § 1-52(1) (2015). As stated previously, a cause of action accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises. *Penley*, 314 N.C. at 20, 332 S.E.2d at 62. Plaintiff also argues the "continuing wrong" doctrine applies to toll the statutes of limitations for his claims for trespass to chattels, conversion, and negligence. We disagree.

In the instant case, plaintiff alleged that defendants initiated income withholding against monies earned by him at employment with the City of Raleigh and Penske Logistics on 5 January 2009 and 3 September 2010, respectively. Plaintiff alleged that "[d]efendants continued to garnish Plaintiff's wages until approximately April 2013[.]" As a plaintiff has

three years from the date of accrual to bring their claims for trespass to chattels, conversion, and negligence, see N.C.G.S. § 1-52(1), plaintiff's claims are barred, absent a tolling of the statute of limitations. Plaintiff's relevant allegations as to these claims are as follows:

[TRESPASS TO CHATTELS]

99. Defendants interfered with Plaintiff's right to exclusive use and possession by garnishing the wages from Plaintiff when they had no legal right, authority, or justification to do so in the following ways:

    a. By interrupting Plaintiff's physical possession of the monies;

    b. By interrupting Plaintiff's making ordinary use of the monies;

    c. By interrupting Plaintiff's benefit of the use of the monies;

. . . .

[CONVERSION]

104. The Defendants' pursuit, enforcement, collection and disbursement of monies in excess of Plaintiff's legal obligation constitute a conversion, as it was an unauthorized assumption and exercise of the right of ownership over the property belonging to the Plaintiff, to the exclusion of the Plaintiff's ownership rights.

. . . .

[NEGLIGENCE]

113. The Defendants owed a duty to all obligors, including Plaintiff, to enforce the State's Child Support Enforcement Program in accordance with federal and state law.

114. The Defendants breached this duty owed to the Plaintiff as follows:

    a. By collecting money from Plaintiff by garnishment for the full amount from each of Plaintiff's two (2) jobs at double the rate and in violation of all existing Order and judgments in this case.

b. By intercepting tax refunds due to Plaintiff at a rate and amount in excess of any Order of Judgment in this case.

c. By refusing to return said funds to Plaintiff after these errors were discovered.

d. By failing to adopt adequate procedures to ensure that funds were not being taken from obligors against whom they initiated and enforced actions at rate and/or amount in excess of existing Orders and Judgments.

e. by failing to exercise their authority to obtain information from other departments in the State pursuant to N.C. Gen. Stat. §§ 110-128 et. seq. to determine the obligor's required amount and rate of payment.

. . . .

115. These multiple breaches proximately caused the Plaintiff's wages to be garnished, and his tax refunds to be intercepted, and forced the Plaintiff to make payments to SMI/Centralized Collections.

As stated previously, "in order for the continuing wrong doctrine to toll the statute of limitations, the plaintiff must show '[a] continuing violation' by the defendant that 'is occasioned by continual unlawful acts, *not by continual ill effects from an original violation*.' " *Stratton*, 211 N.C. App. at 86, 712 S.E.2d at 229 (alteration in original) (quoting *Marzec*, 203 N.C. App. at 94, 690 S.E.2d at 542). In *Stratton*, this Court held that "the continued deprivation of shareholder rights and nonpayment of dividends were not continual violations, but rather 'continual ill effects' of the conversion" of the plaintiff's stock. *Id.* at 87, 712 S.E.2d at 230. Furthermore, this Court characterized the conversion of the plaintiff's stock as a "discrete occurrence—not a cumulative one—that should have been discovered through reasonable diligence." *Id.* at 87, 712 S.E.2d at 229.

We believe the alleged double garnishment of plaintiff's wages that took place each month until April 2013 did not constitute "continual violations, but rather 'continual ill effects' " of the original garnishment, instituted in order to collect plaintiff's child support obligation. *See id.* at 87, 712 S.E.2d at 230. Similar to this Court's characterization in *Stratton*,

the garnishment of plaintiff's wages in the instant case was also a "discrete occurrence," despite the arguably cumulative effect of the garnishment (plaintiff alleges he overpaid by approximately $15,241.95). *See id.* at 87, 712 S.E.2d at 229. Certainly the alleged double garnishment was discoverable to plaintiff as soon as defendants initiated income withholding ($309.00/month) from plaintiff's second place of employment, Penske Logistics, on 3 September 2010, for a total of $618.00 garnished from plaintiff's total combined wages each month.

Lastly, in looking to "[t]he particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged," *id.* at 86, 712 S.E.2d at 229 (quoting *Williams*, 357 N.C. at 179, 581 S.E.2d at 423), applying the continuing wrong doctrine under these facts would allow plaintiffs to bring claims decades after their accrual in order to contest any alleged wrongful wage garnishment in child support actions. In this case, the "continuing wrong" doctrine does not apply, and plaintiff's argument is overruled.

D. Constructive Fraud/Breach of Fiduciary Duty Claim

[4] Plaintiff next argues the trial court erred in granting defendants' motion to dismiss plaintiff's claims for constructive fraud/breach of fiduciary duty by finding that plaintiff's complaint failed to state a claim upon which relief could be granted. Specifically, plaintiff contends a fiduciary relationship existed between plaintiff and defendants. We disagree.

"A claim for breach of fiduciary duty requires the existence of a fiduciary relationship." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 293, 603 S.E.2d 147, 155 (2004).

> In general terms, a fiduciary relation is said to exist "[w]herever confidence on one side results in superiority and influence on the other side; where a special confidence is reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence."

Id. (quoting *Vail v. Vail*, 233 N.C. 109, 114, 63 S.E.2d 202, 206 (1951)).

Regarding the connection between breach of fiduciary duty and constructive fraud, "[t]o survive a motion to dismiss, a cause of action for constructive fraud must allege (1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured." *Id.* at 294, 603 S.E.2d at 156 (citing *Sterner v. Penn*, 159 N.C. App. 626, 631, 583 S.E.2d 670, 674 (2003)). "The primary difference between pleading a

claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself." *Id.*

In the instant case, plaintiff alleged in his verified complaint as follows:

> 118. By virtue of the Defendants' dealings with the Plaintiff as more particularly described herein, as well as the duty and obligation to work with all parties subject to a child support action, the Defendants created a fiduciary relationship and responsibility to the Plaintiff.
>
> 119. The Defendants took advantage of their position of trust to the detriment of the Plaintiff, and thus breached their fiduciary duty.
>
> 120. The Defendants breached this fiduciary duty owed to the Plaintiff as follows:
>
> a. by continuing to collect funds from Plaintiff through garnishment after all amounts legally owed had been paid and satisfied.
>
> b. By collecting funds from Plaintiff through garnishment in a rate and amount exceeding what Defendants could lawfully collect pursuant to Judgment or Order.
>
> c. by failing to adopt adequate procedures to ensure that the obligors against whom they initiated and enforced actions seeking support still owed the money being collected through garnishment[.]
>
> . . . .
>
> 121. Upon information and belief, the Defendants took advantage of their position of trust by the collection of child support payments, and as a result, the Plaintiff has been damaged as herein alleged.

However, plaintiff has cited to no authority which would support his conclusion that defendants owed plaintiff a fiduciary duty. To the contrary, North Carolina courts have declined to find that a fiduciary relationship exists where the relationship between the parties is that of debtor-creditor. *See Sec. Nat'l Bank of Greensboro v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 95, 143 S.E.2d 270, 276 (1965) ("There was no fiduciary relationship; the relation was that of debtor and creditor.");

Branch Banking & Trust Co. v. Thompson, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699 (1992) ("[T]he mere existence of a debtor-creditor relationship between [the parties does] not create a fiduciary relationship." (second alteration in original) (citations omitted)).

A fiduciary relationship arises when, due to considerations of law and equity, a fiduciary must set aside his or her own best interests in favor of the beneficiary's best interests. *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014). Here, the relationship between plaintiff and defendants was adversarial in nature; defendants were charged with enforcing the support orders from the court, and in doing so, were authorized to institute wage withholding against plaintiff. Thus, this relationship is more akin to that of debtor-creditor, a relationship that has not been recognized as a fiduciary one. *See Sec. Nat'l Bank of Greensboro*, 265 N.C. at 95, 143 S.E.2d at 276.

Further, plaintiff does not allege that this relationship parallels any special relationship our courts have found to constitute a fiduciary one. *See*, *e.g.*, *Eubanks v. Eubanks*, 273 N.C. 189, 195–96, 159 S.E.2d 562, 567 (1962) (husband-wife); *Fox v. Wilson*, 85 N.C. App. 292, 299, 354 S.E.2d 737, 742 (1987) (attorney-client). Plaintiff's mere allegation that defendants had an "obligation to work with all parties subject to [the] child support action," does not give rise to a fiduciary duty. Accordingly, because no fiduciary relationship existed between plaintiff and defendants, the trial court did not err in dismissing plaintiff's claim for breach of fiduciary duty/constructive fraud. Plaintiff's argument is overruled.

E. Failure to State a Claim

As we have determined that the respective statutes of limitations bar plaintiff's section 1983 claims and claims for trespass to chattels, conversion, negligence, and state constitutional violations, and that the trial court did not err in dismissing plaintiff's claim for breach of fiduciary duty/constructive fraud, we also affirm that portion of the trial court's order dismissing plaintiff's claim in its entirety for failure to state a claim.

II

[5] Next, plaintiff contends the trial court improperly considered allegations of counsel and/or evidence not contained or supported in the pleadings. As such, plaintiff argues, the trial court's order dismissing plaintiff's complaint should be reversed and this matter remanded for further proceedings. However, as plaintiff did not receive a ruling on his objection below, this issue is not properly preserved for our review.

In order to properly preserve error, "a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10. (2015). "[I]t is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." *Id.*

Reviewing the record and transcript on appeal, the only time plaintiff's counsel objected throughout the proceeding was when counsel for defendants discussed the issue of improper service on an individual not related to plaintiff's case. Plaintiff's attorney objected, stating, "I'm going to object to this. I believe [counsel] is testifying as to something that has no basis at all in evidence." Notably, the trial court did not render a ruling in response, but merely stated, "I'm going to let you talk when it's your turn to talk." Accordingly, having failed to obtain a ruling at the lower court, *see id.*, we decline to review plaintiff's issue on appeal.

In conclusion, we hold the trial court did not err in dismissing plaintiff's claims for constructive fraud/breach of fiduciary duty, violation of the N.C. Constitution, as well as plaintiff's section 1983 and tort claims. The order of the trial court is

AFFIRMED.

Judges TYSON and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 FEBRUARY 2017)

BANK OF OZARKS v. KINGS MOUNTAIN PROPS.,LLC No. 16-739	Mecklenburg (15CVS9933)	Affirmed
CHURCH v. NORELLI No. 16-799	Caldwell (15CVS1016)	Reversed
HUCKABEE v. ROBERTS No. 16-603	Durham (09CVD307) (15CRS2245)	Reversed and Remanded
IN RE B.W.S. No. 16-850	Surry (14JT53) (14JT54)	Affirmed
IN RE FORECLOSURE OF ADAMS No. 16-653	Mecklenburg (15SP383)	Affirmed
IN RE O.J.W. No. 16-783	Wake (14JA48-49)	Affirmed
IN RE R.L.D. No. 16-821	Northampton (14JT16)	Affirmed
IN RE V.G. No. 16-733	Wake (14JT183)	Affirmed
KENNEDY v. HARRIS TEETER No. 16-727	N.C. Industrial Commission (14-000917)	Affirmed
LYNN v. FUTRELL No. 16-743	Halifax (11CVD1203)	Vacated and Remanded
MASTNY v. MASTNY No. 16-440	Wake (11CVD14976)	Affirmed in part; reversed in part and remanded.
PENNINGA v. TRAVIS No. 16-751	Madison (11CVD317)	Vacated and Remanded
STATE v. BAKER No. 16-708	Orange (14CRS169) (14CRS50404) (14CRS50423) (14CRS50424) (14CRS50426) (15CRS124)	No Error

STATE v. BYRD No. 16-619	Stanly (13CRS51641)	No Prejudicial Error
STATE v. CLAY No. 16-564	Cabarrus (13CRS54149) (13CRS54151)	Affirmed
STATE v. DAVIS No. 16-288	Forsyth (12CRS55599-602)	No Error
STATE v. HIGGINS No. 16-404	Burke (13CRS52351)	No Error
STATE v. HUDSON No. 16-431	Mecklenburg (14CRS20721-23)	No Error
STATE v. HUDSON No. 16-571	New Hanover (13CRS56047-48)	DISMISSED IN PART; NO ERROR IN PART.
STATE v. LASSITER No. 15-1216	Pitt (14CRS51675)	No Error
STATE v. LITTLE No. 16-480	Beaufort (05CRS52742)	Affirmed
STATE v. MACE No. 16-703	Haywood (14CRS53412) (14IFS703562)	No Error
STATE v. MACK No. 16-561	Mecklenburg (12CRS251525-26)	NO PREJUDICIAL ERROR.
STATE v. MODLIN No. 16-634	Alamance (14CRS54385)	Vacated and Remanded
STATE v. NORRIS No. 16-683	New Hanover (15CRS1309-1311)	Affirmed and Remanded
STATE v. PITT No. 16-709	Pitt (14CRS60587) (15CRS803)	No Error
STATE v. STEWART No. 16-347	Guilford (14CRS82246)	No Error
STOWERS v. PARKER No. 16-747	Davie (14CVS32)	Appeal dismissed.
WRIGHTSVILLE HEALTH HOLDINGS, LLC v. BUCKNER No. 16-726	New Hanover (16CVD526)	Affirmed

STEVEN HARRIS, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

No. COA16-341

Filed 7 March 2017

Public Officers and Employees—correctional officer—wrongful termination—just cause

The administrative law judge (ALJ) did not err by concluding as a matter of law that respondent North Carolina Department of Public Safety lacked just cause to terminate petitioner from his position as a correctional officer. The ALJ's conclusion that just cause existed for a written warning and a one week suspension without pay was also affirmed.

Chief Judge McGEE concurring in part and dissenting in part.

Appeal by respondent from final decision entered 25 January 2016 by Administrative Law Judge Donald W. Overby in the Office of Administrative Hearings. Heard in the Court of Appeals 3 October 2016.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Tamika L. Henderson, for respondent.

TYSON, Judge.

The North Carolina Department of Public Safety ("Respondent") appeals from a final decision of the North Carolina Office of Administrative Hearings, which concluded as a matter of law that Respondent lacked just cause to terminate Steven Harris ("Petitioner") from his position as a correctional officer, and ordering his reinstatement. We affirm the decision of the administrative law judge.

I. Background

Petitioner began working in February 2013 as a correctional officer at Maury Correctional Institution ("Maury Correctional"), a state prison operated by Respondent. Petitioner attended Respondent's basic training program and continued to be trained annually regarding Respondent's policies and procedures, including its Use of Force policy.

Petitioner's personnel record contained no disciplinary action prior to the incident at issue.

Petitioner was working the night shift at Maury Correctional on 5 February 2015. He was working in the "Gray Unit," which housed the prison's segregation cell block. Inmate Christopher Walls ("Walls") was housed on the Gray Unit. Walls placed his feces into a plastic bag and placed the bag into the toilet, which caused water to leak onto the floor. Walls then poured the feces onto the floor. In response to Walls' actions, Sergeant Vernell Grantham ordered Ronnie Johnson ("Officer Johnson"), Devon Alexander ("Officer Alexander"), and Dominique Sherman ("Officer Sherman") (together "the officers") to remove Walls from his cell to allow a janitor to clean up the feces and extinguish the stench.

The officers restrained Walls with handcuffs behind his back, a waist chain, and leg cuffs. Petitioner was not tasked with transporting Walls from his cell to another location. Officers Johnson, Alexander, and Sherman testified Petitioner approached Walls, stated to him: "You think this is funny" and punched Walls in the stomach. Walls was physically restrained, compliant, and under the other officers' control at the time Petitioner punched Walls. The officers each testified that Walls did not attempt to spit on Petitioner and was not offering any resistance at the time Petitioner punched him. While the Gray Unit is equipped with several security cameras, the incident was not captured, because it occurred in a blind spot inside the facility. Officer Johnson became upset and informed Petitioner that he was going to report him for punching the inmate.

Walls, the inmate, stated to Sergeant Grantham, "Y'all hit like bitches." Less than thirty minutes after the incident occurred, Walls was taken to and screened by medical personnel, who observed no bruising or redness on his abdomen. At no point in time did Walls complain that Petitioner had struck him or abused him in any way.

After the incident was reported, Respondent conducted an internal investigation, concluded Petitioner had violated Respondent's Use of Force policy, and recommended corrective action. Petitioner received a written notice, dated 14 April 2015, of a pre-disciplinary conference with Administrator Dennis Daniels and Administrative Services Manager Gary Parks, to be held the following day. The written notice stated the conference was to discuss a recommendation for Respondent to terminate Petitioner from his position for "unacceptable personal conduct." Petitioner was provided with the reasons his termination was recommended and was given an opportunity to respond to the allegations.

Following the conference, Respondent's management approved the recommendation to terminate Petitioner's employment. Petitioner was notified by letter dated 17 April 2015 that his employment was terminated for unacceptable personal conduct. Petitioner filed an appeal with the Employee Advisory Committee, which recommended Petitioner's dismissal be upheld. Respondent notified Petitioner by letter dated 29 June 2015 of its final agency decision upholding Petitioner's dismissal.

Petitioner filed a petition for a contested case hearing with the Office of Administrative Hearings ("OAH"). The case was heard before an Administrative Law Judge ("the ALJ") on 23 October 2015. Following that hearing, the ALJ issued a final decision on 25 January 2016. The final decision contained twenty-seven findings of fact. Utilizing the framework established by our Supreme Court in *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004) and by this Court in *Warren v. N.C. Dep't of Crime Control*, 221 N.C. App 376, 726 S.E.2d 920, *disc. review denied*, 366 N.C. 408, 735 S.E.2d 175 (2012), the ALJ concluded as a matter of law that "[t]o the extent . . . Petitioner's conduct [punching Walls in his stomach] constituted unacceptable personal conduct, it does not rise to the level of conduct that would justify the severest sanction of dismissal under the totality of facts and circumstances of this contested case" and that "[i]t is not 'just' to terminate Petitioner[.]"

The ALJ reversed Respondent's decision to terminate Petitioner's employment, ordered Petitioner to be retroactively reinstated to his position of employment, and ordered a deduction from Petitioner's pay, equivalent to a one-week suspension. Respondent appeals.

II. Jurisdiction

Pursuant to N.C. Gen. Stat. § 7A-29(a) (2015), an appeal as of right lies directly to this Court from a final decision of the Office of Administrative Hearings under G.S. 126-34.02. Respondent's appeal is properly before us.

III. Issues

Respondent argues: (1) the ALJ erred as a matter of law by concluding Respondent failed to establish just cause to dismiss Petitioner for unacceptable personal conduct; (2) the ALJ erred as a matter of law by substituting his own judgment for that of Respondent and imposing new discipline upon Petitioner; (3) certain findings of fact and conclusion of law of the ALJ are not supported by substantial evidence, are unsupported by the findings of fact, or are affected by an error of law; and, (4) the ALJ erred as a matter of law by excluding evidence that was not specifically mentioned in Respondent's dismissal letter to Petitioner.

IV. Just Cause for Dismissal

Respondent argues the ALJ erred by concluding Respondent failed to establish just cause for Petitioner's dismissal. We disagree.

A. Statutory Scheme and Standard of Review for Determining Just Cause

In 2013, our General Assembly significantly amended and streamlined the procedure governing state employee grievances and contested case hearings, applicable to cases commencing on or after 21 August 2013. *See generally* 2013 N.C. Sess. Laws ch. 382. Our Supreme Court explained the previous statutory framework in detail in *Carroll*, 358 N.C. at 657-58, 599 S.E.2d at 893-94.

A career state employee who alleged he was dismissed, demoted, or suspended without pay without just cause under N.C. Gen. Stat. § 126-35 was first required to "pursue any grievance procedures established by the employing agency or department." *Id.* at 657, 599 S.E.2d at 893 (citations omitted). Once those internal grievance procedures were exhausted, the aggrieved employee could demand a formal, quasi-judicial evidentiary hearing before an ALJ by filing a contested case petition with the Office of Administrative Hearings. *Id.* The ALJ issued a "recommended decision," and each party was entitled to pursue an administrative appeal by filing exceptions and written arguments with the State Personnel Commission ("SPC"). *Id.* at 657, 599 S.E.2d at 893-94.

The SPC issued its final agency decision based on its "review of the parties' arguments and the materials preserved in the official record[.]" *Id.* at 658, 599 S.E.2d at 894. The SPC was authorized "to reinstate a wrongfully terminated employee and to order a salary adjustment or other suitable action to correct an improper disciplinary action." *Id.* (citation omitted). The SPC's decision was subject to judicial review upon the petition of either the employee or the employing agency in the superior court. *Id.* (citation omitted). The superior court's decision was subject to further review in the appellate division. *Id.* (citation omitted).

As part of the 2013 amendments, the General Assembly enacted N.C. Gen. Stat. §§ 126-34.01 and 126-34.02 into the North Carolina Human Resources Act. Under N.C. Gen. Stat. § 126-34.01 (2015), a State employee "having a grievance arising out of or due to the employee's employment" must first discuss the matter with the employee's supervisor, and then follow a grievance procedure approved by the North Carolina Human Resources Commission. The agency will issue a final decision, approved by the Office of State Human Resources. *Id.*

While a final agency decision under the previous statutory framework included formal findings of fact and conclusions of law, a final agency decision under the current framework simply "set[s] forth the specific acts or omissions that are the basis of the employee's dismissal." 25 NCAC 01J .0613(4)(h) (2016).

Once a final agency decision is issued, a potential, current, or former State employee may appeal an adverse employment action as a contested case pursuant to the method provided in N.C. Gen. Stat. § 126-34.02 (2015). As relevant to the present case, N.C. Gen. Stat. § 126-34.02(a) provides:

> (a) [A] former State employee may file a contested case in the Office of Administrative Hearings under Article 3 of Chapter 150B of the General Statutes. . . . In deciding cases under this section, the [ALJ] may grant the following relief:
>
> (1) Reinstate any employee to the position from which the employee has been removed.
>
> (2) Order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied.
>
> (3) Direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improper action of the appointing authority.

One of the issues, which may be heard as a contested case under this statute, is whether just cause existed for dismissal, demotion, or suspension. As here, "[a] career State employee may allege that he or she was dismissed, demoted, or suspended for disciplinary reasons without just cause." N.C. Gen. Stat. § 126-34.02(b)(3). In such cases, "the burden of showing that a career State employee was discharged, demoted, or suspended for just cause rests with the employer." N.C. Gen. Stat. § 126-34.02(d). In a contested case, an "aggrieved party" is entitled to judicial review of a final decision of an administrative law judge [ALJ] by appeal directly to this Court. N.C. Gen. Stat. § 126-34.02(a); N.C. Gen. Stat. § 7A-29(a).

While Chapter 126 is silent on the issue, Chapter 150B, the Administrative Procedure Act, specifically governs the scope and standard of this Court's review of an administrative agency's final decision. *See Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697,

702, 635 S.E.2d 442, 446 (2006), *disc. review denied*, 361 N.C. 220 (2007). Article 4 of Chapter 150B is entitled "Judicial Review," and includes N.C. Gen. Stat. § 150B-43:

> [a]ny . . . person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to the . . . person aggrieved by statute or agency rule, is entitled to judicial review of the decision under this Article, *unless adequate procedure for judicial review is provided by another statute.*

N.C. Gen. Stat. § 150B-43 (2015) (emphasis supplied).

Chapter 150B also includes Section 51, which is entitled "Scope and standard of review." N.C. Gen. Stat. § 150B-51 (2015). The statute provides:

> 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.

Id.

The standard of review is dictated by the substantive nature of each assignment of error. N.C. Gen. Stat. § 150B-51(c); *Carroll*, 358 N.C. at 658, 599 S.E.2d at 894. "It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test." *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894-95 (brackets, quotation marks and citation omitted). The court engages in *de novo* review when the error asserted is within § 150B-51(b)(1), (2), (3), or (4). N.C. Gen. Stat.

§ 150B-51(c). "Under the *de novo* standard of review, the trial court considers the matter anew and freely substitutes its own judgment for the agency's." *Overcash*, 179 N.C. App. at 703, 635 S.E.2d at 446 (brackets, quotation marks, and citation omitted).

On the other hand, when the error asserted is within N.C. Gen. Stat. § 150B-51(b)(5) & (6), the reviewing court applies the "whole record standard of review." N.C. Gen. Stat. §150B-51(c). Under the whole record test,

> [The court] may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.

Carroll, 358 N.C. at 660, 599 S.E.2d at 895 (internal citations and quotation marks omitted).

> We undertake this review with a high degree of deference because it is well established that
>
> "[i]n an administrative proceeding, it is the prerogative and duty of [the ALJ], once all the evidence has been presented and considered, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. The credibility of witnesses and the probative value of particular testimony are for the [ALJ] to determine, and [the ALJ] may accept or reject in whole or part the testimony of any witness."

N.C. Dep't of Pub. Safety v. Ledford, __ N.C. App. __, __, 786 S.E.2d 50, 64 (2015) (quoting *City of Rockingham v. N.C. Dep't of Env't. & Natural Res.*, 224 N.C. App. 228, 239, 736 S.E.2d 764, 771 (2012)), *review allowed*, __ N.C. __, 792 S.E.2d 152 (2016).

"[O]ur Supreme Court has made [it] clear that even under our *de novo* standard, a court reviewing a question of law in a contested case is without authority to make new findings of fact." *Id.* at __, 786 S.E.2d 50, 63-64 (2015) (citing *Carroll*, 358 N.C. at 662, 599 S.E.2d at 896).

> In a contested case under the APA, as in a legal proceeding initiated in District or Superior Court, there is but one fact-finding hearing of record when witness demeanor may be directly observed. Thus, the ALJ who conducts a contested case hearing possesses those institutional advantages that make it appropriate for a reviewing court to defer to his or her findings of fact.

Carroll, 358 N.C. at 662, 599 S.E.2d at 896 (internal citations and quotations marks omitted).

Our separately writing colleague asserts the provisions of Chapter 150B are inapplicable because of N.C. Gen. Stat. § 150B-43, which states a person is entitled to judicial review of the final decision under Chapter 150B "unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute." N.C. Gen. Stat. § 150B-43 (2015). The separate opinion asserts N.C. Gen. Stat. § 126-34.02 is "another statute," which provides "an adequate procedure for judicial review." We disagree.

The provisions of Chapters 126 and 150B are not inconsistent. N.C. Gen. Stat. § 126-34.02 simply provides the employee's procedure to file a contested case, the issues the employee may bring before the ALJ, the types of relief the ALJ may impose, and the right to appeal directly to this Court from the ALJ's final decision. The scope and standard of review of this Court's review of the ALJ's final decision is expressly set forth in § 150B-51. Chapter 126 is silent on this issue. While Chapter 126 governs the proceeding before the ALJ and provides the aggrieved party the right to appeal to this Court, Chapter 150B sets forth our standard of review, which is the same standard of review that has been consistently applied by our appellate courts and is not contested by our separately writing colleague.

We perceive no intent, through the 2013 changes to this procedural framework, to alter the applicable standard of review. Consistent with the Administrative Procedure Act, the ALJ makes "a final decision or order that contains findings of fact and conclusions of law" in each contested case. N.C. Gen. Stat. § 150B-34(a). Respondent argues the ALJ must give deference to the agency in determining whether just cause exists for the agency's action.

Respondent's assertion is directly contrary to the express statutory burden established by the General Assembly for contested case hearings of this nature. Given that the statute explicitly places the burden of proof on the agency to show just cause exists for the discharge, demotion, or

suspension of a career State employee, it is illogical for an ALJ to accord deference to an agency's legal conclusion and to the particular consequences or sanction imposed. *See* N.C. Gen. Stat. § 126-34.02(d)

An appellate court's standard of review of an agency's final decision—and now, an administrative law judge's final decision—has been, and remains, whole record on the findings of fact and *de novo* on the conclusions of law. *See Carroll*, 358 N.C. at 666-67, 599 S.E.2d at 898 (noting that whether just cause existed is a question of law which is reviewed *de novo* on appeal); *Blackburn v. N.C. Dept. of Pub. Safety*, ___ N.C. App. __, __, 784 S.E.2d 509, 518, *disc. review denied*, 786 S.E.2d 915 (2016) (" 'Where the petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency.' " (quoting *Souther v. New River Area Mental Health*, 142 N.C. App. 1, 4, 541 S.E.2d 750, 752, *aff'd per curiam*, 354 N.C. 209, 552 S.E.2d 162 (2001)).

An ALJ, reviewing an agency's decision to discipline a career State employee within the context of a contested case hearing, owes no deference to the agency's conclusion of law that either just cause existed or the proper consequences of the agency's action. This Court came to the same conclusion in a recent unpublished opinion. *See Clark v. N.C. Dep't of Pub. Safety*, __ N.C. App. __, __, 791 S.E.2d 661, __ (Sept. 6, 2016) (unpublished) (rejecting Respondent's argument that "the ALJ [improperly] substituted his own judgment for that of" the agency in holding that "whether just cause exists is a conclusion of law, which the ALJ had authority to review *de novo*." (citing *Carroll*, 358 N.C. at 666, 599 S.E.2d at 898)).

After receiving and considering the evidence, and entering findings of fact, an ALJ is free to substitute their judgment for that of the agency regarding the legal conclusion of whether just cause existed for the agency's action. Based upon the evidence presented and the findings of fact supporting the legal conclusion of just cause, the ALJ may order any remedy within the range provided in N.C. Gen. Stat. § 126-34.02, without regard to the initial agency's determination.

B. Whether Petitioner's Conduct Warranted Termination

Respondent contends the ALJ erred in concluding Respondent's dismissal of Petitioner for unacceptable personal conduct was not supported by just cause. A career state employee subject to the North Carolina Human Resources Act may only be "discharged, suspended, or demoted for disciplinary reasons" upon a showing of "just cause." N.C. Gen. Stat. § 126-35(a) (2015). Under the North Carolina Administrative

Code, "just cause" for the dismissal, suspension, or demotion of a career state employee may be established only on a showing of "unsatisfactory job performance, including grossly inefficient job performance," or "unacceptable personal conduct." 25 NCAC 1J .0604 (2016).

"Just cause, like justice itself, is not susceptible of precise definition." *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900 (citations and quotation marks omitted). The term "just cause" has been interpreted by our Supreme Court as a "flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." *Id.* (citation and quotation marks omitted). "Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." *Id.*

In *Warren v. N.C. Dep't of Crime Control*, 221 N.C. App. 376, 726 S.E.2d 920, this Court delineated a three-part inquiry to guide judges in determining whether just cause existed for an employee's dismissal for unacceptable personal conduct:

> We conclude that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining unacceptable personal conduct. The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. *Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken.*

Warren, 221 N.C. App. at 382-83, 726 S.E.2d at 925 (emphasis supplied) (citations and footnote omitted). The first two prongs of *Warren* are easily satisfied. The ALJ found and concluded as follows:

> 12. Here, the preponderance of the evidence shows that Petitioner engaged in the conduct alleged by Respondent. While there is some evidence to the contrary, the greater

> weight of evidence demonstrates that Petitioner struck a restrained inmate in the abdomen.
>
> . . . .
>
> 18. Hitting inmate Walls while in restraints does not fit any of the categories identified for use of force. The only reason that makes any sense at all for the force used in this case is as some form of retribution for having defecated in his cell or to make a point that such behavior is not to be tolerated. Such behavior by Petitioner is prohibited. Hitting Walls was not "justified."
>
> 19. Thus, hitting a restrained inmate as found herein violates Respondent's Use of Force Policy and constitutes unacceptable personal conduct as Petitioner's conduct violates a written work rule.

As to the first prong, the unchallenged findings of fact tend to show Petitioner punched Walls in the stomach, without provocation, and at a time when Walls was restrained and under the control of multiple officers.

As to the second prong, Petitioner's conduct amounts to the "willful violation of known or written work rules," which is one of the listed instances of unacceptable conduct pursuant to 25 NCAC 1J .0614(8)(d) (2016). Petitioner had been trained and was aware of Respondent's Use of Force policy, which limited the use of force to "instances of justifiable self-defense, protection of others, protection of state property, prevention of escapes, and to maintain or regain control, and then only as a last resort" and noted that "[i]n no event is physical force justifiable as punishment."

We agree with the ALJ's finding of fact that punching Walls, while he was in restraints and under the control of other officers, "does not fit into any of the categories identified for use of force," and that force was used by Petitioner as "some form of retribution" for Walls' actions. We also agree with Respondent and the ALJ that the record evidence and the ALJ's conclusions support the determination that Petitioner's conduct constituted "unacceptable personal conduct" and warranted discipline for his actions. 25 NCAC 1J .0604.

Having found the first two *Warren* prongs satisfied, we proceed to a consideration of whether "[Petitioner's] misconduct amounted to just cause *for the disciplinary action taken*." *Warren*, 221 N.C. App. at 382-83, 726 S.E.2d at 925 (emphasis supplied). The ALJ found:

28. In this contested case, there are considerable mitigating factors to consider. They are as follows:

a. This Tribunal has found as fact and concluded as a matter of law there is sufficient probative evidence that Petitioner punched Walls in the stomach as alleged by Respondent in the dismissal letter. While Sgt. Grantham lacks credibility, the other correctional officers are credible. However, there are aspects of the facts that remain troubling and serve to mitigate in favor of Petitioner.

b. The Petitioner has a good work history with Respondent generally and with inmate Walls in particular. There is no evidence of any prior instances of unacceptable personal conduct, disciplinary action, or anything in Petitioner's past suggesting he would engage in an act of excessive force against an inmate. His regular shift sergeant described him as a hard worker and an asset to his unit.

c. Petitioner had a good working relationship with Walls, an inmate who has more than 100 adjudicated disciplinary infractions. Petitioner testified without contradiction that he was the staff member on his regular shift who could calm Walls down because Walls thought Petitioner was a fellow Muslim. There was no indication that Petitioner had a prior specific problem with Walls or any substantially negative prior interaction with Walls.

d. This action took place when Petitioner was not working his regular shift. He was working with a supervisor (Grantham) and other correctional officers (Johnson, Sherman, and Alexander) with whom he had not worked before. It does not seem logical for Petitioner to punch an inmate without provocation while working with strangers.

e. The medical evidence—or lack thereof—also militates in Petitioner's behalf. Petitioner is a very large man and inmate Walls is a small man. The Use of Force Medical screening conducted within half an hour of the alleged assault found (Petitioner's Exhibit 3E) no evidence whatsoever of Walls having been punched by anyone. There was no sign of any injury at all; not even redness.

f. Among inmate Walls's many disciplinary issues, there were multiple complaints by Walls that he was assaulted

by staff, all of which were unsubstantiated. On this occasion, Walls never claimed to anyone that he was assaulted by Petitioner. He did not file a grievance against Petitioner or write any statement against Petitioner as he had against other officers in the past.

g. Walls also had a documented history of making fictitious or exaggerated medical complaints. On this occasion, less than 30 minutes after allegedly being punched by Petitioner, Walls made no complaints of pain or injury whatever and was in "no active distress," with "no complaints," even though he was being attended to in the medical clinic at the facility with every opportunity to complain. It strains credulity to conclude that an inmate with this kind of history would make no complaint whatever after receiving an unprovoked assault from a staff member.

h. The statement "Y'all hit like bitches" attributed to Walls was plural, made no reference to Petitioner, and was spoken to Sergeant Grantham.

i. Video taken moments after the supposed unprovoked assault shows Walls walking erect, smiling, and in no apparent distress. Petitioner and officers Sherman and Alexander appear to be engaged in friendly conversation and are smiling and at times laughing. Johnson is in front escorting the inmate, and is not engaged in the conversation, but the video fails to show him remonstrating with Petitioner or trying to keep Petitioner away from the inmate. Everything about the video shows a completely uneventful situation. Likewise, the video taken directly before the incident shows nothing unusual.

j. There is no evidence that Walls ever bent over even in the slightest after having been hit by a very large man. He was not winded by having been punched. There was no evidence at all from any of the corrections officers of any physical reaction to having been punched.

k. The facts that Walls made no complaint, that he made the statement to Grantham, that there was no physical reaction to having been punched, that there was no sign of assault in the physical exam and moments later he is walking as though nothing has happened are indicative that only one of two possible scenarios existed on that date

> and at that time: either (1) Petitioner did not hit inmate Walls at all, or (2) Petitioner did hit Walls but with such insignificant force that it was practically non-existent.
>
> l. Having concluded that the three corrections officers' testimony was sufficiently credible and concluded that indeed Petitioner did strike inmate Walls, then the only rational conclusion based on the totality of the circumstances in this contested case is that Petitioner struck Walls with very little force.

These findings, which are challenged by Respondent, are listed in the ALJ's final decision under the heading "Conclusions of Law." However, they are more appropriately reviewed as findings of fact. *See Barnette v. Lowe's Home Ctrs., Inc.*, __ N.C. App. __, __, 785 S.E.2d 161, 165 (2016) ("[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law," while a "determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact." (citation omitted)). We consider and review them as findings of fact, without regard to the given label. *See N.C. State Bar v. Key*, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008) ("[C]lassification of an item within [an] order is not determinative, and, when necessary, the appellate court can reclassify an item before applying the appropriate standard of review.").

As the sole fact-finder, the ALJ has both the duty and prerogative to determine the credibility of the witnesses, the weight and sufficiency of their testimony, "to draw inferences from the facts, and to sift and appraise conflicting and circumstantial evidence." *Ledford*, __ N.C. App. at __, 786 S.E.2d at 64 (citation omitted). We afford "a high degree of deference" to the ALJ's findings, when they are supported by substantial evidence in the record. *Id.* After reviewing the whole record, we find substantial evidence support the ALJ's findings, and they are binding on appeal. *See Carroll*, 358 N.C. at 660, 599 S.E.2d at 895.

Just cause is determined upon "examination of all the facts, circumstances, and equities of a case, [and] consideration of additional factors shedding light on the employee's conduct[.]" *Bulloch v. N.C. Dept. of Crime Control and Pub. Safety*, 223 N.C. App. 1, 12, 732 S.E.2d 373, 381, *disc. review denied*, 366 N.C. 418, 735 S.E.2d 178 (2012). The Court in *Warren* referred to this process as "balanc[ing] the equities." *Warren*, 221 N.C. App. at 382, 726 S.E.2d at 925. This Court recently explained, "A just and equitable determination of whether the unacceptable personal conduct constituted just cause for the disciplinary action taken requires

consideration of the facts and circumstances of each case, *including mitigating factors*." *N.C. Dep't of Pub. Safety v. Shields*, __ N.C. App. __, __, 781 S.E.2d 718, __ (Jan. 19, 2016) (unpublished), *disc. review denied*, __ N.C. __, 784 S.E.2d 176 (2016).

Based upon the evidence received and the findings set forth above, the ALJ determined Petitioner's conduct "does not rise to the level of conduct that would justify the severest sanction of dismissal under the totality of facts and circumstances of this contested case; it is not the 'right' thing to do." While we do not condone Respondent's behavior, we recognize the ALJ is the sole fact-finder, and the only tribunal with the ability to hear testimony, observe witnesses, and weigh credibility. As such, we defer to the ALJ's findings of fact, even if evidence was presented to support contrary findings. *Ledford*, __ N.C. App. at __, 786 S.E.2d at 64.

In consideration of the findings of fact set forth above, and after "balancing the equities," we hold the ALJ did not err in determining the agency did not meet its burden to show just cause for Respondent's termination. *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925.

C. Imposition of Alternative Discipline by the ALJ

The North Carolina Administrative Code sets forth four disciplinary alternatives, which may be imposed against an employee upon a finding of just cause: "(1) written warning; (2) Disciplinary suspension without pay; (3) Demotion; and (4) Dismissal." 25 NCAC 1J.0604(a). "Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. . . . Just cause must be determined based upon an examination of the facts and circumstances of each individual case." *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925. Under the necessarily malleable judgment standard created by our precedents, and after considering the totality of the unique facts and circumstances of the present case, we affirm the ALJ's determination that just cause did not exist to impose the most severe form of discipline: dismissal from employment. *See Carroll*, 358 N.C. at 669, 599 S.E.2d at 900.

In a contested case, "the burden of showing a career State employee was discharged, demoted, or suspended for just cause rests with the employer." N.C. Gen. Stat. § 126-34.02(d). There are likely scenarios in which the employer meets its burden to show just cause exists to impose a disciplinary action, but just cause does not exist to support dismissal of the employee. The General Assembly recognized this range of possible sanctions and enacted N.C. Gen. Stat. § 126-34.02 as part of the 2013 amendments. The statute reads:

> (a) Once a final agency decision has been issued in accordance with G.S. 126-34.01, an applicant for State employment, a State employee, or former State employee may file a contested case in the Office of Administrative Hearings under Article 3 of Chapter 150B of the General Statutes. The contested case must be filed within 30 days of receipt of the final agency decision. Except for cases of extraordinary cause shown, the Office of Administrative Hearings shall hear and issue a final decision in accordance with G.S. 150B-34 within 180 days from the commencement of the case. *In deciding cases under this section, the Office of Administrative Hearings may grant the following relief:*
>
> (1) Reinstate any employee to the position from which the employee has been removed.
>
> (2) Order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied.
>
> (3) *Direct other suitable action to correct the abuse* which may include the requirement of payment for any loss of salary which has resulted from the *improper action* of the appointing authority.

N.C. Gen. Stat. § 126-34.02(a) (2015) (emphases supplied).

Under subsection (a)(3) of the statute, the ALJ has express statutory authority to "[d]irect other suitable action" upon a finding that just cause does not exist for the particular action taken by the agency. Under the ALJ's *de novo* review, the authority to "[d]irect other suitable action" includes the authority to impose a less severe sanction as "relief." *See id.*

Because the ALJ hears the evidence, determines the weight and credibility of the evidence, makes findings of fact, and "balanc[es] the equities," the ALJ has the authority under *de novo* review to impose an alternative discipline. Upon the ALJ's determination that the agency met the first two prongs of the *Warren* standard, but just cause does not exist for the particular disciplinary alternative imposed by the agency, the ALJ may impose an alternative sanction within the range of allowed dispositions. *See id.* We hold the ALJ acted within his authority by determining the agency failed to meet its burden to show just cause existed to warrant Petitioner's termination for unacceptable personal conduct.

Our separately writing colleague states N.C. Gen. Stat. § 126-34.02(a)(3) is inapplicable, because "the ALJ could only invoke his or her powers pursuant to [this subsection] if it first determined there was no just cause for the termination of Petitioner's employment." The ALJ clearly determined just cause does not exist for Petitioner's termination. The separate opinion would impose the harshest alternative allowed as a sanction for unacceptable personal conduct. No process or standard is proposed to guide the substitution of the sanction for that imposed by the finder of fact.

The final decision states the ALJ "finds that there was not just cause *to dismiss* Petitioner for unacceptable personal conduct." (emphasis supplied). The ALJ heard the evidence, weighed the credibility, and determined dismissal of Petitioner was unwarranted under these facts, and imposed a written warning and a one-week suspension without pay. Under our *de novo* review, we agree the evidence and findings of fact tends to show just cause exists to impose discipline upon petitioner as a result of his unacceptable personal conduct. The ALJ imposed a sanction within the range of authorized disciplinary alternatives. *See* 25 N.C.A.C. 1J .0604(a).

V. Conclusion

Under our *de novo* review of the existence of just cause, and giving whole record deference to the ALJ's findings of fact, the ALJ's conclusion that Petitioner's conduct "does not rise to the level of conduct that would justify the severest sanction of dismissal under the totality of facts and circumstances of this contested case," and dismissal of Petitioner "is not the 'right' thing to do" is affirmed. The ALJ's conclusion that just cause existed for a written warning and a one-week suspension without pay is also affirmed. The final decision of the ALJ is affirmed.

AFFIRMED.

Judge DIETZ concurs.

Chief Judge McGEE concurs in part, dissents in part, with separate opinion.

McGEE, Chief Judge, concurring in part and dissenting in part.

I concur in the majority's conclusion that an "administrative law judge, reviewing an agency's decision to discipline a career state employee . . . owes no deference to the agency's conclusion of law that

. . . just cause existed" for the action taken by the agency. I also agree that "[a]fter receiving and considering the evidence, and entering findings of fact, an administrative law judge is free to substitute their judgment for that of the agency as to the legal conclusion of whether just cause . . . existed for the agency's action." However, I respectfully dissent from the majority's assertion that the standards of review provided in N.C. Gen. Stat. § 150B-51 apply to this case. I further dissent from the majority's conclusion, in its application of the three-prong "just cause" analysis created by this Court in *Warren v. N.C. Dep't of Crime Control*, 221 N.C. App 376, 726 S.E.2d 920, *disc. review denied*, 366 N.C. 408, 735 S.E.2d 175 (2012), that Petitioner's actions in the present case did not give rise to just cause for his termination – the disciplinary action chosen by the agency.

I. Changes in the Just Cause Statutory Framework

The present case is the first time this Court has interpreted the changes made to the statutory scheme for determining when just cause exists for an agency's disciplinary decision. *See generally* 2013 N.C. Sess. Laws ch. 382 ("the 2013 amendment"). The most significant change made by the 2013 amendment was to alter the role of the ALJ in the just cause determination process. Under the former statutory framework, an ALJ provided a "recommended decision," complete with findings of facts and conclusions of law, before entry of a final agency action. *See N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 657-58, 599 S.E.2d 888, 893-94 (2004). Through the 2013 amendment, the General Assembly created N.C. Gen. Stat. §§ 126-34.01 and 126-34.02, and in doing so significantly shifted the role of the ALJ in the just cause determination process. A contested case hearing is now initiated in the Office of Administrative Hearings "[o]nce a final agency decision has been issued[.]" N.C. Gen. Stat. § 126-34.02(a) (2015). N.C. Gen. Stat. § 126-34.02 currently allows the ALJ to review an agency decision to terminate the employment of a career State employee under the following relevant circumstances:

> (b) The following issues may be heard as contested cases after completion of the agency grievance procedure and the Office of State Human Resources review:
>
> . . . .
>
> (3) Just cause for dismissal, demotion, or suspension. – A career State employee may allege that he or she was dismissed, demoted, or suspended for disciplinary reasons without just cause.

N.C. Gen. Stat. § 126-34.02(b)(3) (2015). The language of N.C. Gen. Stat. § 126-34.02(b)(3) allows a State employee to initiate a contested case in the Office of Administrative Hearings to review whether just cause existed to dismiss, demote, or suspend that employee. *Id.* There is nothing in the language of N.C.G.S. § 126-34.02(b)(3) to indicate that a career state employee may initiate a contested case to argue that he should have received a lesser disciplinary action, although just cause existed for the disciplinary action received.

Further, N.C. Gen. Stat. § 126-34.02(a) limits the Office of Administrative Hearings to the following relief when it has determined that the final agency decision was erroneous:

> Once a final agency decision has been issued in accordance with G.S. 126-34.01, . . . a State employee, or former State employee may file a contested case in the Office of Administrative Hearings under Article 3 of Chapter 150B of the General Statutes. . . . In deciding cases under this section, the Office of Administrative Hearings may grant the following relief:
>
> (1) Reinstate any employee to the position from which the employee has been removed.
>
> (2) Order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied.
>
> (3) Direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improper action of the appointing authority.

N.C. Gen. Stat. § 126-34.02 (2015). N.C. Gen. Stat. § 126-34.02(a)(2) is not relevant to the issue before us. N.C. Gen. Stat. § 126-34.02(a)(1) authorizes reinstatement of an employee if the ALJ in a contested case hearing determines that there was no just cause to terminate the employee. N.C.G.S. § 126-34.02(a)(1) does not specifically authorize the ALJ to grant any relief other than reinstatement if it determines that dismissal was not supported by just cause. N.C. Gen. Stat. § 126-34.02(a)(3) allows the ALJ to take other suitable action that may include actions not specifically mentioned in the statute, but only "to correct the abuse [or the 'improper action of the appointing authority']." *Id.* In other words, N.C.G.S. § 126-34.02(a)(3) only applies if the ALJ had determined that the final agency decision was erroneous. In the case before us, the ALJ could

only invoke his or her powers pursuant to N.C.G.S. § 126-34.02(a)(3) if it first determined there was no just cause for the termination of Petitioner's employment.[1]

In short, the Office of Administrative Hearings is authorized by N.C.G.S. § 126-34.02 to take action in a contested case if it has first determined that the actual discipline included in the final agency decision was not supported by just cause. If the ALJ determines that there was just cause to support the final agency decision, it lacks authority to do anything other than affirm that decision.

While the majority principally cites and quotes from N.C.G.S. § 126-34.02, the majority simultaneously concludes that N.C. Gen. Stat.§ 150B-51 "governs the scope and standard of review of this Court's review of an administrative agency's final decision," and that "[t]he standard of review is dictated by the substantive nature of each assignment of error." (citations omitted). I disagree with any reliance the majority places on N.C.G.S. § 150B-51, a separate statutory framework which is, in my view, inapplicable to the present case. N.C.G.S. § 150B-51, a part of Article 4 of Chapter 150B of the General Statutes, is entitled "Judicial Review" and allows "[t]he court reviewing a final decision" of an ALJ to reverse or modify that decision under certain circumstances and under various standards of review. *See* N.C. Gen. Stat. §§ 150B-51(b)(1)-(6) (2015). N.C. Gen. Stat. § 150B-43, another statute in Article 4, describes when the procedure provided by Article 4 of Chapter 150B governs judicial review of an ALJ's decision, and when it does not:

> Any party or person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to the party or person aggrieved by statute or agency rule, is entitled to judicial review of the decision under this Article, *unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute.*

N.C. Gen. Stat. § 150B-43 (2015) (emphasis added).

The procedure in Article 4 of Chapter 150B, including the standards of review in N.C.G.S. § 150B-51, are inapplicable because N.C.G.S.

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1. I would further note that nothing in N.C.G.S. § 126-34.02(a)(3) suggests that an ALJ is granted authority to substitute his or her judgment for that of the relevant agency as to the correct disciplinary action to be imposed. N.C.G.S. § 126-34.02(a)(3) only gives the ALJ the authority to remedy any damages to a petitioner flowing from an incorrect discipline imposed by a final agency decision.

§ 126-34.02, which states that "[a]n aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals," serves as "another statute" which provides an "adequate procedure for judicial review" and thereby renders N.C.G.S. §§ 150B-43 through 150B-52 not relevant. This view is reinforced by reading N.C.G.S. § 126-34.02, which provides judicial review directly to the Court of Appeals, *in pari materia* with N.C.G.S. § 150B-45, which provides that, under the procedures set out in Article 4 of Chapter 150B, judicial review is undertaken first in superior court. *See* N.C. Gen. Stat. § 150B-45 (2015) ("To obtain judicial review of a final decision under [Article 4 of Chapter 150B], the person seeking review must file . . . [a] petition for review . . . in the superior court[.]"). Both statutes cannot control judicial review of contested case hearings of this nature, and because N.C.G.S. § 126-34.02 was specifically enacted to provide for judicial review directly to this Court, I find it to be the "adequate procedure for judicial review" contemplated by N.C.G.S. § 150B-43. Therefore, the statutory procedure set forth in Article 4 of Chapter 150B, including the standards of review in N.C.G.S. § 150B-51, are inapplicable.[2] I dissent from the majority's conclusion, to the extent that it holds that the standards of review contained in N.C.G.S. § 150B-51 are applicable to this case.

II. *Warren* Analysis: Just Cause for Petitioner's Termination

N.C. Gen. Stat. § 126-35(a) provides: "No career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause. . . . The State Human Resources Commission may adopt, subject to the approval of the Governor, rules that define just cause." N.C. Gen. Stat. § 126-35(a) (2015). Exercising that delegated authority, the State Human Resources Commission has adopted rules, codified in the North Carolina Administrative Code, that define just cause for disciplinary action: "Either unsatisfactory or grossly inefficient job performance or unacceptable personal conduct as defined in 25 NCAC 1J .0614 of this Section constitute just cause for discipline or dismissal." 25 NCAC 01J .0604(c). Unacceptable personal conduct, the reason for dismissal in

2. While the standards of review provided in N.C.G.S. § 150B-51 are inapplicable, the standards of review that *are* applicable to judicial review of contested cases of this nature are well established, and are cited by the majority. Findings of fact are reviewed under the whole record test, and conclusions of law are reviewed *de novo*. *See N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 655, 599 S.E.2d 888, 898 (2004); *Barron v. Eastpointe Human Servs. LME*, ___ N.C. App. ___, ___, 786 S.E.2d 306, 310-11 (2016).

this case, includes "the willful violation of known or written work rules." 25 NCAC 01J .0614(8)(d).

In *Warren*, as noted by the majority, this Court delineated a three-part inquiry to guide courts in determining whether an employee was dismissed for "just cause" for unacceptable personal conduct:

> [T]he best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining unacceptable personal conduct. The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken.

Warren, 221 N.C. App. at 382-83, 726 S.E.2d at 925 (citations and footnote omitted). Applying *Warren*'s framework in the present case, I, too, find the first two inquiries satisfied.[3] As to the first inquiry, the unchallenged findings of fact provide that Petitioner punched Walls in the stomach with his fist, without provocation, and at a time when Walls was restrained and under the complete control of multiple correctional officers. As to the second inquiry, Petitioner's conduct amounted to the "willful violation of known or written work rules," which is one of the instances of unacceptable personal conduct pursuant to 25 NCAC 01J .0614(8)(d).

However, I must disagree with the majority as to "the third inquiry: whether [the petitioner's] misconduct amounted to just cause for the disciplinary action taken." *Warren*, 221 N.C. App. at 382-83, 726 S.E.2d at 925. After considering the totality of the facts and circumstances of the present case, I believe Petitioner's actions of unacceptable personal

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3. Although our Supreme Court is not bound by *Warren*'s three-prong analysis, *see, e.g.*, *Northern Nat'l Life Ins. v. Miller Machine Co.*, 311 N.C. 62, 76, 316 S.E.22d 256, 265 (1984), *Warren*'s analysis is a helpful conceptualization of *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004), and is useful in the just cause analysis.

conduct gave rise to "just cause" for his termination by Respondent. The unchallenged findings show that Petitioner punched an inmate in the stomach with his fist, without justification, and while the inmate was restrained, compliant, and under the complete control of other correctional officers. The three correctional officers present at the scene, and tasked with removing Walls from his cell, testified as to Petitioner's actions, and their effect on Walls.

Officer Johnson testified that Petitioner entered through a side door, said to Walls, "you think this is funny," and punched Walls in the stomach. Officer Johnson explained that the "blow was unexpected," and it caused Walls to "ma[ke] a sound" and fall to the ground. Officer Alexander likewise described Walls' reaction to Petitioner's punch: "[Walls] grunted, leaned forward, shook his head, and stood back up." Petitioner found this funny, and "laugh[ed] all the way" from the scene of the assault to Walls' holding cell. Officer Johnson "couldn't believe [Petitioner] did what he did," and was so astonished that he needed "to clear [his] head." Petitioner later sought out Officer Johnson and, while refusing to answer "why [he] hit that inmate for no reason," explained that the fact the assault occurred in a known blind spot was not coincidental; Petitioner explained that he waited to strike until Walls was in a known blind spot: Petitioner explained to Officer Johnson that "[h]e knew where all the blind spots was [sic], and the camera didn't pick up nothing. Didn't see it." Petitioner also threatened Officer Johnson, telling Sergeant Grantham that "if [Officer] Johnson wrote anything against him, that he [Petitioner] was going to hurt Johnson."

Petitioner was aware of Respondent's Use of Force policy, which limited use of force to a "last resort" and prohibited force as a form of punishment. The reason for Petitioner's attack on Walls was not inmate safety, institutional security, or some other legitimate penological purpose; rather, Petitioner punched Walls as "some form of retribution" for spreading feces in his cell. The majority places great weight on various "mitigating factors" found by the ALJ including, *inter alia*: (1) Petitioner's good prior work history, including a "good working relationship with Walls;" (2) that Petitioner was not working his regular shift; (3) the absence of bruising on Walls thirty minutes after the assault; and (4) the fact that Walls was "walking erect, smiling, and in no apparent distress" after the incident.

Given the testimony of three correctional officers, who unanimously testified to Petitioner's use of unwarranted physical force on an inmate, Petitioner's prior work history or prior "good working relationship" with Walls has little relevance to the question of whether Respondent had

just cause to terminate Petitioner. Regardless of his past work history, I find Petitioner's present acts troubling; Petitioner laid in wait until Walls was in a known blind spot, approached and punched him in the stomach as "some form of retribution" for spreading feces in his cell, found Walls' physical response to being punched funny, and subsequently threatened violence against another officer if that officer reported the incident. And while it appears to me that Petitioner's punch was of much greater force than the majority and the ALJ believe – Officer Johnson testified that the force of the punch brought Walls to the ground, and Officer Alexander characterized Walls as keeling over and shaking his head – the force of Petitioner's punch has little relevance to the just cause determination in the present case.

Notwithstanding Petitioner's positive performance reviews and his lack of problems preceding this incident, I would hold that a single incident of intentionally and maliciously punching a restrained and compliant inmate for no legitimate penological purpose in violation of Respondent's Use of Force policy amounts to unacceptable personal conduct that provides just cause for termination, regardless of the amount of force used.

Nearly all of North Carolina's correctional officers endeavor on a daily basis to ensure the public's safety and undertake their duties in a professional manner, and society calls on our correctional officers to make judgments to assure the safety and security of the public and inmates alike. *See Blackburn v. N.C. Dep't of Pub. Safety*, ___ N.C. App. ___, ___, 784 S.E.2d 509, 528 (2016) (noting that the "most important 'job requirement'" of a correctional officer is "that of exercising good judgment in a supervisory position of great responsibility"). Under the majority's rationale, so long as a correctional officer has maintained a positive work history and injures an inmate in a way that does not leave physical markings, Respondent does not have just cause to remove that officer from his or her position, a position of great trust and confidence. *Id.*

III. Conclusion

I agree with the majority that an administrative law judge "owes no deference to the agency's conclusion of law that . . . just cause existed" for the action taken by the agency, and that "[a]fter receiving and considering the evidence, and entering findings of fact, an administrative law judge is free to substitute their judgment for that of the agency as to the legal conclusion of whether just cause . . . existed for the agency's action." However, I respectfully dissent from the majority's reliance on the standards of review in N.C.G.S. § 150B-51. Because judicial review is

established for cases of this type in "another statute" – namely, N.C.G.S. § 126-34.02 – I believe N.C.G.S. § 150B-51 is not applicable to this case. I further dissent from the majority's application of *Warren*'s third prong, and would conclude that Petitioner's actions provided Respondent with just cause to terminate Petitioner for unacceptable personal conduct. Therefore, I would reverse the decision of the ALJ.

IN THE MATTER OF C.P., C.P., J.C., J.T.

No. COA16-808

Filed 7 March 2017

1. Appeal and Error—preservation of issues—best interests of child—failure to raise at permanency planning hearing

Although respondent mother contended that the trial court violated her constitutional rights in a child abuse and neglect case by concluding that guardianship was in the minor child's best interest without making findings that respondent was unfit or acted in a manner inconsistent with her constitutionally protected status, respondent did not raise the issue during any portion of the permanency planning hearing and thus waived it.

2. Guardian and Ward—guardianship—paternal grandfather—best interests of child

The trial court did not abuse its discretion in a child abuse and neglect case by concluding that guardianship with the paternal grandfather was in the minor child's best interest considering the totality of the court's findings.

3. Child Abuse, Dependency, and Neglect—paternal grandfather—guardian—adequacy of financial resources

The trial court did not err in a child abuse and neglect case when it did not verify that the paternal grandfather had adequate financial resources before appointing him as guardian to the minor child. The trial court considered the grandfather's long, close relationship with the minor child; his willingness to intervene in the proceedings; and the undisputed evidence of his demonstrated ability to fully provide for his grandson.

IN RE C.P.

[252 N.C. App. 118 (2017)]

Appeal by respondent-mother from order entered 9 May 2016 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 30 January 2017.

J. Thomas Diepenbrock, for respondent-appellant mother.

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

K&L Gates LLP, by Associate Attorney Abigail F. Williams, for Guardian ad Litem.

CALABRIA, Judge.

Respondent appeals from the trial court's order awarding guardianship of her minor child, "James,"[1] to his paternal grandfather, Harold Outing ("Mr. Outing").[2] After careful review, we affirm.

I. Background

On 13 March 2013, Mecklenburg County Department of Social Services, Division of Youth and Family Services ("YFS") received a referral alleging that a domestic violence incident had occurred between respondent and her boyfriend, the father of two of respondent's other minor children. The incident caused respondent's C-section stitches to break, and the boyfriend was charged with assault on a female. The charge was later dismissed, but YFS entered into safety plans with both respondent and her boyfriend.

Respondent and her children initially stayed with respondent's mother following the incident, but two weeks later, they moved in with the boyfriend, his mother, and his seventeen-year-old sister. On 17 June 2013, YFS received a referral alleging that James's three-month-old half-sister, "Charlene," had been sexually abused. Charlene was hospitalized for three days.

YFS and respondent entered into another safety plan, which required that she and her children return to their maternal grandmother's home. The maternal grandmother was to provide constant "eye/sight"

1. Pseudonyms are used to protect the identities of the minor children involved in this case and for ease of reading.

2. James's father is deceased.

supervision of the children, and she and respondent agreed that they would not engage in violence in front of the children. However, on 15 July 2013, YFS received reports alleging that respondent and her mother had engaged in multiple acts of domestic violence in the children's presence. Respondent was charged with damage to property and violation of a domestic violence protective order as a result of the incidents. The maternal grandmother told YFS that she was "overwhelmed" and could only provide care for the children through 16 July 2013.

On 17 July 2013, YFS filed a petition alleging that James and his half-siblings were abused, neglected, and dependent juveniles. YFS obtained nonsecure custody of the children and placed them in a foster home. An adjudication hearing was conducted on 18 September 2013, and respondent stipulated to a number of facts. Based on those stipulations, the trial court adjudicated the children as neglected and dependent.

Prior to the dispositional phase of the hearing, Mr. Outing, represented by counsel, moved to intervene in the case. Mr. Outing stated that James had lived with him "on and off" since birth and "exclusively . . . from approximately June 2011 until June 17, 2013." According to Mr. Outing, he had served as James's primary caretaker for two years, during which he provided James with a bedroom, food, clothing, shoes, and other necessities; took him to and from preschool each day; tucked him into bed each night; and cared for him when he was sick. Mr. Outing explained that when he left town to travel for work in June 2013, he left James in respondent's care. However, when he returned home approximately one month later, he was informed that James and his half-siblings were in YFS custody.

The trial court granted Mr. Outing's motion to intervene and proceeded to disposition. The children were ordered to remain in YFS custody, and respondent was awarded supervised visitation. The court ordered YFS to conduct a home study of Mr. Outing's residence and to explore and develop a case plan with him. The court awarded Mr. Outing weekly supervised visitation with James and gave YFS "discretion to expand visitations."

Respondent returned to her mother's residence, and she and her boyfriend continued to have issues with domestic violence. Respondent made inconsistent progress with her case plan, making incomplete attempts at substance abuse treatment and sporadically testing positive for various drugs; spending time in jail on a variety of criminal charges; complying inconsistently with court-approved visitation and safety plans; and cycling through multiple jobs and living arrangements. James

continued to have visitation with Mr. Outing during this timeframe, except for a few periods when visitation was briefly suspended. With the trial court's permission, on 15 June 2015, YFS officially placed James in Mr. Outing's residence full-time.

On 19 April 2016, the trial court entered an order requiring respondent, Mr. Outing, and YFS to schedule a meeting to discuss guardianship of James. Respondent failed to attend that meeting due to a work conflict. Following the next permanency planning hearing, on 9 May 2016, the court entered an order concluding, *inter alia*, that guardianship was in James's best interest and awarding guardianship to Mr. Outing.[3] Respondent appeals.[4]

II. Analysis

A. Respondent's Constitutional Rights

[1] Respondent first argues that the trial court violated her constitutional rights by concluding that guardianship was in James's best interest without making findings that respondent was unfit or acted in a manner inconsistent with her constitutionally protected status. We disagree.

Respondent is correct that the Due Process Clause protects a "parent's paramount constitutional right to custody and control of his or her children[,]" and that "the government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody, or where the parent's conduct is inconsistent with his or her constitutionally protected status[.]" *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001) (citations omitted). "While this analysis is often applied in civil custody cases under Chapter 50 of the North Carolina General Statutes, it also applies to custody awards arising out of juvenile petitions filed under Chapter 7B." *In re D.M.*, 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011) (citation omitted). Thus, in order "to apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit or that his or her conduct is inconsistent with a parent's

3. The order also addressed the status of James's half-siblings. However, respondent's appeal only pertains to the portion of the order granting guardianship of James to Mr. Outing.

4. On 16 May 2016, the trial court amended its 9 May 2016 order to schedule the next hearing for 6 July 2016; all other terms of the original order remain unchanged. On 8 June 2016, respondent entered notice of appeal from the original order. To the extent that respondent should have appealed from the amended order, we construe respondent's appeal as a petition for writ of certiorari and proceed to its merits. *See* N.C.R. App. P. 2, 21.

constitutionally protected status." *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009) (citations omitted).

However, respondent did not raise this issue during any portion of the permanency planning hearing. This Court has previously held that a parent's right to a determination of his or her constitutionally protected status is waived if the parent does not raise the issue before the trial court. *See In re T.P.*, 217 N.C. App. 181, 186, 718 S.E.2d 716, 719 (2011) (declining review of the respondent-mother's argument that the trial court erred in applying the best interest standard because "constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal" (internal quotation marks, brackets, and citation omitted)). Consequently, respondent has failed to preserve this issue, and her argument is overruled.

B. Guardianship

1. Best Interest of James

[2] Respondent next contends that the trial court erred by concluding that guardianship was in James's best interest. We disagree.

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004) (citation omitted). "We review a trial court's determination as to the best interest of the child for an abuse of discretion." *In re J.H.*, __ N.C. App. __, __, 780 S.E.2d 228, 238 (2015) (citation and internal quotation marks omitted).

Respondent contends that the trial court's conclusion that guardianship was in James's best interest is not supported by its findings that respondent was "not acting in a manner inconsistent with the health or safety of the juveniles" and was

> now making progress under her [Family Services Agreement]. [Respondent] looks clean, has continued to attend her visitation, and remains employed. [Respondent] is in a much better place than she was in the Fall. [Domestic violence] has not been addressed yet but there have been no further incidences. There were issues with [respondent] and [the juveniles' maternal grandmother]. [Respondent] continues to look for alternative housing. She recently had a car accident and is attempting to get a new vehicle.

Respondent asserts that these findings cannot be reconciled with the trial court's conclusion; however, the court's findings cannot be considered in isolation. The trial court also found that respondent's children had been in YFS custody for nearly three years, and that James had been placed with Mr. Outing for ten months "and has a good relationship" with him. Even considering respondent's recent progress, the court found that it was still "not possible for [James] to be returned home immediately or within 6 months nor [wa]s it in [his] best interest to return home because: [t]he parents have failed to alleviate the issues that necessitated placement." The court further found that at this time, James's "return to [his] home is contrary to [his] health and safety." Although respondent claims that these findings were not supported by competent evidence, they were wholly consistent with the social worker's testimony at the permanency planning hearing:

> Q And would you say that based on everything that you know in this case that it's not foreseeable for these children to be placed with [respondent] within the next six months?
>
> A Yes.
>
> Q Why is that?
>
> A Well, we actually want to see, you know, more progress in her case plan. Although, you know, she's done well, you know, she's come along, we want her as far as getting housing, stable housing, as well as completing the NOVA program.

Respondent had not completed the NOVA program. This program was meant to address respondent's domestic violence issues, which not only were the initial grounds for removing respondent's children from her care but also remained unresolved nearly three years later. The evidence presented by the social worker was sufficient to support the challenged findings, which in turn support the trial court's conclusion. Therefore, contrary to respondent's argument, the findings regarding her progress do not contradict the findings that it was not in James's best interest to return home, but instead reflect that the trial court considered her progress in making its ultimate determination.

Considering the totality of the court's findings, we hold that the trial court did not abuse its discretion in concluding that guardianship was in James's best interest. This argument is overruled.

2. Verification of Mr. Outing's Resources

[3] Finally, respondent argues that the trial court failed to verify that Mr. Outing had "adequate financial resources" before appointing him as guardian to James. We disagree.

Before placing a juvenile in a guardianship, the trial court must verify that the proposed guardian "understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. § 7B-600(c) (2015); *see also* N.C. Gen. Stat. § 7B-906.1(j). "The court may consider any evidence, including hearsay evidence . . . , or testimony or evidence from any person that is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-906.1(c). "[T]he trial court need not make any specific findings in order to make the verification under these statutory provisions[, b]ut the record must contain competent evidence of the guardians' financial resources and their awareness of their legal obligations." *In re J.H.*, __ N.C. App. at __, 780 S.E.2d at 240 (internal quotation marks and citations omitted) (holding that verification was insufficient where the guardian-grandparents did not testify at the hearing and the only evidence of their financial resources was (1) a DSS report stating that they had been "meeting [the child's] medical needs"; and (2) a guardian *ad litem* report stating that the child had "no current financial or material needs"); *see also In re P.A.*, ___ N.C. App. ___, ___, 772 S.E.2d 240, 246 (2015) (explaining that "some evidence of the guardian's 'resources' is necessary as a practical matter, since the trial court cannot make any determination of adequacy without evidence").

In the instant case, the trial court found that Mr. Outing "stands ready and able to accept the guardianship of [James]. [He] understands the legal significance of the appointment and has adequate resources to care appropriately for [James]." Prior to naming him guardian, the court discussed the significance of the appointment with Mr. Outing:

> THE COURT: In regards to guardianship, Mr. Outing, . . . you understand that if I appoint or if I give you guardianship of [James] the big thing is, in essence, you're going to be mainly the one financially responsible for [him]. Do you understand that?
>
> MR. OUTING: Yes.
>
> THE COURT: Okay. And you're willing to accept that responsibility as far as the main financial provider for the child?

> MR. OUTING: Yes.
>
> THE COURT: Do you also understand that if I appoint giving you guardianship you would have care, custody and control of the juvenile and may arrange for a suitable placement for the juvenile. Do you understand that?
>
> MR. OUTING: Yes.
>
> THE COURT: Do you also understand that you may represent the juvenile in legal actions before any court?
>
> MR. OUTING: Yes.
>
> THE COURT: All right. Do you also understand that you may consent to certain actions on the part of the juvenile in place of the parent or custodian including marriage, enlistment in the armed forces and/or enrollment in school?
>
> MR. OUTING: Yes.
>
> THE COURT: Do you also understand that you may consent to any necessary remedial psychological, medical or surgical treatment for the juvenile?
>
> MR. OUTING: Yes.
>
> . . .
>
> THE COURT: All right. I think the other orders continue to demonstrate as far as Mr. Outing's care of [James] in the past ten months that I think it's in the best interest of [James] that guardianship be awarded to Mr. Outing.

This colloquy, standing alone, is insufficient to meet the statutory verification requirement. "No doubt, had the trial court asked respondent the same question[s], she also would have said 'yes,' but her answer[s] alone would not have been sufficient evidence of her actual resources or abilities to care for [James] either." *Id.* at __, 772 S.E.2d at 248.

Notably, however, the trial court also considered reports from YFS and the guardian *ad litem*, which establish that Mr. Outing provides James with a stable, YFS-approved home where James has his own bedroom, toys, and a TV. James "appears to be happy and safe" there, and he has "responded positively" to the "structure and consistency" that Mr. Outing provides. Since moving in with Mr. Outing, James's prior behavioral issues have decreased, and he has transitioned in to a normal public school. Mr. Outing takes James to all of his many medical, dental, and

therapy appointments. In the future, he plans to enroll James in "some sporting activities outside of the home." *See In re J.E., B.E.*, 182 N.C. App. 612, 617, 643 S.E.2d 70, 73 (concluding that verification was sufficient where the trial court considered a DSS home study reporting, *inter alia*, that the guardian-grandparents were "aware of the importance of structure and consistency in a child's life" and were "financially capable of providing for the needs of their grandson"), *disc. review denied*, 361 N.C. 427, 648 S.E.2d 504-05 (2007).

Respondent contends that "the record . . . raises serious doubts as to whether Mr. Outing has adequate resources to serve as guardian" because he was laid off for a short time around March 2016, prior to the appointment. Nevertheless, in her court report for the 19 April 2016 hearing, the guardian *ad litem* stated that she believed that Mr. Outing "is now working with a moving company." Moreover, in seeking benefits from Temporary Assistance for Needy Families during his brief period of unemployment, Mr. Outing demonstrated that he appreciated the financial burden of caring for James and wanted to prepare for it.

Furthermore, at the adjudication and disposition hearing on 18 September 2013, Mr. Outing presented evidence that he had been James's primary caretaker for approximately two years before YFS obtained custody of him while Mr. Outing was temporarily away for work. From June 2011 to June 2013, Mr. Outing alone consistently provided James with food, clothing, and other necessities. The trial court incorporated Mr. Outing's motion to intervene and the corresponding order into the findings of its dispositional order.

We have held that "a trial court may take judicial notice of earlier proceedings in the same cause and that it is not necessary for either party to offer the file into evidence" in order to do so. *In re M.N.C.*, 176 N.C. App. 114, 120, 625 S.E.2d 627, 632 (2006) (citation, brackets, and internal quotation marks omitted). Here, the trial court did not expressly indicate that it was taking judicial notice of prior orders entered in the cause. While "the better practice would be to explicitly . . . announc[e] in open court that it is taking judicial notice of the matters contained in the court file[,]" the court was not required to give such notice. *Id.* at 121, 625 S.E.2d at 632.

"The trial court has the responsibility to make an independent determination, based upon facts in the particular case, that the resources available to the potential guardian are in fact 'adequate.' " *In re P.A.*, __ N.C. App. at __, 772 S.E.2d at 248 (citation and brackets omitted). Considering Mr. Outing's long, close relationship with James; his

willingness to intervene in the proceedings; and the undisputed evidence of his demonstrated ability to fully provide for his grandson, we are satisfied with the court's determination in this case. The trial court's permanency planning order is affirmed.

AFFIRMED.

Judges INMAN and ZACHARY concur.

KEY RISK INSURANCE COMPANY, PLAINTIFF
v.
CHAD PECK, DEFENDANT/THIRD-PARTY PLAINTIFF
v.
MARK ANDREW MCGUIRE, THIRD-PARTY DEFENDANT

No. COA16-872

Filed 7 March 2017

Jurisdiction—standing—insurance company action in own name—workers' compensation benefits—third party defendants

The trial court did not err in a negligence action seeking to recover workers' compensation benefits by granting defendant third party's motion to dismiss based on lack of standing. Plaintiff insurance company did not possess a statutory right to institute the action in its own name against defendant under N.C.G.S. § 97-10.2. Further, plaintiff failed to show the trial court abused its discretion by denying plaintiff's motion to substitute a party.

Appeal by plaintiff from orders entered 25 April 2016 by Judge W. Allen Cobb in Craven County Superior Court. Heard in the Court of Appeals 6 February 2017.

Macrae, Perry, Macrae & Whitley, LLP, by Gregory T. Whitley, for plaintiff-appellant.

Ennis, Baynard, Morton, Medlin & Brown P.A., by Stephen C. Baynard, for defendant-appellee Peck.

TYSON, Judge.

Key Risk Insurance Company ("Key Risk") appeals from orders entered granting Chad Peck's ("Defendant") motion to dismiss and denying Key Risk's motion to substitute a party. We affirm.

I. Factual Background

Judith Holliday ("Holliday") was employed at CarolinaEast Medical Center, Inc. ("CarolinaEast"). Key Risk provided workers' compensation insurance to CarolinaEast.

On 3 February 2013, Holliday and Third-Party Defendant, Mark Andrew McGuire ("McGuire"), responded to an emergency call. McGuire drove the ambulance, while Holliday was seated in the front passenger seat. Key Risk alleged the ambulance approached an intersection with its emergency lights and sirens activated while en route. Key Risk further alleged Defendant failed to yield, entered the intersection, and collided with the ambulance.

Holliday and Defendant received and alleged injuries resulting from the collision. Defendant signed a "Property Damage Release" releasing CarolinaEast, McGuire, and American Alternative Insurance Corporation from further liability for the collision in exchange for payment of $5,724.56. Defendant also signed a "Release in Full" wherein he released CarolinaEast, McGuire, Glatfelter Claims Management, Inc., and American Alternative Insurance Corporation from further liability for the collision in exchange for payment of $4,143.45 for his bodily injuries.

Holliday received extensive medical care for her injuries. Key Risk's complaint alleged it paid Holliday $63,965.58 as CarolinaEast's provider of workers' compensation insurance. Key Risk's complaint further alleged it filed the proper forms with the North Carolina Industrial Commission, which admitted Holliday's right to compensation for medical treatment for the injuries she had sustained in the collision.

On 3 December 2015, Key Risk filed its complaint. Key Risk alleged Defendant was negligent in the operation of his vehicle, and it was entitled to recover the workers' compensation benefits paid to Holliday from Defendant. Defendant filed an answer and a third-party complaint against McGuire. McGuire filed an answer and a motion for judgment on the pleadings.

Defendant moved to dismiss the action on 29 March 2016 pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. On 13 April 2016, Key Risk moved to substitute Holliday as the named plaintiff pursuant to N.C. Gen. Stat. § 97-10.2.

After hearing oral arguments of counsel and reviewing the submissions of the parties, the trial court denied McGuire's motion for judgment on the pleadings, denied Key Risk's motion to substitute a party, and granted Defendant's motion to dismiss. Key Risk appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015).

III. Issues

Key Risk argues the trial court erred by granting the motion to dismiss for lack of standing. In the alternative, Key Risk argues, even if it did not have standing to bring the claim, the trial court abused its discretion by denying its motion to substitute a party.

IV. Standard of Review

"A motion to dismiss a party's claim for lack of standing is tantamount to a motion to dismiss for failure to state a claim upon which relief can be granted according to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure." *Slaughter v. Swicegood*, 162 N.C. App. 457, 464, 591 S.E.2d 577, 582 (2004).

When considering a motion to dismiss under Rule 12(b)(6), "[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." *Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 373, 553 S.E.2d 89, 91 (2001) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)). The allegations in the complaint must be viewed in the light most favorable to the non-moving party. *Donovan v. Fiumara*, 114 N.C. App. 524, 526, 442 S.E.2d 572, 574 (1994).

A trial court's order denying a motion to substitute a party is reviewed for an abuse of discretion. *Revolutionary Concepts, Inc. v. Clements Walker PLLC*, 227 N.C. App. 102, 112, 744 S.E.2d 130, 137 (2013) (holding the trial court did not abuse its discretion in denying a motion to substitute where plaintiffs failed to offer any compelling reason why they failed to make the motion in a reasonable time after a merger). "Under the abuse-of-discretion standard, we . . . determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Mark Grp. Int'l., Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161 (2002).

V. Insurers' Rights under N.C. Gen. Stat. § 97-10.2

Key Risk reads and asserts the provisions of N.C. Gen. Stat. § 97-10.2 (2015) provide standing to bring this action. We disagree.

When our courts engage in statutory interpretation, the primary task "is to ensure that the legislative intent is accomplished. The best indicia of legislative purpose are the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Radzisz v. Harley Davidson of Metrolina, Inc.*, 346 N.C. 84, 88-89, 484 S.E.2d 566, 569 (1997) (internal citations and quotation marks omitted).

Statutory interpretation begins by examining the plain and ordinary meanings of words in the statute. *Dion v. Batten*, __ N.C. App. __, 790 S.E.2d 844, 848 (2016). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988); *see also State v. Wiggins*, 272 N.C. 147, 153, 158 S.E.2d 37, 42 (1967) ("It is elementary that in the construction of a statute words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise.").

N.C. Gen. Stat. § 97-10.2 exclusively provides for the rights and remedies of employees, employers, and insurance carriers against third parties under the Workers' Compensation Act. *Radzisz*, 346 N.C. at 86, 484 S.E.2d at 568. N.C. Gen. Stat. § 97-10.2(a) states:

> The respective rights and interests of the employee-beneficiary under this Article, the employer, and the employer's insurance carrier, if any, in respect of the common-law cause of action against such third party and the damages recovered *shall be as set forth in this section.*

N.C. Gen. Stat. § 97-10.2(a) (emphasis supplied).

Under this statute, the employee possesses the exclusive right to proceed against a third-party tortfeasor during the first twelve months after the date of injury. N.C. Gen. Stat. § 97-10.2(b). If the employee does not bring such an action within those first twelve months, and the employer has filed the appropriate admission of liability with the Industrial Commission, "then *either the employee or the employer* shall have the right to proceed to enforce the liability of the third party by appropriate proceedings." N.C. Gen. Stat. § 97-10.2(c) (emphasis supplied). If neither the employee nor the employer have instituted an action against the third-party tortfeasor prior to sixty days before the

expiration of the applicable statute of limitations, the right to bring the action reverts exclusively to the employee. *Id.*

When a proceeding is instituted against a third party, "the person having the right" to bring the proceeding must bring it "in the name of the employee or his personal representative[.]" N.C. Gen. Stat. § 97-10.2(d). An exception to this requirement exists where the employee or his personal representative "refuse[s] to cooperate with the employer by being the party plaintiff[.]" *Id.* In these cases, the statute states the action "shall be brought *in the name of the employer* and the employee or his personal representative shall be made a party plaintiff or party defendant by order of court." *Id.* (emphasis supplied). In any properly instituted proceeding, neither the employer nor the insurance carrier are considered necessary or proper parties. *Id.*

After outlining which parties are permitted to institute proceedings within the applicable time periods against a third party, N.C. Gen. Stat. § 97-10.2(g) specifically provides for the rights of the insurance carrier:

> The insurance carrier affording coverage to the employer under this Chapter shall be subrogated to all rights and liabilities of the employer hereunder but this shall not be construed as conferring any other or further rights upon such insurance carrier than those herein conferred upon the employer, anything in the policy of insurance to the contrary notwithstanding.

Here, Key Risk argues the statute grants insurance carriers subrogation to all the rights and liabilities of the employer, and as such insurance carriers have standing under the statute to enforce the liability of the third party. The plain language of N.C. Gen. Stat. § 97-10.2(b)-(d) does not support this reading. *See Lemons*, 322 N.C. at 276, 367 S.E.2d at 658.

The language of these sections explicitly states "*the employer* shall have the right to proceed to enforce the liability of the third party." N.C. Gen. Stat. § 97-10.2(c) (emphasis supplied). The insurance carrier is only mentioned once in the sections outlining the procedure for bringing an action against a third party. The statute provides that when a proceeding is brought against a third party "by the person having the right" to bring such a proceeding, "the insurance carrier shall not be a necessary or proper party thereto." N.C. Gen. Stat. § 97-10.2(d). The next sentence states where an employee refuses to cooperate, "the action *shall* be brought *in the name of the employer*." *Id.* (emphasis supplied). Based upon the plain language of the statute, an insurance carrier does not

have the right to bring an action against a third party in its own name, if the employee refuses to cooperate.

VI. Legislative History

A review of the legislative history also supports this reading of the statute. Before the statute was re-codified and amended in 1959, prior versions of N.C. Gen. Stat. §97-10 provided:

> The employer *or his carrier* shall have the exclusive right to commence an action in his own name and/or in the name of the injured employee or his personal representative for damages on account of such injury or death[.]

N.C. Gen. Stat. § 97-10 (1943), *as amended by* N.C. Gen. Stat. § 97-10.2 (2015).

The paragraph on the insurance carrier's subrogation rights stated:

> When any employer is insured against liability for compensation with any insurance carrier, . . . , it shall be subrogated to all rights and duties of the employer, *and may enforce any such rights in the name of the injured employee or his personal representative*; but nothing herein shall be construed as conferring upon the insurance carrier any other or further rights than those existing in the employer[.]

Id. When the statute was re-codified and amended as N.C. Gen. Stat. § 97-10.2 in 1959, all references to an insurance carrier's right to bring a direct suit against a third party in its own name or in the name of the employee were removed. N.C. Gen. Stat. § 97-10.2(c) & (g) (1959).

Based upon the plain language of the statute and the legislative history, nothing shows the General Assembly intended to provide the insurance carrier with the right to bring a direct action against a third party. *See Radzisz*, 346 N.C. at 86, 484 S.E.2d at 568. The trial court did not err in concluding that Key Risk did not have standing to bring this action and dismissing the action. The trial court's ruling is affirmed.

VII. Motion To Substitute

Key Risk argues, even if it lacked statutory standing, the trial court abused its discretion and should have allowed its motion to substitute a party brought pursuant to N.C. Gen. Stat. § 97-10.2. Key Risk further argues it would have been proper to allow the motion to substitute a party under Rule 17(a) of the North Carolina Rules of Civil Procedure.

A. N.C. Gen. Stat. § 97-10.2(d)

Key Risk first argued "[p]ursuant to N.C.G.S. § 97-10.2(d) [Key Risk] is entitled to an order from the Court directing that Judith Holliday be made the party-plaintiff in this action."

N.C. Gen. Stat. § 97-10.2(d) only allows for substitution of an employee as the named plaintiff where the employee or his personal representative "refuse[s] to cooperate" and the action is "brought in the name of the employer."

Here, the action was brought solely in the insurance carrier's name and not the employer's name. Furthermore, no indication in the record shows the employee refused to cooperate. Key Risk acknowledged both in its motion to substitute and in its arguments to the trial court that "[a]t the time of initiation of this action, [Key Risk] and its counsel had not had the opportunity to speak with Ms. Holliday concerning the action and had thus not secured her consent to cooperate and participate in the action." On this record, Key Risk has failed to show the trial court abused its discretion in denying the motion under N.C. Gen. Stat. § 97-10.2(d).

B. Rule 17(a)

At the trial court's hearing on the motions, Key Risk also argued it would be proper to allow the motion to substitute a party under Rule 17(a) of the North Carolina Rules of Civil Procedure.

Rule 17(a) provides:

> **Real party in interest.** — Every claim shall be prosecuted in the name of the real party in interest . . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

N.C. Gen. Stat. § 1A-1, Rule 17(a) (2015).

"A real party in interest is a party who 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." *Slaughter*, 162 N.C. App. at 463, 591 S.E.2d at 582 (citation and quotation marks omitted). As held *supra*, an insurance carrier does not have a statutory right to bring a direct suit

to enforce a claim against a third party under N.C. Gen. Stat. § 97-10.2. Where a case is not brought by the real party in interest, it is within the discretion of the trial court to allow a motion to substitute under Rule 17(a). *Revolutionary Concepts, Inc.*, 227 N.C. App. at 112, 744 S.E.2d at 137.

N.C. Gen. Stat. § 97-10.2(b)-(d) sets out the procedures regarding who can bring a claim against a third party and when those claims can be instituted under the Workers' Compensation Act. Key Risk did not follow these statutory requirements to properly bring or assert the claim against Defendant.

Key Risk was aware that the statutory right to bring a claim would revert exclusively to the employee sixty days prior to the expiration of the statute of limitations, and admitted to the trial court that "this thing was put together last minute." Key Risk failed to speak to the employee prior to bringing this action. The record indicates Key Risk did not secure the employee's consent to being named party plaintiff until 13 April 2016, several months after the case had been filed and after the statute of limitations had expired.

Based on the facts of this case, Key Risk has failed to show the trial court abused its discretion by denying its motion to substitute a party.

VIII. Conclusion

Key Risk does not possess a statutory right to institute this action in its own name against Defendant under N.C. Gen. Stat. § 97-10.2. Key Risk has failed to show the trial court abused its discretion by denying its motion to substitute a party. The trial court's orders denying Key Risk's motion to substitute a party are affirmed and granting Defendant's motion to dismiss. *It is so ordered.*

AFFIRMED.

Chief Judge McGEE and Judge STROUD concur.

TOM KRAUSE, PLAINTIFF
v.
RK MOTORS, LLC AND WESTERN SURETY COMPANY, DEFENDANTS

No. COA16-911

Filed 7 March 2017

Appeal and Error—interlocutory orders and appeals—counterclaim unresolved—no certification or substantial right

Although plaintiff contended that the trial court erred in a fraud, unfair and deceptive trade practices, negligent misrepresentation, and breach of express warranty case by granting defendants' motion for summary judgment, the case was dismissed for lack of subject matter jurisdiction. The trial court's order failed to acknowledge or resolve defendant RK Motors' counterclaim. Further, the order contained no Rule 54(b) certification, and the briefs failed to make any argument of a substantial right.

Appeal by plaintiff from order entered 7 June 2016 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 February 2017.

Blossom Law PLLC, by Rashad Blossom, and The Law Offices of Jason E. Taylor, by Lawrence B. Serbin, for plaintiff-appellant.

Johnston, Allison & Hord, P.A., by Scott R. Miller and Martin L. White, for defendants-appellees.

MURPHY, Judge.

Plaintiff Tom Krause ("Krause") appeals from the trial court's order granting RK Motors, LLC ("RK Motors") and Western Surety Company's (collectively "Defendants") motion for summary judgment. Specifically, he contends the trial court erred in granting Defendants' motion as the motion failed to state with particularity its bases, and in making findings of controverted fact and conclusions of law in its order. Further, Krause argues that the trial court's grant of summary judgment in Defendants' favor as to his claims for fraud, unfair and deceptive trade practices, negligent misrepresentation, and breach of express warranty were unsupported by law.

RK Motors' counterclaim for unfair and deceptive trade practices remains before the trial court. Additionally, the trial court's order granting summary judgment retained jurisdiction over the case "for such other and further orders as may be necessary and appropriate including, but not limited, to orders for the award of attorneys' fees and recovery of costs." On these bases, the present appeal is interlocutory. Neither party has argued why this case is properly before us despite its interlocutory nature, and it is not the role of this Court to create an appeal for an appellant. Accordingly, we dismiss the appeal for lack of subject matter jurisdiction.

Factual Background

Krause, a citizen and resident of California, was in the market to purchase a restored vintage performance automobile when he came across RK Motors' online listing for a 1967 Chevrolet Nova (the "Nova"). RK Motors is a North Carolina limited liability company located in Charlotte that holds itself out as a dealer of antique, collectible, and customized cars. Its website states that all cars in its showroom earn "the RKM Performance Center Seal of Approval, a comprehensive 70+ point inspection performed by one of [the company's] ASE certified technicians where any major issues are found and addressed."

The listing described the Nova and also displayed several pictures as well as a video of the car. As alleged in Krause's complaint, between its posting and communications with him, RK Motors represented that the Nova: Had 137 miles on it; contained a 383 cubic inch small block V8 supercharged engine with 540 horsepower designed "to go straight at a very high rate of speed"; was professionally assembled and restored; would be an excellent car for someone looking for sheer performance; could be driven and enjoyed; was a "pavement-scorcher" with a six-figure build cost after months of skilled workmanship and hours of thorough detailing in accordance with exacting specifications; had a no-compromises, impressive drivetrain with momentum that perfectly complemented solid, undercoated floor plans and a long roster of serious speed equipment; included a transmission that executed "quick, efficient shifts on the heels of wheel stand-inducing launches"; was "fully sorted and ready to pound the pavement"; and was "ready to hit the road for Friday night cruises, Saturday morning poker runs or Sunday afternoon shows." The listing also reassured that RK Motors was a company of car enthusiasts who "know the kind of dedication a high dollar project takes."

Krause first contacted RK Motors regarding the Nova on 16 August 2013, and he was informed that there was a pending sale of the car. Unbeknownst to Krause, when the other buyer arrived to pick up the

Nova, it ran poorly, overheated, and was spewing radiator fluid after being driven only one-eighth of a mile. That buyer rescinded the contract to purchase the Nova on the spot.

Approximately one month later, Krause revisited the website and noticed the listing was still posted and the "pending sale" note had been removed. On 15 September 2013, Krause emailed Frank Carroll ("Carroll"), RK Motors' Vice President of Sales, and was told the earlier buyer's "wife had nixed the deal." Later, however, Carroll's story changed, and he reported that the previous buyer had "a bad record" with the bank, making it difficult for him to get insurance for a classic car. This change likely resulted from Carroll's tendency to, as he put it, "ma[k]e up something" when asked why a deal fell through.

Krause asked Dave Kindig ("Kindig"), a professional car builder, to review the listing and then contacted Carroll to ask a few questions about the Nova. Krause explained that he and Kindig had noticed the Nova had a crack in its lower-left-rear panel above the exhaust pipe, and he wanted to know what had caused the crack and whether it had been repaired. Carroll replied "that the [Nova]'s horsepower caused vibration that might have caused the crack," but the crack "had been repaired."

On 16 September 2013, RK Motors emailed Krause a number of documents pertaining to the proposed sale of the Nova, including a Bill of Sale and Odometer Disclosure Statement, both signed by the company's president. That paperwork reiterated that there were 137 miles on the Nova. Based on RK Motors' advertisement, photographs, video, emails, verbal representations, Bill of Sale, and Odometer Disclosure Statement, Krause was induced to enter into the contract to purchase the Nova. He paid $67,000.00 to RK Motors in the form of a $1,000.00 down payment on 16 September, and wire transfers to RK Motors of $35,000.00 on 17 September and $31,000.00 on 1 October.

According to RK Motors' records, the company knew no later than 30 August 2013 that the Nova was running poorly and that "above half throttle . . . it spits and sputters and almost cuts off[,]" yet RK Motors concealed these facts from Krause and made false representations to him via email as to the condition of the Nova. On 17 September 2013, RK Motors wrote that "[t]he shop is going through the car and making sure it is running well. Giving it a tune up and checking things out. Everything looks good."

On 4 October 2013, Exotic Car Transport, Inc. picked up the Nova from RK Motors and transported it to Krause. Krause's first opportunity to inspect the Nova was 10 October 2013 when he took actual

possession of the vehicle. Immediately upon taking possession of the Nova, Krause experienced problems with the car. The Nova idled too low and overheated after driving about three miles. Krause took the Nova to a mechanic who attributed the overheating to a broken cooling fan toggle switch. The same mechanic repaired the switch and adjusted the Nova's idle, returning it to Krause the same day. However, when Krause attempted to drive the Nova, he experienced severe vibration and the belt for the supercharger and harmonic balancer fell off. On 12 October 2013, Krause had the Nova towed back to the mechanic.

This time, according to Krause, the mechanic discovered a bolt missing at the end of the harmonic balancer, a damaged crankshaft and supercharger, cracked cylinder heads, loose suspension bolts, a crushed front-right brake line, and a damaged transmission. In addition, the crack in the Nova's lower-left-rear panel, that Carroll reported had been fixed, still existed, and there was a similar crack in the lower-right-rear panel, as well. Upon further inspection by his mechanic, Krause learned that the Nova did not contain a professionally built 383 cubic inch small block engine, but rather a 350 Chevy stock engine with approximately 80,000 miles on it. On 15 October 2013, RK Motors sent him a Dealer's Reassignment of Title to a Motor Vehicle in which the company disclosed for the first time that the odometer reading of 137 miles did not reflect the actual mileage.

On 4 May 2015, Krause filed a complaint in Mecklenburg County Superior Court against RK Motors and the company's surety, Western Surety Company, asserting causes of action against RK Motors for (1) actual fraud/constructive fraud; (2) unfair and deceptive trade practices; (3) violation of the North Carolina Vehicle Mileage Act; (4) gross negligent misrepresentation/negligent misrepresentation; and (5) breach of express warranty. Krause also asserted as the sixth count his right to recover from either RK Motors or Western Surety Company pursuant to N.C.G.S. § 20-288(e). Put simply, Krause alleged that he relied on RK Motors' false representations in deciding to purchase the Nova and that he could not have reasonably discovered the true condition of the Nova before purchasing it.

Defendants filed a motion to dismiss on 19 August 2015. After a hearing, the trial court granted Defendants' motion to dismiss Krause's cause of action for violation of the North Carolina Vehicle Mileage Act, but denied their motion to dismiss the remaining claims. On 10 November 2015, Defendants filed an answer, twenty-six affirmative defenses, and a counterclaim. Defendants contended that RK Motors' website specifically disclaims all warranties and noted that information contained

thereon might be out of date or erroneous. Defendants also relied upon the fact that Krause executed a Buyer's Guide and Disclaimer of Warranties and Liability as part of the purchase. The Buyer's Guide stated that Krause agreed to buy the Nova "as is-no warranty," and that "dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle." The Disclaimer of Warranties and Liability also stated in pertinent part:

> Customer acknowledges and agrees that once any third party carrier secures the purchased Vehicle from RK Motors, Customer and/or such carrier bear all risk of loss if the Vehicle is lost, stolen, destroyed, or damaged in any way while in possession of such carrier and RK Motors has no risk of loss whatsoever under such circumstances.
>
> 4. Customer has had an opportunity to inspect and examine the Vehicle as fully as he/she desires, and, as such, the Vehicle is being sold by RK Motors to Customer in "as-is" condition, with all faults.
>
> 5. RK Motors makes no warranties whatsoever, whether express or implied, of merchantability, fitness for purpose, or otherwise, with respect to the Vehicle, and Customer hereby disclaims and waives all such warranties.
>
> Prior to purchasing the Vehicle, Customer acknowledges that he/she has read and understands the above limitations and disclaimers, that they are terms and conditions of sale and that they constitute the entire agreement between the parties regarding warranties and any other liability.

Based on this language, Defendants alleged that Krause waived any right to recover for any of the false statements made to him.

Krause replied to RK Motors' counterclaim on 16 March 2016, and on 23 March 2016 Defendants filed a motion for summary judgment as to "all claims." Defendants amended their motion for summary judgment on 6 May 2016 to limit it to "all of Plaintiff's claims." At no time did Krause file a cross-motion for summary judgment.

On 7 June 2016, the trial court granted Defendants' motion for summary judgment on Krause's remaining claims. Notably, the order granting summary judgment failed to acknowledge or resolve RK Motors' counterclaim. It did explain, however, "[t]his cause is retained for such other and further orders as may be necessary and appropriate including, but not limited, to orders for the award of attorneys' fees and recovery of

costs." Krause gave notice of appeal from the order granting Defendants' motion for summary judgment on 30 June 2016.

Analysis

At the outset, we note that the record establishes that the counterclaim has not been resolved and that the trial court has not relinquished jurisdiction. Accordingly, this appeal is interlocutory. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." (citation omitted)).

A party may immediately appeal an interlocutory order or judgment only if (1) the trial court certifies the case for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, or (2) if the trial court's decision deprives the appellant of a substantial right that would be lost absent immediate review. *Branch Banking & Tr. Co. v. Peacock Farm, Inc.*, ___ N.C. App. ___, ___, 772 S.E.2d 495, 498, *aff'd per curiam*, 368 N.C. 478, 780 S.E.2d 553 (2015). Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure requires appellants to include a "statement of the grounds for appellate review." If the appeal is interlocutory, that statement must show that the trial court certified the case for immediate review, or "contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C. R. App. P. 28(b)(4).

Here, Krause's brief fails to contain the requisite statement of the grounds for appellate review. Furthermore, he declines to address the interlocutory nature of the appeal in the remainder of his brief. The order granting summary judgment in favor of Defendants contains no Rule 54(b) certification, and the briefs to this Court fail to make any argument as to why the order affects a substantial right.

"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." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994); *see also Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts . . . to create an appeal for an appellant."). That burden rests solely with the appellant. *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254. Accordingly, we are required to dismiss this appeal.

DISMISSED.

Chief Judge McGEE and Judge DAVIS concur.

MURRAY v. MOODY

[252 N.C. App. 141 (2017)]

ROBERT MURRAY, PLAINTIFF
v.
JOSEPH CLIFTON MOODY, DEFENDANT

No. COA16-763

Filed 7 March 2017

Jurisdiction—superior court—workers' compensation lien—subrogation lien—automobile accident

The superior court erred in a personal injury case arising out of an automobile accident by denying defendant Moody's motion to determine the amount of unnamed defendants' workers' compensation lien. When an injured employee is entitled to compensation from a third-party judgment or settlement, N.C.G.S. § 97-10.2(j) grants the superior court limited jurisdiction to determine the amount of an employer's or workers' compensation carrier's subrogation lien.

Appeal by defendant from order entered 31 March 2016 by Judge Reuben F. Young in Wilson County Superior Court. Heard in the Court of Appeals 29 November 2016.

Cranfill Sumner & Hartzog LLP, by Scott H. Dunnagan, for unnamed workers' compensation defendants-appellees.

Law Office of Robert E. Ruegger, by Robert E. Ruegger, for defendant-appellant.

ZACHARY, Judge.

Pursuant to the North Carolina Workers' Compensation Act, an employer and its workers' compensation carrier are entitled to a lien on an injured employee's recovery in an action against a third-party tortfeasor. This lien extends to all benefits paid to an employee for injuries caused by the third party.

In this case, plaintiff Robert Murray was injured in an automobile accident in the course of his employment with unnamed defendant Evans MacTavish Agricraft, Inc. (Evans). Defendant Joseph Moody caused the accident. Evans and its workers' compensation carrier, unnamed defendant Cincinnati Insurance Company (collectively with Evans, unnamed defendants) paid medical and indemnity benefits to Murray, who later brought a personal injury action against Moody. The action was tried to a jury, which heard evidence concerning Murray's injuries and the

amount of workers' compensation benefits that he received. The jury returned a verdict against Moody and awarded Murray money damages.

The trial judge entered a final judgment in favor of Murray that, pursuant to N.C. Gen. Stat. § 97-10.2(e), reduced the damage award by the amount of workers' compensation benefits he received from unnamed defendants. Four days later, the trial judge entered an amended judgment that did not reduce the damage award but instead specifically granted judgment in favor of Evans for the exact amount of workers' compensation benefits that were paid to Murray, and that granted judgment in favor of Murray for the balance of the damage award.

Roughly a year later, Moody filed a motion in Wilson County Superior Court pursuant to N.C. Gen. Stat. § 97-10.2(j), which allows a superior court judge, in his or her discretion, to determine the amount of an employer's lien after an injured employee has obtained a judgment against or settled a claim with a third party. The superior court entered an order denying Moody's motion, holding that the amount of unnamed defendants' lien had been determined by the prior court's amended judgment, and that the same was res judicata and could not be relitigated. As a result, the superior court concluded that it lacked jurisdiction to determine unnamed defendants' lien pursuant to subsection 97-10.2(j).

Moody now appeals the superior court's order, and he argues that the court had jurisdiction to set the amount of the lien. For the reasons that follow, we agree. Accordingly, we reverse the superior court's order denying Moody's motion and remand for further proceedings.

I. Background

On 3 August 2010, Murray was driving on Highway 86 near Hillsborough, North Carolina, when his truck, a company vehicle owned by Evans, was struck in the rear by a car being driven by Moody. The rear impact caused Murray's truck to strike another vehicle, and Murray sustained a compensable neck injury in the accident. Murray's neck injury required extensive medical treatment, including physical and medication therapy.

Unnamed defendants accepted Murray's workers' compensation claim and paid a total of $7,432.13 in benefits (comprised of $5,247.23 in medical benefits and $2,184.90 in indemnity payments). On 2 August 2013, Murray filed a personal injury action against Moody in Wilson County Superior Court. The complaint alleged that Moody negligently caused the August 2010 car accident and sought damages for Murray's pain and suffering, medical expenses, and permanent injury. The case proceeded to trial in March 2015, the Honorable Robert H. Hobgood presiding.

At trial, the jury heard evidence of the medical and indemnity payments that Evans made to Murray due to the compensable injury he sustained in the August 2010 automobile accident. This evidence established that Murray had received a total of $7,432.13 in workers' compensation benefits. The jury returned a verdict finding Moody to be negligent and awarding Murray damages in the amount of $11,000.00. Consequently, on 16 March 2015, Judge Hobgood entered a final judgment consistent with the jury's verdict. Judge Hobgood then reduced Murray's recovery by the amount of workers' compensation benefits paid to Murray. The final judgment reads as follows:

> And the Court having reduced said verdict by $7,423.13, pursuant to the North Carolina Workers['] Compensation Act and in accordance with N.C.G.S. § 97-10.2;
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment be had against the Defendant in the amount of $3,576.87, together with interest from the date of filing hereof and costs taxed to the Defendant herein, including reasonable attorney fees to Plaintiff's counsel pursuant to N.C.G.S. § 6-21.1.

The final judgment complied with N.C. Gen. Stat. § 97-10.2(e) (2015), which provides that

> the amount of compensation and other benefits paid or payable on account of such injury or death shall be admissible in evidence in any proceeding against the third party. In the event that said amount of compensation and other benefits is introduced in such a proceeding the court shall instruct the jury that said amount will be deducted by the court from any amount of damages awarded to the plaintiff.

For reasons not apparent in the record, Judge Hobgood entered an amended final judgment (amended judgment) on 20 March 2015, which expressly provided that "judgment be had against the Defendant in the amount of $7,423.13 in favor of Evans Mactavish Agricraft to be distributed in accordance with N.C.G.S. § 97-10.2(f)." Another portion of the amended judgment granted "judgment . . . in favor of [Murray] in the amount of $3,576.87[,]" the remainder of the jury's damages award. As a result, while the sum of $7,423.13 was simply deducted from Murray's recovery in the initial judgment, the sum of $7,423.13 was specifically awarded to Evans in the amended judgment. Murray's damage award was unchanged by the amended judgment.

On 14 May 2015, Moody appealed to this Court from the amended judgment and other pre- and post-trial orders entered in the negligence action. Roughly three months later, Murray and Moody entered into a settlement that was memorialized in a document entitled "Release of All Claims-Civil Action Pending" (the release). Pursuant to the release, Moody and his liability insurance carrier agreed to pay Murray the lump sum of $15,654.25 in consideration for Murray's agreement to release any "claims resulting or to result" from the August 2010 automobile accident. However, the release expressly preserved unnamed defendants' rights "to enforce the [amended] judgment obtained in favor of [Evans] in [the negligence] action for [workers' compensation] benefits paid . . . to . . . Robert Murray for his personal injuries."

On 2 September 2015, unnamed defendants served a Notice of Appearance and Claim of Lien as well as a motion pursuant to N.C. Gen. Stat. § 97-10.2(j) seeking determination of the amount of their lien on Murray's recovery. Unnamed defendants' motion, however, was never scheduled for hearing. The record suggests that unnamed defendants did not go forward with their motion once they learned that the amended judgment setting the specific amount they could recover had been entered in the negligence action. On 10 September 2015, Moody filed a motion to withdraw his appeal from, *inter alia*, the amended judgment. This Court granted the motion to withdraw the appeal four days later.

In February 2016, Moody filed his own Motion for Determination of Workers' Compensation Lien in superior court pursuant to N.C. Gen. Stat. § 97-10.2(j). On 22 February 2016, the Honorable Reuben F. Young heard Moody's motion in Wilson County Superior Court. At the hearing, unnamed defendants argued that Judge Hobgood's amended judgment had decided the issue and amount of their lien. As such, unnamed defendants argued, the determination of the lien was res judicata and Judge Young had no statutory authority under N.C. Gen. Stat. § 97-10.2(j) to revisit the issue. On 31 March 2016, Judge Young entered an order that denied Moody's motion on the following the grounds:

> [T]his Court lacks jurisdiction to determine the Workers' Compensation [Defendants'] subrogation lien under N.C.G.S. § 97-10.2(j) and the same is res judicata. This Court further finds that the Amended Final Judgment entered on March 20, 2015 in the above-captioned case remains undisturbed, specifically including, but not limited to, payment of $7,423.13 by Defendant Joseph Clifton

> Moody to the Workers' Compensation Defendants to be distributed in accordance with N.C.G.S. § 97-10.2(f).

Moody appeals from Judge Young's order.

II. Discussion

A. Standard of Review

Ordinarily, the trial court's ruling on a motion pursuant to N.C. Gen. Stat. § 97-10.2(j) is reviewed for an abuse of discretion. *Cook v. Lowe's Home Centers, Inc.*, 209 N.C. App. 364, 367, 704 S.E.2d 567, 570 (2011). However, the principal question presented here is whether Judge Young had jurisdiction to rule on the merits of Moody's motion. "[W]hether a trial court has subject matter jurisdiction is a question of law, which is reviewable on appeal *de novo*." *Ales v. T.A. Loving Co.*, 163 N.C. App. 350, 352, 593 S.E.2d 453, 455 (2004) (citation omitted).

B. Analysis

Moody's sole argument on appeal is that Judge Young erred in denying Moody's motion to determine the amount of unnamed defendants' lien on the ground that the amended judgment was res judicata as to the lien issue. We agree.

"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[,]" and the doctrine precludes the relitigation of "all matters that were or should have been adjudicated in the prior action." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citations omitted). For unnamed defendants to establish that Moody's claim (or motion) is barred by res judicata, they "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 privies in the two suits." *Erler v. Aon Risks Servs., Inc.*, 141 N.C. App. 312, 316, 540 S.E.2d 65, 68 (2000), *disc. review denied*, 548 S.E.2d 738 (2001).

It is well established that our Workers' Compensation Act was never intended to provide an employee with a windfall recovery from both the employer and a third party who is legally responsible for causing the employee's compensable injuries. *Radzisz v. Harley Davidson of Metrolina, Inc.*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997). Where "[t]here is one injury, [there is] still only one recovery." *Andrews v. Peter*s, 55 N.C. App. 124, 131, 284 S.E.2d 748, 752 (1981), *disc. rev. denied*, 305 N.C. 395, 290 S.E.2d 364 (1982). To that end, N.C. Gen. Stat. § 97-10.2 defines

the rights and remedies of employees and employers against third-party tortfeasors. *Radzisz*, 346 N.C. at 89, 484 S.E.2d at 569. "Section 97-10.2 and its statutory predecessors were designed to secure prompt, reasonable compensation for an employee and simultaneously to permit an employer who has settled with the employee to recover such amount from a third-party tort-feasor." *Id.* (citation omitted).

In the first twelve months following an injury, an injured employee has the "exclusive right" to enforce the liability of a third party. N.C. Gen. Stat. § 97-10.2(b) (2015). Pursuant to subsection 97-10.2(h) (2015), "[i]n any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest . . . upon any payment made by the third party by reason of such injury or death[.]" "An employer's statutory right to a lien on a recovery from the third-party tort-feasor is mandatory in nature[.]" *Radzisz*, 346 N.C. at 89, 484 S.E.2d at 569.

When an injured employee is entitled to compensation from a third-party judgment or settlement, N.C. Gen. Stat. § 97-10.2(j) (2015) grants the superior court limited jurisdiction to determine the amount of an employer's or workers' compensation carrier's subrogation lien:

> (j) Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer. The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable,

> in determining the appropriate amount of the employer's lien. If the matter is pending in the federal district court such determination may be made by a federal district court judge of that division.

Pursuant to the statute's plain language, there are two instances in which the superior court is given jurisdiction: (1) when the employee has obtained a judgment against the third party, and (2) when the employee has settled with the third party.

"There is no mathematical formula or set list of factors for the trial court to consider in making its determination . . . ; the statute plainly affords the trial court discretion to determine the appropriate amount of [a] lien." *Wood v. Weldon*, 160 N.C. App. 697, 700, 586 S.E.2d 801, 803 (2003) (internal citation omitted), *disc. rev. denied*, 358 N.C. 550, 600 S.E.2d 469 (2004). The discretionary authority granted to the superior court under subsection 97-10.2(j) is rather broad, but it "is not unlimited[.]" *In Re Biddix*, 138 N.C. App. 500, 504, 530 S.E.2d 70, 72 (2000). Rather, " 'the trial court is to make a reasoned choice, a judicial value judgment, which is factually supported . . . [by] findings of fact and conclusions of law sufficient to provide for meaningful appellate review.' " *Id.* (quoting *Allen v. Rupard*, 100 N.C. App. 490, 495, 397 S.E.2d 330, 333 (1990)). It is also "clear from the use of the words 'shall' and 'and' in subsection (j), that the trial court must, at a minimum, consider the factors that are expressly listed in the statute." *Estate of Bullock v. C.C. Mangum Co.*, 188 N.C. App. 518, 526, 655 S.E.2d 869, 874 (2008).

The gravamen of Moody's argument is that the doctrine of res judicata is inapplicable here, as subsection 97-10.2(j) allows him "to challenge the amount the workers' compensation carrier is entitled to recover after a jury trial and entry of judgment" in the negligence action. "If this were not the case," Moody argues, "the ability of a party to challenge the amount of a workers' compensation lien" pursuant to subsection 97-10.2(j) would be limited "only to those situations where a pre-trial settlement was reached."

In response, unnamed defendants argue that because the "amount" of their lien was previously determined . . . by way of Judge Hobgood's Amended Final Judgment," res judicata bars the relitigiation of this matter. Unnamed defendants further argue that even if the doctrine of res judicata does not apply, "both law and equity" require remand for entry of an order consistent with the amended judgment. Unnamed defendants assert that Judge Hobgood's amended judgment secures the amount they are owed and that amount should not be disturbed. This

contention is based on the rule that "ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972).

After carefully reviewing the decisions of this Court and our Supreme Court in *Hieb v. Lowery*, 121 N.C. App. 33, 464 S.E.2d 308 (1995), *aff'd*, 344 N.C. 403, 474 S.E.2d 323 (1996), we conclude that Moody's argument must prevail.

In *Hieb*, the plaintiff, who was gravely injured in an automobile accident and who received workers' compensation benefits from St. Paul Fire and Marine Insurance Company (St. Paul), filed an action against the third-party defendant together with unnamed defendant Hartford Accident and Indemnity Company (Hartford), the plaintiff's underinsured motorist (UIM) insurance carrier. *Hieb*, 121 N.C. App. at 34, 464 S.E.2d at 309. The personal injury action was tried to a jury, which returned a verdict against the defendants and awarded the plaintiff $1,279,000.00 in damages. *Id.* at 34, 464 S.E.2d at 309. Judge Robert Gaines entered judgment upon the jury verdict, and the judgment contained findings that referenced a declaratory judgment action that the plaintiff had filed before trial:

> 7. The Plaintiffs have instituted a second action against St. Paul Fire and Marine and Hartford Insurance Company . . . to determine the respective rights of the parties to the benefits of the Hartford underinsured motorist coverage and to determine the amount of such coverage.
>
> 8. That on or about August 28, 1992, an order was entered in that action by the Honorable Robert P. Johnston which holds that . . . Hartford is allowed to reduce its limits by the amount of worker[s'] compensation paid or to be paid to Plaintiff and further holding that the proceeds of the Hartford underinsured policy are subject to the lien of St. Paul Insurance Company pursuant to North Carolina General Statute[s] [s]ection 97-10.2. That action is now on appeal to the North Carolina Court of Appeals. This Court is bound by the Order of Judge Johnston unless and until said Order is modified by the Court of Appeals or any other Court of competent jurisdiction. This Court has not addressed the issues raised in that action.

Id. at 35, 464 S.E.2d at 309-10 (first alteration added).

Based on these findings, Judge Gaines determined that St. Paul was entitled to a lien on all workers' compensation benefits it had paid, and would pay, to the plaintiff. *Id.* at 35, 464 S.E.2d at 310. As noted in Judge Gaines' judgment, Judge Johnston's order allowed Hartford to reduce its limits by the amount of workers' compensation paid or to be paid to the plaintiff, and held that the Hartford UIM policy's proceeds were subject to the lien of St. Paul for all amounts paid or to be paid to the plaintiff. *Id.* This Court reversed the former portion of that order but affirmed the latter portion of the order allowing St. Paul's lien against the Hartford UIM benefits. *Hieb v. St. Paul Fire & Marine Ins. Co.*, 112 N.C. App. 502, 435 S.E.2d 826 (1993) (*Hieb I*). Shortly after the decision in *Hieb I*, Hartford tendered its UIM policy limit of $475,000.00 in accordance with the orders of Judges Johnston and Gaines. *Hieb*, 121 N.C. App. at 36, 464 S.E.2d at 310 (hereinafter referred to as *Hieb II*). However, the plaintiff and St. Paul could not agree on the distribution of those proceeds, as St. Paul asserted that none of the Hartford money could be disbursed to the plaintiff until St. Paul's lien was set and paid in full. *Id.*

Consequently, the plaintiff moved Judge Claude Sitton to determine the amount of St. Paul's lien pursuant to subsection 97-10.2(j). *Id.* According to the version of subsection 97-10.2(j) in effect at that time, a superior court judge's authority to determine the amount of a workers' compensation lien was triggered only by (1) a judgment that was insufficient to compensate the workers' compensation carrier's subrogation claim[1] or (2) a settlement. *Id.* at 37, 464 S.E.2d at 311 (citing N.C. Gen. Stat. § 97-10.2(j) (1991) ("[I]n the event that a judgment is obtained which is *insufficient to compensate the subrogation claim* of the Workers' Compensation Insurance Carrier, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply. . . .") (emphasis added). Exercising his discretion under subsection 97-10.2(j), Judge Sitton ordered that St. Paul was entitled to recover "$241,677.77 as full satisfaction of any workers['] compensation lien it may have on . . . benefits paid or to be paid" to the plaintiff, and that the plaintiff receive the remainder of the Hartford UIM proceeds. *Id.* at 36-37, 464 S.E.2d at 310-11.

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1. Subsection 97-10.2(j) was amended in June 1999. N.C. S.L. 1999-194, s.2. The amendment eliminated the requirement that a third-party judgment be insufficient to compensate the workers' compensation carrier before the superior court could exercise its discretion and determine the subrogation amount. As noted above, a third-party judgment for any amount of damages will now trigger the superior court's authority to determine the amount of a workers' compensation lien. *See* N.C. Gen. Stat. § 97-10.2(j) (2015).

St. Paul appealed and a divided panel of this Court reversed. After stating that one superior court judge generally may not overrule or modify the judgment of another superior court judge ("the superior court judge rule"), the *Hieb II* Court recognized that subsection 97-10.2(j) provided an exception to this rule. *Id.* at 37, 464 S.E.2d at 311 ("There are, however, some statutory exceptions to [the superior court judge] rule. *See*, *e.g.*, North Carolina General Statutes §§ 97-10.2 (1991) and 1A-1, Rule 60 (1990)."). However, the *Hieb II* Court ultimately held that subsection 97-10.2(j) had not been "call[ed] . . . into play" and that Judge Sitton lacked the authority to modify the other superior court judges' orders because the " 'judgment' (in excess of $1.25 million) exceeded any amount necessary to reimburse" St. Paul at that time.[2] *Id.* at 38, 464 S.E.2d at 311. The plaintiff appealed this Court's decision in *Hieb II* to the North Carolina Supreme Court. *Hieb*, 344 N.C. at 407, 474 S.E.2d at 325.

On appeal to the North Carolina Supreme Court, the plaintiff argued, *inter alia*, that the superior court judge rule was not implicated because "the issue previously decided by Judges Gaines and Johnston was whether a workers' compensation carrier could assert a lien, pursuant to N.C.G.S. § 97-10.2, against the proceeds of UIM insurance purchased by someone other than the insured party's employer, while the issue before Judge Sitton was the *amount* of such workers' compensation lien that should be allowed." *Hieb*, 344 N.C. at 408, 474 S.E.2d at 326. After noting that "Judge Gaines' conclusions of law explicitly state in accordance with Judge Johnston's order that 'St. Paul Fire and Marine Insurance Company is entitled to a lien against the proceeds of the Hartford underinsured motorist policy *for all amounts paid*, *or to be paid*, *to* [the p]laintiff . . . as worker[s'] compensation benefits[,]' " our Supreme Court rejected the plaintiff's argument and held that the superior court judge rule applied:

> [I]t is clear that the amount of the lien is to be the total of all amounts *paid or to be paid* to plaintiff as workers' compensation benefits. Additionally, the Court of Appeals issued a unanimous opinion [(in *Hieb I*)] affirming that portion of Judge Johnston's order relating to the workers' compensation lien of St. Paul. . . . Thus, the issue of amount was dealt with and decided three times prior to plaintiffs

2. When *Hieb II* was decided, "St. Paul had paid [the plaintiff] approximately $266,400.00 in workers' compensation benefits." 121 N.C. App. at 38, 464 S.E.2d at 311.

> presenting the matter to Judge Sitton. Judge Sitton's order, setting a lesser amount of the lien to be repaid, does not address a different issue than that previously decided by Judges Johnston and Gaines.

Id. Even so, the Supreme Court went on to consider the plaintiff's argument that subsection 97-10.2(j) gave Judge Sitton the authority to determine the amount of St. Paul's lien. *Id.* The Court, however, rejected this contention based upon the rationale stated in *Hieb II*:

> Th[e] judgment [obtained by the plaintiff] is greater than the amount of St. Paul's lien at the time of Judge Sitton's order and therefore is not "insufficient to compensate the subrogation claim." On this record, we hold that the Court of Appeals did not err in concluding that Judge Sitton did not have authority under the provisions of N.C.G.S. § 97-10.2(j) to modify the previous judgments.

Hieb, 344 N.C. at 410, 474 S.E.2d at 327.

Our review of the decisions in *Hieb* reveals that the superior court judge rule does not apply in the present case. As noted above, the *Hieb II* Court recognized that subsection 97-10.2(j) provides a specific statutory exception to this rule. 121 N.C. App. at 37, 464 S.E.2d at 311. Likewise, the clear implication of the Supreme Court's analysis in *Hieb* is that subsection 97-10.2(j) would have provided an exception to the superior court judge rule had the plaintiff's judgment been insufficient to compensate St. Paul's subrogation claim, thereby triggering Judge Sitton's authority to determine, in his discretion, the amount of the workers' compensation lien. *See Hieb*, 344 N.C. at 409-10, 474 S.E.2d at 326-27 (addressing whether Judge Sitton's authority under subsection 97-10.2(j) had been triggered); *see also Johnson v. S. Indus. Constructors, Inc.*, 347 N.C. 530, 534, 538, 495 S.E.2d 356, 358-59, 361 (1998) (citing the Supreme Court's decision in *Hieb* and holding that "since the judgment for plaintiff against the third-party tort-feasor in this case, in the amount of $219,052.20, *is* greater than the amount of the lien *at the time of* the trial court's order and is thus not 'insufficient to compensate the subrogation claim,' the trial court did not have jurisdiction to determine the amount of the lien pursuant to N.C.G.S. § 97-10.2(j)").

Against this backdrop, we also conclude that subsection 97-10.2(j) provides a statutory exception to the doctrine of res judicata. Under subsection 97-10.2(j)'s plain language, the lien amount is to be determined at a later, separate proceeding, one that occurs *after* an employee has "obtained" a judgment against (or settled with) the third party, and after

one of the parties has elected to "apply" for such a determination. *See* N.C. Gen. Stat. § 97-10.2(j). Use of the words "obtained" (past tense and past participle of the verb "obtain") and "apply" (present tense) in the statute indicates that the legislature intended subsection 97-10.2(j) to operate as follows: Once an employee has obtained a judgment against a third party, either party may apply to the appropriate superior court judge to determine the subrogation amount. At that point, a determination may be made, in the judge's discretion, after the employer and insurance carrier have been given notice and after all interested parties have been given the opportunity to be heard on the matter. *See id.* Case law from this Court supports this interpretation. *See*, *e.g.*, *Dion v. Batten*, __ N.C. App. __, __, 790 S.E.2d 844, 850 (2016) ("In the present case, a judgment was obtained by Plaintiff against Defendant, and [Defendant's UIM carrier] applied . . . for a determination of the subrogation amount. Under the plain language of [subsection 97-10.2(j)], the authority of the trial court was triggered, allowing it to exercise discretion in determining the subrogation amount."); *Wood*, 160 N.C. App. at 700, 586 S.E.2d at 804 (considering whether the superior court abused its discretion in reducing the defendants' workers' compensation lien after the plaintiff obtained a default judgment against a third-party tortfeasor and applied for determination of the lien amount). Because the statute specifically contemplates that a judgment will be issued in an action between the employee and a third party before "either party" may "apply" to determine the subrogation amount, see N.C. Gen. Stat. § 97-10.2(j), it would be nonsensical to hold that the prior judgment bars further litigation of the lien issue. *See Helms v. Powell*, 32 N.C. App. 266, 269, 231 S.E.2d 912, 914 (1977) ("Under the normal rules of statutory construction, the language of a statute will be interpreted to avoid absurd or illogical consequences.") (citation omitted).

It is also significant that subsection "97-10.2(j) grants *limited jurisdiction* to the superior court to determine the amount of the employer's lien[.]" *Leggett v. AAA Cooper Transp., Inc.*, 198 N.C. App. 96, 99, 678 S.E.2d 757, 760 (2009) (emphasis added). The statute "provides a 'procedural remedy' and not a substantive claim." *Anglin v. Dunbar Armored, Inc.*, 226 N.C. App. 203, 207, 742 S.E.2d 205, 208 (2013). As such, the second element of res judicata, "an identity of the cause of action in both the earlier and the later suit," cannot be proven in the present case. *Erler*, 141 N.C. App. at 316, 540 S.E.2d at 68. Murray's negligence action against Moody involved a civil claim for money damages, a full trial in which factual issues were resolved by a jury, and a judgment entered upon the jury's verdict. In contrast, Moody's motion to determine the amount of the workers' compensation lien is purely

statutory and narrow in scope. Once the superior court's limited jurisdiction under subsection 97-10.2(j) is properly invoked, the court simply performs a judicial act in which it "must . . . consider the factors that are expressly listed in the statute[,]" *Estate of Bullock*, 188 N.C. App. at 526, 655 S.E.2d at 874, and make "a judicial value judgment, which is factually supported . . . [by] findings of fact and conclusions of law[.]" *In Re Biddix*, 138 N.C. App. at 504, 530 S.E.2d at 72.

This Court has held that "orders entered in a [statutory] proceeding . . . in which an executor must show cause why he should not be removed, do not constitute res judicata as to a later civil action for damages between the parties or collaterally estop the bringing of such an action." *Shelton v. Fairley*, 72 N.C. App. 1, 5, 323 S.E.2d 410, 414 (1984). In support of its holding, the *Shelton* Court observed that " '[t]he res judicata doctrine precluding relitigation of the same cause of action has been held inapplicable where the performance of an act was sought in one action and a money judgment in the other.' " *Id.* at 8, 323 S.E.2d at 414 (citation omitted). There is no reason why this general principle should not apply in reverse here, as there is a substantial distinction between Murray's civil negligence action for damages and Moody's later motion to determine the amount of the workers' compensation lien. The amended judgment, therefore, cannot be res judicata as to the final amount of the workers' compensation lien. Rather, that determination must be made by the superior court upon consideration of the mandatory statutory factors contained in subsection 97-10.2(j).

To sum up, Murray (the employee) obtained a judgment against Moody (the third-party defendant) in the negligence action. Moody later applied—as he was entitled—for a determination of the amount of the workers' compensation lien. Unnamed defendants were then given notice and an opportunity to be heard on the matter. Under subsection 97-10.2(j)'s plain language, the superior court's authority was triggered by Moody's motion. Judge Young should have exercised his discretion and determined the subrogation amount, as Judge Hobgood's amended order in the negligence action was not res judicata to Moody's present action. Accordingly, Judge Young erred in concluding that he did not have jurisdiction to consider Moody's motion for the determination of unnamed defendants' lien pursuant to subsection 97-10.2(j).

For the reasons stated above, we reverse Judge Young's order denying Moody's motion and remand to the trial court for proper determination of the amount of the workers' compensation lien on Murray's recovery from Moody in the negligence action. On remand, the superior court should receive evidence "as to matters which must be considered"

under subsection 97-10.2(j) and enter an order with findings that reflect full consideration of the mandatory factors. *Hill v. Hill*, 229 N.C. App. 511, 530, 748 S.E.2d 352, 365 (2013) (addressing remand in equitable distribution when trial court failed to make statutorily-required findings of fact); *see Alston v. Fed. Exp. Corp.*, 200 N.C. App. 420, 425, 684 S.E.2d 705, 708 (2009) (reversing and remanding for additional findings when "no findings of fact in the trial court's order [addressed certain] mandatory statutory factors" contained in subsection 97-10.2(j)).

Finally, we note that this case is unique in the context of subsection 97-10.2(j) because unnamed defendants have not simply asserted a lien on Murray's recovery; instead, the subrogation amount they seek to recover is memorialized in a judgment granted in favor of Murray *and* Evans. If the trial court decides to reduce the lien amount, it may be necessary for Moody to file an appropriate motion to set aside the amended judgment.

III. Conclusion

We reverse the trial court's order and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges CALABRIA and INMAN concur.

ROUNTREE v. CHOWAN CTY.

[252 N.C. App. 155 (2017)]

WILTON GENE ROUNTREE, PLAINTIFF
v.
CHOWAN COUNTY, DEFENDANT

No. COA16-555

Filed 7 March 2017

Counties—retirement benefits—negligent misrepresentation—summary judgment—duty of care—justifiable reliance

The trial court did not err by granting summary judgment in favor of defendant county on a negligent misrepresentation claim based on employment rendering plaintiff ineligible to receive retirement benefits. Plaintiff failed to forecast evidence establishing that the county owed plaintiff a duty of care apart from the county's purported contractual obligation. Even assuming the existence of a separate legal duty, plaintiff failed to produce evidence showing justifiable reliance.

Appeal by plaintiff from order entered 18 December 2015 by Judge J. Carlton Cole in Chowan County Superior Court. Heard in the Court of Appeals 2 November 2016.

Maginnis Law, PLLC, by Edward H. Maginnis and T. Shawn Howard, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, LLP, by Theresa M. Sprain and Lawrence A. Moye, IV, for defendant-appellee.

ELMORE, Judge.

Wilton Gene Rountree (plaintiff), a former tax administrator, retired from his employment with Nash County before accepting a new position with Chowan County (defendant) on a limited basis. After working for nearly two years, plaintiff learned that the terms of his employment with defendant had rendered him ineligible to receive retirement benefits. He resigned and sued defendant for breach of contract and negligent misrepresentation. The trial court granted summary judgment for defendant on both claims.

Plaintiff appeals, arguing that the trial court erred in granting summary judgment on his negligent misrepresentation claim. Upon review, we hold that summary judgment for defendant was proper because (1) plaintiff failed to forecast evidence which, taken as true, would establish

that defendant owed plaintiff a duty of care apart from defendant's purported contractual obligation; and (2) assuming the existence of a separate legal duty, plaintiff failed to produce evidence tending to show that his reliance was justifiable. Affirmed.

I. Background

In 2009, defendant was experiencing financial difficulties. It had been forced to increase taxes twice in the preceding year to fund its operations and, to make matters worse, its longtime tax administrator resigned unexpectedly. Plaintiff was referred to Peter Rascoe, the Chowan County manager, as a potential replacement. Plaintiff had served as a tax administrator, first in Edgecombe County and then Nash County, before his retirement in February 2009. Impressed with plaintiff's experience and reputation, Rascoe contacted plaintiff to discuss the position.

As a retiree, plaintiff was receiving benefits through the Local Government Employees' Retirement System (LGERS). During his initial meeting with Rascoe, plaintiff expressed interest in the tax administrator position but made clear that he wanted to protect his retirement benefits. After their meeting, Rascoe sent plaintiff an offer letter describing the terms of the proposed employment agreement. The letter provided in part:

> As a retiree realizing benefits from the local government retirement system and health insurance benefits from your former employer, you have expressed interest in the position on a contract basis. I am prepared to offer you such an arrangement along the parameters we discussed. As such, the position if accepted by you, would be an "at will" contract relationship. I am prepared to offer such an arrangement to you for at least a term of twenty-four months with the hope that it may continue for a longer period if both parties are in agreement.

On the more specific conditions, the letter stipulated that plaintiff would receive an annual salary of $46,800.00, or $30.00 per hour based on the number of actual hours worked per week, with a target of a thirty-hour work week. Defendant would not withhold retirement contributions, as plaintiff was already receiving those benefits.

Rascoe, an attorney, knew the state had employment restrictions in place for its retirees which, if not observed, could disqualify them from their retirement benefits. During his deposition, Rascoe explained that he

was acting in defendant's interest when he drafted the letter although he tried to address plaintiff's concerns. He did not represent or guarantee that plaintiff's benefits would be safe under the proposed terms of employment but he did believe that plaintiff would find them suitable. Rascoe testified: "It was my understanding that we had presented him . . . with an arrangement that he could agree to that he would have—he could make the determination whether or not it affected his retirement . . . , but it was our understanding . . . of the system that this did that. We thought."

Plaintiff himself was also familiar with LGERS. When he prepared to retire from his position in Nash County, he had consulted the State Employee Retirement Handbook, which contained the benefits eligibility requirements, to determine the amount of money he could expect to receive in retirement. He acknowledged during his deposition that he would have been responsible for maintaining his own benefits eligibility. According to plaintiff's testimony and affidavit, however, Rascoe "assured" him that the employment contract would protect his benefits. Beyond his conversations with Rascoe, plaintiff performed no due diligence to confirm whether defendant's proposed terms of employment would affect his benefits.

Plaintiff eventually accepted the position under the terms set forth in the offer letter. He worked as the tax administrator without incident for nearly two years until 1 August 2011, when he received a written notice from the North Carolina Retirement Systems Division. The notice informed plaintiff that, based on his employment agreement, he had returned to "regular employment" on 1 August 2009 and his compensation since then was subject to retirement contributions, which had not been made. In addition, because the Division had not been informed of plaintiff's "return to service," he had received $114,448.32 in monthly retirement benefits to which he was not entitled as an "employee" under LGERS. Plaintiff resigned the following day.

Beginning in September 2011, the Division began deducting $1,000.00 each month from plaintiff's retirement benefits to repay the $114,448.32 which he had received over the past two years. Defendant later provided counsel to plaintiff, and plaintiff entered into a settlement agreement with the Division to repay $30,000.00 of the $114.448.32 in wrongful distributions. Of the $30,000.00 which plaintiff agreed to repay, $11,000.00 had already been satisfied through monthly deductions, leaving $19,000.00 to be paid in the same manner.

On 29 April 2013, plaintiff filed a complaint against defendant alleging breach of contract and negligent misrepresentation. Defendant

answered and moved for summary judgment on each of plaintiff's claims, which the trial court granted. Plaintiff timely appeals.

II. Discussion

On appeal, plaintiff does not challenge the trial court's ruling on his breach of contract claim. He argues instead that the court erred in granting summary judgment on his negligent misrepresentation claim because he demonstrated genuine issues of material fact for trial. Defendant maintains that the trial court's grant of summary judgment was proper for two reasons: first, plaintiff's claim for negligent misrepresentation is barred by the economic loss rule because it impermissibly arises out of the same alleged contractual duty as his original breach of contract claim; and second, plaintiff failed to establish the essential elements of negligent misrepresentation—specifically, a duty of care, justifiable reliance, and detrimental reliance.

"Our standard of review of an appeal from summary judgment is de novo." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Such judgment is appropriate only when "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). The movant has "the burden of establishing the lack of any triable issue." *Lord v. Beerman*, 191 N.C. App. 290, 293, 664 S.E.2d 331, 334 (2008) (citing *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 62–63, 414 S.E.2d 339, 341–42 (1992)). The movant may satisfy its burden " '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.' " *Id.* (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)); *see also Ussery v. Branch Banking & Trust Co.*, 368 N.C. 325, 335, 777 S.E.2d 272, 279 (2015) ("When the proof offered by either party establishes that no cause of action or defense exists, summary judgment may be granted." (citation omitted)). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted).

"The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d

609, 612 (1988) (citations omitted); *see also id.* at 203, 214, 367 S.E.2d at 611, 617 (adopting the approach to negligent misrepresentation set forth in Restatement (Second) of Torts § 552 (1977)); *Simms v. Prudential Life Ins. Co. of Am.*, 140 N.C. App. 529, 532, 537 S.E.2d 237, 240 (2000) (articulating elements of negligent misrepresentation).

The parties first disagree as to whether the economic loss rule bars plaintiff's negligent misrepresentation claim. The economic loss rule, as it has developed in North Carolina, generally bars recovery in tort for damages arising out of a breach of contract:

> 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) (alteration omitted) (citations omitted); *see also N.C. State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 81–82, 240 S.E.2d 345, 350–51 (1978) (explaining that absent four enumerated exceptions, "a breach of contract does not give rise to a tort action by the promisee against the promisor"), *rejected in part on other grounds by Trs. of Rowan Technical Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 241–43, 328 S.E.2d 274, 289–82 (1985).

Plaintiff alleged in his complaint that defendant breached the employment agreement which, according to plaintiff, "required Defendant to provide employment terms that would not limit, abridge, or diminish Plaintiff's right to receive Retirement Benefits from LGERS." If this condition was part of the agreement, as plaintiff initially pleaded, then his tort claim would fail as a matter of law because "a breach of contract does not give rise to a tort action." *N.C. State Ports Auth.*, 294 N.C. at 81, 240 S.E.2d at 350. In support of his tort claim, however, plaintiff pleaded in the alternative that a misrepresentation occurred prior to the execution of the agreement for the purpose of inducing plaintiff to enter into a contract: "Defendant . . . represented to Plaintiff that it was offering employment terms that would not violate his eligibility for retirement benefits through LGERS," and "Defendant, hoping to induce Plaintiff into employment, intended for him to rely upon the aforesaid representation regarding continued eligibility for retirement benefits." Defendant

argues that plaintiff's tort claim is "merely a restatement of his failed contract claim disguised as a distinct cause of action." But if the evidence otherwise showed that defendant had no contractual obligation to protect plaintiff's retirement benefits, then plaintiff's tort claim, construed liberally, would not be barred by the economic loss rule.

Even so, a viable tort action "must be grounded on a violation of a duty imposed by operation of law, and the right invaded must be one that the law provides without regard to the contractual relationship of the parties." *Asheville Contracting Co. v. City of Wilson*, 62 N.C. App. 329, 342, 303 S.E.2d 365, 373 (1983) (emphasis added) (citation omitted). "When there is no dispute as to the facts or when only a single inference can be drawn from the evidence, the issue of whether a duty exists is a question of law for the court." *Mozingo v. Pitt Cnty. Mem'l Hosp., Inc.*, 101 N.C. App. 578, 588, 400 S.E.2d 747, 753 (1991) (citations omitted), *aff'd*, 331 N.C. 182, 415 S.E.2d 341 (1992).

A breach of duty that gives rise to a claim of negligent misrepresentation has been defined as:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, [and thus] is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Simms, 140 N.C. App. at 534, 537 S.E.2d at 241 (alteration in original) (emphasis omitted) (quoting *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 218, 513 S.E.2d 320, 323–24 (1999)) (internal quotation marks omitted).

Such a duty commonly arises within professional relationships. *See, e.g.*, *Ballance v. Rinehart*, 105 N.C. App. 203, 207–08, 412 S.E.2d 106, 109 (1992) (real estate appraisers); *Stanford v. Owens*, 46 N.C. App. 388, 400, 265 S.E.2d 617, 625 (1980) (engineers); *Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co.*, 42 N.C. App. 259, 271–72, 257 S.E.2d 50, 59 (1979) (architects). In *Raritan River Steel*, for example, two plaintiff-corporations claimed to have extended credit to Intercontinental Metals Corporation (IMC) based upon an audit report of IMC's financial status. 322 N.C. at 203, 367 S.E.2d at 611. IMC had retained a firm of certified public accountants to prepare the report. *Id.* When IMC defaulted, the plaintiffs sued the accounting firm for negligent misrepresentation,

alleging that plaintiffs "incurred damages when they extended credit to IMC in reliance on incorrect information contained in an audit report on IMC's financial status prepared for IMC by defendants." *Id.* As to whether the accounting firm owed a duty of care to the plaintiffs, the Supreme Court explained:

> As we understand it, under the Restatement approach an accountant who audits or prepares financial information for a client owes a duty of care not only to the client but to any other person, or one of a group of persons, whom the accountant or his client intends the information to benefit; and that person reasonably relies on the information in a transaction, or one substantially similar to it, that the accountant or his client intends the information to influence.

Id. at 210, 367 S.E.2d at 614; *see also* Restatement (Second) of Torts § 552 cmt. e (1977) ("When the information [supplied] concerns a fact not known to the recipient, he is entitled to expect that the supplier will exercise that care and competence in its ascertainment which the supplier's business or profession requires and which, therefore, the supplier professes to have by engaging in it.").

We have also recognized, albeit in a more limited context, that a separate duty of care may arise between adversaries in a commercial transaction. In *Kindred of North Carolina, Inc. v. Bond*, 160 N.C. App. 90, 584 S.E.2d 846 (2003), the buyer sued the seller for negligent misrepresentation in connection with the purchase of a closely-held business. *Id.* at 92–95, 584 S.E.2d at 848–49. After entering into a purchase agreement, the buyer discovered that the seller had provided inaccurate financial information about the company. *Id.* at 93–95, 584 S.E.2d at 848–49. This Court held that the seller owed a duty to the buyer during the course of negotiations "to provide accurate, or at least negligence-free financial information" about the company because the seller "*was the only party who had or controlled the information at issue*" and the buyer "*had no ability to perform any independent investigation.*" *Id.* at 101, 584 S.E.2d at 853 (emphasis added) (citing *Libby Hill Seafood Rests., Inc. v. Owens*, 62 N.C. App. 695, 698, 303 S.E.2d 565, 568 (1983) ("[W]here material facts are available to the vendor alone, he or she *must* disclose them.")).

Unlike the buyer in *Kindred*, however, here plaintiff has failed to establish a viable tort action based on a violation of a duty of care. The dispute arose out of a potentially adversarial arm's-length negotiation

between an employer and prospective employee. Defendant did not have exclusive access or control over the benefits eligibility information, which was publicly available and readily accessible. In addition, plaintiff had an equal opportunity to perform his own investigation to determine whether the proposed terms of employment were suitable. In the course of their discussions, therefore, defendant had no legal duty to provide accurate information regarding plaintiff's continued benefits eligibility.

Even assuming that defendant owed to plaintiff a duty of care, plaintiff's negligent misrepresentation claim fails for another reason. Specifically, plaintiff failed to produce evidence tending to show that he made a reasonable inquiry into Rascoe's representations, that he was denied the opportunity to investigate, or that he could not have learned the true facts through reasonable diligence. While normally a question for the jury, the only conclusion that can be drawn from the evidence is that plaintiff's reliance was not justifiable. *See Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 369, 760 S.E.2d 263, 267 (2014) ("Whether a party's reliance is justified is generally a question for the jury, except in instances in which 'the facts are so clear as to permit only one conclusion.' " (quoting *Marcus Bros. Textiles, Inc.*, 350 N.C. at 225, 513 S.E.2d at 327)).

Plaintiff maintains that, according to *Walker v. Town of Stoneville*, 211 N.C. App. 24, 712 S.E.2d 239 (2011), he was under no obligation to undertake his own investigation into the accuracy of defendant's representations. In that case, the defendant Town of Stoneville argued that Walker had a "duty to investigate" the Town's representations, and because Walker "failed to show he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence," the evidence was insufficient to establish reasonable reliance. *Id.* at 34, 712 S.E.2d at 246. Rejecting the Town's contention, this Court first explained that " 'a man is not expected to deal with another as if he is a knave, and certainly not unless there is something to excite his suspicion.' " *Id.* (quoting *White Sewing Mach. Co. v. Bullock*, 161 N.C. 1, 8, 76 S.E. 634, 637 (1912)). In addition, the evidence showed that "[Walker] and the Town were not on equal footing," and there was nothing in the Town's representations "that would put a person of ordinary prudence upon inquiry." *Id.* at 34, 712 S.E.2d at 246–47. Because "the evidence was sufficient to show that [Walker] could not have learned the true facts by exercise of reasonable diligence," the Court did not specifically address whether Walker "was *required* to show that he was denied the opportunity to investigate, or that he could not have learned the true facts by exercise of reasonable diligence." *Id.* at 35, 712 S.E.2d at 247.

At least two Supreme Court cases decided since *Walker* support defendant's argument that plaintiff was required to show more to establish justifiable reliance. In *Dallaire*, the Court held that "a borrower cannot establish a claim for negligent misrepresentation based on a loan officer's statements about lien priority if the borrower fails to make reasonable inquiry into the validity of those statements." 367 N.C. at 364, 760 S.E.2d at 264. Because the borrowers offered no evidence that they inquired, or were prevented from inquiring, into the accuracy the loan officer's statements, the Court affirmed summary judgment for the lender on the borrower's negligent misrepresentation claim. *Id.* at 369–70, 760 S.E.2d at 267–68; *see also Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 256, 552 S.E.2d 186, 192 (2001) ("[W]hen a party relying on a 'misleading representation could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence.' " (citation omitted)), *disc. review denied*, 356 N.C. 438, 572 S.E.2d 788 (2002).

Similarly, in *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 781 S.E.2d 1 (2015), the Court relied on *Dallaire* to affirm the dismissal of the plaintiffs' negligent misrepresentation claim pursuant to Rule 12(b)(6). *Id.* at 451–52, 781 S.E.2d at 9–10. The Court explained: "Reliance is not reasonable if a plaintiff fails to make any independent investigation or fails to demonstrate he was prevented from doing so." *Id.* at 449, 781 S.E.2d at 8 (citations omitted) (internal quotation marks omitted). Rather, "to establish justifiable reliance a plaintiff must sufficiently allege that he made a reasonable inquiry into the misrepresentation and allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." *Id.* at 454, 781 S.E.2d at 11 (citations omitted) (internal quotation marks omitted). Because the plaintiffs did "not allege that they inquired, or were prevented from inquiring," into certain appraisal information, they failed to establish justifiable reliance. *Id.* at 451, 781 S.E.2d at 9 (citing *Dallaire*, 367 N.C. at 370, 760 S.E.2d at 268); *see also Fazzari v. Infinity Partners, LLC*, 235 N.C. App. 233, 241, 762 S.E.2d 237, 242 (2014) (affirming summary judgment for the defendant-lender where the plaintiffs failed to forecast evidence that they conducted an independent inquiry into the value of lots in planned subdivision or were prevented from doing so).

In this case, plaintiff failed to produce any evidence—or allege in his complaint—that he made a reasonable inquiry into Rascoe's representations, that he was denied the opportunity to investigate, or that

he could not have learned the true facts through reasonable diligence. On the contrary, defendant directs our attention to plaintiff's deposition testimony in which plaintiff stated that he was familiar with LGERS and was aware that the rules governing his benefits were available in the State Employee Retirement Handbook. Plaintiff also confirmed that his understanding of his benefits eligibility was based purely on his review of the handbook, and that he even consulted the handbook for other benefits information as he prepared to retire from Nash County. And while he acknowledged his own responsibility for maintaining his personal retirement benefits, he did not consult with anyone else regarding his eligibility requirements before accepting the position with defendant. In the absence of any evidence tending to show justifiable reliance, the trial court properly granted summary judgment in favor of defendant.

III. Conclusion

Because defendant met its burden by proving the absence of a separate duty of care and justifiable reliance, we affirm the trial court's order granting summary judgment for defendant on plaintiff's negligent misrepresentation claim.

AFFIRMED.

Judges HUNTER, JR. and DILLON concur.

STATE v. BABICH

[252 N.C. App. 165 (2017)]

STATE OF NORTH CAROLINA
v.
LORI LEE BABICH

No. COA16-762

Filed 7 March 2017

Evidence—expert testimony—retrograde extrapolation—Daubert fit test—driving while impaired—no prejudicial error

Although the trial court abused its discretion in a driving while impaired case by admitting the State's expert testimony on retrograde extrapolation since it was not sufficiently tied to the particular facts of this case and failed the *Daubert* "fit" test, it was not prejudicial error in light of the strength of the State's evidence. There was no reasonable possibility that exclusion of the expert's testimony would have affected the outcome of this case.

Appeal by defendant from judgments entered 26 February 2016 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 24 January 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Hal F. Askins, for the State.

Sharon L. Smith for defendant.

DIETZ, Judge.

Defendant Lori Lee Babich appeals her conviction for habitual impaired driving, challenging the admission of retrograde extrapolation testimony by the State's expert witness. That expert used Babich's 0.07 blood alcohol concentration one hour and forty-five minutes after the traffic stop to extrapolate that Babich had a blood alcohol concentration of 0.08 to 0.10 at the time of the stop. To reach this conclusion, the expert assumed that Babich was in a post-absorptive state at the time of the stop, meaning that alcohol was no longer entering Babich's bloodstream and thus her blood alcohol level was declining. The expert conceded that there were no facts to support this assumption. The expert made this assumption not because it was based on any facts in the case, but because her retrograde extrapolation calculations could not be done unless Babich was in a post-absorptive state.

As explained below, we hold that the expert's testimony was inadmissible under the *Daubert* standard that applies to Rule 702 of the Rules of Evidence. Although retrograde extrapolation testimony often will satisfy the *Daubert* test, in this case the testimony failed *Daubert*'s "fit" test because the expert's otherwise reliable analysis was not properly tied to the facts of this particular case.

Although we conclude that this expert testimony was inadmissible under *Daubert*, we nevertheless uphold Babich's conviction. As explained below, in light of the strength of the State's evidence that Babich was appreciably impaired, there is no reasonable possibility that exclusion of the expert's testimony would have affected the outcome of this case. Accordingly, we find no prejudicial error in Babich's conviction and sentence.

Facts and Procedural History

On 16 May 2014 at approximately 3:20 a.m., Officer Britton Creech of the Wilmington Police Department saw Defendant Lori Lee Babich driving her vehicle at a high speed in a 45 mile-per-hour zone. After an initial radar reading of 83 miles per hour, Officer Creech began pursuing Babich. While following her, Officer Creech registered a second radar reading of 91 miles per hour. Officer Creech then observed Babich brake before an intersection with a red light, slow down to approximately 45 miles per hour, and then cross the intersection despite the red light. Officer Creech pulled Babich over.

Babich immediately exited her vehicle and approached the officer. Officer Creech commanded Babich to stop and stay in her vehicle, but Babich did not comply, causing the officer to grab her and place her in handcuffs. The officer smelled alcohol on Babich's breath, Babich stumbled as she walked, and her eyes were glazed and red. Officer Creech removed the handcuffs and asked Babich to perform several field sobriety tests.

On the one-leg-stand test, Babich placed her foot on the ground two times and raised her arms for balance contrary to instructions. On the walk-and-turn test, Babich started over in the middle of the test and on three steps did not walk in a heel-to-toe manner as instructed. Finally, on the finger-to-nose test, Babich touched her face instead of her nose. Based on his observations and Babich's unsatisfactory performance on the sobriety tests, Officer Creech arrested Babich for driving while impaired.

At the police station, Officer Dwayne Ouellette, a certified chemical analyst, used an intoximeter breath testing instrument to administer a

breath alcohol test to Babich. Officer Ouellette collected breath samples from Babich at 5:07 a.m. and 5:09 a.m. which both reported a breath alcohol concentration of 0.07. Babich had been stopped by Officer Creech at 3:26 a.m. and remained in his custody and under his observation until Officer Ouellette performed the breath test. During the time she was in custody, Babich did not consume any alcohol or have any opportunity to consume any alcohol.

The State charged Babich with reckless driving to endanger, driving while license revoked, speeding, driving while impaired, and habitual impaired driving. At trial, Bethany Pridgen, a forensic chemist with the Wilmington Crime Lab, testified as an expert witness for the State regarding retrograde extrapolation. Pridgen testified that she performed a retrograde extrapolation to estimate Babich's blood alcohol concentration at the time she was stopped. Based on her calculation, Pridgen gave a conservative estimate that Babich's blood alcohol concentration was between 0.08 and 0.10 at the time of the stop.

The jury convicted Babich of impaired driving, speeding, and reckless driving. Babich stipulated to three prior DWI convictions, constituting habitual status, and was sentenced to 19 to 32 months in prison. Babich timely appealed.

Analysis

I. Admissibility of the Retrograde Extrapolation Testimony

Babich contends that the retrograde extrapolation testimony of the State's expert witness was inadmissible under Rule 702(a)(1) because it was not based on sufficient facts or data. As explained below, although retrograde extrapolation testimony can be scientifically reliable, we hold here that the opinion of the State's expert was not sufficiently tied to the particular facts of this case and thus fails the *Daubert* "fit" test.

We review a trial court's admission of expert testimony for abuse of discretion. *State v. Anderson*, 322 N.C. 22, 28, 366 S.E.2d 459, 463 (1988). Our Supreme Court recently confirmed that Rule 702(a) of the Rules of Evidence "incorporates the standard from the *Daubert* line of cases" in federal evidentiary jurisprudence. *State v. McGrady*, 368 N.C. 880, 888, 787 S.E.2d 1, 8 (2016). To be admissible under Rule 702(a), expert testimony "must meet the three-pronged reliability test that is new to the amended rule: (1) The testimony must be based upon sufficient facts or data. (2) The testimony must be the product of reliable principles and methods. (3) The witness must have applied the principles and methods reliably to the facts of the case." *Id.* at 890, 787 S.E.2d at 9.

In addition, even if expert scientific testimony might be reliable in the abstract, to satisfy Rule 702(a)'s relevancy requirement, the trial court must assess "whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993). This ensures that "expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Id.* at 591 (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985)). The Supreme Court in *Daubert* referred to this as the "fit" test. *Id.*

We now apply these principles from Rule 702, *McGrady*, and *Daubert* to this case. At the outset, we note that Babich does not contend that *all* retrograde extrapolation of blood alcohol content is unreliable under Rule 702(a). Indeed, her own expert testified that retrograde extrapolation can be scientifically reliable if based on sufficiently reliable data. *See generally State v. Turbyfill*, __ N.C. App. __, __, 776 S.E.2d 249, 256 (2015) ("[B]lood alcohol extrapolation is a scientifically valid field, which principles have been tested, subjected to peer review and publication, and undisputedly accepted in the scientific community and in our courts."). Babich instead focuses on the key underlying assumption that the State's expert used in her retrograde extrapolation analysis—that Babich was in a post-absorptive state at the time of the stop.

To extrapolate Babich's blood alcohol level at the time of her arrest, the State's expert started with Babich's blood alcohol test at the police station, which occurred one hour and forty-five minutes after her arrest. Babich's blood alcohol concentration in that test was 0.07.

The State's expert then used a mathematical formula to extrapolate Babich's blood alcohol concentration at the time of the traffic stop based on her 0.07 blood alcohol level one hour and forty-five minutes later. To do so, the expert used data from previous scientific research to devise an average alcohol elimination rate—a conservative estimate of the rate at which the average person eliminates alcohol from the bloodstream. Using this model, the expert opined that, because Babich had a blood alcohol concentration of 0.07 one hour and forty-five minutes after the traffic stop, she had a blood alcohol concentration of 0.08 to 0.10 at the time of the stop.

Importantly, this mathematical model is applicable only if the subject is in a "post-absorptive" or "post-peak" state—meaning that alcohol is no longer entering the subject's bloodstream and thus her blood alcohol level is declining. The State's expert acknowledged that there are many factors that can impact whether a person is in a post-absorptive

or post-peak state, such as when the person last consumed alcohol (and how much was consumed), and whether the person consumed any food that could delay the alcohol's absorption into the bloodstream.

And, just as importantly, the State's expert conceded that she had *no factual information in this case* from which she could assume that Babich was in a post-absorptive state. But, because the expert's model would not work unless Babich was post-peak, the expert simply assumed that this was the case—although the expert readily conceded that she had no underlying facts to support this assumption:

> Q: Moving to this case in particular, Ms. Babich, you've not been provided any data whatsoever, facts about when her last consumption of alcohol was, or whether she consumed food, 30 to, I mean, 90 minutes prior?
>
> [STATE'S EXPERT]: No, I have not.
>
> Q. So you're assuming that she did—she's in the post-absorptive state?
>
> A. That's correct.
>
> Q. And that's not based really on any fact?
>
> A. Nope.
>
> Q. There is no fact that you've been presented to make that assumption?
>
> A. That's correct.
>
> Q. You have to make an assumption?
>
> A. In order to do the calculation, I make the assumption.
> . . .
>
> Q. Again to clarify, for Ms. Babich specifically, if you have that information and if Ms. Babich was not in the post-absorptive state, would your opinion change?
>
> A. For the time of the incident? Yeah. I mean, if there was information that told me that at the time of the incident, you know, she had had something to drink 20 minutes before, then I would be like, well, I don't believe she's post-peak so it wouldn't be a fair—it wouldn't be fair to make that calculation because I can't make that assumption now because I've been given other data.

> Q. Would you make the calculation?
>
> A. No.
>
> Q. What if you had data about her consuming a beverage, the last consumption of alcoholic beverage being one hour before with food, she would not be in the post-absorptive state; correct?
>
> A. Well, if I've been given that as a fact, now I have to make the assumption that she's pre-peak and—you cannot make the retrograde extrapolation calculation without assuming post-peak. So, yeah, it would definitely change. I wouldn't be able to do it, or I would say, well, within light of this type of information, I would now assume in the absorption phase during that time and then a retrograde extrapolation would not necessarily be an accurate assumption.
>
> Q. So if Ms. Babich was not post-peak or not in the post-absorptive state, you would not have an opinion about her breath at the time?
>
> A. That's correct.

In light of this testimony, the question posed in this case is straightforward: under *Daubert*, can an expert offer an opinion that extrapolates a criminal defendant's blood alcohol concentration where that extrapolation can be done only if the defendant was in a post-absorptive state, and the expert had no evidence on which to base the underlying assumption that the defendant was in a post-absorptive state? As explained below, we hold that expert testimony in this circumstance is inadmissible under *Daubert* because, as a matter of law, that testimony cannot satisfy the "fit" test.

To date, our State's appellate courts have not addressed this issue (either before or after the adoption of the *Daubert* methodology). But other courts have, and the majority of those courts have found that the evidence cannot satisfy the criteria of Rule 702(a).

For example, the New Mexico Supreme Court's decision in *State v. Downey* involved nearly identical facts. 195 P.3d 1244, 1252 (N.M. 2008). The state's expert assumed the defendant was in a post-absorptive state without any underlying facts to support that assumption. The court explained that "[g]iven that [the expert] did not have the facts necessary to plot Defendant's placement on the [blood alcohol concentration]

curve, he could not express a reasonably accurate conclusion regarding the fact in issue: whether Defendant was under the influence of intoxicating liquor at the time of the collision." *Id.* The court held that the expert's testimony could not satisfy *Daubert*'s "fit" requirement because the expert did not have sufficiently reliable underlying facts to which he could apply his otherwise reliable methodology. *Id.* As the court explained, the expert's testimony "did not 'fit' the facts of the present case because he simply assumed for the purpose of his relation-back calculations that Defendant had ceased drinking prior to the collision and, therefore, was post-absorptive." *Id.*

The New Mexico Supreme Court then addressed the implications of this holding, explaining that retrograde extrapolation can be (and often will be) admissible. But, at a minimum, the expert must have some facts from which the expert can assume that the defendant is in a post-absorptive state:

> Experts may, and often do, base their opinions upon factual assumptions, but those assumptions in turn must find evidentiary foundation in the record. Here, by contrast, the State did not produce any evidence regarding when Defendant last consumed alcohol, much less the quantity consumed, which rendered [the expert's] assumption mere guesswork in the context of this particular case. Accordingly, because [the expert's] conclusions were nothing more than mere conjecture and should have been excluded, the trial court abused its discretion in permitting this evidence to go to the jury.
>
> We recognize that information regarding when a defendant had begun or ceased drinking may be difficult to obtain absent an admission from the defendant. We point out, however, that the State may be able to glean this information from third-party witnesses or from circumstantial evidence.

Id. (internal citations omitted).

Courts in other jurisdictions have reached the same conclusion when applying the *Daubert* test or similar evidentiary jurisprudence. *See*, *e.g.*, *People v. Floyd*, 11 N.E.3d 335, 342 (Ill. App. Ct. 2014); *State v. Wolf*, 605 N.W.2d 381, 385 (Minn. 2000); *State v. Dist. Ct. (Armstrong)*, 267 P.3d 777, 783 (Nev. 2011); *Commonwealth v. Petrovich*, 648 A.2d 771, 773–74 (Pa. 1994); *Mata v. State*, 46 S.W.3d 902, 916 (Tex. Crim. App. 2001).

We agree with the New Mexico Supreme Court's analysis in *Downey*. Applying the requirements of Rule 702(a), as interpreted by our Supreme Court in *McGrady*, we hold that, when an expert witness offers a retrograde extrapolation opinion based on an assumption that the defendant is in a post-absorptive or post-peak state, that assumption must be based on at least some underlying facts to support that assumption. This might come from the defendant's own statements during the initial stop, from the arresting officer's observations, from other witnesses, or from circumstantial evidence that offers a plausible timeline for the defendant's consumption of alcohol.

When there are at least some facts that can support the expert's assumption that the defendant is post-peak or post-absorptive, the issue then becomes one of weight and credibility, which is the proper subject for cross-examination or competing expert witness testimony. But where, as here, the expert concedes that her opinion is based entirely on a speculative assumption about the defendant—one not based on any actual facts—that testimony does not satisfy the *Daubert* "fit" test because the expert's otherwise reliable analysis is not properly tied to the facts of the case. *Daubert*, 509 U.S. at 593. Accordingly, we hold that the trial court abused its discretion by admitting the challenged expert testimony in this case.

II. Harmless Error Analysis

Because we conclude that the trial court erred in admitting the State's expert testimony, we must address whether that error prejudiced Babich. "An error is not prejudicial unless there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial." *State v. Mason*, 144 N.C. App. 20, 27–28, 550 S.E.2d 10, 16 (2001). "Where it does not appear that the erroneous admission of evidence played a pivotal role in determining the outcome of the trial, the error is harmless." *Id.* at 28, 550 S.E.2d at 16.

A defendant may be convicted of driving while impaired if the State proves that the defendant drove "(1) While under the influence of an impairing substance; or (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more." N.C. Gen. Stat. § 20-138.1(a). The jury in this case was instructed on both alternative grounds.

In *State v. Taylor*, this Court held that any error in the admission of retrograde extrapolation testimony necessary to prove the second ground in N.C. Gen. Stat. § 20-138.1(a) was harmless because of the strength of the evidence that the defendant was appreciably impaired

under the first ground. 165 N.C. App. 750, 758, 600 S.E.2d 483, 489 (2004). The evidence of appreciable impairment in *Taylor* consisted of the following: "that [the officer] smelled an odor of alcohol on defendant's person at the accident scene, that defendant needed assistance with walking to the patrol car, that defendant had difficulty writing his statement on the appropriate lines, that defendant had a 'blank face,' and that defendant did not perform satisfactorily on field sobriety tests administered by [the officer]." *Id.*

We are unable to distinguish this case from *Taylor*. Here, the State presented evidence that the officer saw Babich drive 80 to 90 miles per hour while approaching a red light, suddenly slow down, and then drive through the red light at approximately 45 miles per hour. When the officer stopped Babich, he smelled alcohol on her breath and saw that she had glazed and bloodshot eyes. Babich also stumbled as she walked. Babich ignored the officer's instructions and repeatedly talked over him as he attempted to speak to her. Babich did not properly perform the field sobriety tests, including touching her face instead of her nose, using her other foot and hands to balance herself during the one-leg-stand test, and failing and starting over during the walk-and-turn test. Under *Taylor*, this evidence is sufficient to show that, even without the challenged expert testimony, there is no reasonable possibility that the jury would have reached a different result. Accordingly, although we find error in the trial court's evidentiary ruling, we hold that the error did not prejudice Babich and thus we uphold her conviction and sentence.

Conclusion

For the reasons discussed above, we hold that the trial court erred in admitting the retrograde extrapolation testimony of the State's expert witness, but find no prejudicial error.

NO PREJUDICIAL ERROR.

Judges BRYANT and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
SHYMEL D. JEFFERSON, DEFENDANT

No. COA16-745

Filed 7 March 2017

1. Constitutional Law—felony murder—juvenile sentencing

A defendant who was fifteen years old when he was convicted of felony murder and sentenced to life in prison *with* the possibility of parole after twenty-five years did not show the existence of circumstances indicating that the sentence was particularly cruel and unusual as applied to him. The U.S. Supreme Court has not indicated that the individualized sentencing required in *Miller v. Alabama*, 183 L. Ed. 2d 407 (2012), extends to sentences beyond life without parole. However, there may be a case in which a mandatory sentence of life with parole for a juvenile is disproportionate in light of a particular defendant's age and immaturity.

2. Constitutional Law—juvenile sentencing for murder—issues noted but not addressed

In a case involving a juvenile sentenced to life in prison with the possibility of parole after twenty-five years, defendant did not raise the issue of whether his sentence violated the N.C. Constitution. Moreover, North Carolina remains the only state that permits juveniles as young as thirteen years old to be tried as adults without allowing them to appeal to return to the juvenile system—a provision which this defendant did not challenge.

Judge BRYANT concurring in the result only.

Appeal by Defendant from judgment entered 29 February 2016 by Judge Stanley L. Allen in Rockingham County Superior Court. Heard in the Court of Appeals 24 January 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jonathan P. Babb, for the State.

The Phillips Black Project, by John R. Mills, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Shymel D. Jefferson ("Defendant") appeals his sentence of life imprisonment with the possibility of parole after a term of twenty-five years, alleging the statute mandating his sentence violates the Eighth Amendment of the United States Constitution pursuant to *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). After review, we disagree.

I. Facts and Background

On 25 January 2010, Defendant—then fifteen years old—was charged by petition with first-degree murder in Rockingham County Juvenile Court. Pursuant to N.C. Gen. Stat. § 7B-2200, which requires the juvenile court to transfer any defendant accused of a Class A felony to superior court, the case was transferred to Rockingham County Superior Court. On 8 February 2010, Defendant was indicted for the first-degree murder of Timothy Seay. The case was brought to trial on 29 May 2012. This Court summarized the facts as presented at trial in *State v. Jefferson*, No. 13-668, 2014 N.C. App. LEXIS 256 (N.C. Ct. App. Mar. 4, 2014) (unpublished).

> On the night of 6 November 2009, defendant, Travis Brown, Shaquan Beamer ("Beamer"), and defendant's older cousin, Shavon Reid ("Shavon"), went to the Icehouse, a bar in Eden, North Carolina. Defendant was fifteen years old at this time and had been living with Shavon in Martinsville, Virginia. Prior to the night in question, defendant had begun carrying a pistol for protection. He brought the gun with him to the Icehouse but left it in the car when the group went inside.
>
> At the Icehouse, defendant encountered Jason Gallant ("Gallant"), Timothy Seay ("Seay"), and Terris Dandridge ("Dandridge"). After about an hour in the bar, a fistfight broke out. Defendant, Dandridge, and Gallant were all involved; defendant and Dandridge were seen pushing each other. The fight was quickly broken up by bar security, and both groups were forced to go outside. Defendant left the bar and retrieved his gun from the car.
>
> Once the crowd had moved into the street, Seay's group began taunting defendant's group. Defendant testified that he heard a gunshot during the encounter. He then fired his gun in the direction of the group of people where he thought the shot had come from until he ran out of bullets. Devin Turner, a witness to the incident, testified that

> the only people he saw firing were defendant and Shavon. Ultimately, two people were injured and one was killed as a result of the shooting. Gallant and Dandridge were wounded by gunshots to the wrist and leg, respectively. Seay was killed by a gunshot wound to the head and was also shot one time in the chest, with the bullet getting lodged in his shoulder. Police later recovered two types of shell casings from the scene - .40 caliber and .380. Expert testimony established that the nine .380 casings found at the scene and the bullet in Seay's shoulder were fired from defendant's gun.

Jefferson, 2014 N.C. App. LEXIS 256 at *2-3. At trial, the medical examiner testified Seay was killed by the gunshot wound to his head, which involved a larger caliber bullet than the gunshot wound to his chest. The jury found Defendant guilty of first-degree murder under the felony-murder rule. On 8 June 2012, under then-applicable state law, the trial court sentenced Defendant to a mandatory term of life without the possibility of parole.

During the pendency of Defendant's appeal, the United States Supreme Court decided *Miller v. Alabama*, holding "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " 132 S. Ct. at 2460, 183 L. Ed. 2d 407, 414-15. In response, the General Assembly enacted N.C. Gen. Stat. § 15A-1340.19B, which provided, *inter alia*, the sentence for a defendant found guilty of first-degree murder solely under the felony murder rule shall be life imprisonment with the possibility of parole. N.C. Gen. Stat. § 15A-1340.19B(a)(1) (2015). *Jefferson*, 2014 N.C. App. LEXIS 256 at *6-7. A defendant sentenced under this act must serve a minimum of twenty-five years before becoming eligible for parole. N.C. Gen. Stat. § 15A-1340.19A (2015).

As a result, this Court overturned Defendant's sentence on appeal and remanded to the trial court for resentencing pursuant to § 15A-1340.19B. *Jefferson*, 2014 N.C. App. LEXIS 256 at *6-7. On 29 February 2016, the trial court held resentencing proceedings, and imposed a sentence of life with the possibility of parole after twenty-five years. Defendant entered notice of appeal in open court.

II. Jurisdiction

Defendant appeals a final judgment of the superior court. As such, his appeal is proper pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a)(1) (2015).

III. Standard of Review

"When constitutional rights are implicated, the appropriate standard of review is de novo." *In re Adoption of S.D.W.*, 367 N.C. 386, 391, 758 S.E.2d 374, 378 (2014) (citation omitted). When mounting a facial constitutional challenge[1], "[a] party must show that there are no circumstances under which the statute might be constitutional." *Beaufort County Bd. of Educ. v. Beaufort Count Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009). "[T]he presumption is that any act passed by the legislature is constitutional, and the court will not strike it down if [it] can be upheld on any reasonable ground." *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 486 (2005) (internal citations omitted).

IV. Analysis

[1] Defendant challenges the constitutionality of N.C. Gen. Stat. § 15A-1340.19B(a)(1), contending the statute failed to provide the trial court with the discretion to consider mitigating factors and render an individualized sentence, as required by the United States Supreme Court in *Miller v. Alabama*. Because the Supreme Court has not indicated the individualized sentencing required in *Miller* extends to sentences beyond life without parole, we must presume the statute is constitutional, and defer to the legislature.

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments" on criminal defendants. U.S. Const. amend VIII. Central to any analysis of the Eighth Amendment is the concept of proportionality. The United States Supreme Court has held the right against cruel and unusual punishment "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Miller*, 132 S. Ct. at 2462, 183 L. Ed. 2d at 417 (internal quotation marks and citations omitted). Applying this basic principle, the United States Supreme Court has issued three recent decisions limiting the State's ability to apply its "most severe penalties" to defendants who were less than eighteen years old when they committed their offenses. *Id.* at 2466, 183 L. Ed. 2d at 421.

First, in *Roper v. Simmons*, the Court considered "whether it is permissible under the Eighth and Fourteenth Amendments to the

1. While Defendant did not explicitly use this label, he makes no argument that the statute was applied unconstitutionally in his case and does not claim that the application of the law to his case was uniquely flawed. Rather, he merely asserts that N.C. Gen. Stat. § 15A-1340.19B(a)(1) does not provide a trial judge with sufficient discretion to consider his mitigating factors.

Constitution of the United States to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime." 543 U.S. 551, 555-56, 161 L. Ed. 2d 1, 13 (2005). Because juveniles tend to display a "lack of maturity and an underdeveloped sense of responsibility," are vulnerable to "negative influences and outside pressures, including peer pressure," and generally possess a character that is "not as well formed" as an adult's, the Court concluded juvenile offenders may not reliably "be classified among the worst offenders." *Id.* at 569, 161 L. Ed. 2d at 21-22. Moreover, these same characteristics vitiate the penological justifications for the death penalty. *Id.* at 571, 161 L. Ed. 2d at 23. Because they lack self-control and rational cost-benefit thinking, juveniles are less likely to respond to the death penalty as a deterrent, and are less likely to be fully culpable for their actions. *Id.* As a result, *Roper* categorically barred the application of capital punishment to juvenile defendants. *Id.* at 578, 161 L. Ed. 2d at 28.

Next, in *Graham v. Florida*, the Court went further, barring the sentencing of juveniles to life without parole for non-homicide crimes. 560 U.S. 48, 176 L. Ed. 2d 825 (2010). While maintaining that a death sentence is "unique in its severity and irrevocability," the Court held it shared characteristics with a sentence of life without parole in that "[i]t deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence." *Graham*, 560 U.S. at 69-70, 176 L. Ed. 2d at 842 (internal citation omitted). Again focusing on the ramifications of immaturity on the penological rationale for giving the harshest sentences to juvenile offenders, the Court established another categorical rule, prohibiting "the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Id.* at 82, 176 L. Ed. 2d at 850.

Finally, in *Miller v. Alabama*, the Court contemplated whether the Eighth Amendment prohibited mandatory sentences of life without parole for juveniles convicted of homicide. 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Here, the Court synthesized its holdings in *Roper* and *Graham* to again institute a categorical bar. The Court trod more explicitly on the connection between the death penalty and life without parole, characterizing the latter as the "ultimate penalty for juveniles." *Miller*, 132 S. Ct. at 2466, 183 L. Ed. 2d at 421. On that basis, the Court imported the requirement of individualized sentencing from its death penalty jurisprudence, holding when the State imposes life without parole on a juvenile, it must take into consideration the defendant's age and its "hallmark features—among them, immaturity, impetuosity, and failure

to appreciate risks and consequences." *Id.* at 2468, 183 L. Ed. 2d at 423. As a result, it held "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* at 2469, 183 L. Ed. 2d at 424.

Defendant contends the Supreme Court's holding in *Miller* is open-ended and may be extended to reach sentences of life *with* the possibility of parole. He urges us to adopt Chief Justice Roberts' reasoning in dissent that "[t]he principle behind [*Miller*] seems to be only that because juveniles are different from adults, they must be sentenced differently. There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive." *Miller*, 132 S. Ct. at 2482, 183 L. Ed. 2d at 437-38 (Roberts, C.J., dissenting) (internal citations omitted). While the Court indeed draws a bright line distinction between sentencing adults and juveniles, its reasoning in *Graham* and *Miller* suggests an equally bright line between sentences that condemn a juvenile defendant to a life in prison without hope of redemption and sentences that provide a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75, 176 L. Ed. 2d at 846.

Miller and the line of cases leading to it conclusively establish that in certain circumstances, "children are different" in the same way that "death is different." *Miller*, 132 S. Ct. at 2470, 183 L. Ed. 2d at 425 (internal citations and quotation marks omitted). The Court's rulings make clear that the trial court must consider the juvenile defendant's relative inability to exercise self-control, as well as the limited applicability of legitimate penological justifications such as retribution to defendants with reduced moral agency. Nonetheless, the Court's holdings in *Graham* and *Miller* have been carefully circumscribed. In *Graham*, the Court instituted a categorical bar to sentences of life without parole, but only to the class of juvenile defendants who have committed non-homicide offenses. In *Miller*, the Court's holding was narrower, barring only mandatory sentences of life without parole for juvenile offenders.

Moreover, the Court's holding in both *Miller* and *Graham* clearly rested upon its characterization of life without parole as the functional equivalent of the death penalty in juvenile cases. *Graham*, 560 U.S. at 69-70, 130 S. Ct. at 2027, 176 L. Ed. 2d at 842; *Miller*, 132 S. Ct. at 2466, 183 L. Ed. 2d at 421. To wit, the *Miller* court stated "*Graham*'s (and also *Roper*'s) foundational principle [was] that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller*, 132 S. Ct. at 2466, 183 L. Ed. 2d at 421.

However, the Court explicitly defined the "most severe penalties" in terms of capital punishment and life without parole. *Id.* ("Life-without-parole terms . . . share some characteristics with death sentences that are shared by *no other sentences*.") (quoting *Graham*, 560 U.S. at 69-70, 130 S. Ct. at 2027, 176 L. Ed. 2d at 842) (emphasis added). In doing so, the Court referred to "imprisoning an offender until he dies," the "lengthiest possible incarceration," and the "ultimate penalty for juveniles." *Id.*

This connection between life without the possibility of parole and individualized sentencing has been borne out in both subsequent decisions by the United States Supreme Court and several state courts asked to interpret *Miller*. In *Montgomery v. Louisiana*, the Supreme Court held *Miller* had retroactive effect as a substantive rule of constitutional law and invalidated the sentence of a defendant sentenced in 1963 to life without parole at the age of seventeen. 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). Turning to a remedy, the Court held "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Montgomery*, 136 S. Ct. at 736, 193 L. Ed. 2d at 622.

As it has in other Eighth Amendment cases, the Court spoke approvingly of parole in *Montgomery*, stating that it "ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Id.* at 736, 193 L. Ed. 2d at 622. *See also Rummel v. Estelle*, 445 U.S. 263, 280-81, 63 L. Ed. 2d 382, 395 (1980) (upholding a mandatory sentence of life with parole imposed under Texas' "three-strikes" statute, noting the Court could "hardly ignore the possibility that [defendant] will not actually be imprisoned for the rest of his life."). The Court also cited to a Wyoming statute which, like the provision under which Defendant was sentenced, makes any juvenile defendant sentenced to life imprisonment eligible for parole after twenty-five years. Wyo. Stat. Ann. § 6-10-301(c) (2016). Thus, *Montgomery* suggests the Court views parole as an appropriate way to provide juvenile defendants with the required "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75, 176 L. Ed. 2d at 845-46.

The decisions of the state courts which have been asked to extend *Miller* beyond explicit sentences of life without parole similarly make clear the touchstone of the *Miller* analysis is whether the defendant is sentenced to a life term (or its functional equivalent) without an "opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* In *State v. Null*, the Iowa Supreme Court invalidated a

mandatory 52.5 year sentence, noting that "geriatric release, if one is to be afforded the opportunity for release at all," does not provide the defendant a meaningful opportunity to regain his freedom and reenter society. 836 N.W.2d 41, 71 (Iowa 2013). Similarly, the Wyoming, Indiana, and California supreme courts have held *Miller* requires individualized sentencing where one or more mandatory minimum sentences results in a *de facto* life sentence without parole. *See*, *e.g.*, *Bear Cloud v. State*, 334 P.3d 132, 142 (Wyo. 2012) (consecutive terms of twenty and twenty-five years provided defendant would not be eligible for parole until age sixty-one); *Brown v. State*, 10 N.E.3d 1, (Iowa 2014) (defendant sentenced to three consecutive terms adding up to one hundred and fifty years); *People v. Caballero*, 282 P.3d 291, 294-95 (Cal. 2012) (defendant sentenced to life with parole but was only eligible for release after serving one hundred and ten years of his term).

Defendant's sentence is neither an explicit nor a *de facto* term of life imprisonment without parole. Upon serving twenty-five years of his sentence, Defendant will become eligible for parole, where state law mandates he be given an opportunity to provide the Post-Release Supervision and Parole Commission with evidence of his maturity and rehabilitation. *See* N.C. Gen. Stat. § 15A-1371(b)(3) (2015) ("The Post-Release Supervision and Parole Commission *must* consider any information provided by [the prisoner] before consideration of parole.") (emphasis added). The Commission may only refuse him parole if it appears Defendant is a "substantial risk" to violate the conditions of his parole, his release would "unduly depreciate the seriousness of his crime or promote disrespect for law," his rehabilitation would be better served by remaining in prison, or he posed a substantial risk of recidivism.[2] N.C. Gen. Stat. § 15A-1371(d) (2015). Because "[p]arole is intended to be a means of restoring offenders who are good social risks to society," its very purpose is to allow Defendant to demonstrate he has been rehabilitated and obtained sufficient maturity as to have overcome whatever age-related weaknesses in character that led to the commission of his crime. *Jernigan v. State*, 10 N.C. App. 562, 565, 179 S.E.2d 788. 790 (1971) (quoting *Zerbst v. Kidwel*l, 304 U.S. 359, 363, 58 S. Ct. 872, 874, 82 L. Ed. 1399, 1401 (1938)).

Consequently, we conclude neither the United States Supreme Court nor the North Carolina Supreme Court has yet held the Eighth

2. The official commentary to the North Carolina General Statutes states "[t]he Commission intended that this be an exclusive list of legitimate bases for denying parole." N.C. Gen. Stat. § 15A-1371, cmt. (2015).

Amendment requires the trial court to consider these mitigating factors before applying such a sentence to a juvenile defendant.[3] Because Defendant has failed to meet his burden of proving the statute is unconstitutional in all applications, we must presume the statute is constitutional and defer to the legislature, which has the exclusive authority to prescribe criminal punishments. *State v. Whitehead*, 365 N.C. 444, 446, 722 S.E.2d 492, 494 (2012). *See also Jernigan v. State*, 279 N.C. 556, 563-64, 184 S.E.2d 259, 265 (1971).

Nevertheless, we note there may indeed be a case in which a mandatory sentence of life with parole for a juvenile is disproportionate in light of a particular defendant's age and immaturity. That case is not now before us. Defendant chooses only to assert that N.C. Gen. Stat. § 15A-1340.19B(a)(1) fails to provide a trial judge with discretion to consider the mitigating factors of youth and immaturity. He does not show the existence of circumstances indicating the sentence is particularly cruel and unusual as-applied to him.

Because Defendant fails to meet the burden of a facial constitutional challenge and does not bring an as-applied challenge, the trial court's sentence is

AFFIRMED.

Judge DIETZ concurs.

Judge BRYANT concurs in result only in a separate opinion.

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[2] 3. We would like to note Defendant declined to address whether his sentence violated the North Carolina Constitution. Unlike the United States Constitution's Eighth Amendment, Art. 1, Sec. 27 of the state constitution requires that courts not inflict "cruel *or* unusual punishments" (emphasis added). While our courts have historically applied the same analysis to both provisions, it is unclear "[w]hether the word 'unusual' has any qualitative meaning different from 'cruel' . . . . On the few occasions [the United States Supreme Court] has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn." *State v. Green*, 348 N.C. 588, 603, 502 S.E.2d 819, 828 (1998) (quoting *Trop v. Dulles*, 356 U.S. 86, 100, 2 L. Ed. 2d 630, 642 n.32 (1958)).

North Carolina remains the only state in the nation which permits juveniles as young as thirteen years old to be tried as adults without allowing them the ability to appeal for return to the juvenile system. Tamar Birkhead, North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform, 86 N.C.L. Rev. 1443, 1445 (2008). *See also* N.C. Gen. Stat. §§ 7B-2200, 7B-2203 (2015). Furthermore, the statute requires transfer for any Class A felony where the trial court finds probable cause. N.C. Gen. Stat. § 7B-2200 (2015). Because Defendant did not challenge this provision, its constitutionality is not before us and is a question we do not now decide.

BRYANT, Judge, concurring in the result by separate opinion.

The majority undergoes a thorough constitutional analysis of what it interprets as a facial constitutional challenge as opposed to an applied one. I concur in the result reached by the majority but write separately to address the narrower issue raised by defendant in his appeal: whether the trial court had discretion under the statute to consider mitigating circumstances relating to a defendant's youth, community, and ability to benefit from rehabilitation, and impose an individualized sentence.

In this case, "[t]he jury rejected the theories of premeditation and deliberation and acting in concert, but convicted defendant based on the felony murder rule, with the underlying felony being assault with a deadly weapon inflicting serious injury." *State v. Jefferson*, No. COA13-668, 2014 WL 859345, at *2 (N.C. Ct. App. Mar. 4, 2014) (unpublished). The question of whether the trial court has discretion in this matter was answered squarely by this Court in *State v. Lovette*, 225 N.C. App. 456, 737 S.E.2d 432 (2013) (*Lovette I*), where it set out sentencing requirements for defendants who are under the age of eighteen at the time of offense, following *Miller v. Alabama*, ___ U.S. ___, 183 L. Ed. 2d 407 (2012), and the enactment of N.C. Gen. Stat. §§ 15A-1340.19A and -1340.19B:

> In response to the *Miller* decision, our General Assembly enacted N.C. Gen. Stat. § 15A-1476 *et seq.* ("the Act"), entitled "An act to amend the state sentencing laws to comply with the United States Supreme Court Decision in *Miller v. Alabama*." N.C. Sess. Law 2012-148. The Act applies to defendants convicted of first-degree murder who were under the age of eighteen at the time of the offense. N.C. Gen. Stat. § 15A-1340.19A. Section 15A-1340.19B(a) provides that if the defendant was convicted of first-degree murder *solely* on the basis of the felony murder rule, his sentence shall be life imprisonment with parole. N.C. Gen. Stat. § 15A-1340.19B(a)(1) (2012). *In all other cases*, the trial court is directed to hold a hearing to consider any mitigating circumstances, *inter alia*, those related to the defendant's age at the time of the offense, immaturity, and ability to benefit from rehabilitation. N.C. Gen. Stat. §§ 15A-1340.19B, 15A-1340.19C.

Lovette I, 225 N.C. App. at 470, 737 S.E.2d at 441 (emphasis added) (footnotes omitted); *see also State v. Lovette*, ___ N.C. App. ___, ___, 758 S.E.2d 399, 405 (*Lovette II*) (holding that "the Court's prior opinion [in *Lovette I*] is the law of the case"), *appeal dismissed*, ___ N.C. ___, 763

S.E.2d 392 (2014) (allowing defendant's motion to dismiss the appeal "for lack of substantial constitutional question filed by the State of NC"). In other words, where a defendant is convicted of first-degree murder under a theory other than the felony-murder rule, the defendant is entitled to a hearing regarding mitigating circumstances. *See Lovette I* , 225 N.C. App. at 470, 737 S.E.2d at 441.

In the instant case, defendant was fifteen years old at the time of the murder, and his conviction was based "solely" on the felony-murder rule. *See Jefferson*, 2014 WL 859345, at *2. Accordingly, N.C.G.S. § 15A-1340.19B(a)(1) requires that defendant be sentenced to life imprisonment with parole. *Id.* § 15A-1340.19B(a)(1). In turn, N.C.G.S. § 15A-1340.19A defines "life imprisonment with parole" to mean that "defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole." *Id.* § 15A-1340.19A. As defendant was sentenced to life imprisonment with the possibility of parole in twenty-five years at the 29 February 2016 resentencing hearing, and this Court has previously held that N.C. Gen. Stat. §§ 15A-1340 and 15A-1340B comply with *Miller*, *see State v. James*, ___ N.C. App. ___, ___, 786 S.E.2d 73, 78–79 (2016); *State v. Pemberton*, 228 N.C. App. 234, 247, 743 S.E.2d 719, 728 (2013), defendant's argument on appeal that his sentence fails to provide for sufficient discretion to consider mitigating factors is without merit. Accordingly, I concur in the result reached by the majority and affirm the trial court.

STATE v. PARLIER

[252 N.C. App. 185 (2017)]

STATE OF NORTH CAROLINA,
v.
ALLEN DUANE PARLIER, DEFENDANT

No. COA16-724

Filed 7 March 2017

1. Confessions and Incriminating Statements—videotaped confession—not custodial

The videotaped confession of a defendant in a statutory rape and indecent liberties trial was admissible even though defendant contended that it was elicited in a custodial interrogation without *Miranda* warnings. There was no custodial interrogation; although any interview of a suspect by a police officer has been recognized to have coercive aspects, here there was neither a formal arrest nor a restraint on freedom of the degree associated with a formal arrest, and a reasonable person in this defendant's position would not have understood it to be a custodial interrogation.

2. Appeal and Error—preservation of issues—victim's sexual history

Defendant did not preserve for appellate review the question of the victim's past sexual history in a prosecution for statutory rape and indecent liberties where defendant did not make an offer of proof. Defendant made no application to the trial court for a determination of the relevance of the behavior about which he wished to question the victim and no hearing was held.

Appeal by defendant from judgment entered 7 January 2016 by Judge Yvonne Mims Evans in Caldwell County Superior Court. Heard in the Court of Appeals 26 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Tracy Nayer, for the State.

Gillette Law Firm, PLLC, by Jeffrey William Gillette, for defendant-appellant.

BERGER, Judge.

On January 7, 2016, a Caldwell County jury convicted Allen Duane Parlier ("Defendant") of statutory rape and indecent liberties with a

child. Defendant appeals, alleging these convictions should be reversed because his confession was obtained in violation of *Miranda*, and that he should have been allowed to interrogate the victim regarding her general sexual history contrary to the Rape Shield Law. We disagree.

Factual Background

Caldwell County Detective Shelley Hartley was assigned to investigate a report from July 23, 2013, concerning an incident between Defendant and the parents of a 15-year-old girl, Cindy.[1] When Cindy's parents discovered that the 41-year-old Defendant had been having sex with their daughter, Defendant fled to avoid a physical confrontation. Detective Hartley was unable to locate Defendant during her investigation, and advised Defendant's mother that she would like to speak with him.

On February 10, 2014, nearly seven months later, Defendant called Detective Hartley and left a voicemail message for her. Detective Hartley made contact with Defendant that same day, and she requested that he come speak with her at the Caldwell County Sheriff's Department. No warrant or other criminal process had been issued for Defendant, and no one from the Sheriff's Department transported him to meet Detective Hartley. Defendant traveled to the Sheriff's Department voluntarily.

Detective Hartley met Defendant in the Sheriff's Department lobby, identified herself, and advised that she was a detective. She was not dressed in a patrol uniform, but in plain clothes, and her weapon, although on her person, was not visible.

Detective Hartley requested that Defendant come talk with her, and Defendant followed her to an interview room. The two proceeded down a long hallway with at least two secure doors which prevented public access into the investigations division. The hallway doors were not locked and did not prevent egress from the Sheriff's Department. Defendant was not placed under arrest at that time, and he was never told that he was not free to leave. The door to the interview room was closed because of noise in the hallway, but it was not locked. Detective Hartley did not advise Defendant of his *Miranda* rights.

Detective Hartley and Defendant spoke for approximately 25 minutes in the interview room. During this time, Defendant never requested food or water, never requested an attorney, and never indicated that he was uncomfortable or needed a break. Further, Defendant never

1. The pseudonym "Cindy" has been used throughout to protect the identity of the juvenile victim pursuant to Rule 3.1(b) of the North Carolina Rules of Appellate Procedure.

requested to leave the interview room. Prior to entering the interview room, Defendant only stated that he had been sick, but there was no evidence of illness or discomfort during the interview.

Defendant's interview with Detective Hartley was videotaped and later transcribed for use at trial. Defendant admitted that he and Cindy had sexual intercourse on six different occasions. Detective Hartley arrested Defendant at the conclusion of the interview.

Cindy testified at trial that the two began exchanging text messages of a sexual nature in June 2013. Initially, they met and kissed, but soon thereafter, Defendant went to Cindy's home and performed oral sex on her and then gave her marijuana. The following day, Cindy went to Defendant's mother's trailer home where they had sexual intercourse in his mother's room. Defendant's sexual relationship with the 15-year-old lasted until late July 2013, when Cindy's parents discovered the relationship and reported it to law enforcement.

During the investigation, Cindy told Detective Hartley that she could not remember how many times she and Defendant had sex, but it was at least one time per day, each weekday, from the end of June until July 22, 2013. During this time, Defendant provided Cindy with gifts and drugs. Cindy testified that she never wanted to tell anyone about the relationship because she "didn't want to disappoint him."

Cindy testified that she informed Defendant that she was 15 years old before they engaged in sexual activity. Defendant told Cindy that "he was risking a lot to do it with [her] and that, if he ever was caught, he would go to jail."

Procedural Background

On May 6, 2014, Defendant was indicted by a grand jury in Caldwell County for the Class B1 felony of statutory rape of a 15-year-old child in violation of N.C. Gen. Stat. § 14-27.7A (2013), and the Class F felony of taking indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1 (2013).

Prior to trial, the State filed a motion *in limine* to preclude inquiry into the sexual activity of the complainant, other than the acts at issue in the indictment, pursuant to N.C. Gen. Stat. § 8C-1, Rule 412. The trial court held this motion in abeyance prior to trial, but granted this motion during trial.

Defendant made an oral motion at the beginning of trial to suppress the videotaped interview of Defendant by Detective Hartley. This motion

was made on the grounds that the interview was custodial interrogation and Defendant had not been given the warnings mandated by *Miranda*. Defendant did not file an affidavit with the trial court in support of his motion. The trial court heard testimony from Detective Hartley, and arguments from counsel for both the State and Defendant. At the conclusion of this hearing, the trial court made oral findings of fact, and denied the motion to suppress. At trial, Defendant objected to the admission of a transcript of the videotaped interview, but he did not object to the admission of the videotaped interview itself.

On January 7, 2016, the jury found Defendant guilty of both charged offenses. Defendant was sentenced in the presumptive range to a term of 270 to 384 months imprisonment. Defendant timely filed notice of appeal.

Analysis

A. Non-Custodial Interrogation

[1] Defendant first contends that his February 10, 2014 videotaped confession was inadmissible at trial because it was elicited during a custodial interrogation and he was not given *Miranda* warnings prior to making his statement to Detective Hartley. For these reasons, Defendant argues that the trial court erred in denying his motion to suppress this evidence and allowing its admission during trial. We disagree.

In reviewing the trial court's denial of a motion to suppress, "the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence… .' " *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120-21 (2002) (quoting *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994)). However, "the trial court's determination of whether an interrogation is conducted while a person is in custody involves reaching a conclusion of law, which is fully reviewable on appeal." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citation omitted). "The trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *Id.* (citations and quotation marks omitted).

We must first note that Defendant failed to object to the admission of the videotaped interview into evidence at trial. "[O]ur Supreme Court has held that a trial court's evidentiary ruling on a pretrial motion to suppress is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial." *State v. Hargett*, ___ N.C. App. ___, ___, 772 S.E.2d 115, 120 (2015) (citations and quotation marks omitted) (emphasis in original). "Unpreserved error in

criminal cases . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (citing N.C. R. App. P. 10(a)(4); *State v. Black*, 308 N.C. 736, 739-41, 303 S.E.2d 804, 805-07 (1983)). Plain error is 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." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation, quotation marks, and brackets omitted) (emphasis in original). Defendant bears this heavier burden of showing that the error rises to the level of plain error. *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333.

In now turning to the alleged error, we begin with the Fifth Amendment to the United States Constitution, which provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. In *Miranda v. Arizona*, 384 U.S. 436 (1966), "the United States Supreme Court determined that the prohibition against self-incrimination requires that prior to a custodial interrogation, the alleged defendant must be advised that he has the right to remain silent and the right to the presence of an attorney." *State v. Warren*, 348 N.C. 80, 97, 499 S.E.2d 431, 440 (1998) (citing *Miranda*, 384 U.S. at 479). However, "[t]he rule in *Miranda* applies only when a defendant is subjected to custodial interrogation." *State v. Hipps*, 348 N.C. 377, 396, 501 S.E.2d 625, 637 (1998) (citation omitted).

> In determining whether a suspect is in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest. This is an objective test, based upon a reasonable person standard, and is to be applied on a case-by-case basis considering all the facts and circumstances.

State v. Rooks, 196 N.C. App. 147, 150, 674 S.E.2d 738, 740-41 (2009) (citations, quotation marks, and brackets omitted).

Any interview of a suspect by a police officer has been recognized by the United States Supreme Court to have coercive aspects to it. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). However, the United States Supreme Court has also recognized that *Miranda* warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police

suspect." *Id.* at 495. Our inquiry on appellate review is whether there were indicia of formal arrest such that the questioning becomes custodial interrogation. *Buchanan*, 353 N.C. at 339-40, 543 S.E.2d at 827-28.

In the case *sub judice*, the uncontroverted facts found by the trial court during the suppression motion hearing were that

> [t]he defendant called Detective Hartley. She told him she would like to have him come in. He said he would come that same day. And in fact, he did report to the Caldwell County Sheriff's [Department]. He was not told upon his arrival that he was under arrest or in custody, but he was not told that he was free to leave. He indicated that he was feeling sick to his stomach, but he voluntarily walked into the interview room, and he talked with Detective Hartley for approximately 42 minutes. He answered her questions. He never requested an attorney. He did not ask if he was free to leave. He didn't ask if he was under arrest. He did not request water or use of a restroom. He was not handcuffed or shackled.

Looking at the circumstances surrounding Defendant's videotaped interview, there was neither a formal arrest nor a restraint on freedom of movement of the degree associated with a formal arrest. Here, Defendant contacted Detective Hartley and voluntarily traveled to the Caldwell County Sheriff's Department. Detective Hartley invited Defendant to speak with her and he followed her to the interview room. Defendant was not handcuffed or restrained in any way, and the interview room door and hallway doors were not locked. Defendant neither asked to leave, nor expressed any reservations about speaking with Detective Hartley. Furthermore, a reasonable person in the Defendant's position would not have understood this to be custodial interrogation because there were no indicia of a formal arrest.

In *State v. Jones*, 153 N.C. App. 358, 570 S.E.2d 128 (2002), "this Court affirmed the trial court's determination that defendant was not in custody where the defendant voluntarily accompanied police officers to the police department for an interview, was not handcuffed, was told he was not under arrest, was offered the use of the bathroom, no threats or promises were made, and defendant was left unattended while the interviewing officers took a break." *Rooks*, 196 N.C. App. at 150-51, 674 S.E.2d at 741 (citing *Jones*, 153 N.C. App. at 365-66, 570 S.E.2d at 134). While some of the factors noted in *Jones* were not present in this case, such as the offer to use the bathroom and informing the defendant that

he was not under arrest, these are not sufficient to convert Defendant's questioning into custodial interrogation when reviewing all of the circumstances present in this case, especially when reviewing this contention of error for plain error. Therefore, the trial court did not err in its denial of Defendant's suppression motion because the videotaped interview of Defendant was a voluntary statement, not the result of custodial interrogation to which *Miranda* would apply. This contention of error is overruled.

B. Rule 412: Relevance of Past Sexual Conduct of Complainant

[2] Defendant contends in his second and final assignment of error that the trial court erred by denying his request to question Cindy about her prior general sexual history. Defendant argues that because Cindy's medical injuries corroborated her accusations against Defendant, her sexual history provided an alternative explanation for the medical evidence and was beyond the protections of North Carolina's Rape Shield Law. We disagree.

"While a defendant clearly is entitled to cross-examine an adverse witness, the scope of that cross-examination lies within the 'sound discretion of the trial court, and its rulings thereon will not be disturbed absent a showing of abuse of discretion.' " *State v. Dorton*, 172 N.C. App. 759, 766, 617 S.E.2d 97, 102 (2005) (quoting *State v. Herring*, 322 N.C. 733, 743-44, 370 S.E.2d 363, 370 (1988)). "When cross-examination involves the sexual behavior of the complainant, our Rape Shield Statute further limits the scope of cross-examination by declaring such examination to be irrelevant to any issue in the prosecution except in four very narrow situations." *Id.* (citations and internal quotation marks omitted).

This state's Rape Shield Statute is embodied in North Carolina Rules of Evidence, Rule 412(b), which provides:

> (b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> (1) Was between the complainant and the defendant; or
>
> (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or

> (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
>
> (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

Without a determination by the court that the sexual behavior is relevant under Rule 412(b), no such evidence may be introduced in any trial of a charge of rape or a sex offense. N.C. R. Evid. 412(d).[2] Before the defense can make such an offer of proof to allow the trial court to make this determination, as the proponent of the evidence, the Defendant

> shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates. The proponent of such evidence may make application either prior to trial pursuant to G.S. 15A–952, or during the trial at the time when the proponent desires to introduce such evidence. When application is made, the court shall conduct an in camera hearing, which shall be transcribed, to consider the proponent's offer of proof and the argument of counsel, including any counsel for the complainant, to determine the extent to which such behavior is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence.

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2. This Court has also held that "there may be circumstances where evidence which touches on the sexual behavior of the complainant may be admissible even though it does not fall within one of the categories in the Rape Shield Statute." *State v. Martin*, ___ N.C. App. ___, ___, 774 S.E.2d 330, 335 (2015). For example, in *Martin*, we ruled that the trial court had erred in refusing to admit evidence that the defendant, a football coach convicted of sexually assaulting a minor, had caught the minor engaging in sexual acts in a locker room even though the evidence did not fall within one of the four exceptions contained in the Rape Shield Law. Our holding was based on the fact that his defense to the charges against him "was that he did not engage in any sexual behavior with [the minor] but that [she] fabricated the story to hide the fact that defendant caught her performing oral sex on the football players in the locker room." *Id.* at ___, 774 S.E.2d at 336. However, in the present case Defendant has not presented evidence that would trigger the rule discussed in *Martin*.

State v. Mason, 315 N.C. 724, 728-29, 340 S.E.2d 430, 433 (1986) (citing N.C. R. Evid. 412). Here, Defendant made no application to the court for a determination of the relevance of the sexual behavior about which Defendant wished to question Cindy. Consequently, the trial court did not conduct an *in camera* hearing on the issue. Thus, Defendant failed to establish the admissibility of evidence of the complainant's past sexual behavior.

Our Supreme Court has held that:

> [i]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record. We also held that the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred.

State v. Raines, 362 N.C. 1, 20, 653 S.E.2d 126, 138 (2007) (citations and quotation marks omitted). "In the absence of an adequate offer of proof, we can only speculate as to what the witness' answer would have been." *State v. Barton*, 335 N.C. 741, 749, 441 S.E.2d 306, 310-11 (1994) (citation, quotation marks, and brackets omitted). "It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify." *State v. Johnson*, 340 N.C. 32, 49, 455 S.E.2d 644, 653 (1995) (citation and quotation marks omitted).

Because Defendant did not make an offer of proof to show what Cindy's response to questions about her past sexual behavior would have been, he has failed to preserve this issue for appellate review. Any attempt by this Court to presume the substance or prejudicial effect of the excluded evidence would be speculation. This assignment of error is therefore overruled.

Conclusion

Having considered and rejected all of Defendant's assignments of error, and after a thorough and careful review of the record, transcripts, and briefs, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Chief Judge McGEE and Judge DAVIS concur.

STATE OF NORTH CAROLINA
v.
ARTHIANDO LUREZ PHILLIPS

No. COA16-601

Filed 7 March 2017

False Pretense—attempt—sale of counterfeit handbag—undercover buy

The State presented sufficient evidence that defendant attempted to obtain property by false pretenses in a prosecution that arose from a detective seeing a Facebook posting to sell expensive pocketbooks of a brand which was being stolen from an outlet store; an undercover operation resulted in the purchase of one of the bags; and the bag turned out to be counterfeit. Defendant's advertising and holding out the items as a particular brand even though he knew they were counterfeit (established in part by selling the bags at a fraction of their worth if genuine), established intent by defendant to deceive buyers.

Appeal by defendant from judgment entered 15 December 2015 by Judge Gregory R. Hayes in Cleveland County Superior Court. Heard in the Court of Appeals 24 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly S. Murrell, for the State.

Kimberly P. Hoppin for defendant-appellant.

BRYANT, Judge.

Where defendant intended to deceive the buyer but fell short of the completed offense of obtaining property by false pretenses as the undercover officer was not deceived at the time of the sale, the trial court did not err in denying defendant's motion to dismiss the charge of *attempting* to obtain property by false pretenses.

On 17 March 2014, Detective Micah Sturgis with the Cleveland County Sheriff's Office attended a meeting with members from multiple nearby police departments and sheriffs' offices. At the meeting, officers with the Gaffney Police Department reported that several items of Michael Kors inventory, including "purses, pocketbooks, [and] backpacks," were being stolen from the Michael Kors Outlet store in Gaffney.

A week later, Detective Sturgis was on his personal Facebook page when he noticed a posting for Michael Kors backpacks for sale on a website called "One Man's Junk," which he described as an online "flea market." The backpacks, with accompanying photographs, were captioned "Michael Kors Backpacks Startin' at 45," and were listed for sale on the site by an individual named R.D. Phillips. This name caught Detective Sturgis's eye because he was familiar with an individual named Arthiando Phillips, the defendant. Because of the reported larcenies of multiple Michael Kors items from the Gaffney store, Detective Sturgis decided to investigate further.

Using a fake name and address, Detective Sturgis created a fake Facebook account and started a conversation with R.D. Phillips, who was later determined to be defendant, in order to discuss the purchase of the Michael Kors backpacks. Detective Sturgis asked, "[c]an you send me pics of the bags you've got or can you get up with me tomorrow morning sometime?" Defendant replied that he could "get anything from shades to shoes, the MK watches and all." Detective Sturgis requested to meet defendant in Shelby at 11:00 a.m. the next morning, 25 March 2014, and defendant agreed to the meeting and provided his phone number.

Detective Sturgis then contacted Sergeant Fitch, a supervisor with the Cleveland County Sheriff's Office, and the two decided to set up an undercover purchase from defendant for one of the Michael Kors bags in order to determine whether it was (1) one of the stolen Michael Kors bags from the outlet in Gaffney, or (2) counterfeit merchandise. Detective Sturgis enlisted Sergeant Fitch's help to set up the undercover purchase because Sergeant Fitch was more familiar and experienced with undercover buy operations of illegal purchases.

On 25 March 2014, Detective Sturgis called defendant and told him his "business partner Tim" (Sergeant Fitch) would be meeting him. Sergeant Fitch then called defendant to set up the time, date, and location of the meeting for the undercover purchase, and recorded the call. Sergeant Fitch took $50.00 from the sheriff's office special funds account and met defendant at the Walmart on Highway 74 in Shelby. Defendant brought two Michael Kors bags to the meeting, and Sergeant Fitch ultimately purchased one of the bags for $35.00. Defendant never indicated whether the bags were authentic or counterfeit, but according to Detective Sturgis, defendant "used the words 'Michael Kors' and showed a tag on the pocketbook or the book bag as a Michael Kors tag" in his Facebook post. Afterwards, Sergeant Fitch delivered the bag to Detective Sturgis and later testified that he "knew something was not right, to sell a $400 pocketbook for $45."

Thereafter, Detective Sturgis contacted counterfeit expert Wayne Grooms, stating

> [b]ased off of looking at the pocketbook, there were some things about the pocketbook that made me believe the pocketbook was a counterfeit pocketbook instead of a true Michael Kors pocketbook. I had worked with Wayne Grooms and the U.S. Customs in a couple of other investigations where we had gotten some counterfeit goods, and there's some telltale signs that I had picked up from other investigations to be able to determine that this one was probably a counterfeit pocketbook at that point. So I wanted Investigator Grooms to take a look at it to verify what I thought.

On 1 April 2014, Investigator Grooms spoke with Detective Sturgis regarding the authenticity of the Michael Kors bag, which he determined to be not authentic, based on his experience as a Charlotte-Mecklenburg police officer who had been involved in over 10,000 trademark investigations and been sworn as an expert on counterfeit merchandise in both federal and state courts. The same day, Detective Sturgis met with other officers and planned to meet defendant in the Walmart parking lot for the purchase of additional counterfeit goods. However, defendant did not answer the officers' calls or respond to texts, and so officers went to defendant's residence and conducted a search of the home.

At defendant's residence, the officers found "other counterfeit goods located inside the residence, but it appeared that they were for personal use and not for redistribution." During the search, officers also found and seized seven illegal "poker style" video gambling machines in an outbuilding warehoused on the property. Additionally, defendant indicated to Special Agent Brian Bowes with U.S. Customs, that he purchases "counterfeit merchandise" from a warehouse on Old National Highway in Atlanta, Georgia called The Discount Mall. Detective Sturgis passed this information along to authorities in Georgia and U.S. Customs.

Defendant was arrested and charged with obtaining property by false pretenses and possessing five or more video gaming machines. On 8 September 2014, defendant was indicted by a Cleveland County grand jury for the same. The cases were consolidated and tried by a jury during the 14 December 2015 Criminal Session of the Superior Court of Cleveland County, the Honorable Gregory R. Hayes, Judge presiding. Defendant entered a plea of not guilty to both charges.

Following the close of the State's evidence, defendant moved to dismiss all charges against him due to insufficient evidence. The trial court denied the motion. Defendant did not present any evidence at trial.

On 15 December 2015, the jury returned a verdict of guilty of attempting to obtain property by false pretenses and a verdict of not guilty of possession five or more video gaming machines. The trial court entered judgment the same day, committing defendant to the custody of the North Carolina Department of Correction for a term of eleven to twenty-three months. Defendant filed written notice of appeal.

On appeal, defendant contends the trial court committed reversible error by denying defendant's motion to dismiss the charge where the evidence was insufficient to support the conviction for attempting to obtain property by false pretenses. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192–93, 451 S.E.2d 211, 223 (1994) (citing *State v. Sumpter*, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986)).

Defendant was charged and convicted of obtaining property by false pretenses. Pursuant to N.C. Gen. Stat. § 14-100, our Supreme Court has defined this offense as "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Childers*, 80 N.C. App. 236, 242, 341 S.E.2d 760, 764 (1986) (quoting *State v. Cronin*, 299 N.C. 229, 262 S.E.2d 277, 286 (1980)); *see* N.C.G.S. § 14-100 (2015). A key element of the offense is that "an intentionally false and deceptive representation of a fact or event has been made." *State v. Kelly*, 75 N.C. App. 461, 464, 331 S.E.2d 227, 230 (1985).

When a defendant is charged with the completed offense of obtaining property by false pretenses, proof that the victim was indeed deceived at the time of the offense is required. *See State v. Simpson*, 159 N.C. App. 435, 539, 583 S.E.2d 714, 716–17 (2003). However, this Court has previously held that actual deceit is not an element of the crime of *attempting* to obtain property by false pretenses. *See State v. Wilburn*, 57 N.C. App. 40, 46, 290 S.E.2d 782, 786 (1982) ("It is not necessary in order to establish an intent, that the prosecutor should have been deceived, or should have relied on the false pretenses and have parted with his property . . . ." (citations omitted)); *see also State v. Dawson*, No. COA15-420, 2015 WL 7729662, at *2–4 (N.C. Ct. App. Dec. 1, 2015) (unpublished) (finding no error in the trial court's denial of the defendant's motion to dismiss "where neither clerk was deceived by the counterfeit $100.00 bills and did not part with any property in exchange for [them]," as the evidence was sufficient to show the defendant's *attempt* to obtain property by false pretenses, a crime for which "actual deceit" is not required). Indeed, for attempt crimes, the two elements required are (1) "the intent to commit the substantive offense" and (2) "an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense." *State v. Smith*, 300 N.C. 71, 79, 265 S.E.2d 164, 169–70 (1980) (citations omitted).

Defendant argues that the evidence fails to establish a false pretense or intent to deceive because defendant did not "actually represent that the bag he offered for sale was an authentic Michael Kors bag." We disagree.

In the instant case, the evidence shows that defendant advertised Michael Kors bags for sale for $45.00 on a website titled "One Man's Junk." In his statements to Detective Sturgis on Facebook, defendant described one bag as a "Michael Kors bag with tags," and included photographs. The evidence in the record also shows that defendant originally purchased the bags from a warehouse in Atlanta ("The Discount Mall"), and sold the bags for only a fraction of their worth, which also helps to establish that defendant knew the merchandise was counterfeit. Sergeant Fitch testified that he made an undercover purchase of one of the bags, paying defendant $35.00, at the behest of Detective Sturgis. Evidence in the record also supports the fact that Detective Sturgis and Sergeant Fitch were suspicious and had knowledge that the bags sold by defendant, including the one Sergeant Fitch purchased, were likely counterfeit. Indeed, Wayne Grooms, the owner of a private investigative firm that specializes in intellectual property investigations dealing with counterfeit merchandise testified at trial that the Michael Kors bag

at issue in this case was "not a genuine handbag": "The label is totally wrong. The way the "MK" is put on the label is wrong. The way the label is attached to the handbag is wrong. The zippers are wrong. The circles are wrong. The material of the pocketbook is wrong."

Thus, defendant's act of advertising and holding the items out as a particular brand (Michael Kors), even though he knew the merchandise was counterfeit, establishes intent on the part of defendant to deceive undercover officers and other potential buyers. *See id.* Thus, viewing the evidence in the light most favorable to the State, defendant had the requisite intent to cheat or defraud, an action which was calculated to deceive buyers, and the trial court properly denied defendant's motion to dismiss.

With regard to the second element of the attempt offense (overt act), however, defendant, relying on this Court's opinion in *State v. Wilburn*, argues that "where the evidence presented by the State . . . showed a completed offense, then the evidence [is] insufficient to support a conviction for the attempt[,]" and therefore, his conviction should be vacated. See 57 N.C. App. at 46, 290 S.E.2d at 786 (citations omitted). Defendant misconstrues the law as stated in *Wilburn*.

In *Wilburn*, this Court held that "if property is actually obtained *in consequence of the prosecut[ing party's] reliance on the false pretenses*, the offense is complete and an indictment for an attempt will not lie." *Id.* (emphasis added) (citations omitted). However, here, the property was not obtained "in consequence" of Sergeant Fitch's "reliance on the false pretense." Instead, the property was obtained as a part of an undercover operation, and the record supports the conclusion that the officers involved in the operation were suspicious and had knowledge that the bag was likely counterfeit. Thus, because Sergeant Fitch was never deceived by defendant's misrepresentation that the bag was an authentic Michael Kors brand bag, the crime was not complete at the time of the sale. Therefore, while the officer did complete the purchase of the counterfeit bag for the purpose of the undercover operation, the officer was never deceived because he did not rely on defendant's false representation, and defendant was only guilty of attempting to obtain property by false pretenses.

Accordingly, where there was substantial record evidence to support that defendant intended to deceive the buyer but fell short of the completed offense because Sergeant Fitch was not deceived at the time of the sale, the State presented sufficient evidence to establish that

defendant attempted to obtain property by false pretenses, and the trial court did not err in denying defendant's motion to dismiss.

NO ERROR.

Judges HUNTER, JR., and DIETZ concur.

STATE OF NORTH CAROLINA
v.
HERBERT LEE STROUD

No. COA16-59

Filed 7 March 2017

1. Appeal and Error—preservation of issues—motion to dismiss

Defendant preserved for appellate review the contention that the trial court erred by not dismissing some of the charges against him for insufficient evidence where defendant had conceded that there was sufficient evidence to go to the jury on felony murder but subsequently moved "to set aside the verdict for lack of evidence and for legal errors." The Court of Appeals interpreted this as a motion to dismiss pursuant to N.C.G.S. § 15A-1227(a)(3), made as to all of the convictions against him.

2. Robbery—sufficiency of evidence—circumstantial

The State presented substantial evidence to allow the jury to draw a reasonable inference that defendant was the perpetrator of a robbery with a dangerous weapon and larceny. Circumstantial evidence is all that a jury needs to deny a defendant's motion to dismiss, and it is then for the jury to resolve conflicts in the evidence.

3. Appeal and Error—plain error—evidentiary issue

Evidence concerning defendant's attempts to hire counsel prior to his arrest was reviewed for plain error where defendant did not object at trial. Where an alleged constitutional error occurs during either jury instructions or on evidentiary issues, an appellate court must review for plain error if it is specifically and distinctly contended.

4. Constitutional Law—plans to hire lawyer—pre-arrest

There was no plain error where two witnesses testified about defendant's plans to hire a lawyer before he was arrested, given the

passing nature of the comments, the lack of emphasis or detailed discussion of the comments by the prosecutor, and the voluminous amount of other testimony and evidence.

5. Sentencing—felony murder—underlying felonies

A sentence for first-degree felony murder was not disturbed, but judgments for robbery with a dangerous weapon and larceny were arrested, and a conviction for possession of stolen goods was vacated without remand. When a defendant is convicted of felony murder, the underlying conviction merges into the felony conviction, and the trial court erred by failing to arrest judgment on defendant's conviction for robbery with a dangerous weapon. The other felony convictions in this case were not required to be arrested because all three felonies were related to the same event and were not separate convictions. Remand was not needed.

Appeal by Defendant from judgments entered 1 May 2015 by Judge W. Allen Cobb Jr. in Superior Court, Duplin County. Heard in the Court of Appeals 22 August 2016.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for Defendant.

McGEE, Chief Judge.

Herbert Lee Stroud ("Defendant") appeals from judgments entered after a jury found him guilty of first-degree felony murder, larceny, robbery with a dangerous weapon, and possession of stolen goods.

I. Background

The body of Henry Lionel Bouyer, Jr. ("Bouyer") was discovered in a shallow ditch on the side of Carrolls Road in Warsaw, North Carolina, in the early morning hours of 21 August 2012. Dr. Anuradha Arcot ("Dr. Arcot"), the forensic pathologist who performed the autopsy, testified Bouyer died from three shots fired from a shotgun at close range – one to his neck, a second to his back, and a third near his groin. Dr. Arcot was unable to determine a specific time of death, and could only say that Bouyer died sometime within the twenty-four hours prior to the discovery of his body. The State presented a timeline of the events surrounding Bouyer's death.

A few days prior to the discovery of Bouyer's body, Defendant and his stepson, Jeremy Stephens ("Stephens"), visited the home of Travis Jones ("Jones"), a mechanic. Defendant and Stephens asked Jones what alterations he could make to the appearance of a motorcycle. Jones replied that if he was provided the necessary parts and was paid for his labor, he could make any modifications they desired. Defendant and Stephens did not have a motorcycle with them on that day.

Around 6:00 p.m. on 20 August 2012, Bouyer drove his motorcycle to a BP station in Warsaw to buy a lottery ticket. Bouyer's motorcycle, a Suzuki GSXR 1000, was a distinctive black and yellow color with a Joker emblem painted on its side. From the BP station, Bouyer drove to a barbershop for a haircut, arriving around 6:45 p.m. While receiving his haircut, Bouyer made and received between five and ten phone calls, annoying his barber and friend, Martin Batts ("Batts"). Bouyer paid Batts with cash from his wallet, and left on his motorcycle between 7:15 p.m. and 7:30 p.m.

Bouyer was next seen at the Small Towns Convenience Mart ("Small Towns") in nearby Magnolia, North Carolina. Ivey Chestnutt ("Chestnutt"), a clerk at Small Towns, saw Bouyer enter the store around 7:30 p.m. Chestnutt and Bouyer began a conversation, during which Bouyer received a number of phone calls. After finishing one of his phone calls, Bouyer told Chestnutt he had "a guy that wants to buy my motorcycle." Bouyer explained that he "ran it out to him for a couple days, and right now he wants to keep bugging me, wanting [me] to rent the motorcycle out to him or wanting to buy it." Bouyer added that if the unnamed person would pay him $5,000.00, he would sell that person the motorcycle. Bouyer received one more phone call, said goodbye to Chestnutt, and left.

Bouyer rode his motorcycle back to the BP station in Warsaw to meet with Defendant and Stephens. Dedra McGowan ("McGowan"), a clerk at the BP station, saw Bouyer enter the BP station first, followed by the Defendant shortly thereafter. After speaking inside the BP station for only a moment, Bouyer and Defendant left the station and continued talking in the parking lot with Bouyer sitting on his motorcycle, and Defendant and Stephens sitting in Defendant's Jeep Cherokee ("the Jeep"). McGowan testified that the three "looked comfortable," and "looked like they knew each other already." Surveillance footage from the BP station confirmed McGowan's testimony, showing Bouyer and Defendant inside the BP station for a short period of time, and also Bouyer, Defendant, and Stephens talking in the parking lot for about four minutes. Following this conversation, Defendant and Stephens

left the parking lot at 8:59 p.m. in Defendant's Jeep, and Bouyer headed in the same direction on his motorcycle seventeen seconds later. No testimony presented at trial tended to show Bouyer's whereabouts after 8:59 p.m. on 20 August 2012.

That same night, Defendant visited the home of his friend, Ellie Graham ("Graham"), in Rose Hill, North Carolina. Graham initially testified that "it was a little after 9:00 [p.m.] when [Defendant] came to my house[,]" but later testified that Defendant arrived "somewhere between 9:00 [p.m.] and 11:00 [p.m.]" Graham testified that during a thirty minute visit, Defendant "wasn't himself that day" because he was crying, and was generally distraught about marital problems he was having with his wife. Graham testified that other than Defendant having red eyes associated with crying, he did not notice anything different about Defendant's physical appearance. Graham testified that Defendant was alone, and that Defendant stated he needed to borrow some money so he could pick Stephens up from work that night.

The following day, Defendant and Stephens returned to Jones' house around 4:00 p.m. with a motorcycle, later identified as Bouyer's. Defendant and Stephens told Jones they would like the motorcycle to be stretched out and lowered, and would like a mural to be painted on its side. Jones told them that he could not start work on the motorcycle until they either purchased the required parts or paid him so he could order the parts himself. Defendant and Stephens did not have any money with them at the time, so the motorcycle was parked in a field adjacent to Jones' house.

A few days later, Defendant and Stephens returned to Jones' house to ask whether he could sell the bike or otherwise "get rid of it for them." Jones responded that he would be unable to find a buyer without the proper paperwork, but if he was provided with the title to the motorcycle, he would attempt to find a buyer. During that visit, Jones asked Defendant and Stephens whether they "finally [got their] money problem straightened out." Jones testified that Defendant responded "that any problem that they had, any money – any problem that they had had been taken care of, and then [Defendant] looked at [Stephens], and [Stephens] smiled, and that was the end of that conversation."

A. Law Enforcement Investigation

Bouyer's body was discovered the morning of 21 August 2012 around 7:30 a.m. Among the evidence collected at the scene by law enforcement was: a motorcycle helmet, later identified as Bouyer's; a broken cell phone; a pear; and a spent 9-millimeter shell casing, found

one hundred yards from the body. Deputy George Garner ("Deputy Garner"), of the Duplin County Sheriff's Office, was asked to assist in identifying the phone number for the phone that was found at the scene. After identifying the phone number, a subpoena was issued for the subscriber information on the number, which in turn allowed Deputy Garner to determine that the phone belonged to Bouyer. The Duplin County Sheriff's Office also requested and received cell phone records of Defendant and Stephens, among others.

Records from the cell phones of Defendant, Stephens, and Bouyer provided information regarding phone calls and text messages between Stephens and Bouyer, and the relative locations of the three phones on the night of 20 August 2012. First, the call detail records from the phones of Bouyer, Stephens, and Defendant confirmed that many of the phone calls Bouyer placed and received on 20 August 2012 were to and from the cell phone number identified as belonging to Stephens. That day, Bouyer called Stephens four times, and Stephens called Bouyer eleven times. The call detail records show that Defendant's phone was never used to call, and did not receive a call from, Bouyer's phone on 20 August 2012.

Next, the text detail records show multiple text messages between Stephens and Bouyer regarding, presumably, the purchase of Bouyer's motorcycle. Stephens texted Bouyer at 7:29 p.m. on 20 August 2012 that they would "[m]eet . . . at Small Towns," and two minutes later, texted Bouyer that "[w]e are buying it today, ill [sic] let u [sic] use my card [sic] to get back tour [sic] crib." The call detail records also show that Defendant's phone was never used to send a message to, nor did it ever receive a message from, Bouyer's phone.

Finally, the call detail records, through the use of historical cell site analysis, also provided some evidence of the relative location of the phones of Bouyer, Defendant, and Stephens on the night of 20 August 2012. At trial, Agent William Williams ("Agent Williams"), of the Federal Bureau of Investigation, testified that the last two phone calls made to Bouyer's phone that resulted in location data being collected were made at 8:20 p.m. and 8:36 p.m. on 20 August 2012. When those calls were received, Bouyer's cell phone utilized a specific cell tower and sector: tower 4c4, sector 2. Agent Williams testified that both the BP station and Bouyer's residence were within the "footprint" of tower 4c4, sector 2, meaning calls made from those locations would likely be routed through that tower and sector. Regarding Stephens' phone, Agent Williams testified that at 8:36 p.m. and 8:39 p.m. on 20 August 2012, Stephens' phone utilized that same tower and sector, which indicated that his phone and

Bouyer's phone "would have been within the footprint of this particular tower," meaning that they "were relatively close together." Stephens' phone then utilized the same tower, but a different sector, sector 3, five times on 20 August 2012, at 9:15 p.m., 9:17 p.m., 9:19 p.m., 9:20 p.m., and 9:55 p.m. According to Agent Williams, tower 4c4, sector 3 was significant because it was the sector in which Bouyer's body was discovered the next morning.

Regarding Defendant's phone, Agent Williams testified that it utilized tower 4c4, sector 1 four times between 9:39 p.m. and 9:48 p.m. Three of those calls – at 9:43 p.m., 9:45 p.m., and 9:48 p.m. – were between Stephens' and Defendant's phones. Agent Williams explained that tower 4c4, sector 1, "points" to the northeast, towards Warsaw. Defendant's phone then utilized a different tower, tower 4bf, sector 1, near Rose Hill, at 11:04 p.m. Though Defendant's phone made and received a total of eighty-nine calls on 20 August 2012, it never utilized tower 4c4, sector 3 on that date.

Lieutenant Michael Stevens ("Lt. Stevens"), an investigator with the Duplin County Sheriff's Office, retrieved the security footage from the BP station. Lt. Stevens, who was a friend of Bouyer, knew Bouyer worked as a truck driver and would often park his truck in the BP station parking lot when it was not in use. While at the BP station retrieving the surveillance footage, Lt. Stevens noticed Bouyer's truck in the parking lot. In searching the truck, the title to Bouyer's Suzuki motorcycle was located.

After reviewing the call detail records and viewing the BP surveillance footage, law enforcement deemed Stephens a suspect and began surveillance of him on 24 August 2012. During the surveillance, officers observed Stephens leave the Subway restaurant in Rose Hill, North Carolina where he worked, in Defendant's Jeep. Following him from the Subway, officers observed Defendant and Stephens make stops at several locations, and eventually followed the pair to Jones' residence. As a result of the surveillance, law enforcement seized Bouyer's motorcycle from the field adjacent to Jones' residence.

Law enforcement obtained a warrant to search Defendant's Jeep on 28 August 2012. From the Jeep, law enforcement retrieved a wallet, found underneath the center console of the vehicle. The wallet contained Bouyer's North Carolina registration card identifying him as the owner of a Suzuki motorcycle. Subsequent forensic testing revealed Defendant's DNA on the wallet. Law enforcement also found a bag containing a pear in the back cargo area of the Jeep.

The same day, law enforcement also obtained and executed a search warrant on Defendant's home, where both he and Stephens lived. In Stephens' bedroom, law enforcement recovered a motorcycle helmet, in which subsequent testing revealed the presence of Stephens' DNA, but not Defendant's or Bouyer's. At the time the search was executed, Defendant's bedroom door was locked and had to be forced open. In Defendant's bedroom, law enforcement discovered a Lorcin 9-millimeter handgun hidden inside the frame of an electric heater, along with a box of 9-millimeter bullets. A credit card belonging to Stephens was found in Defendant's closet, indicating that both Defendant and Stephens "seemed to occupy that residence" and had regular access to the entire house. Subsequent forensics testing confirmed that the 9-millimeter shell casing found one hundred yards from Bouyer's body had been fired from the 9-millimeter handgun found hidden in Defendant's bedroom. Police also found shotgun shell wadding in the backyard of the residence, and a pear tree in the backyard of the adjoining residence. No shotgun was recovered from Defendant's and Stephens' residence.

Items seized from both Defendant's car and home, including a pair of Stephen's shoes; a pair of Defendant's shoes; a pair of Defendant's pants; the front and rear floor mats from Defendant's Jeep; the rear cargo floor lining from Defendant's Jeep; a pair of gloves; and a black trash bag, among others, were sent to the North Carolina State Crime Lab for testing. None of the items seized from Defendant or Stephens tested positive for the presence of blood. Based on the evidence collected throughout the investigation, a warrant for Defendant's arrest was issued 7 September 2012.

B. Indictment and Trial

Defendant was indicted by a grand jury on 6 October 2014, and his trial began on 20 April 2015. At trial, the State presented the testimony of thirty-seven witnesses over a span of six days. At the conclusion of the State's case, Defendant's counsel made the following motion:

> [Defendant's Counsel]: If Your Honor please, the defendant would – as to Count 1 of the indictment charging murder by premeditation and deliberation, we would ask for a directed verdict. We would acknowledge that there's enough to go to the jury on the felony murder, but I do not – no premeditation or deliberation would be supported.

After hearing from the State, Defendant's counsel clarified that the motion for a directed verdict included counts two - four of the indictment, on

the charges of felony larceny, robbery with a dangerous weapon, and possession of stolen goods. The trial court denied Defendant's motion.

The jury returned a verdict on 1 May 2015 finding Defendant guilty of first-degree murder in the perpetration of a felony only; it specifically declined to find Defendant guilty of first-degree murder on a theory of premeditation and deliberation. The jury also convicted Defendant of felony larceny, robbery with a dangerous weapon, and possession of stolen goods. After the verdict was announced, Defendant moved "to set aside the verdict for lack of evidence and for legal errors." The trial court denied Defendant's motion. The trial court then entered judgments in accordance with the jury's verdict, and sentenced Defendant to life imprisonment without the possibility of parole on the charge of first-degree murder, and to a concurrent term of imprisonment between sixty-four and eighty-nine months for the other three convictions. Defendant appeals.

II. Analysis

Defendant contends the trial court erred by denying his motion to dismiss and failing to arrest judgment on the three felonies underlying his conviction for felony first-degree murder. He also contends the trial court plainly erred by allowing the introduction of testimony regarding his attempts to hire an attorney.

A. Denial of Defendant's Motion to Dismiss

[1] Defendant argues the trial court erred in failing to dismiss for insufficient evidence the charges of robbery with a dangerous weapon, larceny, and first-degree murder. As a preliminary matter, we must determine whether this argument has been properly preserved for our review. As noted, Defendant moved for directed verdict on the charge of first-degree murder under a theory of premeditation and deliberation at the close of State's evidence, but conceded at that time "that there's enough to go to the jury on the felony murder." Before the trial court ruled on the directed verdict motion, Defendant clarified that the motion was also made as to counts two - four of the indictment, those being the charges of larceny, robbery with a dangerous weapon, and possession of stolen goods. After the motion was denied and the jury returned its verdicts, Defendant then made a separate motion "to set aside the verdict for lack of evidence and for legal errors," which was also denied.

In *State v. Mercer*, 317 N.C. 87, 343 S.E.2d 885 (1986), our Supreme Court explained that a defendant's motion "to set aside the verdict as being against the weight of the evidence" is "properly denominated a

motion for dismissal for insufficiency of the evidence to sustain a conviction . . . after return of a verdict of guilty and before entry of judgment, [N.C. Gen. Stat.] § 15A-1227(a)(3)." *Mercer*, 317 N.C. at 99-100, 343 S.E.2d at 893 (citation and quotation marks omitted, alteration in original). Given that Defendant's motion in the present case was nearly identical to that made by the *Mercer* defendant, we likewise treat Defendant's motion as a motion to dismiss pursuant to N.C.G.S. § 15A-1227(a)(3). *Id.*

N.C.G.S. § 15A-1227(a)(3) provides in relevant part: "A motion for dismissal for insufficiency of the evidence to sustain a conviction may be made . . . [a]fter return of a verdict of guilty and before entry of judgment." N.C. Gen. Stat. § 15A-1227(a)(3) (2015). The statute also specifically provides that a "[f]ailure to make the motion at the close of the State's evidence or after all the evidence is not a bar to making the motion at a later time," and that "[t]he sufficiency of all evidence introduced in a criminal case is reviewable on appeal without regard to whether a motion has been made during trial[.]" N.C. Gen. Stat. §§ 15A-1227(b),(d) (2015). Notwithstanding Defendant's anomalous concession that the evidence presented by the State was sufficient to withstand a motion for a directed verdict as to the charge of first-degree murder in the perpetration of a felony, we are satisfied that Defendant's latter motion, standing alone, was sufficient to properly preserve this issue for our review. In accord with precedent, we interpret that motion, styled by Defendant's counsel as a motion "to set aside the verdict for lack of evidence and for legal errors," as a motion to dismiss pursuant to N.C. Gen. Stat. § 15A-1227(a)(3). Because Defendant's § 15A-1227(a)(3) motion was made as to all of the convictions against him – including his conviction for first-degree felony murder – we conclude that Defendant properly moved to dismiss each of the charges against him, and consider the merits of Defendant's argument.

[2] This Court reviews a trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). Our review of a trial court's ruling on a motion to dismiss is the same regardless of when the motion was made. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). In ruling on a motion to dismiss, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (citation and quotation marks omitted). "The terms 'more than a scintilla of evidence'

and 'substantial evidence' are in reality the same and simply mean that the evidence must be existing and real, not just seeming or imaginary." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (citation omitted). In reviewing the trial court's ruling, we must evaluate the evidence in the light most favorable to the State, and all contradictions in the evidence must be resolved in its favor. *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983). The State

> is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

Winkler, 368 N.C. at 574, 780 S.E.2d at 826 (citation omitted).

"If the trial court finds substantial evidence, whether direct or circumstantial, or a combination, 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." *Id.* (citation omitted). "Ultimately, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citation omitted). If, however, the evidence presented at trial is "sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *State v. Golphin*, 352 N.C. 364, 458, 533 S.E.2d 168, 229-30 (2000) (citation omitted).

Felony murder is defined in N.C. Gen. Stat. § 14-17 as: "A murder which . . . shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree[.]" N.C. Gen. Stat. §14-17(a) (2015). "[T]he elements necessary to prove felony murder are that [1] the killing took place [2] while the accused was perpetrating or attempting to perpetrate one of the enumerated felonies [in N.C.G.S. § 14-17]." *State v. Bunch*, 363 N.C. 841, 846-47, 689 S.E.2d 866, 870 (2010) (quotation omitted). When the jury returned its verdict finding Defendant guilty of first-degree felony murder, it indicated that the felonies underlying the murder conviction were larceny, robbery with a dangerous weapon, and possession of stolen goods. As Defendant only

argues that the State failed to present "substantial evidence" that he was the perpetrator of larceny and robbery with a dangerous weapon, we only address those two crimes.[1]

Defendant was convicted of felony larceny, pursuant to N.C. Gen. Stat. § 14-72(a), and robbery with a dangerous weapon, pursuant to N.C. Gen. Stat. § 14-87. Defendant does not argue that the State failed to present substantial evidence that larceny and robbery with a dangerous weapon occurred; rather, the gravamen of Defendant's argument is that the State failed to provide substantial evidence that Defendant was the perpetrator of those two offenses. We disagree.

The State presented evidence tending to show that, in the days prior to 20 August 2012, Defendant and Stephens visited Jones' residence and were interested in changing the appearance of a motorcycle, though they did not have a motorcycle with them at the time. Through a multitude of witnesses, the State then presented a timeline of Defendant's, Stephens', and Bouyer's movements on the evening of 20 August 2012 from roughly 6:00 p.m. until 8:59 p.m. At 8:59 p.m., Bouyer departed a meeting with Defendant and Stephens that occurred in the parking lot of the BP station, and all three men were seen heading off in the same direction. Defendant and Stephens were the last to see Bouyer until his body was discovered early the next morning. In the days following the discovery of Bouyer's body, Defendant and Stephens were in possession of Bouyer's motorcycle – the same motorcycle Bouyer was last seen riding at 8:59 p.m. on 20 August 2015. Evidence presented by the State showed Defendant and Stephens delivered Bouyer's motorcycle to Jones in the days after Bouyer's death, attempted to have the appearance of the motorcycle altered, and later pursued its sale or destruction.

Other evidence suggested Defendant's presence at the scene where Bouyer's motorcycle was taken, in that Stephens and Defendant were last seen leaving the BP station together in Defendant's Jeep at 8:59 p.m. Stephens' cellphone was then used a total of four times within twenty-one minutes of 8:59 p.m. in the "footprint" of tower 4c4, sector 3, the cell tower and sector in which Bouyer's body was later discovered. Defendant's DNA was found on Bouyer's wallet, which in turn was discovered in Defendant's Jeep. The evidence also suggested that two guns

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1. While Defendant concedes there was substantial evidence that he committed the crime of possession of stolen goods, he argues that possession of stolen goods may never serve as the predicate felony for a felony first-degree murder conviction. Because we determine the State presented substantial evidence on the robbery with a dangerous weapon and larceny charges, we do not address this argument.

were used at the scene where Bouyer's body was later found; Bouyer was killed by three shots from a shotgun, and a spent 9-millimeter shell casing was also found within one hundred yards of Bouyer's body. Forensic testing matched the spent shell casing to a Lorcin 9-millimeter handgun later found hidden in Defendant's bedroom.

The evidence presented by the State at trial allowed a reasonable inference that Defendant participated in the robbery and larceny of Bouyer's motorcycle, and that Bouyer was killed during that robbery and larceny. To the extent that some evidence suggested Defendant was alone for a portion of the night, when visiting Graham, and tended to show that Defendant's cellphone was never used within the footprint of Tower 4c4, sector 3, these "contradictions and discrepancies [were] for the jury to resolve and [did] not warrant dismissal." *Winkler*, 368 N.C. at 574, 780 S.E.2d at 826. In sum, we hold that the State presented substantial evidence to allow the jury to draw a reasonable inference that Defendant was the perpetrator of robbery with a dangerous weapon and larceny. *Lee*, 348 N.C. at 488, 501 S.E.2d at 343. While much of this evidence was circumstantial, circumstantial evidence is all a trial court needs to deny a defendant's motion to dismiss for insufficient evidence, and it is then for the jury to resolve conflicts in the evidence and determine the defendant's guilt beyond a reasonable doubt. *Winkler*, 368 N.C. at 574, 780 S.E.2d at 826. The trial court did not err in denying Defendant's motion to dismiss.

B. Evidence Regarding Defendant's Attempts to Hire An Attorney

[3] Defendant argues the trial court erred in allowing the introduction of evidence regarding Defendant's attempts to hire legal counsel prior to his arrest. As Defendant concedes, he failed to timely object at trial to the testimony regarding his efforts to hire an attorney. Due to that failure, the State contends that Defendant has waived all appellate review of the issue, including our review for plain error. As support for this proposition, the State cites *State v. Houser*, ___ N.C. App. ___, ___, 768 S.E.2d 626, 632 (2015), in which this Court held that "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error." *Houser*, ___ N.C. App. at ___, 768 S.E.2d at 632 (quoting *State v. Gobal*, 186 N.C. App. 308, 651 S.E.2d 279 (2007), *aff'd per curiam*, 362 N.C. 342, 661 S.E.2d 732 (2008) (footnote and citations omitted)). However, our Supreme Court recently reaffirmed that where an alleged constitutional error occurs during either instructions to the jury or on evidentiary issues, an appellate court must review for plain error if it is specifically and distinctly contended:

> [W]e apply the general rule that "failure to raise a constitutional issue at trial generally waives that issue for appeal." [*State v. Wilson*, 363 N.C. 478, 484, 681 S.E.2d 325, 330 (2009)]. *Nevertheless, because the alleged constitutional error occurred during the trial court's instructions to the jury, we may review for plain error. State v. Cummings*, 352 N.C. 600, 612-13, 536 S.E.2d 36, 47 (2000) (quoting *State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578, *cert. denied*, 531 U.S. 1041, 121 S. Ct. 635, 148 L. Ed. 2d 543 (2000) ("[W]e have previously decided that plain error analysis applies only to instructions to the jury and evidentiary matters.")), *cert. denied*, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).

State v. May, 368 N.C. 112, 118, 772 S.E.2d 458, 462-63 (2015) (emphasis added). Our Supreme Court has conducted plain error review in cases in which the defendant asserted on appeal that the introduction of evidence and testimony violated their constitutional rights, despite the lack of an objection at trial. *See, e.g.*, *State v. Moore*, 366 N.C. 100, 104-05, 726 S.E.2d 168, 172 (2012); *State v. Raines*, 362 N.C. 1, 16-17, 653 S.E.2d 126, 136 (2007).

In the present case, Defendant argued in his brief to this Court that admission of portions of two witnesses' testimony, admitted without Defendant's objection, was erroneous, and admission of the testimony violated his Sixth Amendment rights. Since this argument is rooted in an "evidentiary matter[]," *Greene*, 351 N.C. at 566, 528 S.E.2d at 578, we consider whether introduction of this evidence amounted to plain error.[2] *See State v. Garcell*, 363 N.C. 10, 53, 678 S.E.2d 618, 645 (2009); N.C. R. App. P. 10(a)(4). The 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

2. To be entitled to plain error review, a defendant must "specifically and distinctly contend that the alleged error constituted plain error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). Here, Defendant has done so; therefore, we proceed to a plain error analysis.

> 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 . . . mistake had a probable impact on the jury's finding that the defendant was guilty."

Cummings, 352 N.C. at 616, 536 S.E.2d at 49 (alterations in original) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). To prevail, a defendant must show "not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602 (2003) (internal quotation marks and citation omitted).

[4] Defendant contends the State improperly elicited statements from two witnesses regarding his attempts to hire a lawyer, and that these statements likely affected the jury's verdict. First, one of the law enforcement officers involved in the case, Lieutenant Andrew Hanchey ("Lt. Hanchey"), explained from the witness stand that a notepad was among the evidence recovered during a search of Defendant's wife's car. At the prompting of the prosecutor, Lt. Hanchey testified that the notepad contained a note which read "lawyers to call" and listed the names of several law firms. Second, McGowan, the clerk at the BP station, was asked by the prosecutor to recall all instances in which she had seen Defendant and Stephens after Bouyer's body had been discovered. McGowan recounted her last encounter with Defendant:

> [Prosecutor:] . . . [W]hen was the next time you saw [Defendant]?
>
> [McGowan:] He came in the store. I'm not sure the date, but it's the date that he got arrested. He came in the store. I was working second shift that day, and he had a little, yellow notepad, and he was trying to get me to write my name and my address and stuff down, because he said that they were going to get a lawyer and, you know, "Put your information down right here so we can go get this lawyer."
>
> [Prosecutor:] Did you agree to do that?
>
> [McGowan:] No.
>
> [Prosecutor:] Why not?
>
> [McGowan:] I told [Defendant] that I didn't need a lawyer, that guilty people need a lawyer, and I wanted him to leave me alone.

This particular exchange ended that day's testimony; except for mentioning the exchange as a reference point for resuming McGowan's testimony the following day, the prosecutor did not ask any additional questions regarding Defendant's attempts to hire an attorney.

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. Amend. VI. This fundamental right was made applicable to the States through the Fourteenth Amendment, *see, e.g.*, *McMann v. Richardson*, 397 U.S. 759, 25 L. Ed. 2d 763 (1970); *State v. Wise*, 64 N.C. App. 108, 306 S.E.2d 569 (1983), and includes the right of an accused to select an attorney of his or her choice. *State v. Yelton*, 87 N.C. App. 554, 559, 361 S.E.2d 753, 757 (1987). Our Supreme Court has held that "there are 'no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it[;] [t]he value of constitutional privileges is largely destroyed if persons can be penalized for relying on them.' " *State v. Ladd*, 308 N.C. 272, 284, 302 S.E.2d 164, 172 (1983) (quoting *Grunewald v. United States*, 353 U.S. 391, 425, 1 L. Ed. 2d 931, 955 (1956) (Black, J., concurring)).

We have no difficulty concluding that the two exchanges violated Defendant's Sixth Amendment right to counsel, and should not have been admitted into evidence. Lt. Hanchey's statement served no purpose other than to inform the jury that Defendant had attempted to hire an attorney prior to his arrest. Likewise, McGowan's opinion that only "guilty people need a lawyer" is the epitome of using "a constitutional privilege to discredit or convict a person who asserts it." *Ladd*, 308 N.C. at 284, 302 S.E.2d at 172. Having determined that admission of these statements was error, we consider whether admission of these statements amounted to plain error. We hold that it did not.

A review of the transcript reveals that, while the prosecutor in this case elicited Lt. Hanchey's testimony regarding the "lawyers to call" note, the prosecutor did not emphasize or highlight Defendant's exercise of his rights, and questioning immediately moved on to other subjects. With regard to McGowan's testimony that "only guilty people need lawyers," we note that the prosecutor's question which elicited this response was relatively innocuous – the prosecutor merely asked McGowan why she declined to give Defendant her contact information. After McGowan gave her inflammatory answer, the prosecutor declined to capitalize on or to emphasize McGowan's comments. *See Moore*, 366 N.C. at 106-107, 726 S.E.2d at 173-74 (holding that statements of a witness regarding the defendant's invocation of his constitutional rights did not amount to

plain error where the prosecutor "did not emphasize, capitalize on, or directly elicit [the witness's] prohibited responses"); *State v. Alexander*, 337 N.C. 182, 196, 446 S.E.2d 83, 91 (1994) (finding no plain error where the prosecutor asked a State's witness, a police officer, if the defendant spoke or talked to him, and noting that the comments were "relatively benign" and that the prosecutor did not emphasize that the defendant did not speak with law enforcement after his arrest). Given the passing nature of these statements, the lack of emphasis or detailed discussion of these comments by the prosecutor, and the voluminous amount of other testimony and evidence received throughout this case, we do not believe the statements by Lt. Hanchey and McGowan "had a probable impact on the jury's finding that [D]efendant was guilty." *Cummings*, 352 N.C. at 616, 536 S.E.2d at 49. Therefore, admission of the testimony was not plain error.

C. Failure to Arrest Judgment/Vacatur of Underlying Felonies

[5] Defendant next argues the trial court erred by failing to arrest judgment on all of the felonies underlying his felony first-degree murder conviction. The State concedes the error, but maintains the proper remedy is to arrest judgment on Defendant's robbery with a dangerous weapon conviction, and vacate the larceny and possession of stolen goods convictions.

In its verdict, the jury indicated it had determined that the robbery with a dangerous weapon, larceny, and possession of stolen goods convictions served as the predicate felonies underlying Defendant's conviction for first-degree felony murder. Our Supreme Court has held that when a defendant is convicted of felony murder, "the underlying felony supporting a conviction for felony murder merges into the murder conviction. The underlying felony provides no basis for an additional sentence, and any judgment imposed thereon must be arrested." *State v. Barlowe*, 337 N.C. 371, 381, 446 S.E.2d 352, 358-59 (1994); *see also State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 770 (2002) (noting that conviction of the underlying felony "constitutes an element of first-degree murder," requiring merger for sentencing purposes). Following this rule in the present case, we find the trial court erred in failing to arrest judgment on Defendant's conviction for robbery with a dangerous weapon.

Normally, "[o]nly one underlying felony is necessary to support a felony-murder conviction[.]" *Barlowe*, 337 N.C. at 381, 446 S.E.2d at 358. While the merger rule "requires the trial court to arrest judgment on at least one of the underlying felony murder convictions *if two separate convictions* supported the conviction for felony murder," the trial court

is permitted to use its "discretion to select which felony conviction would serve as the underlying felony." *State v. Ridgeway*, 185 N.C. App. 423, 437, 648 S.E.2d 886, 896 (2007) (emphasis added) (citations and internal quotation marks omitted). The other felony convictions are not required to be arrested under the merger rule. *Id.*

Application of this rule would suggest that a remand to the trial court is necessary for it to exercise discretion in choosing which of the three felonies on which to arrest judgment. However, remand for this purpose is not needed in the present case because the three felonies underlying Defendant's first-degree murder conviction are not "separate convictions." Defendant's convictions for robbery with a dangerous weapon, larceny, and possession of stolen goods all related to the same event – the taking and subsequent possession of Bouyer's motorcycle. Our Supreme Court has held that felony larceny is a lesser-included offense of robbery with a dangerous weapon when both charges stem from the same taking. *See State v. Cobb*, 150 N.C. App. 31, 43, 563 S.E.2d 600, 609 (2002) (citing *State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988)). A trial court "violate[s] federal and state constitutional principles against double jeopardy," when it sentences a defendant for a robbery with a dangerous weapon and larceny arising out of the same taking, and the proper remedy is to arrest judgment on the larceny conviction. *State v. Jaynes*, 342 N.C. 249, 276, 464 S.E.2d 448, 465 (1995) (citing *State v. Adams*, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992)).

Similarly, our Supreme Court has held that while "[l]arceny and possession of property stolen in the larceny are separate crimes" because "[e]ach crime requires proof of an additional fact which the other does not," our General Assembly "did not intend to punish an individual for receiving or possession of the same goods that he stole." *State v. Perry*, 305 N.C. 225, 234-37, 287 S.E.2d 810, 815-17 (1982), *overruled in part on other grounds by State v. Mumford*, 364 N.C. 394, 402, 699 S.E.2d 911, 916 (2010); *see also State v. Moses*, 205 N.C. App. 629, 640, 698 S.E.2d 688, 696 (2010) (noting that the "Legislature . . . did not intend to subject a defendant to multiple punishments for both robbery and the possession of stolen goods that were the proceeds of the same robbery"). In *Perry*, a case in which the defendant was convicted of both larceny and possession of the goods stolen in that larceny, our Supreme Court chose to vacate the possession of stolen goods conviction, rather than arrest judgment on that conviction. *Perry*, 305 N.C. at 237, 287 S.E.2d at 817. Following *Perry*, we do the same in the present case.

III. Conclusion

The State presented "substantial evidence" that Defendant was the perpetrator of the crimes for which he was charged and convicted, and the trial court did not err in denying Defendant's motion to dismiss the charges of first-degree felony murder, robbery with a dangerous weapon, and larceny. The trial court erred in admitting the two statements elicited by the State regarding Defendant's attempts to hire an attorney. Those statements violated Defendant's Sixth Amendment right to counsel. However, given the passing nature of those statements, the circumstances in which they arose, and the voluminous other evidence presented against Defendant in the course of his trial, we conclude that the error did not likely affect the jury's verdict and for that reason did not amount to plain error.

Regarding Defendant's sentencing, the trial court's judgment of life in prison without the possibility of parole corresponding with Defendant's conviction for first-degree felony murder remains undisturbed. However, we arrest judgment on Defendant's convictions for robbery with a dangerous weapon and larceny, and vacate Defendant's conviction for possession of stolen goods.

NO ERROR IN PART; NO PLAIN ERROR IN PART; JUDGMENT ARRESTED IN PART; VACATED IN PART.

Judges STROUD and INMAN concur.

STATE OF NORTH CAROLINA
v.
LINZIE LEE SWINK, DEFENDANT

No. COA16-89

Filed 7 March 2017

1. Criminal Law—bench trial—waiver of jury trial effective

The trial court had the authority to try defendant for the rape of a child and for indecent liberties where defendant requested a bench trial on 2 March 2015. Defendant contended that his waiver of a jury trial under N.C.G.S. § 15A-1201 was not effective because that statute only applied to cases arraigned on or after 1 December 2014, and he was never formally arraigned. However, defendant never requested an arraignment; if he had been arraigned, it would have been on or after 1 December 2014, and the 2 March 2015 hearing essentially served the purpose of the arraignment.

2. Criminal Law—bench trial—alleged ineffective waiver of jury trial—no prejudice

Defendant was not able to show prejudice in a case in which he claimed that his bench trial was unauthorized because he was not indicted. Defendant was charged with raping a child and taking indecent liberties, he made a strategic decision to ask for a bench trial, and he was acquitted of two of the charges at the bench trial.

3. Constitutional Law—right to jury trial—waiver—constitutionally sufficient

The trial court did not err in its inquiry into defendant's waiver of a jury trial, and defendant's waiver was constitutionally sufficient where he consistently requested a bench trial throughout the proceedings, he was represented by counsel of his choice throughout the proceedings, and he never expressed any hesitation about his choice to waive his right to a jury trial.

Appeal by defendant from judgments entered on or about 4 May 2015 by Judge Hugh B. Lewis in Superior Court, Catawba County. Heard in the Court of Appeals 8 August 2016.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jennifer T. Herrod, for the State.

W. Michael Spivey for defendant-appellant.

STROUD, Judge.

Defendant Linzie Lee Swink appeals his convictions for rape of a child and indecent liberties with children. On appeal, defendant argues that the trial court lacked authority to try him without a jury, in violation of the North Carolina Constitution and N.C. Gen. Stat. § 15A-1201, and that the trial court erred when it failed to adequately determine whether defendant made a knowing and voluntary waiver of his right to a jury trial. We disagree and affirm the actions of the trial court.

Facts

Defendant was indicted on or about 3 December 2012 for two counts of rape of a child (12 CRS 7763 and 12 CRS 7764), on or about 3 September 2013 for one count of taking indecent liberties with children (13 CRS 4688), and on or about 2 March 2015 for superseding indictments of rape of a child (12 CRS 55705) and sexual offense with a child (15 CRS 50932). Defendant filed a motion for a bill of particulars, which the State answered on 25 February 2015. The State's answer laid out details of the date and time of each offense. On 2 March 2015, the trial court heard defendant's request for a bench trial. The court inquired into defendant's waiver, calling him to the stand and engaging in the following colloquy with defendant:

> THE COURT: Sir, are you able to hear and understand me?
>
> MR. SWINK: Yes, sir.
>
> THE COURT: And are you under the influence of any alcoholic beverages, drugs, narcotics or pills at this time?
>
> MR. SWINK: No, sir.
>
> THE COURT: And how old are you?
>
> MR. SWINK: 40.
>
> THE COURT: And at what grade level can you read and write?
>
> MR. SWINK: Probably 11th grade right now, 11th.
>
> THE COURT: Do you suffer from any mental handicap or physical handicap that would prevent you from understanding what's going on in this courtroom?
>
> MR. SWINK: No, sir.

THE COURT: And you are represented by counsel.

MR. SWINK: Yes, sir.

THE COURT: And you had the opportunity to discuss this waiver with him?

MR. SWINK: Yes, Sir.

THE COURT: And he has discussed with you the pros and cons of waiving these Constitutional rights to a jury trial?

MR. SWINK: Yes, sir.

THE COURT: And having balanced those pros and cons, you have made the decision -- and it is your decision, you understand that?

MR. SWINK: Yes, sir.

THE COURT: Not anybody else's.

MR. SWINK: Yes, sir.

THE COURT: That you prefer to have a judge decide your case as opposed to a jury of 12 individuals?

MR. SWINK: Yes, sir.

The trial court allowed the waiver and granted defendant's bench trial request. Defendant's waiver was later reduced to writing and signed by defendant on or about 28 April 2015.

On 4 May 2015, the trial court found defendant guilty of two counts of rape of a child (12 CRS 7763 and 12 CRS 7764) and one count of indecent liberties with a child (13 CRS 4688), and not guilty of the two remaining charges (12 CRS 55705 and 15 CRS 50932). Defendant timely appealed the guilty verdicts to this Court.

Discussion

I. Waiver of Jury Trial

[1] Defendant first argues that the trial court lacked authority to try him without a jury and that his waiver was not authorized under N.C. Gen. Stat. § 15A-1201 (2013).[1] North Carolina voters approved an amendment

1. The 2013 statute volume contains both the version of N.C. Gen. Stat. § 15A-1201 effective before 1 December 2014 and the amended version effective 1 December 2014

to N.C. Gen. Stat. § 15A-1201(b) on 4 November 2014 which allows criminal defendants to waive the right to a trial by jury. *See* 2013 N.C. Sess. Law 2013-300 (eff. Dec. 1, 2014). The amended statute became effective on 1 December 2014 and applied "to criminal cases arraigned in superior court on or after that date." *Id.* Defendant argues that since the statute as amended is only applicable to cases in which the defendant was arraigned on or after 1 December 2014, the statute is inapplicable to him -- since he was never formally arraigned -- so the court should not have allowed him to waive his right to a jury trial.

In order to succeed with this claim, defendant would have to be able to show both that the trial court violated the statute and that such violation prejudiced him. *See*, *e.g.*, *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) ("[W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding [the] defendant's failure to object at trial."); *see also State v. Love*, 177 N.C. App. 614, 623, 630 S.E.2d 234, 240-41 (2006) ("However, a new trial does not necessarily follow a violation of statutory mandate. Defendants must show not only that a statutory violation occurred, but also that they were prejudiced by this violation." (Citations omitted)). Defendant cannot do either in this case.

First, defendant has not shown that N.C. Gen. Stat. § 15A-1201 was violated. If defendant was arraigned at all in this case, it would have been on or after 1 December 2014. Defendant was indicted on multiple counts between 3 December 2012 and 2 March 2015. The trial court heard defendant's request for a bench trial at the hearing on 2 March 2015, well after the date the amendment to the statute took effect. Moreover, arraignment is not mandatory. Under N.C. Gen. Stat. § 15A-941(d) (2015), a defendant will be arraigned only if the defendant files a written request within 21 days of being served an indictment. Although defendant's counsel mentioned arraignment more than once during the pretrial proceedings, defendant admits on appeal that he "never requested arraignment and thus was never arraigned."

In addition, while there is no dispute that defendant never requested a formal arraignment, the 2 March 2015 hearing essentially served the purpose of an arraignment. This Court addressed a similar situation in *State v. Jones*, __ N.C. App. __, 789 S.E.2d 651 (2016). In *Jones*, as in

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that was contingent on a public vote. The statute was also later amended again, effective 1 October 2015, to include a more detailed waiver procedure, with this version applying "to defendants waiving their right to trial by jury on or after that date." *See* 2015 N.C. Sess. Laws 2015-289 (eff. Oct. 1, 2015).

this case, the defendant never requested a formal arraignment pursuant to N.C. Gen. Stat. § 15A-941. *Id.* at __, 789 S.E.2d at 655. The *Jones* Court found that by not doing so, "his right to be formally arraigned by means of this statutory procedure was deemed waived on or about 2 August 2010 -- 21 days after he was indicted." *Id.* at __, 789 S.E.2d at 655. We noted in *Jones* that "it is not uncommon for a defendant to forego the procedure set out in [N.C. Gen. Stat.] § 15A-941 and for his arraignment to take place more informally." *Id.* at __, 789 S.E.2d at 655. Ultimately, this Court found that the defendant in *Jones* was informally arraigned on 11 May 2015, when he pled not guilty, and that "because Defendant's arraignment occurred after the effective date of the constitutional amendment and accompanying session law, the trial court was constitutionally authorized to accept Defendant's waiver of his right to a jury trial." *Id.* at __, 789 S.E.2d at 655.

Here, as in *Jones*, defendant never requested a formal arraignment, so his right to such formal arraignment is deemed waived. *Id.* at __, 789 S.E.2d at 655. Moreover, while in this case, defendant may not have explicitly stated a "not guilty" plea at the 2 March 2015 hearing, he implicitly plead not guilty when he requested a bench trial. And the 2 March 2015 hearing served the same function as an arraignment, similar to the 11 May 2015 hearing in *Jones*. *Id.* at __, 789 S.E.2d at 655. Accordingly, we conclude the same as the *Jones* Court that "because Defendant's arraignment occurred after the effective date of the constitutional amendment and accompanying session law, the trial court was constitutionally authorized to accept Defendant's waiver of his right to a jury trial." *Id.* at __, 789 S.E.2d at 655.

[2] Furthermore, even if we assumed there was a violation of the statute, defendant has not met the second prong of the standard: prejudice. *See Ashe*, 314 N.C. at 39, 331 S.E.2d at 659. Defendant made a strategic decision to ask for a bench trial in this case, and he has not shown on appeal how that decision prejudiced him. Defendant was charged with two counts of rape of a child and one count of taking indecent liberties with children. Given these charges and defendant's alibi defense, which required a bill of particulars, we need not speculate much to understand why defendant would make the strategic decision to ask for a bench trial. Furthermore, defendant was acquitted of two charges against him during the bench trial, so if anything, having a bench trial most likely worked in his favor.

Defendant argues that the "denial of the right to a jury trial is a structural error requiring automatic reversal without a showing of prejudice." But the cases defendant cites involve fatal constitutional errors

depriving the defendant of his or her constitutional right to a jury trial, rather than the intentional waiver of a statutory right to a jury trial, which is what is at issue here. *Cf. State v. Bunning*, 346 N.C. 253, 257, 485 S.E.2d 290, 292 (1997) (improper alternate juror substitution after jury deliberations had already begun led to "[a] trial by a jury which . . . is so fundamentally flawed that the verdict cannot stand."); *State v. Bindyke*, 288 N.C. 608, 627, 220 S.E.2d 521, 533 (1975) ("[T]he presence of an alternate in the jury room during the jury's deliberations violates N.C. Const. art. I, § 24 and G.S. 9-18 and constitutes reversible error *per se*."); *State v. Hudson*, 280 N.C. 74, 79, 185 S.E.2d 189, 192 (1971) (Defendant's waiver of his right to a trial by twelve jurors after one juror became ill and had to be excused violated the law in this State -- as it stood at that time -- that "no person can be finally convicted of any crime except by the unanimous consent of twelve jurors who have been duly impaneled to try his case."); *Sullivan v. Louisiana*, 508 U.S. 275, 281, 282, 124 L. Ed. 2d 182, 190-91, 113 S. Ct. 2078, 2082, 2083 (1993) (jury instruction with unconstitutional definition of reasonable doubt led to "[d]enial of the right to a jury verdict of guilt beyond a reasonable doubt" that "unquestionably qualifies as 'structural error.' "); *Rose v. Clark*, 478 U.S. 570, 586-87, 92 L. Ed. 2d 460, 476, 106 S. Ct. 3101, 3110 (1986) (noting that "harmless-error inquiry remains inappropriate for certain constitutional violations no matter how strong the evidence of guilt may be."). As we have concluded in this case that no constitutional error occurred, defendant's argument regarding structural error has no merit here.

II. Knowing and Voluntary

[3] Next, defendant argues that his waiver was not constitutionally sufficient and that the trial court erred by failing to conduct an adequate inquiry into whether he made a knowing and voluntary waiver of his right to a jury trial. We disagree.

The North Carolina Constitution was amended by 2013 N.C. Sess. Law 2013-300 (eff. Dec. 1, 2014) to allow defendants in criminal cases to waive the right to a jury trial and now states in relevant part:

> No person shall be convicted of any crime but by the unanimous verdict of a jury in open court, except that a person accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, in writing or on the record in the court and with the consent of the trial judge, waive jury trial, subject to procedures prescribed by the General Assembly.

N.C. Const. art. I, § 24. This amendment "[became] effective December 1, 2014, and applies to criminal cases arraigned in superior court on or after that date." 2013 N.C. Sess. Laws 2013-300 (eff. Dec. 1, 2014). Since we have concluded that defendant must have been arraigned on or after 1 December 2014, the constitution as amended would apply.[2]

At the time defendant requested to waive his right to a trial by jury in this case in early March 2015, N.C. Gen. Stat. § 15A-1201 noted that such waiver may be done "in writing or on the record in the court and with consent of the trial judge" so long as the waiver is made "knowingly and voluntarily[.]" Federal courts interpreting the United States Constitution similarly are required to find whether a defendant's waiver of his Sixth Amendment right to a trial by jury is knowing, voluntary, and intelligent. *See United States v. Boynes*, 515 F.3d 284, 286 (4th Cir. 2008) ("The Sixth Amendment requires that the waiver [of the right to a jury trial] be knowing, voluntary, and intelligent.").

Here, defendant's waiver was knowing and voluntary and made both in writing and personally in open court on the record. First, the trial court engaged in a colloquy with defendant eight weeks before trial. On 2 March 2015, defendant was sworn in and questioned about his age, education, representation by counsel, and his request to waive his right to a jury trial. The court concluded that "defendant has knowingly and with advice from counsel . . . made his individual decision to waive his right to a jury trial and will be allowed to go forward with a bench trial." Defendant then signed a written waiver form that same date.

Additionally, on 28 April 2015, before the bench trial began, the court reiterated that defendant had requested a bench trial and waived his right to a trial by jury. The court asked whether waiver was "still the desire of the defendant[,]" and defendant's trial counsel affirmatively responded that it was. The court then had defendant and his attorney come forward to date and sign a certification form. Defendant's trial counsel noticed that the form was dated for 2 March 2015 and asked

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2. Although the North Carolina Constitution as amended now provides that the exercise of the waiver is "subject to procedures prescribed by the General Assembly," N.C. Const. art. I, § 24, we note that the General Assembly had not prescribed any specific procedures for waiver of jury trial that would have been effective at the time defendant's waiver was made to the trial court in this case. A subsequent amendment to N.C. Gen. Stat. § 15A-1201 (2015) does contain further guidance on the waiver procedure that "applies to defendants waiving their right to trial by jury on or after [October 1, 2015]." 2015 N.C. Sess. Laws 2015-289 (eff. Oct. 1, 2015). We therefore rely upon existing law in analogous situations to resolve this case, while acknowledging the limited scope of cases for which this may be applicable.

whether "to leave that date as is or would you like me to change[?]" The Court instructed counsel to "add today's date under that date as well since that's when he originally made his decision."

Defendant's written waiver further demonstrated that his waiver was knowing and voluntary. With the written waiver, defendant had a chance to reaffirm his decision to seek a bench trial, and he did so. On appeal, defendant raises new questions about his written waiver, such as that the waiver form states that a transcript of the hearing on 2 March 2015 was attached, but the transcript was not prepared until 3 March 2015. But defendant cites no authority supporting his claim that these alleged inconsistencies render his written waiver ineffective. Defendant has not disputed that he personally signed the waiver form, and the form reflects that his attorney advised him of the charges against him, the nature and punishment for each charge, the nature of the proceedings, and his rights including the right to participate in selecting the jury and his right to a unanimous jury verdict. The waiver also noted that by waiving his right to a jury trial, the judge alone would decide defendant's guilt or innocence. Defendant also has not contested the accuracy of his attorney's certification on the waiver form.

Defendant consistently requested a bench trial throughout the proceedings below many times: through his counsel on 2 February 2015; on the record at the 2 March 2015 hearing; and in writing on 28 April 2015. Defendant was represented by counsel of his choice throughout the proceedings, and he never expressed any hesitation about his choice to waive his right to a jury trial. Defendant's waiver of his right to trial by jury was constitutional, and the record reflects that his waiver was knowing and voluntary. We therefore affirm the trial court.

III. Conclusion

Accordingly, we affirm defendant's convictions and hold that the trial court did not err by allowing defendant to waive his right to a jury trial, and his waiver was knowing and voluntary.

AFFIRMED.

Chief Judge McGEE and Judge CALABRIA concur.

STATE OF NORTH CAROLINA
v.
DEAN MICHAEL VARNER, DEFENDANT

No. COA16-591

Filed 7 March 2017

Child Abuse, Dependency, and Neglect—misdemeanor child abuse—failure to give requested jury instruction—right to discipline

The trial court erred in a misdemeanor child abuse case by failing to give a requested jury instruction concerning a parent's right to discipline his child. There was insufficient evidence to show that defendant's paddling caused or was calculated to cause permanent injury.

Appeal by Defendant from judgment entered 14 January 2016 by Judge Thomas H. Lock in Lee County Superior Court. Heard in the Court of Appeals 1 December 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Caroline Farmer, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for the Defendant.

DILLON, Judge.

Dean Michael Varner ("Defendant") was convicted of misdemeanor child abuse for inflicting physical injuries on his son with a paddle. Defendant appeals, contending that the trial court erred by failing to give a requested jury instruction concerning a parent's right to discipline his or her child. We reverse.

I. Factual Background

The evidence presented at trial tended to show as follows: Defendant and his ten-year old son were having pizza for dinner at the kitchen table with other family members. Defendant's son, who was a "picky eater," refused to eat the pizza, telling Defendant that pizza made him gag. Defendant left the table, briefly sat down in the living room, and then retrieved a paddle. Defendant returned to the kitchen table with the paddle, stood next to his son, who was still seated at the kitchen table, and

counted down from three. After completing his countdown, Defendant struck his son's left thigh three times with the paddle. Defendant also struck his son's foot as his son pulled his leg up in an attempt to block the blows. Defendant's son then took a bite of the pizza.

The next morning, Defendant's son had bruising on his thigh, from his knee to his waist. For several days thereafter, Defendant's son was in pain from the punishment, walking with a slight limp and unable to participate in gym class at school. After several days, the pain and bruising subsided.

Months later, the State obtained an indictment, charging Defendant with felony child abuse.

II. Procedural Background – Jury Instructions

Prior to the case being sent to the jury, the parties and the trial judge held a charge conference to discuss the jury instructions. During the charge conference, the trial judge indicated to the parties that he was planning to include an instruction to advise the jury that it could not convict Defendant if it determined that his son's physical injuries were inflicted as a result of Defendant's "moderate punishment to correct [his] child." Neither party objected to this instruction.

The trial judge, however, further indicated that he would give an instruction defining "moderate punishment" as "punishment that does not cause *lasting* injury." The State objected to this definition, contending that "moderate punishment" should not be limited to that which produced lasting injuries. The trial judge agreed with the State and, over Defendant's objection, struck this definition. In the end, the trial judge left "moderate punishment" undefined, leaving it to the jury to determine whether the punishment inflicted by Defendant on his son was moderate "according to the facts and circumstances of the particular case and in the exercise of [their] reason and common sense."

The jury acquitted Defendant of felony child abuse but found him guilty of the lesser-included offense of *misdemeanor* child abuse. Defendant gave timely notice of appeal.

III. Analysis

Defendant's sole argument on appeal is that the trial court committed reversible error when it struck the proposed instruction defining "moderate punishment" as punishment which caused "lasting" injury to the child. Specifically, Defendant contends that the instruction impermissibly allowed the jury to convict him simply because they thought

Defendant's *degree* of punishment was excessive, even if they thought Defendant was acting in good faith and did not inflict a lasting injury upon his child. We agree with Defendant. Even though sufficient evidence was presented to convict Defendant of misdemeanor child abuse, we are compelled to reverse and remand for a new trial.

On appeal, this Court reviews jury instructions *de novo*, *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009), considering the matter anew and substituting its own judgment for that of the lower court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

A parent commits misdemeanor child abuse when the parent intentionally inflicts *any* "physical injury" on their child who is under 16 years of age. N.C. Gen. Stat. § 14-318.2 (2013).

A parent, however, has the constitutionally protected "paramount right" to raise one's children as the parent sees fit. *See Peterson v. Rogers*, 337 N.C. 397, 402, 445 S.E.2d 901, 904 (1994). Accordingly, our Supreme Court has recognized that, as a general rule, a parent (or one acting *in loco parentis*) is *not* criminally liable for inflicting physical injury on a child in the course of lawfully administering corporal punishment. *State v. Alford*, 68 N.C. 322, 323 (1873).

This general rule regarding a parent's right to administer corporal punishment does *not* apply: (1) where the parent administers punishment "which may seriously endanger life, limb or health, or shall disfigure the child, or cause any other *permanent* injury[,]" *Alford*, 68 N.C. at 323; (2) where the parent does not administer the punishment "honestly" but rather "to gratify his own evil passions[,]" irrespective of the degree of the physical injury inflicted, *State v. Thorton*, 136 N.C. 610, 615, 48 S.E. 602, 604 (1904); or (3) where the parent uses "cruel or grossly inappropriate procedures . . . [or] devices to modify" a child's behavior, N.C. Gen. Stat. § 7B-101(1)(c) (2013).

In 1837, our Supreme Court recognized the power of those with parental authority to administer "moderate" corporal punishment:

> One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits; and to enable him to exercise this salutary sway, *he is armed with power to administer moderate correction*, when he shall believe it to be just and necessary.

State v. Pendergrass, 19 N.C. 365, 365-66 (1837) (emphasis added).[1] The Court defined "moderate punishment" not as this phrase might be understood today, but more narrowly to include *any* punishment which did not produce "permanent" injury, including any punishment that "may seriously endanger life, limbs or health, or shall disfigure the child[.]" *Id.* at 366.

Our Supreme Court further held in *Pendergrass* that even where a punishment does not produce or threaten a permanent injury, a parent may nonetheless be held criminally responsible if he administers the correction to "gratify his own bad passions[.]" *Id.* at 367. But if a parent inflicts the punishment "honestly" and the punishment does not produce or threaten permanent injury, the law will not question the parent's discretion to choose the *degree* of punishment to inflict: "[A parent] cannot be made penally responsible for error of judgment, but only for wickedness of purpose." *Id.* at 366.

In conclusion, our Supreme Court stated in *Pendergrass* that a proper instruction informs the jury that a parent is not criminally liable for injuring his child during the administration of corporal punishment "unless the jury could clearly infer from evidence, that the correction inflicted had produced, or was in its nature calculated to produce, lasting injury to the child" *or* "unless the facts [] induced a conviction in their minds that the defendant did not act honestly in the performance of duty, according to [a] sense of right, but [rather] under the pretext of duty, [for the purpose of] gratifying malice." *Id.* at 368.

In 1873, the Court relied on *Pendergrass* to affirm the right of a step-father, acting *in loco parentis*, to administer corporal punishment where the punishment was not "calculated to produce lasting injury." *Alford*, 68 N.C. at 324.

Our Supreme Court last cited *Pendergrass* in 1904, when it reaffirmed the holding and approved an instruction which informed the jury of its duty *not* to convict even if it found that "the whipping was more than was necessary, and was attended by bodily pain and suffering," unless "they found that there was either malice or a permanent injury; the latter being an injury which is lasting and will continue indefinitely." *See Thorton*, 136 N.C. 610, 48 S.E. 602 (1904).

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1. *Pendergrass* was authored by Justice William Gaston, one of our State's most prominent justices (serving from 1833 until his death in 1844), the writer of our State song, *The Old North State* (in 1835), and for whom Gaston County was named (in 1846).

Our Supreme Court has never disavowed the principles set forth in *Pendergrass* regarding a parent's right to discipline their child.

Our General Assembly, though, has since further limited a parent's authority to discipline his child by declaring that a minor is "abused" when a parent uses a "cruel or grossly inappropriate" procedure or device to discipline the minor. N.C. Gen. Stat. § 7B-101(1)(c).[2]

Applying the above principles to the facts in the present case, we conclude that there was not sufficient evidence from which a jury could find that Defendant's paddling caused or was calculated to cause permanent injury. However, we conclude that there was sufficient evidence from which a juror could find that Defendant acted with malice. For instance, there was evidence that Defendant cursed and yelled at his son prior to administering the paddling. And a juror could find that the paddling in this case was excessive, which is *some* evidence of malice. But we further conclude that a jury could reasonably find based on the evidence that Defendant administered the paddling without malice and that the punishment was not *grossly* inappropriate, regardless of whether the jury might have believed that the paddling was otherwise excessive.

The instruction here allowed the jury to convict if it determined that the punishment administered by Defendant was not "moderate," without giving further guidance as to what constitutes "moderate" punishment, except that the jury was to use their own "reason and common sense." The trial court refused Defendant's request to clarify the term "moderate" as meaning any punishment that did not produce a "lasting" injury. This was reversible error.

Without the clarification, the jury was free to convict Defendant of misdemeanor child abuse even if it determined that Defendant acted honestly but, in their minds, excessively. Therefore, we reverse Defendant's conviction and remand the matter for further proceedings not inconsistent with this opinion.

We note that it would have been proper for the State to request an instruction advising the jury that it could nonetheless convict if it determined that Defendant acted out of "wickedness of purpose,"

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2. Our General Assembly has also declared that a school official, when acting in *loco parentis*, may discipline a student when otherwise authorized so long as the official does not inflict physical injury which "requires medical attention beyond simple first aid." N.C. Gen. Stat. § 115C-390.4(5) (2013).

irrespective of the extent of the physical injuries. *See Pendergrass*, 19 N.C. at 366.

REVERSED AND REMANDED.

Judges McCULLOUGH and TYSON concur.

STATE OF NORTH CAROLINA
v.
TEON JAMELL WILLIAMS, DEFENDANT

No. COA16-592

Filed: 7 March 2017

1. Narcotics—two substances mixed together—possession of particular substance

Defendant was not improperly convicted of possession with intent to manufacture, sell, or deliver (PWIMSD) 4-Methylethcathinone where he had already been convicted and sentenced for PWIMSD Methylone and argued that the two were the same substance under N.C.G.S. § 90-89 because they were mixed together. Possession of any mixture that contains any quantity of a Schedule I controlled substance is sufficient to charge a defendant with possession of the particular substance and to support a conviction for possession of the substance. This is true not only where the controlled substances are listed in separate schedules but also when the defendant is convicted of possession of two separate, distinct Schedule I substances.

2. Collateral Estoppel and Res Judicata—motion to suppress—case remanded

The trial court properly denied defendant's motion to suppress based on collateral estoppel where defendant had filed a motion which was practically identical in a prior prosecution for which he had been improperly indicted. The trial court correctly applied the doctrine of collateral estoppel.

Appeal by Defendant from judgment entered 1 February 2016 and order entered 3 February 2016 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 11 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas O. Lawton, III, for the State.

Meghan Adelle Jones for the Defendant.

DILLON, Judge.

Teon Jamell Williams ("Defendant") entered an *Alford* plea to possession with intent to manufacture, sell, or deliver ("PWIMSD") a Schedule I controlled substance and attaining habitual felon status. Defendant reserved the right to appeal the trial court's denial of his motion to suppress evidence obtained during a search of his residence. For the following reasons, we affirm.

I. Background

In 2013, during a routine search of Defendant's residence, Defendant's probation officer discovered a bag containing a white, powdery substance. Laboratory results determined that the bag contained two separate Schedule I substances, Methylone and 4-Methylethcathinone. *See* N.C. Gen. Stat. § 90-89(5)(j) (2013).

Defendant was indicted for PWIMSD "Methylethcathinone," where the prefix "4" was inadvertently omitted from the drug name, and for PWIMSD Methylone. Prior to his trial, Defendant filed a motion to suppress, which was denied by the trial court. He was convicted on both counts and given consecutive sentences. In the first appeal to this Court, we affirmed Defendant's conviction for PWIMSD Methylone; however, we vacated Defendant's conviction for PWIMSD "Methylethcathinone" because the name of the controlled substance, an essential element of the crime, was not properly alleged in the indictment. *State v. Williams*, ___ N.C. App. ___, ___, 774 S.E.2d 880, 885-86 (2015) (unpublished).

In 2015, the State indicted Defendant for PWIMSD "*4*-Methylethcathinone" rather than simply "Methylethcathinone." Defendant filed a motion to suppress which was functionally identical to the motion to suppress he filed prior to his first trial. The trial court denied the second motion to suppress based on the doctrine of collateral estoppel, stating that the motion "relate[d] to the same chain of events and same transaction and occurrence . . . and relate[d] to the same issues" as Defendant's first motion to suppress heard prior to the first appeal.

Following the denial of his second suppression motion, Defendant was found guilty PWIMSD of 4-Methylethcathinone, a Schedule I

substance, and was sentenced accordingly. Defendant gave notice of appeal in open court.[1]

II. Analysis

On appeal, Defendant argues that the trial court erred in sentencing him a second time for possession of what he contends was a single Schedule I substance. Alternatively, Defendant argues that the trial court erred in denying his motion to suppress. We shall address each argument in turn.

A. Sentencing

[1] Defendant first argues that the trial court improperly convicted him of PWIMSD 4-Methylethcathinone where he had already been convicted and sentenced for PWIMSD Methylone because both substances were mixed together in the same bag. Defendant's argument is one of statutory interpretation, specifically the language in N.C. Gen. Stat. § 90-89.

N.C. Gen. Stat. § 90-89 is the statute which classifies certain substances as Schedule I controlled substances. N.C. Gen. Stat. § 90-89(5) defines the relevant class of Schedule I substances as "[a]ny material, compound, *mixture*, or preparation that contains any quantity of the [listed] substances[.]" N.C. Gen. Stat. § 90-89(5) (emphasis added). Methylone and 4-Methylethcathinone, the substances found in the bag in Defendant's residence, are included in Subsection (5)(j) of N.C. Gen. Stat. § 90-89 as Schedule I controlled substances.

Defendant argues that, based on the words used by the General Assembly in subsection (5) of N.C. Gen. Stat. § 90-89, it is the *mixture* that is the Schedule I substance, not the individual listed substances therein. Essentially, Defendant contends that because the "Methylone" and "4-Methylethcathinone" were found in the *same mixture*, they constitute a single Schedule I controlled substance for purposes of criminal prosecution. As Defendant's argument goes, had the General Assembly intended for these two substances found in the same mixture to be punishable as two separate offenses, the General Assembly would have described a Schedule I substance to include "any of the following substances found in a mixture," rather than to include "any mixture [ ] that contains" the listed substances. While Defendant's argument may have

1. To the extent that it may be necessary to correct any jurisdictional defect due to Defendant's failure to properly preserve grounds for his appeal, we hereby invoke Rule 2 of the North Carolina Rules of Appellate Procedure to address the merits of Defendant's appeal. Defendant's petition for certiorari is therefore denied.

some logical appeal, we hold that Defendant was properly subject to prosecution for two separate offenses.

We note that our Court has already rejected the argument advanced by Defendant in another case where our Court affirmed a defendant's convictions of possession of ecstasy *and* possession of ketamine, where the ecstasy and ketamine were in the same pill. *State v. Hall*, 203 N.C. App. 712, 716-18, 692 S.E.2d 446, 450-51 (2010). In *Hall*, the defendant argued that she could not be sentenced for possession of both ecstasy and ketamine because the statutes in question "[did] not allow the State to charge separate offenses when there is a mixture." *Id.* at 717, 692 S.E.2d at 450. We rejected this argument, reasoning as follows:

> Defendant's argument misses the mark. The quantity of ecstasy and ketamine contained in each pill found in Defendant's possession was irrelevant to Defendant's convictions. *Any amount* of ecstasy and *any amount* of ketamine found in Defendant's possession would have been sufficient to charge Defendant with possession of *both* controlled substances. . . . A person will be deemed "to possess" ecstasy if that person is in possession of "[a]ny . . . mixture . . . which contains any quantity of [ecstasy]." Likewise, a person is considered "to possess" ketamine if that person is in possession of "[a]ny . . . mixture . . . which contains any quantity of . . . Ketamine." Neither the presence nor the amount of ecstasy contained in each pill had any bearing on Defendant's conviction for possession of ketamine, and *vice versa*. Accordingly, the double jeopardy protections of the Fifth Amendment were not implicated in this instance.

Id. at 717-18, 692 S.E.2d at 451 (internal citations omitted).

As in the present case, the applicable statutes in *Hall* both defined the controlled substance as "any . . . mixture . . . which contains any quantity of [the relevant substance]"; however, we nonetheless concluded that the defendant could be punished for two offenses where two different drugs are found in the same "material, compound, mixture, or preparation." *Id.* Defendant's argument, while creative, ignores the quantitative element of the statute: possession of "[a]ny material, compound, mixture, or preparation that contains *any quantity*" of a Schedule I controlled substance is sufficient to charge a defendant with possession of the particular substance and to support a conviction for possession of the substance. N.C. Gen. Stat. § 90-89(5); *see Hall*, 203 N.C. App. at 717-18, 692 S.E.2d at 451.

Defendant contends that *Hall* is distinguishable because the defendant in *Hall* was convicted of possession of a Schedule I substance and a Schedule III substance, rather than two Schedule I substances. However, we do not believe that the Court's reasoning in *Hall* is limited to a situation where a person may be convicted for possession of two controlled substances listed in separate schedules – it is equally applicable where a defendant is convicted of possession of two separate, distinct Schedule I substances. Applying the reasoning in *Hall* to the present case, we must conclude that "neither the presence nor the amount of [Methylone] contained in [the bag] had any bearing on Defendant's conviction for possession of [4-Methylethcathinone], and *vice versa*." *See id.* at 718, 692 S.E.2d at 451.

B. Motion to Suppress

[2] Defendant's second argument on appeal relates to the trial court's denial of his second motion to suppress based on the doctrine of collateral estoppel.

After Defendant was indicted for PWIMSD 4-Methylethcathinone following his first appeal to this Court, he filed a motion to suppress in the trial court which was practically identical to the motion to suppress he filed after he was first – incorrectly – indicted for PWIMSD Methylethcathinone. When Defendant filed the first motion to suppress, the trial court held a full hearing, during which it received evidence and ultimately denied the motion. In its ruling on Defendant's *second* motion to suppress, the trial court noted that the second motion "relate[d] to the same chain of events and same transaction and occurrence as [the first motion to suppress] and relate[d] to the same issues."

Collateral estoppel precludes parties from "retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (internal marks omitted). The doctrine of collateral estoppel applies to both civil and criminal actions. *Sealfon v. United States*, 332 U.S. 575, 578 (1948). Proper application of collateral estoppel requires: (1) the same parties, (2) the same issue, (3) that the issue was raised and actually litigated in the prior action, (4) that the issue was material and relevant to the disposition of the prior action, and (5) that the determination of the issue was necessary and essential to the prior judgment. *State v. Dial*, 122 N.C. App. 298, 306, 470 S.E.2d 84, 89 (1996) (citing *King*, 284 N.C. at 358, 200 S.E.2d at 806).

It may be true, as Defendant argues, that the trial court had no jurisdiction over the PWIMSD 4-Methylethcathinone charge during

the suppression hearing held prior to the first appeal to this Court. However, "collateral estoppel" involves "issue preclusion," not "claim preclusion." The issue in the second suppression hearing was the same as the issue decided in the first suppression hearing regarding Defendant's possession of Methylone; namely, whether the *bag* was lawfully discovered. When our Court vacated Defendant's conviction for PWIMSD Methylethcathinone, it left Defendant's conviction for PWIMSD Methylone undisturbed, which included the trial court's conclusion that the bag was lawfully discovered.

Therefore, the trial court properly applied the doctrine of collateral estoppel when it denied Defendant's second motion to suppress because: (1) the parties were the same, (2) the issues raised by the motion to suppress were the same – whether the bag containing the powdery substance was lawfully obtained from Defendant's residence, (3) the issues raised were raised and fully litigated during the trial court's hearing on Defendant's first motion to suppress, (4) the issue was material and relevant to the disposition of the prior action, and (5) the trial court's determination was necessary and essential to the final judgment – Defendant's conviction of PWIMSD Methylone.

Accordingly, we conclude that the trial court properly denied Defendant's second motion to suppress based on collateral estoppel.

AFFIRMED.

Judges ELMORE and ZACHARY concur.

THOMPSON v. TOWN OF WHITE LAKE

[252 N.C. App. 237 (2017)]

NOEL THOMPSON, PETITIONER
v.
TOWN OF WHITE LAKE, RESPONDENT

No. COA16-104

Filed 7 March 2017

1. Appeal and Error—interlocutory motion—zoning—nothing left to be resolved

Petitioner's appeal in a zoning case was not interlocutory where the superior court fully resolved the merits of the parties' dispute and remanded the matter only for the municipal zoning board to schedule petitioner's compliance with her permit. The decision left nothing more to be resolved in the superior court.

2. Zoning—review by trial court—standard

The superior court used the wrong standard of review and entered its own findings in a zoning case involving a storage building allegedly intended for commercial use in a residential neighborhood. The whole record review applied to the superior court's review of the municipal zoning board's findings and inferences and de novo review applied to the board's conclusions of law and interpretation of the ordinance. The superior court's language and the act of finding facts made clear that it applied the de novo standard to all the issues in dispute, including the board's findings and inferences.

3. Zoning—review by trial court—contradiction of Board finding

The superior court's finding that a storage building was constructed in contradiction with a zoning permit contradicted the municipal zoning board's finding and substituted an alternative basis for a stop work order and notice of intent. The superior court may not substitute its own justification for that of the board with regard to findings and inferences from the evidence where a challenge is based upon whether substantial evidence exists to support the board's decision.

Appeal by Petitioner from an order entered 14 May 2015 by Judge James Gregory Bell in Bladen County Superior Court. Heard in the Court of Appeals 7 June 2016.

Morningstar Law Group, by William J. Brian, Jr. and Jeffrey L. Roether, for Petitioner-Appellant.

Hester, Grady & Hester, P.L.L.C., by H. Clifton Hester, for Respondent-Appellee.

INMAN, Judge.

This appeal arises from a zoning dispute. Because the superior court misapplied a *de novo* standard of review and entered new findings of fact contrary to a municipal zoning board's findings, the judgment must be reversed. Also, because the appellee concedes that the record evidence did not support the municipal zoning board's only finding of fact supporting its decision, the board's decision must be reversed.

Noel Thompson ("Petitioner") appeals from an order by the trial court affirming a zoning decision by the Town of White Lake Board of Adjustment (the "Board") that stopped Petitioner from completing construction of a storage building in a residential neighborhood. Petitioner asserts the Board's decision was not supported by competent evidence and misinterpreted the local zoning ordinance. Petitioner also contends the superior court applied the incorrect standard of review to the Board's decision. Respondent, the Town of White Lake (the "Town"), asserts that the superior court applied the correct standard of review and that its judgment should be affirmed. After careful review, we reverse the trial court's judgment as well as the Board's decision.

Factual and Procedural History

Petitioner is the owner of real property located at 1431 Highway 53 East (the "Property") in the Town of White Lake, North Carolina. The Property is zoned as an R-1, residential zoning district. The Town's zoning ordinance (the "Ordinance") provides that a person may construct an accessory storage structure on residential property by obtaining a zoning permit from the Town, which will be issued so long as the structure conforms to the Ordinance and the construction conforms to the issued permit.

On 13 March 2014, Petitioner obtained a zoning permit (the "Permit") from the zoning inspector for the Town, Timothy Frush (the "Zoning Inspector"). The Permit allowed Petitioner to construct a 24'x40' tan, metal storage building on her property for residential purposes. The Permit further specified the Building would have four doors, all facing away from the street. Petitioner proceeded to construct a building (the "Building") with eight doors, including four facing the street.

In response to complaints about the Building under construction, the Zoning Inspector investigated and found two deviations from the

Permit: (1) the Building had four doors on each side, and (2) the Building had a center dividing wall, which created eight separate 10'x12' units within the whole structure. On 7 April 2014, the Zoning Inspector issued a stop work order (the "Stop Work Order") for the construction of the Building and on 16 April 2014 sent Petitioner a notice of intent to revoke the Permit (the "Notice of Intent"). In the Notice of Intent, the Zoning Inspector cited three reasons that the Building violated the Ordinance:

- The accessory structure is a commercial structure and is inconsistent with the R-1 zoning permit authorization granted by the Town of White Lake. (Article V, 5-1.2)
- The permit recipient failed to develop or maintain the property in accordance with the approved plans. (Article V, 5-6.1)
- The accessory structure is not located behind the front building line of the principle structure. (Article XII, 12-7(A)[sic]

Petitioner appealed the Stop Work Order and Notice of Intent to the Board. After an open meeting which included testimony by the Zoning Inspector and Petitioner, the Board affirmed the Zoning Inspector's decision on the first of the three allegations: that "[t]he accessory structure is a commercial structure and is inconsistent with the R-1 zoning permit authorization . . . ." The Board unanimously voted that "[b]ased on the evidence provided, the allegation is: Valid." The Board rejected the Zoning Inspector's other two allegations—that Petitioner "failed to develop or maintain the property . . . in accordance with the approved plans" and that "[t]he accessory structure is not located behind the front building line of the principle structure." The Board voted unanimously that each of those grounds was "[e]rroneous and not supported in fact or under the applicable provisions of the White Lake Zoning Ordinance as alleged by the [Zoning Inspector]." The Board concluded its decision with a comment that "the most serious violation (That the structure would be used for commercial purposes[]) was valid and was sufficient to support the action of revoking the permit."

Petitioner appealed the Board's decision to the Superior Court of Bladen County, arguing, *inter alia*, that (1) the Zoning Inspector presented no competent evidence to support the Board's finding that the Building would be used for commercial purposes, and (2) the Board erred as a matter of law by affirming the Stop Work Order and Notice of Intent pursuant to Article V, 5-1.2 of the Ordinance.

On 14 May 2015, the superior court entered an order affirming the Board's decision. The superior court entered findings of fact including, *inter alia*, that although the Permit approved a building with only four exterior doors facing the residential side of the structure and no internal dividing walls, "[t]he actual structure . . . contained [eight] doors and [eight] separate rooms, each with a separate door." The superior court further found that

> the actual structure (a mini-storage building with [eight] separate compartments/rooms with [four] street-side doors) [was] not a permissible 'Accessory Use' structure incidental to a residential use as those terms are defined by the White Lake Zoning Ordinance. Furthermore, the [Building], as originally represented by the petitioner (a one-room storage building with [four] doors facing the residence), would have been a permissible 'Accessory Use' structure as defined by the ordinance.

The superior court concluded that the deviation from a one-room structure with four doors to an eight-room structure with eight doors sufficiently diverged from the Permit to support the Stop Work Order and Notice of Intent. The superior court also concluded the Building was not an "Accessory Use" structure incidental to the primary residence, but rather was a "commercial use 'structure' as defined by the ordinance and was not consistent with the R-1 residential use of the lot in question." The superior court did not cite any provision in the Ordinance defining a commercial structure. The superior court affirmed the Board's decision and remanded the matter to the Board to determine a schedule for Petitioner's compliance with the Permit.

Petitioner timely appealed the superior court's order.

Analysis

I. The Town's Motion to Dismiss

[1] As an initial matter, we address the Town's Motion to Dismiss Petitioner's appeal as interlocutory. The Town asserts the Notice of Intent was not an actual revocation of the Permit, and because Petitioner asserted revocation as grounds for her appeal, we should dismiss the appeal. We disagree.

A party in a civil action has a right of appeal to this Court "[f]rom any final judgment of a superior court[,] . . . [or f]rom any interlocutory order or judgment of a superior court . . . that . . . [a]ffects a substantial right[.]"

N.C. Gen. Stat. § 7A-27(b) (2015).[1] "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted). "An order that completely decides the merits of an action therefore constitutes a final judgment for purposes of appeal even when the trial court reserves for later determination collateral issues such as attorney's fees and costs." *Duncan v. Duncan*, 366 N.C. 544, 546, 742 S.E.2d 799, 801 (2013). "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*, 231 N.C. at 362, 57 S.E.2d at 381.

Here, the superior court fully resolved the merits of the parties' dispute and remanded the matter only for the Board to schedule Petitioner's compliance with her Permit. The superior court fully decided the issues in dispute: (1) whether the Building complied with the Ordinance and (2) whether the Board was correct in affirming the Stop Work Order and Notice of Intent. So while the revocation may not have occurred yet, the superior court determined the Building's non-compliance with the Ordinance and the Board's justification for affirming the notices and remanded the matter for Board proceedings that would lead either to compliance by Petitioner or revocation of the Permit with no further determination by the superior court. The superior court also ordered Petitioner to pay court costs associated with the matter, further indicating the finality of the judgment. The decision left nothing more to be resolved in the superior court. Accordingly, we hold the superior court's order was a final order for the purposes of this appeal.

II. The Superior Court's Review

A. Standard of Review

"An appellate court's review of the trial court's zoning board determination is limited to determining whether the superior court applied the correct standard of review, and to determine whether the superior court correctly applied that standard." *Overton v. Camden Cnty.*, 155 N.C. App. 391, 393-94, 574 S.E.2d 157, 160 (2002) (citation omitted).

When the superior court hears a decision from a board of adjustment, it "sits as an appellate court, and not as a trier of facts[.]"

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1. N.C. Gen. Stat. § 7A-27 was amended in 2016; however, this amendment does not affect the cited language.

Sun Suites Holdings, LLC v. Bd. of Alderman of Town of Garner, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527 (2000) (quoting *Tate Terrace Realty Investors, Inc. v. Currituck Cnty.*, 127 N.C. App. 212, 217, 488 S.E.2d 845, 848 (1997)). The superior court's review is limited to determinations of whether:

> 1) the [b]oard committed any errors in law; 2) the [b]oard followed lawful procedure; 3) the petitioner was afforded appropriate due process; 4) the [b]oard's decision was supported by competent evidence in the whole record; and 5) [whether] the [b]oard's decision was arbitrary and capricious.

Overton, 155 N.C. App. at 393, 574 S.E.2d at 159 (alterations in original) (quoting *Capital Outdoor, Inc. v. Guilford Cnty. Bd. of Adjustment*, 152 N.C. App. 474, 475, 567 S.E.2d at 441 (citation omitted)).

The proper standard of review for the superior court "depends upon the particular issues presented on appeal." *Amanini v. N.C. Dep't of Human Res., N.C. Special Care Ctr.*, 114 N.C. App. 668, 374, 443 S.E.2d 114, 118 (1994) (citation omitted). "If a petitioner contends the [b]oard's decision was based on an error of law, 'de novo' review is proper." *JWL Invs., Inc. v. Guilford Cnty. Bd. of Adjustment*, 133 N.C. App. 426, 429, 515 S.E.2d 715, 717 (1999). "When the petitioner 'questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the "whole record" test.' " *ACT-UP Triangle v. Comm'n for Health Servs. of the State of N.C.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993)).

"Under a *de novo* review, the superior court 'consider[s] the matter anew[] and freely substitute[es] its own judgment for the agency's judgment.' " *Mann Media Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13-14, 565 S.E.2d 9, 17 (2002) (alterations in original) (quoting *Sutton v. N.C. Dep't. of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999)). "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.' " *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118 (citation omitted). "[T]he 'whole record' test 'gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence[,]' " *Bennett v. Hertford Cnty. Bd. of Educ.*, 69 N.C. App. 615, 618, 317 S.E.2d 912, 915 (quoting *Overton v. Goldsboro City Bd. of Educ.*, 304

N.C. 312, 322, 283 S.E.2d 495, 501 (1981)), but "does not allow the reviewing court to replace the [b]oard'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*," *Thompson v. Wake Cnty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). "It is not the function of the reviewing court . . . to find facts, but instead, . . . to determine if the findings made by the [b]oard are supported by the evidence." *JWL Invs.*, 133 N.C. App. at 429, 515 S.E.2d at 717 (citation omitted).

B. Discussion

[2] We now consider whether the superior court applied the appropriate standards of review to the Board's determination of the Notice of Intent and Stop Work Order, and if so, whether the superior court applied the standards correctly. We start with the issues presented to the superior court on appeal from the Board's decision.

In her petition for writ of certiorari to the superior court, Petitioner contended:

> 28. The findings, inferences, conclusion and decisions of the Board that the storage building is a commercial structure inconsistent with the R-1 zoning permit authorization granted by the Town are not supported by substantial competent evidence in view of the entire record.
>
> 29. The Board's findings, inferences, conclusions and decisions were arbitrary and capricious.
>
> . . .
>
> 31. The Board's decision violates N.C. Gen. Stat. § 160A-381 in that the Board failed to interpret the Ordinance in a manner that promotes the health, safety, morals and general welfare of the community.

Petitioner's contentions implicate both *de novo* and whole record standards of review. " '[A] court may properly employ both standards of review in a specific case.' " *Mann Media*, 356 N.C. at 15, 565 S.E.2d at 18 (quoting *Sun Suites*, 139 N.C. App. at 273, 533 S.E.2d at 528). "However, the standards are to be applied separately to discrete issues, and the reviewing superior court must identify which standard(s) it applied to which issues[.]" *Id.* (internal quotation marks and citations omitted). In this case, whole record review applies to the Board's findings and

inferences and *de novo* review applies to the Board's conclusions of law and interpretation of the Ordinance.

The superior court's judgment described the standard of review as follows:

> Based upon the facts, the [c]ourt concludes that there are questions of law presented. The [c]ourt should apply a *de novo* standard of review to Board decisions involving application and interpretation of zoning ordinances.

But the superior court also made its own findings of facts based "[u]pon reviewing the evidence and hearing argument of Counsel[.]" The superior court's language and the act of finding facts makes clear it applied a *de novo* standard to all issues in dispute, including the Board's findings and inferences. The superior court did not apply the whole record standard to the Board's findings as required by the issues presented by Petitioner. Nor did the superior court acknowledge the distinction between the issues of fact and issues of law before it.

The Board's decision was not a model of clarity for judicial review. Following the recital of the issues before it, the Board's decision states as follows: "Having heard all of the evidence and arguments presented at this hearing, the Board made the following FINDINGS OF FACT and drew the following CONCLUSIONS" and next states: "There is substantial evidence in the record to show the following Facts and Conclusions." With respect to the allegation on which it affirmed the Zoning Inspector and denied Petitioner's appeal, the Board's decision indicates that its members unanimously voted that "[b]ased on the evidence provided, the allegation is: Valid."

Article II of the Ordinance, titled "Interpretations and Definitions," does not define the term "commercial structure" or the word "commercial." It provides that "[w]ords not defined in this Ordinance shall be given their ordinary and common meaning." Town of White Lake, N.C., Zoning Ordinance, Art. II, § 2-2.1 (2011). The Town on appeal refers to the "finding" by the Board that "the structure *would* be used for commercial purposes," and comments that "the word 'could' was probably intended by the Board."[2] In addition to the Town's reference on appeal to this determination as a finding of fact, before the Board, counsel for

2. The record indicates, however, that Petitioner's counsel urged Board members to consider only the proven purpose for the Building rather than whether it "could" be used for commercial purposes. The record indicates no effort by the Town to correct the Board's word choice in its finding.

the Town and for Petitioner addressed the dispute regarding the nature of the Building as an issue of fact.[3]

In their deliberations on Petitioner's appeal in open session, Board members discussing the allegation that the Building was a commercial structure did not refer to the scope or meaning of the Ordinance. Before voting commenced, one member commented that "if you vote that it's valid which means that means [sic] you are supporting what the zoning officer has said in his letter that the accessory structure is a commercial structure and is inconsistent with R1 zoning permit authorized." Each member voted that the allegation was valid. While the language of the Board's decision was not clear, considered in the context of the record, the determination that the Building is a commercial structure arose from the Board members' consideration of evidence presented and inferences drawn from the evidence.[4] As such, it required a whole record review by the superior court, and the superior court was prohibited from substituting its findings for the findings of the Board.

The parties agree that the Board's only factual justification to affirm the Stop Work Order and the Notice of Intent—"That the structure would be used for commercial purposes"—was not supported by the evidence. The Town concedes on appeal that "there is no evidence of the Petitioner's intended use for commercial purposes." But the Town seeks to classify the Board's decision and subsequently the superior court's decision regarding the character of the building as an issue of law requiring a *de novo* review. This argument is inconsistent with the record and the language of the Board's decision.

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3. Petitioner testified that her intended use of the Building was "strictly personal." She testified that she had no plans to rent the Building or any portion of it for storage by others. She acknowledged that some of the items she planned to store in the Building were used in her vacation rental properties, but also said the storage would include "some things I put in my own house." The Town presented hearsay evidence of several complaints the Zoning Inspector had received protesting the Building or rental of storage units in Petitioner's neighborhood. Petitioner's counsel argued to the Board that "a commercial structure is a structure that is used to make money," and noted that no evidence had been presented showing that Petitioner intended to make money from the Building. The Town's counsel argued to the Board that it needed to determine, *inter alia*, "[t]he specific use of which the building is intended."

4. Likewise, the Board's determination that the Zoning Inspector's other two allegations were erroneous arose at least in part from findings of fact by the Board. Neither Petitioner, who prevailed on those issues before the Board, nor the Town appealed those determinations. They were therefore not subject to review by the superior court and are not subject to review by this Court.

[3] The Town asserts that the Board's finding that "[t]he accessory structure is a commercial structure and is inconsistent with the R-1 zoning permit authorization granted by the Town of White Lake" supports the superior court's application of a *de novo* review because consistency with the R-1 zoning permit requires an interpretation of the Ordinance, *i.e.*, an issue of law. This argument is refuted by the record of the Board's determination that the evidence presented did *not* support the Zoning Inspector's allegation that "[t]he permit recipient failed to develop or maintain the property . . . in accordance with the approved plans." The Board affirmed the Stop Work Order and Notice of Intent based solely on the allegation that the Building would be used "for commercial purposes." The superior court may not substitute its own justification for that of the Board with regard to findings and inferences from the evidence where a challenge is based upon whether substantial evidence exists to support the Board's decision. *Thompson*, 292 N.C. at 410, 233 S.E.2d at 541. The superior court, in finding that the Building was constructed inconsistent with the Permit, contradicted the Board's finding that such allegation was erroneous and substituted an alternative basis to affirm the Stop Work Order and Notice of Intent.

Ordinarily when a superior court applies the wrong standard of review to a municipal board decision, this Court vacates the superior court judgment and remands for proper application of the correct standard. *See Sutton*, 132 N.C. App. at 389, 511 S.E.2d at 342. But we need not do so in this case because the Town, in its brief before this Court, concedes that the Board's factual finding necessary for the decision challenged on appeal was not supported by the evidence. In the interest of judicial economy, we conclude remand to the superior court is unnecessary. *See Mann Media*, 356 N.C. at 15-16, 565 S.E.2d at 18-19; *Sun Suites*, 139 N.C. App. at 274, 533 S.E.2d at 528-29.

Conclusion

Because the superior court applied the wrong standard of review and entered its own findings inconsistent with the Board's findings, and because the parties agree the evidence did not support the Board's determination that the Building would be used for commercial purposes, we reverse both the superior court's decision and the Board's decision.

REVERSED.

Judges BRYANT and TYSON concur.

THE TIMES NEWS PUBLISHING COMPANY D/B/A TIMES-NEWS, PLAINTIFF
v.
THE ALAMANCE-BURLINGTON BOARD OF EDUCATION, D/B/A ALAMANCE-BURLINGTON SCHOOLS OR THE ALAMANCE-BURLINGTON SCHOOL SYSTEM; & DR. WILLIAM HARRISON, IN HIS CAPACITY AS INTERIM SUPERINTENDENT OF ALAMANCE-BURLINGTON SCHOOL SYSTEM, DEFENDANTS

No. COA16-588

Filed 7 March 2017

1. Open Meetings—closed sessions—minutes—redacted—general account

In a case in which a newspaper sought to obtain an unredacted version of the minutes of closed sessions of a board of education, the trial court correctly determined that only certain portions of the minutes were subject to disclosure. The newspaper argued that even where minutes have been properly redacted, the Open Meetings Law requires a public body to create and make public a general account of the redacted portions with sufficient detail that members of the public would be able to reasonably understand what transpired at the meeting. However, where a public body has kept minutes which are sufficient to give someone not in attendance a reasonable understanding of what transpired, the public body has met its burden to create a general account.

2. Open Meetings—closed sessions—minutes—properly redacted

Portions of board of education closed session minutes were properly redacted by the trial court. N.C.G.S. § 143-318.10(e) states that both minutes or an account of a closed session may be withheld from public inspection so long as public inspection would frustrate the purpose of the closed session.

Appeal by Plaintiff from order entered 16 December 2015 by Judge Michael O'Foghludha in Alamance County Superior Court. Heard in the Court of Appeals 19 October 2016.

The Bussian Law Firm, by John A. Bussian, for the Plaintiff-Appellant.

Tharrington Smith, LLP, by Deborah R. Stagner and Neal A. Ramee, for the Defendants-Appellees.

Stevens Martin Vaughn & Tadych, PLLC, by C. Amanda Martin, for amicus curiae North Carolina Press Association.

Christine T. Scheef and Allison B. Schafer, for amicus curiae N.C. School Boards Association.

DILLON, Judge.

The Times News Publishing Company ("Times News"), a publisher of a daily newspaper, originally brought this action seeking an order compelling the Alamance-Burlington Board of Education (the "Board") to provide unredacted minutes of a series of closed sessions of the Board. Times News appeals an order in which Judge O'Foghludha determined that only certain portions of the minutes were subject to disclosure. We affirm Judge O'Foghludha's order.

I. Background

In 2011, Dr. Lillie Cox was hired by the Board to serve as the superintendent of the Alamance-Burlington School System. In May 2014, during a closed session of the School Board, Dr. Cox resigned her position as superintendent. The Board agreed to pay her $200,000 as a severance payment and $22,000 in unused vacation pay.

In October 2014, Times News submitted a written request to the Board seeking access to the minutes from certain closed sessions, including the May 2014 closed session, "pursuant to the Public Records Act." Times News specifically requested disclosure of unredacted minutes of "specially called meeting[s], including any closed sessions in or about May of 2014 relating to the continued employment of the then current Superintendent of Schools." In response, the Board produced forty-five (45) pages of heavily redacted minutes of closed sessions held between March and May 2014.

Times News subsequently commenced this action, seeking a court order compelling the Board to produce the meeting minutes in their *unredacted* form, alleging that the Board had violated the Open Meetings Law and the Public Records Act by failing to produce the minutes. In response, the Board filed a motion to dismiss and an answer, claiming that the redacted portions of the meeting minutes consisted of confidential personnel information and information protected by attorney-client privilege.

The trial court granted the Board's motion to dismiss, concluding that "the records sought by [Times News] [were] not public records subject to disclosure under the Public Records Act." Times News appealed the trial court's grant of the Board's motion to dismiss to this Court in December 2014.

In Times News's first appeal, our Court reversed the trial court's ruling, holding that a trial court presented with an Open Meetings Law claim concerning closed meeting minutes "must review the minutes *in camera*—meaning in private, not in open court—and 'tailor the scope of statutory protection in each case' based on the contents of the minutes and their importance to the public." *Times News Publ'g Co. v. Alamance-Burlington Bd. of Educ.*, ___ N.C. App. ___, ___, 774 S.E.2d 922, 924 (2015) (quoting *News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 480, 412 S.E.2d 7, 16 (1992)).

On remand from the first appeal, the Board submitted the full unredacted minutes from the May 2014 closed session and other sessions to the trial court for *in camera* review. In its December 2015 Order, the trial court found that only one previously redacted paragraph from the minutes was subject to disclosure, ruling as follows:

> 6. With the exception of the first paragraph on the last page of the minutes, the redacted material was properly withheld as containing personnel information related to Dr. Cox and other employees, and discussions protected by the attorney-client privilege. The first paragraph on the [last][1] page contains a discussion of the policies of the Board, and that paragraph should therefore not be withheld from public inspection.
>
> . . . .
>
> 8. With the exception of the first paragraph on the last page of the minutes, public inspection of the unredacted minutes would frustrate the dual purposes of the closed sessions.
>
> 9. The first paragraph on the last page of the minutes concerns a policy issue which must be public.

Times News timely filed notice of appeal of the December 2015 Order, resulting in the appeal presently before this Court.

II. Analysis

[1] As in the first appeal, our consideration of this appeal requires us to address the interplay between two state laws enacted to ensure public

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1. The trial court's order refers to the "first paragraph on the first page" in this finding. It appears from the record and the other findings in the trial court's order that this was in error.

access to government records – the Open Meetings Law and the Public Records Act. *Times News*, ___ N.C. App. at ___, 774 S.E.2d at 925.

The Public Records Act recognizes that public records and public information are generally open to inspection by the public, *see* N.C. Gen. Stat. § 132.1(b) (2013), but it does have narrow exceptions, such as information protected by attorney-client privilege, personnel information, or confidential matters concerning students. N.C. Gen. Stat. 143-318.11 (a)(1), (3), (6) (2013); *Times News*, ___ N.C. App. at ___, 774 S.E.2d at 925. For instance, personnel records created by a local board of education are not subject to public inspection under the Public Records Act. *Id.*

The Open Meetings Law permits a public body to hold "closed sessions" – sessions not open to the public – in limited situations. *Id.*; *see* N.C. Gen. Stat. § 143-318.11. For instance, a closed session is allowed in order to (1) prevent the disclosure of non-public information, (2) allow a public body to consult with its attorney and preserve the attorney-client privilege, and (3) allow a public body to confidentially consider individual personnel issues. N.C. Gen. Stat. § 143-318.11(a). The Open Meetings Law further requires that "[e]very public body . . . keep full and accurate minutes of all official meetings, including any closed sessions." N.C. Gen. Stat. § 143-318.10(e). These minutes are considered public records under the Public Records Act, but may be withheld from public inspection where "public inspection would frustrate the purpose of a closed session." *Times News*, ___ N.C. App. at ___, 774 S.E.2d at 925 (quoting N.C. Gen. Stat. § 143-318.10).

The relevant statute, N.C. Gen. Stat. § 143-318.10, provides as follows:

> Every public body shall keep full and accurate minutes of all official meetings, including any closed sessions held pursuant to G.S. 143-318.11. Such minutes may be in written form or, at the option of the public body, may be in the form of sound or video or sound recordings. *When the public body meets in closed session, it shall keep a general account of the closed session so that a person not in attendance would have a reasonable understanding of what transpired.* Such accounts may be written narrative, or video or audio recordings. Such minutes and accounts shall be public records within the meaning of the Public Records Law, [] provided, however, that *minutes or an account of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection*

> *so long as public inspection would frustrate the purpose of a closed session.*

N.C. Gen. Stat. § 143-318.10(e) (emphasis added).

In this appeal, Times News argues that even where minutes have been properly redacted, the Open Meetings Law requires a public body, such as the Board, to create and make public a "general account" of the redacted portions with sufficient detail such that members of the public would be able to "reasonably understand what transpired" at the meeting. *See* N.C. Gen. Stat. § 143-318.10(e). Essentially, Times News contends that a "general account" of a closed session created pursuant to N.C. Gen. Stat. § 143-318.10(e) is separate from the actual minutes of the session, and further contends that even if the minutes themselves might not be subject to public inspection, the general account is subject to public inspection. We disagree with this interpretation of the Open Meetings Law.

The plain language of the Open Meetings Law provides that "every public body shall keep full and accurate *minutes*" of a closed session. The statute also provides that a public body "shall keep *a general account*" of a closed session. Our Court has previously delineated the differences between "minutes" and a "general account" as follows:

> The purpose of *minutes* is to provide a record of the actions taken by a board and evidence that the actions were taken according to proper procedures. If no action is taken, no minutes (other than a record that the meeting occurred) are necessary. The purpose of a *general account*, on the other hand, is to provide some sort of record of the discussion that took place in the closed session, whether action was taken or not. A public body must always prepare a general account of a closed session, even if minutes of that closed session are unnecessary. As a practical matter, *the general account of a meeting at which action is taken will usually serve as the minutes of that meeting as well*, if the account includes a record of the action.

Multimedia Publ'g of N. Carolina, Inc. v. Henderson Cnty., 145 N.C. App. 365, 372–73, 550 S.E.2d 846, 851 (2001) (emphasis added).

In accordance with *Multimedia*, we hold that where a public body has kept minutes which are sufficient to give someone not in attendance "a reasonable understanding of what transpired," the public body has met its obligation to create a "general account." *Multimedia*

Publ'g, 145 N.C. App. at 372–73, 550 S.E.2d at 851. We note that Times News has not challenged the trial court's conclusion of law in its 2015 Order that "the minutes of the closed session . . . do comply with the statutory requirement."

[2] Further, we hold that the statute is unambiguous in allowing a public body to prohibit public inspection of any portion of minutes or a "general account" of a closed session where disclosure would "frustrate the purpose of [the] closed session." *See State v. Hooper*, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004) ("The first step in determining a statute's purpose is to examine the statute's plain language. 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."). Specifically, N.C. Gen. Stat. § 143-318.10(e) states that both "*minutes or an account* of a closed session . . . may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session." N.C. Gen. Stat. § 143-318.10(e). Our Supreme Court has recognized that the non-disclosure provision in the Open Meetings Law is an exception to the Public Records Act. *News & Observer v. Poole*, 330 N.C. at 480, 412 S.E.2d at 16.

Here, the trial court redacted the majority of the forty-five (45) pages of minutes, noting that "the redacted material was properly withheld as containing personnel information related to Dr. Cox and other employees, [] discussions protected by the attorney-client privilege[,]" and confidential student information.

A trial court's findings, based on *in camera* review, regarding whether a public body's closed session minutes comply with the Open Meetings Law and the Public Records Act are conclusions of law, *Multimedia Publ'g*, 145 N.C. App. at 370, 550 S.E.2d at 850; therefore, the proper standard for appellate review is *de novo*.

We have carefully reviewed the unredacted minutes submitted under seal to this Court and conclude that the undisclosed portions were properly redacted by the trial court on remand. We also agree with the trial court that the first paragraph on the last page of the minutes concerns a policy issue which must be disclosed to the public. Accordingly, we affirm the trial court's order in its entirety.

AFFIRMED.

Judges ELMORE and HUNTER, JR., concur.

WARD v. WARD

[252 N.C. App. 253 (2017)]

ALONZA H. WARD, JR. AND MARIE W. WARD, PLAINTIFFS
v.
LAURA C. WARD, DEFENDANT

No. COA16-832

Filed 7 March 2017

1. Real Property—partition—implied-in-fact contract—not found

The trial court did not err by partitioning a property by sale and dividing the proceeds equally, with plaintiff receiving one half of the maintenance expenses and taxes she had paid. The parties had separated and divorced without resolving ownership of the property, so that ownership was as tenants-in-common with defendant living in the house and paying the expenses. Although defendant contended that plaintiff Alonza Ward had waived his interest in the property through an implied-in-fact contract and that she was the sole owner of the property, the trial court found and concluded that there was neither a written agreement nor particular conduct or action sufficient to give rise to a contract implied-in-fact. There was competent evidence to support this finding, and the finding was sufficient to support the conclusion.

2. Real Property—partition—equities

The trial court did not err in a partitioning proceeding for real property where defendant contended that plaintiff Alonza Ward had invoked the court's equitable powers with unclean hands because of his adulterous affair with his co-petitioner. Although partition proceedings are equitable in nature, it is well settled that a trial court will deny a cotenant's right of partition only where there has been an express or implied agreement not to partition or where partition would make it impossible to fulfill the terms of the agreement. The adulterous relationship had no bearing on the equities associated with the partitioning of a marital home.

Appeal by defendant from order entered 5 February 2016 by Judge Robert F. Johnson in Dare County Superior Court. Heard in the Court of Appeals 9 February 2017.

Phillip H. Hayes, Jr. and Bradford J. Lingg for defendant-appellant.

Aldridge, Seawell & Hudspeth, LLP, by Paddison P. Hudspeth and Laura M. Twichell, for plaintiffs-appellees.

MURPHY, Judge.

Laura Ward ("Laura") appeals from the 5 February 2016 Order partitioning real property. She contends that the trial court erred in concluding that an implied-in-fact contract did not arise through the conduct of the parties over the fifteen years preceding the filing of the petition to partition. She also argues that the trial court erred in failing to apply principles of equity relating to partitions. We disagree, and accordingly affirm the ruling below.

Factual Background

Alonza Ward, Jr. ("Alonza") and Laura had been married for nearly six years when in 1973 they purchased as tenants by the entirety the property at issue – 2010 Edenton Street, Kill Devil Hills, North Carolina. At some point thereafter, Alonza had an affair with his current wife, Marie Ward ("Marie"). Alonza and Laura separated in 2000, and Laura continued to live in the home at the Edenton Street address with the couple's minor son. During that time, Laura paid all maintenance costs and property taxes associated with the home without support or contribution from Alonza. Alonza and Laura divorced in 2006 and share the property as tenants in common.

Between the time of their separation and divorce proceedings, Laura's lawyers sent three different letters to Alonza, proposing, *inter alia*, that he agree to convey all rights in the property to her. However, Alonza never responded to those letters, nor did he sign any document acknowledging their terms.

As part of their divorce proceedings in 2006, both parties sought equitable distribution of the marital estate. Laura sought an unequal distribution in her favor on the grounds that (1) she alone bore the expenses associated with the maintenance of the property after the couple's separation; and (2) Alonza abandoned the marital relationship. Their divorce was finalized on 6 July 2006, but Alonza's and Laura's claims for equitable distribution remained pending.

On 9 May 2007, the trial court scheduled an equitable distribution pretrial conference for 31 July 2007 and ordered Alonza and Laura to submit equitable distribution inventory affidavits by specified dates – 11 June 2007 for Alonza and 12 July 2007 for Laura. The trial court specifically noted that failing to file those affidavits or being unprepared to proceed at the pretrial conference would result in dismissal of the parties' claims for equitable distribution. On 9 June 2007, Alonza voluntarily dismissed his equitable distribution claim. Neither party filed

an equitable distribution inventory affidavit or appeared for the pretrial conference. However, on 30 August 2011, Laura moved for summary judgment on her claim for unequal equitable distribution. Ultimately, Laura's claim was dismissed for failure to comply with the trial court's mandated deadlines. Laura appealed that decision to this Court, and we affirmed the dismissal.[1]

On 21 January 2015, Alonza and Marie jointly petitioned the Dare County Clerk of Superior Court for a partition by sale of the property, with the proceeds therefrom to be divided in proportion to Laura's and Alonza's respective interests in the home. Laura's response to the petition included a motion to dismiss Marie from the petition; a counterclaim for offset of the expenses she incurred maintaining the property; and affirmative defenses of waiver of the right to partition as well as estoppel. Specifically, Laura contended that Alonza waived his interest in the property through an implied-in-fact contract providing that she would remain in the home after he abandoned their marital relationship and property, and further that he should be estopped from violating his own agreement.

On 13 August 2015, the Dare County Clerk of Superior Court issued a ruling that Laura was not entitled to reimbursement from Alonza for maintenance and repairs, but should be compensated for the property taxes she paid. The Clerk also granted Alonza and Marie's petition, ordering the property be sold by private sale and the proceeds therefrom divided equally between Alonza and Laura. On 24 August 2015, Laura appealed the Clerk's order to the Dare County Superior Court.

On 19 November 2015, the Superior Court conducted a *de novo* hearing at which it considered testimony from Alonza, Laura, and their daughter, Christine Gray. On 5 February 2016, the trial court likewise ordered the property be partitioned by sale, with the proceeds equally divided between Alonza and Laura. The trial court also determined that Laura was entitled to reimbursement of one-half of all maintenance costs and property taxes she paid on the property since 6 July 2006. The trial court based this conclusion on the finding that there was neither a written agreement, nor conduct between the parties, that would give rise to either an implied-in-fact contract to transfer ownership of the property or to waive Alonza's right to partition. Laura timely appealed the order of partition to this Court.

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1 *Ward v. Ward*, 225 N.C. App. 268, 736 S.E.2d 647 (2013) (unpublished).

Analysis

I. Standard of Review

The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether those findings support the conclusions of law and ensuing judgment. *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176, *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002). Competent evidence is evidence "that a reasonable mind might accept as adequate to support the finding." *Forehand v. Forehand*, 238 N.C. App. 270, 273, 767 S.E.2d 125, 128 (2014) (citation and quotation marks omitted). Upon determining that there is competent evidence to support the trial court's findings, this Court is bound by the trial court's findings of fact, even if there is evidence in the record that would sustain findings to the contrary. *Hensgen v. Hensgen*, 53 N.C. App. 331, 335, 280 S.E.2d 766, 769 (1981).

II. Implied-in-Fact Contract

[1] Laura first argues that the trial court's finding that there was no implied-in-fact contract between her and Alonza is not supported by competent evidence. In particular, she takes issue with a portion of the court's twelfth finding of fact. In pertinent part, that finding states:

> Having considered the evidence presented and having reviewed the cases tendered by counsel for both parties, the Court finds that the cases submitted by Respondent where the Court has upheld a contract implied in fact are not applicable here because those cases are factually distinguishable. In those cases finding a contract implied in fact there has been actual conduct or some written agreement between the parties. If there was an agreement that at least impliedly modified and limited the right of partition, such an implied agreement arose from some written agreement between the parties. In this case, there is no written agreement signed by the parties that implied any agreement between the parties to waive the right to partition or to transfer ownership of the property. There was no particular conduct or action taken by either party that suggests an implied in fact contract to waive partition or transfer ownership. Rather, there were actions taken by both parties contrary to an implied agreement and indicative of a continuing dispute between the parties concerning the division of the property. . . . It appears,

> by greater weight of the evidence, that there was no agreement between the parties concerning the division of the property.[2]

Laura contends the trial court's assertion that "a petition to partition can only be denied if there is some written agreement between the parties" is incorrect. She also disagrees with the trial court's supposition that a contract implied-in-fact did not arise pursuant to the parties' conduct over the fifteen years preceding the filing of the petition to partition.

As a preliminary matter, Laura misapprehends the trial court's finding. The trial court does not state that a petition to partition will be denied *only* if a written agreement exists between the parties. Instead, it correctly identifies two means of establishing a contract implied-in-fact: "[A]ctual conduct *or* some written agreement between the parties." (Emphasis added). The trial court then went on to analyze both grounds before it ultimately found that there was neither written agreement nor "particular conduct or action taken by either party" that would reveal the existence of an implied-in-fact contract.

In determining whether the trial court's finding was in error, we must first examine a cotenant's rights in regard to partitions. Generally, a tenant in common retains the right to have the court physically partition any real estate in which he has an interest such that he may enjoy his share. N.C.G.S. § 46-3 (2015); *Kayann Props., Inc. v. Cox*, 268 N.C. 14, 19, 149 S.E.2d 553, 556 (1966). If there is no way to physically partition the property without substantial injury to any of the interested parties, a tenant in common is equally entitled to a partition by sale. N.C.G.S. § 46-22(a) (2015); *Kayann Props.*, 268 N.C. at 19, 149 S.E.2d at 557.

Although a cotenant is generally entitled to partition as a matter of right, he may waive that right by either express or implied contract. *Kayann Props.*, 268 N.C. at 20, 149 S.E.2d at 557 ("Such an agreement may be verbal, if it has been acted upon, and it need not be expressed, but will be readily implied, and enforced, if necessary to the protection of the parties." (citation and quotation marks omitted)); *see also Dillingham v. Dillingham*, 202 N.C. App. 196, 206, 688 S.E.2d 499, 507 (2010) (recognizing doctrine of estoppel as it relates to partition proceedings will

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2. In this case, the trial court's finding regarding the nonexistence of a contract implied-in-fact is a mixed finding and conclusion because it involves the application of a legal principle to a determination of facts. When the trial court's determination is a mixture of factual findings and legal conclusions, the determination is itself reviewable by the appellate courts. *Hall v. Hall*, 88 N.C. App. 297, 299, 363 S.E.2d 189, 191 (1987).

not permit tenant in common to exercise his right to partition when he has by express or implied agreement waived that right). This is because:

> In this State partition proceedings have been consistently held to be equitable in nature, and the court has jurisdiction to adjust all equities in respect to the property. Partition is always subject to the principle that he who seeks it by coming into equity for relief must do equity. Equity will not award partition at the suit of one in violation of his own agreement . . . .

Kayann Props., 268 N.C. at 20, 149 S.E.2d at 557 (internal citations and quotation marks omitted).

Here, Laura was unable to provide the trial court with an express contract within which Alonza conveyed the property or waived his right to partition. Therefore, her sole ground for relief – if any – would necessarily rely on the existence of an implied-in-fact contract.

> [A] contract implied in fact arises where the intent of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts. Such an implied contract is as valid and enforceable as an express contract. . . . It is essential to the formation of any contract that there be mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds. . . . With regard to contracts implied in fact, . . . one looks . . . to the actions of the parties showing an implied offer and acceptance.

Creech v. Melnik, 347 N.C. 520, 526-27, 495 S.E.2d 907, 911-12 (1998) (internal citations and quotation marks omitted).

At the *de novo* hearing on the petition to partition, the trial court considered caselaw, took testimony, and reviewed exhibits. In particular, the trial court examined three letters written by various attorneys on Laura's behalf over a four-year span. The first of these letters, dated 10 May 2001, was a proposed separation agreement. It enumerated suggestions as to how the couple might handle matters such as custody of the couple's minor child, his medical bills, and repairing the roof of the marital home. Relevant to the petition to partition, paragraph (7) of the letter read: "Home - You would agree to give Laura a deed conveying all your right, title and interest in the home found at 2010 Edenton Street, Kill Devil Hills, should she so request some time in the future." Alonza never signed or replied to Laura's offered separation agreement.

On 8 March 2002, Laura's second attorney sent another proposed separation agreement to Alonza. That letter stated, in pertinent part, that

> The Parties are presently owners as tenants by the entirety of a house and lot . . . . The Husband shall convey by General Warranty Deed to the Wife the marital home and the lot on which it is situated. The Husband shall convey to the Wife his interest in the above described real property simultaneous with the execution of this Agreement by the Parties. The Wife shall have sole possession and ownership of the marital home in which she now resides.

Once again, Alonza did not sign or reply to this letter.

On 6 June 2005, Laura's third lawyer sent a letter to Alonza. This letter simply stated, "[Laura] has indicated to me that if she assumes an outstanding tax liability of yours with the IRS, then you will deed to her the marital residence in which she resides with your son, Travis. Please advise as to what you have agreed to with Ms. Ward." For a third time, Alonza declined to respond in any respect.

At the hearing, the trial court also heard testimony. Specifically, the court heard directly from Alonza. In pertinent part, he testified as follows:

> Q: When you and [Laura] separated did you have a separation agreement?
>
> A: Not really.
>
> Q: Did you ever enter a written separation agreement with [Laura]?
>
> A: No, sir. I never signed anything.
>
> . . . .
>
> Q: So the equitable distribution suit is dismissed in 2011 and after that did you and [Laura] enter any type of agreement concerning the disposition or division of your home?
>
> A: No, sir.
>
> Q: At any point, [Alonza], have you and Laura Ward entered into any type of agreement concerning the disposition or division of your home?

> A: We discussed it but when we went to the court that first time--when we went to court the first time in '06 that is what that was all about, that is where we were at now.
>
> Q: That was never resolved?
>
> A: No, sir.
>
> . . . .
>
> Q: [Alonza], [Laura] never demanded child support from you following your departure, did she?
>
> A: Our agreement was I paid for the van in lieu of child support and I would pay--I carried the insurance on him, Blue Cross Blue Shield, and I also had paid all of his doctor bills which was real close to $16,000 and I also in--I believe it was--I'm not positive of the date but I can find out if I have to, I bought him a truck for $9,000 and give him a thousand dollars . . . for his taxes and insurance in '07. And the truck I paid off and just give him the title and everything, then I give him a thousand dollars. And the first year we were separated, that Christmas, I give her $400 and him $300 in case.
>
> . . . .
>
> Q: And following your departure in September of 2000, did you ever contribute anything in a monthly payment or anything of that nature in the way of spousal support toward Laura Ward?
>
> A: Like I said before, and I have that in the first lawyer she had, I have that where she sent me . . . Well, no because we had an agreement and I have that in writing. And of course I never signed that, she sent it to me from another lawyer. . . . Just like I said before, we had an agreement that I would pay the van payment instead of alimony or child support I meant.

The trial court also heard testimony from Laura. Initially, she testified that, on the day Alonza left, "he said the house was mine and everything that was in there." She also explained that it was her understanding that "the house was mine and I would take care of it." Contradictorily, however, when the trial court questioned Laura about the three letters she had attorneys send Alonza, the following exchange occurred:

> THE COURT: And for my clarification, were you at that time [you sent the letters] trying to reach some sort of settlement or agreement or trying to resolve the marital disputes?
>
> [Laura]: Yes.
>
> THE COURT: And for my clarification, I take it that the disputes over the property and all were not resolved and no final resolution was reached, is that correct?
>
> [Laura]: Correct.
>
> . . . .
>
> THE COURT: Didn't you understand as a result of your litigation that if you did not have a written document conveying to you your ex-husband's interest in the house and lot on which the house sat that you were not the sole owner of the property, didn't you understand that?
>
> [Laura]: Yes.

The trial court also heard from Christine Gray, the couple's third child. She testified that on two or three different occasions after Alonza and Laura separated, her father told her "he wasn't going to take the house away from [Laura] because she didn't have anything else." However, when asked if he made that statement, Alonza claimed, "If I did, I do not remember that."

On appeal, Laura relies on Christine's testimony as well as her own as establishing that Alonza said he was giving her the home. She also points to Alonza's testimony that an agreement existed between the parties that established Alonza would pay their youngest child's medical bills and also provide for his health insurance. Furthermore, she asserted that this testimony recognized he would pay all remaining car payments on the couple's van in place of child support or alimony. Alonza specifically noted that this agreement was in writing and sent to him by one of Laura's lawyers. Laura alleges that, if we compare these statements with the terms delineated in the first letter that one of her attorneys sent to Alonza, the two are in accord. She contends Alonza acknowledged acceptance of the offer set forth in the first proposed separation agreement. Viewing this evidence collectively, she maintains that the trial court erred in concluding an implied-in-fact contract did not arise over the fifteen years prior to the filing of the petition to partition.

Our review of this issue is limited to an assessment of whether the trial court's findings of fact are supported by competent evidence and whether those findings support the court's conclusions of law and ensuing judgment. *Cartin*, 151 N.C. App. at 699, 567 S.E.2d at 176. In this case, the trial court found that there was neither a written agreement nor particular conduct or action sufficient to give rise to a contract implied-in-fact. We are satisfied that there is competent evidence to support this finding.[3]

The evidence tended to show that Alonza declined to endorse or return the offered separation agreements presented to him by Laura. This demonstrates that he never assented to the terms of these offers. Alonza confirmed this proposition by expressly testifying that he and Laura never entered into any agreement concerning disposition or division of the home. Despite initially testifying that she believed the house was hers, Laura conceded to the trial court that she continued to send letters to Alonza in an attempt to reach a consensus regarding the possible transfer of Alonza's interest in the home. She also acknowledged when questioned by the trial court that she understood she was not the sole owner of the property after she emerged from litigation about the marital estate without a written document conveying to her Alonza's interest in the home. Collectively, this evidence tends to establish that there was never a meeting of the minds as to any proposed agreement that Alonza convey to Laura his interest in the property and that Alonza never gave up his right to partition.

In terms of countervailing evidence, Christine testified that her father maintained that he would not take the house from her mother. However, Alonza testified that he did not remember making such a remark. Additionally, Laura argues that Alonza, through his testimony that an agreement existed that matched the terms of the first letter she sent him, essentially ratified the offer articulated within that letter. However, our courts have long recognized that when there is inconsistent evidence, the judge in a non-jury trial acts as both judge and jury and resolves any conflicts in the evidence. *G.R. Little Agency, Inc. v. Jennings*, 88 N.C. App. 107, 110, 362 S.E.2d 807, 810 (1987). It is the trial court's duty to weigh all of the competent evidence presented to it, and, "[i]f different inferences may be drawn from the evidence, [the trial judge] determines which inferences shall be drawn and which shall be rejected" as he is in the best position to evaluate such discrepancies. *Williams v. Pilot Life*

3. We recognize this finding is a mixed finding of fact and conclusion of law. However, this does not affect our assessment of the validity of the finding.

Ins. Co., 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975); *Dep't of Transp. v. Elm Land Co.*, 163 N.C. App. 257, 264, 593 S.E.2d 131, 136 (2004) ("It is within the trial court's discretion to determine the weight and credibility given to all evidence presented during a non-jury trial. The trial court is in the best position to weigh the evidence, determine the credibility of witnesses and the weight to be given their testimony." (internal citations and quotation marks omitted)).

We conclude there is competent evidence to support the trial court's finding that there was no written agreement between Alonza and Laura pertaining to their rights in the property. There is also competent evidence to support the trial court's finding that there was "no particular conduct or action" taken by either party affecting ownership of the property or Alonza's right to seek partition of the property at a later date. Therefore, we are bound by both findings on appeal. *Hensgen*, 53 N.C. App. at 335, 280 S.E.2d at 769. In turn, these findings are sufficient to support the conclusion that no implied-in-fact contract was ever formed between Alonza and Laura that would make her sole owner of the property or waive his right to seek partition. Accordingly, we affirm the trial court as to this issue.

III. Principles of Equity

[2] Laura also asserts the trial court erred in failing to apply principles of equity in ordering partition by sale as an equitable means of distributing the real property at issue. Specifically, she asserts that, although the trial court equitably determined that Alonza's failure to make an effort to resolve the marital dispute precludes him from claiming he should not share in the expenses Laura incurred maintaining the home, it failed to apply these same equitable principles in allowing for a partition.

Laura submits that Alonza may not come with unclean hands to the court to invoke its equitable powers. Laura maintains he has unclean hands because "[h]e admitted that he was in an adulterous affair with the co-petitioner, Marie W. Ward, and upon separating from the Respondent, immediately and illegally cohabitated with his co-petitioner" prior to his divorce from her. In her brief, she highlights that Alonza and Marie could have been criminally charged with a Class 2 misdemeanor and civilly sued for engaging in this relationship, but discloses that "[i]n light of the 'agreement' reached by the parties herein, this was not pursued[.]"

We have already recognized that partition proceedings are equitable in nature, and the court has jurisdiction to adjust all equities in respect to the property. *Henson v. Henson*, 236 N.C. 429, 430, 72 S.E.2d 873, 873-74 (1952). A court of equity seeking to do justice among tenants in

common may either assign an improved or renovated portion of the property at issue to the person who undertakes those improvements or may reimburse that individual a reasonable allowance for that enhancement. *Holt v. Couch*, 125 N.C. 456, 461, 34 S.E. 703, 705 (1899). However, it is well-settled that a trial court will only deny a cotenant's right of partition where there has been an express or implied agreement not to partition, or where partition would make it impossible to fulfill the terms of an agreement. *Kayann Props.*, 268 N.C. at 20, 149 S.E.2d at 557. Alonza's relationship with Marie prior to his divorce from Laura has no bearing on the equities associated with the partitioning of a marital home, and Laura cites no authority suggesting otherwise on appeal.

Here, the trial court balanced the equities with respect to the property when it required Alonza to reimburse Laura for half of the expenses she incurred as a result of paying taxes on and maintaining the property. Therefore, Laura's argument that the trial court did not apply principles of equity is simply incorrect.

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Chief Judge McGEE and Judge DAVIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 MARCH 2017)

DOE v. CATAWBA COLL. No. 16-394	Mecklenburg (15CVS14140)	Affirmed
GRUBBS v. GRUBBS No. 16-129	Forsyth (13CVD634)	Reversed in Part, Vacated in Part, and Remanded in Part.
IN RE R.A.S. No. 16-805	Forsyth (15JB249)	Vacated.
LEE v. COLLINS No. 16-789	Cumberland (15CVS7239)	Affirmed
SNYDER v. GOODYEAR TIRE & RUBBER CO. No. 16-309	N.C. Industrial Commission (13-003826)	Affirmed
STATE v. BAKER No. 16-453	Durham (13CRS54775)	No Error
STATE v. BAKER No. 16-645	Mecklenburg (14CRS223560) (14CRS37595)	No Error
STATE v. BOUKNIGHT No. 16-544	Mecklenburg (14CRS247477-84) (15CRS16966)	Affirmed
STATE v. BROOKS No. 16-674	Pasquotank (14CRS50957)	No Error
STATE v. CARLTON No. 16-880	Pitt (13CRS56753) (16CRS31)	Affirmed.
STATE v. DOMINGUEZ No. 16-919	Forsyth (06CRS51434)	Affirmed.
STATE v. EDWARDS No. 16-974	Graham (14CRS50285-86) (15CRS253)	NO ERROR IN PART; REVERSED IN PART; AND REMANDED FOR RE-SENTENCING.
STATE v. HOLDEN No. 16-685	Wake (14CRS221485)	Dismissed

STATE v. HOSTETLER No. 16-680	Mecklenburg (13CRS206652-656) (13CRS206659-660) (13CRS206809-810)	Appeal dismissed.
STATE v. ISLEY No. 16-401	Guilford (14CRS65788)	No Error
STATE v. MARSHALL No. 16-731	Hyde (15CRS174) (15CRS50125)	No Error
STATE v. MOOSE No. 16-867	Rowan (14CRS50104-05)	No Error
STATE v. MORRISON No. 16-942	Cabarrus (13CRS2694-96) (13CRS51693) (16CRS182-184)	Affirmed.
STATE v. MUHAMMAD No. 16-306	Mecklenburg (13CRS240853-54)	No prejudicial error in part, dismissed in part.
STATE v. OXNER No. 16-859	Union (13CRS52896) (13CRS52897)	No Error
STATE v. ROA No. 16-769	Hoke (13CRS50993) (13CRS51225-26) (14CRS695-96)	No error in part; Remanded for correction of clerical error in 13 CRS 50993.
STATE v. ROJAS No. 16-802	Mecklenburg (15CRS208860) (15CRS208863)	Vacated and Remanded
STATE v. SANTANA No. 16-691	Wake (14CRS218611)	Affirmed
STATE v. SAUNDERS No. 16-825	Forsyth (14CRS54331-32) (14CRS54334)	No Error
STATE v. SHEPHERD No. 16-935	Guilford (12CRS68426) (12CRS68430)	No Error

STATE v. WILLIAMS No. 16-855	Currituck (15CRS127-129)	No Error
STATE v. WILLIAMSON No. 16-820	Wake (12CRS252)	No Error

CELIA A. BELL, EMPLOYEE, PLAINTIFF
v.
GOODYEAR TIRE AND RUBBER COMPANY, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA15-1299

Filed 21 March 2017

1. Workers' Compensation—causation—shoulder injury

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee's shoulder injury was causally related to her compensable 12 May 2007 work injury. Defendants failed to present evidence to disprove the causal connection.

2. Workers' Compensation—temporary total disability compensation—trial return to work unsuccessful—immediate reinstatement of benefits—penalty

The Industrial Commission erred in a workers' compensation case by failing to conclude that defendants were required to immediately reinstate disability compensation benefits upon notice that her trial return to work was unsuccessful. Defendants were subject to a 10% penalty on temporary total disability compensation benefits not paid to plaintiff following the end of her trial return to work.

3. Workers' Compensation—attorney fees—costs

The Industrial Commission did not abuse its discretion by allegedly failing to consider the imposition of sanctions, including attorney fees and costs pursuant to N.C.G.S. § 97-88.1. The Commission considered the award of attorney fees and costs and denied them.

Appeal by defendants and cross-appeal by plaintiff from opinion and award entered 3 September 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 April 2016.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for plaintiff-appellee and cross-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Matthew J. Ledwith and M. Duane Jones, for defendant-appellants and cross-appellees.

BRYANT, Judge.

Where defendants failed to rebut the presumption that plaintiff's 2013 shoulder injury was causally related to her compensable 2007 shoulder injury, we affirm the Industrial Commission's conclusion and award of disability compensation. Where defendants failed to reinstate plaintiff's temporary total benefits following defendants' admission of plaintiff's right to compensation and notice of her unsuccessful trial return to work and where defendants further failed to file with the Industrial Commission a request to terminate plaintiff's disability compensation, defendants are subject to a ten percent penalty for payments due to plaintiff following her unsuccessful trial return to work. Where the Commission acted within its discretion by denying plaintiff an award of attorney fees and costs, we affirm the denial of plaintiff's request.

On 12 May 2007, plaintiff Celia A. Bell was employed by defendant-employer Goodyear Tire and Rubber Company as a tire builder. When pulling and twisting a tire carcass, she felt a "pop" in her right shoulder. Plaintiff was examined by Dr. Christopher Barnes, who "performed an arthroscopic subacromial decompression and arthroscopic superior labrum anterior and posterior (SLAP) lesion repair" to her right shoulder. Plaintiff filed a Form 18, Notice of Accident to Employer and Claim of Employee regarding the injury to her right shoulder. Defendant entered a Form 26A, Employer's Admission of Employee's Right to Permanent Disability which was approved by the Commission on 21 December 2008. After defendant filed three Form 60s, Employer's Admission of Employee's Right to Compensation, altering the compensation amount and the body part injured, Deputy Commissioner Chrystal Redding Stanback filed an Opinion and Award in which she concluded that plaintiff sustained a "compensable injury to her *right shoulder* pursuant to N.C. Gen. Stat. § 97-2(6), and concluded Plaintiff was entitled to payment of future necessary medical compensation for her compensable injury pursuant to N.C. Gen. Stat. § 97-25.1." (Emphasis added).

On 9 January 2010, plaintiff again injured her right shoulder at work. The parties entered into a Consent Order approved by the Industrial Commission, wherein "the parties agree[d] that the . . . right shoulder exacerbation injury [was] a continuance of the admittedly compensable right shoulder injury sustained on May 12, 2007."

Following the 2010 incident, plaintiff was examined by Dr. Robert Carroll, a physician board certified in orthopedics, specializing in shoulder treatment.

> Dr. Carroll . . . probed the biceps tendon and noted a suture anchor which had grasped tissue from the middle

> glenohumeral ligament. Dr. Carroll then debrided the scar tissue at the suture site, released the glenohumeral ligament and removed the suture material. Dr. Carroll testified that Plaintiff's symptoms were likely coming from the acromioclavicular joint and the rotator cuff but it was also possible her pain was due to the biceps tendon.

On 14 March 2012, Dr. Carroll noted that plaintiff had achieved maximum medical improvement (MMI) and assigned her permanent physical restrictions to avoid carrying over 45 pounds, lifting more than 25 pounds from waist to shoulder, and over 40 pounds from waist to floor. However, when defendant could not provide plaintiff a job within those physical restrictions, plaintiff did not return to work.

On 21 December 2012, plaintiff reported to Dr. Carroll after she felt pain in her right shoulder while raking her yard. "Dr. Carroll assessed right shoulder pain and possible proximal biceps tendinitis." He prescribed a steroid taper and pain medication.

On 19 August 2013, plaintiff returned to work in a position that defendant described as within her permanent physical restrictions. On 6 September, plaintiff was performing heavy lifting when, again, she felt a "pop" in her right shoulder. Plaintiff sought treatment at a clinic later that day. On 9 September, plaintiff was seen by Dr. Carroll. "Dr. Carroll found limited and uncomfortable internal rotation and relative weakness of the rotator cuff." Plaintiff was assigned restrictions of no lifting or carrying over 5 pounds and no pulling or pushing over 10 pounds. But because defendants could not accommodate these restrictions, plaintiff did not return to work until 3 October 2013, when Dr. Carroll assigned new physical restrictions: "no lifting or carrying over 20 pounds, no pulling or pushing over 30 pounds, no work over shoulder height, and the ability to take 10-minute breaks every two hours."

Back on 12 September 2013, defendant filed a Form 28T, Notice of Termination of Compensation by Reason of Trial Return to Work, which indicated that payments of temporary total disability benefits to plaintiff were terminated on 18 August 2013 due to plaintiff's trial return to work on 19 August 2013. On 16 September 2013, defendant filed a Form 62, Notice of Reinstatement or Modification of Compensation. However, defendant "pulled and destroyed" the form and failed to reinstate plaintiff's disability compensation.

Plaintiff returned to work on 3 October and continued through 23 October 2013, when she again returned to Dr. Carroll with complaints of shoulder pain. Plaintiff was diagnosed with "proximal biceps tendinitis"

in her right shoulder. Given new work restrictions, which defendant was unable to accommodate, plaintiff did not return to work after 23 October 2013 and remained out of work through 27 May 2015 (the date this matter was heard before the North Carolina Industrial Commission).

On 14 October 2013, plaintiff filed a motion with the Industrial Commission to request reinstatement of temporary total disability compensation. Defendants challenged whether "[p]laintiff's current complaints resulting in work restrictions [were] causally related to the accepted May 12, 2007 injury or to the documented lifting incident without accident of September 6, 2012."

The matter came before a deputy commissioner who concluded that "[t]he medical opinion testimony in this case [was] insufficient to establish that [p]laintiff's biceps tendon is causally related to Plaintiff's original right shoulder injury in 2007 or subsequent re-injury in 2010[,]" and denied plaintiff's claim for additional temporary total disability compensation benefits stemming from the 6 September 2013 incident. Plaintiff appealed to the Full Commission ("the Commission").

On 3 September 2015, the Commission filed an Opinion and Award reversing the opinion and award of the deputy commissioner. In its findings of fact, the Commission noted testimony from three physicians (Drs. Kevin Speer, Christopher Barnes, and Carroll) that was equivocal as to whether plaintiff's 6 September 2013 injury to her biceps tendon was causally related to her admittedly compensable 12 May 2007 right shoulder injury. However, the Commission noted that due to the *Parsons* presumption, a rebuttable presumption that additional medical treatment is related to an initial compensable injury (as discussed in *Parsons v. Pantry*, 126 N.C. App. 540, 485 S.E.2d 867 (1997)), defendants had the burden of proof to show that the September 2013 injury and treatment was not directly related to the 2007 compensable injury. The Commission concluded defendants failed to rebut the presumption. The Commission thus determined that plaintiff's attempted trial return to work was unsuccessful due to her 12 May 2007 injury. Defendants Goodyear Tire and Rubber Company and Liberty Mutual Insurance Company were ordered to pay plaintiff temporary total disability benefits for the stated periods from 9 September to 5 October 2013 and from 24 October 2013 to the date of hearing, and until plaintiff returned to work or otherwise ordered by the Commission.

Defendants and plaintiff both appeal.

On appeal, (I) defendants argue the Commission erred by concluding plaintiff's shoulder injury was causally related to her compensable work injury. On cross-appeal, plaintiff argues the Commission erred by failing to (II) conclude that defendants were required to immediately reinstate compensation benefits upon learning of plaintiff's failed trial return to work and (III) assess a late penalty and impose sanctions as a result.

Standard of Review

The Commission is the ultimate finder of fact in a workers' compensation case. *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998). This Court reviews an award from the Commission to make two determinations: "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (citation omitted). On appeal, findings of fact may be set aside if there is a complete lack of competent evidence to support them. *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230 538 S.E.2d 912, 914 (2000). Even if there is evidence to support a contrary finding, the Industrial Commission's findings of fact are conclusive on appeal if they are supported by competent evidence. *Sanderson v. Ne. Constr. Co.*, 77 N.C. App. 117, 121, 334 S.E.2d 392, 394 (1985) (citation omitted). The Commission's conclusions of law are reviewed *de novo*. *Griggs v. E. Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

Defendants' appeal

I

[1] Defendants argue that the Commission erred by concluding plaintiff's shoulder injury was causally related to her compensable 12 May 2007 work injury. Defendants contend the injury sustained on 6 September 2013 was to the biceps tendon and assert that it is a part of the body different from the superior labrum and rotator cuff plaintiff injured on 12 May 2007. Thus, defendants argue the Commission erred by applying the *Parsons* presumption and, as a result, improperly shifted the burden of proof to defendants to disprove the causal relationship between the injuries. We disagree.

"In a worker's compensation claim, the employee has the burden of proving that his claim is compensable. An injury is compensable as employment-related if any reasonable relationship to employment exists." *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752

(2003) (citations omitted). Once an employee has established a causal relationship between a workplace accident and the injury, an employer is required to pay future medical treatment directly related to the original compensable injury. *Parsons*, 126 N.C. App. at 541–42, 485 S.E.2d at 869. "Where a plaintiff's injury has been proven to be compensable, there is a presumption that the additional medical treatment is directly related to the compensable injury. The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury." *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 135, 620 S.E.2d 288, 292 (2005) (citations omitted) (citing *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869); *see also id.* at 136 n.1, 620 S.E.2d at 293 n.1 ("We can conceive of a situation where an employee seeks medical compensation for symptoms completely unrelated to the compensable injury. But the burden of rebutting the presumption of compensability in this situation, although slight, would still be upon the employer.").

Defendants accepted plaintiff's 12 May 2007 right shoulder injury as compensable, and on 28 October 2009, Deputy Commissioner Stanback issued an opinion and award concluding there was a "substantial risk of the necessity of future medical compensation for Plaintiff for her compensable injury." Defendants argue the Commission erred in applying the *Parson's* presumption because plaintiff sustained a new injury to a different body part. We disagree. Defendants accepted the compensability of the injury to plaintiff's right shoulder and will not be heard to say now that the right bicep tendon, a part of the right shoulder complex, is not connected to the right shoulder. Defendants challenge to the Commission's application of the *Parson's* presumption must fail, and defendants properly had the burden of proof to rebut the presumption that a causal relationship existed between the injuries.

Before this Court, defendants contest the causal relationship between plaintiff's 12 May 2007 shoulder injury and the proximal biceps tendinitis diagnosed after plaintiff's 6 September 2013 incident. They assert that they have met the burden of proof that plaintiff's bicep injury is causally related to her 6 September 2013 incident, identifying proximal biceps tendinitis, and not causally related to the compensable injury occurring 12 May 2007.

The Commission reviewed testimony from three physicians, each of whom examined plaintiff: Dr. Carroll, Dr. Barnes, and Dr. Speer. After reviewing the testimony of Dr. Barnes, a board-certified orthopedic

surgeon specializing in treatment of upper extremities, the Commission made the following unchallenged finding of fact[1]:

> [Dr. Barnes testified that a] superior labral tear is repaired at the location where the biceps tendon attaches to the shoulder socket. Once the labrum is repaired, it is not as strong as it was prior to the tear, in part because it fills with scar tissue. The superior labral repair [conducted as a result of the 12 May 2007 injury] placed Plaintiff at a higher risk of having an injury to the biceps tendon.

And though defendants also challenge the Commission's finding of fact regarding Dr. Carroll's testimony, in their brief to this Court, defendants acknowledge the viewpoint expressed by both Drs. Speer and Barnes "that Dr. Carroll is the provider in the best position to give an opinion as [to] the state of Plaintiff's shoulder between the 2011 surgery and the 6 September 2013 Urgent Care presentation." We note in pertinent part that the finding of fact based on Dr. Carroll's testimony is consistent with the Commission's unchallenged finding of fact regarding Dr. Barnes's testimony.

> [Dr. Carroll] went on to testify that the biceps tendon is part of the "complex," that where the bicep[] attaches to the bone is where the anterior labrum is, and that the multiple shoulder surgeries Plaintiff had put her at risk for further injury, and there it is related. However, he ultimately concluded that it was too speculative for anyone to say whether her pain is coming from the 2013 event, or all related back to May 12, 2007.

Three physicians examined plaintiff, each board certified in orthopedics and specializing in treatment of the shoulder or upper extremities. And each testified that he could not say to a reasonable degree of medical certainty that plaintiff's 2013 diagnosis of proximal biceps tendinitis was caused by her 12 May 2007 compensable injury. Nevertheless, Drs. Barnes and Carroll each testified that the superior labral repair plaintiff underwent in 2007 weakened the complex where her bicep attaches to the shoulder socket and placed plaintiff at a higher risk for injury to the bicep tendon. Thus, this testimony lends support to the presumption that additional medical treatment to plaintiff's right shoulder complex

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1. In support of this finding, the Commission cited Dr. Barnes testimony: " 'I think it's going to boil down to is I don't know if she hurt it at work, . . .' but the prior superior labral repair 'places her at a higher risk of subsequent injuries.' "

is directly related to the 12 May 2007 compensable right shoulder injury. *Perez*, 174 N.C. App. at 135, 620 S.E.2d at 292 (establishing a compensable injury raises a presumption that future medical treatment is related to the compensable injury). Therefore, there was sufficient evidence to support the Commission's findings of fact and conclusions of law that the medical treatment of plaintiff's right shoulder proximal biceps tendinitis was causally related to her 12 May 2007 compensable right shoulder injury. With the burden of proof shifted, defendants failed to present evidence to disprove the causal connection. *See id.* at 135, 620 S.E.2d at 292 (rebutting the presumption of a causal connection between a compensable injury and future medical treatment is initially the employer's burden). Accordingly, defendants' argument is overruled.

Plaintiff's cross-appeal

II & III

[2] On cross-appeal, plaintiff argues that the Commission erred by failing to conclude that defendants were required to *immediately* reinstate disability compensation benefits upon notice that her trial return to work was unsuccessful thus subjecting defendants to sanctions in the form of a late payment penalty, attorney fees, and costs. We agree in part.

Pursuant to the Workers' Compensation Rules of the Industrial Commission, "when compensation for total disability being paid pursuant to N.C. Gen. Stat. § 97-29 is terminated because the employee has returned to work for the same or a different employer, such termination is subject to the trial return to work provisions of N.C. Gen. Stat. § 97-32.1." Workers' Comp. R. of N.C. Indus. Comm'n 404A(1), 2014 Ann. R. (N.C.) 1275, 1283. Pursuant to General Statutes, section 97-32.1,

> an employee may attempt a trial return to work for a period not to exceed nine months. . . . *If the trial return to work is unsuccessful, the employee's right to continuing compensation under G.S. 97-29* [("Rates and duration of compensation for total incapacity")] *shall be unimpaired* unless terminated or suspended thereafter pursuant to the provisions of [the Workers' Compensation Act].

N.C. Gen. Stat. § 97-32.1 (2015) (emphasis added); *see also Burchette v. E. Coast Millwork Distribs, Inc.*, 149 N.C. App. 802, 808–09, 562 S.E.2d 459, 463 (2002) (discussing the statutory authority for ceasing and reinstating disability compensation pursuant to N.C. Gen. Stat. §§ 97-18.1 and -32.1). "If during the trial return to work period, the employee must stop working due to the injury for which compensation had been paid,

the employee should complete and file with the Industrial Commission a Form 28U[, ('Request that compensation be reinstated')] . . . ." Workers' Comp. R. 404A(2). "If the employee fails to provide the required certification of an authorized treating physician as specified in [Workers' Comp. R. 404A(2)], . . . the employer or carrier/administrator *shall not be required* to resume payment of compensation." *Id.* 404A(3) (emphasis added). However, interpreting N.C. Gen. Stat. § 97-32.1, this Court has held that "[t]hough an employee 'should' give notice to an employer of an unsuccessful trial return to work via a Form 28U prior to total disability compensation resuming, *a Form 28U is not required for reinstatement of compensation*." *Davis v. Hospice & Palliative Care of Winston-Salem*, 202 N.C. App. 660, 668, 692 S.E.2d 631, 637 (2010) (emphasis added) (citing I.C. Rule 404A(3) (2009); *Burchette*, 149 N.C. App. at 809, 562 S.E.2d at 463)); *accord Jenkins v. Pub. Serv. Co. of N.C.*, 134 N.C. App. 405, 411, 518 S.E.2d 6, 10 (1999) ("If [a] trial return to work is unsuccessful, the employee's right to continuing compensation under G.S. 97-29 [for total incapacity] shall be unimpaired . . . . To expedite reinstatement of an employee's compensation pending a determination by the Commission of whether an employee's return to work was unsuccessful, the Commission's rules provide that an employee may file a Form 28U 'Request that Compensation be Reinstated.' . . . Upon the filing of a properly completed Form 28U, the defendant-employer shall forthwith resume payment of compensation for total disability." (alterations in original) (citations omitted)), *rev'd in part on other grounds*, 351 N.C. 341, 524 S.E.2d 805 (2000).

To the extent that there is a contradiction between General Statutes, section 97-32.1 (stating where "the trial return to work is unsuccessful, the employee's right to continuing compensation . . . shall be unimpaired") and Workers' Compensation Rule 404A(3) (stating where an employee fails to file a Form 28U with the Industrial Commission "the employer or carrier/administrator *shall not be required* to resume payment of compensation"), this Court has held that General Statutes, section 97-32.1 controls.[2] *See Davis*, 202 N.C. App. at 668, 692 S.E.2d at 637 (citing *Burchette*, 149 N.C. App. at 809, 562 S.E.2d at 463–64); *see also id.* at 669, 692 S.E.2d at 637 ("[E]mployers do not have the right to present evidence before reinstating disability compensation following notice

2. "To make its purpose that the North Carolina Workmen's Compensation Act shall be administered exclusively by the North Carolina Industrial Commission effective, the General Assembly has empowered the said Industrial Commission to make rules, *not inconsistent with this act*, for carrying out the provisions of the act . . . ." *Chaisson v. Simpson*, 195 N.C. App. 463, 473, 673 S.E.2d 149, 158 (2009) (quoting *Winslow v. Carolina Conf. Ass'n*, 211 N.C. 571, 579, 191 S.E. 403, 408 (1937) (internal quotation marks omitted)).

of an unsuccessful return to work. When an employer receives notice, either through a Form 28U or other means of acquiring actual knowledge, then disability compensation should be reinstated automatically.").

Here, the Commission made the following unchallenged finding of fact:

> 21. Defendants had notice in September 2013 that the trial return to work was unsuccessful; however, defendants took the position that the condition which rendered Plaintiff unable to work after September 9, 2013 and October 24, 2013 was not causally related to the injury she had sustained at work on May 12, 2007.

The Commission concluded that plaintiff had an unsuccessful trial return to work and that

> it would be inconsistent with the policy and intent behind N.C. Gen. Stat. § 97-32.1 to conclude that Plaintiff is not entitled to further benefits . . . . Therefore, as a result to the injury of May 12, 2007, plaintiff was temporarily and totally disabled from September 9, 2013 to October 5, 2013, and again from October 24, 2013 to the present and ongoing.

Plaintiff contends that the Commission "should have [further concluded] that . . . defendants were obligated to reinstate [plaintiff]'s compensation *immediately* . . . ." (Emphasis added). In accordance with General Statutes, section 97-32.1 and the opinion issued by this Court in *Davis*, we agree. *See* N.C.G.S. § 97-32.1 ("If the trial return to work is unsuccessful, the employee's right to continuing compensation under G.S. 97-29 shall be unimpaired . . . ."); *Davis*, 202 N.C. App. at 668, 692 S.E.2d at 637 ("Total disability compensation must be reinstated under N.C. Gen. Stat. § 97-32.1 . . . as soon as an employer has knowledge that an employee's return to work has been unsuccessful." (citation omitted)); *cf. Jenkins*, 134 N.C. App. at 411, 518 S.E.2d at 10.

Plaintiff further contends that because defendant failed to automatically reinstate disability compensation after notice that plaintiff's trial return to work was unsuccessful, defendant was required to pay plaintiff an additional ten percent of the outstanding total disability payments at the time of the 3 September 2015 Opinion and Award.

General Statutes, section 97-18, "[i]f any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%)

thereof, which shall be paid at the same time as, but in addition to, such installment . . . ." N.C. Gen. Stat. § 97-18(g) (2015).

In *Burchette*, 149 N.C. App. 802, 562 S.E.2d 459, a panel of this Court considered whether the Commission's assessment of a ten percent penalty, pursuant to section 97-18(g) was in error. The facts indicated that the employee suffered a compensable injury, received disability benefits, and subsequently attempted a trial return to work. However, the return to work was unsuccessful. The employer's contention on appeal was the employee's failure to file a Form 28U "reliev[ed] the employer of any responsibility to resume payment of disability compensation." *Id.* at 808, 562 S.E.2d at 463. The Court panel disagreed.

> [O]nce [the defendant-employer] had knowledge that [the plaintiff-employee]'s trial return to work was unsuccessful, they were required to reinstate compensation pursuant to the Form 21[3] . . . . At the time the trial return to work was unsuccessful, the defendants did not qualify for the exception listed in N.C.G.S. § 97-18.1(b.)[4] Defendants' remedy at that point, if they felt plaintiff's refusal to work was unjustified, was to file a Form 24 [(a request to terminate benefits)] pursuant to N.C.G.S. § 97-18.1(c). As a result of defendants' failure to follow these procedures, defendants are subject to the ten percent penalty pursuant to N.C.G.S. § 97-18(g).

Id. at 809, 562 S.E.2d at 463–64.

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3. [A] Form 21 agreement (approved by the Commission) represents an admission of liability by the employer for disability compensation pursuant to the Workers' Compensation Act (the "Act"). [*S*]*ee* . . . [*Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994)] (Form 21 agreement is an admission by employer of liability, entitling employee to continuing presumption of disability).

Kisiah v. W.R. Kisiah Plumbing, 124 N.C. App. 72, 77, 476 S.E.2d 434, 436 (1996).

4. As cited in *Burchette*, North Carolina General Statutes, section 97-18.1 states that

> [a]n employer may terminate payment of compensation for total disability being paid pursuant to G.S. 97-29 when the employee has returned to work for the same or a different employer . . . . The employer shall promptly notify the Commission and the employee, on a form prescribed by the Commission, of the termination of compensation . . . .

149 N.C. App. at 808, 562 S.E.2d at 463 (quoting N.C. Gen. Stat. § 97-18.1 (1999)).

Here, in finding of fact 20, the Commission found that following plaintiff's unsuccessful trial return to work, "[d]efendants filed a Form 62, Notice of Reinstatement or Modification of Compensation, indicating that payment of temporary total disability benefits would be reinstated on September 11, 2013" before the form was "pulled and destroyed." In finding of fact 21, the Commission made the following unchallenged statement:

> 21. Defendants had notice in September 2013 that the trial return to work was unsuccessful; however, defendants took the position that the condition which rendered Plaintiff unable to work after September 9, 2013 and October 24, 2013 was not causally related to the injury she had sustained at work on May 12, 2007.

The record fails to reflect any action by defendants giving notice to plaintiff or the Commission to contest plaintiff's right to compensation in accordance with our General Statutes, section 97-18(c) ("If the employer or insurer denies the employee's right to compensation, the employer or insurer shall notify the Commission, on or before the fourteenth day after it has written or actual notice of the injury . . ., or within such reasonable additional time as the Commission may allow, and advise the employee in writing of its refusal to pay compensation on a form prescribed by the Commission." N.C. Gen. Stat. § 97-18(c) (2015)). Defendants simply refused to reinstate plaintiff's disability compensation benefits following notice of plaintiff's unsuccessful trial return to work. Therefore, in consideration of the Commission's findings of fact, including the conclusion that plaintiff's trial return to work was unsuccessful due to her 7 May 2012 compensable injury, we hold that defendants are subject to a penalty of ten percent (10%) on temporary total disability compensation benefits not paid to plaintiff following the end of her trial return to work in accordance with General Statutes, section 97-18(g). We remand this matter to the Commission for entry of an Opinion and Award consistent with this opinion.

[3] Plaintiff further contends that the Commission erred in failing to consider the imposition of sanctions, including attorney fees and costs pursuant to N.C. Gen. Stat. § 97-88.1.

"The decision whether to award or deny attorney's fees rests within the sound discretion of the Commission and will not be overturned absent a showing that the decision was manifestly unsupported by reason." *Thompson v. Fed. Express Ground*, 175 N.C. App. 564, 570, 623 S.E.2d 811, 815 (2006) (citation omitted). Under section 97-88.1, "[i]f

the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." N.C. Gen. Stat. § 97-88.1 (2015).

We note that in its Opinion and Award, the Commission reasoned that "[d]efendants' defense of this matter was not grounded in unfounded litigiousness and Plaintiff is not entitled to attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1. Thus, the Commission considered the award of attorney fees and costs and denied them, as was within its discretion. Accordingly, this argument is overruled.

REVERSED IN PART AND REMANDED; AFFIRMED IN PART.

Judges STROUD and DIETZ concur.

HARRIS & HILTON, P.A., PLAINTIFF
v.
JAMES C. RASSETTE, A/K/A CHAD RASSETTE, DEFENDANT

No. COA16-809

Filed 21 March 2017

1. Appeal and Error—interlocutory orders and appeals—substantial right—order disqualifying counsel

An order disqualifying counsel is immediately appealable because it affects a substantial right.

2. Attorneys—disqualification—fee collection case—Rule 3.7

The trial court did not abuse its discretion by disqualifying two attorneys from appearing as trial counsel for their law firm in a fee collection case based on their status as necessary witnesses. The trial court properly applied Rule 3.7 of the North Carolina Rules of Professional Conduct as written.

Appeal by plaintiff from order entered 20 June 2016 by Judge Debra S. Sasser in Wake County District Court. Heard in the Court of Appeals 31 January 2017.

Harris & Hilton, P.A., by Nelson G. Harris, for plaintiff-appellant.

Williams Mullen, by Kelly Colquette Hanley, for defendant-appellee.

DAVIS, Judge.

This case presents the question of whether a categorical exception to the applicability of Rule 3.7 of the North Carolina Rules of Professional Conduct exists in fee collection cases. Harris & Hilton, P.A. ("Harris & Hilton") appeals from the trial court's order disqualifying Nelson G. Harris ("Mr. Harris") and David N. Hilton ("Mr. Hilton") from appearing as trial counsel in this action based on their status as necessary witnesses. Because this Court lacks the authority to create a new exception to Rule 3.7, we affirm the trial court's order.

Factual and Procedural Background

On 10 June 2015, Harris & Hilton filed the present action in Wake County District Court against James C. Rassette ("Defendant") to recover attorneys' fees for legal services the firm had allegedly provided to Defendant prior to that date. The complaint asserted that Harris & Hilton was entitled to recover $16,935.69 in unpaid legal fees. On 13 November 2015, Defendant filed an answer in which he asserted various defenses, including an assertion that no contract had ever existed between the parties.

On 10 June 2016, a pre-trial conference was held before the Honorable Debra S. Sasser. During the conference, Judge Sasser expressed a concern about the fact that Harris & Hilton's trial attorneys — Mr. Harris and Mr. Hilton — were also listed as witnesses who would testify at trial on behalf of Harris & Hilton. After determining that Mr. Harris and Mr. Hilton were, in fact, necessary witnesses who would be testifying regarding disputed issues such as whether a contract had actually been formed, Judge Sasser entered an order on 20 June 2016 disqualifying the two attorneys from representing Harris & Hilton at trial pursuant to Rule 3.7. On 27 June 2016, Harris & Hilton filed a notice of appeal to this Court.

Analysis

I. Appellate Jurisdiction

[1] As an initial matter, we must determine whether we possess jurisdiction over this appeal. "[W]hether an appeal is interlocutory presents a jurisdictional issue, and this Court has an obligation to address the issue *sua sponte*." *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390,

392, 651 S.E.2d 261, 263 (2007) (citation, quotation marks, and brackets omitted). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Id.* (citation omitted). Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather "directs some further proceeding preliminary to the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985).

"Generally, there is no right of immediate appeal from interlocutory orders . . . ." *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, 228 N.C. App. 314, 317, 745 S.E.2d 69, 72 (2013) (citation and quotation marks omitted). The prohibition against interlocutory appeals "prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 800, 526 S.E.2d 494, 496 (2000) (citation and brackets omitted).

> However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

N.C. Dep't of Transp. v. Page, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (internal citations omitted).

In the present case, the trial court's order is not a final judgment, and Judge Sasser's order does not contain a certification under Rule 54(b). Therefore, this appeal is proper only if Harris & Hilton is able to show the existence of a substantial right that would be lost absent an immediate appeal. *See Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) ("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.").

Harris & Hilton contends that because the trial court's order serves to disqualify its chosen trial counsel, the order affects a substantial right that would otherwise be lost in the absence of an immediate appeal. This Court has held that "an order disqualifying counsel is immediately

appealable because it affects a substantial right." *Robinson & Lawing, L.L.P. v. Sams*, 161 N.C. App. 338, 339 n.3, 587 S.E.2d 923, 925 n.3 (2003) (citation omitted). Thus, we possess jurisdiction over this appeal.

II. Applicability of Rule 3.7

[2] Harris & Hilton's sole argument is that the trial court abused its discretion by disqualifying Mr. Harris and Mr. Hilton pursuant to Rule 3.7. "Decisions regarding whether to disqualify counsel are within the discretion of the trial judge and, absent an abuse of discretion, a trial judge's ruling on a motion to disqualify will not be disturbed on appeal." *Oliver v. Bynum*, 163 N.C. App. 166, 169, 592 S.E.2d 707, 710 (2004) (citation and quotation marks omitted). Under the abuse of discretion standard, "we review to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Brewer v. Hunter*, 236 N.C. App. 1, 8, 762 S.E.2d 654, 658 (citation and quotation marks omitted), *disc. review dismissed*, 367 N.C. 800, 766 S.E.2d 769 (2014).

Rule 3.7 states, in pertinent part, as follows:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

N.C. Rev. R. Prof. Conduct 3.7(a).

Rule 3.7 prohibits a lawyer from simultaneously serving in these dual roles because "[c]ombining the role of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client." N.C. Rev. R. Prof. Conduct 3.7, cmt. 1. We have previously applied Rule 3.7 in the context of fee collection cases. *See, e.g.*, *Robinson & Lawing, L.L.P.*, 161 N.C. App. at 341, 587 S.E.2d at 925 (holding that trial court properly disqualified defense counsel based on her status as necessary witness in action to recover legal fees).

Harris & Hilton does not dispute the fact that (1) Mr. Harris and Mr. Hilton will both be necessary witnesses at trial; (2) their testimony will encompass material, disputed issues; and (3) none of the three

above-quoted exceptions contained within Rule 3.7 are applicable. Nor does it contest the fact that a literal reading of Rule 3.7 supports the trial court's ruling. Instead, it asks this Court to adopt a new exception based on its contention that Rule 3.7 should not be applied in fee collection actions to disqualify counsel from both representing their own firm and testifying on its behalf.

Harris & Hilton argues that permitting a law firm's attorney to serve both as trial counsel and as a witness in a fee collection case is no different than allowing litigants to represent themselves *pro se*. It is true that litigants are permitted under North Carolina law to appear *pro se* — regardless of whether the litigant is an attorney or a layperson. *See* N.C. Gen. Stat. § 1-11 (2015) ("A party may appear either in person or by attorney in actions or proceedings in which he is interested."); N.C. Gen. Stat. § 84-4 (2015) ("[I]t shall be unlawful for any person or association of persons, except active members of the Bar . . . to practice as attorneys-at-law, to appear as attorney or counselor at law in any action or proceeding before any judicial body . . . *except in his own behalf as a party thereto*[.]" (emphasis added)).

However, the present case does not involve the ability of Mr. Harris or Mr. Hilton to represent themselves on a *pro se* basis. Instead, they seek to represent their *law firm* — a professional corporation — in a suit against a third party while simultaneously serving as witnesses on their firm's behalf as to disputed issues of fact. It is well established that an entity such as Harris & Hilton is treated differently under North Carolina law than a *pro se* litigant. *See LexisNexis*, *Div. of Reed Elsevier*, *Inc. v. Travishan Corp.*, 155 N.C. App. 205, 209, 573 S.E.2d 547, 549 (2002) (holding that under North Carolina law, a corporation is not permitted to represent itself *pro se*).

Harris & Hilton also makes a policy argument, contending that the current version of Rule 3.7 is archaic and fails to take into account the disproportionate economic burden on small law firms that are forced to hire outside counsel to litigate fee collection cases. However, in making this argument, Harris & Hilton misunderstands the role of this Court given that it is asking us not to *interpret* Rule 3.7 but rather to *rewrite* it — a power that we simply do not possess.

N.C. Gen. Stat. § 84-23(a) states as follows:

> The [North Carolina State Bar] is vested with the authority to regulate the professional conduct of licensed lawyers and State Bar certified paralegals. Among other powers,

> the [State Bar] shall . . . formulate and adopt rules of professional ethics and conduct . . . .

N.C. Gen. Stat. § 84-23(a) (2015); *see also Mebane v. Iowa Mut. Ins. Co.*, 28 N.C. App. 27, 30, 220 S.E.2d 623, 625 (1975) ("Chapter 84, Article 4 [of the North Carolina General Statutes] creates the [North Carolina] State Bar as the agency, subject to the superior authority of the General Assembly, to formulate and adopt rules of professional ethics and conduct for licensed attorneys.").

Just as this Court lacks the authority to rewrite the General Statutes, *see State v. Wagner*, __ N.C. App. __, __, 790 S.E.2d 575, 582 (2016) ("Our courts lack the authority to rewrite a statute, and instead, the duty of a court is to construe a statute as it is written." (citation, quotation marks, and brackets omitted)), *disc. review denied*, __ N.C. __, 795 S.E.2d 221 (2017), we similarly lack the ability to rewrite the Rules of Professional Conduct. Thus, the appropriate audience for Harris & Hilton's policy argument is the State Bar rather than this Court.

In sum, we cannot say that the trial court abused its discretion by applying Rule 3.7 as written as opposed to creating a new exception that neither appears within the Rule itself nor has been recognized by North Carolina's appellate courts. Accordingly, we affirm the trial court's disqualification order. *See State v. Rogers*, 219 N.C. App. 296, 306, 725 S.E.2d 342, 348-49 (2012) ("[T]here is competent evidence in the record to support the trial court's conclusion that [defense counsel] was likely to be a necessary witness at defendant's trial and that none of the exceptions to Rule 3.7 apply."), *appeal dismissed and disc. review denied*, 366 N.C. 232, 731 S.E.2d 171 (2012); *cert. denied*, __ U.S. __, 133 S. Ct. 1604, 185 L. Ed. 2d 595 (2013); *Braun v. Tr. Dev. Grp., LLC*, 213 N.C. App. 606, 611, 713 S.E.2d 528, 531 (2011) (trial court did not err in granting defendants' motion to disqualify pursuant to Rule 3.7 because plaintiff's attorneys were necessary witnesses).

Conclusion

For the reasons stated above, the trial court's 20 June 2016 order is affirmed.

AFFIRMED.

Judges DILLON and INMAN concur.

HILDEBRAN HERITAGE & DEVELOPMENT ASSOCIATION, INC., AND CITIZENS UNITED TO PRESERVE THE OLD HILDEBRAN SCHOOL, PLAINTIFFS

v.

THE TOWN OF HILDEBRAN AND FOOTHILLS RECYCLING & DEMOLITION, LLC, DEFENDANTS

No. COA16-568

Filed 21 March 2017

1. Appeal and Error—mootness—newly revealed information—demolition contract—destruction of property in fire

Although plaintiffs contended that the trial court erred by entering a directed verdict in favor of defendants as to the claim that a demolition contract was null and void, this issue was moot due to newly revealed information. The destruction of the property in a fire rendered performance under the contract impossible.

2. Open Meetings—Open Meetings Law—town councilman one-on-one meetings—public vote

The trial court did not err by concluding that defendant town did not violate the Open Meetings Law even though a town councilman conducted one-on-one meetings. Even assuming arguendo that the councilman's conduct was designed to avoid the protections of the Open Meetings Law, the vote itself took place at the 26 January 2015 meeting where the public was present, minutes were taken, and the votes of the Town Council were recorded.

3. Open Meetings—reasonable public access—lack of overflow seating or external speakers

The trial court did not err by concluding the town provided reasonable public access to the 26 January 2015 meeting. A lack of overflow seating or external speakers, absent more, did not constitute an unreasonable failure of access.

4. Attorney Fees—Open Meetings Law—prevailing parties

The trial court did not abuse its discretion by declining to award attorney fees based upon defendants' purported violation of the Open Meetings Law. The trial court found that both parties succeeded on significant issues in the litigation.

Judge BRYANT concurring in part and dissenting in part.

HILDEBRAN HERITAGE & DEV. ASS'N, INC. v. TOWN OF HILDEBRAN

[252 N.C. App. 286 (2017)]

Appeal by plaintiffs from judgment entered 11 August 2015 and order entered 14 September 2015 by Judge Joseph N. Crosswhite, in Burke County Superior Court. Heard in the Court of Appeals 4 October 2016.

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Jason White and Amber R. Mueggenburg, for plaintiff-appellants.

Byrd, Byrd, McMahon, & Denton, P.A., by Lawrence D. McMahon, Jr. and G. Redmond Dill, Jr., for defendant-appellee Town of Hildebran.

The Starnes Law Firm, by James B. Hogan, for defendant-appellee Foothills Recycling & Demolition, LLC.

Engstrom Law, PLLC, by Elliot Engstrom, for amicus curiae Engstrom Law, PLLC.

CALABRIA, Judge.

Where the meeting of the town council was held openly and in view of the public, the trial court did not err in concluding that it did not violate the Open Meetings Law. Where the only evidence of unreasonable limitation of opportunity for access to the meeting was the fact that the venue could not accommodate all present, the trial court did not err in concluding that the town council did not violate the Open Meetings Law.

Where the trial court declared the contract for demolition of a building null and void, and the building was subsequently destroyed in a fire, the issue of whether the trial court erred in granting a partial directed verdict is moot. Where plaintiffs failed to demonstrate an abuse of discretion, the trial court did not abuse its discretion in declining to award attorney's fees. We affirm in part, and dismiss in part.

I. Factual and Procedural Background

The Old Hildebran School ("Old School") was built in 1917, and has since been viewed as a town landmark. Two additions to the Old School were completed in 1924 and 1937, and in the 1950s a breezeway was added to connect the older portions of the building to the newer high school structures. The Old School functioned as both a Junior High and High School from its opening in 1917 until 1987, when new school buildings were built in town. The Town of Hildebran ("Town") acquired the Old School from the Burke County Board of Education in 1988.

The Old School was first discussed at a 22 September 2014 special meeting of the Hildebran Town Council ("Town Council"). At this meeting, Council Member Lee Lowman ("Lowman") brought up the physical state of the school, expressing his belief that the Old School was beyond repair and was both a safety and fire hazard. Council Member Jamie Hollowell ("Hollowell") then requested that "hard copy bids" be solicited for costs of both demolition and repair of the school, in order to make an informed decision. Virginia Cooke ("Cooke"), Council Member and town mayor, stated that she had solicited a quote for costs to demolish the school.

The Town Council next discussed the Old School at its 27 October 2014 regularly scheduled meeting. There were two discussions concerning the Old School at the 27 October 2014 meeting. First, the Town Council considered a resolution that would exempt it from following the formal bidding process for projects costing less than ninety thousand dollars, which failed. Second, the Town Council entered into a closed session to "discuss matters relating to the location or expansion of industries or other businesses in the area served by the public body, including agreement on a tentative list of economic development incentives that may be offered by the public body in negotiations" citing N.C. Gen. Stat. § 143-318.11(a)(4). Later, at trial, the evidence showed that the Old School's future was discussed during the closed session rather than a discussion pertinent to "the location or expansion of industries or other businesses[.]"

The Town Council next discussed the Old School at the regularly scheduled meeting on 24 November 2014, where a presentation was given regarding the possibility of historic rehabilitation. The Old School was otherwise not discussed any further at the 24 November 2014 meeting.

Public interest in the fate of the Old School began to grow in late November and early December of 2014. The trial court found that "at least one Council member and the Mayor knew that public interest in the fate of the old school building was very high[.]" At the Town Council's December 2014 regular meeting, Cooke announced that there would be a public forum to allow citizens to discuss options for the Old School, and the forum was scheduled for 8 January 2015, as a special meeting.

At the 8 January 2015 special meeting, Cooke announced which portions of the school would be "affected" by demolition. Twenty-one members of the public spoke, each addressing opinions as to the fate of the school, with nineteen of the twenty-one speakers in favor of saving

the Old School. The Town Council held another special meeting on 23 January 2015, at which the school was not discussed.

The Town Council's next meeting was its regularly scheduled meeting on 26 January 2015. The Town Council posted the agenda for this meeting, as was its routine, on its website. The published agenda for the 26 January 2015 Town Council meeting showed that the Town Council would discuss the Old School, but there was no indication that the Town Council would vote upon the Old School's fate at the meeting. Even though there was no vote scheduled on the agenda, the meeting room was full for the 26 January 2015 meeting. Around twenty to twenty-five members of the public were permitted to enter the meeting room to voice their opinions, however they were not permitted to remain in the room once having done so. At least one member of the public and one Council Member requested the meeting to be relocated to the Town auditorium, a standalone structure adjacent to the Town Hall complex. The relocation request was denied. The reason for denying the request was that a change in location would have required the Town Council to give at least forty-eight hours public notice, pursuant to N.C. Gen. Stat. § 143-318.12(a).

The evening before the 26 January 2015 meeting, Lowman communicated with Cooke and all members of the Council, except for Councilman Wendell Hildebran ("Hildebran"). The purpose of the conversations between Lowman and the others was to (1) discuss his intention to amend the agenda and call for a vote as to the fate of the school and (2) determine whether the Council Members would support his effort to amend the agenda and call for a vote. Lowman did not contact Hildebran because he knew he would not support Lowman's amendment to the agenda, and Lowman believed that Hildebran would inform the public of the plan to amend the agenda.

Based on Lowman's conversations with Cooke and other Town Council members, Lowman made a motion to amend the agenda at the 26 January 2015 meeting from "Original School Building Discussion" to "Original School Building Discussion/Vote[.]" The trial court found that "[p]rior to the meeting held on January 26, 2015, the public did not have knowledge that the agenda would be amended or the nature of the amendment to the agenda." Hildebran requested that the vote be tabled until the Town's 23 March 2015 meeting.

The motion to amend the agenda passed, and Hildebran was the only member to oppose the amendment. The agenda was further amended to add "Old School Building Demolition Quotes under Old

Business" because Cooke had informed Lowman, prior to the 26 January 2015 meeting, that she had received demolition quotes. The Town voted to demolish the Old School and to award the demolition contract to Foothills Recycling & Demolition, LLC ("Foothills") on 26 January 2015.

On 24 February 2015, Hildebran Heritage & Development Association, Inc. ("HHDA"), and Citizens United to Preserve the Old Hildebran School ("Citizens United") (collectively, "plaintiffs"), filed a complaint against the Town and Foothills (collectively, "defendants"), alleging breach of contract, failure to comply with N.C. Gen. Stat. § 143-129 *et seq.* (the procedure for government bodies taking bids on public contracts), and failure to comply with N.C. Gen. Stat. § 143-318.9 *et seq.* (the "Open Meetings Law"). In addition, plaintiffs sought a temporary restraining order and a preliminary injunction to prevent the demolition of the Old School. On 20 March 2015, Foothills filed its answer and motions to dismiss, alleging failure to state a claim upon which relief can be granted, lack of capacity by Citizens United to file a lawsuit, and plaintiffs' lack of standing. On 24 April 2015, the Town filed its answer.

A bench trial was held before the Superior Court of Burke County. At trial, at the conclusion of plaintiffs' evidence, defendants moved for a partial directed verdict on the issue of the validity of the contract between the Town and Foothills. On 3 September 2015, the trial court entered an order on this motion, granting it in favor of defendants, and holding that "the evidence . . . is insufficient as a matter of law to establish that the contract between the Defendants to demolish the School Building is invalid[.]"

On 11 August 2015, the trial court entered its judgment on plaintiffs' complaint. It first noted that plaintiffs had alleged four different violations of the Open Meetings Law: (1) that the Town Council had discussed remodeling or destroying the Old School during the 27 October 2014 closed session meeting; (2) that the Town Council had failed to provide reasonable access to the 26 January 2015 meeting; (3) that Lowman had engaged in one-on-one discussions outside of the open sessions; and (4) that the Town Council had voted to amend its agenda at the 26 January 2015 meeting. With respect to the first allegation, the trial court acknowledged that the discussion during the closed session meeting on 27 October 2014 constituted a violation of the Open Meetings Law. Nonetheless, the trial court concluded that, notwithstanding this violation, "the vote of the Defendant's Town Council to demolish the old school building and the award of the demolition contract to the Defendant Foothills should not be declared null and void."

With respect to plaintiffs' remaining allegations, the trial court concluded that the measures taken to make the 26 January 2015 meeting accessible to the public were "reasonable under all the circumstances existing at that time and substantially complied with the Open Meetings Law[,]" that the evidence with respect to the one-on-one discussions and vote to amend was "insufficient as a matter of law to establish that any of these other acts were in violation of the Open Meetings Law[,]" and that therefore defendants were entitled to a directed verdict with respect to these allegations.

The trial court then considered whether to award attorney's fees. The court concluded that, as both parties had succeeded on a substantial issue in the case, both were "prevailing parties" under statute. In its discretion, the court declined to award attorney's fees to either side.

From the trial court's order granting a partial directed verdict, and from the trial court's judgment, plaintiffs appeal.

II. Directed Verdict

[1] In their third argument, which we choose to address first, plaintiffs contend that the trial court erred in entering a directed verdict in favor of defendants as to the claim that the demolition contract was null and void. Due to newly revealed information, however, we hold that this issue is moot.

At oral arguments before this Court, it was revealed by the parties that the Old School, during the pendency of the appeal, had caught fire and burned down. The fact that the parties did not consider this information to be pertinent to be brought to the attention of this Court is itself troubling. This information would not have been brought to the attention of the Court, but for a fortuitous question from the Court.

> Where parties contract with reference to specific property and the obligations assumed clearly contemplate its continued existence, if the property is accidentally lost or destroyed by fire or otherwise, rendering performance impossible, the parties are relieved from further obligations concerning it. . . . Before a party can avail himself of such a position, he is required to show that the property was destroyed, and without fault on his part.

Sechrest v. Forest Furniture Co., 264 N.C. 216, 217, 141 S.E.2d 292, 294 (1965) (citation and quotations omitted). In the instant case, it is clear that the Old School was completely destroyed by fire, through no fault of

either party. Likewise, the contract for the demolition of the Old School clearly contemplated its continued existence, at least until the contract was completed.

Had this information been available at trial, it would clearly have supported the trial court's determination that the contract was null and void. Performance of the contract was rendered impossible by the destruction of the Old School by fire. However, the record contains no evidence as to when the Old School was destroyed by fire; moreover, the trial court's order on the motion for a directed verdict seems to imply that, as of the entry of that order, the trial court was unaware of the Old School's destruction, had the fire even occurred at that time. As such, this new information has no bearing on the trial court's order.

It does, however, have bearing on the ultimate disposition of this issue. The destruction of the Old School renders performance under the contract impossible. Certainly, even if the contract was not null and void when the trial court entered its order, the contract is null and void now. Even were we to agree with plaintiffs' contentions and remand this issue, the outcome would be the same; the trial court would grant a directed verdict, holding the contract to be null and void as a result of the destruction of the Old School. We therefore hold that this matter is moot, and dismiss this argument accordingly.

III. The Open Meetings Law

In their first and second arguments, plaintiffs contend that the Town violated the Open Meetings Law, both by purposefully conducting sub-quorum meetings, and by failing to provide reasonable public access. We disagree.

A. Standard of Review

"Issues of statutory construction are questions of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). "Whether a violation of the Open Meetings Law occurred is a question of law. We therefore apply *de novo* review to this portion of the decision of the trial court." *Knight v. Higgs*, 189 N.C. App. 696, 700, 659 S.E.2d 742, 746 (2008).

B. One-on-One Meetings

[2] First, plaintiffs contend that the Town violated the Open Meetings Law by permitting Lowman to conduct one-on-one meetings.

> It is the public policy of our State that "hearings, deliberations, and actions of [public] bodies be conducted openly."

> N.C. Gen. Stat. § 143-318.9 (2005). Accordingly, as a general rule, "each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting." N.C. Gen. Stat. § 143-318.10(a) (2005).

Gannett Pac. Corp. v. City of Asheville, 178 N.C. App. 711, 714, 632 S.E.2d 586, 588 (2006); *see also* N.C. Gen. Stat. §§ 143-318.9 and -318.10(a) (2015). Plaintiffs contend that the Town, a public body, violated this public policy, in that Lowman contacted members of the Town Council individually and in private, rather than openly.

Plaintiffs attempt to analogize these facts with those in *News & Observer Publishing Co. v. Interim Bd. of Educ.*, 29 N.C. App. 37, 223 S.E.2d 580 (1976). In that case, the defendant created a special "committee of the whole" in order to enact business without invoking the Open Meetings Law. This Court acknowledged that certain grounds might exist to form a closed session committee of the whole, such as theft or embezzlement, but held that "we do not think a board can evade the provisions of statutes requiring its meetings to be open to the public merely by resolving itself into a committee of the whole." *Id.* at 49, 223 S.E.2d at 588.

We hold, however, that plaintiffs' analogy is inapplicable. In *News & Observer*, the defendant board met to conduct votes in closed session, in violation of the Open Meetings Law. Plaintiffs do not allege, however, that Lowman conducted any business during these one-on-one meetings. Rather, Lowman discussed with other members of the Town Council his plan to present a motion to amend at the meeting proper. Even assuming *arguendo* that Lowman's conduct was designed to avoid the protections of the Open Meetings Law, the vote itself took place at the 26 January 2015 meeting, at which the public was present, minutes were taken, and the votes of the Town Council were recorded. Unlike *News & Observer*, in which a closed session was held in violation of the Open Meetings Law, this meeting was held in view of the public, with members of the public able to speak, and with records taken of the proceedings. As such, we hold that the trial court did not err in concluding that the Town did not violate the Open Meetings Law.

C. Reasonable Public Access

[3] Plaintiffs further contend that the Town failed to provide reasonable public access to the 26 January 2015 meeting.

Pursuant to the Open Meetings Law, the court must consider a defendant's actions "according to the standard of reasonableness of opportunity

for public access to the meetings." *Garlock v. Wake Cty. Bd. of Educ.*, 211 N.C. App. 200, 201, 712 S.E.2d 158, 162 (2011). Plaintiffs contend that the venue used for the meeting was inadequate to address the public's interest, that between twenty and twenty-five people were forced to stand outside the meeting room, and that no equipment was available to permit these excess attendees to observe or hear what transpired during the meeting. Plaintiffs contend that whether the opportunity for public access was reasonable is a question of fact for the jury, and that the trial court erred in ruling on it as a matter of law.

However, "[w]hether a violation of the Open Meetings Law occurred is a question of law." *Knight*, 189 N.C. App. at 700, 659 S.E.2d at 746. As such, it was appropriate for the trial court to determine this issue on a motion for directed verdict. The trial court's order set out numerous facts, which are supported by the evidence, in support of its determination as a matter of law that opportunity for public access was reasonable, and that no violation of the Open Meetings Law resulted. We agree. We decline to find that a lack of overflow seating or external speakers, absent more, constitutes an unreasonable failure of access. We therefore hold that the trial court did not err in holding, as a matter of law, that there was reasonable opportunity for access to the meeting under the Open Meetings Law.

IV. Attorney's Fees

[4] In their fourth argument, plaintiffs contend that the trial court erred in declining to award attorney's fees based upon defendants' purported violation of the Open Meetings Law. We disagree.

A. Standard of Review

"When an action is brought pursuant to [the Open Meetings Law], the court may make written findings specifying the prevailing party or parties, and may award the prevailing party or parties a reasonable attorney's fee, to be taxed against the losing party or parties as part of the costs." N.C. Gen. Stat. § 143-318.16B (2015). "Such an award is discretionary under the statute." *Knight*, 189 N.C. App. at 704, 659 S.E.2d at 748.

B. Analysis

In its judgment, the trial court found that both plaintiffs and the Town succeeded on significant issues in the litigation, and therefore found that "the Plaintiffs and the Defendant [Town of] Hildebran are both prevailing parties." In an exercise of its discretion, the trial court declined to

award attorney's fees, and ordered each party to bear its own costs. On appeal, plaintiffs contend this ruling was an abuse of discretion.

Plaintiffs' argument is premised on the fact that "the directed verdict granted in favor of the Town was erroneous." However, we have already held that the trial court did not err in granting a directed verdict in favor of defendants. Plaintiffs present no additional arguments to support their contention that the trial court abused its discretion in declining to award attorney's fees. We hold, therefore, that the trial court did not abuse its discretion.

V. Conclusion

The trial court did not err in concluding as a matter of law that the Town substantially complied with the Open Meetings Law, including providing reasonable access to the 26 January 2015 meeting. The trial court did not abuse its discretion in declining to award attorney's fees. We dismiss plaintiffs' arguments with respect to the trial court's order for a partial directed verdict.

AFFIRMED IN PART, DISMISSED IN PART.

Judge TYSON concurs.

Judge BRYANT concurs in part and dissents in part.

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

Because I believe the trial court erred in directing a verdict when it concluded, contrary to the facts, that one-on-one meetings conducted by Councilman Lowman did not violate the Open Meetings Law, I respectfully dissent from that portion of the majority opinion.

> In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, *giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom* and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke Univ., 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989) (emphasis added) (citation omitted).

> Allegations that a party violated the Open Meetings Law are considered by the Superior Court in its role as a trier of fact.
>
> > "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." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). If supported by competent evidence, the trial court's findings of fact are conclusive on appeal. *Finch v. Wachovia Bank & Tr. Co.*, 156 N.C. App. 343, 347, 577 S.E.2d 306, 308–09 (2003). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 26, 265 S.E.2d 123, 127 (1980).
>
> *Gannett Pacific Corp. v. City of Asheville*, 178 N.C. App. 711, 713, 632 S.E.2d 586, 588 (2006). Whether a violation of the Open Meetings Law occurred is a question of law. We therefore apply *de novo* review to this portion of the decision of the trial court.

Knight v. Higgs, 189 N.C. App. 696, 699–700, 659 S.E.2d 742, 745–46 (2008).

North Carolina's public policy requires that hearings, deliberations, and actions of public bodies be conducted openly. N.C. Gen. Stat. § 143-318.9 (2015). As a general rule, "each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting." N.C. Gen. Stat. § 143-318.10(a) (2015). A "public body" is defined as

> any elected or appointed authority, board, commission, committee, council, or other body of [North Carolina], . . . or other political subdivisions or public corporations in [North Carolina] that (i) is composed of two or more members and (ii) exercises or is authorized to exercise a legislative policy-making, quasi-judicial, administrative, or advisory function.

Id. § 143-318.10(b).

An "official meeting" is defined as "a meeting, assembly, or gathering together at any time or place or the simultaneous communication by conference telephone or other electronic means of a majority of the members of a public body . . . ." *Id.* § 143-318.10(d). "By the plain language of the statute, in order to be an official meeting, a majority of the members of the public body must be present." *Gannett Pac. Corp.*, 178 N.C. App. at 715, 632 S.E.2d at 589. "However, a social meeting or other informal assembly or gathering together of the members of a public body does not constitute an official meeting unless it is called or held *to evade the spirit and purposes of this Article.*" N.C.G.S. § 143-318.10(d) (emphasis added).

At trial, Councilman Lowman was called as a witness by plaintiff and testified at length about the propriety of the "one-on-one" discussions with council members and the mayor:

> Q. Have you had any occasions at any -- at any point in time . . . to discuss a matter pertaining to the demolition of the old school building one-on-one with, say, the mayor?
>
> A. I have talked one-on-one with the mayor and one-on-one with the council.
>
> Q. And are there also examples where other members of the council have talked one-on-one with the mayor about the fate of the old school building?
>
> A. Yes.
>
> Q. And those would be one-on-one discussions that were had individually, rather than calling a meeting to talk about it collectively?
>
> A. Correct. A meeting is considered three, three of us together, three council or two council and the mayor -- or three of us and the mayor.
>
> Q. And you're aware, then, that you can have those one-on-one discussions --
>
> A. Uh-huh.
>
> Q. -- and avoid calling a meeting.
>
> A. Correct.
>
> Q. And if the mayor's having discussions or if you're having discussion one-on-one with a council member about

the fate of the old building, you can do that individually and avoid having to call a meeting and have the public sit in and listen, correct?

A. That is correct.

Q. And that's happened, has it not, with regard to the demolition of the old school building?

A. It has, both, demolition and rehab.

Q. But, but, in particular, it has in terms of demolition, correct?

A. That is correct.

Q. And, again, no member of the public's going to be privy to those one-on-one discussions that you're having regarding demolition of the building, for example, with the mayor, correct?

A. That is correct.

Q. No member of the public's going to be privy to the information you're discussing . . . one-on-one with members of the council with the mayor, correct?

A. That is correct.

Q. Have you had meetings where you met with two of the other council members?

A. No.

Q. The reason you haven't done that is because that would constitute a meeting, correct?

A. That is correct.

Q. And you don't want to do that, correct?

A. That is correct.

. . . .

Q. And you didn't want to have it be a matter of public record, that you planned on amending the agenda, did you?

A. I didn't make that call until the week of the meeting.

Q. But you certainly had enough time to discuss that one-on-one with those council members.

A. I asked them if they were ready to vote, yes.

Q. And that was outside of the public meeting.

A. Correct.

Q. And that was pertaining specifically to the demolition of the old school building.

A. Demolition versus the rehab. I was not swaying their votes. It was just were they ready.

Q. And you had that discussion.

A. Yes.

Q. Outside of a public meeting.

A. Yes.

Q. And you knew that there would be no record of that that would be available to the public.

A. That is correct.

. . . .

Q. And, ultimately, the council decided and voted to allow you to amend the agenda, correct?

A. That is correct.

Q. And did each of those members that you had those one-on-one conversations with -- did they vote in support of amending the agenda?

A. As far as I know, yes. Except for one.

Q. Did you have a one-on-one conversation with Mr. Hildebrand [sic] beforehand?

A. No, I knew where he stood.

Q. So the reason you didn't have a conversation with him is because you knew he'd be opposed to amending the agenda.

A. There was -- He was opposed and I was for. It was plain as day, yes.

> Q. Okay. So you avoided having that conversation with him based upon that.
>
> A. I don't speak to Mr. Hildebrand [sic].
>
> Q. Well, whether you do or not, the reason you didn't have the discussion with him, as you did with the others that voted for your position to amend the agenda, was because you knew he wouldn't be in favor of it, correct?
>
> A. That is correct.
>
> Q. And he would let the public know about it, correct?
>
> A. Correct.

The trial court made the following relevant findings of fact:

> 14. Prior to the meeting on January 26, 2015, Councilman Lee Lowman contacted certain other Council members one-on-one to inquire about amendment of the agenda for the January 26, 2015 meeting to include a vote to demolish the old school building.
>
> 15. Councilman Lee Lowman contacted certain other Council members one-on-one *to avoid holding an official meeting* ~~and to prevent such communications from being open to the public~~.
>
> 16. Councilman Lee Lowman ~~intentionally~~ did not contact the one Council member that he knew held an adverse position to his own.
>
> 17. Councilman Lee Lowman indicated that it was typical for Council members to have one-on-one communications to conduct the business of the Town of Hildebran.

(Strike-outs in original) (emphasis added).

The trial court's findings of fact, particularly that Councilman Lowman (1) contacted other council members one-on-one specifically "*to avoid holding an official meeting*," and (2) did not contact Councilman Hildebran as he knew he held an adverse position, are clearly based on evidence in the record that the other council members were called "to ensure that they had the vote to amend the agenda, which would allow them to vote on the school building demolition without any prior notice to the public." Councilman Lowman admitted that he didn't contact Councilman Hildebran because he knew Hildebran held an adverse

position, and if Lowman asked Hildebran about voting to amend the agenda, he would alert the public. The only reasonable inference to be drawn from these facts is that Councilman Lowman's action of contacting other council members individually was to evade the purpose of the Open Meetings Law.

Thus, because the findings by the trial court support a conclusion that Councilman Lowman's actions were purposeful and undertaken in order to evade the purpose and spirit of the Open Meetings Law and the council's obligation to conduct meetings in public, I submit the trial court erred in concluding the above-described actions did not amount to a violation. Therefore, I respectfully dissent.

IN THE MATTER OF R.P.

No. COA16-856

Filed 21 March 2017

Child Abuse, Dependency, and Neglect—permanency planning review—appointment of guardian—constitutionally protected parental status

The trial court erred in a child neglect and dependency case by appointing a guardian for a juvenile without first determining that respondent father was unfit or acted inconsistently with his constitutionally protected parental status.

Appeal by respondent from orders entered 2 May 2016 by Judge David Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 20 February 2017.

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

Mark L. Hayes for respondent-appellant father.

Parker Poe Adams & Bernstein LLP, by Mindy Campo and Maya Engle, for guardian ad litem.

INMAN, Judge.

Respondent, the father of the juvenile R.P. ("Ricky")[1], appeals from a permanency planning review order and an order appointing a guardian for the juvenile. After careful review, we reverse and remand.

Factual and Procedural Background

On 17 June 2014, Mecklenburg County Department of Social Services, Youth and Family Services ("YFS") filed a petition alleging that Ricky, as well as two older siblings ("Amy" and "Donald")[2], were neglected and dependent juveniles. YFS claimed that it had received a referral on 30 April 2014 stating that respondent and the juveniles' mother had engaged in a physical altercation in which respondent allegedly bit the mother on the leg and struck her face. A warrant was issued for respondent's arrest and it remained outstanding at the time the petition was filed. A social worker met with the mother on 1 May 2014 to discuss the incident. During this meeting, the mother refused to obtain a restraining order against respondent, claiming that respondent "merely needed to be hospitalized involuntarily so that he can again begin taking his medication(s) for his bipolar disorder for which he received disability income." The mother entered into a safety agreement with YFS and claimed not to know of respondent's whereabouts or contact information. Subsequently, however, the mother retrieved Amy from her placement with an aunt and, based on information provided by family members, went to reside with respondent in South Carolina. YFS obtained non-secure custody of Ricky on 17 June 2014 and placed him with his maternal aunt ("Mrs. M.").

An adjudicatory hearing was held on 19 August 2014. Respondent had still not been served with the petition at that time. Based upon an agreement mediated between Ricky's mother, Amy's father, and YFS, the juveniles were adjudicated neglected and dependent. The trial court noted that the adjudication was being "held in abeyance" as to respondent. The court ordered that the permanent plan for Ricky be reunification.

A review hearing was held on 18 November 2014, at which respondent appeared. Respondent was ordered to meet with a social worker and develop a case plan. At a review hearing held on 24 March 2015, the court ordered respondent to be compliant with his mental health treatment, but otherwise continued the plan of reunification.

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1. Pseudonyms are used to protect the identities of the juveniles and promote ease of reading.

2. Respondent is not the father of Amy or Donald and they are not the subject of this appeal.

At permanency planning review hearings held on 23 June 2015, and 7 and 20 October 2015, concerns were expressed regarding possible incidents of domestic violence between respondent and the juveniles' mother. The court advised respondent and the mother that "if no [domestic violence] concerns were raised and there was no 'drama' during this upcoming review period then the Court can begin considering/discussing transition plans." Nevertheless, the court adopted a concurrent permanent plan of guardianship.

In October 2015, an incident occurred between respondent and the mother which led to respondent filing a complaint for a domestic violence protection order ("DVPO"). On 6 November 2016, a consent order was entered granting the DVPO. The DVPO provided that respondent and the mother would have no contact with one another for a period of one year.

A subsequent permanency planning review hearing was held on 9 February 2016. In an order entered on 26 February 2016, the court changed the primary permanent plan for Ricky to guardianship, and changed the secondary concurrent plan for Ricky to reunification. The court found that respondent had made progress on his case plan, but expressed concern about the continued domestic violence between respondent and the mother. The court specifically noted that despite the no-contact provisions of the DVPO, respondent and the mother continued to have contact with one another, and expressed "grave concern regarding the safety of the juveniles when the parents get together." The court further found that Ricky was doing very well with Mrs. M. and it was in his best interests that Mrs. M. be granted guardianship. The court stated that it would proceed with granting guardianship to Mrs. M. at the next hearing. On 2 May 2016, following a hearing held on 17 March 2016, the trial court entered a permanency planning review order and a separate guardianship order placing Ricky in guardianship with Mrs. M. Respondent gave written notice of appeal on 11 May 2016.

Analysis

We initially note that respondent filed a petition for writ of certiorari in the alternative seeking review of the trial court's permanency planning review order entered on 26 February 2016. However, in our discretion, we determine it is unnecessary to grant certiorari and deny the petition.

Respondent argues that the trial court erred by granting guardianship to Mrs. M. without first determining that he was unfit or acted inconsistently with his constitutionally protected parental status. We agree.

" '[P]arents have a constitutionally protected right to the custody, care and control of their child, absent a showing of unfitness to care for the child.' " *In re A.C.*, __ N.C. App. __, __, 786 S.E.2d 728, 735 (2016) (citation omitted). "[A] parent may lose the constitutionally protected paramount right to child custody if the parent's conduct is inconsistent with this presumption or if the parent fails to shoulder the responsibilities that are attendant to rearing a child." *Cantrell v. Wishon*, 141 N.C. App. 340, 342, 540 S.E.2d 804, 806 (2000). Prior to granting guardianship of a child to a nonparent, a district court must "clearly address whether [the] respondent is unfit as a parent or if [his] conduct has been inconsistent with [his] constitutionally protected status as a parent[.]" *In re P.A.*, __ N.C. App. __, __, 772 S.E.2d 240, 249 (2015). "[A] trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." A.C. at __, 786 S.E.2d at 733 (citing *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001)).

Here, the trial court's written orders make no reference whatsoever to respondent's constitutionally protected status as a parent, let alone whether he has acted inconsistently with that status or is otherwise unfit to serve as a parent to Ricky. The guardian ad litem cites the adjudication of neglect and dependency, and argues that "[p]arental conduct that leads to an adjudication of the children as neglected and dependent clearly constitutes 'some showing of unfitness' and is inconsistent with the protected status of parents." However, a finding that a parent is unfit or acted inconsistent with his or her constitutionally protected status is nevertheless required, even when a juvenile has previously been adjudicated neglected and dependent. *See In re D.M.*, 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011) (reversing a custody order where the trial court specifically found that neither parent was unfit and because the trial court failed to make any findings regarding whether the father had acted inconsistently with his parental rights); *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009) (reversing custody order where the district court "failed to issue findings to support the application of the best interest analysis" and stating that "[a]lthough there may be evidence in the record to support a finding that [the r]espondent acted inconsistently [with his constitutionally protected status as a parent], it is not the duty of this Court to issue findings of fact").

We note that respondent failed to raise any constitutional issue before the trial court. We have held that a parent's right to findings regarding her constitutionally protected status is waived if the parent does not raise the issue before the trial court. *See In re T.P.*, 217 N.C.

App. 181, 186, 718 S.E.2d 716, 719 (2011) (holding that mother "waived review of this issue on appeal" based on the doctrine that " '[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal' ") (citation omitted). We decline to find waiver here, however, because we conclude that respondent was not afforded the opportunity to raise an objection at the permanency planning review hearing.

The purpose of a permanency planning hearing is to develop a plan "to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-906.1(g) (2015). N.C. Gen. Stat. § 7B–906.1(c) additionally provides:

> At each hearing, the court *shall* consider information from the parents, the juvenile, the guardian, any person providing care for the juvenile, the custodian or agency with custody, the guardian ad litem, and any other person or agency that will aid the court's review. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C–1, Rule 801, or testimony or evidence from any person that is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

N.C. Gen. Stat. § 7B–906.1(c) (emphasis added); *see also In re D.L.*, 166 N.C. App. 574, 583, 603 S.E.2d 376, 382 (2004) (emphasis omitted) ("As no evidence was presented . . . regarding the permanency plan, the trial court's findings of fact are unsupported.").

Here, the trial court determined at the 9 February 2016 permanency planning review hearing that it would "proceed with guardianship at the *next* date." (Emphasis added). At the next hearing, on 17 March 2016, the trial court would not allow any evidence to be presented concerning guardianship, stating that guardianship had been determined at the prior hearing. Evidence was strictly limited to the issue of visitation. Regardless of the court's intentions, the court did not actually change custody and award guardianship at the subsequent 9 February 2016 permanent planning hearing. Instead, it merely changed the permanent plan for the juvenile, a plan which still included a secondary concurrent plan of reunification. Therefore, it was improper for the court to limit the 17 March 2016 hearing to the issue of visitation. Consequently, because the trial court did not hold a proper hearing, respondent was not offered the opportunity to raise an objection on constitutional grounds. Thus, we conclude that his constitutional argument was not waived.

Accordingly, because the trial court failed to make the required findings of fact discussed herein, the permanency planning review order and guardianship order are reversed.

REVERSED AND REMANDED.

Judges CALABRIA and ZACHARY concur.

JEANNE LUND, PLAINTIFF
v.
ROBERT LUND, DEFENDANT

No. COA16-813

Filed 21 March 2017

1. Divorce—equitable distribution—valuation—marital residence—no credible evidence

The trial court did not abuse its discretion in an equitable distribution case by finding plaintiff wife's testimony regarding the value of the marital residence not credible, and by failing to value and distribute the increase in value of the marital home between the dates of separation and distribution. Plaintiff failed to show this determination was manifestly unsupported by reason.

2. Appeal and Error—preservation of issues—previously ruled upon—dismissed

Although plaintiff wife contended the trial court erred in an equitable distribution case by failing to properly consider her unequal distributional factors, plaintiff's attempt to have the Court of Appeals reconsider an issue previously considered and ruled upon was improper and dismissed.

3. Divorce—equitable distribution—hearing on remand—followed court mandate

The trial court did not err in an equitable distribution case by failing to conduct a further hearing on remand as to the date of distribution valuations and unequal distribution factors. The trial court followed the Court of Appeals' mandate to consider and make findings upon remand to determine the existence of divisible property with regard to the marital residence.

LUND v. LUND

[252 N.C. App. 306 (2017)]

Appeal by plaintiff from order entered 1 April 2016 by Judge Ward D. Scott in Buncombe County District Court. Heard in the Court of Appeals 8 March 2017.

Mary Elizabeth Arrowood for plaintiff-appellant.

Ana M. Prendergast and Siemens Family Law Group, by Jim Siemens, for defendant-appellee.

TYSON, Judge.

Plaintiff, Jeanne Lund ("Wife"), appeals from the trial court's revised equitable distribution order, entered after this Court's remand for further findings of fact. We affirm.

I. Background

Wife and Defendant ("Husband") married on 14 February 1997, separated on 5 January 2013, and divorced on 6 February 2014. Prior to the date of absolute divorce, Wife had sued Husband for equitable distribution and sought an *unequal* distribution of the marital estate. Husband answered and counterclaimed for an equitable and equal distribution of the marital estate. The matter came before the trial court and was heard during a four-day trial. On 11 August 2014, the trial court entered an equitable distribution order, which divided the marital estate equally.

The trial court heard testimony regarding the value of the former marital residence located at 403 Sugar Hollow Drive, Fairview, North Carolina. Three licensed real estate appraisers testified as expert witnesses regarding the fair market value of the marital residence. Two of the appraisers testified on behalf of Wife. Mark Morris, Husband's witness, opined $263,000.00 was the value of the marital residence on the date of separation.

The court found Mr. Morris was the only appraiser to testify and opine to the value of the marital residence on the date of separation. The court found Mr. Morris's testimony as credible, determined $263,000.00 to be the value of the marital residence, and distributed that property to Husband.

The trial court further found that neither party had presented evidence regarding the value of the marital home at the date of distribution. The court concluded there was no divisible property in connection with the marital home, since neither party had presented evidence tending

to show any increase or decrease in value of the home during the time period between the parties' separation and distribution of the property.

Wife appealed the 11 August 2014 order to this Court. This Court reversed the trial court's finding "that neither party introduced evidence of divisible property associated with any passive increase (or decrease) in value of the marital home during the period of separation[.]" *Lund v. Lund*, __ N.C. App. __, __, 779 S.E.2d 175, 184 (2015) ("*Lund I*"). This Court remanded the issue to the trial court "for more findings on this issue," and to revise the order, if necessary, to achieve an equitable division of the parties' marital property. *Id.* The trial court did not hear, receive, or consider further evidence upon remand, and entered a revised order on 1 April 2016. Wife appeals.

II. Issues

Wife argues the trial court erred by: (1) finding Wife's evidence on the value of the marital home was speculative and not credible; (2) failing to value and distribute, as divisible property, the increase in value of the marital home from the date of separation through the date of trial; (3) failing to properly consider the unequal distributional factors raised by Wife and to make appropriate findings of fact with regard to those factors; and, (4) failing to conduct a further hearing on remand as to the date of distribution valuations and unequal distribution factors.

III. Standard of Review

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

Wiencek-Adams v. Adams, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted). The trial court's findings of fact are conclusive on appeal, if supported by competent evidence. *See Alexander v. Alexander*, 68 N.C. App. 548, 552, 315 S.E. 2d 772, 776 (1984).

N.C. Gen. Stat. § 50-20 requires the trial court to conduct a three-step analysis when making an equitable distribution of the marital assets: (1) classify the property, (2) calculate the net value of the property, fair market value less encumbrances, and (3) distribute the property in an equitable manner. *See Cable v. Cable*, 76 N.C. App. 134, 137, 331 S.E. 2d 765, 767, *disc. review denied*, 315 N.C. 182, 337 S.E. 2d 856 (1985). An equal division of the marital property is required unless, in the exercise

of its discretion, the court determines an equal distribution is inequitable. N.C. Gen. Stat. § 50-20(c) (2015).

IV. Value of the Marital Residence

[1] Wife argues the trial court abused its discretion by finding her testimony regarding the value of the marital residence not credible, and by failing to value and distribute the increase in value of the marital home between the dates of separation and distribution. We disagree.

A passive increase or decrease in the value of the marital residence between the date of separation and date of distribution is divisible property and must be distributed by the trial court. N.C. Gen. Stat. § 50-20(b)(4)(a) (2015). Marital property is valued as of the date of separation, while divisible property is valued as of the date of distribution. N.C. Gen. Stat. § 50-20(b) (2015). The trial court's initial order stated that no evidence was presented regarding the value of the marital home as of the date of distribution. In her prior appeal, Wife argued she did, in fact, present evidence through her own opinion that the marital home was valued at $300,000.00 on the date of distribution. *See Lund I*, __ N.C. App. at __, 779 S.E.2d at 182.

The trial court found none of the three appraisers had opined to the value of the marital home on the date of distribution. The trial court addressed Wife's testimony in its revised order. The court found that Wife had testified she "would like to say" the value of the home was between $290,000.00 and $300,000.00 at the time of separation, and at the time of trial "she would like to say [the value was] closer to $300,000.00." The trial court declined to "choose from a range of values and [found] Plaintiff's testimony to be speculative." The court also specifically determined Wife's testimony and estimates of the value of the marital home was speculative and not credible. The court found "[n]either party presented credible evidence of a date of distribution value which differs from the date of separation value relied upon by the Court." The court again concluded no divisible property existed to distribute with regard to the marital home.

As our Court recognized in *Lund I*, "a finding by the trial court of 'no *credible* evidence' being presented on the issue would not have been error, since the trial court is free to give any weight (or no weight) to any evidence presented." *Id.* (citing *Bodie v. Bodie*, 221 N.C. App. 29, 38, 727 S.E.2d 11, 18 (2012)) (emphasis original). Upon remand, the trial court made findings regarding Wife's testimony of the value of the marital residence, and specifically found her testimony was not credible. This determination rests within the discretion, duty, and prerogative of

the trial court, and will not be disturbed on appeal, when supported by findings of fact. *Id.*

Myron Creson, one of the appraisers called by Wife, presented the court with a written report stating his opinion of the value of the marital residence as of 23 January 2014, approximately four months prior to the commencement of trial. Wife argues Mr. Creson's appraisal was evidence of the increased value of the property at the time of trial. The trial court made no finding on the specific value amount Mr. Creson had opined. The court found "[n]o appraiser called by either party provided an opinion of the date of distribution value of the marital home." The equitable distribution order was entered in August 2014, approximately eight months after the date of Mr. Creson's appraisal. Apparently, the trial court determined Mr. Creson's opinion was too remote in time to be considered a date of distribution value. Wife has failed to show this determination was manifestly unsupported by reason to amount to an abuse of discretion. *Wiencek-Adams*, 331 N.C. at 691, 417 S.E.2d at 451. Wife's arguments related to the increased value of the marital home are overruled.

V. Consideration of Distributional Factors

[2] Wife argues the trial court failed to properly consider distributional factors she presented at trial and failed to make appropriate findings of fact with regard to these factors.

In her brief, Wife sets forth, in detail, twelve distributional factors she claims were not properly considered by the trial court in making its equal distributive award. The only material changes to the trial court's order on remand are discussed above and pertain to the value of the marital residence.

In her initial appeal before this Court, Wife argued the trial court erred by classifying, valuing, and distributing certain marital and divisible property, and by determining an equal distribution of the marital property was equitable. *See Lund I*, __ N.C. App. at __, 779 S.E.2d at 177.

A review of Wife's appellant brief before this Court in *Lund I* shows Wife *made the identical argument* before this Court in her previous appeal. She set forth, *word for word*, the same factors she now claims support an unequal distribution award. This Court rejected Wife's argument in *Lund I*, and held the trial court did not abuse its discretion in determining an equal distribution was equitable. __ N.C. App. at __, 779 S.E.2d at 178. Wife's attempt to have this Court reconsider an issue previously considered and ruled upon is improper and dismissed. *See Lea*

Co. v. N.C. Bd. of Transp., 323 N.C. 697, 699, 374 S.E.2d 866, 868 (1989) ("A decision of this Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal.").

VI. Hearing After Remand

[3] Wife argues a hearing was required upon remand in April 2016 to determine values of the property and distributional factors at that time, and the trial court erred by failing to conduct a further hearing. We disagree.

The trial court followed this Court's mandate to consider and make findings upon remand to determine the existence of divisible property with regard to the marital residence. The trial court considered the competent evidence it had received at trial and made further findings. No further hearing was required to address the mandate of this Court. In *Lund I*, this Court affirmed the trial court's determination that an equal division of the marital estate was equitable. *Lund I* included no mandate to the trial court to consider additional evidence on that issue. Wife's argument is overruled.

VII. Conclusion

Wife has failed to show the trial court abused its discretion by determining Wife's testimony was not credible regarding the date of distribution value of the marital residence and by finding no evidence showed the value of the marital residence on the date of distribution. The trial court was not mandated in *Lund I* to hold a new hearing upon remand.

Wife's argument pertaining to the trial court's consideration of distributional factors and conclusion that an equal division is equitable was raised and considered during Wife's initial appeal in *Lund I* and is dismissed. The revised equitable distribution order entered by the trial court upon remand is affirmed. *It is so ordered.*

AFFIRMED.

Judges ELMORE and Judge DIETZ concur.

MEINCK v. CITY OF GASTONIA

[252 N.C. App. 312 (2017)]

JOAN A. MEINCK, PLAINTIFF
v.
CITY OF GASTONIA, A NORTH CAROLINA MUNICIPAL CORPORATION, DEFENDANT

No. COA16-892

Filed 21 March 2017

1. Immunity—governmental immunity—tort liability—city ownership and maintenance of building—summary judgment

The trial court erred by granting summary judgment in favor of defendant City on the issue of governmental immunity. Defendant was not immune from suit for tort liability in the ownership and maintenance of its building located at 212 West Main Avenue, and was answerable to plaintiff for any negligent act which may have caused injury and damage.

2. Negligence—summary judgment—sufficiency of evidence—maintenance of steps

The trial court erred by granting summary judgment in favor of defendant City on the issue of negligence. Plaintiff's forecast of evidence was sufficient to raise genuine issues of material fact of whether defendant city negligently failed to maintain the steps on which plaintiff tripped or acted negligently in failing to warn about the condition of the steps.

3. Negligence—contributory negligence—summary judgment—exiting hazardous steps

The trial court erred by granting summary judgment in favor of defendant City on the issue of contributory negligence. A jury could find plaintiff acted reasonably in using the exit with the hazardous steps. No evidence of other means of exiting the building was presented.

Appeal by plaintiff from order entered 1 June 2016 by Judge Lisa Bell in Gaston County Superior Court. Heard in the Court of Appeals 22 February 2017.

Law Office of Thomas D. Bumgardner, PLLC, by Thomas D. Bumgardner, for plaintiff-appellant.

Stott, Hollowell, Palmer & Windham, L.L.P., by Martha Raymond Thompson and Ryan L. Bostic for defendant-appellee.

TYSON, Judge.

Joan Meinck ("Plaintiff") appeals from an order granting summary judgment in favor of the City of Gastonia ("Defendant"). We reverse and remand.

I. Background

Defendant owns a commercial building located at 212 West Main Avenue in Gastonia, North Carolina. The building is located within a downtown revitalization district established by Defendant in a 1999 city resolution. Defendant did not use the building to house any municipal or government departments or offices.

Beginning in 2013, Defendant leased the building to the Gaston County Art Guild ("Art Guild"), a private non-profit entity unaffiliated with either Defendant or Gaston County. Defendant leased the building as an effort to fill a vacancy and help remove a blight from vacant buildings on the downtown area. Defendant's evidence tends to show Defendant did not seek to make a profit from the lease. Defendant retained the responsibility for maintaining the exterior of the premises and the right to inspect the building at any time.

The lease agreement between Defendant and the Art Guild limited the Art Guild's uses of 212 West Main Avenue to an "art gallery and artists' studios and a gift shop." The lease agreement provided for four separate means of compensation to Defendant. The first method required the Art Guild to pay Defendant 90% of all rent money it received from subtenants. The second method guaranteed Defendant 30% of the gross sales receipts received for art the Art Guild sold on the premises. The third method required subtenants of the Art Guild to disgorge 15% of their gross sales receipts to Defendant. The fourth method required subtenants to provide a minimum of fifteen hours of volunteer time each month working on tending to the gallery and the gift shop. In addition to the minimum required volunteer time, subtenants were also tasked to arrange sales shows, serve on committees, or help manage other subtenants.

The subleased space in 212 West Main Avenue contained enough room for nineteen private art studios for subtenants. Plaintiff was one of the subtenants of the Art Guild. Plaintiff paid $95.00 per month to rent space inside 212 West Main Avenue, 90% of which was paid to Defendant.

For the 2013 fiscal year, Defendant expended $33,062.01 on 212 West Main Avenue and received revenues of $21,572.98 from the Art Guild's

lease, a loss of $11,489.03. For the 2014 fiscal year, Defendant expended $40,008.13 and received revenues of $21,935.57, a loss of $18,072.56.

On 11 December 2013, Plaintiff left through the rear exit of 212 West Main Avenue, and she carried several large pictures, lost her balance on a set of steps, and fell. As a result of her fall, Plaintiff suffered a broken hip, required hospitalization, and incurred medical expenses. Portions of the cement on the steps had apparently eroded. As a result of carrying large pictures, Plaintiff was prevented from seeing where she was stepping.

On 4 February 2015, Plaintiff filed a complaint and alleged Defendant had negligently failed to maintain the exit of the building or to warn of the dangerous condition of the exit. On 12 January 2016, Defendant filed a motion for summary judgment asserting governmental immunity as an affirmative defense. The trial court granted Defendant's motion on that basis. Plaintiff appeals.

II. Statement of 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. Standard of Review

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2016).

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

> An issue is "genuine" if it can be proven by substantial evidence and a fact is "material" if it would constitute or irrevocably establish any material element of a claim or a defense.
>
> A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her

> claim. Generally this means that on undisputed aspects of the opposing evidential forecast, where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.

Lowe v. Bradford, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations and internal quotation marks omitted).

This Court reviews a trial court's summary judgment order *de novo*. *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

IV. Analysis

A. Governmental Immunity

[1] Plaintiff asserts the trial court's grant of summary judgment for governmental immunity was error.

"Under the doctrine of governmental immunity, a county or municipal corporation 'is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity.'" *Estate of Williams v. Pasquotank County*, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012) (quoting *Evans ex rel. Horton v. Hous. Auth.*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (internal quotation omitted)). "Nevertheless, governmental immunity is not without limit. '[G]overnmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions.' Governmental immunity does not, however, apply when the municipality engages in a proprietary function." *Williams*, 366 N.C. at 199, 732 S.E.2d at 141 (quoting *Evans*, 359 N.C. at 53, 602 S.E.2d at 670 (citations omitted), and citing *Town of Grimesland v. City of Washington*, 234 N.C. 117, 123, 66 S.E.2d 794, 798 (1951)).

A governmental function is an activity which is "discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself [.]" *Britt v. City of Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952). A proprietary function is an activity which is "commercial or chiefly for the private advantage of the compact community[.]" *Id.* "[I]n cases of doubtful liability[,] application of [governmental immunity] should be resolved against the municipality." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 530, 186 S.E.2d 897, 908 (1972) (citations omitted).

Whether a particular government activity is a governmental or proprietary function depends upon a multi-factor inquiry. "[T]he threshold inquiry in determining whether a function is proprietary or governmental is whether, and to what degree, the legislature has addressed the issue." *Williams*, 366 N.C. at 200, 732 S.E.2d at 141-42.

Here, Plaintiff asserts a claim against Defendant on the basis of its ownership and maintenance of the building leased to the private, nonprofit tenant, as allegedly part of Defendant's downtown revitalization efforts. The legislature has authorized cities to lease property to private parties pursuant to N.C. Gen. Stat. § 160A-272 (2015). The legislature did not specify in N.C. Gen Stat. § 160A-272 nor elsewhere, whether a city's leasing of property to a private party is a governmental or proprietary function.

The legislature also authorizes cities to establish municipal service districts for the purpose of, *inter alia*, downtown revitalization projects. N.C. Gen. Stat. § 160A-535 (2016). The statute defines "downtown revitalization" to mean "improvements, services, functions, promotions, and developmental activities intended to further the public health, safety, welfare, convenience, and economic well-being of the central city or downtown area." N.C. Gen. Stat. § 160A-536(b). Nowhere has the legislature deemed all downtown revitalization projects undertaken by a city within a service district to be activities, which are exempt from suit through governmental immunity.

"[W]hen an activity has not been designated as governmental or proprietary by the legislature, that activity is necessarily governmental in nature when it can only be provided by a governmental agency or instrumentality." *Williams*, 366 N.C. at 202, 732 S.E.2d at 142. The ownership and maintenance of property leased to a private entity is not an activity, which is provided only by a governmental agency or instrumentality.

When the service in question can be provided both privately and publicly, we are required to consider several additional factors, including: "whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider." *Id.* at 202-03, 732 S.E.2d at 143 (footnotes omitted). Here, a city's ownership and maintenance of a building that is occupied and used solely by a private non-profit entity is not a service solely and traditionally provided by a governmental entity. *Id.*

With regards to the rentals received by Defendant from leasing the building and maintaining the exterior of the building, the case of *Glenn*

v. City of Raleigh is instructive. In *Glenn*, the plaintiff was injured when a rock was thrown from a lawn mower and struck him in the head, while he was visiting a public park operated by the City of Raleigh. *Glenn v. City of Raleigh*, 246 N.C. 469, 470, 98 S.E.2d 913, 913-14 (1957). Our Supreme Court determined the revenue generated from the city's operation of the park "import[ed] such a corporate benefit or pecuniary profit or pecuniary advantage to the city of Raleigh as to exclude the application of governmental immunity." *Id.* at 477, 98 S.E.2d at 919. The Court stated, "[i]n order to deprive a municipal corporation of the benefit of governmental immunity, . . . the act or function must involve special corporate benefit or pecuniary profit inuring to the municipality." *Id.* at 476, 98 S.E.2d at 918 (internal quotation marks and citation omitted).

Here, Defendant received substantial revenues from multiple sources from the lease and subtenants of 212 West Main Avenue of $21,572.98 and $21,935.57 for fiscal years 2013 and 2014 respectively. These revenues included amounts Defendant received as rent payments, gift shop proceeds, as well as percentages of the amount of private artwork sold by the subtenant-artists including Plaintiff. The substantial revenue Defendant-city has received from the lease of the premises located at 212 West Main Avenue, solely to the private Art Guild, provides such a pecuniary advantage to exclude the application of government immunity as a matter of law. *See id.* at 477, 98 S.E.2d at 919.

We view the private commercial nature of Defendant's agreement with the Art Guild to receive a 15% commission on all private art sold, Defendant's lease of the building solely to a private organization, and the Defendant's generation of substantial revenues from the lease, gift shop sales, and subtenants' rents, together as weighing heavily towards concluding Defendant's ownership and maintenance of the leased building to be a proprietary function. *Compare Bynum v. Wilson County*, 367 N.C. 355, 359-60, 758 S.E.2d 643, 646-47 (2014) (placing significance on county's use of building to house *government* departments where slip-and-fall incident occurred); *See Britt*, 236 N.C. at 450, 73 S.E.2d at 293 (defining a proprietary function as *commercial* in nature); *See Glenn* at 477, 98 S.E.2d at 919 (holding that defendant-city's generation of revenue from activity precluded governmental immunity).

In light of all these factors, we hold that Defendant is not immune from suit for tort liability in the ownership and maintenance of its building located at 212 West Main Avenue, and is answerable to Plaintiff for any negligent act which may have caused Plaintiff injury and damage.

B. Negligence

[2] Plaintiff contends that her forecast of evidence presents a material question of fact regarding defendant's negligence. We agree.

"Summary judgment is rarely appropriate in negligence cases, even when there is no dispute as to the facts, because the issue of whether a party acted in conformity with the reasonable person standard is ordinarily an issue to be determined by a jury." *Surrette v. Duke Power Co.*, 78 N.C. App. 647, 650, 338 S.E.2d 129, 131 (1986) (citation omitted). In North Carolina, "the landowner . . . is required to exercise reasonable care to provide for the safety of all lawful visitors . . . ." *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 161, 516 S.E.2d 643, 646 (1999). In order to prove a defendant's negligence, a "plaintiff must show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence." *Fox v. PGML, LLC*, 228 N.C. App. 28, 31, 744 S.E.2d 483, 485 (2013) (citation omitted).

"To determine whether or not the court should grant summary judgment in a premises liability case, courts have focused on whether or not the premises met relevant building standards and whether there was evidence of a lack of notice of any prior problems with the premises." *Id.* (citation omitted). "Whether or not a building meets these standards, though not determinative of the issue of negligence, has some probative value as to whether or not defendant failed to keep his [premises] in a reasonably safe condition." *Thomas v. Dixson*, 88 N.C. App. 337, 343, 363 S.E.2d 209, 213 (1988).

Viewed in the light most favorable to the non-movant, Plaintiff's evidence tends to show the following facts and circumstances. Defendant was responsible for maintaining the exterior of the building, including the steps. Defendant retained and possessed the right to inspect the premises and building at any time. At the time of Plaintiff's fall, the exit from which she left the building and fell was the only means of exit available. Plaintiff was a subtenant of the Art Guild tenant and was not a trespasser on the premises.

Plaintiff's expert witness, Dr. Hunt, stated the condition of the building's steps did not meet the building code's requirements. Defendant has not forecasted any evidence tending to show the steps met code standards. Additionally, Defendant's City Manager, Edward Munn, testifying on behalf of Defendant, stated the condition of the steps was such as to necessitate repairs.

Plaintiff's forecast of evidence is sufficient to raise the genuine issues of material fact of whether Defendant negligently failed to maintain the steps on which Plaintiff tripped or acted negligently in failing to warn about the condition of the steps.

C. Contributory Negligence

[3] Pursuant to Rule 28(c) of the North Carolina Rules of Appellate Procedure:

> Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.

N.C. R. App. P. 28(c).

Before the trial court, Defendant moved for summary judgment on the ground of Plaintiff's contributory negligence, and on the ground of governmental immunity. The trial court granted Defendant's motion for summary judgment solely upon the ground of governmental immunity. On appeal, Defendant-city argues contributory negligence as a matter of law and as an alternative basis to support the trial court's grant of summary judgment under Rule 28(c).

Contributory negligence "is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Fisk v. Murphy*, 212 N.C. App. 667, 670, 713 S.E.2d 100, 102 (2011) (citation omitted). "[S]ummary judgment is rarely an appropriate remedy in cases of . . . contributory negligence." *Frankenmuth Ins. v. City of Hickory*, 235 N.C. App. 31, 34, 760 S.E.2d 98, 101 (2014) (citing *Thompson v. Bradley*, 142 N.C. App. 636, 641, 544 S.E.2d 258, 261 (2001)).

Where a plaintiff's injury results from slipping and falling, "[t]he basic issue with respect to contributory negligence is whether the evidence shows that, as a matter of law, plaintiff failed to keep a proper lookout for her own safety." *Duval v. OM Hosp., LLC*, 186 N.C. App. 390, 395, 651 S.E.2d 261, 265 (2007) (quoting *Rone v. Byrd Food Stores, Inc.*, 109 N.C. App. 666, 670, 428 S.E.2d 284, 286 (1993)). "The existence of contributory negligence does not depend on plaintiff's *subjective* appreciation of danger; rather, contributory negligence consists of conduct which fails to conform to an *objective* standard of behavior[,] the care

an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury." *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 670, 268 S.E.2d 504, 507 (1980) (quotation marks and citation omitted) (emphasis supplied).

Here, Defendant argues Plaintiff was contributorily negligent as a matter of law, and asserts Plaintiff should have known of any hazard on the steps based upon her several prior uses of the exit and steps. In addition, Defendant argues Plaintiff was contributorily negligent for carrying pictures which blocked her view of the steps.

Viewing the evidence in the light most favorable to Plaintiff as the non-moving party, Plaintiff had never moved large pictures out of the building previously. Also, the exit steps on which Plaintiff fell was the only exit available to her to leave the building.

In *Duval v. OM Hosp.*, the plaintiff, a guest at a hotel, left her room by means of an unlit stairwell and fell. *Duval*, 186 N.C. App. at 391, 651 S.E.2d at 263. In reversing the trial court's grant of summary judgment for the defendant, this Court held, in part, the jury should consider whether the plaintiff, despite her knowledge of the hazardous condition of the stairwell, had acted reasonably by using the only means of egress available to her. *Id.* at 396, 651 S.E.2d at 265.

Here, a jury could find Plaintiff also acted reasonably in using the exit with the hazardous steps. No evidence of other means of exiting the building was presented. The carrying of large pictures out of the art gallery is a reasonable, non-negligent use of the exit. *See id.* Summary judgment for Defendant as a matter of law, on the issue of Plaintiff's contributory negligence, is inappropriate in this case.

V. Conclusion

We reverse the trial court's entry of summary judgment in favor of Defendant on the issue of governmental immunity, and deny summary judgment for Defendant on the issues of Plaintiff's negligence and contributory negligence. We remand this case to the trial court for further proceedings. *It is so ordered.*

REVERSED AND REMANDED.

Judges ELMORE and DIETZ concur.

PORTER v. PORTER

[252 N.C. App. 321 (2017)]

JEFFERY LAWRENCE PORTER, PLAINTIFF
v.
SHEILA JOY PORTER, DEFENDANT

No. COA16-329

Filed 21 March 2017

1. Divorce—equitable distribution—marital property—classification—valuation—business

The trial court did not err in an equitable distribution case by its classification and valuation of plaintiff husband's 1/3 interest in the business Rugworks. Defendant wife met her burden of showing that it was marital property, with the exception of the $50,000.00 initially invested by plaintiff. There was no additional evidence to classify plaintiff's interest as separate.

2. Divorce—equitable distribution—distributive award—term of payment, interest rate, and monthly payments—ability to prepay balance prior to expiration of term

The trial court erred in an equitable distribution case by awarding defendant wife a distributive award payable over 15 years with interest at the rate of 8% on the entire amount for the entire 15 years. The court's order was remanded for a new order establishing the term of payment, interest rate, and monthly payments for the distributional award; and making clear that plaintiff husband was permitted to prepay the remaining balance of the award prior to expiration of the full term.

Appeal by plaintiff from order entered 14 October 2015 by Judge Melinda H. Crouch in District Court, New Hanover County. Heard in the Court of Appeals 6 October 2016.

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

The Lea/Schultz Law Firm, P.C., by James W. Lea, III and Paige E. Inman, for defendant-appellee.

STROUD, Judge.

Plaintiff Jeffery Lawrence Porter ("Husband") appeals from the trial court's equitable distribution order filed 14 October 2015. Husband

argues that the trial court erred in the classification, valuation, and distribution of his 1/3 interest in Rugworks, LLC and that the court erred in awarding defendant Sheila Joy Porter ("Wife") a distributional award payable over 15 years subject to an eight percent interest rate. Although the trial court properly classified and divided Husband's business interest in Rugworks as marital property, the court's order does not properly set out the distributive award Husband must pay to Wife. Accordingly, we reverse the court's order in part and remand for the trial court to enter an order clearly establishing the distributive payment due, interest rate, and terms of payment.

Facts

Husband and Wife were married on 12 April 1996 and had two children during the marriage. In April 1998, Husband started a business, Rugworks, LLC ("Rugworks") with two business partners. Each partner had a 1/3 interest in the business, and Husband invested $50,000.00 from a separate retirement account to acquire his 1/3 interest. Husband worked full time with Rugworks during the marriage, while Wife worked during part of the marriage as a respiratory therapist before eventually becoming a stay-at-home mother after the birth of their second child, as she remained until the parties' separation.

Husband and Wife moved to Wilmington, North Carolina, in 2006, where they had both grown up, in order to relocate a second Rugworks store from Myrtle Beach, South Carolina to Leland, North Carolina. At that time, Husband became the main operator of the relocated store and solely supported the family from this employment until he and Wife separated. Husband also formed a business known as R.W. Management Company with his Rugworks partners to purchase and lease land to Rugworks. R.W. Management Company was formed after the marriage of the parties and there was no evidence presented of any separate property invested in its acquisition.

Husband and Wife separated on 2 December 2013. Husband filed his complaint on 15 January 2014 with claims for child custody and equitable distribution. Wife answered and included counterclaims for alimony, child support, child custody, and equitable distribution. All of the pending claims were tried together on three days, starting on 16 June 2015 and ending on 22 June 2015. The trial court rendered its rulings on all of the claims orally on 28 July 2015, but the trial court ultimately entered three separate orders. On 15 September 2015, the trial court entered a child custody order granting joint custody, with Husband having primary physical custody of one child and Wife having primary physical custody

of the other.[1] A few weeks later, on 14 October 2015, the court entered an order denying Wife alimony on the basis that she had not presented sufficient proof that she was a dependent spouse.

The trial court also entered its equitable distribution order on 14 October 2015. In the order, the court found that the parties had stipulated to the values of several items of personal property and financial accounts. The primary dispute in the equitable distribution portion of the trial was the valuation of Rugworks and R.W. Management. The trial court found that Husband invested $50,000.00 of separate funds into Rugworks when it was formed and that at the time of trial, the business had gross revenues around $10,000,000.00 per year. The court also found that Wife's expert was a qualified business valuation expert and noted the valuation techniques he relied on to determine revenue and profits of Rugworks, specifically the "capitalization of earnings" technique, which the trial court found to be "the most credible methodology." The court concluded that Husband's expert, in contrast, "expressed limited knowledge in the area of business valuations and had not conducted any of the preferred methods of business valuations on Rugworks." As for R.W. Management, the court found that the fair market value of its real estate on the date of separation was $1,400,000.00. The trial court also found that Husband's 1/3 interest in the real estate alone was $148,482.00 and that his interest in the net real estate value and receivable value was a total of $198,553.00.

After considering a variety of potential distributional factors, the trial court concluded that an equal distribution would be equitable. The court found that Husband "should be required to pay a distributional payment to Wife in the amount of $348,050.00." After concluding that Husband had insufficient assets to pay this amount by making payments of over $5,000.00 per month within six years at no interest, the court instead concluded that Wife "will need to be paid her distributional payment over a period of time with interest applied at the legal rate of eight percent (8%)." The trial court's order contains a section regarding the distributional payment, which states: "In order to equalize the distribution of the parties' assets and debts, Husband shall pay a distributional payment to Wife in the amount of $348,050. Beginning October 1, 2015, Husband shall pay to Wife $3,326.15 per month for a period of 180 months to satisfy this payment." Husband timely appealed to this Court.

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1. This order did not address child support. On 2 October 2015, Wife filed a motion requesting that the trial court establish child support in accordance with the North Carolina Child Support Guidelines.

Discussion

Husband raises two issues on appeal regarding the trial court's equitable distribution order related to Husband's interest in Rugworks. This Court has previously explained its standard of review in equitable distribution cases as follows:

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

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

I. Classification and Valuation of Interest in Rugworks, LLC

[1] Husband first argues that the trial court erred in its classification and valuation of Husband's 1/3 interest in Rugworks. At trial, Husband's main argument regarding his interest in Rugworks was based upon valuation. Husband presented expert valuation testimony from an accountant that as of December 2013, Rugworks had a negative value. Ultimately, the trial court found that Wife's valuation expert used the most credible valuation technique. Wife's expert, Dr. Craig Galbraith, testified regarding several valuation methods he compared when determining the value of Rugworks, and he determined that it had a positive value around $1.8 million. The trial court specifically found his valuation method more credible than that presented by Husband's expert and relied on it when determining a marital value of $566,931.00 for Husband's 1/3 interest in Rugworks after deducting his $50,000.00 separate contribution. Husband's only argument on appeal regarding the valuation method adopted by the trial court is an alternative claim that the court "adopted Galbraith's 'average' of his various valuation methods" but that this calculation "appears to be a mathematical error."

Although Husband seeks to treat his argument on appeal as one regarding valuation, really his arguments predominately address classification. At trial, he put all of his eggs in the valuation basket, while on appeal he asks that we consider the classification basket. Husband's arguments on appeal, including those disguised as valuation arguments, are based upon the premise that some portion of Rugworks other than the initial $50,000.00 investment should have been classified as his separate property.

Husband now argues that as part of its improper valuation of Rugworks, the trial court erred in its *classification* of Husband's 1/3 interest in Rugworks. Specifically, Husband notes that the trial court found, in Finding of Fact No. 16, that Husband acquired his 1/3 interest in Rugworks with $50,000.00 of separate property. Husband argues that the trial court did not expressly value his interest in Rugworks either upon distribution or when it was acquired and that it should have classified Husband's 1/3 interest in Rugworks as separate property at the time of separation. The court did describe Husband's 1/3 interest, less the $50,000.00 separate contribution, as having "a total marital value of $566,931.00." Nevertheless, Husband contends that "it is evident the trial court considered the 1/3 interest to be marital property, with the exception of the $50,000 contribution of separate property. The evidence and trial court's own findings, however, establish the 1/3 interest in Rugworks is [Husband's] separate property." But Husband's argument that his 1/3 interest must be classified entirely as separate has no foundation in the evidence presented at trial.

Wife argues that Husband "should be barred from asserting that Rugworks is not marital property because with the exception of the $50,000.00 initially invested by [Husband,] there was no dispute regarding the classification of the Rugworks, LLC property until this appeal." Wife notes that although Husband was obligated under N.C. Gen. Stat. § 50-21(a) (2015) to file an initial inventory listing, which is supposed to identify any property alleged to be separate, he failed to file this inventory. *See* N.C. Gen. Stat. § 50-21(a) ("Within 90 days after service of a claim for equitable distribution, the party who first asserts the claim shall prepare and serve upon the opposing party an equitable distribution inventory affidavit listing all property claimed by the party to be marital property *and all property claimed by the party to be separate property*, and the estimated date-of-separation fair market value of each item of marital and separate property." (Emphasis added)). Nor did the pretrial order addressing the issues to be decided in the equitable distribution trial identify classification of Rugworks as one of the issues for the trial court to decide. The pretrial order provided as follows:

> 9. For the purposes of equitable distribution, the parties agree that the following are the issues to be decided by the Court:
>
> . . . .
>
> E. *Value* of Rugworks, LLC;
>
> F. *Value* of R.W. Management;

(Emphasis added). On the schedules of the pretrial order setting forth the items of property and parties' contentions of values and classification, Wife contended that Rugworks and R.W. Management were marital property, designated by "M." Husband left the column for his contention as to classification blank, although he had filled in the same column for other items of property on the same page as "M." Notably, he did not fill in the classification blank with "S" for "separate." Husband notes that he did not stipulate to classification of Rugworks or R.W. Management, but Wife responds that he also did not make any direct contentions or argument regarding classification of any portion other than the initial $50,000.00 investment as separate property. In fact, he did not even argue in closing that the trial court should classify any portion of Rugworks other than the initial $50,000.00 investment as separate. Instead, his position at trial was that Rugworks had a negative value as of the date of separation.

Husband responds that "[t]he question before the trial court was whether there was any increase in the value of Mr. Porter's 1/3 interest in Rugworks which could be valued as marital property." He contends that Wife has made "general assertions about stipulations -- but points to no stipulation in the record. Nothing in the pre-trial order indicates the classification and valuation of 'Rugworks' has been stipulated to or decided. To the contrary, Rugworks, and [Husband's] 1/3 interest, were a central issue at trial. In closing arguments to the trial court, [Husband's] trial attorney argued the 1/3 interest in Rugworks should not be distributed at all because it had no value (or really a negative value) based on the evidence from [Husband's] accountant."

We recognize that to some extent classification and valuation arguments at trial were perhaps conflated, and Husband is correct that there was no stipulation as to classification, although the parties did stipulate to the classification and values of several items of property and to the issues to be determined by the trial court in the pretrial order. We will therefore generously assume that Husband did preserve the issue of classification for appeal, despite his failure to note it in his inventory or the pretrial order.

Husband argues that a trial court's classification of property should be reviewed *de novo*, noting our case law that states: "Because the classification of property in an equitable distribution proceeding requires the application of legal principles, this determination is most appropriately considered a conclusion of law." *Hunt v. Hunt*, 112 N.C. App. 722, 729, 436 S.E.2d 856, 861 (1993). More importantly, however, Husband and Wife both correctly note that this Court has long held that in an

equitable distribution proceeding, the party seeking the specific classification has the burden of proving that classification by the preponderance of the evidence. *See, e.g.*, *Brackney v. Brackney*, 199 N.C. App. 375, 383, 682 S.E.2d 401, 406 (2009) ("In equitable distribution proceedings, the party claiming a certain classification has the burden of showing, by a preponderance of the evidence, that the property is within the claimed classification."). Moreover, "[w]hen marital efforts actively increase the value of separate property, the increase in value is marital property and is subject to distribution." *Conway v. Conway*, 131 N.C. App. 609, 615, 508 S.E.2d 812, 817 (1998) (citations omitted). "Any increase is presumptively marital property unless it is shown to be the result of passive appreciation." *Id.* at 616, 508 S.E.2d at 817. *See also O'Brien v. O'Brien*, 131 N.C. App. 411, 420, 508 S.E.2d 300, 306 (1998) ("[T]he party seeking to establish that any appreciation of separate property is passive bears the burden of proving such by the preponderance of the evidence.").

Here, Wife met her burden of showing that Husband's 1/3 interest in Rugworks was marital, as it was acquired during the marriage and owned on the date of separation. But the only evidence Husband presented as to a separate classification of any portion of Rugworks was the evidence of his initial $50,000.00 investment from his separate funds. To the extent that there was any evidence as to the appreciation of Husband's 1/3 interest during the marriage, it indicated that the appreciation was active, not passive. Husband was employed full-time with Rugworks during the marriage and he and his partners worked to expand the business for many years. No evidence of passive appreciation of Rugworks was presented at trial. To the contrary, the court heard testimony that Husband played a key role in managing Rugworks during the course of the marriage and that Wife became a stay-at-home mother so that Husband could devote his full attention to Rugworks. Husband and his partners testified about the long hours and hard work they put into establishing and expanding Rugworks.

For example, Todd Williams, one of the Rugworks partners, described his role as well as Husband's: "It's management, managing people, managing sales." He testified that they got their business by "Reputation. Hard work. Going out and asking for it" and that they worked "as many [hours] as needed" averaging "10 or 12" hours a day. Rugworks opened new locations, and Husband moved to North Carolina to operate one of the new locations in 2006. Husband failed to meet his burden of showing that any portion of the increase in value was separate property. Husband did not even argue to the trial court that any portion of the value of Rugworks other than the initial $50,000.00 investment

was separate; his arguments were almost exclusively related to valuation. Husband's classification basket was empty at trial, and he cannot put new eggs in it now. Other than the initial $50,000.00 investment, the trial court had no evidence upon which it could classify Husband's interest in Rugworks as separate.

II. Distributive Award

[2] Next, Husband contends that the trial court erred in awarding Wife a distributive award payable over 15 years with interest at the rate of 8% on the entire amount for the entire 15 years. N.C. Gen. Stat. § 50-20(b)(3) (2015) states that " '[d]istributive award' means payments that are payable either in a lump sum or over a period of time in fixed amounts[.]" Husband contends that: (1) the trial court's order improperly requires him to pay 8% interest on the full amount of the award for the entire 15 years; (2) the trial court failed to find that he has the ability to pay the award as ordered, and (3) under *Lawing v. Lawing*, 81 N.C. App. 159, 184, 344 S.E.2d 100, 116 (1986), the trial court erred by extending the period of payment beyond six years. To some extent, Husband's arguments on the distributive award are interrelated, since a change in the interest rate or term of payment also changes the amount of the monthly payments and the determination as to Husband's ability to pay. But we must address all three of these variables in the equation, since any or all may change on remand.

(1) Interest on distributive award

The trial court's findings of fact and decretal establish a distributive award of $348,050.00 as the amount necessary to equalize the distribution of the total value of the marital estate, and we have affirmed this ruling above. But the decretal also requires that "Beginning October 1, 2015, [Husband] shall pay to [Wife] $3,326.15 per month for a period of 180 months to satisfy this payment." If paid over the full 15 years at 8% per annum interest, the payments would total $598,707.00. The trial court's findings addressed the need to have the distributive award paid over a time period of more than six years as follows:

> 34. In order to equalize the distributions to each party, Husband should be required to pay a distributional payment to Wife in the amount of **$348,050.00**.
>
> 35. The payout of the distributional payment within six (6) years with no interest would result in a payment by Husband to Wife in excess of $5,000.00 per month. The

> Court finds that there are not assets from which to make this payment and a distributional payment is proper.
>
> 36. In addition, there are no other assets from the marriage with which to pay any type of lump sum payment to Wife and to require Husband to do so would be a severe financial hardship. For Wife's interest in Rugworks she will need to be paid her distributional payment over a period of time with interest applied at the legal rate of eight percent (8%). If the Court does not apply an interest rate, the present value of a payout over any period of time would be substantially less than the total distributional payment. Accordingly, it is necessary to apply the legal rate to the distributional payment until paid in full. [2]

Husband argues:

> The trial court ordered the award to be made in payments over 180 months (or 15 years) in installments of $3,326.15 per month, which expressly includes 8% interest amortized over the life of the award. In other words, [Husband] is required to pay a total amount of $598,707 over this time period. The trial court's order contains no other option for [Husband] to comply with this award other than to make these monthly payments including interest.

(Footnote omitted). Although the court found that Husband does not currently have the assets to pay a distributional award in full, we agree with Husband that the award should be established as a set amount -- $348,050.00 -- and make clear that this amount may be paid prior to the time set out in the order if Husband is able to do so, in order to avoid some interest. As noted in *Lawing*, discussed in further detail below, a distributive award "should be crafted to assure completion of payment as promptly as possible." *Id.* at 184, 344 S.E.2d at 116. The decretal as written *appears* to require Husband to pay the award over the entire period of 15 years in monthly payments of $3,326.15 and would not allow Husband to pay off the remaining principal balance of the award sooner, if he is able to do this.[3] Finding of Fact No. 36 suggests that Husband

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2. Although the trial court referred to the award as a "distributional payment," we take this to mean the same as a distributive award under N.C. Gen. Stat. § 50-20(b)(3).

3. In addition, in the oral rendition of the judgment, the trial court stated that the monthly payments would be $2,666.87, which would result in a total sum paid of $480,036.60, based upon the interest rate of 3.5% which the trial court noted at that time.

would be able to prepay the distributive award and thus avoid some of the interest, as it says interest would apply "until paid in full[,]" but the decretal specifically requires 180 payments of $3,326.15 and does not appear to allow prepayment. We realize that this may have simply been a poorly worded decretal provision, but in any event, Husband must be afforded the opportunity to pay the distributive award sooner and avoid payment of some of the interest. We therefore remand for the court to clarify in its order that Husband must pay the distributive award of $348,050.00 and that he shall pay this amount in monthly payments for a fixed period of time with interest on the balance remaining, but he *may* pay the balance remaining sooner and thus avoid payment of additional interest.

Husband also argues, and we agree, that it is not clear from the order why the court used an interest rate of eight percent. On 28 July 2015, when making its oral rendition of the judgment, the trial court stated that it would be using an interest rate of 3.5 percent. The trial court stated that "the Court would order that that distributional payment be made over 180 payments at an interest rate of 3.5 years [sic] for 15 years for a monthly payment of $2,666.87." During the rendition, the trial court answered some questions from counsel about the ruling and reiterated the 3.5% rate:

> [THE COURT:] And do you need further direction on -- because you've submitted the order?
>
> [Wife's trial counsel]: No, ma'am. No. I know what you're saying. That's fine. You said 3.5 percent, I think; is that right?
>
> THE COURT: 3.5 percent.

We realize that the written order controls over the oral rendition, *see*, *e.g.*, *In re O.D.S.*, __ N.C. App. __, 786 S.E.2d 410, 417 (2016) ("[P]rior opinions of this Court have made clear that, as a general proposition, the written and entered order or judgment controls over an oral rendition of that order or judgment."), *disc. review denied*, __ N.C. __, 792 S.E.2d 504 (2016); and the trial court may have fully intended to change the interest rate and monthly payment to the amounts set forth in the written order, but nothing in the court's order explains why the interest rate used in the written order was eight percent, other than that

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This rendition was also generally consistent with the distributive award payment schedule requested by Wife's counsel in his closing argument. ("So the fact of the matter is, is that 15-year payment results in a payment of about two grand a month.").

the order noted that this is "the legal rate."[4] It is possible that the trial court decided after its oral rendition to use eight percent instead of 3.5 percent, but it is also possible that eight percent was included inadvertently because it was the usual "legal rate" at that time. N.C. Gen. Stat. § 24-1. Wife argues simply that a rate of eight percent has been allowed in other cases, such as *Lawing*, 81 N.C. App. at 178, 344 S.E.2d at 113; but the fact that this Court affirmed an order with a particular interest rate in one case does not mean that the interest rate has been approved for all cases, or that all awards require an interest payment. This Court has long held that "the decision of whether to order the payment of interest on a distributive award is one that lies within the discretion of the trial judge." *Mrozek v. Mrozek*, 129 N.C. App. 43, 49, 496 S.E.2d 836, 840 (1998). And we have ruled on orders with other interest rates as well. *See*, *e.g.*, *Becker v. Becker*, 127 N.C. App. 409, 413, 489 S.E.2d 909, 913 (1997) (finding abuse of discretion due to unduly delay of distributive award in matter where trial court ordered the plaintiff to pay distributive award "plus interest at the rate of seven percent per annum").

With each equitable distribution order, the trial court has to consider the circumstances in that particular case, the current economic conditions, and the ability of the payor to pay a distributive award under N.C. Gen. Stat. § 50-20(e). The combination of the interest rate and the term of payment will determine the monthly payments, and the trial court must consider whether the payor has the ability to pay those monthly payments. *See Lawing*, 81 N.C. App. at 179, 344 S.E.2d at 113 ("[N.C. Gen. Stat. § 50-20(e)] clearly recognizes that the court may make the distributive award payable over an extended period. Since G.S. 50-20(e) does not limit the duration of the time period for payment, nothing else appearing, the structure and timing of payment of the award would rest with the discretion of the trial judge."). As the decision is ultimately up to the discretion of the court, *Mrozek*, 129 N.C. App. at 49, 496 S.E.2d at 840, the trial court may decide to adjust the interest rate or the payment term or both to bring the monthly payments to an appropriate level. In this case, the change in interest rate from 3.5% to 8% per annum increased the amount of Husband's monthly payments by $659.28; this amount is not insignificant and is also relevant to Husband's arguments as to his ability to pay. On remand, the court should clarify the interest

4. N.C. Gen. Stat. § 24-1 (2015), entitled "Legal rate is eight percent[,]" states: "The legal rate of interest shall be eight percent (8%) per annum for such time as interest may accrue, and no more." *Id.* This statute was later amended in 2016, but the amended version would not have been in effect at the time the trial court entered its order on 14 October 2015. *See* 2016 N.C. Sess Law 2016-90 (eff. July 11, 2016) (adding the phrase "Except as otherwise provided in G..S. 136-113," to the statute).

rate and the corresponding monthly payment, with Husband permitted to pay the remaining balance of the distributive award sooner than the full term of the payments.

We also recognize that another possible reason for any confusion or ambiguity in the order could be the fact that the trial court heard both alimony and equitable distribution in the same trial but entered two separate orders on the same day -- one denying Wife's alimony claim and one granting equitable distribution. While neither order specifically references to or relies upon the other, they are interrelated. Neither Husband nor Wife has appealed the alimony order, so we cannot disturb it; but in the alimony order, the trial court noted:

> The Court has considered *the distributional payment and child support obligation* that will be paid by the Plaintiff to the Defendant as well as factors set forth in N.C.G.S §50-16.3 (A) in its decision with regard to an award of alimony.

(Emphasis added).

There may have been other reasons the trial court did not award Wife alimony, since one of the factors noted by the alimony order was Wife's marital misconduct, but the alimony order shows that the trial court's denial of alimony was ultimately based on its determination that Wife was not a dependent spouse, as indicated in one of the two conclusions of law made in the order. The trial court found:

> 2. Wife has not presented sufficient proof that she is a dependent spouse as that term is defined by the North Carolina General Statutes who is actually dependent upon Husband for her maintenance and support and is substantially in need of maintenance and support from Husband.

And the trial court determined that Wife was not a dependent spouse in need of alimony at least in part *because of* the distributional payments in the equitable distribution order -- in the specific amount of $3,326.15 -- and perhaps child support established in another order.[5] When we look

5. Our record does not include a child support order, although Wife had requested that a child support order be entered. Since Husband's income was far more than Wife's income, it would appear that Husband would have had some child support obligation to Wife, although our record does not reveal what the amount would be. We also note that by the time the trial court receives this case on remand, the parties' oldest child will be age 18 and the younger will be age 16, so the child support obligation may be different than it was at the time of the order on appeal.

at the two orders in our record together, it seems possible that the trial court may have found Wife to be a dependent spouse and ordered that Husband pay alimony of some amount *but for* the distributive award in the amount and for the time period set forth in the equitable distribution order. Husband's brief recognizes this possibility, as he argues, "the award appears designed to ensure [Wife] a stream of income for as long as possible including a high interest rate, which effectively replaces the alimony payments she was denied in the alimony order entered the same day on the basis she was not a dependent spouse who needed any support." On remand, the trial court thus has the discretion to reconsider the manner of payment of the distributive award, while considering that Wife will not receive any alimony since the order denying alimony has not been appealed.

(2) Ability to pay distributive award in monthly payments

Husband also argues that the trial court failed to consider his ability to pay the distributive award and specifically that he is unable to pay either the lump sum of $348,050.00 or $3,326.15 per month. Husband argues:

> The trial court made no finding [Husband] has the ability to pay this amount nor did the trial court identify a source of funds by which [Husband] could pay this award. The only finding the trial court made was its finding [Husband] did not have the ability to pay the distributive award over 6 years even without interest.

The trial court's actual finding in the equitable distribution order as to Husband's ability to pay was the following:

> 35. The payout of the distributional payment within six (6) years with no interest would result in a payment by Husband to Wife in excess of $5,000.00 per month. The Court finds that there are not assets from which to make this payment and a distributional payment is proper.

The trial court's finding, particularly if read in context with the remainder of the order, does acknowledge, albeit indirectly, that Husband did not have the ability to pay $348,050.00 immediately *and* that he did not have the ability to pay monthly payments "in excess of $5,000.00 per month[,]" which would be the amount required to pay the entire award within six years. The findings did not directly address Husband's ability to pay the distributive payments of $3,326.15 per month as ordered (or $2,666.87, as stated in the rendition), other than to order the payments over a longer period of time to make the monthly payments lower than

$5,000.00 per month. In fact, the equitable distribution order did not address Husband's income or expenses at all. Again, this problem may arise from the fact that the alimony order entered on the same day did include one finding regarding Husband's income and expenses:

> [Husband's] currently [sic] gross income is $10,400.00 per month but has presented no evidence with regard to his deductions or his expenses on a monthly basis.[6]

Since the alimony order denied alimony, perhaps the trial court determined there was no need for the trial court to address Husband's earnings or expenses in more detail; and even if those things should have been addressed, the alimony order was not appealed. Furthermore, we note that the trial court may have addressed the income and expenses of the parties in more detail in a child support order, as alluded to in the alimony order, but we do not have the benefit of a child support order in our record. In short, on the record before us we cannot determine how the trial court evaluated Husband's ability to pay the monthly payment on the distributive award, and as discussed above, on remand it is possible that the monthly amount may be revised if the interest rate or term of payment is revised. We therefore must remand for additional findings regarding Husband's ability to pay the distributive award as directed by the trial court on remand, whether in the same amount as previously ordered in the order on appeal or in a different amount.

(3) Extension of payment of distributive award beyond 6 years

Husband argues that the 15 year period for payment of the distributive award is in violation of N.C. Gen. Stat. § 50-20(b)(3), which provides:

> (3) "Distributive award" means payments that are payable either in a lump sum or over a period of time in fixed amounts, but shall not include alimony payments or other similar payments for support and maintenance which are treated as ordinary income to the recipient under the Internal Revenue Code.

Husband relies upon *Lawing* and argues that the trial court erred because that case holds "that a court's authority to make distributive awards is limited and that a court may not enter a distributive award that will be treated as ordinary income under the Internal Revenue Code."

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6. We note that the distributive payment as ordered would be around 32% of Husband's *gross* income before deduction of any taxes or living expenses, and he perhaps also pays some child support, according to the alimony order. Based on these numbers, Husband's argument of inability to pay is not unreasonable.

81 N.C. App. at 179, 344 S.E.2d at 114. Husband argues that the trial court's "inclusion of the taxable interest component as an express part of the distributive award in this case is error, and this Court should reverse the trial court's distributive award and remand the matter with instructions to the trial court to reconsider its distributive award and strike the taxable interest component." We have already determined above that the trial court must consider the interest as well as the schedule and payments for the distributive award, but as the period over which the distributive award will be paid must be addressed on remand, we must also address this issue. Husband asks this Court to remand to "reconsider" the distributive award and "strike the taxable interest component[,]" but his arguments do not support this particular relief on remand.

Wife argues that

> [a] trial court is not prohibited from entering a payment structure of this nature as long as the appropriate findings are made. In the instant case, there were not sufficient assets in the marital estate that would allow [Wife] to recoup the distributive award immediately, and [Husband] did not have sufficient assets in order to make the required payment within six years. A payment of this magnitude within the six year time frame would require a payment in excess of $5,000.00 per month, which would result in severe financial hardship to [Husband]. The inability to pay outside of this payment structure is admitted by [Husband] in [his brief.] Pursuant to *Lawing*, because the trial court made findings regarding [Husband's] inability to pay the distributive award within the six year time frame, the trial court did not err in entering a payment schedule of this nature.

(Record citations omitted).

In *Lawing*, the defendant-husband was ordered to pay a distributive award to plaintiff-wife of $245,000.00, with $25,000.00 due immediately and the remainder in payment of $1,000.00 per month with interest at "8% per annum on the balance" over 220 months, or 18.3 years. *Id.* at 178, 344 S.E.2d at 113. On appeal, the plaintiff-wife argued that this award was "contrary to the statutory definition and authorization, and that it inequitably makes her dependent on defendant over an inordinately lengthy period." *Id.* The *Lawing* court held that the trial court has authority to make a distributive award which is payable over a period of more than six years, but only

> upon a showing by the *payor* spouse that legal or business impediments, or some overriding social policy, prevent completion of the distribution within the six-year period. Awards for periods longer than six years, if necessary, should be crafted to assure completion of payment as promptly as possible. This will serve both statutory goals: affording the recipient's share non-recognition treatment under the Code, and fairly wrapping up the marital affairs as quickly and certainly as possible.

Id. at 184, 344 S.E.2d at 116 (citation omitted). This Court held that the payment schedule was "erroneous as a *matter of law* and must be vacated" because the defendant-husband -- the payor spouse -- failed to make any "showing of legal or business impediments to an earlier distribution[.]" *Id.*

Cases since *Lawing* have reiterated the requirement that if a distributive award will extend beyond six years, the payor spouse must show, and the trial court must find:

> legal or business impediments, or some overriding social policy, prevent completion of the distribution within the six-year period. Our court later held the trial court has a concurrent duty to affirmatively find the existence of these grounds for extending the payment period beyond six years. . . . In addition, we have also stated that awards for periods longer than six years, if necessary, should be crafted to assure completion of payment as promptly as possible.

Becker, 127 N.C. App. at 413, 489 S.E.2d at 912-13 (citations, quotation marks, and ellipses omitted).

In *Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994), this Court affirmed an order which demonstrates the type of findings needed to order a distributive award payable over a period beyond six years:

> The court found, among its numerous detailed findings made concerning the distributive award, that the total amount of the award could not be paid within the six year period after the date of the parties' divorce because of: (1) certain legal impediments to transfer; (2) business impediments to transfer; (3) disputes concerning the value of the property owned at the time of the cessation

> of the marriage; and (4) "other factors." As the "other factors" found by the court preventing payment of the award within the six year period, the court noted that defendant did not have the present liquidity or ability to pay the award within that time, and that a reasonable social policy does not require the forced dissolution and liquidation of a substantial marital estate in order to effectuate complete payment of a distributive award within a six year period.
>
> The court further addressed in detail defendant's ability to pay the distributive award as ordered. The court found that defendant has the ability to make substantial monthly payments and to pay the distributive award within the time required by the court; that given defendant's age (63 when the judgment was entered), a reasonable period in which to accomplish transfer of the distributive award as promptly as possible is ten years, or 120 months; and that this period of time for payment of the award is a reasonable period that assures completion of the payment as promptly as possible under the circumstances.

Id. at 516, 433 S.E.2d at 229-30.

These cases establish that the burden is upon the payor-spouse -- here, Husband -- to make a "showing . . . that legal or business impediments, or some overriding social policy, prevent completion of the distribution within the six-year period." *Lawing*, 81 N.C. App. at 184, 344 S.E.2d at 116. In addition, the trial court must make findings as to the facts which justify a longer period of time for completion of the distribution. *See*, *e.g.*, *Harris v. Harris*, 84 N.C. App. 353, 364, 352 S.E.2d 869, 876 (1987) ("Because the trial court made no findings which would permit completion of the payment of the distributive award beyond six years from the date the parties' marriage was terminated, we must vacate that portion of the order providing for the distributive award and remand this case for further proceedings consistent with this opinion."). *Lawing* seems to say that where the payor-spouse has failed to make this evidentiary showing, the trial court erred as a matter of law in ordering a delayed payment schedule for the distributive award and thus vacated that portion of the order. 81 N.C. App. at 184, 344 S.E.2d at 116. Later cases seem to soften the requirements upon the payor-spouse a bit, as in *Becker*, where this Court reversed and remanded the case to the trial court "for reassessment of its decision to order an unequal division without considering the improper factor listed in finding 13(e)" and held only that "[a]n abuse of discretion occurred in ordering an unduly

delayed distributive award[,]" 127 N.C. App. at 412, 414, 489 S.E.2d at 912, 913; and in *Harris*, where this Court noted that the trial court, in its discretion on remand, could find it necessary to hear additional evidence to address the payment schedule for the distributive award. 84 N.C. App. at 364, 352 S.E.2d at 876.

In this case, Husband made no showing and no argument regarding how the distributive payments should be done or over what time period. In fact, his closing argument was based on the premise that Wife would owe a distributive award to him, since Rugworks -- a marital asset -- had a negative value, although he acknowledged that she would be unable to pay a distributive award.[7] Yet Wife's arguments before the trial court and this Court concede that Husband would be unable to pay the award within six years, the evidence supported the finding that he would be unable to pay within six years, and thus the trial court properly ordered the extended payment period. Wife's position on appeal is also somewhat different than her position at trial, where she argued that if Husband was required to pay over 15 years, the payments would be about $2,000.00 per month:

> I just wanted to point out that if you had it paid out over six years, the present value of that, even though I'm asking for 376, is actually $288,000.00. If it's paid out over 15 years, I'm asking for 376, at a discount rate of 4.5 percent, present day is 194,388. So I get that he -- he can't write a check. I get that. So -- but there -- and I'm -- I'll be glad to hand these up to the Court, if the Court would like to see them. . . .
>
> . . . .
>
> . . . . So the fact of the matter is, is that 15-year payment results in a payment of about two grand a month. I mean, you can just divide it or you can run an interest rate. We all know how to do that and amortize whatever is owed.

Thus, both parties agreed that Husband would be unable to pay the distributive award immediately or even within six years, so an extended payment schedule was necessary. The trial court found as

7. "And so what I would ask the Court to do is to find that the value of the business has a net value in negative numbers and that it's just impossible to distribute, because she doesn't have the money to make it up."

much, although the finding of fact is somewhat cursory. We have already determined that we must vacate the order and remand for the trial court to make findings of fact and a new order regarding the proper interest rate and addressing the Husband's ability to pay the resulting distributive payments, which may well change the time period over which the payments are ordered. As in *Harris*, on remand the trial court may "rely upon the original record and its findings of fact and conclusions of law relating to the identification and valuation of the marital and separate property, which we specifically affirm[,]" but has the discretion to allow additional evidence on remand "to the extent that it finds the taking of additional evidence necessary to the determination of the question of the distributive award[.]" 84 N.C. App. at 364, 352 S.E.2d at 876. We also "recognize, however, that the trial court may, depending upon its findings upon remand with respect to a distributive award, conclude that it is necessary to modify the manner in which it has distributed the parties' marital property and we specifically confirm that any such decision is committed to the sound discretion of the trial court." *Id.*

Conclusion

Accordingly, while we conclude that the trial court properly classified Husband's interest in Rugworks as marital property and that the valuation is supported by the evidence, we also find that the court's order does not properly set out the distributive award amount. Accordingly, we reverse the court's order and remand so that the trial court may enter an order clearly establishing the term of payment, interest rate, and monthly payments for the distributional award and making it clear that Husband will be permitted to prepay the remaining balance of the award due prior to expiration of the full term.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges McCULLOUGH and ZACHARY concur.

JENNIFER RITTELMEYER, PETITIONER
v.
UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, DEFENDANT

No. COA15-1228

Filed 21 March 2017

1. Appeal and Error—briefs—order of issues

Petitioner put the cart before the horse by waiting until the last issue in her brief to raise any challenges to the findings. It would have been helpful for petitioner to challenge the findings before addressing alleged errors of law.

2. Appeal and Error—briefs—length

Petitioner's invitation for the Court of Appeals to comb through over 1,000 pages of exhibits and "her 99 additional proposed Findings" to find the substantial evidence, or lack thereof, to support an Administrative Law Judge's 260 findings, or some portion thereof, was declined. Petitioner's argument essentially sought to add many, many pages to her brief by reference to her lengthy submissions to the ALJ and the trial court.

3. Appeal and Error—briefs—challenge to findings

Petitioner abandoned her argument challenging the Administrative Law Judge's findings of fact, because she merely sought to add immaterial details to the findings of fact.

4. Appeal and Error—briefs—statement of issues—arguments—order

Although N.C. Rule of Appellate Procedure 28(b)(2) does not specifically require that issues in a brief be addressed in the same sequence in both the statement of issues presented for review and the arguments, that seems to be nearly the universal practice in the Court of Appeals. The Court of Appeals had some difficulty in this case determining which conclusions of law were addressed by each argument.

5. Disabilities—reasonable accommodation—effective accommodation—not synonymous

In a case arising from a light sensitivity disability, petitioner's contentions were based almost entirely upon Title I of the Americans with Disabilities Act, arguing that respondent's failure to make reasonable accommodations for her disability ultimately led to her

discharge. The contention that a reasonable accommodation and an effective accommodation are the same has been rejected previously, and petitioner's contentions that the accommodations in this case were not per se reasonable because they were not effective for her was rejected. Reasonableness is an objective standard.

6. Disabilities—accommodation—informal—effect on other employees

In a case arising from a disability caused by a light sensitivity, petitioner's argument that the employer must prove undue hardship and morale issues to other employees when revoking an informal accommodation failed. The fact that petitioner's supervisor was willing to try certain accommodations does not mean she was then bound to continue an accommodation if ended up being untenable.

7. Disabilities—termination—not coming to work

In a case arising from a disability caused by a light sensitivity, petitioner's arguments failed where she was terminated because she stopped coming to work without even letting respondent know that she would not report to work as scheduled and repeatedly refused to work from home. She was not terminated for her disability.

Appeal by petitioner from order entered on or about 19 June 2015 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Court of Appeals 21 February 2017.

Edelstein and Payne, by M. Travis Payne, for petitioner-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly D. Potter, for respondent-appellee.

STROUD, Judge.

This case arises from petitioner's appeal from a trial court order affirming the administrative law judge's decision to affirm respondent's termination of petitioner's employment. Because the administrative law judge's order was based upon substantial evidence and was in accord with the applicable law, and the trial court conducted a proper review of the administrative law judge's order, we affirm the trial court order.

I. Background

This summary of the facts is based upon the administrative law judge's ("ALJ") findings of fact in the final agency decision ("decision").

The ALJ made 260 findings of fact -- approximately 40 pages, single-spaced -- detailing the history of petitioner's light sensitivity all the way back to her "late teens" when she first noticed the problem, through her employment with respondent, and up to the inception of her claim. Upon petition to Superior Court, the trial court found that there was substantial evidence to support all of the findings of fact. Petitioner has, in one cursory final issue, challenged many of these extensive findings of fact on appeal, but because she has failed to properly present this argument on appeal, as discussed below, we accept the ALJ's findings of fact as binding upon this Court.[1] *Garrett v. Burris*, 224 N.C. App. 32, 34, 735 S.E.2d 414, 416 (2012), *aff'd per curiam*, 366 N.C. 551, 742 S.E.2d 803 (2013) ("Plaintiff does not challenge any of the trial court's findings of fact as unsupported by the evidence. These findings, therefore, are binding on appeal."). The decision shows that petitioner's employer took many actions to accommodate her light sensitivity throughout the entire process of their working relationship. We will not list every single accommodation respondent made for petitioner for the sake of brevity but will note many of them.

In August of 2002, petitioner was hired by respondent's Department of Medicine and Genetics to work as a part-time, temporary administrative assistant. Petitioner informed Ms. Sikes, petitioner's supervisor, that exposure to fluorescent lights caused her to have migraine headaches.[2] In 2004, petitioner became a permanent employee as a social clinical research assistant. Between approximately 2002 and 2004, Ms. Sikes informally accommodated petitioner's light sensitivity by allowing her to work in an office with a window where petitioner could use the natural light and avoid turning on her overhead lights. In 2005, petitioner's entire department moved to a new building where petitioner's new work station was in a cubicle. To accommodate petitioner, the overhead lights in the general work area remained off and this lack of lighting did to some extent affect other employees. In 2010, the department was scheduled to move again and Ms. Sikes suggested petitioner check out the new workspace and allowed her "to design her own work space[.]"

In February 2010, the department moved and for "the first time all [of] the genetic counselors were working together in one shared space."

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1. Petitioner notes in her statement of the facts in her brief that she has relied upon "Petitioner's *Proposed* Decision submitted at OAH, which is included in the Rule 11(c) Supplement[.]" (Emphasis added.) As discussed below, we deem petitioner's arguments regarding the findings of fact abandoned, and we have relied upon the ALJ's order.

2. We have used pseudonyms for the other employees to protect their privacy.

Most of the employees were in cubicles. Petitioner was working in a cubicle directly across a corridor from Ms. Sikes's office. In her office, Ms. Sikes used only one of her two sets of overhead florescent lights. The overhead lights over the entire cubicle area were initially kept off, while another department, sharing the same overall space but not grouped with petitioner's department, kept the lights on over their workspace. Although the main lights over petitioner's workspace were turned off, petitioner was still exposed to fluorescent lights from the other department's lights, the emergency lights, bathroom lights, and lights by the elevator. Respondent then disengaged some of the emergency lights around petitioner's cubicle. Other employees began using floor and desk lamps in their workspaces to accommodate the dark conditions. Petitioner also began complaining about sensitivity to fragrances, so respondent posted signs asking the employees to cease wearing scented products. Overall, during the time period from moving into the new space in February of 2010, until November of 2011, the department effectively completed its work.

During this same time period, respondent also had to make constant adjustments to the lighting due to complaints by other employees that their work areas were too dark. Petitioner specifically complained that she had headaches caused by the supplemental lighting in the cubicle adjoining hers, where Ms. Lee worked. Because it was closest to petitioner's cubicle, Ms. Lee's cubicle was the darkest workspace. Ms. Lee tried different combinations of lighting and changed light bulb wattages, but petitioner remained dissatisfied.

In November of 2011, while petitioner was on vacation and without Ms. Sikes's knowledge, Ms. Lee submitted a work order to have the overhead lights above petitioner's cubicle and directly to the left and right of it disabled. Once this was done, the department began using the overhead lights again since the overhead lights in petitioner's immediate vicinity were disabled. On 19 November 2011, petitioner went to work but eventually got a headache that lasted until the next day. On 21 November 2011, petitioner informed Ms. Sikes that the new lighting conditions would not work for her. Ms. Sikes contacted respondent's disability office for assistance. A formal request from petitioner was needed to begin disability accommodations, so on 27 November 2011, petitioner expressed her desire to move forward with the formal accommodation process.

On 30 November 2011, Ms. Phillips, the employee working with petitioner and respondent from the disability's office, responded to petitioner about beginning the formal process of accommodation. On

6 December 2011, petitioner submitted a form to Ms. Phillips requesting accommodations and provided a letter from her doctor regarding her sensitivity to light. Ms. Phillips began corresponding with many individuals about accommodations, and during this time petitioner asked on multiple occasions that all overhead lights be turned back off, but this request was not initially allowed. Ms. Phillips then suggested perhaps petitioner could work from home, but petitioner refused. In December of 2011, Ms. Lee was moved to a different workspace so that all of the lights could remain off while petitioner was at work.

On 12 January 2012, respondent installed panels on top of petitioner's cubicle to block out the overhead lights from other areas. Tack boards were then added on top of the panels to block more light. The lights immediately above and around petitioner's cubicle remained disengaged, but the following day, petitioner said the modification did not work. On 17 January 2012, petitioner again requested the overhead lights in the entire area remain off until a solution could be found. Ms. Phillips informed Ms. Sikes that petitioner would come back to work on 19 January 2012, if the lights were turned off for her, but Ms. Sikes did not agree.

Petitioner then refused to allow Ms. Phillips to speak to her healthcare provider about other possible accommodation options and rejected the idea of room-darkening glasses. Petitioner also again rejected the idea of working from home. On 20 January 2012, taller partitions were installed to the cubicle to raise the walls; new tack boards were also installed. Petitioner's cubicle walls were approximately nine feet high at this point.

During January and February of 2012, petitioner attended work sporadically and suffered from a migraine "essentially every day she tried to work[.]" During February of 2012, petitioner still refused to work from home or to allow Ms. Phillips to speak with her healthcare provider. On 10 February 2012, solid panels were installed from the floor to the ceiling on petitioner's cubicle; part of the cubicle had been left open during the prior modification at petitioner's request because she wanted to allow natural light from that area.

On 14 February 2012, petitioner claimed the accommodation did not work, continued to complain about Ms. Lee's supplemental lighting, and claimed she could not walk to areas like the copier and scanner. Respondent then moved the copier and scanner into petitioner's "darkened area[.]" Petitioner then requested Ms. Sikes put up black paper to

block the lights from her office, although these lights had never been a problem before, and she also requested breaks. The next day, on 15 February 2012, all of the cubicle walls were raised to the ceiling; this same day petitioner requested that the gaps where the walls touched the ceiling be duct taped and that Ms. Sikes keep her office door closed. Petitioner still believed Ms. Lee's supplemental lighting was part of her problem though petitioner was never clear on the source of her problem and complained about issues which she had originally not mentioned.

On 17 February 2012, petitioner requested a door and a roof for her cubicle, but Ms. Phillips declined these accommodations since petitioner's workspace was now much darker than it had been before November of 2011 when the formal accommodation process began. Also, the additions to the walls already reached the ceiling. Petitioner also made modification requests prior to the previous set of requests even being made. Ultimately in late February 2012, petitioner requested leave under the Family Medical Leave Act which was approved from 22 February 2012 to 21 May 2012. The communications regarding modifications continued and respondent made numerous other modifications.

On 9 March 2012, petitioner requested a transfer to another position; respondent denied this request but informed her that she was free to apply for any position she desired. During her leave, petitioner wore special room-darkening glasses to block fluorescent light, although when she had been at work she complained they made her nauseous. On 21 May 2012, petitioner returned to work and acknowledged her workspace was much darker than it had been in November of 2011, but petitioner's sensitivity to light had increased. On 24 May 2012, petitioner left work early due to a migraine; the next day, petitioner left work at 9:00 a.m. On 29 May 2012, petitioner again requested that Ms. Sikes be required to keep her door closed, and this accommodation was denied.

After 1 June 2012, petitioner began reporting to work even less than she had been despite her workspace being its darkest yet. On 13 June 2012, petitioner received a written warning due to her absences. On 18 June 2012, petitioner applied for Family Illness Leave which was approved for two days. Thereafter, petitioner continued to miss work frequently. On 24 July 2012, respondent gave petitioner four weeks of leave without pay from 16 July 2012 until 12 August 2012. After 24 July 2012, petitioner stopped communicating with respondent and failed to return to work. On 14 August 2012, petitioner's employment was terminated. Up until this point, the accommodation process was still ongoing and had not stopped.

On 4 September 2012, petitioner filed a petition for a contested case hearing contending that respondent "failed to accommodate" her disability. Petitioner further explained that respondent

> [g]ave her an unjustified final written warning, and terminated her as of August 14, 2012, when she could not return to her job following a period of leave without pay. Petitioner was unable to return to her job because of her Employer's failure to appropriately and adequately accommodate her disability, which resulted in Petitioner suffering server[e] migraine headaches and eye pain after a short time each day at her job.
>
> Petitioner has initiated a grievance concerning her discharge and under the UNC Grievance Procedure. That grievance raises the issue of lack of just cause for the discharge as well as the issues that the discharge violates Petitioner's rights under the Americans with Disabilities Act and the Family Medical Leave Act. To the extent that grievance is unsuccessful, once the process is complete, Petitioner will file a Petition for a Contested Case on those matters and move to join them with this petition.

On 31 January 2013, petitioner did just that and filed a petition for a contested case hearing regarding her grievance which had been denied; petitioner moved to have the two petitions joined. On or about 26 February 2013, the chief ALJ consolidated the two petitions.

Over the course of five days in October and November of 2013, an ALJ heard petitioner's case. In June of 2014, the ALJ entered a 60-page decision ultimately determining all issues in favor of respondent. On 24 July 2014, petitioner filed a 54-page petition with the Superior Court for review from the ALJ decision. On 22 August 2014, respondent responded to petitioner's petition, requesting that the trial court affirm the ALJ decision. In June of 2015, the trial court entered an order affirming the ALJ decision. Petitioner appeals.

II. Standard of Review

When the trial court considered the final agency decision its standard of review was provided by North Carolina General Statue § 150B-51:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the

substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

(c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51 (2013).

As to this Court's review,

> [a] party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in G.S. 7A-27. The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases. In cases reviewed under G.S. 150B-51(c), the court's findings of fact shall be upheld if supported by substantial evidence.

N.C. Gen. Stat. § 150B-52 (2013). Furthermore,

> [a]n appellate court reviewing a superior court order regarding an agency decision examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly. When, as here, a petitioner contends the agency's decision was based on an error of law, *de novo* review is proper.

Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 361 N.C. 531, 535, 648 S.E.2d 830, 834 (2007) (citations, quotation marks, and brackets omitted).

In summary, as this case is being reviewed pursuant to North Carolina General Statute § "150B-51(c), the [trial] court's findings of fact shall be upheld if supported by substantial evidence." N.C. Gen. Stat. § 150B-52. Alleged errors of law will be reviewed *de novo*. *Holly Ridge Assocs., LLC.*, 361 N.C. at 535, 648 S.E.2d at 834. Furthermore, we will review the trial court order to determine "whether the trial court exercised the appropriate scope of review and, if appropriate, . . . whether the court did so properly[.]" *Id.*

More specifically, as to our review of the trial court's scope of review, if the argument raised before the trial court asserted an error with the agency decision which was "(1) [i]n violation of constitutional provisions; (2) [i]n excess of the statutory authority or jurisdiction of the agency or administrative law judge; (3) [m]ade upon unlawful procedure; [or] (4) [a]ffected by other error of law[,]" we will review to consider whether the trial court properly used "the de novo standard of review." N.C. Gen. Stat. § 150B-51(c). If the argument raised before the trial court asserted an error with the agency decision which was "[u]nsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or . . . [a]rbitrary, capricious, or an abuse of discretion[,]" we will review to consider whether the trial court properly used "the whole record standard of review." *Id.*

III. Petitioner's Appeal of Findings of Fact

[1] Petitioner raises 14 issues on appeal. Petitioner's brief puts the cart before the horse by waiting until the last issue to raise any challenges to the findings of fact. Since findings of fact are required to support conclusions of law, *see Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 184 N.C. App. 110, 116, 645 S.E.2d 857, 861 (2007) ("The trial

court's findings of fact must support its conclusions of law in order to enter a lawful order."), if the findings of fact were not supported by substantial evidence, *see generally* N.C. Gen. Stat. § 150B-52, it would have been helpful for petitioner to challenge those facts *before* addressing alleged errors of law. After all, if material facts in the findings were not supported by the evidence, we might never need to reach at least some of the arguments regarding errors of law. Thus, we will first address the last issue which purports to challenge many of the ALJ's findings of fact. Petitioner's entire argument is as follows:

> Petitioner excepted in whole or in part to Findings 13, 24, 29, 30, 33, 36, 37, 53, 62, 67, 86, 90, 114, 115, 122, 123, 125, 127, 136, 137, 138, 140, 141, 142, 143, 144, 145, 146, 152, 189, 196, 203, 205, 209, 221, 222, 258, 259 and 260 [R. pp. 9-20]. The specifics as to what portion of each Finding exception was taken, is set out in each of the paragraphs of the Petition. Additionally, evidence that each Finding is at least in part wrong, is cited in each of the paragraphs. The exceptions to the specified Findings are well taken, and under the whole record test they should have each been modified or deleted.
>
> At pages 17-45 of her Petition [R. pp. 20-48], Petitioner set forth 99 additional proposed Findings that are supported by the Record. Each of those proposed Findings cites to the evidence that supports it. They are all appropriate and they should be adopted.

[2] As tempting as it may be, we decline petitioner's invitation to comb through over 1,000 pages of exhibits and her "99 additional proposed Findings" to find the substantial evidence, or lack thereof, to support the ALJ's 260 findings of fact or some portions of those findings; that is petitioner's job. *See generally Carlton v. Oil Co.*, 206 N.C. 117, 172 S.E. 883, 884 (1934) ("[O]n appeal the burden is on appellant to show error[.]") Petitioner likely relegated her challenge to the findings of fact to her last issue because even she acknowledges that the changes to the findings she requests are not really material changes that would make any difference in the legal analysis; she recognizes this in footnote 22 of her brief:

> The reference to "FOF" is to the Findings of Fact in the Decision. While Petitioner has asserted that some findings are not supported by the evidence, and that other findings should have been made, *the Decision appears to contain sufficient findings to support the errors of law*

> *that Petitioner has raised*. It is possible this Court could agree with Petitioner regarding the legal errors that she has raised, and fashion conclusions of law that are supported by the existing Findings of Fact.

(Emphasis added.) We also note that our rules impose page limitations on briefs, *see* N.C.R. App. P. 28(j), as petitioner pointed out in her statement of the facts, but petitioner's argument essentially seeks to add many, many pages to her brief by referring us to her lengthy submissions to the ALJ and trial court.

[3] But as to petitioner's argument which refers us to the other documents in the record, we have read petitioner's petition to the trial court from the ALJ order and most of petitioner's contentions are not that the ALJ's findings of fact were not supported by the evidence, but rather further details petitioner would like to add to each finding of fact. For example, finding of fact 33 in the ALJ decision was as follows:

> 33. At first, [Ms. Lee] had only one supplemental lamp, but that amount of light was insufficient. (Tr. 608). [Ms. Lee] then tried two lamps, but the lighting bothered Petitioner, so [Ms. Lee] switched the bulbs to a lower wattage. *Id.* Petitioner continued to express dissatisfaction with the lights used by [Ms. Lee].

Petitioner's exception to this finding was as follows:

> 21. To Finding of Fact #33 in that it does not accurately reflect the number and type of supplemental lights that [Ms. Lee] had, which were 2 floor lamps and 2 desk lamps; and it ignores the evidence that every cubicle had an under-the-shelf fluorescent light that allowed employees to have substantial light shine on matters on which they were working, which [Ms. Lee's] cubicle also had.

In the context of this order, in which many other findings of fact describe the lighting conditions over time in great detail, we cannot see how the additional details of exact numbers of lamps and bulb types would have any effect upon the result. As to petitioner's highly detailed argument to portions of the findings of fact, we note that the findings of fact do not need to include every evidentiary fact, but only those necessary for the ultimate determination. *See generally Kelly v. Kelly*, 228 N.C. App. 600, 606–07, 747 S.E.2d 268, 276 (2013) ("[T]he trial court need not recite all of the evidentiary facts but must find those material and ultimate facts from which it can be determined whether the findings are

supported by the evidence and whether they support the conclusions of law reached." (citation omitted)).

Because petitioner has failed to specifically raise an argument on appeal to *any* particular finding of fact, has failed to direct us to any particular portion of the record to consider a challenge to even one finding of fact, has failed to address any particular finding of fact as not supported by the evidence, and has failed to raise any issues with the findings of fact which she contends are material, we conclude that petitioner has abandoned her argument challenging the findings of fact. We will therefore accept all of the findings of fact made by the ALJ as supported by substantial evidence, *see generally Garrett*, 224 N.C. App. at 34, 735 S.E.2d at 416, and we will proceed to address petitioner's legal arguments.

IV. Petitioner's Appeal of Conclusions of Law

Petitioner challenges many of the ALJ's 49 conclusions of law in her remaining 13 issues presented in her brief on appeal. The conclusions of law she challenges are as follows:

> 9. In this case, Petitioner was "unavailable" as (1) she was unable to return to all the position's essential duties and work schedule due to her medical condition that caused headaches and eye pain to be triggered by fluorescent lights, and (2) Petitioner and Respondent were unable to agree upon a return to work arrangement that met the agency's needs and Petitioner's medical condition. By the date of her separation, Petitioner had no leave time to cover her absence.
>
> 10. Respondent met the requirements for properly separating Petitioner due to her unavailability after leave was exhausted. Respondent provided the appropriate notifications to Petitioner, awarded her four weeks of additional leave once Petitioner informed her supervisors that she was applying for short-term disability, and informed Petitioner that she was to return to work August 13, 2012 if she hadn't notified them of her short-term benefit application.
>
> 11. The facts are clear and disputed that Respondent took reasonable efforts to avoid separating Petitioner from employment by notifying Petitioner that she had

exhausted all applicable leave. Respondent granted Petitioner four additional weeks of leave without pay when it was not required to do so. Respondent's efforts to avoid separating Petitioner from employment were unsuccessful, because Petitioner, by her own volition, ceased contact with Respondent, and failed to return to work. Petitioner knew she needed to contact [Ms. Sikes] . . . regarding her short-term disability application, or return to work by August 13, 2012. Petitioner understood that her failure to report on August 13, 2012 would result in her being involuntarily separated from employment due to unavailability. Yet, Petitioner did not report to work on August 13, 2012 or contact her supervisors. The preponderance of the evidence proved that Petitioner's actions justified Respondent involuntarily separating Petitioner from employment.

12. Based on a preponderance of the evidence, all foregoing Findings of Fact and Conclusions of Law, Respondent properly separated Petitioner from employment due to Petitioner's unavailability after approved leave was exhausted under 25 NCAC .01C. 1007.

. . . .

19. The Fourth Circuit has held that an employee who cannot meet the attendance requirements of a job is not considered a qualified individual covered by the ADA. (*See Tyndai v. Nat'l Educ. Ctrs.*, 31 F.3d 209, 213 (4th Cir. 1994)) In *Bell*, *supra*. at 1-3, the US District Court for the Middle District of North Carolina held that since the Plaintiff had been absent without leave for months, and indicated she would continue to be out indefinitely, Defendant was not as a matter of law required to offer Plaintiff leave as a reasonable accommodation for her disability. *Id.* That Court further provided that, because the Plaintiff was not able to perform the essential functions of any job, the Defendant could not be liable because "an employer who fails to engage in the interactive process will not be held liable if the employee cannot identify a reasonable accommodation that would have been possible." *Id.* at 20. (quoting *Wilson v. Dollar Gen. Corp.*, 717 F.3f[d] 337, 347 (4th Cir. 2013)[.]

20. In this case, Petitioner was employed on a full-time basis by Respondent yet routinely failed to work even 32 hours in a workweek. (Pet. Exs. 61-62) Her poor attendance alone means that she is not a qualified individual. However, she claims that her absences were due to exposure to fluorescent lighting in her work environment, even though she was exposed to fluorescent lighting in the same building for more than one year before November 2011. Petitioner admitted that after late November 2011, she would come to work and routinely notify her supervisor that she had a migraine and had to leave. Respondent had to rely, necessarily, on Petitioner's subjective reports regarding her pain. Even with these reports, Respondent was still entitled to have reasonable work expectations for Petitioner's attendance.

21. After returning without any restrictions from her twelve weeks of FMLA in May 2012, Petitioner immediately had attendance problems, and was counseled about the importance of being at work. Respondent made it clear to Petitioner that she must adhere to her approved work schedule to "ensure we have the office and phone coverage necessary during normal/working business hours." (Resp. Ex. 79) Petitioner's attendance continued to be sporadic, and fell considerably short of either a 32 or 40- hour workweek requirement. (Pet. Exs. 61 & 62) Since Petitioner refused to allow Respondent to speak with the medical providers, Respondent did not know that Dr. Kylstra meant Petitioner remained unable to work with fluorescent lights.

22. Petitioner failed to produce any binding legal precedent to support her allegation that her work environment aggravated her disability, and caused her absences.

23. Cases in the Fourth Circuit have held that the cause of Petitioner's incapacity is irrelevant to whether she is able to perform the essential duties of her job, especially in absen[ce of] any bad faith on Respondent's part. An employer does not violate the ADA[] when it "discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability." *Rocha v. Coastal Neuropsychiatric Crisis Servs.* PA, 7:12-CV-2-D, 2013 WL 5651801 (ED NC Oct 16, 2013)

(citing *Jones [v]. Am. Postal Workers Union*, 192 F.2d 417, 429 (4th Cir. 1999)).

24. Discharging an individual because of the specific attributes of a disease, (for instance, firing an employee with epilepsy for seizures) is fundamentally different than firing an employee for disability-related misconduct that is not itself the disability. *Martinson v. Kinney Shoe Corp.*[,] 104 F.3d 683, 686 (4th Cir. 1997) The *Martinson* Court further held that, "By contrast, misconduct - even misconduct related to a disability - is not itself a disability, and an employer is free to fire an employee on that basis." *Id.* at 686. (citing *Tyndall*, supra. at 214). The *Tyndall* Court ruled that:

> Because [the employee's] attendance problems rendered her unable to fulfill the essential functions of her job, and because these problems occurred even with [her employer's] more than reasonable accommodations for her own disability, we hold that she was not a ["]qualified individual with a disability[]" as required by § 12111(a) of the ADA.

(*Tyndall*, supra. at 214)[.]

25. In the present case, the preponderance of the evidence proved that Petitioner was not separated from employment because of her light sensitivity, but she was separated from employment because she failed to report to work, an essential element of her office position. For the foregoing reasons, Petitioner is not a "qualified individual with a disability."

26. Assuming that Petitioner met the first criterion of being a qualified individual entitled to the protection of the ADA, Petitioner still did not establish the second criterion that Respondent discriminated against Petitioner. Even if Petitioner is a qualified individual with a disability, Respondent met its obligations to accommodate her in a reasonable manner. "Reasonable accommodation" is defined as:

> modifications or adjustments to the work environment, or to the manner or circumstances under

> which the position is held or desired, is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position.

29 C.F.R. § 1630.2(o) (2012) The ADA affirms that the employer's judgment is a major factor in the Court's assessment of what constitutes a job's "essential functions." 42 USC §12111(8). The reasonableness of an accommodation is assessed objectively, not subjectively from the concerns of either party. *See Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346 (4th Cir. 1996)[.]

27. The employer is not required to provide an accommodation that reallocates an essential job function or that causes an undue hardship. "Undue hardship" means:

> [Significant difficulty or expense incurred by [an employer], taking into consideration factors such as the nature and cost of accommodation, the type of operation of the covered entity, and the impact of the accommodation upon the operation of the facility, including the ability of other employees to perform their duties and the facility's ability to conduct business.

29 CFR § 1630.2(p)(1)-(2)[.]

28. The preponderance of evidence at hearing established that Respondent engaged in an extensive, interactive process with Petitioner to determine what accommodations would be reasonable. Petitioner consistently requested accommodation that the overhead lights over the entire Genetics Counseling Group remain turned off. However, under the applicable case law, Respondent is not required to provide Petitioner the exact accommodation requested, but only to provide an objectively reasonable accommodation, which Respondent did in this case. Throughout the entire interactive process, Petitioner was provided an opportunity to participate in the accommodation process.

29. Respondent physically modified Petitioner's workspace per Petitioner's request and specifications. Respondent deemed Petitioner's requests - to hang black

curtain as a door to Petitioner's office, to keep Ms. [Sike's] door closed at all times, and to turn off all overhead lights (pre-November 2011 lighting conditions)- unreasonable due to the impact on other employees' abilities to perform their work, and the unit's ability to conduct business. Ultimately, Respondent modified Petitioner's workspace to be darker than it was before November 2011. (Resp. Ex. 78)

30. The interactive accommodation stopped only because Petitioner ceased contact with her supervisors once she left work on July 2, 2012. Petitioner admitted she knew Respondent would continue to work with her upon her return to work, but Petitioner failed to return to work by her own volition.

31. A preponderance of the evidence proved that Respondent provided a series of modifications to accommodate Petitioner reasonably, while reducing the impact on her coworkers, despite Petitioner's unwillingness to allow Respondent to speak with her treating physicians.

32. To the extent Petitioner attempted to bring a retaliation claim pursuant to ADA, Petitioner failed to establish a causal link between her seeking accommodations and her separation. Although Petitioner's supervisors, and coworkers certainly expressed frustration and personal hostility toward Petitioner and with the lengthy accommodation process, there was no credible evidence Respondent retaliated against Petitioner for seeking that accommodation. The evidence at hearing established that Respondent followed each modification that . . . [the disability office] suggested.

33. Petitioner relied on *McMillian v. City of New York*, 711 F.3d 120 (2nd Cir. 2013) to argue that Respondent must show that the informal lighting accommodation before November 2011 is no longer reasonable, and was a[n] undue burden on Respondent. However, Petitioner's reliance is misplaced for several reasons. First, *McMillian* is not a 4th Circuit case, and therefore, is not binding in this case, but merely persuasive. Second, Petitioner failed to cite any North Carolina or 4th Circuit case applying the

ruling in *McMillian* in this State. Third, the *McMillian* Court ruled that a previous arrangement with an employee could be a *factor* in determining what constituted a reasonable accommodation. It did not rule that the employer was required to prove that an informal accommodation is unduly burdensome to the employer before the employer can remove the accommodation without violating the ADA.

34. Despite Petitioner's argument, a previous accommodation does not tie the employer's hands and force the employer to continue to offer the accommodation. "The fact that certain accommodations may have been offered by the County [employer] to some employees as a matter of good faith does not mean that they must be extended to Myers [another employee] as a matter of law." *Myers v. Hose*, 50 F.2d 278, 284 (4th Cir. 1995)[.] Similarly, in *Perrin v. Fennell*, No. 1:10-CV-810, 2011 US Dist. LEXIS 21730, *1-*6 (ED Va. Mar. 2, 2011), the Fourth Circuit held that:

> [T]he fact that FLSS [the employer] had previously granted Perrin [employee] a similar request is irrelevant. An employer's one time, goo[d] faith offer of accommodations does not bind the employer to extend similar offers in the future. . . . [s]uch a regime would discourage employers from treating disabled employees in a spirit that exceeds the mandates of federal law.

Id. at *19-*20.

35. Based on the above case law, Respondent in this case is not bound by the ADA to continue to offer Petitioner the previous accommodation of having all the overhead lights over the Genetic Counseling Group turned off. From a policy standpoint, holding employers liable for prior efforts that went beyond federal law would discourage them from accommodating above the bare minimum federal requirements.

36. Based on all foregoing Findings of Fact and Conclusions of Law, Respondent met its obligations to provide Petitioner with reasonable accommodations under the ADA.

37. For the foregoing reasons, Petitioner failed to establish that Respondent terminated her from employment based on her disability. (See *EEOC v. Stowe-Pharr Mill Inc.*, 216 F.3d 373, 377 (4th Cir. 2000)).

Retaliation for Requesting an Accommodation

38. The third issue is whether Respondent retaliated against Petitioner for requesting an accommodation pursuant to the ADA.

39. The ADA prohibits employers from retaliating against employees who seek accommodations pursuant to the statute. 42 U.S.C. 12203(a) provides that "[n]o person shall discriminate against any individual because such individual . . . made a charge . . . under this Chapter."). (See 42 U.S.C. § 12203(a); *A Soc'y Without a Name*, *for People without a Home*, *Millennium Future-Present v. Virginia*, 655 F.3d 342, 350 (4th Cir. Va. 2011) (holding that an employee claiming retaliation claim under the ADA, must establish a causal link exists between the protected conduct and the adverse action).

40. A preponderance of the evidence showed that Petitioner did not establish a causal link between her protected activity and any adverse action by Respondent. Petitioner was separated from employment due to her unavailability for work. At the time of her separation, the ADA accommodation process was still ongoing.

Each of petitioner's 13 remaining issues on appeal relates to one or more of the contested conclusions of law.

A. Petitioner's Brief

[4] We have had some difficulty determining which conclusions of law were addressed by each argument. For example, petitioner notes Conclusions of Law No. 26 and/or 36 in her "ISSUES PRESENTED" numbered 1, 4, 5, 6, 7 and 8. But the argument section of her brief has sections lettered A through N, instead of numbered as they were in the "issues presented" section; furthermore, the numbered issues do not necessarily coincide with the lettered sections of the argument. For example, the first issue presented, issue number 1, argues the ALJ and Superior Court erred in determining respondent had made a reasonable accommodation while the first argument, letter A, is entitled "Discrimination Under Title I of the ADA" and provides the general framework for making a

claim under the ADA, the American With Disabilities Act. Even if we ignore the "ISSUES PRESENTED" section entirely, the headings of the lettered sections also do not directly relate to particular issues; again, letter A in the argument section is a general restatement of the law and the facts from petitioner's perspective without any contentions for this Court to review.[3] But with that caveat, we have attempted to match up petitioner's arguments to the issues as best we can.

B. Title I of the ADA

[5] Petitioner's arguments are based almost entirely upon Title I of the ADA.

> To prevail on an ADA claim, the plaintiff must prove that: (1) she has a disability as defined by the ADA; (2) she is qualified for the job; and (3) she was unlawfully discriminated against by an employer because of her disability.
>
> Under the ADA, the term disability is defined as a physical impairment that substantially limits one or more of the major life activities of such individual. . . .
>
> Only a qualified individual with a disability may prevail on a discrimination claim under the ADA. The term qualified individual with a disability means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. Essential functions of the job are the fundamental job duties of the person with the disability that bear more than a marginal relationship to the job at issue.
>
> The term reasonable accommodation may include—
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

3. North Carolina Rule of Appellate Procedure 28(b)(2) requires that the brief set forth "[a] statement of the issues presented for review" and (6) requires "[a]n argument, to contain the contentions of the appellant with respect to each issue presented." N.C. App. P. R. 28. We must admit that Rule 28 does not specifically *require* that the issues be addressed in the same sequence in both portions of the brief, although that seems to be nearly the universal practice in briefs filed in this Court, but in this case our initial assumption that the numbered issues were intended to coincide directly with the lettered arguments was apparently wrong; it was simply a coincidence that there are 14 issues presented and 14 arguments.

> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Johnson v. Trustees of Durham Tech. Cmty. Coll., 139 N.C. App. 676, 684–85, 535 S.E.2d 357, 363 (2000) (citations, quotation marks, ellipses, and brackets omitted).

Petitioner brought claims under the ADA for her wrongful discharge arguing that respondent's failure to make reasonable accommodations for her disability so that she could continue working ultimately led to her discharge. The ALJ determined that petitioner's claims failed because

> Petitioner was not separated from employment because of her light sensitivity, but she was separated from employment because she failed to report to work, an essential element of her office position. For the foregoing reasons, Petitioner is not a "qualified individual with a disability" [pursuant to the ADA,]

and even

> [a]ssuming that Petitioner met the first criterion of being a qualified individual entitled to the protection of the ADA, Petitioner still did not establish the second criterion that Respondent discriminated against Petitioner. Even if Petitioner is a qualified individual with a disability, Respondent met its obligations to accommodate her in a reasonable manner.

Again, "[t]o prevail on an ADA claim, the plaintiff must prove that: (1) she has a disability as defined by the ADA; (2) she is qualified for the job; and (3) she was unlawfully discriminated against by an employer because of her disability." *Id.* at 684, 535 S.E.2d at 363. The parties do not dispute that petitioner's light sensitivity which leads to migraine headaches is a "disability" as defined by the ADA, and for purposes of this opinion we will assume petitioner "is qualified for the job."[4] *Id.* Thus, all

4. There is a question of whether petitioner was qualified for the job, but because petitioner's claim fails if she does not meet any one of the three prongs for her claim, we choose to address only the third prong. *See generally Johnson*, 139 N.C. App. 676, 684–85, 535 S.E.2d 357, 363.

that remains to consider is plaintiff's contention that "she was unlawfully discriminated against by an employer because of her disability." *Id.* In this particular case, the alleged discrimination is petitioner's termination. Therefore, the crucial issue is whether "Respondent met its obligations to provide Petitioner with reasonable accommodations under the ADA" because if respondent met its obligation to "provide Petitioner with reasonable accommodations under the ADA[,]" then petitioner's failure to return to work would be without legal justification and that would be a proper ground for termination, not a discriminatory one, as the ALJ determined. Thus, we will therefore first address the issue of reasonable accommodation under the ADA.

C. Reasonable Accommodation

Petitioner's arguments on appeal which relate to the issue of reasonable accommodations under the ADA are scattered throughout several sections of her brief. Petitioner contends as follows:

> At Conclusions 9 through 12, the Decision finds that Ms. Rittelmeyer was properly "separated due to unavailability", and the just cause issue she raised was never reached. These conclusions constitute error because Respondent did not prove "that reasonable efforts were taken to avoid separation" as required by 25 NCAC 01C.1007(c)(2). Ms. Rittelmeyer stopped coming to work because her disability had never been effectively accommodated by Respondent, and essentially each time she tried to work, she was subjected to a painful migraine attack. As a result of the repeated and severe migraine attacks, her health was suffering, she was becoming more and more susceptible to migraine attacks, and the attacks were more severe and lasting longer. It was the failure of Respondent to put in place an accommodation that would allow her to work without these very serious medical consequences, that caused her to miss work and ultimately stop coming to work. The "reasonable efforts" that Respondent should have engaged in to "avoid separation" would have been to implement an effective accommodation, which officials of Respondent refused to do right from the beginning of the accommodation process. To say, as the Decision does, that sending Ms. Rittelmeyer letters demanding that she report to work, where she knew she would again be subjected to long lasting, painful migraine

> attacks triggered by the lights, constituted "reasonable efforts", is the height of sophistry.

(Footnote omitted.) Thus, petitioner claims that respondent failed to make "reasonable efforts" to accommodate her disability, and due to that failure, she should prevail on this issue.

42 U.S.C.A. § 12111(9) defines reasonable accommodation:

> The term "reasonable accommodation" may include—
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C.A. § 12111(9) (West 2013).

42 U.S.C.A. 12112 defines discrimination as

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

42 U.S.C.A. § 12112(b)(5)(A) (West 2013).

Petitioner's main argument is that although respondent did make modifications to her work area to accommodate her disability, those modifications were not effective – because they did not work – so therefore they were not "reasonable" accommodations as a matter of law. In other words, respondent argues that the only accommodations that qualify as "reasonable" are those that would have been effective in eliminating her migraines at work. Petitioner relies primarily upon *US Airways, Inc. v. Barnett*, 535 U.S. 391, 152 L. Ed. 2d 589 (2002), contending that "[a]s recognized by the Supreme Court in US Airways, Inc. v. Barnett, 535 U.S. 391, 400 (2002), 'An *ineffective* "modification" or "adjustment" will not *accommodate* a disabled individual's limitations.'

(emphasis in original). Ineffective accommodations therefore are not accommodations." Petitioner's argument quotes *US Airways, Inc. v. Barnett*, out of context; in fact, the Supreme Court specifically *rejected* the idea that a "reasonable accommodation" and an "effective accommodation" are one and the same:

> Barnett argues that the statutory words "reasonable accommodation" mean only "effective accommodation," authorizing a court to consider the requested accommodation's ability to meet an individual's disability-related needs, and nothing more. . . .
>
> . . . .
>
> These arguments do not persuade us that Barnett's legal interpretation of "reasonable" is correct. For one thing, in ordinary English the word "reasonable" does not mean "effective." It is the word "accommodation," not the word "reasonable," that conveys the need for effectiveness. An ineffective "modification" or "adjustment" will not accommodate a disabled individual's limitations. Nor does an ordinary English meaning of the term "reasonable accommodation" make of it a simple, redundant mirror image of the term "undue hardship." The statute refers to an "undue hardship on the operation of the business." 42 U.S.C. § 12112(b)(5)(A). *Yet a demand for an effective accommodation could prove unreasonable because of its impact, not on business operations, but on fellow employees*—say, because it will lead to dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent.
>
> Neither does the statute's primary purpose require Barnett's special reading. The statute seeks to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life, including the workplace. *See generally* §§ 12101(a) and (b). These objectives demand unprejudiced thought and reasonable responsive reaction on the part of employers and fellow workers alike. They will sometimes require affirmative conduct to promote entry of disabled people into the work force. *See supra*, at 397-98.

They do not, however, demand action beyond the realm of the reasonable.

Neither has Congress indicated in the statute, or elsewhere, that the word "reasonable" means no more than "effective." The EEOC regulations do say that reasonable accommodations "enable" a person with a disability to perform the essential functions of a task. But that phrasing simply emphasizes the statutory provision's basic objective. The regulations do not say that "enable" and "reasonable" mean the same thing. And as discussed below, no court of appeals has so read them. But see 228 F.3d, at 1122–1123 (Gould, J., concurring).

Finally, an ordinary language interpretation of the word "reasonable" does not create the "burden of proof" dilemma to which Barnett points. Many of the lower courts, while rejecting both U.S. Airways' and Barnett's more absolute views, have reconciled the phrases "reasonable accommodation" and "undue hardship" in a practical way.

They have held that a plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an "accommodation" seems reasonable on its face, *i.e.*, ordinarily or in the run of cases. *See, e.g.*, *Reed v. LePage Bakeries, Inc.*, 244 F. 3d 254, 259 (CA1 2001) (plaintiff meets burden on reasonableness by showing that, "at least on the face of things," the accommodation will be feasible for the employer); *Borkowski v. Valley Central School Dist.*, 63 F. 3d 131, 138 (CA2 1995) (plaintiff satisfies "burden of production" by showing "plausible accommodation"); *Barth v. Gelb*, 2 F. 3d 1180, 1187 (CADC 1993) (interpreting parallel language in Rehabilitation Act, stating that plaintiff need only show he seeks a "method of accommodation that is reasonable in the run of cases" (emphasis in original)).

Once the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances. *See Reed*, *supra*, at 258 (" 'undue hardship inquiry focuses on the hardships imposed . . . in the context of the particular [employer's] operations' ")

> (*quoting Barth*, *supra*, at 1187); *Borkowski*, *supra*, at 138 (after plaintiff makes initial showing, burden falls on employer to show that particular accommodation "would cause it to suffer an undue hardship"); *Barth*, *supra*, at 1187 ("undue hardship inquiry focuses on the hardships imposed . . . in the context of the particular agency's operations").
>
> Not every court has used the same language, but their results are functionally similar. In our opinion, that practical view of the statute, applied consistently with ordinary summary judgment principles, see Fed. Rule Civ. Proc. 56, avoids Barnett's burden of proof dilemma, while reconciling the two statutory phrases ("reasonable accommodation" and "undue hardship").

535 U.S. 391, 399-402, 152 L.Ed.2d 589, 601-03 (emphasis added). Thus, we reject petitioner's contention that because the accommodations were not effective for her, they were *per se* not reasonable. *See id.*

Under *Barnett*, an "ineffective modification" is one which "will not accommodate a disabled individual's limitations." *See id.* at 400, 152 L. E. 2d at 601. The most obvious modification to accommodate light sensitivity is to eliminate an employee's exposure to lights, if possible, and otherwise to reduce exposure to light as much as possible without excessive interference with the ability of other employees to do their work.

The determination of reasonableness is

> an objective analysis, not a subjective one dominated by either party's concerns. In assessing objective reasonableness, the governing statute provides guidance. See 42 U.S.C. § 12111(9). It provides that reasonable accommodation' may include a number of listed measures; obviously Congress considered these types of accommodations to be reasonable.

Williams v. Channel Master Satellite Systems, Inc., 101 F.3d 346, 350 (4th Cir. 1996) (quotation marks omitted).

Respondent tried many of the listed measures in 42 U.S.C.A. § 12111(9). *See* 42 U.S.C.A. § 12111(9). For example, respondent offered "job restructuring" by proposing that petitioner work from home; she rejected this proposal more than once. Respondent also "modif[ied] . . . equipment or devices" by making many changes to petitioner's cubicle

and to lights throughout the work area. The modifications were objectively reasonable in that they lessened petitioner's exposure to light, while allowing other employees adequate light to work. Over the course of several months respondent made many accommodations, including some based on petitioner's own requests for changes which she believed would accommodate her needs, and others identified by respondent. The accommodations included turning off various sets of lights, light bulb watt changes, disabling lights, several modifications to petitioner's cubicle, and movement of shared office equipment to petitioner so she would not need to leave her cubicle. At the same time, respondent also had to address complaints of other employees who were having difficulty seeing in the darkened areas of the workplace. Respondent was also trying to hit a moving target, since petitioner's light sensitivity increased over time.[5] Even petitioner admitted that after the modification, her cubicle was darker than it had ever been yet she began requesting accommodations for light sources that had not previously been a problem, such as Ms. Sikes's office. Furthermore, petitioner rejected requests to work from home and the option of wearing room-darkening glasses, although she admitted that she used them elsewhere. Given the binding findings of fact, *see generally Garrett*, 224 N.C. App. at 34, 735 S.E.2d at 416, it is clear that respondent made numerous reasonable accommodations.

D. Undue Hardship

[6] Petitioner further contends that

> where an employer has informally accommodated an employee's disability, and the employee performs their job satisfactorily, that establishes that the accommodation is reasonable and if the employer revokes that accommodation, they must prove that continuation of the accommodation would cause it undue hardship[, and] morale issues of other employees do not constitute undue hardship to the employer, where the evidence shows that the work of the employees was getting completely done[.]

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5. One of petitioner's arguments is that her exposure to light in the workplace actually "aggravated" her light sensitivity, so that respondent's failure to find the right accommodation earlier in the process worsened her condition. Even if we assume this to be true, respondent had no way of knowing or predicting if petitioner's light sensitivity would increase, decrease, or stay the same based upon the modifications made. The only medical information on this increase in sensitivity was presented at the hearing; petitioner would not permit respondent to communicate with her healthcare providers during the interactive process. This additional information regarding petitioner's increasing sensitivity may have helped respondent do a better job of accommodating petitioner's condition, but petitioner chose not to share her medical information during the accommodation process.

(Quotation marks omitted.) Again, petitioner is incorrect in her legal analysis. In a related issue, the Fourth Circuit clarified that

> *[t]he fact that certain accommodations may have been offered by the County to some employees as a matter of good faith does not mean that they must be extended to Myers as a matter of law. See Traynor v. Turnage*, 485 U.S. 535, 549, 108 S.Ct. 1372, 1384, 99 L. Ed. 2d 618 (1988) ("There is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons."). Moreover, such a regime would discourage employers from treating disabled employees in a spirit that exceeds the mandates of federal law. If an employer undertook extraordinary treatment in one case, the same level of accommodation would be legally required of it in all subsequent cases; in other words, a good deed would effectively ratchet up liability, and thus not go unpunished. *See Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995). Discouraging discretionary accommodations would undermine Congress' stated purpose of eradicating discrimination against disabled persons. *See* 42 U.S.C. § 12101(b). Accordingly, we do not accept the proposition that Myers is ipso facto entitled to the precise accommodations afforded other disabled County employees.

Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1995) (emphasis added).

While *Myers* was addressing different employees, the logic also applies here. *Compare id.* The fact that Ms. Sikes was willing to try certain accommodations does not mean she was then bound to continue an accommodation even if it ended up being untenable. *See generally id.* Ms. Sikes tried turning off all overhead florescent lights but she later determined that this accommodation could not continue due to other employees' complaints. *See generally id.* Petitioner's interpretation would do exactly what *Myers* warns about causing "a good deed [to] effectively ratchet up liability[;]" an employer should not be punished for being willing to try an accommodation which ends up not working or being discontinued for other reasons, whether due to the disabled employee, other employees, or the employer. *Id.* Again, reasonableness is an objective standard, and it is not objectively reasonable to require all other employees to work without overhead lights in this particular situation. *See Williams*, 101 F.3d at 350. U.S.C.A. § 12112(b)(5)(A)

mandates that the employer must demonstrate undue hardship if refusing a *reasonable* accommodation, not an unreasonable accommodation proposed by the disabled employee. *See* U.S.C.A. § 12112(b)(5)(A). Therefore, we need not further address petitioner's arguments regarding undue hardship.

E. Interactive Process

[7] Closely related to petitioner's challenge of the reasonableness of respondent's accommodations are her arguments that respondent failed to use good faith in engaging in the interactive process of finding a reasonable accommodation. Specifically, petitioner argues:

> 6. Did the ALJ and the Superior Court Judge commit errors of law when they failed to recognize that under the ADA the employer must propose additional possible reasonable accommodations when it is aware that the accommodations[] it has implemented are not effective, and also when the employee proposes additional accommodations, and the failure to do so constitutes a failure to engage in the interactive process required by the ADA? COL 28, 29, 30, 36 & 37 [R. pp.155-56], *aff'd*, R. p.163]
>
> 7. Did the ALJ and the Superior Court Judge commit errors of law when they failed to recognize the bad faith of Respondent in the interactive process as shown by numerous statements by managers indicating discriminatory intent, and the refusal to consider the reasonable accommodation of turning off the fluorescent lights? COL 28, 29, 30, 32, 36 & 37 [R. pp.155-56], *aff'd*, R. p.163.
>
> 8. Did the ALJ and the Superior Court Judge commit errors of law when they failed to recognize that when the lack of an effective accommodation for a disabled employee causes the employee to have deficiencies in their work performance such as excessive absenteeism, under the ADA a discharge for those deficiencies is a discharge based on disability? COL 19, 20, 21, 23, 24, 25, 36 & 37 [R. pp.153-54 & 156], *aff'd*, R. p.163.

The parties were engaged in a formal interactive process to find a reasonable accommodation and both employee and employer are required to participate in good faith:

> Once an employee has made a request for an accommodation, the ADA's regulations state that "it may be necessary

for the employer to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation" in order to craft a reasonable accommodation. 29 C.F.R. § 1630.2(o)(3). The EEOC's interpretive guidelines reinforce this directive, but also stress that the interactive process requires the input of the employee as well as the employer. *See* 29 C.F.R. Pt. 1630, App. § 1630.9 at 359 ("flexible, interactive process that involves both the employer and the qualified individual with a disability"). *See also Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 165 (5th Cir.), *cert. denied*, 519 U.S. 1029, 117 S.Ct. 586, 136 L. Ed. 2d 515 (1996) (duty to launch interactive process is triggered by request for an accommodation). The need for bilateral discussion arises because "each party holds information the other does not have or cannot easily obtain." *See Taylor v. Phoenixville School Dist.*, 174 F.3d 142, 162 (3rd Cir.1999) (noting that employers will not always understand what the disabled employee is capable of and the employee will not always understand what accommodations are reasonably available). Courts interpreting the interactive process requirement have held that when an employer's unwillingness to engage in a good faith interactive process leads to a failure to reasonably accommodate an employee, the employer violates the ADA. *See Taylor v. Phoenixville School Dist.*, 174 F.3d 142, 165; *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1285 (7th Cir.1996). However, recognizing that "the responsibility for fashioning a reasonable accommodation is shared between the employee and the employer," *see Principal Financial Group*, 93 F.3d at 165 (emphasis added), courts have held that *an employer cannot be found to have violated the ADA when responsibility for the breakdown of the "informal, interactive process" is traceable to the employee and not the employer. See Beck v. University of Wisconsin Bd. Of Regents*, 75 F.3d 1130, 1135 (7th Cir.1996); *Templeton v. Neodata Services, Inc.*, 162 F.3d 617 (10th Cir.1998). This reasoning flows naturally from our recognition in *Principal Financial Group* that responsibility for the interactive process is shared. Since on the evidence here no reasonable jury could find Akzo at fault for the breakdown of the interactive process,

> the district court was correct to grant judgment as a matter of law in Akzo's favor.

Loulseged v. Akzo Nobel Inc., 178 F.3d 731, 735–36 (5th Cir. 1999) (emphasis added) (footnotes and brackets omitted).

Petitioner's issues here are all based upon the "failure" of the ALJ and Superior Court to "recognize" certain things. While petitioner's issues are framed as legal issues they really ask this Court to re-weigh the evidence and make different factual determinations. But we have already determined that the findings of fact are binding upon this Court. *See Garrett*, 224 N.C. App. at 34, 735 S.E.2d at 416. Furthermore, to the extent that petitioner's issues regarding the ALJ's and Superior Court's "failures" are based upon a legal determination, petitioner's legal arguments also fail because the numerous findings of fact regarding the many reasonable accommodations made by respondent demonstrate that respondent engaged in the interactive process in good faith.

The findings of fact also establish that it was petitioner who ended the interactive process. Thus, even generously assuming *arguendo* that respondent's arguments may raise some interesting legal points, the fact remains that petitioner's actions ultimately caused the interactive process to stop before finding an effective accommodation. Though petitioner argues that she disengaged from the process because she could no longer return to work without risking a migraine being triggered, this point *ignores* the evidence and findings that petitioner was given the opportunity to work from home as the interactive process continued. Petitioner chose not to work from home; petitioner chose not to return to work; petitioner's choices were the reason the interactive process failed to continue. "No matter how earnestly one party attempts to engage in an interactive process, its efforts can always be superficially characterized as unilateral if the other party refuses to interact. One cannot negotiate with a brick wall." *Loulseged*, 178 F.3d at 737. These arguments are overruled.

F. Termination

Petitioner's final subset of arguments run the gamut touching on "discrimination," "retaliation," and the failure of the ALJ and Superior Court to "adopt" her findings of fact and cited law and to award her damages. All of petitioner's arguments are based upon the premise that respondent failed to properly engage in the interactive process and failed to make reasonable accommodations, so ultimately respondent retaliated against petitioner by terminating her employment on the discriminatory basis of her disability. But petitioner was not terminated

for her disability; she was terminated because she stopped coming to work without even letting respondent know that she would not report to work as scheduled, after she also repeatedly refused to work from home. Petitioner's arguments fail.

V. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA
v.
BREYON BRADFORD, DEFENDANT

No. COA16-988

Filed 21 March 2017

1. Criminal Law—instructions—flight—defendant not the driver of the car

The trial court did not err by instructing the jury on the theory of flight in a prosecution involving a shooting that began at a gas station and involved a car that sped away. The evidence plainly supported an instruction on flight despite the fact that defendant was not actually driving the car when it fled the station.

2. Criminal Law—clerical errors—remand

A conviction for assault with a deadly weapon and other charges was remanded for the correction of undisputed clerical errors.

Appeal by defendant from judgments entered 14 March 2016 by Judge Kendra D. Hill in Wake County Superior Court. Heard in the Court of Appeals 23 February 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General David P. Brenskelle, for the State.

Leslie Rawls for defendant-appellant.

MURPHY, Judge.

Breyon Bradford ("Defendant") appeals from his convictions for (1) two counts of assault with a deadly weapon with intent to kill inflicting serious injury; (2) two counts of discharging a firearm into occupied property; and (3) assault with a deadly weapon with intent to kill. On appeal, he contends that the trial court erred by providing an instruction to the jury on flight. Specifically, he asserts that because he was a passenger — not the driver — of the vehicle that fled the scene while he shot at a crowded car, the State failed to present sufficient evidence at trial to merit such an instruction.

Defendant also contends that several clerical errors were made by the trial court necessitating remand. Specifically, he asserts that the incorrect file numbers were recorded on the verdict sheets, final judgment forms, and appellate entries. After careful review, we conclude that Defendant received a fair trial free from error, however, we remand for the limited purpose of correcting the clerical errors present on the face of the final judgment forms and related documents.

Factual Background

At approximately 5:00 p.m. on 14 July 2015, Najee Cunningham ("Najee") and his brother, James Cunningham ("James"), drove in Najee's silver Buick to the Exxon station at the intersection of New Bern Avenue and Trawick Road in Raleigh, North Carolina after picking up Najee's one year old son, N.D.,[1] from daycare. After pulling into the station and parking at one of the gas pumps, Najee went inside to buy gas leaving N.D. in the backseat of the car. While Najee was paying, James began fueling the Buick.

As James was pumping gas, he noticed a burgundy Volkswagen Passat parked in front of Najee's car at another pump. The front passenger-side window of the Passat was open and James saw Defendant staring out of it at him with a "crazy look." James asked Defendant, "[w]hat the F were you looking at?" Defendant responded by pointing a black handgun out of the car window at James.

Shortly thereafter, Najee returned to his car. James told Najee that Defendant had pointed a gun at him, and Najee proceeded to get out of the Buick and yell at Defendant and the driver of the Passat, William Holden ("Holden"), that his son was in the backseat of the car. He then returned to the Buick at which point both James and Holden began driving their respective vehicles toward the station exit.

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1. Initials are used throughout this opinion to protect the identity of the minor child.

As they reached the station exit, Holden's Passat was positioned directly in front of Najee's Buick. Suddenly, the Passat accelerated causing its tires to "squall" as it pulled out of the gas station and onto New Bern Avenue. As the Passat was turning, Defendant leaned out of the open passenger-side window, and fired his gun multiple times back towards the Buick and the station. One of the bullets went through Najee's front passenger door, hitting Najee — who was seated in the front passenger seat just feet from one year old N.D. — in his buttocks. Another bullet went through the wall of the nearby Microtel Inn and Suites hotel hitting Wylie Mendicino ("Mendicino") — who was staying at the hotel and laying in bed at the time with his girlfriend Logan Ardrey — in his right thigh. The Passat continued down New Bern Avenue at a high rate of speed. Both Mendicino and Najee were taken to WakeMed and treated for their gunshot wounds shortly thereafter.

After speeding away from the Exxon station, Defendant told Holden to stop the Passat at Rodgers Lane. He then abandoned Holden and the vehicle and left the area on foot. Shortly thereafter, he disposed of his handgun in an unknown location.

After examining surveillance video footage from the Exxon station, detectives with the Raleigh Police Department determined Holden's identity based on the Passats' license plate number. Detectives contacted Holden's father who was the registered owner of the Passat. Holden's mother then called Holden, who came to his parent's house where he was interviewed about the shooting. During the interview, Holden identified Defendant as the shooter. Defendant was subsequently located and arrested.

On 17 August 2015, Defendant was indicted on charges of (1) assaulting Najee with a deadly weapon with intent to kill inflicting serious injury; (2) conspiracy to commit assault with a deadly weapon with intent to kill inflicting serious injury[2]; (3) assaulting N.D. with a deadly weapon with intent to kill; (4) assaulting James with a deadly weapon with intent to kill; (5) two counts of discharging a firearm into occupied property; and (6) assaulting Wylie Mendicino with a deadly weapon with intent to kill inflicting serious injury. A jury trial was held in Wake County Superior Court beginning on 7 March 2016 before the Honorable Kendra D. Hill.

At trial, the State proffered the testimony of James, who stated that neither he nor Najee were armed with a gun during the gas station

2. Prior to trial, the State elected not to proceed on the conspiracy charge and it was accordingly dismissed.

incident. He further testified that he did not provoke Defendant into shooting at them in any way. The State additionally introduced the testimony of Najee who also stated that he and James were unarmed that day.

In addition, the State introduced the testimony of the driver, Holden, who stated the following during direct examination:

> Q. Did you at any point see the [D]efendant shooting or hear him shooting from your vehicle back towards the gas station?
>
> A. As I started to leave.
>
> Q. Okay. So how soon after you get onto New Bern Avenue do you hear or see gunfire?
>
> A. Maybe five seconds. I'm not sure. About five seconds.
>
> Q. Could you tell where the gray Buick was when the shots were fired?
>
> A. In my mirror.
>
> Q. In your mirror? In your mirror back at the exit or actually out on New Bern Avenue?
>
> A. Out on New Bern.
>
> Q. Out on New Bern. Okay. About how much distance between the two of you? Between the two cars, I should say.
>
> A. I'm not exactly sure.
>
> Q. Do you recall hearing or seeing any gunfire come from that car, from the gray Buick?
>
> A. Couldn't really hear or see. I was focusing on driving, so I'm not sure.
>
> Q. So what happened after shots were fired?
>
> A. I proceeded up New Bern.
>
> Q. Okay. Who fired shots?
>
> A. Breyon.
>
> Q. The [D]efendant?
>
> A. Correct.

Q. Okay. Do you know what kind of gun he fired?

A. A handgun, I suppose.

Q. Do you know the size or caliber?

A. I didn't.

. . . .

Q. Okay. Was the [D]efendant with you that whole time?

A. No.

Q. Okay. Did he get out of the vehicle?

A. Up towards Roger Lane.

Q. Okay. Did he ask you to stop or did you stop and tell him to get out? What did you do?

A. I stopped.

Q. Okay. Why?

A. Because I was upset.

Q. About what?

A. About what just happened.

Q. Can you tell the jury why? What was upsetting to you about it?

A. I was upset because I figured that the police department will contact my father because I was on camera at the gas station pumping gas with his credit card, and the incident happened where I figured they would describe my car and they'll run the cameras back and it would lead back to me.

Q. Did it lead back to you?

A. Yeah.

. . . .

Q. Okay. Now, after -- when you were upset and the [D]efendant got out of your car at Rogers Lane, what did you say to him?

A. Exactly what I just said to the jury, that I figured that they would try to come at me about the situation.

Q. Did he respond?

A. Yup.

Q. What did he say?

A. Told me not to worry about it, that he was going to take his charge.

Defendant testified on his own behalf at trial. His theory of the case was that he had acted in self-defense. He claimed that Najee had pointed a gun at him as Holden was pulling out of the Exxon station onto New Bern Avenue, prompting him to fire his own weapon in response.

On cross-examination, Defendant admitted that he had disposed of the gun he had shot while at the Exxon station and was unaware of its current location.

Q. Where is that gun, by the way?

A. I don't know. I couldn't tell you.

. . . .

Q. Did you dispose of the gun after this all happened?

A. Yes, sir.

During the charge conference, the State requested an instruction on flight and Defendant's trial counsel objected. The trial court then proceeded to provide the jury with the following instruction on flight:

> The State contends, and the defendant denies, that the [D]efendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient, in itself, to establish [D]efendant's guilt.

The jury acquitted Defendant of the charge of assault with a deadly weapon with intent to kill N.D., and found Defendant guilty of all remaining charges. The trial court consolidated Defendant's assault with a deadly weapon with intent to kill inflicting serious injury convictions and sentenced Defendant to 44-65 months imprisonment. The trial court also consolidated the discharging a firearm into occupied property convictions and sentenced Defendant to 38-58 months imprisonment, to begin at the expiration of his sentence for his assault with a deadly weapon with intent to kill inflicting serious injury convictions. Finally,

the trial court sentenced Defendant to 20-36 months imprisonment for his assault with a deadly weapon with intent to kill conviction, suspended that sentence, and placed Defendant on 36 months supervised probation to begin upon his release from prison for his other convictions. Defendant gave oral notice of appeal in open court.

Analysis

I. Jury Instruction on Flight

[1] Defendant argues that the trial court erred in instructing the jury on the theory of flight. Specifically, Defendant contends that because he was the passenger in the car that sped away from the gas station — and not the driver of the vehicle — that the State failed to carry its burden in presenting sufficient evidence to support a flight instruction. We disagree.

"This Court reviews jury instructions only for abuse of discretion. Abuse of discretion means manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. . . . The party asserting error also bears the burden of showing that the jury was misled or that the verdict was affected by the instruction." *State v. Allen*, 193 N.C. App. 375, 381, 667 S.E.2d 295, 300 (2008) (internal citations and quotation marks omitted).

It is well settled that:

> Evidence of a defendant's flight following the commission of a crime may properly be considered by a jury as evidence of guilt or consciousness of guilt. A trial court may properly instruct on flight where there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged. However, mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension.

State v. Lloyd, 354 N.C. 76, 119, 552 S.E.2d 596, 625-26 (2001) (internal citations, quotation marks, brackets, and alteration omitted).

The bar for a defendant taking "steps to avoid apprehension" such that an instruction on flight will be deemed proper is low. Indeed, "this Court [has] noted that an action that [is] not part of defendant's normal pattern of behavior could be viewed as a step to avoid apprehension." *Allen*, 193 N.C. App. at 382, 667 S.E.2d at 300 (citation, quotation marks, brackets, and ellipses omitted).

Here, it is undisputed that Defendant (1) fired his gun while the Passat was already in the process of speeding away from the Exxon station after turning onto New Bern Avenue at a high rate of speed such that the tires "squalled"; (2) told Holden to stop at Rogers Lane after the Passat had sped away from the scene, abandoned his transportation, and then proceeded to leave the area on foot; and (3) intentionally disposed of his gun shortly thereafter. All of the above evidence plainly supports an instruction on flight in spite of the fact that Defendant was not actually driving the Passat when it fled the Exxon station. *See State v. Nixon*, 117 N.C. App. 141, 152, 450 S.E.2d 562, 568 (1994) (holding flight instruction proper where after shooting multiple victims, defendant left scene and disposed of gun).

As a result, we are satisfied that the trial court did not err by instructing the jury on the theory of flight. Defendant's arguments to the contrary are without merit.

II. Clerical Errors

[2] Defendant also asserts that the trial court made several clerical errors. Specifically, he claims that the trial court recorded the incorrect file numbers on several trial court documents including the final judgment forms. We agree.

We have consistently maintained that "[w]hen, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696-97 (2008) (citation and quotation marks omitted).

> A clerical error is defined as an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination. . . . This Court has held that an error on a judgment form which does not affect the sentence imposed is a clerical error, warranting remand for correction but not requiring resentencing.

State v. Gillespie, __ N.C. App. __, __, 771 S.E.2d 785, 790 (citation, quotation marks, and brackets omitted), *disc. review denied*, 368 N.C. 353, 777 S.E.2d 62 (2015).

Here, it is undisputed that the trial court erroneously recorded the incorrect file numbers on the verdict sheets, the final judgment forms,

and appellate entries. Consequently, we remand to the trial court for the limited purpose of correcting these clerical errors.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error. However, we remand to the trial court for the limited purpose of correcting the aforementioned clerical errors.

NO ERROR; REMANDED FOR CORRECTION OF CLERICAL ERRORS.

Judges STROUD and DILLON concur.

STATE OF NORTH CAROLINA
v.
DEVIN WAY FINK

No. COA16-934

Filed 21 March 2017

1. Larceny—by employee—auto repair—ownership of funds paid to employee—employee as agent of company

There was sufficient evidence to convict defendant of larceny by employee in a case involving a payment for auto repairs. Although defendant argued that the money belonged to the customer and was not the property of the auto repair company that employed defendant, so that defendant was not the employee of the owner of the stolen goods, defendant acted solely as the repair company's agent when he accepted the cash for the work.

2. Indictment and Information—variance between indictment and proof—name of corporation

There was no fatal variance between an indictment for larceny by employee and the proof at trial where the indictment alleged that defendant's employer was Precision Auto Care, Inc. (PACI) but the evidence was that the actual name of the corporation was Precision Franchising, Inc., which did business as Precision Tune Auto Care. This case involved only one corporation, and minor variations between the name of the corporate entity in the indictment and the evidence are immaterial. Moreover, the variation in the names did not hamper defendant's ability to defend against the charges or expose defendant to future prosecution for the same crime.

3. Evidence—prior charge—relevant to knowledge, plan, or scheme —not prejudicial

The trial court did not err in a prosecution for larceny by employee by admitting evidence of defendant's prior embezzlement charge where the evidence was admitted for the limited purpose of showing defendant's prior knowledge, plan, or scheme and intent to permanently deprive his employer of its property. The trial court's admission of the evidence did not violate Rule of Evidence 403.

Appeal by defendant from judgment entered 30 March 2016 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Jeremy D. Lindsley, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

TYSON, Judge.

Devin Way Fink ("Defendant") appeals from judgment entered, following his conviction of larceny by employee. We find no error.

I. Factual Background

The State's evidence tended to show Defendant was employed as the store manager of an auto repair shop located on 4909 South Boulevard in Charlotte on 3 June 2014. This shop is part of a chain of repair shops owned by Precision Franchising, Incorporated, d/b/a Precision Tune Auto Care ("Precision"). Defendant managed all aspects of the shop, including discussing repairs with and pricing estimates for customers, writing service orders and invoices, ordering parts, and taking payments from customers.

On 3 June 2014, Randall Stywall ("Stywall") took her car to the South Boulevard Precision shop, where Defendant was working as the sole manager on duty. Stywall explained to Defendant that, among other things, she needed replacement of both front struts and rear shocks. Defendant filled out a service order, which detailed the precise estimate for the work would be $1,501.93. Defendant provided Stywall with a copy.

Because Stywall's mother, Pamela Nixon ("Nixon"), was paying for the repairs, Stywall contacted Nixon to confirm the estimated price.

After Nixon agreed to the $1,501.93 estimate, Stywall left her car and a shop employee took her to work. Later that day, Defendant notified Nixon the repairs to her daughter's car were complete and her car was ready to be picked up. After Nixon finished work for the day, she went to the shop and paid $1,501.93, in cash, to Defendant, who provided her a receipt. Thereafter, Defendant closed the shop for the day and left.

After paying for the repairs and receiving the keys to the car, Nixon went to pick up Stywall and brought her back to the shop to get her car. As soon as Stywall got into her car and started to drive it, she noticed the car was still making the earlier noise and was bouncing up and down as if the shocks were not replaced. Less than a minute after leaving Precision's parking lot, Stywall called Nixon and told her "the car's not fixed." Because Precision was already closed for the day, Nixon told her daughter to slowly drive the car home.

That evening, Nixon called Defendant's cell phone number, which he had given to her earlier in the day, notified him the car was not fixed, and demanded the parts be removed and her money back. Defendant responded by stating he would not fulfill her requests, but he would try to get the car fixed the following day. Defendant requested Nixon not to call the shop.

Not satisfied with Defendant's responses, Nixon called Precision's corporate office and complained. The next day, 4 June 2014, Precision District Operations Manager, Tony Lee Harp ("Harp"), contacted Nixon and discovered a discrepancy of approximately $425.00 between the amount stated on Nixon's service order and receipt. Harp then told her he was going to "make it right."

Upon noticing this discrepancy, Harp called Defendant and questioned him. Defendant admitted he had the missing money. Harp requested Defendant to return to the shop immediately. Harp testified, that after the phone conversation with Defendant, he checked the records and saw the service order for $1,501.93 and the invoice for $1,076.56 for Stywall's car. The computer did not disclose how much the customer had tendered. Based off this invoice, Harp concluded the price discrepancy was the result of the deletion of the installation of the new rear shocks from the original service order.

During his phone conversation with Harp, Defendant claimed he could not find the parts needed to complete the work, as the reason he still possessed the $425 in cash. Further, Defendant asserted Stywall was aware of this fact, and the two of them had agreed to Precision finishing the work once the necessary parts were obtained. Harp, however,

testified he checked for the allegedly missing parts the next day, 4 June 2014, and found them "readily available." According to Harp, the company's policy for handling such a situation, where a customer paid an entire bill, prior to all the work being completed, was to create a deposit for the amount paid for uncompleted work.

After speaking with Harp, Defendant returned to the shop and provided Precision with the missing $425.00. Precision completed the unfinished work to Stywall's car and provided Nixon with an additional future store credit for her troubles. Defendant was arrested at the shop.

On 15 September 2014, Defendant was indicted with one count of larceny by employee. The indictment alleged Defendant went away with, embezzled, and converted to his own use United States currency, which had been delivered to be kept for his employer, Precision Auto Care, Inc. (PACI). The case proceeded to trial on 28 March 2016.

At trial, Defendant objected to testimony by Charlotte Mecklenburg Police Officer Jarrett Phillips ("Phillips"), concerning a past encounter with Defendant. Phillips testified he had investigated Defendant for embezzlement in 2010. Defendant had worked as the manager of a restaurant and admitted stealing from the restaurant by voiding out cash transactions and keeping the cash for himself. Defendant signed a three-page statement written by Officer Phillips, wherein Defendant admitted he had been taking money from the restaurant. Defendant was later arrested for embezzlement.

At the close of the State's evidence, Defendant moved to dismiss the charge on three separate grounds: (1) insufficient evidence to convict in violation of the Due Process Clause, U.S. Const. amends. V and XIV; (2) a fatal variance between the crime alleged in the indictment and any crime for which the State's evidence may have been sufficient to go to the jury regarding the identity of the victim, namely a larceny against Nixon, not an "embezzlement" against "Precision Auto Care, Incorporated"; and (3) a fatal variance between the business as named in the indictment and as identified in testimony during trial. The motion was denied.

During its deliberations, the jury posed the following question: (1) "If company name on charge is different than actual name, do we, the jury, need to consider? e.g., Precision Tune vs. Precision Auto vs. DBA." In response, the trial court re-read its jury instruction regarding the offense of larceny by employee. On 30 March 2016, the jury returned a verdict of guilty of one count of larceny by employee.

Defendant gave notice of appeal in open court.

II. Jurisdiction

Jurisdiction of right lies in this Court by timely appeal from final judgment entered by the superior court, following a jury's verdict pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2015).

III. Issues

Defendant asserts the trial court erred by (1) denying his motion to dismiss the charge of larceny by employee for insufficiency of the evidence; (2) denying his motion to dismiss the charge of larceny by employee for a fatal variance of the evidence from the indictment; and (3) allowing the State to present improper evidence under Rule 404(b), where the prejudicial effect outweighed the probative value under Rule 403.

IV. Motions to Dismiss

Defendant argues the trial court erred by denying his motions to dismiss at the close of the State's evidence and again at the close of all the evidence where: (1) the State failed to present sufficient evidence to show Precision was the true owner of or entitled to the money Defendant took, and (2) there was a fatal variance between the entity named in the indictment and the proof at trial.

A. Standard of Review

This Court has stated:

> The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Wood, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (internal citations and quotations omitted).

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

(citation omitted). "[A] variance between the indictment and the proof at trial does not require reversal unless the defendant is prejudiced as a result." *State v. Weaver*, 123 N.C. App. 276, 291, 473 S.E.2d 362, 371 (citation omitted), *cert. denied and disc. review denied*, 344 N.C. 636, 477 S.E.2d 53 (1996).

B. Insufficiency of the Evidence

[1] N.C. Gen. Stat. § 14-74 provides:

> If any servant or other employee, to whom any money, goods or other chattels . . . by his master shall be delivered safely to be kept to the use of his master, shall withdraw himself from his master and go away with such money, goods, or other chattels . . . with intent to steal the same and defraud his master thereof, contrary to the trust and confidence in him reposed by his said master; or if any servant, being in the service of his master, without the assent of his master, shall embezzle such money, goods or other chattels . . . or otherwise convert the same to his own use, with like purpose to steal them, or defraud his master thereof, the servant so offending shall be guilty of a felony: Provided, that nothing contained in this section shall extend to . . . servants within the age of 16 years.

N.C. Gen. Stat. § 14-74 (2015).

The elements of larceny by employee are: "(1) the defendant was an employee of the owner of the stolen goods; (2) the goods were entrusted to the defendant for the use of the employer; (3) the goods were taken without the permission of the employer; and (4) the defendant had the intent to steal the goods or to defraud his employer." *State v. Frazier*, 142 N.C. App. 207, 209, 541 S.E. 2d 800, 801 (2001) (citation omitted).

In this case, the indictment alleged that Defendant had

> unlawfully, willfully and feloniously being the employee of Precision Auto Care, Inc. (PACI), a corporation, go away with, embezzle, and convert to his own use United States currency, which had been delivered to be kept for his employer's use, with the intent to steal and to defraud his employer. This act was done without his employer's consent and contrary to the trust and confidence reposed in him by his employer.

Defendant contends he could not have committed larceny by employee under N.C. Gen. Stat. § 14-74 because the cash given to

Defendant remained the customer's property, and never became Precision's property. Defendant bases this contention on the following exchange between defense counsel and Harp:

> Q. After the repair is complete, the customer — and — and the work orders, the customer has given you the money, is that when you would say the money becomes Precision Tune's?
>
> A. Whenever the customer pays the bill. I mean, that's — I mean, that would be —
>
> Q. I mean, if the — if the customer pays the bill but the work isn't done is it still your money?
>
> A. If the customer pays the bill they would have to create a deposit. And if the work wasn't done, no, it would not be Precision Tune's money until —
>
> Q. Until the work was done?
>
> A. — until the customer decided that they were satisfied with the repair. But if they create a deposit, like I said before, it is discretionary on the manager's position whether or not the money's returned to the customer, depending on — if they're special order parts, it can't be returned, then I guess the deposit would be non-refundable.

Defendant argues this exchange establishes the $425.00 remained Nixon's property, not Precision's, because the work had not been performed at the time she had made the payment. As a result, Defendant asserts the State failed to present sufficient evidence that "[D]efendant was an employee of the *owner* of the stolen goods." *See id.* (emphasis supplied). Defendant's contention is without merit.

Evidence tended to show the cash was the property of Precision for purposes of larceny by employee under N.C. Gen. Stat. § 14-74. Harp testified Defendant returned the money to Precision, not Nixon. Nixon never received the $425.00 after delivering it to Defendant, who was the manager of the Precision shop. After Defendant returned the cash to Precision, the shop fixed Nixon's car and never offered her a refund. Instead, she was offered a voucher for future services worth $250.00 at Precision. Defendant does not show or argue he received the money from Nixon for any other reason or in any capacity other than as a manager of the Precision shop.

Precision is bound under agency principles by Nixon's payment to Defendant, as its manager of Precision's shop. *See Haynes Petroleum Corp. v. Turlington*, 261 N.C. 475, 478, 135 S.E.2d 43, 45-46 (1964) (citation omitted) ("No duty rests upon a debtor, who makes a payment to an agent designated to receive it, to see that the money reaches the principal, if the debtor is without notice of an improper purpose or intention on the part of the collecting agent."); *see also Lucas v. Li'l General Stores*, 289 N.C. 212, 220, 221 S.E.2d 257, 262 (1976) (citation omitted) ("[A] principal, who has clothed his agent with apparent authority to contract in behalf of the principal, is bound by a contract made by such agent, within the scope of such apparent authority, with a third person who dealt with the agent in good faith, in the exercise of reasonable prudence and without notice of limitations placed by the principal upon the agent's authority.").

As shop manager, Defendant's responsibilities included providing estimates and taking customer's payments. Defendant solely acted as Precision's agent when he provided the proposal and accepted the cash as full payment from Nixon for the agreed upon work. As soon as Nixon tendered payment to Defendant as Precision's manager and agent, the funds became Precision's "property" for purposes of larceny by employee under N.C. Gen. Stat. § 14-74.

The State presented substantial evidence to allow a jury to determine whether the $425.00 belonged to Defendant's employer, Precision, or to Nixon. *See State v. Mabry*, 269 N.C. 293, 296, 152 S.E.2d 112, 114-15 (1967) (citation omitted) (holding "[a]ny contradictions and discrepancies in the State's case are for the jury to resolve"). Viewed in the light most favorable to the State, and giving the State the benefit of every reasonable inference upon Defendant's motion to dismiss, sufficient evidence was presented to allow the jury to convict Defendant of the larceny by employee charge. The trial court properly denied Defendant's motion to dismiss for insufficient evidence. Defendant's argument is overruled.

C. Variance between Indictment and Proof at Trial

[2] Defendant argues the trial court erred by denying his motion to dismiss the larceny by employee charge. He asserts a fatal variance exists between the indictment and the proof at trial. We disagree.

"It is well established that '[a] defendant must be convicted, if at all, of the particular offense charged in the indictment' and that '[t]he State's proof must conform to the specific allegations contained' therein." *State v. Henry*, 237 N.C. App. 311, 322, 765 S.E.2d 94, 102 (2014), *disc. review denied*, 368 N.C. 277, 775 S.E.2d 852 (2015) (quoting *State v. Pulliam*,

78 N.C. App. 129, 132, 336 S.E.2d 649, 651 (1985)). However, "a variance between the indictment and the proof at trial does not require reversal unless the defendant is prejudiced as a result." *Weaver*, 123 N.C. App. at 291, 473 S.E.2d at 371 (citation omitted).

Defendant argues prejudice is shown, because the evidence presented by the State did not establish his employer was "Precision Auto Care, Inc. (PACI), a corporation," as alleged in the indictment. Evidence tended to show the actual name of the corporation is "Precision Franchising, Inc." which does business as "Precision Tune Auto Care." Defendant relies heavily on the holding in *State v. Miller* as authority to support their fatal variance argument. 271 N.C. 646, 157 S.E.2d 335 (1967).

In *Miller*, the Defendant was charged with one count of feloniously breaking and entering a building "occupied by one Friedman's Jewelry, a corporation" and one count of felonious larceny from the same corporation named in count one. *Id.* at 653-54, 157 S.E.2d at 342. At trial, the evidence showed that "the felonious breaking and entering was in a building occupied by 'Friedman's Lakewood, Incorporated'; that there [were] three Friedman's stores in Charlotte and that each is a separate corporation, but that all the merchandise that was stolen from the store that was broken into and entered was owned by 'Friedman's Jewelry, Incorporated,' with its home office located in Augusta, Georgia." *Id.*

Our Supreme Court held the variance in the breaking and entering charge of the indictment was fatal because the building was owned by an entirely separate corporation, "Friedman's Lakewood, Incorporated," than the corporation named in the indictment, "Friedman's Jewelry, a corporation." *Id.* However, our Supreme Court held the variance between the indictment, which alleged that stolen rings were the property of "Friedman's Jewelry, a corporation," and the evidence, which showed the rings were the property of "Friedman's Jewelry, Incorporated," was not fatal as to the charge of felonious larceny. *Id.*

Miller is readily distinguishable from the facts at bar. Where the variance in *Miller* involved two entirely separate corporate entities, the present case only involves one corporation. *See id.* Further, *Miller*'s holding as to the second charge of felonious larceny supports the State's assertion that this variance is immaterial. *Id.* (holding the variance between the indictment, which alleged that stolen rings were the property of "Friedman's Jewelry, a corporation," and the evidence, which showed the rings were the property of "Friedman's Jewelry, Incorporated," was not fatal as to the charge of felonious larceny).

Our courts have repeatedly held that minor variations between the name of the corporate entity alleged in the indictment and the evidence presented at trial are immaterial, so long as "[t]he defendant was adequately informed of the corporation which was the accuser and victim. A variance will not be deemed fatal where there is no controversy as to who in fact was the true owner of the property." *State v. Ellis*, 33 N.C. App. 667, 669, 236 S.E.2d 299, 301 (1977) (citation omitted); *see also State v. Wilson*, 264 N.C. 595, 597-98, 142 S.E.2d 180, 181-82 (1965) (finding no error when the indictment referred to the property owner as "B.M. Hancock & Son, a corporation" and evidence at trial referred to the corporation as "B.M. Hancock & Son's Feed Mill, Inc.," "B.M. Hancock & Son, Inc.," "B.M. Hancock & Son's," and "B.M. Hancock's Feed Mill"); *State v. Wyatt*, 254 N.C. 220, 221-22, 118 S.E.2d 420, 420-21 (1961) (finding no fatal variance where the indictment for embezzlement alleged ownership by the "Pestroy Exterminating Company," the bill of particulars alleged ownership in "Pestroy Exterminators, Inc.," and the evidence at trial referred to both of these names as well as "Pestroy Exterminating Corporation"); *State v. Davis*, 253 N.C. 224, 226, 116 S.E.2d 381, 383 (1960) ("The fact that the property was stolen from T.A. Turner & Co., Inc. rather than from T.A. Turner Co., a corporation, as charged in the bill of indictment, is not a fatal variance."); *State v. Morris*, 156 N.C. App. 335, 339, 576 S.E.2d 391, 394 (2003) (finding no fatal variance where the indictment referred to the employer as "AAA Gas and Appliance Company, Inc." and the evidence at trial referred to the corporation as "AAA Gas and Appliance Company," "AAA Gas," or "AAA").

Harp testified at trial he was the district operations manager for "Precision Tune Auto Care, North Carolina." When questioned by defense counsel, Harp noted the official name of the corporation was "Precision Franchising, Incorporated," doing business as "Precision Tune Auto Care." Harp and other witnesses subsequently referred to the company at various times as "Precision," "Precision Auto Care," "Precision Tune Auto Care," and "Precision Tune" throughout their testimony. The trial transcript demonstrates these names were simply shorthand methods for identifying the company during testimony.

The evidence presented sufficiently identified Defendant as the employee of Precision Auto Care, as alleged in the indictment. On cross-examination of Harp, the following exchange occurred:

> [Defense Counsel]: Okay. So, to be clear, you work for Precision Franchising, Incorporated?
>
> [Harp]: That is correct.

> [Defense Counsel]: And not Precision Auto Care, Incorporated?
>
> [Harp]: One of the same.
>
> [Defense Counsel]: But there is only one, right? Which one — which one do you work for?
>
> [Harp]: They are one of the same. We do business as Precision Auto Care in a court of law.

Additionally, Defendant has failed to demonstrate that he was prejudiced by use of the shorthand references to his employer during trial. The variation in names did not hamper Defendant's ability to defend against the charges or expose Defendant to potential future prosecution for the same crime. The trial court properly denied Defendant's motion to dismiss this charge. Defendant's contention is without merit. This assignment of error is overruled.

V. Admission of Officer Phillips' Testimony under Rule 404(b)

[3] Defendant argues the trial court erred by allowing the jury to hear Officer Phillips' testimony regarding Defendant's prior embezzlement charge because: (1) the dissimilarity and remoteness between the two crimes makes its admission improper under Rule 404(b); (2) the testimony was not relevant to show the purposes to which the court limited its use: to show intent, plan, and absence of mistake or accident; and (3) the testimony was unduly prejudicial and inadmissible under Rule 403. We disagree.

A. Standard of Review

Our Supreme Court held:

> [W]hen analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

"A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the

result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985) (citation omitted).

B. Analysis

1. 404(b) Evidence

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013). However, evidence of a defendant's prior crimes, statements, actions, and conduct is admissible, if relevant to any fact or issue other than the defendant's character. *See Beckelheimer*, 366 N.C. at 130-31, 726 S.E.2d at 159 (citation omitted).

North Carolina Rule of Evidence 404(b) is a rule of inclusion, not exclusion. *Id.* at 131, 726 S.E.2d at 159 (citing *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990)).

> The rule lists numerous purposes for which evidence of prior acts may be admitted, including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. This list is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue [at trial] . . . .

Beckelheimer, 366 N.C. at 130, 726 S.E.2d at 159 (internal citations and quotation marks omitted).

Our Supreme Court has ruled Rule 404(b) is "subject to but *one exception* requiring the exclusion of evidence if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged. *State v. Lyons*, 340 N.C. 646, 668, 459 S.E.2d 770, 782 (1995) (emphasis in original) (citation omitted).

Rule 404(b) "evidence is relevant and admissible so long as the incidents are sufficiently similar and not too remote [in time]." *State v. Blackwell*, 133 N.C. App. 31, 35, 514 S.E.2d 116, 119 (1999) (citing *State v. Bagley*, 321 N.C. 201, 207, 362 S.E.2d 244, 247-48 (1987)); *see also State v. Smith*, 152 N.C. App. 514, 527, 568 S.E.2d 289, 297 ("The use of evidence permitted under Rule 404(b) is guided by two constraints: similarity and temporal proximity.") (citation omitted), *disc. review denied*, 356 N.C. 623, 575 S.E.2d 757 (2002).

Officer Phillips' testimony, along with a written statement signed by Defendant, contained admissions that Defendant had embezzled cash receipts from his previous employer. Specifically, Officer Phillips stated

he had interviewed Defendant in response to a fraud call at Encore Bistro Bar ("Encore") on 6 October 2010. Defendant had worked as Encore's manager and admitted stealing money from Encore by "voiding out" customer transactions and keeping the cash for himself.

In a motion *in limine*, the State argued Officer Phillips' testimony regarding Defendant's prior conviction for embezzlement was admissible because it showed Defendant's prior knowledge, plan, or scheme and intent to permanently deprive Precision of its property. The trial court granted the State's motion *in limine* and allowed Officer Phillips to testify regarding Defendant's prior embezzlement charge.

The State argued the specific facts and circumstances of Defendant's prior embezzlement charge described by Officer Phillips' testimony were relevant to show the Defendant's intent to permanently deprive Precision of its property, an essential element of larceny by employee. *See Frazier*, 142 N.C. App at 209, 541 S.E.2d at 801 (describing one of the elements of larceny by employee: "the defendant had the *intent* to steal the goods or to defraud his employer").

Evidence tending to show Defendant embezzled from a previous employer four years prior to the incident at bar was clearly relevant to show his "intent," "plan," or "absence of mistake or accident." In both cases, Defendant: (1) worked for the victim business; (2) held a managerial position; (3) took cash paid to and intended for the victim business; (4) kept the cash for himself; and (5) manipulated the accounting procedures in an effort to cover his tracks. Officer Phillips' testimony was relevant under Rule 401, and served a proper purpose under Rule 404(b).

In *State v. Riddick*, our Supreme Court stated: "Remoteness in time is less important when the other crime is admitted because its *modus operandi* is so strikingly similar to the *modus operandi* of the crime being tried as to permit a reasonable inference that the same person committed both crimes." 316 N.C. 127, 134, 340 S.E.2d 422, 427 (1986); *see also State v. Gray*, 210 N.C. App. 493, 507, 709 S.E.2d 477, 488 (2011) ("[T]he more striking the similarities between the facts of the crime charged and the facts of the prior bad act, the longer evidence of the prior bad act remains relevant and potentially admissible for certain purposes."). The similarity of the two crimes and the methods Defendant used to conceal and steal cash receipts from his employers supports the trial judge's ruling. *See Id.*

This evidence was properly admitted under the North Carolina Rules of Evidence, Rule 404(b). *See Coffey*, 326 N.C. at 278–79, 389 S.E.2d at 54 (holding Rule 404(b) is a rule of inclusion). The trial court also gave

the jury a limiting instruction regarding the purposes for which the jury could consider the evidence. The jury is presumed to have followed these instructions. *State v. Montgomery*, 291 N.C. 235, 244, 229 S.E.2d 904, 909 (1976) (citation omitted) ("We assume, as our system for administration of justice requires, that the jurors in this case were possessed of sufficient character and intelligence to understand and comply with th[e limiting] instruction by the court.").

The testimony of Officer Phillips and Defendant's signed statement was not admitted to show Defendant had a propensity to commit crimes. This evidence was admitted for the limited purposes to show Defendant's prior knowledge, plan, or scheme and intent to permanently deprive Precision of its property. The trial court did not err in concluding that Rule 404(b) permitted admission of these statements into evidence.

2. Rule 403 – Unfair Prejudice

The trial court's admission of Officer Phillips' testimony did not violate Rule 403. "Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56 (citation omitted). The trial court determined the probative value of this evidence was not substantially outweighed by any prejudicial effect the admission of this evidence would have on Defendant based on the State's purposes of showing intent, plan, absence of mistake or accident.

The trial court also gave a specific limiting instruction to the jury, both at the time of Officer Phillips' testimony and during the instruction to the jury. This limiting instruction stated:

> Evidence has been received tending to show that there was prior embezzlement from Encore Bistro & Bar. *This evidence was received solely for the purpose of showing that the Defendant had the intent which is necessary — which is a necessary element of the crime charged in this case, that there existed in the mind of the Defendant a plan involving the crime charged in this case, the absence of mistake, the absence of accident.* If you believe this evidence you many consider it but only for the limited purpose for which it is received. You may not consider it for any other purpose.

(emphasis supplied).

The trial court found the admission of Officer Phillips' testimony and the statement signed by Defendant was for a permissible purpose

under Rule 404(b). The trial court also specifically limited its use in its instructions to the jury. Defendant has failed to show the trial court's process or admission of this evidence constitutes an abuse of discretion. Defendant's argument is overruled.

VI. Conclusion

The trial court did not err by denying Defendant's motions to dismiss the charge of larceny by employee, which asserted insufficiency of the evidence and a fatal variance between the evidence presented and the allegations in the indictment. The trial court properly allowed the State to present evidence under Rule 404(b). Defendant has failed to show an abuse of discretion in the trial court's ruling under Rule 403, that the prejudicial effect was not outweighed by the probative value. Defendant received a fair trial, free from prejudicial errors he preserved and argued. *It is so ordered.*

NO ERROR.

Judges CALABRIA and STROUD concur.

THE STATE OF NORTH CAROLINA
v.
DANIEL CHRISTIAN GARNER, DEFENDANT

No. COA16-289

Filed 21 March 2017

1. Larceny—indictment—entity capable of owning property—country club

An indictment charging defendant with larceny of the personal property of "Pinewood Country Club" was fatally defective because it did not allege that "Pinewood Country Club" was an entity capable of owning property. The term "country club" has not been recognized by statute or by the courts as sufficient for identifying an entity capable of owning property.

2. Sentencing—arrested judgment—basis—possibility of remand

A verdict for possession of stolen goods was remanded for resentencing where the trial judge arrested judgment out of the mistaken belief that he was compelled to do so by law. Although a judgment arrested because of a fatal flaw appearing on the face

of the record precludes entry of a final judgment subject to appellate review, the underlying guilty verdict remains intact when the judgment is arrested for double jeopardy or other concerns. Here, the trial court failed to expressly explain the underlying reason for its decision, but the record provided some indication that the trial court's decision to arrest judgment was predicated on double jeopardy concerns.

3. Constitutional Law—Confrontation Clause—anonymous telephone call

The trial court did not violate the Confrontation Clause of the Sixth Amendment when it admitted testimony about an anonymous telephone call that identified defendant as a perpetrator of the crimes charged. The trial court admitted the testimony for a purpose other than the truth of the matter asserted and identified this limited purpose for the jury. Moreover, the evidence of guilt was overwhelming and any error in the admission of testimony about the anonymous call was harmless beyond a reasonable doubt.

Appeal by Defendant from judgment entered 3 September 2015 by Judge Michael D. Duncan in Randolph County Superior Court. Heard in the Court of Appeals 9 August 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Tracy Nayer, for the State.

Irons & Irons, PA., by Ben G. Irons, II, for Appellant-Defendant.

INMAN, Judge.

An indictment for felonious larceny is fatally defective when it fails to allege that property was taken from an entity capable of owning property. When the record indicates that a trial court arrested a judgment of conviction for double jeopardy-related concerns and no fatal defect of the conviction appears on the face of the record, the appellate court may treat the judgment as set aside rather than vacated and remand for the trial court's further consideration of the conviction.

Daniel Christian Garner ("Defendant") appeals from a judgment entered 3 September 2015 following a jury trial and verdicts finding him guilty of felonious larceny from a local country club and felonious possession of stolen goods. On appeal, Defendant argues the indictment for felonious larceny was fatally defective because the indictment failed to

allege that the entity from which the property was taken was capable of owning property and that the trial court violated the Confrontation Clause of the Sixth Amendment when it admitted testimony related to an anonymous call received by club employees. Defendant further argues that because the trial court arrested judgment on his conviction for possession of stolen goods without stating its reasoning, no court can reinstate that judgment. After careful review, we vacate Defendant's larceny charge and remand for resentencing under the possession of stolen goods charge.

Facts and Procedural History

Defendant was indicted on 4 November 2013 for felonious larceny and felonious possession of stolen goods. The indictment charged Defendant with having stolen twelve golf cart batteries and a pole saw from "Pinewood Country Club." Defendant was tried before a jury between 31 August 2015 and 3 September 2015.

At trial, the State offered evidence including the testimony of Defendant's half-brother Tony Garner, the owner of M.J.'s Recycling in Lexington, North Carolina, a Davidson County Sheriff's Office detective, and two employees of the Pinewood Country Club, Steven Richau and Farrell Harris. Steven Richau and Farrel Harris testified about the contents of an anonymous phone call they received following the vandalism and theft of twelve golf cart batteries from the Pinewood Country Club. Mr. Richau testified: "[The caller] then proceeded by stating that 'I don't want to be involved. I don't want anything out of it, but I overheard two guys at the service station earlier in the morning talking about some batteries and a mower they had taken from Pinewood.' " Mr. Richau further testified that the caller told him "that the Garner boys said they were taking the batteries to Lexington Recycling . . . ." Mr. Harris similarly testified as to the contents of the call, stating "[The caller] said he stopped at the gas station and overheard some guys talking about batteries. [The caller] kept saying he wanted to remain anonymous. [The caller] then said we[, Pinewood Country Club,] needed to call and check at Lexington Recycling. [The caller] said he knew their names, and they were Tony and Dale Garner . . . ."

Defendant's trial counsel objected to this testimony on the grounds that such testimony amounted to a violation of the Confrontation Clause of the Sixth Amendment. The trial court overruled trial counsel's objection and offered the following limiting instructions. In regard to Mr. Richau's statement the trial court explained:

> THE COURT: . . . Ladies and gentlemen of the jury, I need to give a brief limiting instruction. The Court is not allowing the statement of any caller or anonymous caller that this witness may be referring to for the truth of the matter as set forth in the statement that is going to be given to you, but only to show why the officers did what they did or the course of the investigation based on the statement of the caller.
>
> So, again, you are not to consider any statement by an anonymous caller for the truth of the matter asserted in the statement.

As to Mr. Harris's statement, the trial court stated:

> THE COURT: All right. Ladies and gentlemen, the same as the other witness, the Court is not allowing the statement of any anonymous caller for the truth of the matter that may be set forth in the statement that's gonna be testified to, but only to show why the officers did what they did or the course of the investigation based upon the statement.
>
> So, again, you're not to consider any statements of the anonymous caller for the truth of the matter that's asserted . . . .

Following each limiting instruction, the trial court verified by asking for a show of hands that the jury understood the instruction.

The jury found Defendant guilty of both offenses and the trial court sentenced him to a prison term of seven to eighteen months. The trial court then arrested judgment on Defendant's conviction for possession of stolen goods. Defendant gave notice of appeal in open court.

Analysis

I. The Indictment

[1] Defendant first argues the indictment is fatally defective because it does not allege that "Pinewood Country Club" was an entity capable of owning property. The State concedes this issue and we agree.

A. Larceny

"Larceny of goods of the value of more than one thousand dollars ($1,000) is a Class H felony." N.C. Gen. Stat. § 14-72(a) (2015). " '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 the intent

to deprive the owner of the property permanently.' " *State v. Sheppard*, 228 N.C. App. 266, 269, 744 S.E.2d 149, 151 (2013) (quoting *State v. Wilson*, 154 N.C. App. 686, 690, 573 S.E.2d 193, 196 (2002)). "To be valid a larceny indictment must allege the ownership of the [stolen] property either in a natural person or a legal entity capable of owning (or holding) property." *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015) (alteration in original) (internal quotation marks and citation omitted).

"When alleging ownership in an entity, an indictment must specify that the owner, 'if not a natural person, is a corporation or otherwise a legal entity capable of owning property,' unless the entity's name itself 'imports an association or a corporation capable of owning property.' " *Id.* (quoting *State v. Thornton*, 251 N.C. 658, 661, 111 S.E.2d 901, 903 (1960)). Our courts have held that terms such as "church," "corporation," "incorporated," "limited," or "company," or their abbreviated forms, are sufficient for identifying an entity in an indictment. *Id.* at 86-87, 772 S.E.2d at 443-44. The term "country club" has not been recognized by statute or by our courts as sufficient for identifying an entity as being capable of owning property, and we do not recognize it today. An indictment that fails to sufficiently allege an entity capable of owning property is "fatally defective." *Thornton*, 251 N.C. at 662, 111 S.E.2d at 904.

Here, the indictment charges Defendant with larceny of "the personal property of *Pinewood Country Club* . . . ." (emphasis added). The parties agree, and we hold, that this identification is insufficient and the indictment for felonious larceny is fatally defective. Accordingly, we vacate Defendant's larceny conviction.

B. Possession of Stolen Goods

[2] The State contends we should remand Defendant's conviction for possession of stolen goods to the trial court for resentencing. Defendant asserts that because the trial court arrested judgment on this conviction without specifying a reason for doing so, the conviction is deemed vacated and beyond appellate review. We disagree.

A trial court's arrest of a judgment has one of two effects: (1) to vacate the underlying judgment, or (2) to withhold the entry of judgment based on a valid jury verdict. *State v. Pendergraft*, 238 N.C. App. 516, 528, 767 S.E.2d 674, 683 (2014) (citing *State v. Reeves*, 218 N.C. App. 570, 575, 721 S.E.2d 317, 321 (2012) (citing *State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990))).

If a judgment is arrested because of a fatal flaw which appears on the face of the record, such as a substantive error on the indictment,

the trial court's decision to arrest judgment will "vacate the defendant's conviction and preclude the entry of a final judgment which is subject to review on appeal." *Id.* (quoting *Reeves*, 218 N.C. App. at 575-76, 721 S.E.2d at 321-22 (citations omitted)). On the other hand, if a trial court arrests judgment "for the purpose of addressing double jeopardy or other concerns, such as a situation in which the defendant has been convicted of committing a predicate felony in a case in which he or she has also been convicted of first degree murder on the basis of the felony murder rule, or convicted of a charge used to enhance punishment for a related offense," the conviction is not vacated. *Id.* at 528-29, 767 S.E.2d at 683 (citations omitted). "In the event that the trial court arrests judgment for the first of these two reasons, we lack the authority to review any challenge that [a d]efendant might seek to lodge against the underlying conviction on appeal given that the underlying conviction has been vacated." *Id.* at 529, 767 S.E.2d at 683-84 (citing *Reeves*, 218 N.C. App. at 576, 721 S.E.2d at 322). When a judgment is arrested for the second reason, "the underlying guilty verdict remains intact so that judgment can be entered based on that verdict in the event that (1) the conviction for the murder or related charge is overturned in subsequent proceedings and (2) the verdict with respect to which judgment has been arrested is not disturbed on appeal." *Id.* at 529, 767 S.E.2d at 683 (citing *Pakulski*, 326 N.C. at 439-40, 390 S.E.2d at 132).

Our initial task is to determine the reason the trial court arrested judgment on Defendant's conviction for possession of stolen goods.

A careful review of the record indicates the trial court failed to expressly explain the underlying reason for its decision. "[I]n the absence of some indication that the trial court's decision to arrest judgment stemmed from double jeopardy-related concerns, the effect of the decision to arrest judgement is to vacate the underlying conviction and preclude subsequent appellate review." *Pendergraft*, 238 N.C. App. at 530, 767 S.E.2d at 684 (citing *State v. Stafford*, 45 N.C. App. 297, 300, 262 S.E.2d 695, 697 (1980)). Whether some indication of double jeopardy-related concerns exists requires this Court to conduct a careful review of the record. *See, e.g.*, *Pakulski*, 326 N.C. at 442, 390 S.E.2d at 133 ("Our own close examination of the record reveals no error on the face of the record which would justify an arrest of judgment. We therefore conclude that Judge Fountain arrested judgment on this charge out of the mistaken belief that he was compelled by law to do so."); *cf. Pendergraft*, 238 N.C. App. at 530, 767 S.E.2d at 684 ("After carefully reviewing the record, we see no indication that the trial court's decision to vacate the judgment in the felonious breaking or entering case rested upon double jeopardy-related considerations.").

Here, the record provides some indication that the trial court's decision to arrest judgment on the possession of stolen goods conviction was predicated on double jeopardy concerns. The transcript indicates that following the jury verdicts and the trial court's pronouncement of a prison sentence, counsel for the parties approached the bench to confer with the trial court. Following this conference, the trial court stated:

> All right. With regard to the second sentence, with regard to the felony possession of stolen goods worth more than a thousand dollars, the Court will arrest judgment. Strike any judgment the Court entered on that. The Court's just entering the sentence on the felonious larceny, and that was an active sentence.

Trial courts are required to arrest judgments of convictions for either possession of stolen goods or larceny when a defendant is convicted of those charges in relation to the same incident. *See*, *e.g.*, *State v. Szucs*, 207 N.C. App. 694, 702-03, 701 S.E.2d 362, 368 (2010) (citations omitted) (arresting a defendant's conviction for felonious possession of stolen goods when he was convicted of larceny and possession of stolen goods for the same property, noting: "[o]ur Supreme Court has held that the legislature did not intend to punish a defendant for possession of the same goods that he stole"). Defendant did not argue before the trial court, nor does he argue on appeal, nor have we discovered in our review, any error on the face of the record related to the possession of stolen goods charge that would justify vacating the judgment.[1] Accordingly, we conclude that the trial court arrested judgment to avoid double jeopardy and the underlying guilty verdict remains intact. We therefore remand for resentencing on the possession of stolen goods conviction.

II. Anonymous Phone Call

[3] Defendant argues that the trial court violated the Confrontation Clause of the Sixth Amendment when it admitted testimony about the anonymous phone call identifying Defendant as a perpetrator of the crimes charged. We disagree.

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1. While the indictment's failure to specify Pinewood Country Club as an entity capable of owning property is fatal to the charge of larceny, it is not fatal to the charge of possession of stolen goods. *State v. Patterson*, 194 N.C. App. 608, 614-15, 671 S.E.2d 357, 361 (2009), *overruled on other grounds by State v. Campbell*, 368 N.C. 83, 772 S.E.2d 440 (2015) ("Because the crime of possession of stolen goods does not require the taking of personal property from another, an indictment for this crime is not required to signify that the entity who is allegedly wronged is capable of owning property.").

"It is well-settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated." *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007) (internal quotation marks and citations omitted). "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2015). "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *State v. Lawrence*, 365 N.C. 506, 513, 723 S.E.2d 326, 331 (2012) (alteration in original) (citations omitted). Our question becomes whether there was a violation of the Sixth Amendment, and if so, whether that error was harmless beyond a reasonable doubt.

A violation of the Confrontation Clause occurs when a "testimonial" statement from an unavailable witness is introduced against a defendant who did not have a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed.2d 177, 203 (2004) ("Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."). The Supreme Court has provided some guidance as to whether evidence is "testimonial," including the following description: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially[.]" *Id.* at 58, 158 L. Ed. at 193 (internal quotation marks and citations omitted). This Court has held that "where evidence is admitted for a purpose other than the truth of the matter asserted, the protection afforded by the Confrontation Clause against testimonial statements is not at issue." *State v. Hayes*, __ N.C. App. __, __, 768 S.E.2d 636, 640-41 (2015) (internal quotation marks and citation omitted).

Here, the trial court admitted the statements concerning the anonymous call for a purpose other than the truth of the matter asserted and identified this limited purpose for the jury. The trial court also noted the jurors' recognition and understanding of the limiting instructions. Because the testimony was admitted for a purpose other than the truth of the matter asserted, it falls outside the protections afforded by the Confrontation Clause of the Sixth Amendment.

In any event, assuming *arguendo* that the statements were testimonial, we are satisfied that any error that may have occurred was

harmless beyond a reasonable doubt. Tony Garner's girlfriend testified that Defendant conveyed to her several different versions of the story of his involvement with the batteries, including one in which "Tony had went and stole [the batteries] from Pinewood" and another in which Defendant and Tony "went together." Tony Garner testified that he "had an idea [that the batteries] might be stolen" when Defendant drove up with the batteries in his truck and that Defendant said he "ground the numbers off" of the batteries. Martin Lyon, the owner of the recycling business, testified that he witnessed Defendant "ripping stickers off the top of the batteries[,]" and acting in a manner that resulted in Mr. Lyon calling Detective Barnes to ask if "there [had] been any report of golf cart batteries stolen? 'Cause [he had] two gentlemen here that's ripping stickers off, and this doesn't add up." When Detective Barnes contacted Mr. Lyon a few days later to inform him there was a report of stolen batteries from Asheboro, Mr. Lyon testified that he told Detective Barnes "remember when I was telling you about the batter—the guys down there stripping off—things off—stickers off the batteries? I think this may be them." This testimony along with the surveillance footage of Defendant at the recycling center provided such overwhelming evidence of Defendant's guilt of possession of stolen goods any error in admitting the content of the anonymous phone call was harmless beyond a reasonable doubt.

Conclusion

For the forgoing reasons, we vacate Defendant's conviction for felonious larceny and remand for sentencing on the possession of stolen goods conviction.

VACATED AND REMANDED.

Judges BRYANT and TYSON concur.

STATE v. JACOBS

[252 N.C. App. 402 (2017)]

STATE OF NORTH CAROLINA
v.
JOHN OWEN JACOBS

No. COA 16-464

Filed 21 March 2017

1. Appeal and Error—constitutional violation—not raised at trial

Defendant did not raise an issue regarding a constitutional violation at trial, and the Court of Appeals did not hear defendant's contention.

2. Evidence—child sexual abuse victim—presence of STDs—excluded

The presence of sexually transmitted diseases (STDs) in a victim of child sexual abuse was not relevant under Rule of Evidence 412(b)(2) and was properly excluded at trial. Although defendant tested negative for those diseases, the presence of an STD in the victim denotes sexual behavior and is accompanied by the type of stigma that Rule 412 was designed to prohibit.

Judge HUNTER, Jr. concurring in the result only.

Appeal by defendant from judgment entered 28 July 2015 by Judge Rueben F. Young in Bladen County Superior Court. Heard in the Court of Appeals 22 September 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth J. Weese, for the State.

Paul F. Herzog for defendant-appellant.

McCULLOUGH, Judge.

John Owen Jacobs ("defendant") appeals from judgment entered upon his conviction for first-degree sex offense with a child. For the following reasons, we find no error.

I. Background

Defendant was arrested on 6 May 2013 based on allegations of sex abuse by his daughter and, on 8 July 2013, indicted by a Bladen County

Grand Jury on charges of first-degree rape of a child and first-degree sex offense with a child.

On 9 May 2013, between defendant's arrest and his indictment, the Bladen County Sheriff's office applied for and obtained a search warrant for physical evidence from defendant. Pursuant to that warrant, defendant provided blood samples which tested negative for trichomonas vaginalis and the herpes simplex virus, Type II.

Both the State and defendant filed pre-trial motions regarding evidence they sought to exclude or admit at trial. Pertinent to this appeal, the State filed two motions pursuant to N.C. Gen. Stat. § 8C-1, Rule 412 to exclude evidence of the alleged victim's ("Betty")[1] sexual history. On 31 June 2015, the State filed a motion to prohibit the defense from questioning any witnesses about the sexual behavior of the victim, other than the sexual acts at issue in the indictments. On 7 July 2015, the State filed a motion *in limine* to prohibit the defense from referencing any sexually transmitted diseases ("STD") or infections that may have been detected in Betty. In response to the State's motions to exclude evidence pursuant to Rule 412, on 15 July 2015, defendant filed a notice of intent to call an expert witness to testify that Betty has STDs that defendant does not have.

Defendant's case came on for trial in Bladen County Superior Court on 20 July 2015, the Honorable Reuben F. Young, Judge presiding. The judge heard arguments on the State's Rule 412 motions at the beginning of the trial and, before opening statements, ruled that the STD evidence was inadmissible under Rule 412.

Defendant's trial then proceeded with evidence tending to show the following: Defendant is Betty's biological father. Betty, at the time of trial, was 13 years old. On 6 May 2013, Betty told a friend at school that her father had sex with her the night before and that he had been having sexual relations with her for a "long time." Betty's friend then told a teacher, who in turn notified the school's social worker. That same day, Betty was taken to Bladen County Hospital, where a doctor performed a standard victims sexual assault kit examination. The results showed Betty tested positive for two STDs, trichomonas vaginalis and herpes simplex virus, Type II.

At trial, Betty testified about three specific instances of defendant having sexual relations with her in 2013. First, Betty testified that, on 5 May

1. This pseudonym is used throughout the opinion to protect the identity of the minor child.

2013, defendant had sex with her in her bedroom after she had showered, eaten, and gone to bed. Betty testified that in another instance, about one week before the 5 May incident, defendant had sex with her in the kitchen of their home during the day while her younger brother played outside. Finally, Betty testified that, on 25 April 2013, defendant had sex with her in her bedroom after he brought her home from school early due to her kicking another student. In addition to these three instances, Betty further testified that defendant first had sex with her in 2011 and continued having sex with her two to three times per week over the course of about three years.

Upon consideration of the evidence, on 28 July 2015, a jury returned a verdict finding defendant guilty of first-degree sex offense with a child but deadlocked on the remaining charges of first-degree rape of a child, leading the trial court to declare a mistrial on those charges. Upon the first-degree sex offense with a child conviction, the trial court entered judgment sentencing defendant to a term of 420 to 564 months. Defendant gave oral notice of appeal.

II. Discussion

On appeal, defendant raises two issues: whether (1) the denial of the STD evidence into evidence at trial constitutes a violation of his constitutional right to present a defense; and (2) the STD evidence was properly excluded pursuant to Rule 412.

Constitutional Issue

[1] We first address defendant's argument that denying admittance of STD evidence violates his constitutional right to present a defense.

Generally, constitutional issues that are not raised at trial are not considered on appeal. *See State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009) (" '[A] constitutional issue not raised at trial will generally not be considered for the first time on appeal.' " (quoting *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002)). The same holds true for appeals based on constitutional grounds. *See also State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600, *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003); *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002); *State v. Anderson*, 350 N.C. 152, 175, 513 S.E.2d 296, 310 (1999).

Here, our review of the record shows that defendant did not raise any issue or argument at trial regarding a violation of his constitutional rights that he now raises on appeal. Thus, defendant has waived those arguments on appeal.

Rule 412

[2] Defendant next contends that the trial court erred when it excluded evidence of Betty's STDs and evidence that defendant did not have those STDs pursuant to Rule 412. Defendant argues that the evidence would make a sexual relationship between Betty and defendant less likely and shows that someone other than defendant had sexual relations with Betty.

Rule 412, North Carolina's rape shield law, provides, in pertinent part, as follows:

> (b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> (1) Was between the complainant and the defendant; or
>
> (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
>
> (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
>
> (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.
>
> (c) Sexual behavior otherwise admissible under this rule may not be proved by reputation or opinion.

N.C. Gen. Stat. § 8C-1, Rule 412 (2015). As used in Rule 412, "the term 'sexual behavior' means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial." N.C. Gen. Stat. § 8C-1, Rule 412(a). Thus, in short, "Rule 412 provides that evidence of sexual behavior of the complainant is irrelevant unless it falls within one of four categories listed in the rule." *State v. Guthrie*, 110

N.C. App. 91, 93, 428 S.E.2d 853, 854, *disc. review denied*, 333 N.C. 793, 431 S.E.2d 28 (1993).

As our Supreme Court has explained, prior to the enactment of the predecessor to Rule 412, a victim's "general reputation for unchastity" was admissible in a rape trial to attack the victim's credibility and show the victim's proneness to consent to sexual acts. *State v. Younger*, 306 N.C. 692, 695, 295 S.E.2d 453, 455 (1982) (citing *State v. Fortney*, 301 N.C. 31, 37, 269 S.E.2d 110, 113 (1980)). However, in enacting the predecessor to Rule 412, the legislature "cast aside the idea, that any previous sexual behavior of a rape victim is per se relevant to a rape proceeding." *Id.* at 696, 295 S.E.2d at 455 (internal quotation marks, citation, and emphasis omitted). The Court further explained that the "statute was designed to protect the witness from unnecessary humiliation and embarrassment while shielding the jury from unwanted prejudice that might result from evidence of sexual conduct which has little relevance to the case and has a low probative value." *Id.* at 696, 295 S.E.2d at 456.

In our analysis, we first examine whether evidence of an STD constitutes sexual activity under Rule 412 and, thus, whether Rule 412 is implicated. The State argues that the evidence showing that Betty has STDs constitutes evidence of past sexual behavior that should be excluded by Rule 412; and evidence that defendant did not also have the STDs is not relevant without first establishing that Betty has the STDs. We agree with the State.

Although we have found various instances of evidence allowed under Rule 412, there is no precedent in North Carolina that evidence of an STD constitutes sexual behavior that would be barred by Rule 412. Indeed, defendant cites *State v. Rorie*, __ N.C. App. __, 776 S.E.2d 338 (2015), and *State v. Guthrie*, 110 N.C. App. 91, 428 S.E.2d 853 (1993), to argue that evidence of an STD is admissible under Rule 412, but those cases are distinguishable.

In *Rorie*, this Court found that the act of watching a pornographic video did not constitute sexual activity under Rule 412. __ N.C. App. at __, 776 S.E.2d at 344. In *Guthrie*, this Court found that written letters offering sexual acts did not constitute sexual activity under Rule 412. 110 N.C. App. at 93-94, 428 S.E.2d at 854.

Here, we hold the presence of an STD, by contrast, denotes sexual behavior because an STD is commonly associated with sexual activity, sexual intercourse, and is accompanied with the same type of stigma that Rule 412 was designed to prohibit. We find guidance from other states that have ruled that an STD constitutes sexual behavior under

their respective rape shield laws. *See State v. Ozuna*, 155 Idaho 697, 702, 316 P.3d 109, 114 (2013) (holding that "evidence related to whether a victim had an STD or whether the defendant thought the victim had an STD at the time of an alleged sex crime is evidence of a victim's past sexual behavior"); *Fells v. State*, 362 Ark. 77, 83, 207 S.W.3d 498, 502 (2005) (holding that because the public generally views HIV as an STD, it is tantamount to evidence of the victim's prior sexual behavior); *State v. Mitchell*, 568 N.W.2d 493, 496 (Iowa 1997) (analyzing the admissibility of STD evidence under Iowa's rape shield law as evidence of the victim's past sexual behavior); *State v. Cunningham*, 164 Or. App. 680, 995 P.2d 561, 568 (2000) (holding that evidence of STDs falls under the purview of Oregon's rape shield law because "evidence of sexually transmitted diseases is tantamount to evidence of past sexual behavior because sexually transmitted diseases occur as the result of sexual intercourse, sexual contact, or deviate sexual intercourse."). The presence of an STD is indicative of prior sexual behavior and, thus, Rule 412 is implicated.

Although Rule 412 is implicated by the STD evidence, the evidence of prior sexual behavior may still be admissible if it falls under one of the four exceptions to the Rule. *Guthrie*, 110 N.C. App. at 93, 428 S.E.2d at 854. Here, defendant argues that evidence of the STD should be allowed under the exception which allows evidence of "specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant." N.C. Gen. Stat. § 8C-1, Rule 412(b)(2). We have admitted evidence of sexual behavior under the Rule 412(b)(2) exception in other cases. *See State v. Ollis*, 318 N.C. 370, 348 S.E.2d 777 (1986) (holding that evidence should have been admitted under Rule 412(b) to provide an alternative explanation for medical evidence presented); *State v. Davis*, 237 N.C. App. 481, 767 S.E.2d 565 (2014) (holding the trial court erred when it excluded evidence of a prior sexual encounter occurring the day before the alleged rape because the evidence was relevant to provide an alternative explanation for the existence of semen).

Defendant relies on *Ollis*, in which our Supreme Court ruled that testimony regarding a specific instance of prior sexual activity was relevant under Rule 412(b)(2). *Ollis*, 318 N.C. at 376, 348 S.E.2d at 781. In that case the defendant argued that he should be able to question the victim about instances of rape committed by another person to prove that physical findings described by the physician who examined the victim were the result of those acts committed by the other person. *Id.* As noted above, the Court held that "the evidence should have been admitted, as it would have provided an alternative explanation for the medical

evidence presented by [the examining physician] and falls within exception (b)(2) of Rule 412." *Id.*

In this case, by contrast, defendant offers no such alternative explanation or specific act to prove that any sexual act committed was by someone other than him. Rather, defendant offers evidence of Betty's STD, and the nonexistence of an STD for himself, to raise speculation and insinuate that Betty must have been sexually active with someone else. Therefore, we find that the presence of an STD is not relevant under Rule 412(b)(2) and was properly excluded from the evidence admitted at trial. Without evidence of Betty's STD, the fact that defendant does not have an STD is irrelevant The evidence defendant seeks to admit is the very type of evidence Rule 412 was designed to keep from the jury's consideration.

III. Conclusion

For the reasons discussed above, we hold the trial court did not err in excluding the STD evidence from the evidence admitted at trial.

NO ERROR.

Judge DIETZ concurs.

Judge HUNTER, Jr., concurs in result only by separate opinion.

HUNTER, JR., Robert N., Judge, concurs in the result only by separate opinion.

Although I concur in the result reached by the majority, I write separately to emphasize evidence regarding sexually transmitted diseases ("STD") is not a class of evidence unto itself that should be included wholesale under North Carolina Rule of Evidence 412.

The majority holds "the presence of an STD . . . denotes sexual behavior because an STD is commonly associated with sexual activity, sexual intercourse, and is accompanied with the same type of stigma that Rule 412 was designed to prohibit." While STDs are commonly transmitted by sexual activity, it is well established that these diseases may be contracted from non-sexual contact, such as from mother to child during childbirth or from blood transfusions.[1]

1. World Health Organization, Sexually Transmitted Infections: Fact Sheet (2014), http://www.who.int/iris/handle/10665/112323

Consequently, I would not require all defendants seeking to introduce evidence related to an STD to satisfy the strictures of Rule 412(b). Rather, if the defendant can offer specific, relevant medical evidence that presumptively exculpates him from the crime, and does not necessarily speak to the past sexual behavior of the victim, such evidence should be admissible regardless of whether it fits within one of the exceptions to Rule 412.

STATE OF NORTH CAROLINA
v.
MICHAEL TODD WALKER, DEFENDANT

No. COA16-109

Filed 21 March 2017

Appeal and Error—preservation of issues—failure to raise at trial—sufficiency of evidence

Defendant's arguments as to the sufficiency of the evidence on the four challenged charges, including three assaults with a deadly weapon with intent to kill inflicting serious injury and one attempted first-degree murder, were dismissed for failure to preserve the issue at trial. Defense counsel argued before the trial court only specific elements of the charges and did not refer to a general challenge regarding the sufficiency of the evidence to support each element of each charge.

Appeal by Defendant from judgments entered 19 June 2015 by Judge Gale M. Adams in Hoke County Superior Court. Heard in the Court of Appeals 9 August 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Peter A. Regulski, for the State.

Cooley Law Office, by Craig M. Cooley, for Defendant-Appellant.

INMAN, Judge.

Michael Todd Walker ("Defendant") appeals from judgments entered on 19 June 2015 convicting him of, *inter alia*, two counts of assault with

a deadly weapon with intent to kill inflicting serious injury upon K.D.[1], assault with a deadly weapon with intent to kill inflicting serious injury upon D.C., and attempted first degree murder of K.D. Defendant asserts that the State failed to present sufficient evidence to support the intent elements of each of these four convictions. After careful review, we hold Defendant failed to preserve his arguments before the trial court, and affirm his convictions, dismissing Defendant's appeal.

Procedural History

Defendant was indicted on thirty-four counts, including three counts of assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWWIKISI"), and one count of attempted first degree murder. After waiving his right to a jury trial, Defendant was convicted on the above mentioned charges as well as twenty-six of the remaining thirty charges. The trial court consolidated the convictions and sentenced Defendant to three consecutive life terms without the possibility of parole.

Defendant timely appealed.

Analysis

As an initial matter, the State challenges Defendant's preservation of his arguments on appeal. Specifically, the State asserts that Defendant failed to challenge the sufficiency of the evidence as to the intent elements of the four challenged convictions before the trial court, and therefore did not preserve those arguments for appellate review. We agree.

To preserve an issue for appellate review, "a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2015). Rule 10(a)(3) of the North Carolina Rules of Appellate Procedure provides further that

> [i]n a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal or judgment in

1. The victims are not identified by name to protect their identities pursuant to N.C. R. App. P. 4(e) (2015).

> case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.
>
> A defendant may make a motion to dismiss the action, or for judgment as in case of nonsuit, at the conclusion of all the evidence, irrespective of whether defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action, or for judgment as in case of nonsuit, at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

N.C. R. App. P. 10(a)(3).

Our 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 in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (internal quotation marks and citations omitted). This "swapping horses" argument historically has applied to circumstances in which the arguments on appeal were grounded on separate and distinct legal theories than those relied upon at the trial court, or when a sufficiency of the evidence challenge on appeal concerns a conviction different from a charge challenged before the trial court. *See id.*, 155 N.C. App. at 123-24, 573 S.E.2d at 685-86 (arguing before the trial court that the defendant's confession was coerced, while arguing on appeal that the defendant's seizure was improper for lack of probable cause); *State v. Baldwin*, 117 N.C. App. 713, 717, 453 S.E.2d 193, 195 (1995) (arguing double jeopardy concerns at trial, while arguing on appeal a variance between the indictment and the proof offered at trial); *State v. Williams*, 209 N.C. App. 757, 710 S.E.2d 707, 2011 WL 693281 *1, *3, 2011 N.C. App. LEXIS 339 *1, *7-9 (Mar. 1, 2011) (unpublished) (holding the defendant did not preserve a challenge to the sufficiency of the evidence for a possession of a firearm by a felon charge, when at trial the defendant argued only that there was insufficient evidence for a first-degree kidnapping charge).

In *State v. Chapman*, this Court applied the "swapping horses" rule to a scenario in which the defendant argued before the trial court that the State presented insufficient evidence as to one element of a charged offense, and on appeal asserted the State presented insufficient evidence as to a different element of the same charged offense. __ N.C. App. __,

__, 781 S.E.2d 320, 330 (2016) (holding the defendant, who argued at trial that the State failed to present sufficient evidence to support the "dangerous weapon" element of a charge of robbery with a dangerous weapon, did not preserve for appeal an argument that the State failed to present sufficient evidence that she "knowingly committed the crime as an actor in concert or as an aider or abettor.") (internal quotation marks omitted). The decision in *Chapman* highlighted the defense counsel's specific language at trial limiting the basis for the motion to dismiss to the specific element challenged. *Id.* (quoting from the trial transcript, "We contend there has been no evidence showing that the manner in which it was used, in which the BB gun was used, rises to the level of being a dangerous weapon. *Based upon that*, we would ask Your Honor to dismiss the charge of robbery with a dangerous weapon.") (emphasis added). The Court explained that the specific reference to one element of the offense removed the other elements of the offense from the trial court's consideration, and therefore from this Court's consideration, because the consideration of the sufficiency of the evidence on those other elements was no longer "apparent from the context." N.C. R. App. P. 10(a)(1). A specific reference to one element contrasts with cases in which a defense counsel makes a more generalized motion to dismiss for insufficiency of the evidence. *See, e.g.*, *State v. Glisson*, COA16-426, __ N.C. App. __, __, __ S.E.2d __, __ (Feb. 7, 2017) (holding that the defendant's challenge to the sufficiency of the evidence was preserved because the trial court referred to the challenge as a "global" and "prophylactic" motion to dismiss, thereby making apparent that the trial court considered the sufficiency of the evidence as to all elements of each charged offense); *State v. Pender*, __ N.C. App. __, __, 776 S.E.2d 352, 360 (2015) (holding that while the defense counsel presented a specific argument addressing only two elements of two charges, counsel also asserted a general motion to dismiss which "preserved [the defendant's] 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 the trial counsel's presentation of a specific argument addressed only five charges, but the general motion to dismiss preserved the arguments regarding the other charges on appeal). A general motion to dismiss requires the trial court to consider the sufficiency of the evidence on all elements of the challenged offenses, thereby preserving the arguments for appellate review.

In this case, Defendant's motion to dismiss addressed specific elements of the charged offenses other than the intent element and did not present a general challenge to the sufficiency of the evidence as to all elements of each offense. In his initial motion to dismiss following the presentation of the State's evidence, defense counsel challenged

the three AWDWWIKISI charges based solely on the severity of the victims' injuries. Regarding the charge of attempted first degree murder, defense counsel stated: "I would move for a dismissal *simply* on the grounds that the attempt wasn't carried out and the circumstances as described by the witnesses would suggest that the opportunity was there." (emphasis added). Defense counsel failed to broaden the scope of his motion when he renewed it following the close of all the evidence. He explained: "Your Honor, at this time, we would move for dismissal at the close of all of the evidence. I'll just repeat the same arguments that I made previously. I believe that there's not sufficient evidence *in all of the particulars* that I repeated [sic] in my initial argument." (emphasis added). The trial court asked counsel to clarify the basis for the motion to dismiss, further highlighting its narrow scope:

> MR. HEDGPETH: . . . I would move for a dismissal *simply* on the grounds that the attempt wasn't carried out and the circumstances as described by the witnesses would suggest that the opportunity was there. *Therefore, I would argue that there was no attempt to do so.*
>
> THE COURT: Are you saying "no attempt" or "no intent"?
>
> MR. HEDGPETH: Attempt, no attempt.
>
> THE COURT: Attempt.
>
> MR. HEDGPETH: That is my recollection of evidence and my motion for a dismissal.

(emphasis added).

Because defense counsel argued before the trial court the sufficiency of the evidence only as to specific elements of the charges and did not refer to a general challenge regarding the sufficiency of the evidence to support each element of each charge, we hold Defendant failed to preserve the issues of the sufficiency of the evidence as to the other elements of the charged offenses on appeal.

Conclusion

For the above mentioned reasons, we dismiss Defendant's arguments as to the sufficiency of the evidence on the four challenged charges for failure to preserve the issue below.

DISMISSED.

Judges BRYANT and TYSON concur.

MICAH TERRELL, PLAINTIFF
v.
KERNERSVILLE CHRYSLER DODGE, LLC, DEFENDANT

No. COA16-429

Filed 21 March 2017

1. Appeal and Error—interlocutory orders and appeals—arbitration denied

The denial of a motion to compel arbitration is interlocutory but immediately appealable because the right to arbitrate is a substantial right which could be lost if review is delayed.

2. Arbitration and Mediation—motion to compel—findings and conclusions—required

The denial of a motion to compel arbitration was remanded for an order that clearly stated its findings and conclusions where the trial court's written order contained no findings whatsoever—although, from the hearing transcript, it seemed that the trial court may have determined that defendant did not sign the retail purchase agreement or the arbitration agreement, or both.

Appeal by defendant from order entered 17 December 2015 by Judge David L. Hall in Superior Court, Forsyth County. Heard in the Court of Appeals 6 October 2016.

Public Justice, P.C., by Leah M. Nicholls, pro hac vice, and Norris Law Firm, PLLC, by J. Matthew Norris, for plaintiff-appellee.

Jeffrey F. Hutchins for defendant-appellant.

STROUD, Judge.

Defendant Kernersville Chrysler Dodge, LLC ("defendant") appeals from the trial court's order denying defendant's motion to compel arbitration. Because the trial court failed to include any findings of fact in its order denying defendant's motion, we must reverse its order and remand for the trial court to make findings and conclusions on the motion.

Facts

Plaintiff's complaint set forth the following allegations. On 23 April 2015, plaintiff contacted defendant about a vehicle defendant had

advertised for sale ("the vehicle"). Plaintiff placed a $500.00 hold on the vehicle over the phone, and defendant's employee, Larissa Santos, provided plaintiff with information and photographs of the vehicle. Plaintiff also gave Ms. Santos several questions to ask the service department about the vehicle's condition. Ms. Santos contacted plaintiff the following day and let him know that his questions had been given to the service department and that the vehicle was currently being serviced. Ms. Santos gave plaintiff a price quote for the vehicle, and on 25 April 2015, plaintiff drove down from Charlottesville, Virginia, for a test drive and, if he decided to buy it, to complete his purchase of the vehicle.

After arriving, plaintiff met salesperson Brandon Widener and took the car for a test drive. During the test drive, plaintiff noticed a noise coming from the engine compartment and brought it to Mr. Widener's attention, who took the vehicle to one of defendant's mechanics for an inspection. After approximately two hours, plaintiff was told that the " 'tensioner pulley' " was causing the noise and that the part had been replaced. Plaintiff alleged that defendant "assured [p]laintiff that the Vehicle had undergone a thorough inspection prior to sale, that it was a safe Vehicle, and that there were no major structural or mechanical problems." Relying on those representations, plaintiff purchased the vehicle and drove it home.

On the way home, plaintiff noticed "some slight issues with the steering and the u-joint/ball joint/axle area." Shortly after getting back home, plaintiff contacted defendant about these issues and let Ms. Santos know that he planned to have the issues looked at by a repair shop in Charlottesville. Plaintiff dropped the vehicle off on 30 April 2015, and two days later, the repair shop told plaintiff that the vehicle "had significant 'frame rot', caused by rust and decay over the entire underside frame and engine mount." Because of this issue, the vehicle would not pass a Virginia State Inspection and was unsafe to drive.

Plaintiff filed his complaint on 25 June 2015, alleging defendant engaged in unfair and deceptive trade practices, fraud, and breach of an express warranty. Defendant initially filed a *pro se* answer denying the material allegations in plaintiff's complaint, which was stricken by the trial court on 1 September 2015. Defendant then filed a new answer on 17 September 2015, followed by a motion to compel arbitration on 13 November 2015. Defendant attached to the motion copies of the documents it alleged were the governing arbitration agreement and the retail purchase agreement. The copy of the retail purchase agreement -- as attached by defendant – appears to be signed and dated by plaintiff. The form has two signature lines for "purchaser" at the bottom left side

and the signature appears on one of the lines. There are two additional blank lines at the bottom of the form on the right. The top line is labeled as "salesperson" and is filled in with the typewritten name "Brandon P. Widener." The bottom line is labeled "accepted by authorized dealership representative" and the handwritten initials "RCM" appear above this line. We also note that it is not clear if the retail purchase agreement as it appears in our record has only one page or if the "Governing Arbitration Agreement" is a separate form, although the arbitration agreement may be on the reverse side of the retail purchase agreement.[1] One section of the retail purchase agreement, entitled "OTHER MATERIAL UNDERSTANDINGS AND INCORPORATED DOCUMENTS" has a provision which states as follows:

> 4. I understand that any dispute arising from, or relating to this transaction, shall be settled by neutral arbitration pursuant to the GOVERNING ARBITRATION AGREEMENT signed by my hand and incorporated into this Agreement.
>
> (CONTINUED ON THE REVERSE SIDE OF THIS AGREEMENT)
>
> I HAVE BEEN GIVEN AMPLE OPPORTUNITY TO EXAMINE THIS ENTIRE RETAIL PURCHASE AGREEMENT, FRONT AND BACK, AND I HEREBY ACCEPT THE TERMS AND CONDITIONS INCLUDING THOSE LISTED ON THE REVERSE SIDE OF THIS AGREEMENT.

The retail purchase agreement also has the following provision just above the signature lines:

> I HEREBY ACKNOWLEDGE THIS AGREEMENT IS COMPLETE AND ACCURATELY REFLECTS ANY AND ALL RELATED DOCUMENTS SIGNED BY MY HAND AND REFERENCED AS INCORPORATED INTO THIS AGREEMENT BETWEEN THE DEALERSHIP AND MYSELF.
>
> I ACKNOWLEDGE RECEIPT OF A COPY OF THIS AGREEMENT WITH THE UNDERSTANDING THIS

1. We are unable to determine if the arbitration agreement is on the reverse side of the retail purchase agreement because only one of the three copies in our record presents the document in this manner. But based upon the provisions of paragraph 4 of the retail purchase agreement, it appears that the arbitration agreement was probably on the reverse side.

> AGREEMENT IS NOT BINDING UPON THE DEALERSHIP OR PURCHASER(S) UNTIL SIGNED BY AN AUTHORIZED DEALERSHIP REPRESENTATIVE.

The arbitration agreement states at the beginning as follows:

> This Governing Arbitration Agreement shall be incorporated into the vehicle purchase/lease contract executed as of the date recorded below and is between the "Purchaser(s)" and the "Retailing Dealership" listed below herein referred to as the "Parties."

The copy of the arbitration agreement attached to the defendant's motion has two signature lines for "purchaser" at the bottom left and the top line was signed by plaintiff. The form has two signature lines at the bottom right side. The top line is labeled "RETAILING DEALERSHIP" and is filled in with typewritten "KERNERSVILLE CHRYSLER DODGE JEEP." The bottom signature line is labeled "DEALERSHIP REPRESENTATIVE" and is blank.

At a hearing on the motion to compel arbitration on 7 December 2015, defendant presented evidence in support of the motion and counsel for both parties made arguments. Defendant called Ronald Craig McCullough to testify at the hearing, who explained that he was one of defendant's finance managers at the time of the sale of the vehicle to plaintiff. Mr. McCullough testified that his initials, "RCM," were on the retail purchase agreement. However, another copy of the retail purchase agreement in the addendum to the record, apparently Plaintiff's copy of the retail purchase agreement, shows no signature on the purchaser line for plaintiff and does not have the initials "RCM." Mr. McCullough also testified that he did not sign the governing arbitration agreement. Plaintiff argued that without a signature from the dealership on the arbitration agreement, "it creates a one-sided obligation to arbitrate disputes[,]" and plaintiff "could not compel the defendant to arbitrate a dispute that it had against him if the defendant did not have a signature agreeing to arbitrate."

At the hearing, there was factual dispute over if and how an authorized representative for the dealership had signed the retail purchase agreement. The retail purchase agreement form was apparently a triplicate form with a white top page, a yellow middle page, and a pink last page. Plaintiff had received the yellow middle page, which is the version in the addendum to the record that has no signatures. The copy as attached to the motion by defendant had both plaintiff's signature and the initials "RCM" for the dealership. According to Mr. McCullough, the

dealership normally scanned forms to be stored in a digital format and after a period of time, the original documents are shredded.[2] But the copies of the "Governing Arbitration Agreement" are all the same, and unsigned by a dealership representative.

It appears from the transcript that the trial court ultimately agreed with plaintiff and stated at the hearing that "the contract should be construed against the drafter and it is just not sufficient for this Court to find a binding, a mutual binding, arbitration agreement." On 17 December 2015, the court entered its order simply denying defendant's motion to compel arbitration, without any findings of fact or any explanation of the basis for the ruling. Defendant timely appealed to this Court.

Discussion

[1] We first note that while an order denying a motion to compel arbitration is interlocutory, it is nevertheless immediately appealable, "because the right to arbitrate a claim is a substantial right which may be lost if review is delayed." *T.M.C.S., Inc. v. Marco Contractors, Inc.*, __ N.C. App. __, __, 780 S.E.2d 588, 592 (2015) (citations, quotation marks, and brackets omitted).

[2] Defendant argues that the trial court erred by failing to find that a valid agreement to arbitrate was entered into by the parties and by not granting its motion to compel arbitration. Noting that this State "has a strong public policy favoring arbitration[,]" defendant contends that the parties had a valid agreement to arbitrate, claiming both parties signed "the contract which incorporated the arbitration agreement into the agreement. The plaintiff also signed the arbitration agreement. No evidence was ever presented by either party that the plaintiff failed to provide a copy of the arbitration agreement. No [e]vidence was ever presented by either party that the plaintiff did not sign the arbitration agreement or the contract."

A trial court reviewing a motion to compel arbitration must conduct "a two-step analysis . . . to ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement." *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004) (citations and quotation marks omitted). *See also T.M.C.S., Inc.*, __ N.C. App.

2. There was some discussion at the hearing by counsel regarding the dealership's document retention policies and an inspection of the defendant's records by a DMV inspector, but there was no testimony or evidence offered on these matters.

at __, 780 S.E.2d at 593 ("When, as here, one party claims a dispute is covered by an agreement to arbitrate and the other party denies the existence of an arbitration agreement, the trial court must determine whether an arbitration agreement actually exists." (Citation and quotation marks omitted)).

> The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary. Accordingly, upon appellate review, we must determine whether there is evidence in the record supporting the trial court's findings of fact and if so, whether these findings of fact in turn support the conclusion that there was no agreement to arbitrate.

Sciolino v. TD Waterhouse Inv'r Servs., Inc., 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (2002) (citations omitted).

In this case, the hearing transcript indicates that the trial court found plaintiff's counsel's argument regarding lack of mutuality and the ability of plaintiff to enforce the arbitration agreement against defendant to be most persuasive. The court noted that "basic contract law is that the contract should be construed against the drafter. Here the drafter is the dealership. Given the totality of the submissions before me, I am unable to conclude that there is a binding arbitration agreement." The trial judge pointed out to defendant's trial counsel that the arbitration agreement "is not signed by your client." The court then concluded:

> All right. I am denying the motion to compel arbitration because I do not find -- I find that there is no binding arbitration agreement between the parties.
>
> . . . .
>
> . . . . Again, the contract should be construed against the drafter and it is just not sufficient for this Court to find a binding, a mutual binding, arbitration agreement. I wish the parties well in resolving the matter.

The court then entered a written order on 17 December 2015. But the trial court's order simply stated, without any findings of fact:

> THIS MATTER coming to be heard, and being heard, at the December 7, 2015, civil session of the Forsyth County Superior Court, on Defendant's Motion to Compel

> Arbitration and the Court, having carefully considered the matters of record including pleadings, authorities and arguments of both counsel, finds that Defendant's Motion to Compel Arbitration should be denied.
>
> NOW, THEREFORE, it is ORDERED, ADJUDGED, and DECREED as follows:
>
> 1. Defendant's Motion to Compel Arbitration is denied.

This Court has addressed the sufficiency of written orders denying motions to compel arbitration many times. In *Cornelius v. Lipscomb*, this Court reversed an order denying a motion to compel and remanded for additional findings of fact:

> As an initial matter, defendants argue that the order denying their motion to compel arbitration is facially defective because it "contains no findings whatsoever" and does not "identify any basis for the refusal to dismiss or stay this action and compel arbitration." We agree.
>
> This Court has repeatedly held that an order denying a motion to compel arbitration must include findings of fact as to whether the parties had a valid agreement to arbitrate and, if so, whether the specific dispute falls within the substantive scope of that agreement. When a trial court fails to include findings of fact in its order, this Court has repeatedly reversed and remanded to the trial court for a new order containing the requisite findings.
>
> In this case, the trial court's order denying defendants' motion to compel arbitration stated in relevant part only:
>
> > Prior to ruling on the motions, the Court considered all pleadings and other materials contained in the file. The Court considered the briefs submitted by the parties with regard to the motions. Further, the Court considered the materials and testimony submitted at the hearing on the motions. Finally, the Court considered the arguments of counsel with regard to the motions.
> >
> > After consideration of all matters as set forth above in this Order, it appears to the

> Court that both Motions as to both Defendants should be denied.
>
> NOW, THEREFORE, IT IS ORDERED:
>
> 1. The Defendants Sunset Financial Services, Inc. and Jeffrey Lipscomb's Joint Motion to Compel Arbitration and to Stay Court Action is denied as to both Defendants.
>
> The order provides no findings and no explanation for the basis of the court's decision to deny the motion to compel arbitration. We, therefore, must reverse the trial court's order and remand for findings of fact regarding whether the parties had a valid agreement to arbitrate and, if so, whether the dispute between the parties falls within the substantive scope of that agreement.

Cornelius v. Lipscomb, 224 N.C. App. 14, 16-17, 734 S.E.2d 870, 871-72 (2012) (citations and quotation marks omitted).

Here, as in many of the cases stated as examples in Cornelius, the trial court's order contained absolutely no findings and simply concluded without explanation that the motion would be denied. Although it seems from the hearing transcript that the trial judge may have determined that defendant did not sign the retail purchase agreement, the governing arbitration agreement, or both, the court did not include any findings whatsoever in its written order. It is also possible that the trial court determined that plaintiff had not signed the retail purchase agreement, as one version of that agreement in our record is unsigned by either party. Nor did the court resolve the question of whether signatures only on the retail purchase agreement, which explicitly incorporated by reference the Governing Arbitration Agreement (which *may* have been on the reverse side of the form) would be sufficient to bind the dealership. Our review on appeal of a trial court's denial of a motion to compel arbitration is limited to the trial court's findings and conclusions of law. Accordingly, we must remand for the trial court to enter an order that clearly states its findings and conclusions supporting its decision to denying the motion to compel arbitration.

REVERSED AND REMANDED.

Judges McCULLOUGH and ZACHARY concur.

JENNIFER ANNE WOLSKI, PETITIONER
v.
NORTH CAROLINA DIVISION OF MOTOR VEHICLES AND THE COMMISSIONER OF MOTOR VEHICLES, RESPONDENTS

No. COA16-702

Filed 21 March 2017

1. Motor Vehicles—impaired driving—refusal to take breathalyzer—standard of review

The trial court applied the correct standard of review to a Department of Motor Vehicles hearing officer's decision to revoke petitioner's driver's license for refusal to submit to a breathalyzer test. The standard of review applied was whether there was sufficient evidence in the record to support the findings and whether the findings supported the conclusions.

2. Motor Vehicles—impaired driving—refusal to take breathalyzer—rights form—modification

An officer's failure to modify a Rights Form to indicate petitioner's refusal to take a breathalyzer in front of a magistrate or official stripped the Department of Motor Vehicles of jurisdiction to revoke petitioner's driver's license.

Appeal by Respondents from order entered 24 May 2016 by Judge Daniel A. Kuehnert in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 January 2017.

Knox, Brotherton, Knox & Godfrey, by Allen C. Brotherton, for Petitioner-Appellee.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for Respondent-Appellant.

DILLON, Judge.

North Carolina Division of Motor Vehicles and the Commissioner of Motor Vehicles (collectively referred to as "the DMV" or the "Respondents")[1] appeal from a trial court order reversing an agency

1. While the two are separate entities, a number of the pleadings and documents before this Court refer to the "North Carolina Division of Motor Vehicles *and* the Commissioner of Motor Vehicles" as one single, fused entity.

decision that revoked Jennifer Anne Wolski's driver's license. After careful review, we affirm the trial court's order.

I. Background

In April 2015, a Huntersville police officer arrested Jennifer Anne Wolski for driving while under the influence.

After being advised of her rights under N.C. Gen. Stat. § 20-16.2(a) (2013) at police department headquarters, Ms. Wolski refused to both submit to a breathalyzer test and sign the provided statutory form ("Rights Form").

The officer, who is a certified chemical analyst, executed a sworn affidavit and revocation report[2] that contained conflicting information regarding Ms. Wolski's refusal to submit to breathalyzer testing.[3] Although the affidavit referred to an attached Rights Form as evidence of Ms. Wolski's refusal to submit to testing, the attached Rights Form did *not* indicate that Ms. Wolski had refused testing.

The officer later amended the attached Rights Form to reflect Ms. Wolski's refusal to submit to testing. The officer did not re-execute the affidavit to reflect this change.

The DMV notified Ms. Wolski of the impending revocation of her driver's license. Ms. Wolski requested a hearing to challenge the imminent revocation on jurisdictional grounds. The hearing officer rejected Ms. Wolski's jurisdictional arguments and affirmed the DMV's decision to revoke her driver's license.

Ms. Wolski appealed the DMV hearing officer's decision. The trial court reversed the revocation of Ms. Wolski's driver's license. The DMV filed an appeal.[4]

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2. Pursuant to N.C. Gen. Stat. § 20-16.2(c1) (2013), the arresting officer and chemical analyst must execute an affidavit setting forth: (1) the alleged, implied-consent offense—generally a driving under the influence charge, (2) information regarding the arrest and offense at issue, (3) information establishing that the arrestee was advised of her statutory rights, and (4) information establishing whether the arrestee submitted to breathalyzer testing. *Id.* Execution entails completion of the affidavit and signage by the arresting officer and chemical analyst in front "of an official authorized to administer oaths." *Id.*

3. The affidavit indicated that Ms. Wolski had *both* submitted and refused to submit to breathalyzer testing.

4. The DMV's notice of appeal refers to the "Respondents"—namely the North Carolina Division of Motor Vehicles *and* the Commissioner of Motor Vehicles—as one single, fused entity. Nevertheless, we have appellate jurisdiction to review this matter as the DMV's intent to appeal the trial court's order as *two separate entities* "can be fairly

II. Standard of Review

As the trial court reviewed the hearing officer's decision as an *appellate court*, *see Johnson v. Robertson*, 227 N.C. App. 281, 286, 742 S.E.2d 603, 607 (2013) (reaffirming principle that a trial court acts as an appellate court when reviewing certain, final agency decisions), our standard of review is limited to "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly," *ACT-UP Triangle v. Comm'n for Health Servs. of the State of N.C.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (internal quotation marks omitted). Here, the trial court's appropriate scope of review is "whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license." N.C. Gen. Stat. § 20-16.2(e) (2013). Questions of law are reviewed *de novo*. *See Davis v. Dep't of Crime Control & Pub. Safety*, 151 N.C. App. 513, 516, 565 S.E.2d 716, 719 (2002).

III. Analysis

[1] The DMV contends in part that the trial court erred as the officer's affidavit was executed in compliance with N.C. Gen. Stat. § 20-16.2(c1). For the following reasons, we disagree.

At the outset, we note that the trial court applied the correct standard of review. The trial court revealed that "[t]he standard of review applied . . . is . . . whether there is sufficient evidence in the record to support Respondents' findings of fact, whether the conclusions of law are supported by the findings of fact and whether Respondents committed an error of law in revoking the license."

[2] As to the DMV's substantive argument, we hold that *Lee v. Gore*, 365 N.C. 227, 717 S.E.2d 356 (2011) controls and therefore conclude that the DMV lacked jurisdiction to revoke Ms. Wolski's driver's license. In *Lee*, our Supreme Court affirmed a Court of Appeals' decision reversing license revocation, holding that "an affidavit materially altered outside the presence of someone authorized to administer oaths, or an affidavit that omits entirely the material element of willfulness, is not properly executed for the purposes of section 20–16.2(d)." *Id.* at 233–34, 717 S.E.2d at 361 (internal quotation marks omitted).

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inferred from the notice [of appeal]." *State v. Springle*, ___N.C. App. ___, ___, 781 S.E.2d 518, 521 (2016) (internal quotation marks omitted).

Much like the officer in *Lee*, *id.* at 233, 717 S.E.2d at 361, the officer here failed to modify the Rights Form in front of a magistrate or an official authorized to administer oaths. Although the modification at issue in *Lee* was made directly on the affidavit form, *id.* at 228-29, 717 S.E.2d at 358, the officer's modification here nevertheless related to a material requirement under N.C. Gen. Stat. § 20-16.2(c1)—namely, whether Ms. Wolski submitted to testing. Moreover, the Rights Form was specifically incorporated by reference in the affidavit. *See Patterson ex rel. Jordan v. Patterson*, 137 N.C. App. 653, 659, 529 S.E.2d 484, 488 (2000) (applying general principle of incorporation by reference to affidavits). Therefore, any *material* alteration to the Rights Form required re-execution of the affidavit in compliance with N.C. Gen. Stat. § 20-16.2(c1). Accordingly, we hold that the officer's failure to modify the Rights Form in front of a magistrate or official stripped the DMV of jurisdiction to revoke Ms. Wolski's driver's license.

IV. Conclusion

As the Rights Form was not modified in front of a magistrate or official, we hold that the DMV lacked jurisdiction to revoke Ms. Wolski's license. We therefore affirm the trial court's ruling.

AFFIRMED.

Judges ELMORE and ZACHARY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 MARCH 2017)

CREWS v. PAYSOUR No. 16-604	Pitt (12CVD641)	Vacated and Remanded
CROCKER v. TRANSYLVANIA CTY. DEP'T OF SOC. SERVS. No. 16-875	Office of Admin. Hearings (15OSP8687)	Affirmed
CTY. OF HARNETT v. ROGERS No. 16-757	Harnett (12CVS890)	Affirmed in Part, Reversed in Part and Remanded
EASTON v. HEDGEPETH No. 15-982	Currituck (10CVS288)	Dismissed in Part; Reversed and Remanded in Part
IN RE C.C. No. 16-971	Watauga (14JT53-55)	Affirmed
IN RE E.P.H. No. 16-663	Guilford (14JT79)	Affirmed
IN RE G.G.R. No. 16-898	New Hanover (09JA43)	Reversed and Remanded
IN RE G.S. No. 16-648	Iredell (14JA16-17)	Affirmed in part; Vacated and Remanded in part.
IN RE G.W. No. 16-857	Rockingham (14JA96-98)	Affirmed
IN RE I.S.D. No. 16-824	New Hanover (14JT84)	Affirmed.
IN RE M.B. No. 16-788	Johnston (14JA49)	Affirmed
IN RE M.B. No. 16-866	Orange (16JA15)	Reversed in Part and Remanded
IN RE N.G.H. No. 16-896	Pender (13JT31)	Reversed
IN RE S.M.C. No. 16-681	Buncombe (13JT398-399)	Affirmed

IN RE T.E. No. 16-981	Ashe (14JA27) (14JA28)	Dismissed
KASKA v. PROGRESSIVE UNIVERSAL INS. CO. No. 16-729	Onslow (16CVS39)	Affirmed
LEWIS v. HEDGEPETH No. 15-706	Currituck (10CVS275)	Dismissed
LEWIS v. HEDGEPETH No. 15-914	Currituck (10CVS275)	Reversed and Remanded
McLEAN v. KING No. 16-624	Caldwell (13CVD730)	Affirmed in part; reversed in part, and remanded
STAMEY v. STAMEY No. 16-843	Transylvania (13CVD236)	Vacated and Remanded; Reversed.
STATE v. ANDREWS No. 16-772	Forsyth (14CRS56565)	Vacated and Remanded
STATE v. BROYLES No. 16-853	Lincoln (15CRS50678)	Vacated and Remanded
STATE v. ECHEVERRIA No. 16-673	Cumberland (13CRS52365)	No Error
STATE v. FARRAR No. 16-679	Mecklenburg (13CRS200265) (13CRS200266)	Vacated and Remanded
STATE v. GLISSON No. 16-517	Buncombe (13CRS55608)	No Error
STATE v. HENSLEY No. 16-695	Madison (13CRS50637-38)	Vacated and Remanded
STATE v. MORRIS No. 16-643	Onslow (14CRS57645-46)	No error in part, reversed and remanded in part, dismissed in part.
STATE v. O'SHIELDS No. 16-822	Transylvania (11CRS50642)	No Error
STATE v. PYE No. 16-754	New Hanover (12CRS56239)	Affirmed

WAYNE T. BRACKETT, JR., PETITIONER
v.
KELLY J. THOMAS, COMMISSIONER, RESPONDENT

No. COA16-912

Filed 4 April 2017

Motor Vehicles—driving while impaired—civil revocation of driver's license—sufficiency of evidence—willful refusal to submit to chemical analysis

The superior court did not err in a driving while impaired case by reversing the Department of Motor Vehicles' (DMV's) civil revocation of petitioner's driver's license. DMV failed to show the evidence supported the conclusion that petitioner willfully refused to submit to a chemical analysis.

Appeal by respondent from order entered 16 June 2016 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 6 February 2017.

Joel N. Oakley for petitioner-appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christopher W. Brooks, for respondent-appellant.

TYSON, Judge.

I. Procedural Background

Wayne T. Brackett, Jr. ("Petitioner") filed a complaint against Kelly J. Thomas, Commissioner of the North Carolina Division of Motor Vehicles, ("Respondent") on 19 January 2016. Petitioner alleged he was arrested and charged with driving while impaired on 13 August 2015. Petitioner further alleged "[Respondent] notified Petitioner that effective January 18, 2016, [P]etitioner's driving privileges were to be suspended and revoked based on a refusal to submit to a chemical test."

Petitioner requested an administrative hearing before the Division of Motor Vehicles ("DMV"), which was conducted on 7 January 2016. The DMV administrative hearing officer upheld the suspension of Petitioner's driving privileges. Petitioner thereafter filed a petition for a hearing in superior court, pursuant to N.C. Gen. Stat. §§ 20-16.2 and 20-25 (2015).

The superior court heard Petitioner's petition on 6 June 2016 and reversed the decision of the DMV, holding "[t]he record does not support the conclusion under N.C. Gen. Stat. § 20-16.2(d)(5)." Petitioner was later convicted of the underlying charge of impaired driving. Respondent appeals and argues the superior court erred in reversing the administrative decision of the DMV hearing officer. We affirm.

II. Statement of Jurisdiction

Jurisdiction lies in this Court as an appeal of a final judgment of a superior court entered upon review of an administrative agency pursuant to N.C. Gen. Stat. § 7A-27(b)(1).

III. Standard of Review

On appeal from a DMV hearing, the superior court sits as an appellate court and determines "whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license." N.C. Gen. Stat. § 20-16.2(e) (2015). This Court reviews the superior court's decision to " '(1) determin[e] whether the trial court exercised the appropriate scope of review and, if appropriate, (2) decid[e] whether the court did so properly.' " *Johnson v. Robertson*, 227 N.C. App. 281, 286-87, 742 S.E.2d 603, 607 (2013) (quoting *ACT–UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)).

"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). We apply the same standard of review required by N.C. Gen. Stat. § 20-16.2(e) for reviewing a DMV decision to revoke a petitioner's driving privileges for a willful refusal to submit to chemical analysis for an implied-consent charge. On appeal, "there is a presumption in favor of regularity and correctness in proceedings in the trial court with the burden on the appellant to show error." *L. Harvey & Son Co. v. Jarman*, 76 N.C. App. 191, 195–96, 333 S.E.2d 47, 50 (1985) (citing *In re Moore*, 306 N.C. 394, 293 S.E.2d 127 (1982), *app. dism.*, 459 U.S. 1139, 74 L.Ed.2d 987 (1983)).

IV. Analysis

Respondent argues the superior court erred in reversing the DMV's decision. The Commissioner asserts the agency record contains substantial evidence to support the findings of fact, and the findings of fact

support the hearing officer's conclusion that Petitioner willfully refused to submit to chemical analysis. We disagree.

This appeal arises from a revocation proceeding under N.C. Gen. Stat. § 20-16.2, "which authorizes a civil revocation of the driver's license when a driver has willfully refused to submit to a chemical analysis." *Steinkrause v. Tatum*, 201 N.C. App. 289, 292, 689 S.E.2d 379, 381 (2009), *aff'd per curiam*, 364 N.C. 419, 700 S.E.2d 222 (2010). N.C. Gen. Stat. § 20–16.2 "provides for a civil hearing at which the driver can contest the revocation of her driver's license." *Id.* at 292, 689 S.E.2d at 381.

Pursuant to N.C. Gen. Stat. § 20–16.2(d), the hearing is limited to consideration of whether:

> (1) The person was charged with an implied-consent offense or the driver had an alcohol concentration restriction on the drivers license pursuant to G.S. 20-19;
>
> (2) A law enforcement officer had reasonable grounds to believe that the person had committed an implied-consent offense or violated the alcohol concentration restriction on the drivers license;
>
> (3) The implied-consent offense charged involved death or critical injury to another person, if this allegation is in the affidavit;
>
> (4) The person was notified of the person's rights as required by subsection (a); and
>
> (5) The person willfully refused to submit to a chemical analysis.

N.C. Gen. Stat. § 20-16.2(d) (2015).

Respondent argues substantial evidence in the record supports the findings of fact in the DMV's decision, which in turn supports the DMV's conclusion of law. The superior court reviewed the record and the transcript of the DMV's administrative hearing and heard arguments from both parties.

In its order reversing the DMV's decision, the superior court found "[t]he record does not support the conclusion under N.C. Gen. Stat. § 20-16.2(d)(5). Therefore, the Hearing Officer should not have found that the petitioner willfully refused to submit to a chemical analysis of his breath." The superior court's order does not set out the standard of review required by N.C. Gen. Stat. § 20-16.2(e), and does not explain

which of the agency's fact findings were unsupported. The order does not state what standard of review was used by the superior court.

However, as our Supreme Court held in *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.*, 355 N.C. 269, 559 S.E.2d 547 (2002), "an appellate court's obligation to review a superior court order for errors of law. . . can be accomplished by addressing the dispositive issue(s) before the agency and the superior court without examining the scope of review utilized by the superior court." *Id.* (adopting the dissenting opinion in 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001) (Greene, Judge, dissenting)). After review of the record and transcripts, we consider the issue under the applicable statutory standard of review, without remanding the case to the superior court.

Respondent argues substantial evidence in the record supports the findings of fact, which in turn supports the DMV's conclusion of law that Petitioner willfully refused to submit to a chemical analysis. The DMV Hearing Officer made the following findings of fact in his order, which upheld the revocation of Petitioner's driver's license:

> 1. On August 13, 2015, Officer Brent Kinney, Guilford County Sheriff's Office, was stationary in the Food Lion parking lot at 7605 North NC Hwy 68 when he observed the petitioner and a female walking to the connecting parking lot of a bar, Stoke Ridge, between 9:30-9:40 [p.m.]. He noted the petitioner had a dazed appearance and was unsure on his feet.
>
> 2. Officer Brent Kinney observed the petitioner enter the driver's seat of a gold Audi, back out of the parking space, and quickly accelerate to about 26 mph in the Food Lion parking [lot].
>
> 3. Officer Brent Kinney got behind the petitioner until the petitioner stopped in the parking lot. At that point[,] Officer Brent Kinney observed both doors open and the petitioner and the female exit the vehicle.
>
> 4. Officer Brent Kinney lost sight of the vehicle when he exited the parking lot. Then he got behind the vehicle when it exited the parking lot.
>
> 5. Officer Brent Kinney observed the gold Audi cross the yellow line twice and activated his blue lights and siren.
>
> 6. The female was driving and Officer Brent Kinney determined she was not impaired.

7. Officer Brent Kinney detected a strong odor of alcohol on the petitioner, whom he saw driving in the PVA of Food Lion and observed he had slurred speech, glassy eyes and was red-faced.

8. The petitioner put a piece of candy in his mouth even after Officer Brent Kinney told him not to do so. He subsequently removed the piece of candy when asked to do so.

9. Officer Brent Kinney asked the petitioner to submit to the following tests: 1) Recite alphabet from E-U—Petitioner recited E, F, G, H, I, J, K, L, M, N, O, P[,] and stopped; and 2) Recite numbers backwards from 67-54—Petitioner recited 67, 66, 65, 4, 3, 2, 1, 59, 8, 7, 6, 5,4, 3, 2, 1.

10. Officer Brent Kinney arrested the petitioner, charging him with driving while impaired, and transported him to the Guilford County jail control for testing.

11. Officer Brent Kinney, a currently certified chemical analyst with the Guilford County Sheriff's Office, read orally and provided a copy of the implied consent rights at 10:30 [p.m.] The petitioner refused to sign the rights form and did not call an attorney or witness.

12. Officer Brent Kinney explained and demonstrated how to provide a sufficient sample of air for the test.

13. Officer Brent Kinney requested the petitioner submit to the test at 10:49 [p.m.] The petitioner did not take a deep breath as instructed and faked blowing as the instrument gave no tone and the gauge did not move, indicating no air was being introduced.

14. Officer Brent Kinney warned the petitioner that he must blow as instructed or it would be determined he was refusing the test and explained again how to provide a sufficient sample.

15. The petitioner made a second attempt to submit to the test. This time he did take a breath but then gave a strong puff and then stopped; and then gave a second strong puff and stopped.

16. The petitioner's second attempt concluded at 10:50 [p.m.] at which time Officer Brent Kinney determined he

was refusing the test by failing to follow his instructions and marked the refusal at that time.

17. *The petitioner's second attempt resulted in a detection of mouth alcohol. With that, Officer Brent Kinney had to reset the instrument, not to provide another opportunity for the petitioner to take the test, but to enter the refusal into the instrument.* [emphasis added].

18. In spite of the test ticket recording the refusal at 10:56 [p.m.], the DHHS 4081 indicates the refusal was actually at 10:50 [p.m.]

19. The doctor's note indicates the petitioner's asthma appears to be stabilized with medication and anxiety disorder is managed by Xanax.

The DMV Hearing Officer also made the following conclusions of law in its order:

1. [Petitioner] was charged with an implied-consent offense.

2. Officer Brent Kinney had reasonable grounds to believe that [Petitioner] had committed an implied-consent offense.

3. The implied-consent offense charged involved no death or critical injury to another person.

4. [Petitioner] was notified of his rights as required by N.C.G.S. 20-16.2(a).

5. [Petitioner] willfully refused to submit to a chemical analysis.

A. Evidence That Petitioner Was Charged With An Implied-Consent Offense

Under the first requirement of N.C. Gen. Stat. § 20–16.2(d), testimony at the administrative hearing is sufficient evidence to show Petitioner was charged with an implied-consent offense. The DMV's Finding of Fact number 10, relevant to this conclusion of law, is supported by Officer Brent Kinney's testimony that he arrested Petitioner for driving while impaired. Additionally, Petitioner concedes in his petition seeking review of the DMV's revocation of his license that he was charged with the implied-consent offense of Impaired Driving under N.C. Gen. Stat. § 20-138.1. This conclusion of law is supported by the findings and is not in dispute.

B. Evidence That A Law Enforcement Officer Had Reasonable Grounds To Believe Petitioner Had Committed An Implied–Consent Offense

"[R]easonable grounds in a civil revocation hearing means probable cause, and is to be determined based on the same criteria." *Steinkrause*, 201 N.C. App. at 293, 689 S.E.2d at 381. "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.* at 293, 689 S.E.2d at 381-82 (alteration in original). "A determination of probable cause depends on the totality of the circumstances." *Id.* at 293, 689 S.E.2d at 381.

Concerning the second requirement, Respondent identifies the DMV Hearing Officer's Findings of Facts 1 through 9 as supporting the conclusion that Officer Kinney had reasonable grounds to believe Petitioner had committed an implied-consent offense. Officer Kinney indicated in his testimony: (1) Petitioner appeared to be impaired based on his gait, glassy eyes, and dazed look; (2) Officer Kinney observed Petitioner operating his vehicle while in the shopping center parking lot (3) Petitioner admitted to Officer Kinney that he had driven his car in the shopping center parking lot; (4) Petitioner had slurred speech; (5) After Officer Kinney had pulled over the vehicle Petitioner was in, Petitioner disregarded Officer Kinney's instructions to not put candy in his mouth; (6) Petitioner "had a very strong odor of alcohol on him[;]" and (7) Petitioner failed two field sobriety tests.

Officer Kinney's testimony is competent evidence, which supports the DMV's Findings of Fact 1, 7, 8, and 9. These Findings of Fact support the DMV's conclusion that a law enforcement officer had reasonable grounds to believe Petitioner had committed an implied-consent offense. *See Atkins v. Moye*, 277 N.C. 179, 185, 176 S.E.2d 789, 794 (1970) (finding that the "[f]act that a motorist ha[d] been drinking, when considered in connection with faulty driving . . . or other conduct indicating an impairment of physical or mental faculties, is sufficient prima facie [evidence] to show a violation of [the driving while impaired statute].") (quotations and citations omitted).

C. The Affidavit Contains No Allegation That The Implied-Consent Offense Charged Involved Death Or Critical Injury To Another Person

The third requirement of N.C. Gen. Stat. § 20-16.2(d) is inapplicable to the present case. No death or critical injury to another person was alleged in the affidavit. Neither party contends subsection (3) is at issue.

D. Evidence That Petitioner Was Notified Of His Rights

As to the fourth requirement, Respondent asserts Officer Kinney's testimony shows he read Petitioner his implied-consent rights, and supplied Petitioner with a copy of his implied-consent rights. Petitioner refused to sign the implied-consent rights form or indicate he wanted to call an attorney or witness. This testimony supports the DMV hearing officer's Finding of Fact number 11. Finding of Fact number 11 supports the hearing officer's conclusion of law that Petitioner was notified of his rights as required by N.C. Gen. Stat. § 20-16.2(a).

E. Evidence That Petitioner Willfully Refused To Submit To A Chemical Analysis

As to the fifth requirement, Respondent asserts testimony presented at the DMV hearing shows Petitioner willfully refused to submit to a chemical analysis. Officer Kinney testified that: (1) he instructed Petitioner on how to provide a valid sample of breath for testing; (2) Petitioner failed to follow the officer's instructions on the first Intoximeter test, as the pressure gauge on the instrument did not indicate that air was being breathed by Petitioner; (3) Officer Kinney provided Petitioner a second opportunity to provide an air sample; and (4) contrary to Officer Kinney's instructions, Petitioner finished blowing before being told to stop and then followed up with another puff of air.

Petitioner urges us to affirm the superior court's decision and asserts the admitted evidence in the record shows: (1) the results of Petitioner's second Intoximeter test registered "mouth alcohol;" (2) the operating manual and procedures for the EC/IR II Intoximeter requires that if the machine detects "mouth alcohol," then a subsequent test should be administered after a 15-minute observation period; (3) Petitioner testified that he blew as long and hard as he could into the Intoximeter; (4) Petitioner testified he told the arresting officer before being administered the Intoximeter that he suffered from asthma.

In *Steinkrause v. Tatum*, this Court concluded that where the petitioner breathed quick, short bursts of air into the breathalyzer, contrary to the chemical analyst's instructions to provide an adequate continuous breath sample, the evidence was sufficient to support a finding and conclusion that the petitioner willfully refused to submit to chemical analysis. *Steinkrause*, 201 N.C. App. at 296-97, 689 S.E.2d at 383-84. In *Steinkrause*, the petitioner complained to the arresting officer that injuries she suffered had diminished her ability to provide an adequate breath sample. *Id.*

The arresting officer testified that the petitioner looked physically capable of providing an adequate sample of breath. *Id.* Relying on *Tedder v. Hodges*, the Court held that evidence of a petitioner's failure to follow the instructions of an intoxilyzer operator provides an adequate basis for a superior court to conclude that the petitioner willfully refused chemical analysis. *Id.* at 298, 689 S.E.2d at 385 (citing *Tedder v. Hodges*, 119 N.C. App. 169, 175, 457 S.E.2d 881, 885 (1995)). Respondent argues, citing *Steinkrause* and *Tedder*, the arresting officer's testimony that Petitioner did not follow instructions provided an adequate basis for the DMV Hearing Officer's findings of fact to support the conclusion Petitioner had willfully refused to submit to chemical analysis.

The facts in both *Steinkrause* and *Tedder* are factually distinguishable from the instant case. In *Steinkrause* and *Tedder*, "petitioners agreed to submit to a test of their breath and failed to maintain sufficient pressure to provide a valid sample." *Id.* at 299, 689 S.E.2d at 385 (summarizing *Tedder v. Hodges*, 119 N.C. App. 169, 457 S.E.2d 881). In neither case did the intoxilyzer machine register "mouth alcohol" nor sufficient samples when the petitioners purported to blow.

Here, the findings of fact show and it is undisputed that when Petitioner blew a second time, the Intoximeter registered "mouth alcohol" as the result of the sample. The arresting officer asserted Petitioner failed to follow instructions by blowing insufficiently into the machine and he marked it as a willful refusal. Rather than indicating Petitioner blew insufficiently to provide a sample on his second attempt, Petitioner provided an adequate sample for the Intoximeter to read and register "mouth alcohol". The arresting officer's testimony that Petitioner blew insufficiently is directly contradicted by the Intoximeter's registering a sample with a "mouth alcohol" test result.

Respondent did not produce any evidence to demonstrate the EC/IR II Intoximeter will produce a "mouth alcohol" reading if the test subject fails to submit a sufficient sample. The undisputed evidence shows the EC/IR II Intoximeter registered "mouth alcohol" and did not indicate an inadequate sample or refusal from Petitioner's failure to blow sufficiently.

Officer Kinney's testimony asserting Petitioner willfully refused is contradicted by the machine's acceptance of Petitioner's sample. The indicated procedure to follow from this result of "mouth alcohol" is for a subsequent EC/IR II Intoximeter test to be administered after a 15-minute observation period elapses. This procedure was not followed here. The DMV Hearing Officer's conclusion that "[Petitioner] willfully

refused to submit to a chemical analysis" is not supported by the record evidence or the findings.

V. Conclusion

Respondent has not shown the record evidence supports the conclusion, "[t]he person willfully refused to submit to a chemical analysis," set forth in N.C. Gen. Stat. § 20-16.2(d) for civil revocation of Petitioner's driver's license. The superior court's order reversing the DMV's civil revocation of Petitioner's license is affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge McGEE and Judge STROUD concur.

GAIL LEE HEWITT, PLAINTIFF
v.
ROBIN LEE HEWITT, INDIVIDUALLY AND AS TRUSTEE OF THE ROBIN LEE HEWITT REVOCABLE TRUST DATED AUGUST 12, 2011, DEFENDANT

No. COA16-16

Filed 4 April 2017

Fraud—constructive—land transfer between parents and child

In a case involving the transfer of real estate between parents and their child and a trial on plaintiff's claim for constructive fraud, the trial court erred by denying defendant's motions for directed verdict and judgment notwithstanding the verdict. There was not a scintilla of evidence that, at the time of the transaction, plaintiff and defendant were in a position of trust and confidence that defendant exploited or attempted to exploit to take advantage of plaintiff.

Appeal by Defendant from judgment entered 20 July 2015 by Judge Ebern T. Watson, III, in Brunswick County Superior Court. Heard in the Court of Appeals 24 May 2016.

The Del Ré Law Firm, PLLC, by Benedict J. Del Ré, Jr., for Plaintiff-Appellee.

Shipman & Wright, LLP, by Kyle J. Nutt, for Defendant-Appellant.

INMAN, Judge.

Robin Lee Hewitt, individually and as trustee of the Robin Lee Hewitt Revocable Trust ("Defendant"), appeals a judgment resulting from a jury verdict in favor of Gail Lee Hewitt ("Plaintiff") on a claim of constructive fraud. Defendant contends the trial court erred in denying her motions for directed verdict and her motion from judgment notwithstanding the verdict (JNOV), or in the alternative, motion for a new trial. After careful review, we hold that the trial court erred in denying the motions for directed verdict and JNOV, and reverse the judgment.

I. Factual & Procedural Background

This appeal arises out of a 2010 sale of property located in Brunswick County ("the Transaction") from Plaintiff and her late husband, Douglas Hewitt ("Mr. Hewitt") (collectively, "the Hewitts"), to their daughter, Defendant. The evidence at trial, considered in the light most favorable to Plaintiff, tends to show the following:

Defendant is one of the Hewitts' three daughters. At age sixteen, Defendant left the family home. She lived in California for twenty-seven years preceding the Transaction.

In 1987, the Hewitts purchased a tract of land in Supply, North Carolina from Mr. Hewitt's mother, Mary Hewitt. The deed explicitly reserved a life estate for Mary Hewitt in the property. Following the death of Mary Hewitt, the Hewitts built a new house ("the Property") on the land in 2005.

In May 2009, the Hewitts decided to enter a home equity conversion mortgage, also known as a reverse mortgage, on the Property. Attorney Richard Green ("Green") and his closing coordinator, Rhonda Caison ("Caison"), represented the Hewitts in the closing. Green was "trusted lawyer" and "friend" of Plaintiff, whom she had known for fifteen years and felt "confident" using. The Hewitts attended counseling sessions through a federal government agency and received informational documents regarding the loan's cost and the financial implications. On 12 June 2009, the Hewitts entered into the reverse mortgage from which they received a loan for $168,000 from RBC Bank, borrowed against their equity in the Property. At the time they entered into the reverse mortgage closing, an $80,989.52 lien on the Property with Chase Home Mortgage was recorded.

In closing on the reverse mortgage, the Hewitts received the proceeds of the loan from RBC Bank, retired the debt to Chase Home Bank, placed a new deed of trust on the record, and signed a new promissory note securing the new loan. The note was payable 2 May 2086. The loan

covered the $8,446 closing costs, provided the Hewitts a loan advance of $25,880.70, and allowed them to remain in their home, without making mortgage payments, for the rest of their lives. In the event that either spouse lived away from the Property for over a year, the Property was sold, or both spouses died, the reverse mortgage would terminate and the loan would become due. The Hewitts remained responsible for paying the maintenance, insurance, and taxes on the Property.

At the time the Hewitts entered into the reverse mortgage, Defendant lived in California. She allegedly told her parents by phone that the reverse mortgage was a "big mistake." However, Plaintiff admitted that she also received "advice independent of [Defendant] on whether or not the reverse mortgage was a good deal[.]"

In May or June of 2010, in a telephone conversation from her residence in California, Defendant offered to buy the Property from her parents. Defendant stated she could buy the Property the following year, allegedly telling her parents that "[the house] will still be in the family," "you'll be okay[,]" and "[e]verything will be the same except that I'll own the house." A few months later, in September or October of 2010, Defendant called her parents and said she was prepared to purchase the Property.

Plaintiff investigated the value of the Property in anticipation of selling it to Defendant. She consulted "four or five" real estate agencies but never requested a professional appraisal. Plaintiff referred Defendant to Green to prepare the documentation for the sale of the Property.

On 4 October 2010, Defendant contacted Green's office and spoke with Caison, the closing coordinator. Later that day, Defendant confirmed her conversation with Caison by email, stating, "Let me know what steps I need to take next for the title company and for the purchasing contract for the property." Caison responded by email stating, "I will handle the title company from here and order your title policy. . . . I'll prepare the contract and forward it to you in an e-mail."

Green's office prepared all of the documentation regarding the Transaction, including, *inter alia*, the Offer to Purchase and Contract (the "Purchase Contract"), the General Warranty Deed (the "Deed"), and the settlement sheet listing all financial terms of the Transaction. The Purchase Contract listed the Property's purchase price as $126,000.

Defendant signed The Purchase Contract in California on 11 October 2010 and sent it to North Carolina. The Hewitts signed the Purchase Contract at home on 13 October 2010 and delivered it to Green's office.

Plaintiff and Defendant never expressly discussed the terms of the Purchase Contract.[1] Plaintiff admitted that no one ever misled her about the contents of the Purchase Contract. Five days later, on 18 October 2010, as a condition of a mortgage loan Defendant obtained for the purchase, the Property was appraised at $131,000.

On 10 November 2010, Plaintiff personally retrieved the Deed and other remaining transactional documents from Green's office to take home for signing, as Mr. Hewitt was unable to leave their residence. At that time, Plaintiff allegedly asked Green if they were going to be okay signing the papers, and Green said, "I can't tell you if it's a good move or a bad move . . . but I see nothing wrong." Green testified that he considered both Plaintiff and Defendant his clients.

The Hewitts signed the Deed later that day and a neighbor notarized their signatures. The Deed was recorded on 17 November 2010 in the Brunswick County Registry.

Plaintiff testified that she mistakenly believed the life estate reserved in the 1987 deed to Mary Hewitt, her mother-in-law, also granted Plaintiff a life estate in the Property. Plaintiff testified that, "I thought that basically there was something that said in writing that we had a life estate." However, neither the executed Purchase Contract nor the Deed included any mention of a life estate. Plaintiff admitted that she had the opportunity to read the documents regarding the Transaction. Defendant testified that she would not have purchased the Property with a life estate reservation. The settlement sheet summarizing the Transaction reflects that Defendant purchased the Hewitts' home for $126,000, and paid $126,472.34 to pay off the reverse mortgage.

Following the closing, Defendant paid the new mortgage, taxes, and insurance on the Property. Plaintiff changed her insurance policy to a tenant's policy and referred to Defendant as her "landlord."

Defendant moved from California to Brunswick County shortly after the closing, on the day after Thanksgiving of 2010. Defendant

1. A post-it note written in Green's handwriting affixed to an undated, unsigned draft of the Purchase Contract reads, "M and D to have life estate." Green testified that he never communicated with Defendant and was certain that Caison never told him that the Hewitts intended to reserve a life estate in the Property. He said that he could not recall the reason he wrote the note, but assumed that Plaintiff had informed him of her desire to have a life estate in the Property. He did not recall relaying that information to Caison or anyone else. Neither the unsigned draft nor the executed Purchase Contract—or any other document introduced in evidence—referred to the conveyance reserving a life estate for the grantors.

cared for her father until his death two years later on 11 February 2013. Following her father's death, Defendant no longer felt she had a purpose in Brunswick County. Just after Christmas in December 2013, Defendant expressed her desire to sell the Property and move back to California.

Plaintiff filed the complaint initiating this action on 2 June 2014 alleging fraud, fraud in the inducement, and constructive fraud. Following discovery, Defendant filed a motion for summary judgment and Plaintiff filed a cross-motion for summary judgment. On 30 April 2015, the trial court denied Plaintiff's motion, granted Defendant's motion as to the claims for fraud and fraud in the inducement, and denied Defendant's motion as to the constructive fraud claim.

The case came on for trial on 29 June 2015, Judge Ebern T. Watson, III, presiding. At the close of Plaintiff's evidence, Defendant moved for a directed verdict, which the trial court denied. Defendant renewed the motion for directed verdict at the close of all the evidence, and the trial court again denied the motion. The jury returned a verdict in favor of Plaintiff and on 20 July 2015, the trial court entered a judgment for constructive trust.

Defendant filed a motion for JNOV or, in the alternative, a new trial on 23 July 2015. On 6 August 2015, the trial court denied Defendant's motion. Defendant timely filed a notice of appeal.

II. Analysis

Defendant argues the trial court erred in denying her motions for directed verdict, JNOV or, in the alternative, motion for new trial. After careful review of the record and applicable law, we agree.

"On appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury." *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God Inc.*, 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000) (citation omitted). We review the ruling *de novo*. *Maxwell v. Michael P. Doyle, Inc.*, 164 N.C. App. 319, 323, 595 S.E.2d 759, 761 (2004) ("Because 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*.").

"In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant[.]" *Turner v. Duke Univ.*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989). The non-movant is given "the benefit

of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor." *Id.* at 158, 381 S.E.2d at 710. "A motion for either a directed verdict or JNOV should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim." *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (2009) (citations and quotation marks omitted). "However, if [the] plaintiff fails to present evidence of each element of his claim for relief, the claim will not survive a directed verdict motion." *Ridenhour v. Int'l Bus. Mach. Corp.*, 132 N.C. App. 563, 566, 512 S.E.2d 774, 777 (1999) (citation omitted).

The North Carolina Supreme Court has defined the elements of a constructive fraud claim as proof of circumstances "(1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981) (quotation marks, citations, and brackets omitted). This Court has defined the essential elements of constructive fraud in slightly different formulations. *See Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A.*, 219 N.C. App. 615, 620, 730 S.E.2d 763, 767 (2012) ("To establish constructive fraud, a plaintiff must show that defendant (1) owes plaintiff a fiduciary duty; (2) breached this fiduciary duty; and (3) sought to benefit himself in the transaction."); *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004) (defining the elements of constructive fraud as "(1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured"); *Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 28, 560 S.E.2d 817, 823 (2002) (defining the elements of constructive fraud as "(1) the existence of a fiduciary duty, and (2) a breach of that duty"). Although the stated elements vary, each holding requires that the defendant exploits or seeks to exploit the relationship to his or her advantage.

"A number of relationships have been held to be inherently fiduciary, including the relationships between spouses, attorney and client, trustee and beneficiary, members of a partnership and physician and patient." *King v. Bryant*, __ N.C. __, __, 795 S.E.2d 340, 349 (2017). "The very nature of [these] relationships . . . gives rise to a fiduciary relationship as a matter of law." *CommScope Credit Union v. Butler & Burke, LLP*, __ N.C. __, __, 790 S.E.2d 657, 660 (2016). However, "[a] confidential or fiduciary relation can exist under a variety of circumstances and is not

limited to those persons who also stand in some recognized legal relationship to each other[.]" *Stilwell v. Walden*, 70 N.C. App. 543, 546-47, 320 S.E.2d 329, 331 (1984). A fiduciary relationship can exist as a matter of fact in those circumstances "in which there is confidence reposed on one side, and resulting domination and influence on the other." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). The North Carolina Supreme Court recently reaffirmed this principle in *King v. Bryant*, noting that "[i]t is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side and the resulting superiority and influence on the other." __ N.C. at __, 795 S.E.2d at 349 (quoting *Abbitt*, 201 N.C. at 598, 160 S.E. at 906-07).

"Generally, the existence of a [fiduciary relationship as a matter of fact] is determined by specific facts and circumstances, and is thus a question of fact for the jury." *Stamm v. Salomon*, 144 N.C. App. 672, 680, 551 S.E.2d 152, 158 (2001). However, the trial court, and this Court on appeal, must determine as a matter of law whether the evidence is sufficient to submit the issue to the jury. *See Maxwell*, 164 N.C. App. at 323, 595 S.E.2d at 761.

Plaintiff argues that a close relationship with family members can suffice to establish a confidential or fiduciary relationship. Although a close family relationship can serve as a factor for consideration in this analysis, the relationship of parent and child does not as a matter of law create a confidential or fiduciary relationship. *See Davis v. Davis*, 236 N.C. 208, 211, 72 S.E.2d 414, 416 (1952) (holding that the parent-child relationship "is a family relationship, not a fiduciary one, and such relationship does not raise a presumption of fraud or undue influence"); *see also Benfield v. Costner*, 67 N.C. App. 444, 446, 313 S.E.2d 203, 205 (1984) (holding that "[a]n allegation of a 'mere family relationship' is not particular enough to establish a confidential or fiduciary relationship").

In *Curl v. Key*, 311 N.C. 259, 261, 316 S.E.2d 272, 274 (1984), the plaintiffs, siblings ages 16, 17, 18, and 21, inherited their family home following the death of their father. The defendant was the late father's best friend, known to the plaintiffs as "Uncle Jack," who lived in the family home with the plaintiffs. *Id.* at 262-63, 316 S.E.2d at 274-75. Upon inheriting the house, the plaintiffs were threatened, harassed, and occasionally physically abused by other relatives. *Id.* at 261, 316 S.E.2d at 274. The defendant told the plaintiffs that he would keep their relatives away if they signed a "peace paper" giving him the right to kick troublemakers off the property. *Id.* at 262, 316 S.E.2d at 274. After signing the "peace paper," the plaintiffs discovered that they had actually signed a deed to

their home, and brought an action to set aside the deed. *Id.* at 260, 316 S.E.2d at 273. The North Carolina Supreme Court held that the plaintiffs had produced sufficient evidence that, at the time the plaintiffs executed the deed to the defendant, a confidential or fiduciary relationship existed between the plaintiffs and the defendant. *Id.* at 263, 316 S.E.2d at 275.

In *Willetts v. Willetts*, 254 N.C. 136, 138, 118 S.E.2d 548, 549 (1961), the plaintiff, who was in debt and unable to obtain refinancing, made an agreement with his son, the defendant, wherein (1) the father would deliver a deed conveying his real property to his son; (2) the son would obtain a loan secured by the property; (3) the son would pay off his father's debt; and (4) the son would then reconvey the real property to his father, who would assume the outstanding mortgage. *Id.* at 138, 118 S.E.2d at 549. The son acquired a loan using the real property as security, repaid his father's debt, but never conveyed the property back to his father. *Id.* at 138, 118 S.E.2d at 549. The North Carolina Supreme Court noted that the trial court found that the son had assisted his father in farming and marketing his livestock and crops, and the son was listed as "agent" for his father's tax listing. *Id.* at 139, 118 S.E.2d at 550. The Supreme Court also noted that there was no evidence that the father was mentally or physically incapable of transacting business at the time he executed the deed. *Id.* at 142, 118 S.E.2d at 552. Noting that "[t]he evidence leaves the impression that all [the] defendant did was to assist his father when called upon to do so[,]" the Court held that "[t]here is no evidence tending to show any incident or transaction either before or after the execution and delivery of the subject deed in which [the] defendant exercised or attempted to exercise a dominating influence over his father." *Id.* at 142, 118 S.E.2d at 552.

Here, the relationship between Plaintiff and Defendant is dissimilar to the confidential relationship found in *Curl* and analogous to the parent-child relationship in *Willetts*, which the Supreme Court held was insufficient to establish a confidential relationship. Unlike the defendant in *Curl*, who was living with the young plaintiffs when they signed the deed, Defendant here was living in California more than 3,000 miles away from Plaintiff, and had lived there for twenty-seven years preceding the Transaction. During the decade immediately preceding the Transaction, Defendant visited Plaintiff "somewhere between three and eight" times, *i.e.* less frequently than once a year. Defendant planned the Hewitts' fiftieth wedding anniversary party in 2005 and occasionally traveled with her parents. Plaintiff explained that her relationship with Defendant

> is one that we trusted her. We had such faith in her, because she was the most independent of our children. She never

> asked for anything. She never broke a promise. She was always the one to keep us apprized [sic] of what was going on with her life, her promotions through business, one that we never found even the slightest glimmer of there being any reason to not have anything but pride and love and affection.

Plaintiff's own account of her relationship with her daughter, while endearing, in no way indicates that Defendant exploited or attempted to exploit the relationship for her benefit. Plaintiff admitted that at the time of the Transaction, she was legally and financially independent of Defendant, and Defendant was "totally independent" of her parents. Plaintiff also admitted that the only business transaction she had with Defendant was the sale of the Property, that Defendant never had any control over Plaintiff's finances, and that Defendant did not dominate Plaintiff.

Also, Plaintiff admitted she was a "sharp" woman, a high school graduate who had worked as an office administrator in her husband's business for forty-five years. Prior to the Transaction, Plaintiff "sought other advice," and Mr. Hewitt "spoke to several of his friends[.]" Plaintiff investigated the value of the Property prior to the Transaction. Plaintiff referred Defendant to Green, an attorney whom she knew and trusted, to prepare the necessary documentation. Plaintiff and Mr. Hewitt signed the Purchase Contract, which specified the express terms of the Transaction, and, approximately one month later, signed the Deed. As in *Willetts*, Plaintiff presented no evidence that at the time of the Transaction, she was physically or mentally incapable of conducting her own business or that Defendant exercised or attempted to exercise any dominating influence over Plaintiff.

Additionally, Defendant was in California at the time that the Hewitts signed the Purchase Contract and the Deed. Defendant paid $126,000 for the Property, over 96% of the value of the professional appraisal. It was only *after* the Transaction that Defendant returned to North Carolina and began to see Plaintiff regularly, in the course of caring for Mr. Hewitt. Plaintiff failed to present any evidence that at the time she signed the Purchase Contract or at the time she signed the Deed that she was in a position to be taken advantage of or that "[D]efendant exercised or attempted to exercise a dominating influence over [her]." *Willetts*, 254 N.C. at 142, 118 S.E.2d at 552.

In sum, a careful review of the record reveals no requisite scintilla of evidence that at the time of the Transaction, Plaintiff and Defendant were in a relationship of trust and confidence that Defendant exploited

or attempted to exploit to take advantage of Plaintiff. Plaintiff's evidence, even when considered in the light most favorable to her, giving her the benefit of all reasonable inferences and resolving all conflicts in her favor, fails to satisfy the essential elements of the constructive fraud claim. We therefore hold that the trial court erred in denying Defendant's motions for directed verdict and JNOV.

Defendant also argues that the trial court erred in failing to give her requested special jury instructions. Because we hold the trial court erred in denying Defendant's motions for directed verdict and JNOV and reverse the trial court's judgment, we need not address this issue on appeal.

III. Conclusion

Because Plaintiff failed to present even a scintilla of evidence of a fiduciary relationship or a relationship of trust and confidence which Defendant exercised or attempted to exercise to her benefit, we hold that the trial court erred in denying Defendant's motions for directed verdict and JNOV. Accordingly, we reverse the trial court and remand for entry of judgment consistent with this opinion.

REVERSED AND REMANDED.

Judges BRYANT and TYSON concur.

IN RE L.L.O.

[252 N.C. App. 447 (2017)]

IN THE MATTER OF L.L.O.

No. COA16-1098

Filed 4 April 2017

Termination of Parental Rights—grounds—failure to make findings and conclusions—repetition of neglect if returned to parents—willfully left in foster care without reasonable progress

The trial court's order terminating respondents' parental rights was vacated. The trial court failed to enter adequate findings of fact to demonstrate and conclude that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) and (2) regarding the likelihood of repetition of neglect if the child was returned to their care or that respondents willfully left the child in foster care without showing reasonable progress to correct the conditions which led to her removal.

Appeal by respondents from order entered 9 August 2016 by Judge Mike Gentry in Person County District Court. Heard in the Court of Appeals 20 March 2017.

No brief filed for Person County Department of Social Services petitioner-appellee.

Mary McCullers Reece for respondent-appellant mother.

J. Thomas Diepenbrock for respondent-appellant father.

Alston & Bird, LLP, by Kendall L. Stensvad, for guardian ad litem.

TYSON, Judge.

Respondents appeal from an order terminating their parental rights to their minor child L.L.O. We vacate the district court's order and remand.

I. Background

In May 2012, L.L.O. was born at Duke University Hospital, twelve weeks premature, weighing one pound fourteen ounces. As the result of her premature birth, L.L.O. remained hospitalized for approximately six weeks. After L.L.O.'s weight increased, Respondents were allowed to

take her home. Respondents lived in Durham at the time, but moved to Roxboro about a month later. L.L.O. continued to receive medical care in Durham.

L.L.O. had an appointment at Duke Pediatrics on 4 December 2012, from where she was taken by ambulance to the hospital because she was in "respiratory distress." She was released the same day with a follow-up appointment scheduled for the next day. After L.L.O. missed that appointment, the Person County Department of Social Services ("DSS") received a report of purported medical neglect concerning L.L.O. On 6 December 2012, a DSS social worker spoke with Respondent-mother, encouraged her to reschedule the appointment for the following day, and offered to provide transportation to the appointment for Respondent-mother and L.L.O. At L.L.O.'s appointment the next day, she was determined to be in "respiratory distress." Her pulse oxygen levels were "dangerously low" and she was again transported to the hospital.

When L.L.O. was discharged from the hospital on 10 December 2012, Respondent-mother was given a prescription for prednisone for L.L.O. She was instructed to fill the prescription and give L.L.O. a dose every twelve hours for the next forty-eight hours. According to Respondent-mother, she was unable to fill the prescription that day because her pharmacy was closed by the time she and L.L.O. had returned to Roxboro. On 11 December 2012, the following day, a social worker filled the prescription for Respondent-mother and delivered it to the home. Although the social worker brought the medication to Respondents' home at 4:45 p.m. that day, L.L.O. did not receive her first dose of prednisone until the following day, 12 December 2012. That same day, a social worker transported L.L.O. and Respondent-mother to a follow-up appointment, where she was again found to be in "respiratory distress."

On 15 December 2012, a social worker transported L.L.O. and Respondent-mother to Duke Pediatrics. L.L.O. was again found to be in "respiratory distress" and was transported to the hospital by ambulance. Following L.L.O.'s discharge several hours later, Respondents were instructed to schedule a follow-up appointment, which Respondents did not do. Duke Pediatrics scheduled an appointment on L.L.O.'s behalf and notified Respondents of the 19 December appointment. Respondents did not appear with L.L.O. for the appointment.

On 19 December 2012, DSS filed a petition alleging L.L.O. was neglected, because Respondents had failed to provide her necessary medical and remedial care. DSS obtained nonsecure custody of L.L.O. the same day. On 1 April 2013, the district court adjudicated L.L.O. to be

neglected "as alleged in the Petition," and ordered Respondents to submit to drug screens, relinquish L.L.O.'s WIC vouchers to DSS and develop a case plan with DSS.

Respondents agreed and entered into case plans with DSS, which included the following goals: obtain and maintain employment and housing; participate in psychological and substance abuse evaluations and follow all recommendations; refrain from using drugs and alcohol and participate in drug testing; attend visitation with L.L.O.; and communicate respectfully with DSS, foster parents, and other staff regarding L.L.O.'s care and scheduled visits.

Following a 2 December 2013 permanency planning hearing, the trial court ordered that DSS could cease reunification efforts. At the next permanency planning hearing on 9 June 2014, the court ordered the permanent plan be changed from reunification to adoption.

On 30 September 2014, DSS filed its motion for termination of parental rights ("TPR") alleging L.L.O. was neglected as defined in N.C. Gen. Stat. § 7B-101. Without a statutory reference, the motion also alleged that "[t]wenty-one months have passed since the child was removed from the parents' custody and little likelihood exists that the parents will ever be able to resume custody of their child."

On 9 September 2015, the court entered an order limiting the time for presentation of the parties' cases to five hours total for Petitioner and the guardian ad litem and five hours total for Respondents. In its order terminating Respondent's parental rights, Judge Gentry stated he "wants the Court of Appeals to decide if he is right or wrong on that issue." Respondents do not raise this time limitation issue on appeal and it is not before us.

Petitioner's motion for TPR was heard on 5 November, 6 November, and 9 November 2015. The trial court entered an order on 9 August 2016 concluding that Respondents had neglected L.L.O. and willfully left L.L.O. in foster care or placement outside of the home for more than twelve months without showing reasonable progress in correcting the conditions that led to L.L.O.'s removal. The court concluded termination was in the juvenile's best interest and terminated Respondents' parental rights. Respondents appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(6) (2015).

III. Standard of Review

> On appeal, our standard of review for the termination of parental rights is whether the trial court's findings of fact are based on clear, cogent and convincing evidence and whether the findings support the conclusions of law.
>
> The trial court's conclusions of law are reviewable *de novo* on appeal.

In re J.S.L., 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (citations and internal quotation marks omitted).

IV. Issues

Respondents assert the trial court erred when it concluded they had neglected their daughter, L.L.O., without making any finding or conclusion of the likelihood of repetition of neglect, if L.L.O. was returned to their care. Respondents also argue the trial court erred by concluding they willfully left L.L.O. in foster care without showing reasonable progress to correct the conditions which led to her removal.

V. Analysis

A. Neglect

A court may terminate parental rights upon a finding that the parents have neglected the juvenile within the meaning of N.C. Gen. Stat. § 7B-101(15). N.C. Gen. Stat. § 7B-1111(a)(1) (2015). In relevant part, N.C. Gen. Stat. § 7B-101(15) (2015) defines a neglected juvenile as one "who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care[.]"

Where a child has not been in the custody of the parents for a significant period of time prior to the TPR hearing, "the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect." *In re Pierce*, 146 N.C. App. 641, 651, 554 S.E.2d 25, 31 (2001), *aff'd*, 356 N.C. 68, 565 S.E.2d 81 (2002). The court must consider "evidence of changed conditions in light of the history of neglect by the parent, and the probability of a repetition of neglect." *Id.* (citing *In re Ballard*, 311 N.C. 708, 714, 319 S.E.2d. 227, 231 (1984)). The trial court concluded grounds existed for terminating the parental rights of both Respondents because both had "neglected [their] minor child, [L.L.O.]."

The trial court's order must reflect the process by which the court reasoned and adjudicated facts, based upon clear and convincing evidence, which compel the conclusion that Respondents were likely to neglect L.L.O. if she were returned to their custody. *See Appalachian Poster Adver. Co. v. Harrington*, 89 N.C. App. 476, 480, 366 S.E.2d 705, 707 (1988). Respondents argue the court's order lacks the requisite findings that they were likely to repeat the neglect which led to the initial adjudication, and no clear and convincing record evidence supports such finding. We agree.

In *In re E.L.E.*, __ N.C. App. __, __, 778 S.E.2d 445, 447 (2015), the child, Emma, had been adjudicated neglected and removed from the respondent's care due to domestic violence and respondent's substance abuse. The trial court's TPR order contained no finding that "there was a probability of repetition of neglect if Emma were returned to respondent." *Id.* at __, 778 S.E.2d 450. This Court held "thus, the ground of neglect is unsupported by necessary findings of fact." *Id.* at __, 778 S.E.2d at 450. The court in *In re E.L.E.* recognized that "[a]rguably, competent evidence in the record exists to support such a finding, however, the absence of this necessary finding requires reversal." *Id.* at __, 778 S.E.2d at 450-51.

While DSS has not filed an appellant brief, the Guardian ad Litem ("GAL") argues the following are findings supporting a conclusion of Respondent-father's neglect.

> 48. That during the pendency of the neglect proceeding, the Respondent father failed to gain or maintain any employment or gainful activity to enable him to provide financial assistance to the child;
>
> . . . .
>
> 50. During the course of the neglect proceeding, the Respondent father has not provided any financial support for his minor child, [L.L.O.];
>
> . . . .
>
> 57. The father was requested to attend drug screens on seven occasions;
>
> 58. On five occasions, he failed to attend the drug screens;
>
> 59. On one of his drug screens he tested positive for controlled substances through hair testings, two positive

screens through urine testing, and he had zero negative drug screens;

. . . .

64. Pursuant to such Exhibit #4, the agency also kept up with the number of visits that the parents missed, those that were rescheduled or cancelled due to DSS or other issues, and those that were removed from the parents due to their own failure to comply with visitation schedules;

65. From a review of such exhibit, and considering the testimony of the DSS Social Worker and parents, the Court finds that the parents failed to visit their child on a sufficiently regular schedule in order to maintain any bond they may have originally had with their infant child; . . . .

72. The time the father has been in jail has prevented him from bonding with his child;

. . . .

82. That [Respondents'] accommodations are not sufficient to additionally house [L.L.O.];

. . . .

95. The Court doesn't know how many times the father said he talked to his daughter. He testified I think every visit. Which that would tend to come down good for you, but there was no evidence presented about the father talking to DSS or anything else, to be sure how his case was going. Maybe if they could set some time with him to talk when mama wasn't there. Cause I know there were several times when he didn't talk or said during the visits. I think mother testified that there were at least 3 visits that did not take and I'm just talking about it during the incarceration but since cease efforts;

. . . .

101. [L.L.O.] has not had an opportunity to really bond with her father based on the testimony I heard. That she had an opportunity to begin bonding with the mother when she was born prematurely. I believe mama was there 24/7. I don't doubt that. Ma'am it's just your actions when the child needed treatment and then not getting a decent place for the child to live in it appeared that you didn't care[.]

With respect to Respondent-mother, the GAL argues that in addition to the findings numbered 64, 65 and 82, *supra*, addressing both parents, the following findings of fact support the court's conclusion of neglect by Respondent-mother.

> 47. That during the pendency of the neglect proceeding, the Respondent mother failed to gain any employment or engage in any gainful activity to enable her to provide financial assistance to the child; the Court further finds she has not worked in fifteen months;
>
> . . . .
>
> 49. During the course of the neglect proceeding, the Respondent mother has not provided any financial support for her minor child, [L.L.O.];
>
> . . . .
>
> 54. The mother was requested to attend drug screens on seven occasions;
>
> 55. On three occasions, she failed to attend the requested drug screens;
>
> 56. On one of her drug screens she tested positive for controlled substances through hair testings, on two occasions she did not provide a sufficient quantity of hair for testing, on three occasions she had positive screens through urine testing, and she had one negative drug screen through urine testing;
>
> . . . .
>
> 96. I can't swear in this one because I don't know for sure. But in almost every case in every case I can recall. Anytime I've ceased efforts I was sure to say to the parents that cease efforts just moves the ball from DSS Court to your Court. You can keep working, you can keep doing stuff to swing it back to you getting the child back, and mama hasn't done anything. I mean she's done some stuff but she hadn't done anything to amount to anything as far as I'm concerned according to her elements of testimony about getting the child into a public element (you can use that language). You hadn't done anything except you filed an application and paid money that she could have paid 8 or 9 years ago, at least it could have been paid while

> Respondent Father was working. I mean it could have been paid. No question in my mind it could've been paid and it was not[.]

None of these purported findings of fact address or mention the probability of repetition of neglect or failure to provide necessary medical or remedial treatment to L.L.O. In fact, a contradiction is that L.L.O.'s young siblings and a newborn sibling remain in the care and custody of Respondents.

The GAL argues the omission of an ultimate finding of a probability of future neglect was inadvertence and constitutes harmless error. We reject this argument. *See In re D.R.B.*, 182 N.C. App. 733, 738, 643 S.E.2d 77, 80 (2007) (holding that where the "trial court's findings do not establish grounds for termination[,] [i]ts failure to articulate those grounds is not harmless"); *see also In re E.L.E.*, __ N.C. App. at __, 778 S.E.2d at 450-51 ("absence of this necessary finding [of a probability of a repetition of neglect] requires reversal").

The present termination order contains no finding of a probability of a repetition of the neglect, which led to L.L.O.'s removal from Respondents' care. *See In re D.R.B.*, 182 N.C. App. at 738, 643 S.E.2d at 80; *In re E.L.E.*, __ N.C. App. at __, 778 S.E.2d at 450-51. Here, the record contains evidence, which could support, although not compel, a finding of neglect. "Without further fact-finding, we cannot determine whether the court's conclusions are supported by its findings." *In re D.M.O.*, __ N.C. App. __, __, 794 S.E.2d 858, 866 (2016). We vacate that portion of the order and remand.

B. N.C. Gen. Stat. § 7B-1111(a)(2)

N.C. Gen. Stat. § 7B-1111(a)(2) (2015) provides the court may terminate parental rights upon a finding that Respondents have "willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile."

At the outset, we note DSS' motion to terminate Respondents' parental rights failed to cite N.C. Gen. Stat. § 7B-1111 as the particular statutory basis upon which it was seeking to terminate Respondents' parental rights. Further, DSS' motion did not contain any of the terms or any combination thereof which are contained in N.C. Gen. Stat. § 7B-1111(a)(2). "While there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to what acts, omissions

or conditions are at issue." *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002). Without the terms, "willfully left," "reasonable progress," "conditions which led to the removal," Respondents would seem to be at a disadvantage to prepare for the TPR hearing. However, as neither Respondent raises the issue, we address whether the facts support the conclusion of lack of reasonable progress as a ground for termination. *See In re S.Z.H.*, __N.C. App. __, __, 785 S.E.2d 341, 347 (2016).

Respondents assert the district court erred when it concluded they had not made reasonable progress towards correcting the conditions that led to the removal of L.L.O. from their care. Respondents contend the trial court's findings of fact do not support its conclusion of law that grounds exist to terminate pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

To terminate parental rights under N.C. Gen. Stat. § 7B-1111(a)(2), the trial court must perform a two-part analysis. *In re O.C.*, 171 N.C. App. 457, 464, 615 S.E.2d 391, 396, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005).

> The trial court must determine by clear, cogent and convincing evidence that a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and, further, that as of the time of the hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

Id. at 464-65, 615 S.E.2d at 396.

"A finding of willfulness does not require a showing of fault by the parent." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996). "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001).

In this case, the trial court's findings of fact numbered 47, 54, 55, 56, 57, 58, 59 and 65, relied upon by the GAL to support a conclusion of neglect, also address Respondents' failure to achieve the goals they set with DSS in their case plans. In addition, the court found:

> 60. That in order to maintain contact with their infant child, the presiding Judge initially granted the parents unsupervised visitation on three days each week;

. . . .

67. That during the pendency of this action, the father engaged in criminal activity by selling cocaine to an undercover agent of the Person County Sheriff's Department in 2013;

68. After being convicted of selling drugs, and during the pendency of this proceeding, [Respondent-father] was also charged in 2014 with larceny . . . ;

69. Based on his criminal activity, the father was required to spend a significant amount of time in Person County Jail . . . ;

. . . .

74. At some point in time during the initial neglect proceeding, the parents lost their lease for failure to pay rent;

. . . .

76. [Respondent-father's] sister allowed [Respondents] and two of their minor children to move into her home, even though she had herself, her husband and her minor children residing in such home at that time;

. . . .

79. That since the initiation of the Termination of Parental Rights proceeding, the mother has moved from the home of [Respondent-father's] sister, and moved to an apartment rented by her sister . . . in Roxboro;

80. That this is a three room apartment, currently housing the sister and her two children, with [Respondent-mother] and her two children using one bedroom;

. . . .

82. That these accommodations are not sufficient to additionally house [L.L.O.];

83. That save and except for limited visitation, Respondent[s] ha[ve] provided no personal care for [L.L.O.] since the filing of this Motion for Termination of Parental Rights;

. . . .

> 92. . . . Respondent Mother owed a public housing bill of $259 since sometime around 2006, which went unpaid until recently. Looking at all the conditions the parents lived under, the parents had income for two (2) years, but failure to pay the $259 kept them out of public housing, which would have been free. Spending your money on whatever you spend it on, and not paying a debt in the amount of $259 which will get a roof your head is neglect to the Court. I want it to be very clear that she went from 2006 until very recently and didn't pay the $259.
>
> . . . .
>
> 94. That the child has been willfully left by the Respondent parents in foster care or placement outside the home for over 12 months and at the time of the hearing also demonstrated by clear and convincing evidence that the parents have not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. There is no question about leaving the child in foster care now and I was disappointed in this;
>
> . . . .
>
> 114. . . . [T]he only progress made towards the reunification goals by the parents has been related to visits with [L.L.O.];

However, the court also made findings of fact contradicting those stated above:

> 27. The mother . . . . is currently completing an application for public housing;
>
> . . .
>
> 29. The father has completed his GED and other courses involving Life Skills, Financial Skills, and Critical Thinking; and attended NA and AA meetings while incarcerated;
>
> . . . .
>
> 31. That the Respondent father broke his foot in April, 2013 and was unable to work;
>
> . . . .

> 36. That Respondent mother now has a valid driver's license and access to a motor vehicle for use at all times;
>
> 37. That Respondent mother has attended all hearings in this matter, and on various occasions has walked from her residence, sometimes over two (2) miles to attend such hearing;
>
> 38. That Respondent mother successfully completed a required course of Substance Abuse Comprehensive Outpatient Treatment by Freedom House Recovery Center on September 27, 2013;
>
> 39. That the Respondents' annual family income during 2012, 2013, and 2014 and to date in 2015 has been less than $20,000 in each year;
>
> 40. That the Court takes Judicial Notice that the Respondents family income in 2012, 2013, 2014 and 2015 was below the Federal Poverty Level;

In the case of *In re E.L.E.*, the evidence presented at the TPR hearing failed to suggest the respondent remained involved in any domestic violence. __ N.C. App. at __, 778 S.E.2d at 450. In its order terminating the respondent's parental rights, the trial court made no findings of fact regarding the respondent's progress toward correcting the domestic violence issues. Further the court "commended respondent on her progress in addressing her substance abuse issues." *Id.* This Court concluded such findings cannot support a conclusion that the respondent "had not made reasonable progress under the circumstances toward *correcting the conditions which led to [the child's] removal from her care*." *Id.* (emphasis supplied).

This Court requires orders to contain findings of fact which are clear and enable this Court to adequately determine if the findings support the trial court's conclusions of law. *In re A.B.*, 239 N.C. App. 157, 172, 768 S.E.2d 573, 581-82 (2015). Here, many of the trial court's findings could best be described as "stream of consciousness." "While stream of consciousness is a well-recognized literary style, it is not well suited to court orders." *Peltzer v. Peltzer*, 222 N.C. App. 784, 789, 732 S.E.2d 357, 361 (2012).

Inconsistent and "stream of consciousness" findings and conclusions in an order impedes this Court's ability to determine whether the trial court reconciled and adjudicated all of the evidence presented to it.

"Without adjudicated findings of fact this Court cannot conduct a meaningful review of the conclusions of law and 'test the correctness of [the trial court's] judgment.' " *In re M.K.*, __ N.C. App. __, __, 773 S.E.2d 535, 538 (2015) (quoting *Appalachian Poster Adver. Co.*, 89 N.C. App. at 480, 366 S.E.2d at 707).

In the case of *In re D.M.O.*, __N.C.__, 794 S.E.2d 858 (2016), the respondent-mother's parental rights to her son had been terminated for abandonment. To terminate on grounds of abandonment the trial court must find the respondent "willfully" abandoned her child. *Id.* at __, 794 S.E.2d at 861. The trial court in *D.M.O.* found "respondent-mother had a history of substance abuse" and was incarcerated for periods during the determinative six months. *Id.* at __, 794 S.E.2d at 864. The court also found that, during those same months, "respondent-mother failed to exercise visitation and to attend [her son's] sports games, and failed to contact [him] during three of those months." *Id.*

However, the trial court "made no findings establishing whether respondent-mother had made any effort, had the capacity, or had the ability to acquire the capacity, to perform the conduct underlying its conclusion that respondent-mother abandoned [her son] willfully." *Id.* This Court held the trial court's findings were inadequate to support a conclusion of abandonment. Because conflicting evidence was presented at the TPR hearing, and this Court could not determine whether the court's conclusions supported its findings, this Court vacated the TPR order and remanded to the trial court for further findings and conclusions relating to the issue of willfulness. *Id.* at __, 794 S.E.2d at 865-66.

Here, the trial court found:

> 94. That the child has been willfully left by the Respondent parents in foster care or placement outside the home for over 12 months and at the time of the hearing, also demonstrated by clear and convincing evidence that the parents have not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. There is no question about leaving the child in foster care now and I was disappointed in this[.]

The court's finding numbered 94 was followed by the "stream of consciousness" and impossible to follow findings numbered 95 and 96, *supra*.

The order does not contain the necessary findings of fact to support the conclusion that Respondents willfully left L.L.O. in foster care without making reasonable progress under the circumstances to correct the conditions which led to the removal of their child.

According to Respondent-mother's trial testimony, they sought transportation assistance from DSS, but were denied help. They believed DSS was to transport them to the missed appointment, which triggered the removal of L.L.O., and when they failed to visit L.L.O. it was due to lack of transportation. Both Respondents testified they had been regularly applying for work.

While the trial court exercises discretion to credit or disbelieve Respondents' evidence, the court's current findings are inadequate to resolve the conflicting evidence. The order does not contain the required findings to support the conclusion that Respondents willfully failed to make reasonable progress towards correcting the conditions which led to the removal of their child. *See id.*

The court's conclusions that Respondents had failed to make reasonable progress under the circumstances in correcting those conditions which led to the removal of the juvenile are not supported by its findings of fact. We vacate and remand that portion of the court's order. On remand, the court may take additional evidence if necessary. *In re D.R.B.*, 182 N.C. App. at 739, 643 S.E.2d at 81.

We also note the trial court violated N.C. Gen. Stat. § 7B-1109(e) and N.C. Gen Stat. § 7B-1110(a) where its TPR order was not entered until approximately nine months after the completion of the adjudicatory and disposition hearing. N.C. Gen. Stat. § 7B-1109(e) (2015) ("The adjudicatory order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing" or "10 days of the subsequent hearing [to explain the reason for delay] required by this subsection."); N.C. Gen. Stat. § 7B-1110(a) (2015) ("Any order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing . . . . [or] within 10 days of the subsequent hearing [to explain reason for delay] required by this subsection.").

Since we vacate the court's order, we do not need to address Respondents' remaining arguments, asserting any shortcomings with respect to their completion of their case plans were due more to poverty than a willful failure to address the issues. *See* N.C. Gen. Stat. § 7B-1111(a)(2) ("[N]o parental rights shall be terminated for the sole

reason that the parents are unable to care for the juvenile on account of their poverty.").

VI. Conclusion

The trial court failed to enter adequate findings of fact to demonstrate and conclude that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (2) to terminate Respondents' parental rights. We vacate the court's order and remand. *It is so ordered.*

VACATED AND REMANDED.

Judges BRYANT and DAVIS concur.

IN THE MATTER OF T.E.N.

No. COA16-1011

Filed 4 April 2017

Termination of Parental Rights—subject matter jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act

The trial court's order terminating respondent father's parental rights was vacated. The district court lacked subject matter jurisdiction under either relevant prong of the Uniform Child Custody Jurisdiction and Enforcement Act.

Appeal by respondent from order entered 29 April 2016 by Judge Randle L. Jones in Guilford County District Court. Heard in the Court of Appeals 20 March 2017.

Petitioner-appellee mother, pro se.

Robert W. Ewing for respondent-appellant father.

TYSON, Judge.

Respondent-father ("Respondent") appeals from an order terminating his parental rights to his child, T.E.N. We vacate the trial court's order for lack of jurisdiction.

I. Factual Background

In 2005, Respondent and petitioner-mother ("Petitioner") began a relationship. T.E.N. was born out of wedlock in May 2009 in Brick, New Jersey. Respondent and Petitioner lived together until July or August 2009, when Petitioner moved into a women's shelter with T.E.N.

According to trial testimony, Petitioner obtained domestic violence protective orders against Respondent during the course of their relationship. In September 2009, Petitioner obtained a restraining order prohibiting contact by Respondent. The order also provided "parenting time" or visitation for Respondent with T.E.N. These orders were neither introduced into evidence at the termination hearing nor made part of the record on appeal.

On 26 October 2011, Petitioner sought and received a Final Restraining Order, barring Respondent from her residence, place of employment, and barring Respondent from having contact with Petitioner or her friend, K.O. The order was issued from the Ocean County Superior Court, Chancery Division, Family Part ("New Jersey court"), and grants Petitioner temporary custody of T.E.N. On 12 February 2012, the New Jersey court issued an Amended Final Restraining Order, which barred Respondent from being present at T.E.N.'s daycare facility. The Amended Order provides for supervised visitation with the assistance of Respondent's mother.

At some point in 2013, Petitioner sought permission from the New Jersey court to relocate with T.E.N. to North Carolina. In July 2013, the New Jersey court granted Petitioner's request. Petitioner moved to North Carolina in August 2013. Respondent continues to reside in New Jersey.

In October 2013, Respondent sought modification of his visitation arrangement with T.E.N. before the New Jersey court. The court's order, made part of the record on appeal, indicates the court modified the visitation arrangement of a 25 July 2013 order and denied reconsideration of a 28 August 2013 court order. Pursuant to the October order, Respondent was allowed one weekend per month of unsupervised visitation with his son. The parties were ordered to alternate the transportation of T.E.N. between North Carolina and New Jersey. Petitioner was ordered to provide the transportation for the first visit. After this initial visit, Respondent did not visit his son again.

On 6 January 2015, Petitioner filed a petition to terminate Respondent's parental rights. The petition alleged as grounds to terminate that: (1) Respondent willfully abandoned the juvenile; and (2)

Petitioner had custody of the juvenile and Respondent failed without justification to pay for the care, support, and education of the juvenile as required by the custody agreement, for a period of one year or more preceding the filing of the petition. *See* N.C. Gen. Stat. § 7B-1111(a)(4),(7) (2015). Following a hearing, the trial court found the existence of willful abandonment on 29 April 2016 and entered an order terminating Respondent's parental rights. Respondent filed written notice of appeal on 12 May 2016.

II. Subject Matter Jurisdiction

In a termination of parental rights action, the trial court's subject matter jurisdiction is established by N.C. Gen Stat. § 7B-1101.

> The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. Provided, that before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. Provided, that before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 and that process was served on the nonresident parent pursuant to G.S. 7B-1106.

N.C. Gen. Stat. § 7B-1101 (2015). "Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987).

III. Issue

Respondent contends, *inter alia*, the trial court did not acquire subject matter jurisdiction over the termination proceeding under the

provisions of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). N.C. Gen. Stat. § 50A-201 et. seq. We agree.

IV. Standard of Review

"Whether a court has jurisdiction is a question of law reviewable de novo on appeal." *In re J.D.*, 234 N.C. App. 342, 344, 759 S.E.2d 375, 377 (2014) (citation omitted).

V. Analysis

Neither party contests the New Jersey court's initial and continued child custody determinations. Both Petitioner and Respondent referred to multiple New Jersey court orders at the hearing. Only three of the orders issued by the New Jersey court were admitted into evidence at the hearing and made part of the record on appeal.

Under the UCCJEA, once a court makes an initial child custody determination, the state in which that court is located generally has "exclusive continuing jurisdiction over the determination." N.C. Gen. Stat. § 50A-202(a) (2015). The UCCJEA provides the circumstances under which the courts of a second state are permitted to exercise jurisdiction over and modify a prior custody determination from the original state. *See* N.C. Gen. Stat. §§ 50A-202, 203, 204 (2015). "Modification" is defined as "a child-custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination." N.C. Gen. Stat. § 50A-102(11) (2015).

Under N.C. Gen. Stat. § 50A-203, a North Carolina court may not modify an out-of-state custody determination unless two conditions are met. First, the North Carolina court must possess jurisdiction to make an initial determination under N.C. Gen. Stat. § 50A-201(a)(1) or N.C. Gen. Stat. § 50A-201(a)(2). N.C. Gen. Stat. § 50A-203. In this case, both parties agree this first condition is satisfied, as North Carolina was "the home state of [T.E.N.] on the date of the commencement of the proceeding." N.C. Gen. Stat. § 50A-201(a)(1) (2015).

The second condition is met if one of the following occurs:

> (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
>
> (2) A court of this State or a court of the other state determines that the child, the child's parents, and any

> person acting as a parent do not presently reside in the other state.

N.C. Gen. Stat. § 50A-203.

Respondent continues to reside in New Jersey. The Guilford County District Court did not gain jurisdiction over this case through N.C. Gen. Stat. § 50A-203(2), and the district court did not purport to gain jurisdiction pursuant to this subsection. The Termination Order does not list a specific statute as the basis to issue its order.

The court's finding of fact seven states, "[t]he Honorable Melanie Appleby of the New Jersey Family Court, on March 28, 2014, transferred the jurisdiction of the custody proceedings from New Jersey to North Carolina." The trial court apparently concluded it could assert subject matter jurisdiction over the case pursuant to N.C. Gen. Stat. § 50A-203(1).

Under subsection N.C. Gen. Stat. § 50A-203(1), there are two grounds under which the Guilford County District Court would gain jurisdiction. The first is if the New Jersey court had determined it no longer possessed jurisdiction under section 50A-202. The applicable portion of N.C. Gen. Stat. § 50A-202 provides that a court:

> which has made a child-custody determination consistent with G.S. 50A-201 or G.S. 50A-203 has exclusive, continuing jurisdiction over the determination until:
>
> > (1) [it] determines that . . . the child, the child's parents, and any person acting as a parent [no longer] have a significant connection with [that] State and that substantial evidence is no longer available in [that] State concerning the child's care, protection, training, and personal relationships; or
> >
> > (2) [it] or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in [the issuing state].

N.C. Gen. Stat. § 50A-202(a).

" '[T]he original decree State is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree State stating that it no longer has jurisdiction.' " *In re N.R.M.*, 165 N.C. App. 294, 300, 598 S.E.2d 147, 151 (2004) (quoting Official Comment to N.C. Gen. Stat. § 50A-202).

In *In re K.U-S.G.*, 208 N.C. App. 128, 702 S.E.2d 103 (2010), a Pennsylvania court had entered initial orders regarding the custody of two juveniles living within the state. Prior to the petitioners' and the juveniles' move to North Carolina, the Pennsylvania court had entered orders granting legal custody of the juveniles to the petitioners and allowing the respondent supervised visitation. *Id.* at 129-30, 702 S.E.2d at 104. Eventually, the petitioners filed petitions to terminate the respondent's parental rights. *Id.* at 130, 702 S.E.2d at 105. The North Carolina court purported to terminate the respondent's parental rights.

The North Carolina court stated "it had contacted 'the Court of Common Pleas, Fayette County, Juvenile Division and determined that Fayette County no longer wished to retain jurisdiction.' " *Id.* at 134, 702 S.E.2d at 107. The record in the case did not include an order from the Pennsylvania court indicating that it no longer exercised jurisdiction. This Court held the Pennsylvania court did not lose jurisdiction under N.C. Gen. Stat. § 50A-202(a)(1). *Id.*

In the present case, Petitioner testified at the termination hearing that the New Jersey court had transferred jurisdiction to North Carolina in March 2014. No such order was produced, introduced into evidence, or made a part of the record on appeal. Without an order from the New Jersey court relieving itself of jurisdiction, which all parties agree it had previously exercised, the Guilford County District Court lacked any basis to conclude it acquired subject matter jurisdiction over the case pursuant to N.C. Gen. Stat. § 50A-202. *See In re N.R.M.* at 300, 598 S.E.2d at 151 (vacating the trial court's termination order where an Arkansas court made the initial child-custody determination and "there [was] no Arkansas order in the record stating that Arkansas no longer [had] jurisdiction").

N.C. Gen. Stat. § 50A-203(1) also allows a North Carolina court to gain jurisdiction over a child-custody matter initiated in another state, if the other state determined North Carolina to be a more convenient forum under N.C. Gen. Stat. § 50A-207 (2015). Nothing in the *In re K.U.-S.G* record showed the Pennsylvania court had made the determination that North Carolina would be a more convenient forum under UCCJEA § 203(1) (N.C. Gen. Stat. § 50A-203(1)). Since the district court lacked subject matter jurisdiction under either relevant prong of the UCCJEA, this Court vacated the North Carolina court's termination order. *In re K.U.-S.G.*, 208 N.C. App. at 135, 702 S.E.2d at 108. Here, no order in the record demonstrates that the New Jersey court ever made such a convenient forum determination.

Since neither method of obtaining jurisdiction under N.C. Gen. Stat. § 50A-203(1) is satisfied, the Guilford County District Court erroneously determined it had acquired subject matter jurisdiction. *See id.* The order of the trial court terminating Respondent's parental rights is vacated. In light of this ruling, it is unnecessary for us to address Respondent's remaining arguments on appeal.

VI. Conclusion

The Guilford County District Court never acquired subject matter jurisdiction to enter the order appealed from. Without any jurisdictional basis, the order terminating Respondent's parental rights is vacated. *It is so ordered.*

VACATED.

Judges BRYANT and DAVIS concur.

LOIS MIDGETT KELLEY, Plaintiff
v.
THOMAS MICHAEL KELLEY, Defendant

No. COA16-425

Filed 4 April 2017

1. Appeal and Error—interlocutory orders and appeals—denial of summary judgment—substantial right

The trial court's denial of defendant's motion for summary judgment affected a substantial right and was immediately appealable under N.C.G.S. §§ 1-277 and 7A-27(d). The summary judgment order implicitly determined a material issue later courts would be bound by, even if the trial court claimed it was not determining the law of the case.

2. Divorce—separation agreement—void amendment—failure to notarize—no ratification or estoppel

The trial court erred in a divorce case by denying defendant's motion for summary judgment. The purported 2003 Amendment or modification to the 1994 separation agreement was void since it was not notarized. Further, a void contract cannot be the basis for ratification or estoppel.

KELLEY v. KELLEY

[252 N.C. App. 467 (2017)]

Appeal by defendant from order entered 5 November 2015 by Judge Gordon Miller in Forsyth County District Court. Heard in the Court of Appeals 9 January 2017.

Morrow Porter Vermitsky Fowler & Taylor PLLC, by John C. Vermitsky, for plaintiff-appellee.

Woodruff Law Firm, P.A., by Carolyn J. Woodruff and Jessica S. Bullock, for defendant-appellant.

TYSON, Judge.

Thomas Michael Kelley ("Defendant") appeals from the trial court's denial of his motion for summary judgment. We address the merits of Defendant's interlocutory appeal as affecting a substantial right. We reverse the trial court's order and remand.

I. Background

Plaintiff and Defendant were married in 1982. They entered into a Separation and Property Settlement Agreement upon their separation in 1994 ("the 1994 agreement") and divorced in 1999.

The 1994 agreement resolved issues of child support, alimony and property settlement, and waived further claims of the parties on the issues of alimony and equitable distribution. Article XXXI of the 1994 agreement is entitled "Modification and Waiver," and states, "[m]odification or waiver of any of the provisions of this Agreement shall be effective only if made in writing and executed with the same formality as this Agreement." Both parties' signatures were affixed and notarized on the 1994 agreement.

In 2003, approximately nine years after the parties separated and four years after their divorce, the parties purportedly signed a document entitled "Part 1 Provisions for Separation" ("the 2003 Amendment"). The 2003 Amendment is not notarized. Both parties were represented by counsel when the 1994 Amendment was executed, but no attorneys were involved on behalf of either party in the execution of the 2003 Amendment.

On 11 July 2014, approximately eleven years after the parties had signed the 2003 Amendment, Plaintiff filed suit against Defendant and alleged breach of the 2003 Amendment. Defendant filed a motion for partial summary judgment, and raised, *inter alia*, the invalidity of the

2003 Amendment. Plaintiff filed a cross-motion for summary judgment, which sought enforcement.

The trial court heard the parties' arguments over two days and determined genuine issues of material fact existed concerning both parties' claims. The court denied both parties' motions for summary judgment. The order specifically states the court found the 2003 Amendment was "not void as a matter of law." This was the only specific finding made by the trial court. The trial court did not certify its order as immediately appealable under Rule 54(b). N.C. Gen. Stat. § 1A-1, Rule 54(b) (2015). Defendant appeals.

II. Jurisdiction

[1] "Denial of summary judgment is interlocutory because it is not a judgment that 'disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.' " *Snyder v. Learning Servs. Corp.*, 187 N.C. App. 480, 482, 653 S.E.2d 548, 550 (2007) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950)). Defendant acknowledges his appeal is interlocutory, but argues the trial court's denial of his motion for summary judgment affects a substantial right and is immediately appealable under N.C. Gen. Stat. §§ 1-277 and 7A-27(d). We agree.

N.C. Gen. Stat. § 1-277 provides:

> (a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, *which affects a substantial right claimed in any action or proceeding*; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

N.C. Gen. Stat. § 1-277(a) (2015) (emphasis supplied); *see also* N.C. Gen. Stat. § 7A-27(b)(3) (2015) (providing for an appeal of right from an interlocutory order which "[a]ffects a substantial right").

Our Court has heard interlocutory appeals where a defendant was precluded from presenting affirmative defenses. *See Faulconer v. Wysong & Miles Co.*, 155 N.C. App. 598, 598-600, 574, S.E.2d 688, 690 (2002); *Estate of Harvey v. Kore-Kut, Inc.*, 180 N.C. App. 195, 198, 636 S.E.2d 210, 212 (2006) (noting that an order granting a motion to strike

is interlocutory). Here, the trial court's order states: "The Court specifically finds that the contentions of Defendant that the modification to the separation agreement is void *ab initio* fail and that the Contract is not void as a matter of law." Defendant argues the order affects a substantial right, because the denial of his motion for summary judgment "strikes an entire defense." We agree.

The trial court found genuine issues of material fact exist, which precluded summary judgment for either party. If the order had stopped there, there would be no need to review this order at this time on appeal. In fact, Plaintiff's counsel noted as much when the trial court was announcing the ruling and discussing the provisions of the order to be entered:

> [PLAINTIFF'S COUNSEL]: And, Your Honor, for the Appellate Court purposes, just so everybody's aware, I'm going to prepare both -- denying both parties' motions for summary judgment because what Your Honor just ruled.
>
> THE COURT: In essence, yes.
>
> [PLAINTIFF'S COUNSEL]: And I'm going to do it the way the Court of Appeals yelled at me last time because I didn't do it and just say "Court finds there's genuine issue" -- like just that statement and then that's it.

We are unsure which case Plaintiff's counsel perceived that this Court "yelled" at him, and we doubt this Court intended to "yell." However, counsel is correct that an order denying summary judgment due to "genuine issue as to any material fact" should not include any "findings of fact." *See Winston v. Livingstone Coll., Inc.*, 210 N.C. App. 486, 487, 707 S.E.2d 768, 769 (2011) ("The order of the trial court granting summary judgment contains findings of fact. The appellate courts of this state have on numerous occasions held that it is not proper to include findings of fact in an order granting summary judgment."); N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015).

Here, however, the trial court specifically directed the denial of summary judgment order to include more, because "one issue . . . controls all the others." The trial court directed that the order include a finding and conclusion that the 2003 Amendment was "not void as a matter of law":

> THE COURT: I'll keep my comments to just the one issue that I think controls all the others. I've already commented on what I think the other pieces are and issues that may or

> not exist. But I think all I need to really rule on is whether or not this is void as a matter of law.
>
> The Court finds that the contract is not void as a matter of law and, therefore, denies the Defendant's motion. I -- I'm not going to rule in your favor, [Plaintiff], on the others. I think you were wanting me to make determinations I can't make. I guess, [Plaintiff's Counsel], you need to draft the order, make sure it's shared with [Defense Counsel] prior to being presented to me.
>
> . . . .
>
> THE COURT: Well, but I -- I want it so it's -- the issue's clear.
>
> [PLAINTIFF'S COUNSEL]: I'll say that it's not void.
>
> THE COURT: That it's -- because that's the key, I think.

The trial court was correct. Whether the 2003 Amendment is void is "the key," but by including this specific conclusion of law, although entitled a "finding" in the order, the trial court, in effect, ruled upon the primary legal issue in this case. In so doing essentially eliminated Defendant's defense to Plaintiff's claim. Because the trial court's order eliminated Defendant's defense to the purported validity of the 2003 Amendment, the order affects a substantial right and is immediately appealable. *See Faulconer*, 155 N.C. App. at 600, 574 S.E.2d at 690-91.

Faulconer involved an action to enforce the terms of a contract. *Id.* at 599, 574 S.E.2d at 690. The plaintiff-employee filed a complaint for breach of contract against his former employer, the defendant-employer, alleging he was entitled to various payments under their contract. *Id.* at 598-599, 574 S.E.2d at 690. The defendant answered and raised several affirmative defenses. The plaintiff filed a motion to strike the affirmative defenses. *Id.* at 599-600, 574 S.E.2d at 690. The trial court granted the motion to strike the defenses, and defendant appealed. *Id.* at 600, 574 S.E.2d at 690.

"[The] [d]efendant present[ed] the following question on appeal: Did the trial court err in granting plaintiff's motion to strike defendant's affirmative defenses?" *Id.* This Court determined the defendant's appeal was proper.

> Ordinarily, Rule 4(b) of the Rules of [Appellate Procedure] precludes an appeal from an order

> striking or denying a motion to strike allegations contained in pleadings. However, when a motion to strike an entire further answer or defense is granted, an immediate appeal is available since such motion is in substance a demurrer.

Id. at 600, 574 S.E.2d at 690-91 (citing *Bank v. Easton*, 3 N.C. App. 414, 416, 165 S.E.2d 252, 254 (1969)) (internal quotation marks omitted).

Our current rules of procedure no longer includes demurrers. As this Court noted in *Cassels v. Ford Motor Co.*:

> When Rule 7(e) [in 1967] abolished demurrers and decreed that pleas for insufficiency shall not be used it also abolished the concept of a defective statement of a good cause of action. Thus, generally speaking, the motion to dismiss under Rule 12(b)(6) may be successfully interposed to a complaint which states a defective claim or cause of action but not to one which was formerly labeled a defective statement of a good cause of action. For such complaint, as we have already noted, other provisions of Rule 12, the rules governing discovery, and the motion for summary judgment provide procedures adequate to supply information not furnished by the complaint.

10 N.C. App. 51, 54-55, 178 S.E.2d 12, 14 (1970) (quotation marks omitted); *see* N.C. Gen. Stat. § 1A-1, Rule 7(c) (2015) (noting 1967 as the year the rule was added). Although demurrers are no longer part of North Carolina's procedure, *see id.*, our Court has continued to rely upon principles and reasoning contained in cases prior to 1967, and to rule at times that a trial court's order was "in substance a demurrer." *Faulconer*, 155 N.C. App. at 600, 574 S.E.2d at 691.

Here, the trial court determined, "as a matter of law" that the 2003 Amendment did not need to be acknowledged before a certifying officer or notarized in order to be a valid and enforceable contract. Defendant's defense, that the 2003 Amendment is void because the original 1994 contract required any modifications or amendments thereto to be formally notarized was, in effect, stricken by the trial court's order. The summary judgment order implicitly determined a material issue later courts will be bound by, even if the trial court claimed it was not determining the law of the case. Since the trial court's order was "in substance a demurrer[,]" *id.*, the order affects a substantial right. Defendant's appeal is properly before us. N.C. Gen. Stat. § 7A-27(b)(3); *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 194, 767 S.E.2d 374, 376 (2014)

("Immediate appeal is available from an interlocutory order that affects a substantial right.").

III. Issues

[2] Defendant argues the trial court erred by denying Defendant's motion for summary judgment where the 2003 Amendment is void *ab initio*, not enforceable, and any claim for breach of the 1994 agreement is precluded by the statute of limitations.

IV. Denial of Defendant's Motion for Summary Judgment

Defendant argues the trial court erred by denying his motion for summary judgment and asserts the 2003 Amendment was not acknowledged in the manner of equal dignity required by the 1994 agreement and under N.C. Gen. Stat. § 52-10.1. Defendant asserts this defect renders the 2003 Amendment void *ab initio*. We agree.

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. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial. Nevertheless, if there is any question as to the weight of evidence summary judgment should be denied.

In re Will of Jones, 362 N.C. 569, 573-74, 669 S.E.2d 572, 576-77 (2008) (internal citations, quotation marks, and brackets omitted).

B. Whether the 2003 Amendment was void *ab initio*

Both parties filed motions for summary judgment. The trial court considered the pleadings, briefs, and arguments of counsel at the hearing. In Plaintiff's amended complaint she alleged, "After their divorce, the parties executed an Amendment to said Separation and Property Settlement Agreement on May 29, 2003, a copy of which is attached hereto as Exhibit A and incorporated herein by reference[.]"

The first page of this document states as follows:

> AMENDMENT TO SETTLEMENT AGREEMENT DATED NOVEMBER 11, 1994
>
> MAY 29, 2003
>
> **EXCEPT FOR AMENDMENTS CONTAINED HEREIN, THE ORIGINAL SETTLEMENT AGREEMENT DATED 11/11/94 WILL REMAIN IN EFFECT AS WRITTEN**

Both parties signed the last page of the 2003 Amendment on a line entitled "Accepted by[.]"

The remaining pages of the 2003 Amendment include sections, which reference the other sections of the original agreement it purports to amend. The Amendment is clearly intended to change certain portions of the agreement, leaving all other original provisions intact. The first two subsections contain the headings "Article I," then "Article V," without Articles II-IV. It does not appear Articles II-IV were intended to be amended by the 2003 Amendment.

The stated characterization of this document as an "Amendment To Settlement Agreement" is important. Plaintiff argues on appeal: 1) this document is a free-standing contract between two unmarried adults; 2) the law applicable to separation agreements does not apply; and, 3) notarization was unnecessary. Plaintiff asserts the modification is just an ordinary contract, even though her amended complaint expressly describes it as "an Amendment to said Separation and Property Settlement Agreement[.]" Plaintiff contends the Amendment is "a signed, bargained-for exchange, supported by adequate consideration between two non-married, capable adults," and "only contracts between husbands and wives made during their coverture must be in writing and acknowledged before a certifying officer."

While Plaintiff argues the statutory requirements for execution of a separation agreement may not necessarily apply to modifications of that agreement, the parties also remain bound by the express terms of the original properly signed and notarized 1994 agreement. That agreement expressly provides that "[m]odification or waiver of any of the provisions of this Agreement shall be effective only if made in writing and executed with the same formality as this Agreement." By the express terms of the 1994 agreement alone, any modification to the 1994 agreement would have to be "executed with the same formality," or with equal dignity to the original agreement, including notarization.

"To be valid, a separation agreement must be in writing and acknowledged by both parties before a certifying officer. The statute further provides that a person acting in the capacity of a notary public may serve as a certifying officer." *Lawson v. Lawson*, 321 N.C. 274, 276, 362 S.E.2d 269, 271 (1987) (citation and quotation marks omitted); *see also* N.C. Gen. Stat. § 52-10.1 (2015) (requiring separation agreements to be acknowledged by a certifying officer).

"In North Carolina the modification of the original separation agreement must be pursuant to the formalities and requirements of G.S. 52-10.1." *Greene v. Greene*, 77 N.C. App. 821, 823, 336 S.E.2d 430, 432 (1985). More recently, this Court has reiterated the requirements for execution of a modification of a separation agreement:

> A separation agreement must conform to the formalities and requirements of N.C. Gen. Stat. § 52-10.1. Specifically, the separation agreement must be in writing and acknowledged by both parties before a certifying officer. An attempt to orally modify a separation agreement fails to meet the formalities and requirements of G.S. 52-10.1. *Thus, a modification of a separation agreement, to be valid, must be in writing and acknowledged, in accordance with the statute.*

Jones v. Jones, 162 N.C. App. 134, 137, 590 S.E.2d 308, 310 (2004) (citations, quotation marks, and brackets omitted) (emphasis supplied).

While Plaintiff is correct that "two non-married, capable adults" can enter into most types of contracts without the statutory formalities required of a separation agreement, it is undisputed that the 2003 agreement is an "AMENDMENT" to the original 1994 agreement entitled, "SEPARATION AGREEMENT AND PROPERTY SETTLEMENT[.]" The statute treats modifications to separation agreements arising out of a marriage differently from ordinary contracts between two adults, even if those adults are divorced. *See id.*

Plaintiff argues the law requiring notarization of a modification or amendment of a separation agreement applies only "during their coverture." We find no requirement of coverture in the cases addressing modification of separation agreements, nor does Plaintiff cite or direct this Court to any such authority. Plaintiff contends that "[t]he court has explicitly held that the section relied upon by Appellant, N.C.G.S. § 52-10, 'requires acknowledgment only during coverture, the period of marriage.' *Howell v. Landry*, 96 N.C. App. 516, 386 S.E.2d 2d 610 (1989)." Plaintiff disregards the remaining portion of the sentence in

Howell, which provides acknowledgment is required pursuant to N.C. Gen. Stat. § 52-10 "only during coverture, the period of marriage, *it does not require acknowledgment for premarital agreements*." *Howell v. Landry*, 96 N.C. App. 516, 530, 386 S.E.2d 610, 618 (1989) (emphasis added). *Howell* plainly addressed the validity of premarital contracts prior to the bonds of marriage, not thereafter. *See id.*

Plaintiff also attempts to distinguish *Greene v. Greene*. While the marital status of the parties at the time of that case is not clearly stated, it would appear that the parties were already divorced when the alleged modification occurred. The substance of the alleged oral modification was the ex-wife had agreed to allow her ex-husband to stop paying alimony pursuant to the terms of the separation agreement as a "wedding present" upon his marriage to another woman. *See Greene*, 77 N.C. App. 821, 336 S.E.2d 430. In short, both the law and the terms of the agreement itself clearly requires any modifications must be notarized to be enforceable. *See id.* It is obvious and undisputed that the 2003 Amendment is not notarized.

We recognize it is possible the modification was signed before a certifying official who could later notarize it. We mention this possibility because Plaintiff argued it at the hearing and a dispute of material facts could potentially be raised. During the hearing, Plaintiff's counsel argued, "She's wrong about *Lawson* saying if it's invalid it never can work because there are cases that say if you sign it and the notary remembers you signing it but it's not notarized, it's valid. So the question – she testified she signed it in a lawyer's office where there's lawyers and notaries everywhere. That's a factual dispute as to whether it's even notarized."

In *Lawson*, the certificate of the certifying officer "was added some two years after the document had been signed." 321 N.C. at 275, 362 S.E.2d at 270. This Court considered the facts and determined:

> [T]he affidavit submitted by the plaintiff indicated to the trial court that plaintiff would testify that both she and defendant executed the separation agreement in the presence of Mr. Radeker after being advised that Radeker was a notary public. Mr. Radeker's testimony during his deposition tends to confirm the evidence stated in plaintiff's affidavit, while defendant's affidavit states he did not acknowledge the separation agreement. Defendant, however, does not deny that he signed the document in the presence of Radeker. The facts as stated by plaintiff and Mr. Radeker and not denied by defendant constitute

> a forecast of competent evidence which would establish acknowledgement as a matter of law.

Id. at 279, 362 S.E.2d at 272-73. In *Lawson*, no genuine issue of material fact challenged whether the husband *did* sign the document before the notary, although the certification was added to the agreement later. Summary judgment should have been granted in favor of the wife who sought to recover under the separation agreement. *Id.* at 274, 362 S.E.2d at 269.

Here, Plaintiff argued the forecast of evidence could show she signed the document in an office with a certifying official, so as in *Lawson*, the individual could simply add the certificate later:

> [PLAINTIFF'S COUNSEL]: But the jury will decide that. That's the point of factual determination. You can't find those facts as a matter of law on summary judgment. In fact, on her summary judgment you have to assume my facts are correct. You have to assume that she signed it in the office. You have to take all those things as absolutely correct and accurate unless there's no scintilla of evidence to support.
>
> THE COURT: But you want me then to just by mere conjecture assume that, well, there was a notary available and possibly you're going to be able to argue that they meant to do it but they didn't. That's not --
>
> [PLAINTIFF'S COUNSEL]: No, you don't -- you don't have to assume either way.
>
> THE COURT: That's not --
>
> [PLAINTIFF'S COUNSEL]: You just have --
>
> THE COURT: -- before the Court.
>
> [PLAINTIFF'S COUNSEL]: You just have to say that you can't decide where she signed it. You can't make that choice. A jury can.
>
> THE COURT: Let's say she signed it on the surface of the moon. What difference will it make?
>
> [PLAINTIFF'S COUNSEL]: Well, it does matter according to case law whether she signed it around or in front of a notary. That does matter. But the other thing, Your Honor,

> is, in this case and in this situation, you would actually -- it's actually reversible to make the decision for the reason [Defense Counsel] was asking you to for judicial economy. It's either void or it's not.

Contrary to counsel's argument, the standard for denial of summary judgment was not simply that the trial judge "can't decide where," or before whom, plaintiff signed the modification, since plaintiff had failed to forecast any evidence whatsoever that the parties signed in the presence of a certifying official.

Plaintiff's deposition testimony does not provide even a scintilla of evidence tending to show a notary was present when she and Defendant signed the modification, even if "signed it in a lawyer's office where there's lawyers and notaries everywhere." Plaintiff testified in her deposition about when they signed the 2003 Amendment:

> A: I think that probably what we did do was that we met at Michael's office -- we often did -- and probably signed it there.
>
> Q: You don't remember, though?
>
> A: I really don't.
>
> Q: And you agree that there's no notary page.
>
> A: I don't see a notary page. There was never a mention of a notary or the need for one.

Even taking Plaintiff's forecast of evidence in the light most favorable to her and drawing all possible favorable inferences from it, no evidence shows a notary or anyone else witnessed the signing of the 2003 Amendment. *See Furr v. K-Mart Corp.*, 142 N.C. App. 325, 327, 543 S.E.2d 166, 168 (2001) ("When a trial court rules on a motion for summary judgment, the evidence is viewed in the light most favorable to the non-moving party, and all inferences of fact must be drawn against the movant and in favor of the nonmovant." (citations, quotation marks, and brackets omitted)). From the transcript of discussions between the trial court and counsel, it appears the trial court also did not find a potential argument could be made that the execution of the 2003 modification had been witnessed before a "certifying officer" and could later be notarized, as in *Lawson*. *See Lawson*, 321 N.C. at 275, 362 S.E.2d at 270.

The 2003 modification is not notarized, and not a scintilla of evidence was tendered to suggest that it ever could be. The trial court erred as

a matter of law in concluding that the 2003 Amendment was "not void as a matter of law."

V. Plaintiff's Estoppel Argument

Plaintiff argues that, even if the 2003 Amendment is void, she may still recover based upon equitable theories, including estoppel and ratification, because Defendant had performed for eleven years under the terms of the 2003 Amendment with knowledge it had not been notarized. We disagree.

It is well settled that a void contract cannot be the basis for ratification or estoppel. *See Bolin v. Bolin*, 246 N.C. 666, 669, 99 S.E.2d 920, 923 (1957) ("A void contract will not work as an estoppel."); *see also Jenkins v. Gastonia Mfg. Co.*, 115 N.C. 535, 537, 20 S.E. 724, 724 (1894) ("[W]e have held that such contract, not being . . . in compliance with the statute, and being executory in its nature, was void and incapable of ratification."). Plaintiff's argument is overruled.

VI. Conclusion

A substantial right of Defendant's has been adversely affected since Defendant's main and prevailing defense was rejected "as a matter of law" by the trial court. Because the purported 2003 Amendment or modification to the 1994 separation agreement is void, we reverse the trial court's order denying summary judgment in favor of Defendant. We remand for entry of summary judgment for Defendant with regard to all of Plaintiff's claims asserted under the 2003 Amendment, and for further proceedings with regard to Plaintiff's remaining claims, if any. *It is so ordered.*

REVERSED AND REMANDED.

Chief Judge McGEE and Judge STROUD concur.

STATE OF NORTH CAROLINA
v.
TREVON DEANDRE RICE, DEFENDANT

No. COA16-906

Filed 4 April 2017

Possession of Stolen Property—possession of stolen goods—firearms—nonexclusive possession of automobile—constructive possession

The trial court did not err by denying defendant's motions to dismiss the charges of possession of stolen goods. Although defendant did not have exclusive possession of the pertinent van, there were other incriminating circumstances showing defendant constructively possessed the stolen firearms.

Appeal by defendant from judgments entered 24 February 2016 by Judge Alma L. Hinton in Edgecombe County Superior Court. Heard in the Court of Appeals 23 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Jason R. Rosser, for the State.

Mary McCullers Reece for defendant-appellant.

MURPHY, Judge.

Trevon Deandre ("Defendant") appeals from his convictions for two counts of possession of stolen goods in violation of N.C.G.S. § 14-71.1 (2015). On appeal, he contends that the trial court erred by denying his motions to dismiss the charges on the ground that the State failed to offer sufficient evidence that he constructively possessed two stolen firearms that were found in a van he had rented. After careful review, we reject Defendant's arguments and conclude that he received a fair trial free from error.

Factual Background

The State presented evidence at trial tending to establish the following facts: On 26 April 2014, Ronald Bryant called the Rocky Mount Police Department to report that his home had been broken into and that various items of his personal property, including his .9 millimeter Smith & Wesson handgun ("the Smith & Wesson"), had been stolen. Eleven days

later on 7 May 2014, Christian Boswell's home in Rocky Mount was broken into and, among other items of personal property, Boswell's .380 millimeter Kel-Tec semi-automatic pistol ("the Kel-Tec") was stolen.

On the same day Boswell's home was robbed, Terry Reeves ("Reeves") was driving by Brandy Braswell's house in Rocky Mount and noticed that a van was parked in the driveway. He returned and observed that the van's rear doors were open and he saw two men walking around the house. Upon seeing Reeves, the two men ran back to the van, pulled onto Flood Store Road, and took off. Reeves was, however, able to get the van's license plate number before he lost sight of it.

Detective Jack Sewell ("Detective Sewell") with the Edgecombe County Sheriff's Office was assigned as the lead investigator on the case. Upon looking into the license plate number of the van, Detective Sewell determined that it was owned by H & J Auto Sales Company ("H & J"). Detective Sewell drove to H & J and spoke with the owner who informed him that the van in question had been rented to Shirelanda Clark ("Clark").

Detective Sewell reached out to Clark who informed him that she, in turn, had rented the van to Defendant and Dezmon Bullock ("Bullock"). She stated that Defendant had paid her $35.00 to use the van and that he was going to return it to her on 8 May 2014. Detective Sewell asked Clark to call him if Bullock or Defendant contacted her again.

On 8 May 2014, Clark reached out to Detective Sewell and told him that Defendant had called her and asked to rent the van for a few more days and that he had arranged to meet her close to the car lot shortly. Detective Sewell drove to the lot to meet with Clark and called Officer Jill Tyson ("Officer Tyson") to assist him as backup.

Defendant arrived and parked the van around the corner from the car lot and walked over to Clark while Bullock, who had accompanied Defendant, remained in the vehicle. Officer Tyson parked her patrol vehicle behind the van while Detective Sewell confronted Defendant in the parking lot.

Detective Sewell, Clark, and Defendant walked over to the van, and while they were approaching, Bullock exited the vehicle. Defendant, Clark, and Bullock all gave Detective Sewell and Officer Tyson permission to search the van. Detective Sewell and Officer Tyson began searching the vehicle and discovered, among other items, a new basketball goal still in its box which Defendant claimed ownership of, for which he said he had lost the receipt.

After claiming ownership of the basketball goal, Defendant suddenly and abruptly stated that he had an appointment and had to leave. Defendant then left the area leaving his personal property — including the basketball goal — behind.

Officer Tyson continued her consent search of the van and found Bryant's Smith & Wesson underneath the driver's seat of the vehicle. She also discovered several cameras, an alarm clock, assorted pieces of a gaming system, cigars, and a set of scales in the van. Officer Tyson then found Boswell's Kel-Tec underneath the front passenger seat.

Warrants were issued and Defendant was arrested. On 8 September 2014, Defendant was indicted on charges of breaking and entering Boswell's residence, larceny after breaking and entering, and possession of a stolen firearm. On 8 June 2015, a superseding indictment was filed in relation to these charges. On 13 October 2014, Defendant was also indicted for possession of a stolen firearm in connection with Bryant's Smith & Wesson. A superseding indictment as to this charge was also subsequently filed on 8 June 2015.

A jury trial was held before the Honorable Alma L. Hinton in Edgecombe County Superior Court on 23 February 2016 and 24 February 2016. At trial, Defendant moved at the close of the State's evidence and at the close of all of the evidence to dismiss the charges of possession of stolen goods on the ground that he did not constructively possess either of the stolen firearms. The trial court denied Defendant's motions.

The jury found Defendant guilty of both counts of felonious possession of stolen goods as to the firearms and acquitted Defendant of the felony breaking and entering and felony larceny charges. The trial court sentenced Defendant to consecutive sentences of 6 to 17 months imprisonment. Defendant gave oral notice of appeal in open court.

Analysis

Defendant argues on appeal that the trial court erred in denying his motions to dismiss the possession of stolen goods charges. Specifically, he contends that the State failed to present sufficient evidence to establish that he constructively possessed either the Kel-Tec or the Smith & Wesson that were found in the van he was renting. We disagree.

> The trial court's denial of a motion to dismiss is reviewed *de novo* on appeal. Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense

> charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.

State v. Pressley, 235 N.C. App. 613, 616, 762 S.E.2d 374, 376 (internal citations and quotation marks omitted), *disc. review denied*, 367 N.C. 829, 763 S.E.2d 382 (2014). Furthermore, "[w]hen ruling on a motion to dismiss for insufficient evidence, the trial court must consider the record evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Worley*, 198 N.C. App. 329, 333, 679 S.E.2d 857, 861 (2009).

It is well settled that:

> The essential elements of felonious possession of stolen property are: (1) possession of personal property, (2) which was [feloniously stolen], (3) the possessor knowing or having reasonable grounds to believe the property to have been [feloniously stolen], and (4) the possessor acting with a dishonest purpose.

State v. McQueen, 165 N.C. App. 454, 459, 598 S.E.2d 672, 676 (2004), *disc. review denied*, 359 N.C. 285, 610 S.E.2d 385 (2005). "Possession of stolen goods may be either actual or constructive." *State v. Phillips*, 172 N.C. App. 143, 146, 615 S.E.2d 880, 882 (2005). Our Supreme Court has maintained that "[a] defendant constructively possesses contraband when he or she has the intent and capability to maintain control and dominion over it." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citation and quotation marks omitted).

Here, Defendant argues that because he did not have exclusive control over the van — given that Bullock also had the ability to control the vehicle — he cannot have constructively possessed the stolen Kel-Tec and Smith & Wesson without other incriminating circumstances. While Defendant is correct that he did not have exclusive possession of the van as he did, in fact, possess it jointly with Bullock, there were other incriminating circumstances that would allow a determination that Defendant constructively possessed the stolen firearms.

We have consistently maintained that "unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *State v. Hudson*, 206 N.C. App. 482, 489-90, 696 S.E.2d 577, 583 (citation, quotation marks, and brackets omitted), *disc. review denied*, 364 N.C. 619, 705 S.E.2d 360 (2010).

> Incriminating circumstances relevant to constructive possession include evidence that defendant: (1) owned other items found in proximity to the contraband; (2) was the only person who could have placed the contraband in the position where it was found; (3) acted nervously in the presence of law enforcement; (4) resided in, had some control of, or regularly visited the premises where the contraband was found; (5) was near contraband in plain view; or (6) possessed a large amount of cash.
>
> Evidence of conduct by the defendant indicating knowledge of [contraband] or fear of discovery is also sufficient to permit a jury to find constructive possession. Our determination of whether the State presented sufficient evidence of incriminating circumstances depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the questions will be for the jury.

State v. Alston, 193 N.C. App. 712, 716, 668 S.E.2d 383, 386-87 (2008) (internal citations, quotation marks, and emphasis omitted), *aff'd per curiam*, 363 N.C. 367, 677 S.E.2d 455 (2009).

At trial, Detective Sewell testified as follows:

> Q. So what happened after you took down their personal information?
>
> A. I asked Ms. Clark and Mr. Bullock and Mr. Rice if it was okay if I conducted a search of the inside of the van. They said, okay. We opened up the hatchback to the back of the van and located several items on the inside.
>
> Q. Do you have any recollection about what type of items they were?
>
> A. Yes, there was a basketball goal set still in a box, several cameras, an Ipod, some chisels, other items inside the van. I started questioning the subjects about the items inside the van.
>
> Q. And did Mr. Rice make any comment about any of the property inside the van?
>
> A. Mr. Rice said he had bought the basketball goal at a Walmart, but had no receipt. It was still in the box.

Q. And without saying anything that Mr. Bullock may or may not have said, did you ask him about anything inside the van as well?

A. Yes, sir, I did.

Q. What happened next?

A. Mr. Rice said he had to leave, that he had an appointment to make and he needed to leave. Well, at that time, I didn't have any evidence to charge him with a crime, no evidence of a crime so I let him go.

Q. So at that initial point, he wasn't under arrest.

A. He was not under arrest.

Q. And he did, in fact, leave.

A. He did.

Here, we are satisfied that multiple indications of incriminating circumstances were present so as to survive Defendant's motion to dismiss. The State presented evidence of (1) Defendant's nervous disposition; (2) the fact that Defendant admitted ownership of the basketball goal in proximity to the stolen firearms; (3) had control over the van in which the stolen property was found by way of his agreement with Clark to rent the van for $35.00; and (4) exhibited irrational conduct tending to indicate he was fearful that the firearms would be discovered during the course of the search — specifically his sudden and abrupt departure from the area when Detective Sewell and Officer Tyson began the search of the van for an appointment he stated he had just remembered, in the process leaving behind his personal property for which he did not return.

A rational juror could have concluded that Defendant suddenly leaving the area as soon as the search commenced amounted to a fearful apprehension on his part that Detective Sewell or Officer Tyson would ultimately locate the stolen firearms in the van which he controlled. *See Hudson*, 206 N.C. App. at 490, 696 S.E.2d at 583 ("Examples of incriminating circumstances include a defendant's nervousness or suspicious activity in the presence of law enforcement."). Furthermore, even assuming that Defendant did, in fact, suddenly remember that he had an actual *bona fide* appointment, we note that otherwise innocent explanations for suspicious and incriminating behavior do not entitle Defendant to the granting of his motion to dismiss. *See State v. Tirado*, 358 N.C. 551,

582, 599 S.E.2d 515, 536 (2004) ("Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. The jurors must decide whether the evidence satisfies them beyond a reasonable doubt that the defendant is guilty." (internal citation, quotation marks, and alteration omitted)), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). The State presented sufficient evidence that Defendant constructively possessed the stolen firearms.

Because Defendant limits his argument on appeal exclusively as to whether the State established that he constructively possessed the firearms, we need not address the remaining elements of the offense of possession of stolen goods.

Conclusion

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

NO ERROR.

Judges STROUD and DILLON concur.

STATE OF NORTH CAROLINA
v.
QUINTIS TRAVON SPRUIELL

No. COA16-639

Filed 4 April 2017

Constitutional Law—effective assistance of counsel—argument not made on appeal

A motion for appropriate relief (MAR) ruling overturning a conviction was reversed where defendant had been convicted of felony murder based on discharging a weapon into occupied property; the conviction was based on defendant having fired a single shot into a parked car at close range, killing the victim at whom he aimed; on direct appeal to the Court of Appeals, appellate counsel did not raise the issue of whether discharging a firearm into an occupied vehicle could serve as the predicate felony on these facts; the conviction was upheld by the Court of Appeals; and, after a MAR hearing, a trial court judge vacated the conviction. Despite opinions discussing a footnote

in a prior case, neither the North Carolina Supreme Court nor the Court of Appeals had ever expressly recognized an exception to the felony murder rule for discharging a weapon into occupied property. While defendant argued neither court had foreclosed the possibility of that exception, that could not be made into the conclusion that there was a reasonable probability that defendant would have prevailed on appeal if appellate counsel had made the argument.

Appeal by the State from order entered 2 December 2015 by Judge C. Winston Gilchrist in Lee County Superior Court. Heard in the Court of Appeals 30 November 2016.

Attorney General Joshua H. Stein, by Senior Deputy Attorney General Robert C. Montgomery, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant-appellee.

DAVIS, Judge.

Quintis Travon Spruiell ("Defendant") was convicted of first-degree murder under the felony murder rule after he fired a single shot into a parked car at close range, striking and killing the victim. This case presents the issue of whether Defendant received ineffective assistance of counsel on direct appeal when his appellate counsel failed to argue that it was error to instruct the jury on felony murder based upon the underlying felony of discharging a weapon into occupied property given that Defendant only fired a single shot at a single victim. The State appeals from the trial court's order granting Defendant's motion for appropriate relief ("MAR") and vacating his convictions for first-degree murder and discharging a weapon into occupied property. Because we conclude that Defendant was not prejudiced by his counsel's failure to raise this argument, we reverse.

Factual and Procedural Background

On the evening of 1 November 2005, Jose Lopez drove Ricardo Sanchez to a car wash in Sanford, North Carolina where Sanchez planned to complete a drug transaction with Defendant. When they arrived and parked Lopez's Ford Explorer, Lopez remained in the driver's seat while Sanchez sat in the rear passenger side seat with the window rolled down.

After Sanchez called Defendant over to the vehicle, Defendant and Shawn Hooker approached the Explorer from the passenger side.

Defendant and Sanchez proceeded to argue about "money and about drugs" for several seconds. Defendant then aimed a revolver at Sanchez and fired one shot through the open rear passenger side window, striking him in the stomach. Defendant was so close to Sanchez when he fired the shot that his gun "was almost touching [Sanchez's] stomach."

Lopez then started to drive away as Sanchez fired several shots at Defendant from the backseat of the moving vehicle, striking Defendant twice. Lopez drove Sanchez to a local hospital where he ultimately died from his gunshot wound.

On 14 November 2005, Defendant was indicted on charges of first-degree murder, discharging a weapon into occupied property, and possession of a firearm by a felon. At trial, defense counsel objected to instructing the jury on the theory of felony murder based upon the predicate offense of discharging a weapon into occupied property, but the objection was overruled.

The jury found Defendant guilty of first-degree murder based upon the felony murder rule and also convicted him of discharging a weapon into occupied property and possession of a firearm by a felon.[1] Defendant was sentenced to life imprisonment without parole for the murder conviction and to a consecutive sentence of 15 to 18 months imprisonment for the possession of a firearm by a felon conviction. His conviction for discharging a weapon into occupied property was arrested.

On direct appeal to this Court, Defendant's appellate counsel asserted several arguments but did not raise the issue of whether instructing the jury on felony murder based on these facts had constituted error. On 19 May 2009, this Court issued an opinion upholding Defendant's convictions. *State v. Spruiell*, 197 N.C. App. 232, 676 S.E.2d 669, 2009 WL 1383399 (2009) (unpublished), *disc. review denied*, 363 N.C. 588, 684 S.E.2d 38 (2009).

On 12 June 2012, Defendant filed an MAR in which he primarily argued that his appellate counsel had rendered ineffective assistance of counsel by failing to challenge on direct appeal the felony murder instruction. Specifically, Defendant argued in his MAR that — based on the specific facts of the underlying crime — the offense of discharging a weapon into occupied property could not legally constitute the predicate felony upon which to base his felony murder conviction. Defendant

1. Although the jury was also instructed on the offense of first-degree murder based on premeditation and deliberation, the jury left this portion of the verdict sheet blank.

filed subsequent amendments to his MAR on 13 September 2013 and 31 October 2014.

A hearing on Defendant's MAR was held before the Honorable C. Winston Gilchrist on 16 December 2013. On 2 December 2015, Judge Gilchrist issued an order (the "MAR Order") granting Defendant's motion. In the MAR Order, Judge Gilchrist made the following pertinent findings of fact:

> 14. [Defendant's appellate counsel] did not have any strategic reason for not arguing to the Court of Appeals that the facts of Defendant's case did not support submission to the jury of first degree murder in perpetration of the felony of shooting into an occupied vehicle.
>
> 15. Published precedents of the courts of North Carolina supporting reversal of Defendant's conviction for felony murder existed at the time Defendant's case was appealed, briefed and decided.
>
> 16. Reasonable counsel would have known of the precedents supporting Defendant's argument that felony murder based on discharging a weapon into an occupied vehicle was not properly submitted to the jury, or would have become aware of these authorities in the course of reasonable representation of Defendant on appeal.
>
> 17. Appellate counsel should have been aware of the need to challenge the trial court's submission of felony murder, given that the Defendant was not convicted of first degree murder on any theory except murder in perpetration of discharging a weapon into occupied property.

After setting forth a detailed legal analysis articulating his reasoning, Judge Gilchrist made the following pertinent conclusions of law:

> 4. Counsel on direct appeal should have argued that the trial court erred in submitting felony murder in perpetration of shooting into an occupied vehicle to the jury. In not so contending, appellate counsel's representation was not objectively reasonable.
>
> 5. Had Defendant's appellate counsel raised the issue of felony murder, there is a reasonable probability that Defendant's conviction for first degree murder — which was based solely on felony murder in perpetration of

> discharging a weapon into occupied property — would have been reversed on direct appeal. Counsel's performance undermines confidence in the outcome of this case. The performance of appellate counsel in fact prejudiced the defendant.
>
> 6. Defendant Spruiell has met his burden of proving the ineffective assistance of counsel. . . .[2]

Based upon these findings and conclusions, Judge Gilchrist vacated Defendant's convictions for first-degree murder and for discharging a weapon into occupied property and ordered that Defendant receive a new trial on these charges. On 12 January 2016, the State filed a petition for writ of *certiorari* seeking review of the MAR Order. We granted *certiorari* on 2 February 2016.

Analysis

In this appeal, the State argues that no legal authority exists in North Carolina that would have prohibited Defendant's felony murder conviction from being predicated on the crime of discharging a weapon into occupied property. Therefore, the State contends, the failure of Defendant's appellate counsel to raise this argument did not constitute ineffective assistance of counsel and the trial court's decision to grant his MAR was erroneous.

"Our review of a trial court's ruling on a defendant's MAR is whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Peterson*, 228 N.C. App. 339, 343, 744 S.E.2d 153, 157 (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 367 N.C. 284, 752 S.E.2d 479 (2013).

This Court has held that "[t]o show ineffective assistance of appellate counsel, Defendant must meet the same standard for proving ineffective assistance of trial counsel." *State v. Simpson*, 176 N.C. App. 719, 722, 627 S.E.2d 271, 275 (citation omitted), *appeal dismissed*, 360 N.C. 653, 637 S.E.2d 191 (2006). 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)

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2. Judge Gilchrist concluded that the other grounds for relief asserted in Defendant's MAR lacked merit. That portion of his ruling is not presently before us.

(citation and quotation marks omitted), *cert. denied*, 565 U.S. 1204, 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). "To show prejudice in the context of appellate representation, a petitioner must establish a reasonable probability he would have prevailed on his appeal but for his counsel's unreasonable failure to raise an issue." *United States v. Rangel*, 781 F.3d 736, 745 (4th Cir. 2015) (citation, quotation marks, and ellipsis omitted).

In the present case, we need not decide the first prong of the ineffective assistance of counsel test because our analysis of the second prong is determinative of Defendant's ineffective assistance of counsel claim. *See State v. Rogers*, 355 N.C. 420, 450, 562 S.E.2d 859, 878 (2002) ("[I]f we 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." (citation and quotation marks omitted)). As explained in detail below, Defendant has failed to demonstrate a reasonable probability that he would have prevailed in his direct appeal had his appellate counsel argued that the offense of discharging a weapon into occupied property could not support Defendant's felony murder conviction.

Ordinarily, first-degree murder requires a showing that the killing was done with premeditation and deliberation. *See* N.C. Gen. Stat. § 4-17(a) (2015). However,

> [p]remeditation and deliberation are not elements of the crime of felony murder. The prosecution need only prove that the killing took place while the accused was perpetrating or attempting to perpetrate one of the enumerated felonies. By not requiring the State to prove the elements of murder, the legislature has, in essence, established a

> *per se* rule of accountability for deaths occurring during the commission of felonies.

State v. Bell, 338 N.C. 363, 386, 450 S.E.2d 710, 723 (1994), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995). Thus, pursuant to the felony murder rule set forth in N.C. Gen. Stat. § 14-17, first-degree murder includes any killing "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon . . . ." N.C. Gen. Stat. § 14-17(a).

The General Assembly has made it a felony to discharge a weapon into occupied property. N.C. Gen. Stat. § 14-34.1(a) (2015). A person is guilty of discharging a weapon into occupied property if "he intentionally, without legal justification or excuse, discharges a firearm into occupied property with knowledge that the property is then occupied by one or more persons or when he has reasonable grounds to believe that it is occupied." *State v. Jackson*, 189 N.C. App. 747, 752, 659 S.E.2d 73, 77 (citation, quotation marks, and brackets omitted), *appeal dismissed and disc. review denied*, 362 N.C. 512, 668 S.E.2d 564 (2008), *cert. denied*, 555 U.S. 1215, 173 L. Ed. 2d 662 (2009). By its express terms, the statute encompasses shots being fired into an occupied vehicle and contains no requirement that such a vehicle be in operation at the time of the offense. *See* N.C. Gen. Stat. § 14-34.1(a).[3]

In the MAR Order, the trial court concluded that, under the factual circumstances of Defendant's case, it was improper for the trial court to instruct the jury on felony murder. This ruling was based upon the proposition that for purposes of the felony murder rule the very same "assaultive act" — here, Defendant's act of firing his gun through an open car window into Sanchez's stomach — cannot constitute *both* the cause of the victim's death *and* the basis for the predicate felony.

In order to fully assess the validity of the MAR Order, it is necessary to examine in some detail several pertinent cases from our Supreme Court and this Court. In *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68 (1982), the Supreme Court considered whether the offense of discharging a weapon into occupied property could provide the basis for a felony murder conviction. In that case, the defendant was a convenience store clerk who followed a woman out of his store after she had refused to pay for a six-pack of beer. The woman climbed into a car, and as she

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3. If the vehicle *is* in operation at the time of the offense, however, the offense is raised from a Class E felony to a Class D felony. *See* N.C. Gen. Stat. § 14-34.1(b).

and the driver were pulling away, the defendant fired three shots at the car with his pistol. The first shot missed the vehicle while the "latter two shots appeared to strike the automobile[,]" with one of the bullets striking and killing the driver. *Id.* at 611, 286 S.E.2d at 70. The defendant was convicted of first-degree murder based upon the felony murder rule — the underlying felony being the offense of discharging a weapon into occupied property. *Id.* at 612, 286 S.E.2d at 71.

On appeal, the defendant argued that the Supreme Court should adopt the "merger doctrine" articulated in *People v. Ireland*, 70 Cal. 2d 522, 450 P.2d 580 (1969). *Wall*, 304 N.C. at 612, 286 S.E.2d at 71. In *Ireland*, the California Supreme Court held that a "felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged."[4] *Ireland*, 70 Cal. 2d at 539, 450 P.2d at 590.

Our Supreme Court acknowledged that "[t]he felony of discharging a firearm into occupied property appears to be such an integral part of the homicide in the instant case as to bar a felony-murder conviction under the California merger doctrine." *Wall*, 304 N.C. at 612, 286 S.E.2d at 71 (internal citation omitted). However, the Supreme Court expressly declined to adopt that doctrine, explaining that on prior occasions it had "expressly upheld convictions for first-degree felony murder based on the underlying felony of discharging a firearm into occupied property. We elect to follow our own valid precedents." *Id.* at 612-13, 286 S.E.2d at 71 (internal citations omitted).

The Court further observed that the defendant's disagreement with the felony murder rule was more appropriately addressed to the General Assembly than the Judicial Branch:

> Our General Assembly remains free to abolish felony murder or, as the Courts did in California, to limit its effect to those other felonies not "included in fact within" or "forming an integral part of" the underlying felony. . . . We do not believe it is the proper role of this Court to abolish

4. It is important to distinguish the "merger doctrine" discussed in *Ireland* and throughout this opinion from the entirely separate merger rule that requires a defendant's conviction for the predicate felony to be arrested after he is convicted of felony murder. *See State v. Moore*, 339 N.C. 456, 468, 451 S.E.2d 232, 238 (1994) ("When a defendant is convicted of first degree murder pursuant to the felony murder rule, and a verdict of guilty is also returned on the underlying felony, this latter conviction provides no basis for an additional sentence. It merges into the murder conviction, and any judgment imposed on the underlying felony must be arrested." (citation and alteration omitted)).

> or judicially limit a constitutionally valid statutory offense clearly defined by the legislature.

Id. at 615, 286 S.E.2d at 72. Accordingly, the defendant's felony murder conviction in *Wall* was upheld. *Id.* at 622, 286 S.E.2d at 76.

The Supreme Court reaffirmed its rejection of the California "merger doctrine" in several subsequent cases where the offense of discharging a weapon into occupied property supplied the basis for a felony murder conviction. *See State v. King*, 316 N.C. 78, 81-82, 340 S.E.2d 71, 74 (1986) ("Defendant argues that the 'merger doctrine' prohibits the application of the felony-murder rule whenever the predicate felony directly results in or is an integral element of the homicide. . . . In *State v. Wall*, we were asked to adopt the 'merger doctrine' but declined to do so . . . . The defendant has presented no argument to warrant a change in our position." (internal citation omitted)); *State v. Mash*, 305 N.C. 285, 288, 287 S.E.2d 824, 826 (1982) ("[D]efendant argues that this Court should adopt the 'merger doctrine' to bar application of the felony-murder rule to homicides committed during the perpetration of the felony of discharging a firearm into occupied property. For the reasons stated in *State v. Wall*, we decline to change the existing law." (internal citation omitted)).

In the MAR Order, the trial court recognized that *Wall* had, in fact, rejected the "merger doctrine" articulated in *Ireland*. However, the trial court placed great reliance upon a footnote — footnote three — in the Supreme Court's later decision in *State v. Jones*, 353 N.C. 159, 538 S.E.2d 917 (2000), construing the footnote as providing an exception to the general rule articulated in *Wall*.

In *Jones*, the defendant crashed his vehicle into another vehicle occupied by six persons, two of whom died as a result. *Id.* at 161, 538 S.E.2d at 921. Pursuant to the felony murder rule, the defendant was convicted of the murders of the two deceased victims based upon the predicate felony of assault with a deadly weapon inflicting serious injury that he perpetrated against the other occupants of the vehicle. *Id.* at 165, 538 S.E.2d at 923.

On appeal to the Supreme Court from a divided panel of this Court upholding his convictions, the defendant argued that the trial court had improperly permitted his first-degree murder conviction to be predicated upon an underlying felony that could be established through a showing of criminal negligence rather than actual intent.[5] The Supreme

5. Assault with a deadly weapon inflicting serious injury may be established through a showing of criminal negligence rather than actual intent. *See id.* at 164-65, 538 S.E.2d

Court agreed with this argument and overturned the defendant's felony murder convictions. *Id.* at 163, 538 S.E.2d at 922.

While the holding in *Jones* is not directly relevant to the present case, the Court stated the following in a footnote:

> Although this Court has expressly disavowed the so-called "merger doctrine" in felony murder cases involving a felonious assault on one victim that results in the death of another victim, cases involving a single assault victim who dies of his injuries have never been similarly constrained. In such cases, *the assault on the victim cannot be used as an underlying felony for purposes of the felony murder rule.* Otherwise, virtually all felonious assaults on a single victim that result in his or her death would be first-degree murders via felony murder, thereby negating lesser homicide charges such as second-degree murder and manslaughter.

Id. at 170 n.3, 538 S.E.2d at 926 n.3 (internal citation omitted and emphasis added).

The MAR Order also discussed *State v. Carroll*, 356 N.C. 526, 573 S.E.2d 899 (2002), which referenced the above-quoted footnote from *Jones*. In *Carroll*, the defendant struck the victim in the head with a machete and then proceeded to strangle her to death. The jury found the defendant guilty of felony murder based upon the underlying felony of assault with a deadly weapon inflicting serious bodily injury, which occurred when the defendant struck the victim with the machete. *Id.* at 534, 573 S.E.2d at 905.

On appeal to the Supreme Court, the defendant argued that the trial court had erred by instructing the jury on felony murder based upon the predicate felony of assault with a deadly weapon inflicting serious bodily injury, contending that footnote three in *Jones* stood for the proposition that "where a felonious assault culminates in or is an integral part of the homicide, the assault necessarily merges with the homicide and cannot constitute the underlying felony for a felony murder conviction." *Id.* at 535, 573 S.E.2d at 906. The defendant then asserted that

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at 922-23 ("[A] driver who operates a motor vehicle in a manner such that it constitutes a deadly weapon, thereby proximately causing serious injury to another, may be convicted of [assault with a deadly weapon inflicting serious injury] provided there is either an actual intent to inflict injury or *culpable or criminal negligence* from which such intent may be implied." (emphasis added)).

"he engaged in one continuous assault on the victim that culminated in her death because [his] initial act of striking the victim with a machete cannot exist separately and independently from the acts causing [the victim's] death." *Id.* The Supreme Court rejected this reasoning, stating as follows:

> Defendant has misconstrued the language of *State v. Jones*. *Jones* precluded the use of assault as the underlying felony for a felony murder conviction only when there is a single assault victim who *dies as a result of the injuries incurred during the assault*. The victim in defendant's case, however, did not die as a result of the assault with the machete. The blow to her head was not fatal. Rather, the cause of death was strangulation. As such, the assault was a separate offense from the murder. Accordingly, the trial court did not err in submitting a felony murder instruction to the jury because the felonious assault did not merge into the homicide.

Id. (internal citation omitted).

Accordingly, *Jones* and *Carroll* stand for the limited proposition that a single assault on one victim that leads to that person's death cannot serve as the underlying felony for purposes of the felony murder rule.[6] In the MAR Order, however, the trial court construed *Jones* and *Carroll* as standing for the far broader proposition that no offense — regardless of whether the offense is classified as an assault or as some other crime — can serve as the basis for a felony murder conviction where the crime results from a "single assaultive act" against one victim. In other words, the trial court reasoned that the term " 'assault' seems to mean *any single act of assaultive conduct*, regardless of the felonious label attached to it." (Emphasis added.) The trial court then explained that this logic fully applied to the act of discharging a weapon into occupied property because "the offense of discharging a weapon into occupied property, like assault, is an offense against the person, and not against property." (Citation and quotation marks omitted.) For this reason, the trial court concluded, "discharging a weapon into occupied property by firing a single shot directly at the decedent cannot support a conviction for felony murder."

The trial court provided additional support for its ruling by citing to a footnote from this Court's decision in *Jackson*. The defendant in

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6. In its briefs to this Court, the State does not dispute this interpretation of *Jones* and *Carroll*.

Jackson was inside a vehicle at an intersection when he fired his weapon multiple times into a nearby vehicle containing two passengers, striking both of them and killing one. *Jackson*, 189 N.C. App. at 749, 659 S.E.2d at 75. The defendant was convicted of felony murder, attempted first-degree murder, and discharging a weapon into occupied property. The felony murder conviction was predicated upon the offense of discharging a weapon into occupied property. *Id.*

On appeal, we upheld the defendant's convictions and declined to apply the "merger doctrine."

> Under the merger doctrine, not adopted in North Carolina but adopted by some states, " 'a . . . felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged.' " *State v. Wall*, 304 N.C. 609, 612, 286 S.E.2d 68, 71 (1982) (quoting *People v. Ireland*, 70 Cal. 2d 522, 539, 450 P.2d 580 (1969)). "[Our Supreme] Court, however, has expressly upheld convictions for first-degree felony murder based on the underlying felony of discharging a firearm into occupied property." *Id.* As we are bound by our Supreme Court's decision in *Wall*, defendant's arguments regarding the merger doctrine are rejected.

Id. at 752, 659 S.E.2d at 77 (footnote omitted).

In a footnote, however, we stated the following:

> Defendant cites our Supreme Court's opinion in *State v. Jones*, 353 N.C. 159, 170, n. 3, 538 S.E.2d 917, 926, n. 3 (2000), which stated that although the merger doctrine has been disavowed, "cases involving a single assault victim who dies of his injuries have never been similarly constrained[,]" as authority to overturn defendant's conviction in this case. The rule announced in *Jones*, however, only applies where there is a single assault victim. *State v. Carroll*, 356 N.C. 526, 535, 573 S.E.2d 899, 906 (2002). There being multiple assault victims in this case, defendant's argument on this point is without merit.

Id. at 752 n.3, 659 S.E.2d at 77 n.3.

While this footnote in *Jackson* appears to embrace the reasoning of footnote three in *Jones*, Defendant reads it far too broadly. The *Jackson*

footnote cannot be construed as a definitive ruling by this Court that the felony murder rule does not apply to instances in which a defendant discharges a weapon into occupied property containing only one person. To the contrary, the footnote was simply a summary rejection of a particular argument offered by the defendant on the facts of that case. This Court was not squarely faced in *Jackson* with the question currently before us — that is, whether the felony murder rule may be applied based upon the predicate felony of discharging a weapon into occupied property where there was a single shot fired at a single victim.[7]

We find more instructive our recent decision in *State v. Juarez*, __ N.C. App. __, 777 S.E.2d 325, (2015), *rev'd on other grounds*, __ N.C. __, 794 S.E.2d 293 (2016). In *Juarez*, the defendant fired one bullet into a car occupied by only the victim, shattering a window and striking and killing the victim. The defendant was convicted of felony murder based upon the underlying felony of discharging a weapon into an occupied vehicle in operation pursuant to N.C. Gen. Stat. § 14-34.1(b). *Id.* at __, 777 S.E.2d at 328.

On appeal, the defendant contended that — based on footnote three in *Jones* — a single assaultive act could not support a felony murder conviction even where the underlying felony was discharging a weapon into occupied property rather than assault. Citing *Wall*, we rejected this argument, holding that "[o]ur precedent clearly states that discharging a firearm into occupied property is a felony involving a deadly weapon, and as such supports a charge of first-degree murder based upon the felony murder theory." *Id.* at __, 777 S.E.2d at 330. Moreover, we explained that the offense of discharging a weapon into occupied property contained elements not present in assault crimes and thus did not fall within the "merger doctrine" for assault crimes as discussed in footnote three in *Jones*.

Thus, unlike in *Jackson*, this Court in *Juarez* expressly considered — and rejected — a defendant's argument that the "merger doctrine" precluded a felony murder conviction based upon the underlying felony of discharging a weapon into occupied property even where there was only one act and one victim. Defendant seeks to distinguish *Juarez* on the ground that it involved a vehicle in operation rather than one that was stationary (as in the present case). However, as the State notes, there was no indication in *Juarez* that anyone other than the actual

7. Indeed, the footnote in *Jackson* contains no analysis at all as to why footnote three in *Jones* (which dealt solely with the predicate felony of assault) should be extended to the legally distinct predicate felony of discharging a weapon into occupied property.

victim was in any danger as a result of the defendant's actions, and our analysis did not focus on the potential for harm to third parties arising from the defendant's conduct.

Our recent decision in *State v. Frazier*, __ N.C. App. __, 790 S.E.2d 312, *disc. review denied*, __ N.C. __, 794 S.E.2d 330 (2016), is also instructive. In *Frazier*, the defendant used his hand to repeatedly strike an infant, resulting in the baby's death. An expert witness testified that the infant died from blunt force trauma from three separate applications of force. Defendant was convicted of felony murder based upon felony child abuse. *Id.* at __, 790 S.E.2d at 316.

On appeal, the defendant argued that the offense of felony child abuse could not support a felony murder conviction because "the felony murder merger doctrine prevents conviction of first-degree murder when there is only one victim and one assault." *Id.* at __, 790 S.E.2d at 320. We refused to adopt this argument, holding that

> [f]elonious child abuse does not merge with first-degree murder because the crime of felonious child abuse requires proof of specific elements which are not required to prove first-degree murder[.] . . . The crime of felonious child abuse is among those offenses that address specific types of assaultive behavior that have special attributes distinguishing the offense from other assaults that result in death. Therefore, our courts have declined to apply the "merger doctrine" in cases where the underlying felony (here, child abuse) was not an offense included within the murder.

Id. (internal citation omitted).

In the present case, the offense underlying Defendant's felony murder conviction likewise included attributes distinguishing it from other acts that result in death in that the State was required to prove that Defendant fired his gun into an occupied vehicle. Defendant seeks to distinguish *Frazier* based upon the fact that the defendant in that case struck the victim multiple times whereas there was only one "assaultive" act in the present case. That reasoning is unavailing, however, given that our holding in *Frazier* was not premised on the number of blows inflicted by the defendant.

* * *

Taking into account all of the relevant statutory authority and caselaw discussed above, it is clear that neither the Supreme Court nor this

Court has ever expressly recognized an exception to the felony murder rule for the offense of discharging a weapon into occupied property. At most, North Carolina courts have recognized a very limited "merger doctrine" that precludes use of the felony murder rule in situations where the defendant has committed one *assault* crime against one victim and the State seeks to use that assault as the predicate felony for a felony murder conviction.

In his brief, Defendant acknowledges the absence of North Carolina caselaw clearly supporting his position, noting that "[w]hile no case has yet held that discharging a weapon into occupied property merges with felony murder, neither this Court nor our Supreme Court have *foreclosed* the possibility." (Emphasis added.) However, this latter observation — even if true — cannot be bootstrapped into a conclusion that a reasonable probability exists Defendant would have prevailed on direct appeal had his counsel made this argument. To the contrary, a ruling in Defendant's favor on this issue in his direct appeal would have constituted a departure from North Carolina's existing jurisprudence.

Accordingly, Defendant has failed to satisfy the prejudice element of his ineffective assistance of counsel claim. We therefore reverse the trial court's MAR Order.

Conclusion

For the reasons stated above, we reverse the trial court's 2 December 2015 order granting Defendant's MAR.

REVERSED.

Judges STROUD and HUNTER, JR. concur.

STATE v. WRIGHT

[252 N.C. App. 501 (2017)]

STATE OF NORTH CAROLINA
v.
REGIS LEE WRIGHT

No. COA16-1017

Filed 4 April 2017

1. Robbery—armed—common law robbery as lesser-included offense—weapon held but not pointed—no instruction

The trial court was not required to instruct the jury on the lesser-included offense of common law robbery where defendant held a gun in his hands while robbing two convenience stores. Although defendant argued that this case fell within the mere possession line of cases, entitling him to the common law robbery instruction, the cases cited by defendant involved cases in which the defendant had a weapon but it wasn't seen by the victim or bystanders.

2. Robbery—armed—convenience store clerk not frightened—common law robbery as lesser-included offense—instruction not given

The trial court was not required to instruct the jury on the lesser-included offense of common law robbery where the witness testified that she was not scared. The North Carolina Supreme Court has previously rejected similar arguments.

3. Constitutional Law—effective assistance of counsel—instruction not requested—motion to dismiss not made—uncontradicted evidence of crime

Defendant did not receive ineffective assistance of counsel in an armed robbery prosecution where his trial counsel did not request an instruction on common law robbery or make a specific motion to dismiss the charge of armed robbery. It would have been futile to request the instruction or move for the dismissal of the armed robbery charge because the State presented uncontradicted evidence of each element of armed robbery.

Appeal by defendant from judgments entered 14 April 2016 by Judge Daniel A. Kuehnert in Cleveland County Superior Court. Heard in the Court of Appeals 20 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Marilyn G. Ozer for defendant-appellant.

DAVIS, Judge.

The primary issue in this appeal is whether a defendant charged with armed robbery is entitled to a jury instruction on the lesser-included offense of common law robbery where there is no evidence that the gun held by the defendant was actually pointed at the victim or that the victim actually feared for her life upon observing the gun. Regis Lee Wright ("Defendant") was convicted of armed robbery based on evidence showing that he entered three convenience stores with a gun in his hand and stole money in the presence of the stores' clerks. Because the State introduced uncontradicted evidence satisfying each element of armed robbery, we hold that no instruction on common law robbery was required.

Factual and Procedural Background

The State presented evidence at trial tending to show the following facts: Defendant was charged with four counts of robbery with a dangerous weapon stemming from robberies occurring at four convenience stores in Shelby, North Carolina. The facts regarding each robbery are summarized below:

I. The Kangaroo Express Robbery

In the morning hours of June 29, 2014, Betty Buehner was working as a clerk at the Kangaroo Express at the intersection of Interstate 74 and Beaver Dam Church Road. At approximately 5:00 a.m., Defendant entered the store wearing a bandana and toboggan over his face and head so that only his eyes were visible. Buehner was cleaning the bathrooms in the back of the store and did not hear Defendant enter.

Buehner testified as follows:

> Well, the door opened and somebody nudged me and said, go to your register. I thought he wanted gas or something. I said, okay, I will be there in just a minute. He said, this is [sic] robbery. And he said, I don't want to hurt you, just go to the register. I looked at him and said, you're kidding. He said, no. I said, I will not. If you want it, go get it yourself. I got to get this trash out. So he went to the register and I was still getting my trash out. I got the trash out of that [sic] while he was up there trying to get into the register.

As Defendant walked back to the register, Buehner observed a gun in Defendant's right hand. Buehner also testified that at some point during the incident Defendant told her he had a gun.

Upon approaching the cash register, Defendant tried unsuccessfully to open it. Buehner then told him: "[Y]oung man you better hurry because there are going to be people coming in." Shortly thereafter, Buehner heard Defendant leave the store. After he left, Buehner realized Defendant had taken a "box of pennies" that had been sitting near the register. She also testified that it was possible that he took a "roll" of quarters. At that point, Buehner called the police.

During her testimony, Buehner stated that during her encounter with Defendant she was "never scared" and that Defendant did not actually point the gun at her. When asked on re-cross-examination if Defendant had threatened her, she stated: "Well, he threatened me at first, but I don't think he meant it."

II. Mike's Food Store Robbery

On the morning of July 6, 2014, Mary Brock was working the cash register at Mike's Food Store on Earl Road. At approximately 11:30 a.m., Defendant "c[a]me in[to] the store with a gun." He was wearing a black ski mask and hospital gloves. Brock testified that she "automatically put [her] hands up because as soon as he c[a]me in the door, you could see the gun." Defendant approached the register and told Brock to "give [him] the money." Brock removed the cash register drawer and put it on the counter. Defendant told her that he also wanted the money in the "lottery drawer" and ordered her to "hurry up." Brock was unable to remove the drawer so she started "grabbing the money and throwing it up on the counter for him." She told Defendant: "[D]on't hurt me, I got kids." Defendant took all of the money from the counter and left. When asked during cross-examination whether Defendant had actually pointed the gun at her, she responded that he had not done so.

Christopher Surratt was buying lottery tickets at Mike's Food Store at the time of the robbery. Surratt testified that Defendant "came in and had the gun in his hand." Upon seeing Defendant enter the store with the gun, he backed away from the counter. Surratt testified that he could tell Brock was terrified during this incident.

III. The Fastop Robbery

On the morning of June 29, 2014, James Stegall was working as a clerk at a Fastop on East Dixon Boulevard. At approximately 5:30 a.m., Defendant entered the store with his face and head covered and

approached the counter where Stegall was working. Defendant "laid across the counter with a gun in his hand and said give it up." Stegall took a step back and put his hands up. He noticed the gun was a "grayish color" and testified that Defendant pointed the gun at him "a couple of times." Stegall then "walked to the [cash] register, pushed the button, opened the drawer, and stepped back." Defendant reached across the counter, removed the money from the register, and left the store. Stegall then proceeded to call the police.

IV. The One Stop Food Store Robbery

During the early morning hours of July 23, 2014, Quanisha Logan and Theodore Davis were working as cashiers at the One Stop Food Store on the corner of White and Fallston Roads. At approximately 2:00 a.m., Defendant entered the store with his face and head covered and a black gun in his right hand. He told Logan and Davis to "put all the money in the bag." Both of them opened their registers and handed Defendant the money inside. Defendant left the store with over $150.

* * *

Defendant was subsequently arrested and indicted on four counts of robbery with a dangerous weapon. Beginning on 11 April 2016, a jury trial was held before the Honorable Daniel A. Kuehnert in Cleveland County Superior Court. The State presented testimony from Buehner, Stegall, Brock, Surratt, Logan, and Davis as well as from several law enforcement officers who had investigated the robberies.

At the close of the State's evidence, the following exchange occurred:

> [DEFENDANT'S COUNSEL]: I'm not going to make an argument. I would just make the standard motion to dismiss at the end of State's evidence.
>
> . . . .
>
> THE COURT: You're probably pushing it in this direction in your questioning, Mr. Gilbert, and [sic] raised a question in my mind. The fact that -- it sounded like the evidence, at least on a few occasions, the defendant didn't point the gun directly at individuals, that he may not have held a gun to somebody's head and said, give me the money or anything like that. There were statements that people were threatened or felt threatened. Some of the law that -- I decided to do a little bit of research while you were asking those questions. The mere fact that the gun

> was shown and was present and the circumstances of the situation -- as I looked at the little bit of law, it looks like it meets the threshold, to meet all the elements necessary for an armed robbery. So I'm sort of anticipating that that might be an issue and I just will let you know that had you emphasized that or argued about it, and I knew you were headed in that direction, that I have looked at and you probably knew this before. . . . That's probably the one weakness that you look at say, [sic] where's the threat?
>
> [DEFENDANT'S COUNSEL]: My practice is not to belabor an issue unless it needs to be belabored. And in this case I can't really argue with any passion that the case ought to be dismissed. . . . I think there is a scintilla.

The trial court then denied Defendant's motion to dismiss. The court proceeded to instruct the jury solely on the offense of armed robbery. The jury returned a verdict finding Defendant guilty with regard to the robberies at the Kangaroo Express, Mike's Food Store, and the Fastop. The jury found Defendant not guilty as to the robbery at the One Stop Food Store.

The trial court sentenced Defendant to a term of 68 to 94 months imprisonment for the Fastop robbery along with a consecutive term of 68 to 94 months for the Mike's Food Store robbery and a concurrent term of 68 to 94 months for the Kangaroo Express robbery. Defendant gave oral notice of appeal.[1]

Analysis

On appeal, Defendant argues that (1) the trial court committed plain error in failing to instruct the jury on the lesser-included offense of common law robbery; and (2) he was deprived of effective assistance of counsel as a result of his trial counsel's failure to request an instruction on common law robbery and to move for dismissal of the charge stemming from the Kangaroo Express robbery based specifically upon the insufficiency of the evidence. We address each argument in turn.

I. Instruction on Common Law Robbery

[1] In his first argument, Defendant contends that with regard to the Kangaroo Express and Mike's Food Store robberies, the State failed to

1. Defendant's appeal relates solely to his convictions stemming from the robberies at the Kangaroo Express and Mike's Food Store.

establish that Defendant's use of a dangerous weapon actually threatened or endangered the life of the victims. Because such evidence is essential to the offense of armed robbery, Defendant argues, the lack of proof offered by the State on this issue required the trial court to instruct the jury on the lesser-included offense of common law robbery.

Because Defendant failed to object to the trial court's jury instructions, our review of this issue is limited to plain error. *See* N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted). Our Supreme Court has held that "even when the 'plain error' rule is applied, it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378 (1983) (citation, quotation marks, and brackets omitted).

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

State v. Covington, __ N.C. App. __, __, 788 S.E.2d 671, 675 (2016) (citation omitted).

Our prior caselaw makes clear that "[t]he trial court is not obligated to give a lesser included instruction if there is no evidence giving rise to a reasonable inference to dispute the State's contention." *State v. Lucas*, 234 N.C. App. 247, 256, 758 S.E.2d 672, 679 (2014) (citation, quotation marks, and ellipses omitted). "Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process." *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (citation and quotation marks omitted).

"The elements of armed robbery 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."[2] *State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 843 (2011) (citation and quotation marks omitted). The elements of common law robbery are "the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982).

Defendant's argument essentially has two components. First, he contends that the State failed to present substantial evidence of the third element of armed robbery — whether the victim's life was endangered or threatened — with respect to either the Kangaroo Express robbery or the Mike's Food Store robbery because no evidence was presented that Defendant actually pointed his gun at Buehner or Brock. Second, he points to the lack of evidence during the Kangaroo Express robbery showing that Buehner genuinely feared for her life in light of her testimony that she was "never scared." As discussed below, we reject both of these contentions.

A. Pointing of the Gun

It is well established that a defendant's mere possession of a weapon — without more — during the course of a robbery is insufficient to support a finding that the victim's life was endangered or threatened. *State v. Gibbons*, 303 N.C. 484, 488, 279 S.E.2d 574, 577 (1981); *see also State v. Whisenant*, __ N.C. App. __, __, 791 S.E.2d 122, 125 ("The State must present evidence that the defendant endangered or threatened the life of the victim by possession of the weapon, aside from the mere

2. Defendant makes no argument in this appeal that the gun he was holding during the robberies was not, in fact, a real gun. Nor does he contend that the gun was inoperable or unloaded.

fact of the weapon's presence." (citation, quotation marks, and brackets omitted)), *disc. review denied*, __ N.C. __, 793 S.E.2d 702 (2016).

In the present case, Defendant argues that because the State did not present evidence that Defendant actually pointed his gun at Buehner or Brock, this case falls within the "mere possession" line of cases, thereby entitling him to an instruction on common law robbery. However, the cases Defendant cites in support of this argument all involved circumstances where a perpetrator possessed a weapon but neither the victim nor bystanders actually saw the weapon during the course of the robbery. *See, e.g.*, *Gibbons*, 303 N.C. at 490, 279 S.E.2d at 578 (although perpetrators acknowledged in their testimony that they possessed shotgun during robbery, no evidence was presented that victim ever saw gun); *State v. Evans*, 279 N.C. 447, 455, 183 S.E.2d 540, 545-46 (1971) (victim's life was not endangered or threatened where co-conspirator left restaurant with shotgun that victim never saw and defendant subsequently made threats to victim during time period when shotgun was not present); *State v. Dalton*, 122 N.C. App. 666, 671, 471 S.E.2d 657, 661 (1996) (victim's purse was taken while she was asleep and thus "she could not have known of the presence of the [defendant's] knife and could not have been induced by it to part with her purse").

However, our appellate courts have held that in cases where the State's evidence establishes that a defendant held a dangerous weapon that was seen by the victim or a witness during the course of the robbery, the third element of armed robbery is satisfied. *See, e.g.*, *State v. Blair*, 181 N.C. App. 236, 242, 638 S.E.2d 914, 919 (defendant endangered or threatened victim's life where officer saw defendant holding knife immediately after stealing wallet even though victim had not seen knife prior to robbery), *appeal dismissed and disc. review denied*, 361 N.C. 570, 650 S.E.2d 815 (2007); *State v. Melvin*, 53 N.C. App. 421, 433, 281 S.E.2d 97, 105 (1981) (defendant endangered or threatened victim's life where he held gun during robbery and demanded money), *cert. denied*, 305 N.C. 762, 292 S.E.2d 578 (1982).

We find particularly instructive our opinion in *Melvin*. In that case, the State presented evidence that the defendant entered a store, told the victim that "he wanted the money that [she] had in the store[,]" and placed a gun on the counter with his hand over it. *Id.* at 433, 281 S.E.2d at 105. On appeal, the defendant argued that the State's evidence "did not reveal that at any time during the commission of the robbery defendant ever actually threatened the victim with harm nor did the evidence reveal that he endangered the victim by the use or threatened use of a firearm." *Id.* at 432, 281 S.E.2d at 104. However, this Court ruled that

"[t]he evidence shows that defendant robbed [the victim] while holding a pistol in his hand. We think this is ample proof of this element of the crime." *Id.* at 433, 281 S.E.2d at 105. Thus, we held that "[t]here was sufficient evidence of each of the elements of armed robbery and that defendant was the perpetrator of the armed robbery to justify the trial court's denial of his motion to dismiss." *Id.*

Here, as in *Melvin*, the uncontradicted evidence presented at trial showed that Defendant held a gun in his hand while robbing both the Kangaroo Express and Mike's Food Store. Buehner testified that during the Kangaroo Express robbery, she observed Defendant holding a gun in his right hand before he attempted to open the cash register. Similarly, Surratt testified that Defendant entered Mike's Food Store with a gun in his hand. Defendant has failed to cite any case involving similar facts in which North Carolina's appellate courts have held either that the third element of armed robbery was not satisfied or that the failure to give an accompanying instruction on the lesser-included offense of common law robbery constituted error.

B. Victim's Fear for Her Life

[2] With regard to the Kangaroo Express robbery, Defendant contends that because Buehner continued cleaning after he told her that he was robbing the store and testified that she was not scared during the incident, her life was not endangered or threatened by Defendant's possession of the gun. However, our Supreme Court has previously rejected similar arguments.

In *State v. Joyner*, 295 N.C. 55, 243 S.E.2d 367 (1978), the defendant argued on appeal that the trial court had erred by denying his motion for nonsuit on the charge of armed robbery. He contended that the State failed to prove the victim's life was endangered or threatened because the victim did not show that she was "in fear for her life at the time she surrendered her [property] . . . ." *Id.* at 62, 243 S.E.2d at 372. The Supreme Court rejected this contention, holding that "there was a threatened use of a dangerous weapon which endangered or threatened the life of the victim." *Id.* at 63, 243 S.E.2d at 373 (emphasis omitted). In its opinion, the Court made clear that "the State did not have to prove such fear to overcome defendant's motion for nonsuit." *Id.*

In *Hill*, the defendant was convicted of armed robbery where the evidence established that he brandished a knife and caused the victim to sustain injury as a result of his actions during the course of the robbery. The defendant argued on appeal that the evidence failed to show that he endangered or threatened the victim's life because the victim's

testimony did "not indicate that he was afraid of or felt threatened by the robber." *Hill*, 365 N.C. at 279, 715 S.E.2d at 845. Our Supreme Court held that the elements of armed robbery were satisfied and reiterated its prior holding in *Joyner* that the third element of armed robbery does not depend on "whether the victim was scared or in fear of his life." *Id.* (citation, quotation marks, and emphasis omitted). Thus, the Court concluded, the evidence was sufficient to establish that the victim's life was "endangered or threatened by the robber's possession, use or threatened use of a dangerous weapon, namely a knife." *Id.* (citation and quotation marks omitted).

* * *

For these reasons, we are satisfied that the State presented uncontradicted evidence establishing the elements of armed robbery for both the Kangaroo Express and Mike's Food Store robberies. Accordingly, Defendant has failed to show that the trial court erred by not instructing the jury on common law robbery. *See Covington*, __ N.C. App. at __, 788 S.E.2d at 677 ("[W]e hold that the trial court did not err at all—much less commit plain error—by failing to instruct the jury on the lesser-included offense . . . .").

II. Ineffective Assistance of Counsel

[3] Defendant's final argument is that he received ineffective assistance of counsel because of his trial counsel's failure to (1) request an instruction on the lesser-included offense of common law robbery with regard to the charges arising from the Kangaroo Express and Mike's Food Store robberies; and (2) make a specific motion to dismiss the charge of armed robbery as to the Kangaroo Express robbery. We disagree.

> In order to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Edgar, __ N.C. App. __, __, 777 S.E.2d 766, 770-71 (2015) (internal citations and quotation marks omitted). "In 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." *State v. Turner*, 237 N.C. App. 388, 396, 765 S.E.2d 77, 84 (2014) (citation and brackets omitted), *disc. review denied*, 368 N.C. 245, 768 S.E.2d 563 (2015).

Here, as shown above, Defendant was not entitled to a jury instruction on common law robbery as to either of these two charges because the State presented uncontradicted evidence of each element of the offense of armed robbery. Thus, it would have been futile for his trial counsel to request such an instruction or to move for the dismissal of the armed robbery charge relating to the Kangaroo Express robbery on a theory of insufficiency of the evidence. Accordingly, Defendant cannot establish a valid ineffective assistance of counsel claim. *See Covington*, __ N.C. App. at __, 788 S.E.2d at 678 (holding that defendant was not deprived of effective assistance of counsel based on his attorney's failure to request jury instruction on lesser-included offense).

Conclusion

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

NO ERROR.

Chief Judge McGEE and Judge McCULLOUGH concur.

GLORIA R. WATLINGTON, PETITIONER
v.
DEPARTMENT OF SOCIAL SERVICES ROCKINGHAM COUNTY, RESPONDENT

No. COA16-1038

Filed 4 April 2017

1. Administrative Law—dismissal of social worker—state or local rules

In a case arising from the termination of an employee of the Rockingham County Department of Social Services (RCDSS), the Administrative Law Judge's findings supported its conclusion that petitioner was subject to the State Human Resources Act (SHRA). The findings demonstrated that the Rockingham County Board of Commissioners passed resolutions leaving the employees of its consolidated human services subject to SHRA, except where the Rockingham County Personnel Policy (RCPP) had been recognized by the State as "substantially equivalent" to the SHRA or that RCDSS was only required to follow the provisions on the RCPP in order to terminate petitioner.

2. Administrative Law—dismissal of social worker—career state employee

In cases arising from administrative tribunals, questions of law receive de novo review while factual issues are reviewed under the whole record test. In a case arising from the termination of an employee of the Rockingham County Department of Social Services (RCDSS), the Court of Appeals affirmed the Administrative Law Judge's conclusion that petitioner was a career State employee subject to the State Human Resources Act, but it was noted that neither this issue nor the question of just cause were argued prior to appeal. On remand, the RCDSS was required to show that just cause existed for her termination.

3. Administrative Law—termination—state employees—local employees—Administrative Code—applicable provisions

Title 25 of the N.C. Administrative Code, the State Human Resources Act, and case law were reviewed to provide clarity on remand of a case involving the termination of a social services employee. Subchapter J of Title 25 applied to State employees and Subchapter I applied to local government employees.

4. Administrative Law—dismissal of social worker—local employee

In a case involving the termination of a Rockingham County Social Services employee, Subchapter I of Title 25 of the Administrative Law Code was held to apply, and the Administrative Law Judge's conclusions that Subchapter J applied were reversed. The terminated employee's position fit the definition of an employee of a local department of social services.

5. Administrative Law—dismissal of social worker—just cause analysis

A case involving the termination of a social services employee was remanded where the Administrative Law Judge's (ALJ) opinion did not address two of the prongs of the test for just cause in *Warren v. N.C. Department of Crime Control and Public Safety*, 221 N.C. App. 376. Nothing in the final decision indicated that petitioner's conduct as found by the ALJ amounted to unacceptable personal conduct and there was no conclusion of law asserting that there was substantial just cause for any disciplinary action.

6. Administrative Law—dismissal of social worker—back pay

An award of back pay to a social services employee who was terminated was reversed. Back pay is not a remedy for a procedural violation under Subchapter I of Title 25 of the Administrative Law Code.

Appeal by respondent from final decision entered 5 July 2016 by Judge J. Randall May in the Office of Administrative Hearings. Heard in the Court of Appeals 8 March 2017.

Mark Hayes for petitioner-appellee-cross-appellant.

Rockingham County Attorney's Office, by Emily Sloop, for respondent-appellant-cross-appellee.

TYSON, Judge.

Rockingham County Department of Social Services ("RCDSS") appeals and Gloria Watlington ("Watlington") cross-appeals from a final decision affirming Watlington's termination and ordering RCDSS to provide back pay salary to Watlington due to a procedural violation. We affirm in part, reverse in part, and remand.

I. Factual Background

RCDSS hired Watlington as a Community Social Services Technician on 9 January 2012. Her primary responsibilities included providing transportation to families and children served by RCDSS, supervising case visits between parents and children in RCDSS' custody, and providing case visit reports to RCDSS social workers.

When Watlington was hired, RCDSS provided her with a copy of Rockingham County's Personnel Policy ("RCPP"). Watlington also attended an orientation for new employees. The personnel policy and orientation described appropriate employee behavior, including RCDSS' policies on unacceptable personal conduct and the acceptance of gifts and favors.

On 15 April 2013, the Rockingham County Board of Commissioners passed a resolution to establish a consolidated human services agency, which consolidated its departments of public health and social services. The resolution, along with a subsequent resolution passed on 3 August 2013, clarified employees of the consolidated human services agency remained subject to the North Carolina Human Resources Act ("SHRA") in most circumstances. The resolutions provided that for those areas of policy and procedures where the RCPP had been recognized by the State as substantially equivalent to the SHRA, the employees are governed exclusively by the RCPP. RCDSS presented no evidence demonstrating the State had recognized the RCPP as substantially equivalent.

In December 2015, Watlington supervised a RCDSS custody visit between P.H. and her daughter. P.H. testified she wanted to do something nice for Watlington, because Watlington "had been real nice in letting us have extra time on our visits and been encouraging that we would be able to be reunited." P.H. purchased an inexpensive jewelry set, which Watlington accepted.

When Watlington's supervisor informed Watlington the gift violated RCDSS' policy, she immediately surrendered the jewelry set to RCDSS. Watlington's supervisor notified Debbie McGuire, the Director of RCDSS, of the occurrence. On 9 December 2015, Watlington was placed on administrative leave with pay, pending investigation and review of allegations made against her regarding violation of the RCPP's provision prohibiting the acceptance of gifts.

During the investigation, additional allegations came forth regarding Watlington's personal conduct. These allegations included she had: accepted food and beverages from RCDSS clientele on more than one

occasion; used Social Security Income ("SSI") money belonging to a child in RCDSS custody to purchase food for herself; accepted a cash loan of sixty dollars from a foster parent; and removed a bassinet stored at RCDSS without permission and gave it to another foster family.

On 11 December 2015, RCDSS provided Watlington a written notice of a pre-dismissal conference to be held that afternoon to discuss a recommendation for her dismissal, due to "unacceptable personal conduct." The notice listed the specific reasons for the recommendation of dismissal. Watlington, her supervisor, and McGuire attended the meeting and discussed the documented allegations.

On 14 December 2015, Watlington received a written notice of dismissal from employment. The notice again included the specific reasons for Watlington's dismissal and informed her of her right to appeal to the County Manager, Lance Metzler. Watlington appealed.

Metzler upheld Watlington's termination and notified her by letter on 15 December 2015. The letter did not inform Watlington of the specific reasons why Metzler was upholding her termination or that his letter was public record. Watlington appealed her termination to the North Carolina Office of Administrative Hearings and Review ("OAH") by filing a Petition for a Contested Case Hearing on 11 January 2016.

The case was heard before the administrative law judge ("the ALJ") on 23 May 2016. After the hearing and reviewing the parties' briefs and proposed orders, the ALJ entered his final decision and made the following findings of fact:

> 13. While employed by Respondent, Petitioner engaged in the following conduct: (1) accepted a loan in the amount of sixty dollars ($ 60.00) offered by a foster parent between two (2) and three (3) years prior to her termination by Respondent; (2) used approximately six dollars ($ 6.00) of a minor child's money to purchase food for herself while transporting the minor child across the state at the request of her supervisor, which Petitioner repaid to Respondent within one (1) week; (3) consumed leftover food purchased by a foster parent for herself and a minor child when offered by the foster parent; (4) gifted a bassinet to a foster family being served by Respondent from an area where Respondent keeps both donations and property assigned to particular families under its supervision, and upon being notified of a problem, retrieved said bassinet and returned it to Respondent; (5) accepted a slice

of cake or cupcakes offered by a foster family at a minor child's birthday party; and (6) accepted a wrapped pair of earrings from a foster parent on behalf of her child, which were immediately returned upon an issue being raised by Respondent.

14. Prior to Petitioner's voluntary disclosure of item number six (6) above to a co-worker, Respondent had taken no formal disciplinary action against Petitioner, despite being aware of at least two (2) of the same aforementioned allegations.

15. Prior to Respondent's initiation of an investigation into Petitioner's conduct, no witness called to testify by Respondent had reported items (1), (3), or (5) of the aforementioned conduct as concerning to them, violating the RCPP; or asked Respondent to initiate formal discipline against Petitioner based on such conduct despite being fully aware of them.

16. Respondent offered no evidence that any of the aforementioned conduct by Petitioner: (1) negatively impacted her job performance; (2) influenced her job performance, recommendations, or reporting; (3) diminished the reputation of Respondent in the community; or (4) led to tangible financial, legal, or regulatory consequences for Respondent.

. . .

18. On or about August 5, 2013, the Rockingham County Board of Commissioners passed an amending and clarifying resolution stating that "[e]mployees of the Consolidated Human Services Agency remain subject to the State Personnel Act. In those areas where the Rockingham County Personnel Policy has been recognized by the state as 'substantially equivalent,' the employees will be governed by the provisions of the [RCPP]."

19. Respondent offered no evidence demonstrating that it is exempt from the provisions of the State Human Resources Act ("SHRA"), codified at N.C.G.S. § 126-1 *et seq*, as implemented by the North Carolina Administrative Code at 25 NCAC 01J.0101 *et seq*, or that its disciplinary or grievance procedures have been

recognized by the State Human Resources Commission as substantially equivalent.

The ALJ also made the following conclusions of law:

1. Petitioner is subject to the protections of the SHRA.

2. Due to the language of the two (2) resolutions passed by the Rockingham County Board of Commissioners and the absence of an exemption by the State Human Resources Commission respecting its disciplinary or grievance procedures, Respondent's conduct as to disciplinary or grievance procedures is controlled by Title 25, Subchapter J, of the North Carolina Administrative Code.

3. In cases in which a state employee is disciplined for "unacceptable personal conduct" that does not involve criminal conduct, the North Carolina Court of Appeals interpreted the North Carolina Supreme Court's decision in *Carroll* as adopting a "commensurate discipline" approach. *See Warren v. N.C. Dep't of Crime Control and Pub. Safety*, 726 S.E.2d 920, 924 (N.C. App. 2012). According to *Warren*, "the proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken."

4. Respondent failed to comply with the procedural requirements for dismissing Petitioner from employment for unacceptable personal conduct by not providing specific written reasons and written details in the Final Agency Decision.

5. 25 NCAC 0lB .0432(b) provides, "[f]ailure to give specific reasons for dismissal, demotion or suspension without pay shall be deemed a procedural violation. Back pay or attorney's fees, or both, may be awarded for such a period of time as the Commission determines, in its discretion, to be appropriate under all the circumstances."

> 6. The December 15, 2015 letter written by Rockingham County Manager Lance L. Metzler constitutes the Final Agency Decision for the purposes of this action.
>
> 7. Based on the language of the Final Agency Decision and pursuant to 25 NCAC 1J.0613(4)(h), Respondent lacked procedural just cause to terminate Petitioner.

The ALJ's final decision affirmed Watlington's termination, but ordered RCDSS to pay Watlington back pay due to a procedural violation. RCDSS appeals. Watlington cross-appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-29(a) (2015).

III. Issues

The appeal and cross-appeal request this Court to address whether the ALJ erred by: (1) holding Watlington was a career State employee subject to the provisions of the SHRA and not the local RCPP; (2) holding Title 25, Subchapter J of the North Carolina Administrative Code governs the case; (3) affirming Watlington's termination; and (4) awarding back pay to Watlington for an alleged procedural violation.

IV. Standard of Review

N.C. Gen. Stat. § 150B-51 (2015) governs the scope and standard of this Court's review of an administrative agency's final decision. *Harris v. N.C. Dep't of Pub. Safety*, No. COA16-341, __ N.C. App. __, __, __ S.E.2d __, __ (filed Mar. 7, 2017); *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 702, 635 S.E.2d 442, 446 (2006). The standard of review is dictated by the substantive nature of each assignment of error. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004).

N.C. Gen. Stat. § 150B-51(b) provides:

> 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.

"It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test." *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894-95 (citation and quotation marks omitted).

The court engages in *de novo* review where the error asserted is pursuant to § 150B-51(b)(1), (2), (3), or (4). N.C. Gen. Stat. § 150B-51(c). "Under the *de novo* standard of review, the trial court considers the matter anew and freely substitutes its own judgment for the agency's." *Overcash*, 179 N.C. App. at 703, 635 S.E.2d at 446 (brackets, citation, and quotations marks omitted).

On the other hand, where the error asserted is pursuant to N.C. Gen. Stat. § 150B-51(b)(5) & (6), the reviewing court applies the "whole record standard of review." N.C. Gen. Stat. § 150B-51(c). Under the whole record test,

> [The court] may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter de novo. Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.

Carroll, 358 N.C. at 660, 599 S.E.2d at 895 (citations and quotation marks omitted).

V. Career Employee Status and Applicability of the SHRA

[1] RCDSS argues the findings of fact do not support the ALJ's conclusion that Watlington is subject to the provisions of the SHRA. RCDSS argues the ALJ failed to make any findings to demonstrate Watlington

was a "career State employee," such that "just cause" was required to support her termination. *See* N.C. Gen. Stat. § 126-35(a) (2015).

The SHRA applies to all non-exempt State employees and certain local government employees, including those who work for local social services departments. N.C. Gen. Stat. § 126-5 (2015). The General Assembly has delegated local governments the statutory authority to create a consolidated human services agency pursuant to N.C. Gen. Stat. § 153A-77(b) (2015). These local employees are not subject to the SHRA, unless the local government chooses to keep them subject to the provisions of the SHRA upon consolidation. N.C. Gen. Stat. § 126-5.

A career State employee is defined as a State employee or a local government employee subject to the SHRA who:

> (1) Is in a permanent position with a permanent appointment, and
>
> (2) Has been continuously employed by the State of North Carolina or a local entity as provided in G.S. 126-5(a)(2) in a position subject to the North Carolina Human Resources Act for the immediate 12 preceding months.

N.C. Gen. Stat. § 126-1.1 (2015). Career State employees may only be "discharged, suspended, or demoted for disciplinary reasons" upon a showing of "just cause." N.C. Gen. Stat. § 126-35(a); *see* 25 NCAC 01I.2301 (2016); 25 NCAC 01J.0604 (2016).

The final decision's findings of fact show RCDSS hired Watlington as a Community Social Services Technician on 9 January 2012. Her employment was terminated on 15 December 2015. The findings also demonstrate the Rockingham County Board of Commissioners passed resolutions leaving the employees of the consolidated human services agency subject to the SHRA, except where the RCPP had been recognized by the State as "substantially equivalent." RCDSS failed to present any evidence showing the State had recognized the RCPP as "substantially equivalent" or that RCDSS was only required to follow the provisions on the RCPP in order to terminate Watlington. These findings support the ALJ's conclusion that Watlington, as an employee of RCDSS, was subject to the SHRA.

[2] Presuming *arguendo*, the findings were insufficient to support the ALJ's conclusion that Watlington was subject to the SHRA, we note RCDSS never argued this issue before the ALJ. Rather, RCDSS' proposed order and brief in support of its order stated Watlington was "subject

to the provisions of [the SHRA]." We also acknowledge the ALJ's order does not include any findings of fact showing Watlington was a career State employee. However, this issue was also not contested in the hearing before the ALJ. RCDSS' brief and proposed order explicitly state that Watlington "was a career State employee."

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) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). RCDSS never contested the application of the SHRA to Watlington nor Watlington's status as a career State employee prior to its arguments on appeal. We affirm the ALJ's conclusion that Watlington was a career State employee subject to the SHRA. As such, RCDSS must show just cause exists for her termination.

VI. Applicable Section of the North Carolina Administrative Code

[3] The ALJ concluded Title 25, Subchapter J of the North Carolina Administrative Code ("Subchapter J") governs this case. RCDSS argues Title 25, Subchapter I ("Subchapter I") controls, because Watlington was considered a local government employee. To provide clarity for the ALJ on remand, we address when these respective subchapters of the North Carolina Administrative Code apply.

A. Review of Title 25, Subchapters I and J

Title 25 of the North Carolina Administrative Code was promulgated pursuant to the SHRA, which established:

> a system of personnel administration under the Governor, based on accepted principles of personnel administration and applying the best methods as evolved in government and industry. It is also the intent of this Chapter that this system of personnel administration shall apply to local employees paid entirely or in part from federal funds, except to the extent that local governing boards are authorized by this Chapter to establish local rules, local pay plans, and local personnel systems.

N.C. Gen. Stat. § 126-1 (2015). The State Human Resources Commission establishes the procedures and rules governing many aspects of this personnel system. N.C. Gen. Stat. § 126-4 (2015).

Title 25 contains the rules adopted by the Commission and includes distinct subchapters on various personnel topics. Relevant to this appeal, Subchapter J, "Employee Relations," contains a section "Disciplinary Action: Suspension and Dismissal," which provides the procedures and rules regarding just cause and dismissals for unacceptable personal conduct. 25 NCAC 01J.0603-.0618 (2016)

Subchapter I, "Service to Local Governments," provides the procedures and rules specific to the personnel system developed for local government employees, including subsections on recruitment and selection, classification, and compensation. *See* 25 NCAC 01I.1800, .1900, and .2100 (2016). Subchapter I includes a separate subsection on "Disciplinary Action: Suspension, Dismissal and Appeals," which includes rules regarding just cause and dismissal for unacceptable personal conduct. 25 NCAC 01I.2301 and .2304 (2016). These rules vary slightly from the rules and procedures stated under Subchapter J. *See* 25 NCAC 01J.0603-.0618.

Subchapter I begins with the "Applicability" section:

> [The SHRA] provides for the establishment of a system of personnel administration applicable to certain local employees paid entirely or in part from federal funds. Local governing boards are authorized by G.S. 126 to establish personnel systems which will fully comply with the applicable federal standards and then may remove such employees from the state system to their own system.

25 NCAC 01I.1701 (2016).

In this case, the parties assert different interpretations of 25 NCAC 01I.1701. RCDSS argues in its brief this provision of Subchapter I is "merely implementing N.C. Gen. Stat. § 126-1, which allows local governing boards to establish local personnel systems *if* they so choose." RCDSS asserts Subchapter J applies to State employees and Subchapter I applies to local government employees, unless the local government removes those employees to its own separate system not governed by either Subchapter I or J. On the other hand, Watlington argues 25 NCAC 01I.1701 gives local governments the authority to remove certain employees from the State system, Subchapter J, to the local government system under Subchapter I.

We agree with RCDSS. As 25 NCAC 01I.1701 notes, the SHRA provided the State Human Resources Commission with the authority to establish a personnel system for certain local government employees.

The rules for that system are contained within Subchapter I. The second sentence in 25 NCAC 01I.1701 simply recognizes the ability of a local government to remove its employees to its own, separate system, if and when certain requirements are met.

Based upon our review of the case law, the SHRA, and the entirety of Title 25, we find Subchapter J applies to State employees and Subchapter I applies to local government employees. *See*, *e.g.*, *Blackburn v. Dep't of Pub. Safety*, __ N.C. App. __, 784 S.E.2d 509, 522 (2016) (applying Subchapter J to a former State employee of the Department of Public Safety); *Ramsey v. N.C. Div. of Motor Vehicles*, 184 N.C. App. 713, 718-19, 647 S.E.2d 125, 128-29 (2007) (applying Subchapter J to a former State employee of the Division of Motor Vehicles); *Steeves v. Scotland Cnty. Bd. of Health*, 152 N.C. App. 400, 406-07, 567 S.E.2d 817, 821-22 (2002) (applying Subchapter I to a former Scotland County Health Director, a career State employee under the SHRA, who was dismissed for "unacceptable personal conduct"); *Fuqua v. Rockingham Cnty. Bd. of Social Servs.*, 125 N.C. App. 66, 71, 479 S.E.2d 273, 276 (1997) (applying Subchapter I to a former director of the Rockingham County Department of Social Services, who was dismissed based on "unacceptable personal conduct").

B. Applicability to this Case

[4] Finding of Fact 19 of the ALJ's final decision states:

> 19. Respondent offered no evidence demonstrating that it is exempt from the provisions of the State Human Resources Act ("SHRA"), *codified at N.C.G.S. § 126-1 et seq*, *as implemented by the North Carolina Administrative Code at 25 NCAC 01J.0101 et seq*, or that its disciplinary or grievance procedures have been recognized by the State Human Resources Commission as substantially equivalent. (emphasis supplied).

The ALJ further stated in Conclusion of Law 2 that due to the resolutions passed by the Rockingham County Board of Commissions, and in absence of an exemption, "Respondent's conduct as to disciplinary or grievance procedures is controlled by [Subchapter J]."

Both Finding 19's assertion "as implemented by the North Carolina Administrative Code at 25 NCAC 01J.0101 *et seq*" and Conclusion of Law 2 are reviewed *de novo* on appeal. *See Zimmerman v. Appalachian State Univ.*, 149 N.C. App. 121, 131, 560 S.E.2d 374, 380-81 (2002) ("We will review conclusions of law *de novo* on appeal regardless of their label.").

We hold Subchapter I is applicable in this case, and reverse the ALJ's conclusions that Subchapter J applies. 25 NCAC 01A.0103(6) (2016) provides the definition of local government employees as "those employees of local social services departments, public health departments, mental health centers and local offices of civil preparedness which receive federal grant-in-aid funds." The evidence and the ALJ's findings of fact demonstrate Watlington's position fits this definition as an employee of a local department of social services, RCDSS. As such, Subchapter I, and not Subchapter J, governs both the substantive just cause determination, the analysis of whether any procedural violations occurred in this case, and the remedies available.

VII. Just Cause Analysis

[5] N.C. Gen. Stat. § 150B-34 (2015) provides that "[i]n each contested case the administrative law judge shall make a final decision or order that contains findings of fact and conclusions of law." The ALJ's duties are further clarified by 26 NCAC 3.0127 (2016) stating the ALJ's final decision "shall fully dispose of all issues required to resolve the case" and is required to contain "findings of fact" and "conclusions of law based on the findings of fact and applicable constitutional principles, statutes, rules, or federal regulations."

As a career State employee subject to the SHRA, Watlington's employment may only be "discharged, suspended, or demoted for disciplinary reasons" upon a showing of "just cause." N.C. Gen. Stat. § 126-35(a). In this case, the ALJ articulated the correct three-part *Warren* test applicable to terminations alleging unacceptable personal conduct:

> The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken.

Warren v. N.C. Dep't of Crime Control and Pub. Safety, 221 N.C. App. 376, 382-83, 726 S.E.2d 920, 925 (2012); *see Harris*, __ N.C. App. at __, __ S.E.2d at __.

Just cause must be determined based "upon an examination of the facts and circumstances of each individual case. Inevitably, this inquiry

requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." *Harris*, __ N.C. App. at __, __ S.E.2d at __ (citation and quotation marks omitted).

This Court has noted:

> In an administrative proceeding, it is the prerogative and duty of the ALJ, once all the evidence has been presented and considered, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. The credibility of witnesses and the probative value of particular testimony are for the ALJ to determine, and the ALJ may accept or reject in whole or part the testimony of any witness.

Id. at __, __ S.E.2d at __ (brackets, citations, and quotation marks omitted).

Here, the ALJ's final decision addressed the first prong of the *Warren* test in Finding of Fact 13. The ALJ found Watlington had engaged in the conduct as RCDSS alleged. This finding of fact is not disputed by either party and is binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

However, the ALJ failed to make any findings of fact or conclusions of law applying the second and third prongs of the *Warren* test to the facts of this case. *See Warren*, 221 N.C. App. at 382-83, 726 S.E.2d at 925. Nothing in the final decision indicates Watlington's conduct as found by the ALJ amounted to unacceptable personal conduct. Furthermore, as both the RCDSS and Watlington acknowledge in their briefs, no conclusion of law asserts RCDSS had substantive just cause for any disciplinary action against Watlington. Rather, under the last section of the order labeled "Final Decision," the ALJ simply states "Petitioner's termination is affirmed." This statement does not constitute an acceptable conclusion of law that RCDSS terminated Watlington based upon just cause. *See id.*

Pursuant to N.C. Gen. Stat. § 150B-51, we remand the case to the ALJ to make proper findings of fact and conclusions of law regarding: (1) whether Watlington's conduct constituted unacceptable personal conduct, and (2) "whether that misconduct amounted to just cause for the disciplinary action taken." *Id.*; *see Harris*, __ N.C. App. at __, __ S.E.2d at __. In making such determinations on remand, the ALJ is bound by the definitions and procedural requirements of Subchapter I.

VIII. Award of Back Pay

[6] Back pay is not provided as a remedy for a procedural violation under Subchapter I. Both parties agree 25 NCAC 01B.0432(b) expired in 2014 and no provision has been promulgated in its place. Furthermore, we note N.C. Gen. Stat. § 150B-33(11), which is cited by the ALJ in support of the award of back pay, does not provide the ALJ with independent authority to award back pay. N.C. Gen. Stat. § 150B-33(11) allows the ALJ to award attorney's fees or witnesses' fees under certain circumstances, one of which is when the ALJ awards back pay as provided in the General Statutes and North Carolina Administrative Code. Because we find that Subchapter I, and not Subchapter J, governs this case, we reverse the ALJ's award for back pay.

Upon remand, the ALJ should determine whether a procedural violation occurred under Subchapter I. If the ALJ determines a procedural violation occurred, the ALJ is limited to those remedies provided in Subchapter I.

IX. Conclusion

RCDSS never contested Watlington's status as a career State employee or that she is subject to the provisions of the SHRA. We affirm the ALJ's conclusion of law that Watlington was a career State employee subject to the SHRA, and as such RCDSS must show just cause for her termination. We reverse the ALJ's conclusion of law that Subchapter J applies, and hold Subchapter I governs this case.

The ALJ failed to make appropriate findings of fact or conclusions of law to allow us to review the substantive just cause determination. We remand to the ALJ to make findings of fact and conclusions of law applying the three-step inquiry as set out in *Warren* to the facts of this case. In doing so, the ALJ must apply the definitions of just cause and unacceptable personal conduct found in Title 25, Subchapter I of the North Carolina Administrative Code.

We reverse that portion of the ALJ's order awarding Watlington back pay. On remand, the ALJ should determine whether RCDSS committed a procedural violation under Subchapter I. If a procedural violation exists, the ALJ is bound by and limited to those remedies provided under Subchapter I. *It is so ordered.*

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges ELMORE and DIETZ concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 APRIL 2017)

CHERRY CMTY. ORG. v. STONEHUNT, LLC No. 16-905	Mecklenburg (15CVS16825)	Dismissed
CRABTREE v. SMITH No. 16-864	Wake (15CVS15523)	Affirmed
IN RE A.M.D. No. 16-943	Caldwell (14J139)	Affirmed
IN RE A.P. No. 16-931	Forsyth (15J267) (15J268)	Affirmed
IN RE A.S. No. 16-1077	Forsyth (15J185)	Affirmed
IN RE C.M.B. No. 16-952	Guilford (14JT385) (14JT386) (14JT387) (14JT388) (14JT389)	Affirmed
IN RE D.R. No. 16-994	McDowell (13JA126-127)	Affirmed
IN RE FORECLOSURE OF GUPTON No. 16-835	Wake (15SP699)	Affirmed
IN RE J.H. No. 16-897	Robeson (14JT236-237)	Affirmed
IN RE J.L.J. No. 16-1085	Iredell (14JT58-59)	Affirmed
IN RE K.S.B. No. 16-894	Wake (14JT332-333)	Affirmed
IN RE SMITH No. 16-882	Mecklenburg (15SPC1360)	Reversed and Remanded
LAW FIRM OF MICHAEL A. DEMAYO, LLP v. SCHWABA LAW FIRM No. 16-899	Mecklenburg (15CVS6967)	Affirmed

SE. REAL ESTATE & DISC. CO. v. BANK OF N.C. No. 16-633	Transylvania (15CVS674)	Vacated and remanded in part, dismissed in part.
STATE v. CARROLL No. 16-986	Affirmed (04CRS58398)	Davidson
STATE v. CASTANEDA-PENA No. 16-806	Guilford (15CRS70341-43)	Affirmed
STATE v. CREWS No. 16-902	Rutherford (15CRS50829)	Affirmed
STATE v. HART No. 16-784	Onslow (15CRS52257)	No Error
STATE v. JOHNSON No. 16-907	Johnston (15CRS54930)	AFFIRMED and REMANDED FOR CORRECTION OF CLERICAL ERROR
STATE v. LAM No. 16-651	Iredell (11CRS54355-56) (11CRS54434)	Remanded in Part
STATE v. LOCKLEAR No. 16-900	Richmond (98CRS5131-32) (99CRS874-875)	Dismissed
STATE v. MARTIN No. 16-795	Catawba (14CRS52550)	Affirmed in part, Dismissed in part.
STATE v. McCASTER No. 16-640	Alamance (14CRS55089)	No Error
STATE v. McNAIR No. 16-1006	Pamlico (13CRS50407) (13CRS700495)	Vacated and Remanded for a New Sentencing Hearing.
STATE v. NETTLES No. 16-923	New Hanover (10CRS57913) (10CRS58745)	Affirmed
STATE v. PALM No. 16-831	Durham (15CRS55343)	NO ERROR IN PART; DISMISSED IN PART WITHOUT PREJUDICE

STATE v. PERRY No. 16-722	Carteret (13CRS55626) (14CRS485) (14CRS50609) (14CRS52915)	Affirmed
STATE v. RAMEY No. 16-876	Forsyth (14CRS59009) (15CRS3550)	No Error
STATE v. VALENTINE No. 16-427	New Hanover (13CRS55682-89) (13CRS55691) (13CRS8312-15)	No error. Remanded.
STATE v. WALKER No. 16-794	Mecklenburg (15CRS216915)	Affirmed
STATE v. WILLIAMS No. 16-686	Wake (13CRS217871) (14CRS528)	No Error
STONEWALL CONSTR. SERVS., LLC v. FROSTY PARROTT BURLINGTON, LLC No. 16-982	Alamance (15CVS124)	Dismissed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

Briefs—length—Petitioner's invitation for the Court of Appeals to comb through over 1,000 pages of exhibits and "her 99 additional proposed Findings" to find the substantial evidence, or lack thereof, to support an Administrative Law Judge's 260 findings, or some portion thereof, was declined. Petitioner's argument essentially sought to add many, many pages to her brief by reference to her lengthy submissions to the ALJ and the trial court. **Rittelmeyer v. Univ. of N.C. at Chapel Hill, 340.**

Briefs—order of issues—Petitioner put the cart before the horse by waiting until the last issue in her brief to raise any challenges to the findings. It would have been helpful for petitioner to challenge the findings before addressing alleged errors of law. **Rittelmeyer v. Univ. of N.C. at Chapel Hill, 340.**

Briefs—statement of issues—arguments—order—Although N.C. Rule of Appellate Procedure 28(b)(2) does not specifically require that issues in a brief be addressed in the same sequence in both the statement of issues presented for review and the arguments, that seems to be nearly the universal practice in the Court of Appeals. The Court of Appeals had some difficulty in this case determining which conclusions of law were addressed by each argument. **Rittelmeyer v. Univ. of N.C. at Chapel Hill, 340.**

Constitutional violation—not raised at trial—Defendant did not raise an issue regarding a constitutional violation at trial, and the Court of Appeals did not hear defendant's contention. **State v. Jacobs, 402.**

Interlocutory motion—zoning—nothing left to be resolved—Petitioner's appeal in a zoning case was not interlocutory where the superior court fully resolved the merits of the parties' dispute and remanded the matter only for the municipal zoning board to schedule petitioner's compliance with her permit. The decision left nothing more to be resolved in the superior court. **Thompson v. Town of White Lake, 237.**

Interlocutory orders and appeals—arbitration denied—The denial of a motion to compel arbitration is interlocutory but immediately appealable because the right to arbitrate is a substantial right which could be lost if review is delayed. **Terrell v. Kernersville Chrysler Dodge, LLC, 414.**

Interlocutory orders and appeals—counterclaim unresolved—no certification or substantial right—Although plaintiff contended that the trial court erred in a fraud, unfair and deceptive trade practices, negligent misrepresentation, and breach of express warranty case by granting defendants' motion for summary judgment, the case was dismissed for lack of subject matter jurisdiction. The trial court's order failed to acknowledge or resolve defendant RK Motors' counterclaim. Further, the order contained no Rule 54(b) certification, and the briefs failed to make any argument of a substantial right. **Krause v. RK Motors, LLC, 135.**

Interlocutory orders and appeals—denial of summary judgment—substantial right—The trial court's denial of defendant's motion for summary judgment affected a substantial right and was immediately appealable under N.C.G.S. §§ 1-277 and 7A-27(d). The summary judgment order implicitly determined a material issue later courts would be bound by, even if the trial court claimed it was not determining the law of the case. **Kelley v. Kelley, 467.**

Interlocutory orders and appeals—failure to comply with discovery—contempt proceeding—Although as a general rule an order compelling discovery is not immediately appealable, a contempt proceeding for failure to comply with an earlier discovery order is immediately appealable. **Li v. Zhou, 22.**

REAL PROPERTY—Continued

ownership was as tenants-in-common with defendant living in the house and paying the expenses. Although defendant contended that plaintiff Alonza Ward had waived his interest in the property through an implied-in-fact contract and that she was the sole owner of the property, the trial court found and concluded that there was neither a written agreement nor particular conduct or action sufficient to give rise to a contract implied-in-fact. There was competent evidence to support this finding, and the finding was sufficient to support the conclusion. **Ward v. Ward, 253.**

ROBBERY

Armed—common law robbery as lesser-included offense—weapon held but not pointed—no instruction—The trial court was not required to instruct the jury on the lesser-included offense of common law robbery where defendant held a gun in his hands while robbing two convenience stores. Although defendant argued that this case fell within the mere possession line of cases, entitling him to the common law robbery instruction, the cases cited by defendant involved cases in which the defendant had a weapon but it wasn't seen by the victim or bystanders. **State v. Wright, 501.**

Armed—convenience store clerk not frightened—common law robbery as lesser-included offense—instruction not given—The trial court was not required to instruct the jury on the lesser-included offense of common law robbery where the witness testified that she was not scared. The North Carolina Supreme Court has previously rejected similar arguments. **State v. Wright, 501.**

Sufficiency of evidence—circumstantial—The State presented substantial evidence to allow the jury to draw a reasonable inference that defendant was the perpetrator of a robbery with a dangerous weapon and larceny. Circumstantial evidence is all that a jury needs to deny a defendant's motion to dismiss, and it is then for the jury to resolve conflicts in the evidence. **State v. Stroud, 200.**

SENTENCING

Arrested judgment—basis—possibility of remand—A verdict for possession of stolen goods was remanded for resentencing where the trial judge arrested judgment out of the mistaken belief that he was compelled to do so by law. Although a judgment arrested because of a fatal flaw appearing on the face of the record precludes entry of a final judgment subject to appellate review, the underlying guilty verdict remains intact when the judgment is arrested for double jeopardy or other concerns. Here, the trial court failed to expressly explain the underlying reason for its decision, but the record provided some indication that the trial court's decision to arrest judgment was predicated on double jeopardy concerns. **State v. Garner, 393.**

Felony murder—underlying felonies—A sentence for first-degree felony murder was not disturbed, but judgments for robbery with a dangerous weapon and larceny were arrested, and a conviction for possession of stolen goods was vacated without remand. When a defendant is convicted of felony murder, the underlying conviction merges into the felony conviction, and the trial court erred by failing to arrest judgment on defendant's conviction for robbery with a dangerous weapon. The other felony convictions in this case were not required to be arrested because all three felonies were related to the same event and were not separate convictions. Remand was not needed. **State v. Stroud, 200.**